LAW & JUSTICE SECTOR

VILLAGE COURT SYSTEM OF PAPUA NEW GUINEA

PNG Justice Advisory Group

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The Papua New Guinea Justice Advisory Group
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ENDORSEMENTS

Certified as meeting a requirement of the Project

Livingston Armytage, Project Director

This report has been prepared through extensive consultation with:-

- GoPNG Law and Justice Sector Agencies;
- Provincial Governments
- and relevant stakeholders.

The recommendations in this report are approved for implementation.

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EXECUTIVE SUMMARY

This report and recommendations has been prepared for the National Coordinating Mechanism (NCM) pursuant to its tasking of 6 November 2003, to undertake an appraisal of the efficiency and effectiveness of village courts in PNG and an evaluation of past/existing AGDISP village court projects, as outlined in the terms of reference in annex 1.

The village court system is performing a valuable role in providing accessible justice and resolving disputes at the local level throughout Papua New Guinea. It is however challenged by a range of problems. In the interests of promoting a more sustainable and accessible system of justice for the people of Papua New Guinea, and thereby contributing to the reduction of poverty, it is recommended that the village court system be restructured as outlined in this report.

The village court system is surviving because of the dedication and goodwill of village court officials, rather than because of efficient administration. Since the passing of the Organic Law of 1995 there has been a significant decline in the efficiency of village courts nationwide. The overall system is becoming fragmented into a variety of differently structured provincial systems, each one administered according to its own provincial policy and funding strategy. As provincial governments restructure internally, responsibility for the administration of village courts has become dispersed and communication gaps have developed between the courts and their provincial administrators. The result has been confusion, accusations of interference, nepotism and corruption and the demoralization of village court officials nationwide.

The most urgent problem is the remuneration of village court officials. In many areas they receive an extremely modest allowance only intermittently, and some have waited more than a year to be paid. Resentment is widespread, village court officials are becoming uncooperative with provincial authorities, and some have stopped operating in protest. All other initiatives to improve and assist village courts are being seriously impeded by this single problem, which cannot be emphasised strongly enough.

Confusion has arisen over responsibilities for the appointment of magistrates, leading to varying policies among provincial governments, against the spirit of the Village Court Act that magistrates be chosen by their own communities, and giving rise to accusations of interference and corruption. Uniforms, an important symbol of authority for village court officials, have not been issued for years in some places, and village courts suffer a lack of respect in the community as a result.

The assistance and cooperation which village courts are supposed to receive from district court magistrates and police is seriously lacking in some parts of the country, and district court magistrates and police commonly do not have a clear understanding of the work and intended authority of village court officials.

A hierarchical and slightly exclusive relationship between village courts and neo-customary dispute-settlers such as village elders, church groups, etc, has developed in

many places, which could undermine the potential of grassroots institutional cooperation which current law and justice policy is attempting to utilise.

Popular generalizations fuelled by rhetoric, dated anecdotes, and sensationalized media reports, rather than by careful research, have created an undeserved image of village courts as oppressive especially of women, misrepresenting a complex cultural issue.

Major difficulties have been generated for magistrates by expectations that they are to serve the "law" on the one hand and "custom" on the other. In fact the application of legal and bureaucratic standards of efficiency drive them toward legalism, rather than the flexible criteria of custom. Further, directives that village courts follow "custom" refer to a concept of custom which render it uncodifiable and contentious so far as practical application is concerned, often put village courts in a double bind whereby they are sometimes accused of applying unacceptable customs instead of the law, and sometimes accused of applying the law oppressively instead of following custom.

There has been a marked improvement in recent times in administrative approaches to ensuring that village court officials know their duties and receive adequate training. The situation in 2004 contrasts significantly with the inadequacies of the previous decade and a half. Earlier training programs were largely counter-productive, reinforcing a sense that village court officials were supposed to rote-learn and rigorously apply the "law" and lacked sensitivity to the real problems of village court magistrates.

Until recently the delivery of village court handbooks and other documentary resources to village court magistrates around the country was significantly deficient. Some magistrates were using outdated and deteriorating copies of the original handbook produced in 1976, and many were operating without adequate written guidelines at all.

A Village Courts Project in 1999 involving the Attorney General's Department Institutional Strengthening Project (AGDISP), including the Village Court Secretariat - now the Community Courts Administration Unit (CCAU) - and a subsequent AusAID/ACIL assessment in 2002 informed by the AGDISP began to address the problem of training and handbooks.

By 2004 the AGDISP, over a four year period, had completed a substantial number of training programs, not only for village court officials, but also for Village Courts Provincial Officers. The latter was made necessary by the effects of the Organic Law introduced in 1995 which transferred responsibility for the village courts (except for jurisdictional matters) to Provincial Governments.

There is clear improvement in the clarification of village court officials' duties and training programs are now much improved. The training program recently developed by the AGDISP and the CCAU is significantly better than any used previously, and is fully compatible with the philosophy of restorative justice which informs new law and justice policy. It is a most appropriate program for village courts in the current social climate in PNG.

The production and distribution of books and other resources is also being managed far more efficiently under AGDISP/CCAU initiative. A recent complication, however, is that provincial governments are beginning to enact their own Provincial Village Court Acts, under national legislative provisions, and it was found in 2004 consultations that some intend to instigate their own training programs. This is likely to lead to disparities in types, emphasis and quality of training around the country, undermining the achievements of the AGDISP/CCAU.

Many of the problems experienced by village courts could be addressed by restructuring the village court system so that it is centrally administered, by the Community Courts Advisory Unit in the Department of Justice and Attorney General, and streamlined, doing away with costly and variable provincial administration systems in favour of locally based village court inspectors directly responsible to the CCAU. It is recognised that this would reverse the decentralisation implemented under the Organic Law, but the deterioration of the system as a whole, particularly exacerbated by the ongoing problems of administrative support and the failure of officials to receive their allowances on a regular and systematised basis, requires radical attention.

It should also be noted that by a conservative estimate, village courts deal with more 603,000 disputes per year, and contribute vitally to preventing the escalation of local disputes into more serious law and order problems. If the system is allowed to deteriorate it could have serious consequences for the law and order situation nationally, with consequent negative impacts on poverty across the nation.

Given the importance of the Village Courts system to a stable law and justice system in PNG, *it is recommended* that the NCM examines the administrative, legal and financial feasibility of restructuring the village court system so that it is centrally administered by the Community Courts Advisory Unit in the Department of Justice and Attorney General, and streamlined to replace provincial administration systems in favour of locally based village court inspectors directly responsible to the CCAU.

The following recommendations have been made in the knowledge that the Village Courts system is a high priority for the Law and Justice Sector, both in terms of the negative effects of a further decline in its operation and the impact on poverty reduction that is likely to flow from an increase in its efficiency and effectiveness. Given its priority status, it is expected that funding will be made available for the recommended changes to occur.

Detailed analyses of the costs and sustainability of the recommendations below go beyond the terms of reference of this study. However, some of these recommendations have significant cost implications, with related questions over their sustainability. It is important that such analyses be carried out prior to a decision to implement the recommendations.

The Law and Justice Sector Program is well positioned to extend continuing support for the village court system by developing, costing and facilitating implementation of the recommendations made in this report under the ongoing direction of the NCM.

RECOMMENDATIONS

1. Dialogue be initiated between central and provincial governments toward the possibility of restructuring the village court system to centralise its administration in the Dept of Justice and Attorney General, with the Community Courts Advisory Unit as the executive administrator of village courts nationwide. (Refer Section 2, pp10-11)

2. Subject to recommendation 1 above, each province should have at least three locally-based Village Court Inspectors, responsible to, and administered directly by, the Community Courts Advisory Unit in the Dept of Justice and Attorney General, dispensing with the need for Provincial administrative units. Inspectors would ensure that village courts are discharging their duties according to the Village Courts Act 1989 and as advised in the Village Court Manual. Inspectors would also be responsible for the collection of revenue from the courts in their province. (Refer Section 2, pp10-11)

3. Responsibility for the remuneration of village court officials be transferred to the Department of Justice and Attorney General, to be administered by the Community Courts Advisory Unit. (Refer Section 3, pp12-15)

4. Allowance rates for village court officials be standardised throughout Papua New Guinea, and that serious remedial attention be given to the fact that remuneration rates at present do not reflect the amount of time and effort devoted by village court officials to dispute settlement. (Refer Section 4, pp15-16)

5. Village Court Magistrates be elected from and by their local community, and that they be appointed by the Department of Justice and Attorney General for a period of three years, after which time they may offer themselves for re-election, and that their appointment may be revoked only by the DJAG, and only in cases of proven misconduct as stated in the Village Court Act. (Refer Section 5, pp16-17)

6. Village Court Magistrates, on appointment, be issued with a certificate of appointment from the Dept of Justice and Attorney General. (Refer Section 5, pp16-17)

7. Uniforms and badges or medallions of office should be issued to appointed Village Court Magistrates and Peace Officers, and badges of office issued to Court Clerks, and that uniforms and badges or medallions be re-issued regularly. (Refer Section 6, p18)

8. The training program developed by the AGDISP be extended as the primary program used for village court officials in Papua New Guinea, and that the provision of training be implemented in all provinces as soon as possible. (Refer Section 7, pp18-22)

9. The 2003 Village Court Manual developed by the CCAU be the standard guide for village court officials in the foreseeable future, and one copy of the

2003 Village Court Manual (in English, Tokpisin or Hiri Motu as appropriate) be delivered forthwith to each village court nationwide, to be held by the chairing magistrate of the court. (Refer Section 7, pp18-22)

10. Yearly informal workshops be facilitated, but not instructed, by Village Court Inspectors held in each district, enabling Village Court Magistrates of similar cultural background to share experiences and problems in dispute settlement and for more experienced magistrates to pass on informal skills and knowledge to others. (Refer Section 7, pp18-22)

11. In the light of current confusing qualifications concerning "bad" and "unacceptable" customs, consideration be given to refining the notion of "Custom" in practical terms as "local community standards of good behaviour", and that village court magistrates be advised to "Apply the law in a manner compatible with community standards of good behaviour" or in Tokpisin "*Bihainim lo na bungim lo wantaim gutpela pasin na sindaun bilong komuniti" or in Hiri Motu "Taravatu oi atoa hegeregere inai kumuniti edia noho mauri namonamo lalonai*". (Refer Section 8, pp22-25)

12. Respected women in the local communities served by village courts be encouraged by Village Court Inspectors to offer themselves for election as Village Court Magistrates. (Refer Section 9, pp25-29)

13. Workshops on village courts, attended by representative Village Court Magistrates, be incorporated into police training programs, to improve relations and cooperation between police and village court officials. (Refer Section 10, pp29-32)

14. District Court Magistrates and, where appropriate, Justices of the National Court be supplied with the content of the Village Courts Act 1989 and Village Court Manual, and workshops on village courts, attended by representative Village Court Magistrates, be incorporated into their education and training, to improve understanding of the position and role of the village court (Refer Section 10, pp29-32)

15. Cooperative interaction between village courts and neo-customary dispute-settlers such as elders, church representatives and localised "peace and good order" committees be encouraged, particularly in mediatory matters, in the spirit of current policy emphasis on the development of community-based law and order initiatives. (Refer Section 10, pp29-32)

16. Consideration be given to using Village Court Magistrates as village-based supervisors of probationers released into their local communities, in pursuance of current policy emphasis on community-based law and order initiatives. (Refer Section 10, pp29-32)

17. Consideration be given to executive assistance to Village Court Magistrates being incorporated into the duties of auxiliary police recruits, in urban areas, to replace village court peace officers. (Refer Section 10, pp29-32)

18. Village Court Magistrates be advised that community work can be substituted for fines when sentencing offenders, as a matter of discretion on a case by case basis. (Refer Section 11, pp32-33)

19. Village court officials who have completed 20 years of service be awarded a medal and long-service certificate in recognition of their contribution to their community and to the work of village courts in pursuit of law, order and justice. (Refer Section 12, p33)

20. The Community Courts Administration Unit be tasked to develop, cost and facilitate implementation of these recommendations in the most appropriate manner, with the assistance of the Law and Justice Sector Program.

REVIEW

1. Introduction

The National Law and Justice Policy has adopted the concept of restorative justice as a core rationale for the long-term future of the law and justice sector. It is in this context that village courts, as a community-based institution, have become a focus in the strategic reorientation toward community initiatives in matters of law and justice.

The Village Court Act of 1973 (now replaced by the Village Court Act of 1989) came into force in 1974, and the first village court was trialled in Kainantu, in the Eastern Highlands, the same year. In modern Papua New Guinea there are now more than 1200 village courts in operation, and the system has proved to be a success, spreading into urban areas where it mostly serves the "grassroots" population in settlements and urban villages. Village courts provide local communities with a readily accessible legal institution for the reasonable settlement of disputes. The village court system has proved popular with the local communities which it was intended to serve and has become institutionalised in a medial position between "customary" dispute settlement procedures and the district courts of the formal legal system. In this respect they perform an important function in preventing the development of disputes between (mostly) individuals into confrontations of increasing size and potential violence. While record-keeping is inadequate, it has been estimated on the basis of incomplete reports received (and therefore conservatively) that the village courts deal with more than 603,000 cases per year.[1] In terms of law and order, then, it is clear that village courts are a vital institution, and that if they did not exist Papua New Guinea's much publicised "law and order" situation would be significantly worse.

The above shows that the Government's renewed interest in village courts is timely and appropriate. Resonant with current law and justice policy, the current Village Court Act of 1989 provides that village courts should "ensure peace and harmony" (s.52) in their areas, apply "relevant custom" (s.57), in accordance with "substantial justice" (s.58), and follow principles of "natural justice" (s.59(2)).Yet while village courts are a successful institution, they have received some criticism from time to time in respect of juridical issues, and the village court system as a whole has suffered from financial and other problems.

The academic literature on the village court system has moved, over time, through a debate which began with the proposition that village courts suffered from creeping formal legalism (see Annex 4 for a history of the village court system). Anthropological observations developed an alternative view that the courts' substantive operations display creativity and flexibility which perpetuate a significant degree of legal pluralism. More recently commentators have suggested that a complex integration of law and dynamic, changing, custom is making the village court system an alternative to *both* traditional dispute settlement and legal formalism. Another, slightly pessimistic, view is that village courts are becoming institutionalised at the bottom of the hierarchy of formal courts in Papua New Guinea under the pressure of administrative impositions and the legalistic expectations of the communities they

[1] Figures supplied by DJAG/CCAU, 2004.

serve.[2] These various views, in total, indicate that village courts are a dynamic and flexible institution, whose nature has changed over time. It is inevitable that problems should arise which were unseen by the original planners of the system.

The problems are itemised in the sections below, with recommendations appended to each section.[3]

2. Major Findings: Deterioration and Fragmentation of the system

The village court system had developed a number of problems by the early 1990s,[4] most of which would have been surmountable with adequate attention at the time.[5] However, some have intensified and more have developed since the passing of the Organic Law of 1995, when the administration of village courts (excepting jurisdictional matters and proclamation of courts) was transferred to Provincial Governments. This has proved to be a major turning point in the history of the system. Provincial Governments have adopted different strategies for administering village courts. Some give reasonable attention to the courts as local dispute-solving institutions, and therefore valuable to the maintenance of law and order and the prevention of escalation of local disputes. Others seem to give little support to them.[6] The unanimous opinion of village court officials consulted around the country in 2004 (some of them veterans of the system) was that they received adequate support previous to the transfer of administration, and that support is now significantly lacking. It has to be said that overall the village court system is surviving because of the dedication and goodwill of village court officials, rather than because of efficient administration. The relative efficiency of the village court system in the past was due to the procedural flexibility in the individual courts, which allowed them to adapt the law to the social and cultural profile of their local community. Stability was provided to the system by its centralised administrative structure.

Since the passing of the Organic Law the significant decline in the efficiency of village courts nationwide has been due to significant delays, or even failure, to pay officials' allowances, the lack of appropriate supervision and inspection, and the lack of support from police and district courts if disputants refuse to cooperate with court decisions and sentences. The overall system is becoming fragmented into a variety of differently structured provincial systems, each one administered according to its own provincial policy. As provincial governments restructure internally, responsibility for the administration of village courts has gone in different directions: some provincial governments preferring to have a village court officer attached to their law and order sections (however named), others in community liaison offices or elsewhere. For example, it was noted in consultations in 2004 that in Madang province the responsibility has been lodged with the social welfare branch. Depending on the province there may be only a single village court inspector for all the village courts in

[2] For examples of the various perspectives in their historical order see, eg, Paliwala 1982, Scaglion 1990, Aleck 1992, Goddard 1992a, Goddard 1996.
[3] See Bibliography, Annex 6, for academic and other resources informing this appraisal.
[4] See Aleck 1992: 112-120 and Goddard 1992: 89-92 for reviews of the situation in the early 1990s.
[5] See Eyford et al 1992.
[6] These observations based on consultation with DJAG staff, and comparison of comments by provincial officers in Milne Bay, Madang, East New Britain and Eastern Highlands Provinces and the National Capital District, checked against comments by village court officials in those Provinces.

the province. Inspectors are a vital link, ideally visiting the individual courts on a regular basis, dealing with their local problems, and ensuring they are operating efficiently. Most inspectors complain there are no vehicles for them to visit the courts under their supervision. This is a serious lack, as most village courts are in rural areas, and not accessible by regular bus services. The lack of inspectors creates a serious gap between the individual courts and their provincial administrators.

The result has been confusion, accusations of interference, nepotism and corruption and the demoralization of village court officials nationwide. Significant improvements have been made very recently in the provision of up-to-date manuals and training courses, due to a small and efficient team in the DJAG. But other aspects of the system are unchanged, and some are significantly worse. The situation is being further complicated as provinces enact their own Village Court Acts, under which they will most likely implement increasingly different administrative strategies among themselves, including differing approaches to the amount and nature of funding.

2. 1 Recommendations

2. 1. 1.

In the interests of promoting a sustainable and accessible system of justice for the people of Papua New Guinea, and thereby contributing to the reduction of poverty, the village court system needs restructuring into a centrally administered, streamlined organization, such that administrative needs of courts can be addressed adequately and without creating disparities throughout the country, while maintaining the crucial flexibility of the courts in dispute settlement procedures at the local level.

It is recommended that dialogue be initiated between central and provincial governments toward the possibility of restructuring the village court system to centralise its administration in the Dept of Justice and Attorney General, with the Community Courts Advisory Unit as the executive administrator of village courts nationwide.

2. 1. 2

At provincial and local levels, the structure needs to be simple, and local administrative staff should be both accessible to village courts officials, and directly responsible to the DJAG/CCAU. This could be achieved by the removal of the current and various systems of village courts administration at Provincial Government level, lessening the staffing and equipment costs and the current confusions over responsibilities. Instead, three or more locally based village court inspectors in each province would be directly responsible to the central administration, which at present consists of eight staff in the CCAU, assisted by DJAG advisors. Pending a detailed appraisal of the costing implications, it is observed that savings generated through this restructure would contribute to offsetting many of the additional costs involved.

It is recommended that if the system were restructured according to the recommendation above, each province should have at least three locally-based Village Court Inspectors, responsible to, and administered directly by, the Community Courts Advisory Unit in the Dept of Justice and Attorney General, dispensing with the

need for provincial administrative units. Inspectors would ensure that village courts are discharging their duties according to the Village Courts Act 1989 and as advised in the Village Court Manual. Inspectors would also be responsible for the collection of revenue from the courts in their province.

3. Remuneration

When the village court system was first established the participation of its magistrates, clerks and peace officers (executive assistants to magistrates) was officially viewed as a community service performed by people selected after deliberation among "villagers". The job required no formal educational qualifications: rather, the personnel were expected to be "persons whom the people respect and feel confident about, that is, who know the customs of the area well, and can be relied upon to make fair decisions...".[7] Magistrates received a tiny "remuneration" of around $2 per week, which was less than a quarter of the official rural minimum wage of the time (min. rural wage was less than half the min. urban wage in the mid 1970s), reflecting the anticipation that their duties would be occasional and light. By the mid 1990s this allowance had risen only to around K6 per week, little more than a quarter of the national minimum adult wage of K22.96 per week determined by the National Wage Board in 1992. In 1995, when responsibility for the payment of allowance was transferred to Provincial Governments under the Organic Law, the rates of pay for village court officials were:

Chairman	-	K32.70	per month
Deputy Chairman	-	K29.06	"
Magistrate	-	K26.64	"
Peace Officer	-	K24.22	"
Court Clerk	-	K24.22	"

By 2004 some provinces had increased this: for example rates in Madang Province are:-

Chairman	-	K50	per month
Deputy Chairman	-	K45	"
Magistrate	-	K45	"
Peace Officer	-	K35	"
Court Clerk	-	K35	"

However, most retain the old rate.

Financial problems were exacerbated by the effects of the Organic Law of 1995, which created a division between the executive administration of the system, vested in the Village Court Secretariat, and its financial administration, which was transferred to provincial governments. The problems were actually anticipated by some commentators in the previous decade, such as Weisbrot, who warned of serious funding problems.[8] The Village Court Secretariat attempted to make sure the financial remuneration was carried out, but found that a number of provincial governments

[7] Village Court Secretariat 1975:1.
[8] See, eg, Weisbrot 1988: 42.

were recalcitrant, and money received by them for village court remuneration was being used for other purposes.

For example, based on an estimate of about 1082 village courts in the country, and a total of 12,656 officials, the allocations for officials in the last year before the passing of the Organic Law totalled K4,306,597. In contrast In 1999, after the passing of the law the total allowances under provincial budgets were supposed to be K5,004,800 (ie considerably higher) but it was discovered that the majority of provinces did not provide adequate funding for allowances.

The consequences have been that, depending which province they tend to be in, village court officials often go for months without remuneration. Official statements occasionally claim that the situation has improved in the past two or three years, but it has not. Lack of payment is a constant source of frustration and anger for the officials, who understandably cannot understand why they do not get money back when they themselves deliver collected fines to provincial governments.

This dissatisfaction has caused demoralization of VC officials, who, while continuing to perform their duties, are becoming less inclined to cooperate with provincial govt officers and other agencies, as a form of protest. This is leading to misunderstandings between different levels of the system. In the Eastern Highlands Province for example, in consultations in 2004 a provincial adviser reported that the total fine money delivered to the provincial office from the 87 village courts in the province for the year 2003 was only K5000 (average of less than K58 per court). He interpreted this as evidence of theft of fine money by magistrates and clerks. Magistrates consulted, on the other hand, pointed out that they managed more disputes through mediation (thus not imposing fines) than through adjudication, but also stated that as they had not been paid for a matter of years, some were simply refusing to deliver collected fines as a protest, and that provincial governments had only themselves to blame if some kept fine money in lieu of unpaid allowances.

The combination of a heavy workload, community and juridical demands on them for more legal rigour and a lack of payment has intensified a perception by village court workers around the country that they are being exploited. In 1994, a small group of village court officers in the Port Moresby area told a researcher[9] that they were trying to network to form a national association or union to press for "proper training", with the long term goal of taking over the work of the formal local courts. This initiative was partly grounded in a logic that the majority of cases heard in village courts were of the same order as those heard in local courts (local courts are no longer in existence), and they therefore considered that village court magistrates should be treated the same way as local court magistrates. There is clearly a rational link, in the thinking of village court magistrates, between workload, increasing demands for legal knowledge and expertise, and rate of pay. It was pointed out by magistrates several times during consultations in 2004 that the "law and order" situation would be significantly worse if village courts did not exist. On the basis of the figure of (at least) 603,000 disputes heard by village courts per year cited in Section 1 above, this is a significant point. In some areas individual village courts had in fact ceased to hear

[9] See Goddard 1996. Current figures supplied by DJAG indicate that current allowances should total K4,648,366.

disputes in 2004 as a final response to an ongoing lack of payment. **There is a growing resentment nationally which should not be ignored**.

Recently two remedies for the long-standing remuneration problem were being considered by the AGDISP. One was the possibility of recentralising control over the payment of allowances by tighter specification and directing of the content of funds released to provincial government. This resonated with the sentiment commonly expressed by village court officials consulted in 2004, who retrospectively viewed the changes under the 1995 Organic Law as the beginning of a deterioration in their financial remuneration, and preferred the earlier arrangement when the Village Court Secretariat had more control over financial administration. Village court officials asked about this in 2004 overwhelmingly called for the remuneration to be controlled by "Attorney-General's [department]". The other remedy under consideration was a "user-pays" strategy, whereby disputants would pay a fee to the village court to have their cases heard, in other words the remuneration would come directly from the local community.

When discussed with village court officials during a survey of their opinions in February 2004, the "user-pays" suggestion drew a mixed but mostly negative response. Village courts in some areas said the nature of their caseload, involving a predominance of lengthy mediation and a low rate of "full-court" adjudications, meant that the income would be lower than their current remuneration. Others -- particularly those with a high "full-court" adjudicatory caseload offering the possibility of a significant income for the court -- thought it might work, but would need rigorous accountancy. Some favoured a "losers-pay" alternative, whereby a disputant who had lost a case which had not been solvable by mediation would pay a sum equivalent to court costs. Some also proposed that disputants who appealed against village court decisions should pay an relatively high appeal fee. But a majority response was that user-pays strategies were not viable because (a) it was a financial burden on local people who often had few resources and were entitled to seek mediation or justice without having to pay for it; (b) magistrates themselves were members of the community and would feel compromised by receiving payment from fellow community members for hearing cases; (c) in some areas where there was a lack of police support, it was difficult enough to enforce the payment of fines ordered by village courts, and officials doubted they could additionally enforce the payment of court-user fees; (d) direct payment by community members added an accounting burden on the court and invited corrupt practice at a grassroots level; (e) different numbers of cases heard among courts would result in differing incomes from court to court. In the current climate of suspicion, it is also important to protect the village court magistrates from exposure to, or the appearance of, influence or corruption.

Meanwhile allowance rates are becoming uneven around the country, as some provincial governments are moving to increase remuneration by varying amounts, while others are maintaining the old rate despite rises in the cost of living, and still other areas are inefficient in delivering payments at all. As provincial government move to enact their own Provincial Village Courts Acts, under current national legislative provisions, these and other disparities will grow. The portents are that if the system is not regularised, the matter of remuneration, already a cause of resentment against administrators at regional and national levels, will become a matter of contention among village court officials themselves, as regional discrepancies in the

amounts paid become known around the country. Overall the matter of remuneration is a shared, fundamental, and overwhelming concern of village court officials everywhere, and has been for some years. The current discrepancies invite suspicions of corruption among village court officials, as they suspect each other of stealing entitlements, which is detrimental to their co-operation and efficiency. It also invites more tangible corruption as officials seek recompence through alternative strategies, and growing resentment which may eventually cause a deterioration in the mediatory and adjudicatory function of the village courts. **The remuneration problem is in urgent need of remedy.**

All other initiatives to improve and assist village courts are being seriously impeded by this single problem, which threatens the integrity of the village court system overall. **It is impossible to over-emphasise the issue**.

3. 1 Recommendation

The most compelling way to resolve the problem is to centralise responsibility for renumeration. With the removal of provincial administrative responsibilities, according to the first two recommendations above, there would be a significant reduction in the number and nature of intermediaries (such as "provincial village court officers") between the central funding agency and the courts, less chance of funds going astray or being directed to other purposes, and hence less likelihood of the need for periodic "top-ups" and "back-payments" to make up the shortfalls at the grassroots level. Centralising responsibility is likely, therefore, to prove less costly for the system overall in the longer term.[10]

It is recommended that responsibility for the remuneration of village court officials be transferred to the Department of Justice and Attorney General, to be administered by the Community Courts Advisory Unit.

4. Allowance rate

While the low retainer referred to in Section 3 above may suggest a relatively light work load, village court officials in reality devote a great amount of time and effort to their work. In addition to formal sittings which have become institutionalised as weekly or twice-weekly rituals in most areas, village court magistrates act as mediators both officially, following the Village Court Act's stipulation that where possible they should attempt mediation before proceeding to more formal adjudication, and unofficially, as their magisterial status invites community members to appeal to them as dispute settlers on a personal basis. This work is often unseen by observers of village courts in action, but it means that a great many village court officials work up to seven days per week. Poor record-keeping and the absence of accurate statistics makes the workload difficult to measure precisely, but the estimation of magistrates consulted in 2004 on the ratio of mediations to "full court" adjudication indicated that there are at least twice as many mediations as adjudications. The peace officers, delivering summonses, intervening in physical confrontations (their official title encourages communities to think this is one of their

[10] See Appendix 1 for current estimates of costings of village courts nationwide. Current figures supplied by DJAG indicate that current allowances should total K4,648,366.

responsibilities) and ensuring court attendance by recalcitrant disputants, also devote far more time to their duties than was anticipated when the village court system began. The high workload also burdens village court clerks: relatively unschooled in many cases, they wrestle with paperwork which has increased in complexity with the development and refinement of the village court system's bureaucratic procedures. Moreover, disputants in or near urban centres treat village courts as if they were institutions of the same order as the former local courts, even to the extent of challenging decisions on occasion with appeals to law, with the case consequently being taken to a district court.

It can be seen then, that the remuneration of village court officials has always been very low in relation to their workload. Clearly, the old allowance rate is not only far below the mininum wage rate, but it does not recognise the amount of work involved in village courts. Some provincial governments have recognised this and raised the allowance, but this has added the complication of significant disparities in rates paid (or not paid at all) from region to region.

4. 1. Recommendation

The rate must be stabilised, and provide a reasonable incentive to officials.

It is recommended that allowance rates for village court officials be standardised throughout Papua New Guinea, and that serious remedial attention be given to the fact that remuneration rates at present do not reflect the amount of time and effort devoted by village court officials to dispute settlement.

5. Appointments

The Village Court Act stipulates that village court officials should be chosen by the community, and appointed for an indefinite period, the appointment being formally approved by the National Minister for Justice. Appointments can be revoked or suspended for misconduct or incapacity. The legislation is reflected in statements in the DJAG's Village Courts Policy (2001), and in the new Village Courts Manual. For two decades the Village Court Secretariat implemented the stipulation in the Act, and interfered as little as possible in the communities' choices, except in cases of extreme incompetence and misconduct. Village court personnel remained fairly stable throughout this period, to the advantage of increased wisdom as magistrates learned from years of experience. The disadvantages were that once in the jobs, many ageing magistrates were reluctant to retire. This could result in frustration among younger generations in changing times, who felt that the old magistrates were out of date in their sense of "custom" and out of touch with modern society. Nevertheless the system worked well at a local level overall, and the practice accords with the current policy in respect of community involvement in law and justice and the recognition of village courts as, ultimately, local-community oriented.

The changes in administrative responsibilities under the Organic Law of 1995, resulted in some confusion over appointments, and a variety of practices have emerged from province to province. Some provincial governments think they can legislate to give themselves power to make appointments, and to choose and remove magistrates accordingly. The ambiguities created by the Organic Law have resulted in

initiatives which seem sensible to provincial officers but have detrimental effects on the morale of village court magistrates at the local level. These initiatives include, in some places, the removal of ageing magistrates and their replacement with younger ones, with mixed results, as experienced (albeit sometimes conservative) officials are replaced by inexperienced (albeit sometimes innovative) ones. In other places, particularly urban environments where there are a mixture of regional migrants, a rationale that each regional group in a local community should have one representative magistrate has resulted in magistrates being replaced because they are 'doubling up' on one regional group. This rationale sometimes clashes with an alternative one that a village court should have at least one woman, the latter policy driven by sensitivity to Constitutional directives on gender equality. In one village court, which had two women magistrates from the same region, enquiries in 2004 discovered that one had recently been removed under the "one magistrate per region" initiative.

These variations in initiatives on appointments have resulted in frustration among magistrates, who, regardless of internal frictions in their village courts, prefer continuity and stability of personnel to constant change. It has also brought accusations of political interference and nepotism at provincial levels, wich are difficult to prove, but are nevertheless detrimental in themselves to the stability and efficiency of village courts.

5. 1. Recommendations

5. 1. 1.

Anomalies in the appointment process can be overcome simply by recourse to the spirit of the Village Court Act. Magistrates should be chosen by the community which they are to serve, not by provincial governments or any other authority. They should be elected by their community and subsequently appointed by the Dept of Justice Attorney General, for a three year term. The DJAG, and only the DJAG, should have the power to revoke appointments in cases of proven corruption, criminal activity or gross incompetence by magistrates.

It is recommended that Village Court Magistrates be elected from and by their local community, and that they be appointed thereupon by the Dept of Justice and Attorney General for a period of three years, at which time they may offer themselves for re-election, and that their appointment may be revoked only by the DJAG, and only in cases of proven misconduct as stated in the Village Courts Act.

5. 1. 2.

It was noted during 2004 consultations with village court magistrates that the old practice of giving magistrates a certificate of appointment has been discontinued in many places. Such certificates not only act as recognition of magistrates' position by those who appoint them, they are a symbol to the community of the magistrates' authority. In the light of common complaints by magistrates that respect for them from, especially, younger people in the community is lessening in changing times, it is important that the issue of these certificates be maintained.

It is recommended that Village Court Magistrates, on appointment, be issued with a certificate of appointment from the Dept of Justice and Attorney General.

6. Uniforms and badges of office

Although village court officials have judicial powers, they are also reliant on a significant degree of respect to be effective in their local communities. A legacy of colonial rule is that uniforms and badges are generally recognised symbols of authority in PNG. All village court members are supposed to be issued with a uniform of blue (or in some places khaki) shirt and trousers and fabric badges of office. In practice the uniforms have been issued rarely and haphazardly. Magistrates and peace officers over the years have attempted to maintain their old uniforms, and many still wear decades-old shirts which have become ragged and threadbare with age. But a great many have no uniforms or badges at all. Enquiries in 2004 at provincial level revealed confusion about where uniforms were bought from. One popular explanation is that the name of the Australian firm which had been supplying the uniforms has been lost! Another explanation was that "government stores" had been closed under a recent government. A lack of uniforms and badges is a common complaint among village court officials, who argue that their authority is undermined without some symbol of their position. The most recent version of the Village Court Manual states that magistrates can be issued with badges and certificates, but adds "but this is not essential and Magistrates can act in an official capacity without these things". This is a practical statement for administrative purposes, but misses the point that to maintain local respect magistrates need to be able to display the symbols of their authority. In some areas like the coastal stretches of the Central Province respect is given to people on the basis of age, inherited status, etc, and village court officials, mostly of mature age are treated with deference as a result. In others, however, magistrates struggle to assert authority and peace officers in particular complain that their directives are ignored partly because they are dressed in "village" clothes.

6. 1. Recommendation

Uniforms are an important symbol of authority for village court officials, yet very few have a uniform any more. In modern times, when uniformed police, security guards and other agents of social control are commonly visible in everyday life, the public are unlikely to show respect for, or follow the directives of, anyone without a uniform or badge of some kind. Lack of authority and lack of respect in local communities is a common complaint of village court officials.

It is recommended that uniforms and badges or medallions of office should be issued to appointed Village Court Magistrates and Peace Officers, and badges of office issued to Court Clerks, and that uniforms and badges or medallions be re-issued regularly.

7. Training

One of the fundamental ideals of the village court system is that magistrates are specialists in matters of custom and customary law, but at the same time, they are supposed to observe the introduced law. In fact most of the interventions into, or over-

ruling of, village court decisions apply matters of law as interpreted by legal specialists.

This paradox was engendered by the original plan for the village courts that village court officials were recruited from the communities they serve, and chosen by the community partly on the understanding that they were not technically qualified jurists but had an organic knowledge of the community's customs. But on the other hand the disputes they dealt with were actually categorised into a reduced range of the same offences that technically qualified magistrates dealt with in local courts of the time and in district courts. An investigation in 1992 of village court magistrates' self-perception revealed that they saw themselves as part of a legal system rather than being an essentially customary institution, and that cases they heard tended to be those in which customary solutions had failed or were inappropriate or could not be applied for some reason.[11]

In various investigations and reviews of the workings of the village court system since its inception, when magistrates are consulted, their own assessments of their work and competency have focused overwhelmingly on their lack of expertise in law, a perceived lack of support from district court officials and their own difficulties with the paperwork. Village court magistrates spoken to during the 2004 survey informing this report raised this issue in respect of young educated people who challenged them. As ageing people relatively less educated than their challengers, the magistrates felt unsure of their own understanding of the laws. These difficulties have driven village court magistrates to rely heavily on their officially-issued operational handbooks, with lists of offences and penalties, and to apply the penalties recommended therein stringently much of the time. At the same time they have long expressed frustration at what they perceive as a lack of support from other arms of the "law", such as district courts and police. Thus they regularly request more training and refresher courses in the "law".

There has been a marked improvement in recent times in administrative approaches to ensuring that village court officials know their juridical duties and receive adequate training. The situation in 2004 contrasts significantly with the inadequacies of the previous decade and a half.

In 1992 the Attorney General's Dept and the Village Court Secretariat engaged a team of consultants from the University of PNG to review the operation of the village court system with a view to improving the training of village court officials. Training programs at that time were attempts to instruct groups of magistrates from various parts of the country in the rules and procedures outlined in the Village Court Handbook. The groups contained a range from relatively educated men in their thirties to aged men with little or no education, who were in many cases non-literate. The training efforts were largely counter-productive, reinforcing a sense that village court officials were supposed to rote-learn and rigorously apply the "law" as written in the handbook. Many of the older men, perfectly adequate dispute settlers in their own ways, found the process confusing and frustrating.

[11] Goddard 1992: 90-91.

The team commented in its report: “The courts work well *despite* the training provided. The training currently provided does not prepare Village Court officials for the job they are called upon to do. In fact aspects of the trainings as they are now conducted actually impair the ability of Village Court officials to do their job”.[12] A “Village Court Luksave Buk” (guidebook) for village court officials was produced after the report but never circulated. A Village Court “Training Trainer’s Manual”, written around the same time, concerned itself with instructing trainers in how to run sessions (in a very Western group-dynamics style), but without demonstrating a sense of the real problems of village court magistrates.

At that time (early 1990s) the delivery of village court handbooks (now known as village court manuals) and other documentary resources to village court magistrates around the country was a problem. Some magistrates were using outdated and deteriorating copies of the original handbook produced in 1976, and many were operating without adequate written guidelines at all. *Ultra vires* adjudication was common, though this was often the result of community pressure and lack of an alternatives judiciary for relatively isolated communities. A Village Courts Project in 1999 involving the Attorney General’s Dept, including the Village Court Secretariat (now restructured and known as the Community Courts Administration Unit) made the improvement of the content and delivery of training courses a major component of its work. In 2002 an AusAID/ACIL assessment informed by the AGDISP and others, made the point that “The lack of knowledge and and understanding of the role and jurisdiction of the village court has resulted in incorrect practices and abuse of power by those charged with operating them.” The assessment expressed concern that less than 50% of current village court officials had received any sort of training.

Training courses have continued to put emphasis on village court procedures, and jurisdictional issues. But there has also been a noticeable shift in the focus of this emphasis in DJ&AG/CCAU training programs in line with the philosophy of restorative justice which is being encouraged as a preference to punitive or win/lose judicial outcomes. In this respect more emphasis is now being put on instruction on aspects such as mediation skills, listening skills, and guiding disputants through the presentation of their case. By 2004 the AGDISP, over a four year period, had completed a substantial number of training programs, not only for village court officials, but also for Village Courts Provincial Officers. The latter was made necessary by the effects of the Organic Law introduced in 1995 which transferred responsibility for the village courts (except for jurisdictional matters) to Provincial Governments.

Also, new manuals have recently been produced in English, Tokpisin and Hiri Motu, and are being distributed. The manuals are considerably more comprehensive than the original handbook, and have been brought up to date, reflecting modern policies and sociocultural trends in the country. The role of mediation has been more clearly articulated, and a section on custom treats the subject with more sophistication than earlier manuals. The issue of women’s rights has been addressed in the manual, and the constitution is explained in commonsense terms. Issues such as *ultra vires* adjudication are addressed more clearly. The new manual provides a best-practice

[12] Eyford et al 1992, emphasis added.

guide for village courts in the new millenium, and is complemented by the new training program.

There is clear improvement in the clarification of village court officials' duties and training programs are much improved in recent times, compared to the situation in 1992. While many village courts are still without up-to-date manuals, the production and distribution of books and other resources is also being managed far more efficiently under AGDISP/CCAU initiative. A recent complication, however, is that provincial governments are beginning to enact their own Provincial Village Court Acts, under national legislative provisions, and it was found in 2004 consultations that some intend to instigate their own training programs. This is likely to lead to disparities in types, emphasis and quality of training around the country, undermining the AGDISP/CCAU.

7. 1. Recommendations

7. 1. 1.

The training program recently developed by the AGDISP and the CCAU is significantly better than any used previously, and is fully compatible with the philosophy of restorative justice which informs new law and justice policy. It is a most appropriate program for village courts in the current social climate in PNG, and its content clarifies many issues which have previously vexed village courts, including *ultra vires* activity. It is important that the AGDISP training program be implemented in every province as quickly as possible to ensure best practice in village courts nationally.[13]

It is recommended that the training program developed by the AGDISP be the single program used for village court officials in Papua New Guinea, and that the provision of training be implemented in all provinces as soon as possible.

7. 1. 2.

Complementing training, and providing village court officers with up-to-date guidance in legal matters, the conduct of mediation and "full court" hearings, the 2003 Village Court Manual should be available to all village court officials. Some village courts are still dependent on the outdated 1976 handbook, and some have none at all. The manual is available from a DJAG website, but few (if any) provincial village court officers have access to the internet, and hard copies should be distributed nationwide as soon as possible.

It is recommended that the 2003 Village Court Manual developed by the CCAU be the standard guide for village court officials in the forseeable future, and one copy of the 2003 Village Court Manual (in English, Tokpisin or Hiri Motu as appropriate) be delivered forthwith to each village court nationwide, to be held by the chairing magistrate of the court.

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[13] Current costing of nationwide training, according to figures provided by DJAG staff, is K1,292,800 (see Appendix 1). A training schedule developed by AGDISP is already in place.

7. 1. 3.

In addition to training courses, and recognising the cultural variations throughout Papua New Guinea, there is a need for village court magistrates to maintain expertise in dealing with disputes whose nature is sometimes particular to their local areas, and the nuances of which cannot be covered by systematic training courses. The opportunity for magistrates to discuss problems among themselves exchange ideas and from the more experienced among them to pass on informal skills and knowledge to others could be provided by yearly informal workshops in each district within the provinces.

It is recommended that yearly informal workshops facilitated, but not instructed, by Village Court Inspectors be held in each district, enabling Village Court Magistrates of similar cultural background to share experiences and problems in dispute settlement and for more experienced magistrates to pass on informal skills and knowledge to others.

8. Custom

When the first village courts began operating, in a rhetorical climate anticipating a post-colonial revival of indigenous cultures, John Kaputin predicted that "customary law will from now on be a real part of the national law....Village Court magistrates who will be appointed because of their knowledge of customary law will be a vital source of information and, indeed, a catalyst for reform". To this end the legislation provided for village court magistrates, untrained in law, to be selected by the local community on the criteria of their adjudicatory integrity and good knowledge of local customs.

Within a short time, however, constraints generated by the legislation and imposed by bureaucracy shifted the practical operations of village courts away from the idealised realm of custom. Official rules and regulations told them what kinds of disputes they could, or could not, hear and demanded the keeping of written records, for example. Village court officials found themselves structurally integrated with the existing legal system. Their activities could be overseen by members of the formal judiciary, and certain types of cases were to be referred to local or district courts, which could also hear appeals by disputants against village court decisions.

Community expectations provided further impetus for village courts to be partially modelled on local and district courts procedurally, and even architecturally. The colonial legal system was seen as representing a general principle of unbiased, uninvolved judges applying rules: this was also attractive to local communities, who had experienced customary dispute settlement as a process beset by bias and manipulation driven by the needs of kin-ordered social organization. In short, local communities wanted "grassroots" versions of formal courts, even to the extent of demanding or building their own permanent courthouses with docks and witness boxes.[14]

[14] See Paliwala 1982, Aleck 1992, Goddard 1992.

While village courts shifted toward legal formalism they did not completely break with informal practice, however. The legally unschooled and unconditioned magistrates demonstrate creativity in their dispute management and decision making. There is a great variation in operational style among village courts in general. Individual courts reflect the sociality of the particular local community they serve, and they manage a complex integration of introduced law and a variety of local customary dispute management procedure.[15] However the expectation that village courts are to serve the "law" on one hand and "custom" on the other, has generated major difficulties for magistrates.

A fundamental problem here is the imprecise concept of indigenous practices generally glossed as "custom". As long ago as 1960 it was recommended that custom be taken into account to a greater degree in courts, while conceding that custom was not a systematic equivalent of European law and would be difficult to rationalise for judicial purposes. Since then, no progress has been made toward the judicial rationalisation of "custom".

In modern Papua New Guinea references to custom in legal discourse are not grounded in a precise definition. Section 4 of the colonial-era Native Customs (Recognition) Act of 1963 provided a tautologous definition: "custom" meant "the custom or usage of the aboriginal inhabitants of the territory...regardless of whether or not that custom or usage has obtained from time immemorial". At Independence this definition wes entered into Papua New Guinea's Constitution (schedule 1.2) with the word "territory" replaced by "country", and is still the official definition for legal purposes.

Juridical ideas about custom in PNG in the past have tended to conceive it as a body of "traditional" beliefs and practices of equivocal legal and moral validity. Indeed, a legal doctrine applied to custom in PNG is that "traditional" customs can be tolerated unless repugnant to the "principles of humanity" (a less-than-precise concept in itself). "Custom" and "tradition" are often collapsed together in popular usage, and further, "custom" is often spoken of as if it could be codified. The common use of the phrase "according to [local] custom" invites the inference that a body of local customs, existing since time immemorial (ie, they are "traditional") can be enumerated, like a list of rules. A further inference, in relation to village courts, is that the courts' adherence to "custom" could be monitored. None of this, however, is true.

Traditions are ever-changing, flexible and adaptable. In most of PNG "tradition" has been affected by European-introduced ideas and practices for at least 30 years, and as long as 130 years in some places. Many ideas and practices assumed by local communities nowadays to be long-standing and authentically indigenous "custom" or "tradition" are not. Elders remember the practices they grew up with, sometimes less than reliably, without realising that many of these were instigated by kiaps, missionaries and others before the elders were born. Many "traditions" would be better termed "neo-traditions". Moreover, "custom" in the sense of "traditional rules" is always a matter of debate within a community, simply because the "rules" are constantly changing according to practical factors at any given moment.

[15] The variety in village court style can seen in comparing descriptions in, eg, Brison 1992, Goddard 2000b, 2002, Scaglion 1979, 1990, Westermark 1986, Young 1992, Zorn 1990.

It should also be noted that the enshrinement in the legislation of custom as a referent for village courts came at a time when the notion of "custom" was used to nationalistic ends, against what was seen as the enforcement of Western culture on Papua New Guinea. Custom at the time was ascribed almost unconditional positive value, as can be seen from the phraseology of the Minster for Justice of the time, John Kaputin (above). The Customs Recognition Act directed that all formal courts in PNG should recognise and enforce custom, unless so doing would result in injustice or be against the public interest. Times have changed, and the notion of custom has proved more problematic than legislators thought at the time. Formal courts now apply the law almost exclusively. "Custom" has proved too problematic in practice in view of developing interpretations of the Constitution, and human rights and other legislation. Yet village courts are still enjoined to privilege custom as conceived at the end of the colonial period.

Village court officials conscientiously struggle to implement this. They carry in their minds a dualistic notion of "law" and "custom", even to the extent of trying to enumerate the particular customs involved in cases before the court. In urban village courts, serving regionally mixed populations, magistrates regard the identification and pursuit of custom as particularly vexing. In their interpretation the directive to follow custom imposes a need for them to become knowledgeable of a diversity of customs, and burdens them with the problem of whose customs to follow in a dispute between people of differing regional backgrounds.

The attempt to apply custom has occasionally led to well-publicised controversy, when "local custom" has clashed with the law, in which cases village courts are variously accused either of applying unacceptable local customs, or of ignoring local custom.[16] In other words, village courts are sometimes put in a no-win situation, because the official definition of custom and its constituents is inadequate as far as precise or critical application in the village court system is concerned.

The writers of the new, 2003, village court manual seem to appreciate this problem and have addressed the notion of custom in more sophisticated terms, pointing out how customs change, how difficult the identification of customs is in fact, and how some customs which were previously uncontroversial have come to be frowned upon. Whether this is helping magistrates or not is difficult to tell, so far. While it is important that village courts should privilege local cultural values as much as possible, there is evidence that the directive that village courts should "apply custom" has not achieved the balance of law and "custom" which was intended.

Further, village courts themselves are not the "customary" courts their planners in the early 1970s intended them to be, but are better seen as informal courts integrated into the legal system, hearing cases where customary or neo-customary solutions have failed or are inapplicable. Despite a common belief that "custom" is applied except when it is against the "law", the actual practice in village courts is a complex integration of introduced law and local standards of appropriate behaviour, driven by the need to maintain community harmony – a strategy which resonates both with the

[16] For examples, see Jessep 1991, Senge *et al* 1992, PNG Post-Courier various reports, The Times various reports.

Village Courts Act's intent that the courts should aim for peace and harmony, and with current policy orientation toward restorative justice. Village courts magistrates' flexibility in admitting testimony and in decision making does not actually pursue the aims of customary law. It is more useful to see village courts as an alternative to both traditional dispute settlement and legal formalism.

8. 1. Recommendation

Rather than being enjoined to apply a notion of customs, or customary law, defined in a way which remains uncodifiable and contentious so far as practical application is concerned, village court magistrates would be better encouraged to think of "custom" in a way compatible with their actual best practice, a compromise between strict law and community standards of appropriate behaviour. This does not negate the importance of custom in any way. In fact we are referring here, indirectly, to the *most appropriate* customary behaviour, rather than to those "customs" which are actually disruptive of communities in modern Papua New Guinea. Further, it is important that the village court manual, and the content of training course, continue to encourage informality and flexibility in dispute settlement, and that "custom" be discussed in the careful manner evidenced in the 2003 manual.

An alternative phraseology is proposed here which is compatible with the notion of restorative justice which guides current law and justice policy, and also with the provisions in the Village Court Act 1989 that village courts should "ensure peace and harmony" (s.52) in their areas, apply "relevant custom" (s.57), in accordance with "substantial justice" (s.58), and follow principles of "natural justice" (s.59(2)). It appeals to commonsense community moral values, and should be far less problematic as far as practical application in village courts is concerned.

It is recommended that, in the light of current confusing qualifications concerning "bad" and "unacceptable" customs, custom be glossed in practical terms as "local community standards of good behaviour" and village court magistrates therefore be advised to "Apply the law in a manner compatible with community standards of good behaviour" or in Tokpisin "Bihainim lo na bungim lo wantaim gutpela pasin na sindaun bilong komuniti" or in Hiri Motu "Taravatu oi atoa hegeregere inai kumuniti edia noho mauri namonamo lalonai".

9. Women in village courts

The examination of the village court system's relevance for and relation to, women has been complicated by a cross-cutting theme concerned with general inequalities affecting women overall in PNG. In this discourse, village courts have been added to a catalogue of institutional and personal prejudices faced by women. The discussion of women in village courts has therefore been limited by a perspective from which village courts are positioned *a priori* as an institution which mistreats women. The evidence supporting this view of village courts is, in fact, relatively limited and not rigorously researched, and a significant proportion of it is taken from unreliable newspaper reports and political rhetoric. Curiously, it also ignores a body of rigorous research which finds that women are increasingly confident and successful users of the village courts. Consequently, some unpicking is required before the relationship of women and village courts can be discussed in a way that might be useful for the

constructive development of village courts. Two main subtopics derive from the general topic of women and village courts. They concern (a) women as village court officials, and (b) women as village court users.

Women Village Court Officials

No reliable assessment can be made of the number or percentage of women village court magistrates nationally, simply because full statistical data is not available. Broad statements that there are no women village court magistrates in any given region should be treated with caution unless they are based on research which has covered the entire region, because for many years no centralised data on currently elected magistrates was efficiently maintained. Only recently has a database been developed, by the AGDISP, with categories for the identification of magistrates as male of female which are yet to be informed by data. In the area that is generally used as the basis of claims of misogynist practices -- the "highlands" (an imprecise category in itself) -- no-one has pursued exhaustive empirical surveys of the gender of magistrates in any of the constituent provinces. However, it is probably true to say that there are very few women magistrates in highland village courts. In highland rural communities, female identity is traditionally intrinsically linked to gardening, child birth and infant care, and small scale-exchange (ie mostly between individuals). Larger-scale economic activity, public oration, political and adjudicatory activities are traditionally the realm of males. Culturally, there is little to encourage women to become village court magistrates, and women in such communities themselves often regard arguments about the need for women village court magistrates as an issue for privileged, educated women. Alternatively in Papuan coastal areas, which have been Christianised for more than a century, women are heavily involved in Church Fellowship activities, which also emphasise materially productive work, rather than politicking or adjudication. An understanding that women do not make political-juridical decisions or give advice to men on political-juridical matters is culturally embedded in these societies. Attempts to increase the number of women magistrates in rural areas in particular will probably meet with limited success while these more fundamental cultural perceptions of the materially productive work and role of women prevail. Some provinces are working toward enacting policies attempting to achieve a goal of having one woman magistrate in each village court, but it is likely that this will have limited success without changes in more fundamental social perceptions of women's roles.

A changing situation can be found in urban areas, where different lifestyles dispose women to look for other kinds of work than gardening, food preparation, church fellowship duties, etc. In these situations women do occasionally work as village court magistrates. There are women village court magistrates in the NCD, for example. Yet even these women work subtly, preferring mediation techniques to making formal judgments, and when adjudication is necessary they tend to manipulate decision-making so that the judgment is actually announced by a male magistrate. Thus they skilfully negotiate cultural understandings that women do not make decisions in juridical matters. Women frequently serve as village court clerks, both in rural and urban areas. The other practical job in the village courts is that of peace officers. Each village court has several, and they act as messengers for the magistrates, serving summonses and delivering court orders, ensuring that disputants attend court, standing or sitting between disputants to prevent physical assaults by one party on another, and

acting as peace wardens in the community. Women sometimes serve as peace officers, more frequently in urban village courts. Again, it can be seen that women who do become involved in village courts tend overall to take on practical tasks which are non-political and non-adjudicatory.

9. Women's use of village courts

A current rhetoric that women disputants are oppressed or mistreated in village courts needs critique. The evidence for this view is actually very limited, as noted above. There are two strands to the view. One is that village courts decisions are unnecessarily harsh on women. This draws repeatedly on two sources. One is a frequently recycled incident observed in the Southern Highlands in 1975 (note: almost three decades ago) when the village court system was in its infancy, the magistrates had no handbook to guide them (the handbook was produced in 1976), and white officials were concerned that the newly established village court might discriminate unjustly against women and strangers. Convictions of women for smoking raised concerns with these colonial observers. This incident (which had little cultural contextualization at first reporting) has been recycled as recently as 1998 and 2000 to support claims of women's *ongoing* mistreatment.[17] The other source is reportage of a High Court judge freeing several women from Baisu Prison (Western Highlands) in the early 1990s after they were allegedly wrongly imprisoned by village courts.[18] The reportage ignored the fact that village courts cannot directly imprison anyone, they write an order which then can be approved and implemented, or rejected, by a District Court Magistrate. Responsibility for imprisoning the women in the cases cited, then, lay with the district court in fact. Investigation of the details of these cases reveals that the "harsh" treatment (ie, the recommended gaol terms) of the women resulted from the careful application by the village court magistrates of the rules in their village court handbooks, for fear of not applying "the law" correctly. This can be linked to comments in section 2.2 (above) about village courts' concerns about "the law" (in these cases village court legal rigour happened to penalise women more than men, but the handbook used at the time, and prepared by a European at the end of the colonial era, made no allowances for such outcomes). Reportage of wrongful imprisonment declined significantly after the incidents cited above, which are still being recycled, nearly a decade and a half later, in support of claims of current mistreatment.

The other strand in the rhetoric alleging mistreatment of women is based on reported cases of village courts being unsympathetic to women in troubled marriages. In contrast to the accusations that village courts are applying the law too harshly, this strand accuses the courts of applying oppressive customs. The examples on which it draws are actually sparse, and inadequately contextualised.[19] That is, they fail to set the village courts in in the cultural context of the local communities they serve, and whose wider interests they have to take into account in their judgments. In respect of the cases involving problem marriages in rural areas the critics of the courts fail even to question why the marital issue is being brought to a village court, instead of being negotiated between the respective clans of the married couple. The latter is the most common course of action in the case of rural "customary marriages" because a single marriage sometimes involves dozens of people who have economic relationships

[17] For example Macintyre 1998, and O'Collins 2000 have recycled this story.
[18] See, eg, PNG Post Courier 1991, Times of PNG 1991.
[19] See, eg, Garap 2000, Slarke 2003.

channelled through it. The breaking up of such marriages can therefore cause socioeconomic rifts between dozens of people, affecting the wider community. If the marriage problem is being brought to a village court, it usually means that one or both marriage partners do not have the support of their clan, probably for complex, and far-reaching socio-economic reasons. A village court would be unwise to make a simple judgment between the two individual disputants against the interests of the wider community. The force of this wider issue often results, in any specific case at hand, in a court decision which might appear to an outsider to be a "loss" for the woman as an individual. Marital problems are cases which village courts do not enjoy hearing, for their "customary" obligations require them to put the interests of the community as a whole ahead of the interests of individuals. Further, unlike higher courts, village courts are not authorised by law to grant divorces in the Western sense, they can judge on matters concerning brideprice payment or non-payment, and are otherwise confined to dealing with problems inside the marriage while leaving the union itself intact. (Women wanting "divorces" have much more success in this respect in urban village courts, where the socio-economic context of the marriage is different, and it is easier for magistrates to announce the relationship "finished".) Advocates of women's rights often recognise that women are subject to community attitudes which appear to oppress them, but focusing on village courts as the specific oppressers is simplistic, as it fails to address the underlying, wider issues which bind the village courts as much as the women.

The judgmental emphasis on relatively few examples of alleged mistreatment not only fails to do justice to the village court system as a whole, but ignores a body of well-researched work which gives a very different picture of women's overall relationship with the village courts, finding women to be frequent and assertive users of the courts, that courts can be severe on males in cases of marital violence,[20] and that village courts were the single most useful forum used by women to settle grievances, in comparison with a range of possible resources from village moots to higher formal courts.[21] Recent research (1994 to present) in the National Capital District indicates that more than 50% of plaintiff disputants are women, and in most cases the female complainants receive a court decision in their favour.[22]

Village courts are as capable of occasionally making bad or unfair judgments as any other type of court, formal or informal, but it is actually difficult to ascertain whether women overall are any more disadvantaged by these lapses than men. The reliable evidence suggests that women are generally confident and successful users of the village courts but we should, of course, be cautious about drawing conclusions. It is to be hoped that further rigorous research, rather than polemic and recycled stories, will clarify this issue before too long.

The village court manual of 2003 discusses women's rights and issues of equality in some depth (unlike the former handbook) and should provide guidance on these matters for village court officials henceforth.

9. 1. Recommendation

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[20] Westermark 1985: 104-119.
[21] Scaglion and Whittington 1985: 132
[22] Goddard n.d.

Administrative selection and appointing of women magistrates irrespective of community (male *and* female) attitudes is not a satisfactory solution to the paucity of women magistrates. It can cause conflict and dissent in the community detrimental to the work of the village court,[23] and it breaches the intent of the Village Court Act that magistrates be chosen by their communities. At the same time, women who have community respect have less problems when elected, and are skilled at negotiating their roles and community attitudes. Such women should be encouraged to become magistrates.

It is recommended that respected women in the local communities served by village courts be encouraged by Village Court Inspectors to offer themselves for election as Village Court Magistrates.

10. Village Court relations with other institutions

Many disputes in rural communities and urban settlements are settled without reaching the village court. This is because of a number of mechanisms which might be termed neo-customary dispute management procedures, which have developed throughout Papua New Guinea from transformations in the structure of social organization over time. One mechanism is a survival from the late colonial period when prominent community members were used by the administration in a politico-jural capacity, installed as village heads and problem solvers. Nowadays these types of people are elderly figures in most cases, but they have maintained their status as dispute settlers by virtue of experience and reputation, and a wide range of disputes which might otherwise have gone to a village court are taken to them. Another forum for dispute settlement or management is provided by church organisations -- deacons, pastors and other church officials regularly mediate or arbitrate disputes. In urban environments regional groups within the community often form their own self-help associations, and again, disputes of certain types can be taken to these groups. Also, in urban settlements there are usually “settlement committees” made up of concerned individuals and aimed at preserving stability in the settlement and working to improve the settlers’ habitat. These committees also attempt to resolve disputes which threaten the well-being of the community. Committee members are also prominent members of the community, and indeed, sometimes the same individuals hold several different positions of prestige, including that of village court magistrate.

In respect of the guidelines for village courts, which provide that mediation is to be attempted where possible before a case comes to a full village court, this unofficial intervention in disputes blurs the boundaries of formal and informal dispute settlement. There are cases where an individual is at the same time an ex-councillor, a church elder and a village court magistrate. When he is approached to settle a dispute (outside a village court forum) the formal or informal capacity in which he is acting is of no particular importance to him or the disputants. As a result of this variety of dispute-settling resources there are some communities in which the types and numbers of disputes which find their way into the village court are fairly limited, and sometimes a matter of default, in that other resources had failed to reach satisfactory results. Thus village courts, rather than being “customary” or “neo-customary”, are

[23] The author has witnessed the problems and stress undergone by women magistrates appointed against community wishes.

commonly used by disputants as a formal and public legal forum *beyond* neo-customary resources. At the same time, they are hearing disputes which, while within the categorical range of those heard in district courts, are of a relatively minor nature and could be resolved or managed within the community, rather than requiring police intervention or the technicalities of the latter courts. From the "grassroots" point of view, taking small disputes to district courts involves a risk of legal complications, unforeseen costs and technicalities which – as already noted above -- threaten the degree of control the community has over its own affairs. It can be seen, then, that particularly in the urban context, village courts mediate between non-legalistic dispute managing resources within the community and legal courts outside the community, while being administratively governed by the formal legal system.

In this regard, while legislation provides that they interact, where and when it is necessary, with police and with district courts (whose endorsement is needed for some village court orders and who hear appeals against village court decisions), their organic links, within their communities, are with neo-customary dispute-settlers. The new Village Court Manual (2003) mentions that particularly in respect of mediation procedures, other dispute settlers (such as elders) can be brought into village court activities. At the moment in many communities the village courts are viewed as a second tier in a three-tier system, with neo-customary dispute settlement procedures below, and district and higher courts above. An important intended function of the village courts was that they should gather customary (or more precisely neo-customary) procedure into their jurisdiction, but this has not happened. Nevertheless they can articulate neo-customary dispute resolution into their practice with the involvement of the groups mentioned about. This can be important in maintaining the community orientation of village courts despite their slow shift into formal legalism which has been discussed above. Their community orientation may become weaker if their organic -- instead of hierarchical -- relationship other dispute settlers is not encouraged.

Relationships with police and district courts are often less than satisfactory. Complaints in this regard heard during consultations in 2004 were depressingly similar to those heard 12 years previously in a tour of provinces.[24] In many areas village court officials have complained for years that police do not support them when required (eg in the cases of arrest warrants, preventive orders and other back up) and do not consult with them as much as they could when dealing with village disruptions.

Similarly, while the Village Court Act intends that district court magistrates fulfil a supervisory role in respect of the juridical work of village courts, in many parts of the country district court magistrates show little interest in, or recognition of, the work of village courts. District court magistrates' responsibilities include the endorsement of imprisonment orders from village courts, and the hearing of appeals against village court decisions. Village court magistrates commonly complain that district court magistrates do not fully investigate the background of decisions which appellants take to them, and that district court magistrates do not give them enough recognition as dispute settlers or adjudicators

[24] See Goddard 1992.

District Court Magistrates, for their part, point out that they are not taught the Village Court Act as part of their training, nor are they taught about the village courts themselves.

10. 1. Recommendations

10. 1. 1.

In fairness to the police, it must be noted that they mostly do not have a clear understanding of the work and intended authority of village court officials. If better informed, police officers may recognise the potential usefulness of village court magistrates in police interactions with local communities, particularly in terms of the practicalities of law enforcement.

It is recommended that workshops on village courts, attended by representative Village Court Magistrates, be incorporated into police training programs, to improve relations and cooperation between police and village court officials.

10. 1. 2.

Similarly, District Court Magistrates should be better informed on village courts.

District Court Magistrates and, where appropriate, Justices of the National Court be supplied with the content of the Village Courts Act 1989, and workshops on village courts, attended by representative Village Court Magistrates, be incorporated into their education and training, to improve understanding of the position and role of the village court.

10. 1. 3.

The development of a hierarchical and slightly exclusive relationship between village courts and neo-customary institutions is a trend which should be discouraged. It could undermine the potential of grassroots institutional cooperation which current law and justice policy is attempting to utilise.

It is recommended that cooperative interaction between village courts and neo-customary dispute-settlers such as elders, church representatives and localised "peace and good order" committees be encouraged, particularly in mediatory matters, in the spirit of current policy emphasis on the development of community-based law and order initiatives.

10. 1. 4

In pursuance of the aims of the National Law and Justice Policy to utilise existing community-based agency, it is suggested that consideration be given to a practice observed in Alotau, Milne Bay Province, where the probation office under the pressure of staffing shortages, was using village court magistrates as village-based quasi-probation officers, responsible for making sure that probationers reported in as required and observed probation rules when in their own villages.

It is recommended that consideration be given into the possibility of using Village Court Magistrates as village-based supervisors of probationers released into their local communities, in pursuance of current policy emphasis on community-based law and order initiatives.

10. 1. 5

Village court peace officers frequently complain that they are not respected or obeyed by community members when they attempt to carry out their duties as executive assistants to magistrates. This may be partly due to the fact that they are no longer issued with uniforms of badges, and therefore the issue of uniforms to them might help them to assert authority. In urban areas with mixed regional populations, peace officers have a further difficulty in gaining cooperation from people of different regional background from themselves. An alternative in urban areas may be to use auxiliary police personnel as peace officers. Auxiliary police are currently recruited from urban communities, especially, to provided a grassroots component to community policing initiatives, and paid a small wage. Executive work for village court magistrates (delivering summonses, making sure people attend court, etc), could conceivably be incorporated into their duties.

Consideration be given to executive assistance to Village Court Magistrates being incorporated into the duties of auxiliary police recruits, in urban areas, to replace village court peace officers.

11. Fines and Community Work

Successful mediation is the ideal goal of village courts, but this is not always possible, and a significant proportion of disputes become matters of adjudication in "full court" hearings. Village courts are encouraged to accept alternatives (produce, etc) to money as fines, and also to order people to do community work as an alternative to fining them. Community work was sometimes used as a punishment in the early days of village courts (more than two decades ago), when communities were more insular, more close knit, and elders had more authority than now. With the weight of censorious community opinion behind them, magistrates were assured of the co-operation of people ordered to do community work. The situation in 2004 is significantly changed. Without coercive backup, it is difficult for village courts to order community work. Today's social conditions require that somebody would have to supervise the work, tools and other resources would need to be supplied (which requires funds). Research in the 1990s revealed no use of the community work option by village courts in the NCD, and little interest elsewhere in the country.[25] Village court magistrates spoken to in 2004 in both urban and rural areas argued that community work was simply impractical in the current social climate. All of them claimed that, beyond payment of compensation and reparation of relations between disputants, fines were the only realistic option.

11. 1. Recommendation

[25] Goddard 1992, 2000.

Village courts currently, and in the immediate future, do not and will not have the practical supervisory authority and means to ensure community work is carried out, especially in urban areas, nor are resources such as tools for offenders' use available. The use of community work in place of fines should be suggested to village court officials, but not enforced.

Village Court Magistrates be advised that community work can be substituted for fines when sentencing offenders, as a matter of discretion on a case by case basis.

12. Long service recognition

The village court system has been in operation for three decades, and many village court officials have been in service since the first village court was established in their district. Many have retired from their duties, as elderly men, with little official recognition for lengthy service in dispute settlement, often working seven days a week in mediation as well as formal court sittings.

12. 1. Recommendation

It would be appropriate for the Dept of Justice and Attorney General to give long-serving village court officials a symbol of recognition. As many of the older generation of Papua New Guineans do not have a reliable calendric record of their age, and there is no "retirement age" for village court officials, 20 years could be an appropriate measure of long-service.

It is recommended that village court officials who have completed 20 years of service be awarded a medal and long-service certificate in recognition of their contribution to their community and to the work of village courts in pursuit of law, order and justice.

Annex 1

TERMS OF REFERENCE

At its meeting on 6 November 2003, the National Coordination Mechanism (NCM) tasked the Justice Advisory Group to undertake a review and appraisal of the village court system, in the following terms:-

- Undertake an appraisal of the efficiency and effectiveness of village courts in PNG – as they operate both in the formal and informal system - including but not limited to making recommendations relating implementation planning, building capacity, training, resources, positioning and the inter-relationship with formal sector agencies and informal community institutions.

- Undertake an evaluation of past/existing AGDISP village court projects, concept paper, and related development work, and develop any appropriate policy guidelines.

Subsequently, in its review of the Program Design Document of the Law & Justice Sector Program on 16 February 2004, the Justice Advisory Group recommended consideration be given to an additional part of this review, as follows:

- The review of the village court system include consideration of the appropriateness of applicable legislation, the role of customary law and the availability of remedies, the extent of government support, the adequacy of training and the relationship of police on the effective operation of the village courts.

Annex 2

METHODOLOGY

Research and consultation

Interviews were conducted with stakeholders and agencies at state and provincial level. It was considered important to complement these with consultations with community-based stakeholders, in particular with village courts magistrates themselves, who are frequently not consulted to any extent in evaluations or reviews of the village court system.

Visits were made to a selection of village courts in the National Capital District, and discussions were held with village court magistrates, peace officers and court clerks, to gain an understanding of issues for village courts in urban contexts. Visits were also made to four provinces -- East New Britain, Madang, Milne Bay, Eastern Highlands -- and interviews and discussions were conducted with relevant provincial officers, and also with groups of village court officials in each province. In all a total of 83 village court officials (magistrates, peace officers, court clerks) were consulted to gain a community-based perspective (see Appendix 3).

Previous evaluations and reviews of the village court system conducted since 1990 by the PNG Attorney General's Dept and AusAID were examined. Academic, advisory and policy literature on the village courts since 1965 was reviewed (see Appendix 4).

Annex 3

CURRENT NATIONAL COSTINGS OF THE VILLAGE COURTS

Based on figures provided by DJAG, 2004:

Allowances (Total for all officials)	---	K4,648,366
Training	---	K1,292,800
Inspection Costs	---	K453,200
Operation Costs	---	K652,880
	Total	K7,047,246

Annex 4

HISTORICAL CONEXT

Policies and considerations leading to the establishment of the system

A useful starting point for a practical history of the village courts is the end of the Second World War, when the previously negative attitude of colonial officials toward the idea of indigenous judges or magistrates began to change. Papua and New Guinea became a single entity known as the Territory of Papua and New Guinea (TPNG) for administrative purposes, and the governing Labour Party in Australia began to implement a "New Deal" policy with a view to eventual independence for the territory. The Administrator of the TPNG at the time, J.K.Murray, mooted the idea of "Native Village Courts", and Section 63 of the Papua and New Guinea Act 1949 provided for the establishment of native village courts and other tribunals run by Papua New Guineans. However, Murray's proposal, "Native courts...with jurisdiction in minor civil and criminal matters, especially but not exclusively in those relating to native custom", was not implemented, partly as a result of a change of Australian Government in 1949. The idea of "native", or village, courts was fielded several times during the 1950s without finding favour with the Administration or the judiciary in Papua New Guinea.

Nevertheless, there was a growing concern on the part of the Administration that the majority of the population was not using the formal system of justice, and unofficial courts, over which the Administration had no systematic control, were flourishing. Discussion among Administration planners began explicitly to bring together issues of legal services, indigenous participation and custom in a configuration which forcefully reintroduced proposals for a Village Court system. In 1965 the legislative draftsman, C.J.Lynch, proposed a reform of the legal system involving "native courts" using "minimally trained native magistrates of the 'village elder' type", and administering "custom" or "customary law", arguing it would provide speedy justice at a low financial cost and would be physically close to the people.

Other factors were also providing impetus toward a new justice delivery strategy. From the 1950s there had been increasing pressure from the United Nations on Australia to prepare Papua New Guinea for political independence, resulting in, among other things, a program of 'localisation' of positions traditionally held by Australians. In the 1960s a growing number of Papua New Guineans were moving into positions of authority in a variety of spheres including parliament. Among indigenous parliamentarians and academics in particular there were calls for the favouring of custom and customary law as more appropriate regulatory instruments for an emerging Melanesian nation than the imposed legal system. This body of opinion complemented a contemporary influx of Papua New Guineans into the judiciary, and added considerable weight to the resurgent notion that some form of "native courts" might be advantageous. In particular there was concern about the inadequacies of Local Courts. These included over-formalised procedures and language difficulties, which alienated local communities particularly in rural areas, and a procedural emphasis on producing a winning litigant, in contrast to traditional Melanesian concern with the maintenance of community stability.

A review of the lower court system and a subsequent enquiry into the need for village courts led to a White Paper being tabled in the House of Assembly and debated late in 1972. By this time the majority of parliamentarians were Melanesian and "custom" was becoming a rhetorical component of the debate over Papua New Guinea's political independence. The Melanesian parliamentarians were mostly in favour of village courts. Among the themes traversed in the course of discussion were nationalism and criticism of the colonial legal system. In September 1973 the Village Courts Bill was introduced for parliamentary debate by the then Minister for Justice, John Kaputin, who emphasised its potential efficacy in giving indigenous communities control over their own affairs. The issue of returning power to local communities was persuasive in the climate of the demise of colonial rule, along with the issue of the rural shortcomings of the current legal system, and a perceived need for an emphasis on rural "law and order". The Village Courts Act 1973 came into force on November 28, 1974. Overall, mediation and the pursuit of peace and harmony in the settlement of low-level intra-community disputes were the principal aims. The commentaries of legal specialists of the time suggest that there were some expectations that village courts would gather existing unofficial dispute settlement procedures into the centralised legal system.

The nature and development of the system since its establishment

When they were first introduced, village courts were intended to serve rural communities, drawing on customary law in preference to the system of law introduced during colonialism. However, the idealization of the system as a neo-customary institution was largely negated from the start by its structural connections with the existing legal system. Magistrates were given a handbook listing what kinds of cases they could or could not hear, maximum penalties, paperwork and record-keeping obligations and other bureaucratic responsibilities. The possibility of bias in court decisions, driven mostly by kin-group loyalty and bribery, was anticipated by legislators, who imposed rules that at least three magistrates must be on the bench to hear a case and that disputants should have the right of appeal against decisions. After a sprinkling of village courts had come into operation by the late 1970s, the system proved very popular and was quickly extended into urban areas, to serve settlements and other "grassroots" communities. Like the rural village courts, the urban village courts procedurally tended to imitate district courts and local courts against the intentions of the system's instigators.

Village court magistrates were relatively untrained in law, and the original legislation provided that they be selected by their local community on the criteria of their adjudicatory integrity and good knowledge of local customs. Lawyers were not, and still are not, allowed to attend village court hearings, and the magistrates have remained creative in their dispute management and decision making much of the time. While they have been concerned to apply the law, as presented to them in the village court handbook originally issued in 1976, in practice they do not bind themselves to legal precedents in the way that formally trained magistrates do, and their intimate relation to their local community results in a great deal of flexibility in the way the law is applied. For example, as members of the grassroots communities they serve, magistrates are often well aware of local social issues manifest in what appear superficially to be disputes between two individuals, and they make their judgments accordingly. This has made the courts a popular forum for local intra-community

dispute settlement and complaints about petty personal offences. The alternative option, taking small disputes to district courts (or in earlier times to local courts), involves a risk of legal complications, unforeseen costs and technicalities which threaten the degree of control local communities have over their own affairs.

Legislatively there have been few changes made in respect of the village courts. The Village Courts Act of 1973 was superceded by the Village Courts Act of 1989, which contained few substantive changes apart from the replacement of colonial terminology ("territory", "native" etc) with terms more appropriate for an independent nation. However, the consolidation of a provincial government system brought with it an important shift in responsibilities previously centralised in the Attorney General's Department and administered by the Village Court Secretariat. In 1980 the Village Courts Administration Act No. 10 was passed, enabling Provincial Governments to take over many of the responsibilities of the Village Court Secretariat, including the payment of village court officials' monthly allowances. Three provinces (East New Britain, Manus, Morobe) responded to this development at the time.

More significant, in terms of its general effect on village courts overall, was the Organic Law of 1995, which transferred responsibility for the administration of village courts, with the exception of a few matters such as jurisdiction, appointment of magistrates, provision of operational materials, and training programs, to provincial governments. In practical terms the greatest impact of this was on the payment of allowances, which became less reliable, and variable in its frequency from province to province. There has also been some confusion over powers of appointment of village court officials, with claims of interference and nepotism at provincial level.

Annex 5

AGENCIES AND PERSONS CONSULTED

Meetings & Consultations

Dept of Justice and Attorney General:
Deputy Secretary, Mr Kepas Paon
Director, Community Courts Advisory Unit, Mr Peni Keris
Deputy Director, CCAU, Mr John Takuna
Customary Law compiler, CCAU, Mr Bruce Didimas
Jurisdiction Officer, CCAU, Mr Darius Dorke
Provincial Liaison Officer, CCAU, Mr Kimson Kimeto
Advisor, A/G Dept Institutional Strengthening Project, Mr Ken Skews
Advisor, A/G Dept Institutional Strengthening Project, Mr Tony Cameron

National Capital District Commission:
Manager, Law and Order, Mr Michael Naphal
Village Courts Officer, Mr Paul Digine

NCD Village Courts:-
Konedobu Village Court,
Chairing Magistrate, Mrs Molly Vani
Retired Chairing Magistrate, Mrs Josephine Maniti
Pari Village Court,
Chairing Magistrate, Mr Morea Hekoi
Erima Village Court,
Chairing Magistrate, Mr Peter Piawa
Retired Chairing Magistrate, Mr Andrew Kadeullo
Magistrate, Mrs Anna Maima
Group discussion with all magistrates, peace officers, court clerk

East New Britian Province:
Provincial Police Commander, Chief Supt Allan Kundi
Acting Provincial Village Court Officer, Mr Kepas Piniau
District Village Court Officer, Kokopo, Mr Matthew Konapulia
District Local Level Government Co-ordinator, Mr Nevil Punai
Senior/Principal District Court Magistrate, Kokopo, Mr Marum
Community Based Corrections, Mrs Susie Vuvut.
Village Courts:-
Combined Vunamami/Bitaulagumgum village court officials: group discussion with 10 village court magistrates, 8 peace officers, 2 court clerks

Eastern Highlands Province:
EHP Advisory Secretariat, Advisory Cttee for Law and Justice
EHP Provincial Government Advisor, Mr Paul Frame
EHP Village Court Officer, Mr Upari Haefa
EHP Village Court Inspector, Mr Ben Sapu
Village Courts:-

Lowa No. 1 Village Court Goroka,
Chairing Magistrate, Mr Lehulehua Lehulehua
Group discussion with all magistrates, peace officers, court clerk.
Lowa No. 2 Village Court Goroka,
Chairing Magistrate, Mr Ahuzari Mikave
Group discussion with all magistrates, peace officers, court clerk

Madang Province:
Madang Village Court Inspector, Mrs Lucy Kamod.
Principal Chairman, Madang Combined Urban Village Courts, Mr Matthew Olian.
Village Courts:-
Amele No. 1 & Amele No 2 Village Courts, combined meeting.
Chairing Magistrates, Mr Muk Adeik (Amele No 1), Mr Odo Gote (Amele No 2)
Group discussion with all magistrates, peace officers, court clerks.

Milne Bay Province:
Provincial Police Commander, Chief Supt Augustine Uampe.
Alotau Town Manager, Mr Richard Dawana
Manager, Village Courts, Mr Ben Mwagwaya.
Principal Advisor, Provincial Liaison Office, Mr Nimrod Mark.
District Court Magistrate, Mrs Boni Kapigeno
Chief Probation Officer, Mrs Sissi Jonathan
Village Courts:-
Waiema and Nigila Village Courts, combined meeting,
Chairing Magistrates, Mr George Perua (Waiema), Mr Matataia Manumeai (Nigila)
Group discussion with 4 magistrates, 3 peace officers, court clerk

Also Attended:-
Justice Advisory Group Briefing
AusAID briefing
Law and Justice Sector Working Group

Annex 6

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