

LAW AND CUSTOM IN THE AUSTRALIAN TERRITORY OF PAPUA AND NEW GUINEA*

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AUSTRALIA IS committed by the United Nations Charter to the political, economic, social and educational advancement of the inhabitants of Papua and New Guinea. Although that commitment extends formally only to what was originally German New Guinea, the Australian government is applying it equally to the Territory of Papua.¹ In 1949 the trust territory of New Guinea and the Australian Territory of Papua were united in an administrative union. Since that time their administration has been carried on as one government.²

In recent years much has been heard about self-government for "emerging" peoples in "underdeveloped" areas of the world. This article outlines two matters that confront those concerned with assisting primitive communities to emerge as self-governing peoples: The relation between the law that courts know and the customs of the communities served by that law; and the role that courts play as social and economic structures become more complicated.

At the outset a background understanding of existing conditions in the area is necessary, and in particular it must be established that interference and assistance from an advanced civilization is required.

The Territory of Papua and New Guinea covers a land area of more than 180,000 square miles and many thousands of square miles of sea. It supports an indigenous population estimated at about two million persons. The con-

* The general information contained in this article is based upon an inquiry into the administration of justice in the Territory of Papua and New Guinea conducted by the author at the request of the Honourable Paul Hasluck, M.P., Minister for Territories in the Australian Government. The report containing the results of that inquiry and the recommendations made is unfortunately still classified as a confidential document and cannot therefore be referred to directly or indirectly.

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¹ In 1884 Germany annexed Northeastern New Guinea including New Ireland, New Britain and the Admiralty Islands. In the same year England annexed what became the Australian Territory of Papua after the Australian States federated in 1901. At the outbreak of the 1914-1918 war German New Guinea was occupied by Australian military forces. It remained under military occupation until 1921 when Australia voluntarily took responsibility for it as a League of Nations mandated territory. After the 1939-1945 war the Territory of New Guinea was accepted as a trusteeship territory from the United Nations.

² The two territories had been governed separately until the Japanese invasion in 1942 resulted in the effective occupation of most of New Guinea and the attempted but unsuccessful occupation of Papua.

ditions affecting that population are adequately summarized in the following passage from a speech made by the Minister for the Territories in 1960:

It is a unique situation and most of the comparisons that are sometimes made between the situation in Papua and New Guinea and situations that may have existed in the past in the newly independent countries in Asia and in Africa are inexact. Except where modifications have been made as the result of the coming of Europeans, New Guinea is still almost unbelievably primitive. It was originally divided into hundreds of small groups speaking different languages and living in a state of fear and enmity one towards the other. Even the racial types are greatly dissimilar. There is nothing yet even faintly resembling a sense of nationalism or sense of community over the whole Territory. There was no single religious belief and nothing in the nature of a priesthood but only the fear of the dead and the power of the sorcerer.

The existence of most of the people was hand to mouth from the garden and the jungle straight to the cooking pot, and, except on the occasions of preparation for a feast, there was little or no storing of food. In their primitive condition the expectation of life was short because of disease, violence and the absence of medical knowledge or hygienic practice. The country itself is made difficult by jungle, precipitous mountains, currents and vast swamps.³

The Australian legislation under which Papua and New Guinea is now governed provides for a clear division of governmental responsibility between an executive, a legislature and an independent judiciary. In the Legislative Council there are twelve indigenous members; six of them are elected representatives from indigenous communities and six are appointed by the government. In addition there are ten elected European members of the Council and fifteen official or government-appointed members. There is a Supreme Court with unlimited jurisdiction. The judges of that Court sit on circuit at more than sixty places throughout the Territory.

The Australian government has made it clear that self-government is the end to be achieved. At the present time, however, talk of self-government in the Territory of Papua and New Guinea is somewhat unreal. There simply is not yet a "self" either to govern or to be governed. The population of about two million people is made up of a bewildering diversity of separate communities, many of them very small groups of one hundred to two hundred people in very little contact with their neighbors and with only slight contact with government representatives. These people vary greatly in physical types, community organizations, ways of life and languages. It has been estimated that there are from 350 to 500 different languages spoken by the native populations

³ Address by the Minister for the Territories, Australian House of Representatives, *PARL. DEB.* (Hansard), 9 *ELIZ. II*, 28 *H.R.* 259 (1960).

of the Territory.⁴ Through a great part of the Territory, however, there is no chieftainship structure that can be used or absorbed by a general administration intending to advance the welfare of the people or to bring about cooperation among different groups.

In some areas comparatively large groups of people see themselves as one people. For example, in the Gazelle Peninsula, in northern New Britain, there are some 38,000 people known as Tolais. They recognize each other as of one people and can converse with each other. They view people from other parts of the Territory, however, as much more foreign than an Englishman would, for example, a Hungarian. In social structure, economic organization, marital and family customs, views of the world and of the supernatural, there are as wide differences among very many groups as would ever have been found on the continent of Europe.

Another factor must be added to this background. What has come to be known as nineteenth century colonialism—viewed as something perpetrated by our ancestors so that vulnerable lands and peoples could be used for the benefit of those who were stronger—touched most of the peoples of this Territory only slightly. The land was too unrewarding, European occupation came so late and, at least so far as Papua was concerned, government policies were “enlightened.”

Very briefly, the policy of the government has been to base its major efforts on the establishment of law and order, health, hygiene, education, a better food supply and better means of earning a living among peoples who are still largely primitive. The total European population in the Territory is still less than 25,000, the majority of whom are either government employees or missionaries. At present more than two-thirds of the government budget for the whole Territory is supplied by subsidies from the Australian taxpayer.⁵

From the first occupation in Papua, and from 1921 in New Guinea when the Australian Government accepted the League of Nations mandate, respect for the ownership of land by its indigenous occupiers was laid down as a basic principle of administration. This has meant as a matter of policy that no land can be acquired from the indigenous peoples except by the Administration. The Administration will not itself acquire land unless the indigenous peoples are willing to sell it, and only if in the judgment of the Administration the land is not necessary for the present or prospective needs of the people who occupy it at the time. As a consequence of that policy, less than one per cent of the land in the Territory is in use at present by non-indigenous peoples,

⁴ No doubt from a philological point of view that sounds like nonsense, but what is clear is that there are at least 350 and perhaps up to 500 ways of speaking sufficiently different to prevent communication between those who do not speak the same way.

⁵ The remaining one-third is almost all collected in taxes from European enterprises in the Territory.

and less than three per cent of the total area of the Territory has been alienated. Much of that three per cent comprises large tracts of unused forest land acquired as reserves by the government.

This then is not a picture of nineteenth century colonialism. Only in a few places are there the resentments and memories of past injuries that have scarred relations in other parts of the world.

It is clear of course that much of any government's attention in fostering self-government must be directed to matters of economics, health and education; no legal structure however skillfully contrived can produce advancement unless the problems arising under those heads are dealt with successfully.

When the magnitude and difficulty of the task are appreciated, it is often asked: Why attempt it at all? There are some who take the view that we should not interfere at all in order to give impetus towards change. On this view, sometimes based upon an intimate understanding of the social and economic structure of indigenous societies, the changes that are being forced upon the indigenous peoples are seen as almost wholly destructive. Bitter comments are sometimes made along this line: Where do you want to take these people anyway? Do you want to turn them into unhappy slum-dwellers from reasonably contented seashore and jungle dwellers?

It is clear that the various indigenous communities in the Territory had established an equilibrium of community living that in each case made up a very complex whole. Usually the basic structure turned upon land use. But personal relations, marriage, inheritance, status, economics and the influence and awareness of the supernatural were all intertwined. If one of those aspects of community life is interfered with, all are disturbed. What right have we, it has been asked, to assume that we can "advance" the indigenous communities by bringing to them some aspects of our own culture? It is now too late to act upon that view whatever merits it may have had. The plea that we should leave these communities to their own life is a plea that now belongs to history and not to present action. The kind of changes already wrought by interference are such that to reverse the process by removing our presence would produce consequences that would not be tolerated by any peoples of the world, and certainly would not be appreciated by the indigenous communities themselves.

One illustration is sufficient to support that view. In the central highlands of Papua and New Guinea, where a very large part of the total population lives, approximately a million people are living in closely settled farming⁶ communities at altitudes ranging from about 4,000 to 8,000 feet. The first Europeans to penetrate those areas did so in the middle 1930's. Administrative interference and control was not at all extensive until after the 1939-1945 war. Many local residents can still remember the first white man to come into the

⁶ "Farming" is not here used in any technical anthropological sense.

area. Almost all the roads, hospitals, plantations and administrative services, except at two places, have been established in the last twelve years. Before administrative control was established, the local communities appeared to have reached a reasonably stable population level and the incidents of disease and war, combined with head-hunting, cannibalism and wife-capturing raiding parties, seem to have prevented much population increase. The population density is high considering the existing land use, and there is not a great deal of unused arable land (arable, that is, by primitive methods).

The population is now increasing rapidly, apparently as the result of the Administration's prevention of warfare and disturbances and also as the result of the medical services that have lowered both the infant mortality rate and the incidence of death from disease. The communities concerned are now land hungry. At the present rate of population increase food will soon have to be provided from the outside world unless more efficient methods of cultivation are adopted or there is considerable emigration from the area.

It seems reasonable to suppose that if the European Administration were now removed, the immediate result would be a sharp diminution in the population from disease, warfare and so forth, until a balance was again struck. Thus, it would not simply be an immediate return to pre-existing conditions, but, for a time at least, a change to conditions that would be seen as intolerable by any observer.

In any case, the indigenous peoples want the changes that European influence and interference bring. The Highlander wants to be able to walk or ride upon a road rather than to climb the sides of steep hills. He does not want to see his children die in the first years of life. He is not happier with a malarial spleen that will kill him at forty years of age than he would be without it. He does like to supplement his diet with meat, even out of a tin, rather than to live entirely upon kaukau. Just as the coastal fisherman prefers to push his Lakatoi into the wind with an outboard motor rather than be forced to wait until the wind changes, so the Highlander would prefer to have light in his house at night, if possible merely by pressing a switch. When the people themselves see such things and such changes as advancements that will make their lives easier, happier and longer, surely it is too late to entertain arguments that we should not disturb the "natural" structures of these communities which are now finding themselves, willy-nilly, caught up into the twentieth century.

It is in the light of this background that it is proposed to outline the questions raised at the outset: law and custom, and the role of the courts.

Much has been said and written about custom and its relation to law by legal theorists, by legal historians and by some anthropologists.⁷ It is enough

⁷ An introduction to the now great volume of published material on this subject may be gained through the following selected references. Older materials are: HOBHOUSE, WHEELER & GINSBERG, *THE MATERIAL CULTURE AND SOCIAL INSTITUTIONS OF THE SIMPLER PEOPLES*

to say that the description of custom sufficiently well established to be noticed and given weight by a common-law court would be accepted by most who have written in the field of primitive law as describing "law," whether or not formal courts had emerged in the community concerned. Thus the conditions for recognition of a customary rule by the common-law courts have been said to be:

- (a) that the rule concerned had existed as a rule of conduct from time immemorial,
- (b) that it had been continuously observed,
- (c) that enjoyment of its benefits had been peaceable,
- (d) that it had been recognized as having force as an obligatory rule,
- (e) that it had sufficient certainty in operation,
- (f) that it could be seen to be reasonable,
- (g) that it did not conflict with another rule accepted as having obligatory force (in a modern legal system of course this includes the test that it does not conflict with established law already recognized by the courts).⁸

Most primitive communities with a kinship and tribal structure have such rules regulating at least some aspects of their life. Naturally enough, European colonial history shows varying attempts, mainly in the interests of economy of effort, to recognize and rely upon such customary regulative systems where it was not necessary to interfere with them in the pursuit of some colonial interest.⁹ It is only comparatively recently, however, that colonial administrations have been faced with the task of welding disparate and conflicting communities, with varying social and economic structures, and varying and conflicting customs, into one whole so as to produce a viable self-government.

In part, of course, empire builders throughout recorded history have pursued such an aim, but their ultimate aims were different. Almost without exception, the process was one of capturing or creating central power by the deliberate use of force. The aim was to retain and exploit that power. In a territory like Papua and New Guinea, however much the initial unity created by the establishment of a colonial administration over the whole territory

(1915); MAINE, *EARLY LAW AND CUSTOM* (1907); MAINE, *ANCIENT LAW* (Pollock ed. 1906); MAINE, *VILLAGE COMMUNITIES LECTURE II* (7th ed. 1895); RAY, *CUSTOM AND CUSTOMARY LAW IN BRITISH INDIA* (1911); VINOGRADOFF, *HISTORICAL JURISPRUDENCE* (1922); VINOGRADOFF, *THE PROBLEM OF CUSTOMARY LAW* (1914); VINOGRADOFF, *VILLEINAGE IN ENGLAND* (1892). More recent materials produced in the light of separate anthropological studies are: GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955); HOEBEL, *THE LAW OF PRIMITIVE MAN* (1954); HOGGIN, *LAW AND ORDER IN POLYNESIA* (1934); LLEWELLYN & HOEBEL, *THE CHEYENNE WAY* (1941); MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1932); REDFIELD, *THE PRIMITIVE WORLD AND ITS TRANSFORMATION* (1953). Recent textbooks providing their own introduction are: ALLEN, *LAW IN THE MAKING* chs. 1-2 (6th ed. 1958); DIAMOND, *PRIMITIVE LAW* (2d ed. 1950).

⁸ ALLEN, *op. cit.* *supra* note 7, at 126-43.

⁹ See Jearey, *The Structure, Composition and Jurisdiction of Courts and Authorities Enforcing the Criminal Law in British African Territories*, 9 INT'L & COMP. L.Q. 396 (1960).

may have depended on the "deliberate use of force," the aim is now fundamentally different. It is to hand over unifying power to something nonexistent before, to something to be created under the protection of the colonial administration. To do so and at the same time to satisfy modern western notions of good government presupposes the creation of a legal system for the whole territory that provides for the exercise of judicial functions protected from arbitrary power.

It might be thought that the aim could be achieved without disturbing the customs enjoyed by each separate community to be joined in the new nation, and that no more interference might be necessary than would be occasioned by the development of a "conflicts" system of rules to regulate those cases (sometimes wrongly assumed to be very small in number) where more than one community is involved. There are many reasons why such an approach is inappropriate for Papua and New Guinea and many of these go to the necessary changes in economic and agricultural activities and to changes in facilities for health, education and intercommunication, which are being pressed forward. A sufficient reason, however, in light of the given aims of the present administration, lies in the relation between law and custom in the Territory—and this is the point of interest here.

Any generalizations about customs throughout the Territory are dangerous—so many differences may be seen. Illustrations, therefore, must be taken as representing rules or conditions that are frequently encountered but that are not in any sense universal. It has long been recognized, where primitive peoples are concerned, that all the habits, practices, patterns of behavior and rules of conduct, sometimes subsumed under the general heading of customs, are not alike. They must be classified and distinguished, and it is from their classification that terms like "customary law" emerged in the literature. It is clear that significant differences exist between "customs" which are mere habits or patterns of behavior that on observation show some degree of regularity and continuance, and those which, in addition to regularity and continuance, are affected by a notion of obligation, so that it is possible to say not only that the persons affected by the "custom" behave in a certain way, but that they feel themselves obliged to behave in that way.

A further important distinguishing step is usually taken between those "customs" that carry this notion of obligation to the community as a whole (in the last resort to be enforced by community action), and those that are not so seen but merely carry the sense of obligation towards some subsidiary group within the community. It is at the point that the notion of obligation is attached to the community as a whole and is likely to be enforced by community action in some way or another, that most modern workers in the field begin to use the word *law* to describe the "custom," whether or not the community concerned has developed formal legal institutions separated from other institutions.

John Dewey observed that it is perhaps most important for the modern jurist, seeking to identify the most significant point in the emergence of law, to seize upon the stage at which a "custom" not only carries this notion of obligation towards and enforcement by the community as a whole, but is capable of being articulated as a rule from within the group so that the obligation can be seen as an obligation to obey a rule. At that point a new and important factor is introduced.¹⁰ At that point a reason for expecting or demanding performance of obligatory conduct may be stated merely in terms of obligation to obey the rule, without reference to other reasons why it is desirable or necessary to behave in the way desired. A further stage, of course, is reached when the rule is not only capable of being articulated but can be or is preserved in writing and a system of records is developed. At this point usually the emergence of the "man of law," with his developing special techniques, introduces new factors into the society's structure.¹¹

Quite apart from such distinctions as those outlined above, there is a further classification of customs that is vital to the understanding of the problem facing a colonial administration.¹² That classification turns on the difference between rules, recognized as such, that go directly to the regulation of conduct and relationships in an established and reasonably certain way, and rules that go merely to the ways in which the community decides questions as to how conduct or relationships *should* be regulated as disputes arise from time to time.¹³ Probably in all communities in Papua and New Guinea there are some rules of the former kind (for example, rules prohibiting certain kinds of marriage). But they are few in number compared for example, with most emerging African communities.

Most of the so-called "custom" of the communities of Papua and New Guinea is concerned with the method by which the communities decide how disputes shall be resolved. Commonly this is by the use of the village meeting. In most areas these meetings are held regularly and frequently. All villagers are apparently expected to attend though there is no penalty applied for non-appearance. The gatherings provide occasions for the discussion of all matters relating to the village and its affairs, but the hearing of "cases" is an important aspect of the work carried out. Usually the matters of general village concern are dealt with first and then the "judicial" matters are dealt with after the general meeting has broken up, and only those involved or interested in the "cases" remain. It has been said by close observers of such meetings that the hearings are conducted with a minimum of formality though even the most

¹⁰ Dewey, Book Review, 28 COLUM. L. REV. 832 (1928), commented upon by Allen, *op. cit. supra* note 7, at 148.

¹¹ LEWELLYN & HOEBEL, *op. cit. supra* note 7, particularly chs. 2, 3, 10-11.

¹² With the aims to which Australia is committed in Papua and New Guinea.

¹³ Cf. HART, THE CONCEPT OF LAW ch. 6 (1961), where he distinguishes primary "rules of obligation" from "rules of recognition."

casual observer would be in little doubt that a legal dispute was being heard. There is no initial attempt to distinguish between a civil or criminal matter (unless the matter is so serious or of such public note that trouble will result if it is not brought to the ears of the European governmental authorities). Hours will be spent in patient inquiry and without recourse to threat or coercion until what appears to be the truth about the facts emerges to the presiding elders and perhaps to all those present.¹⁴

It seems clear that the main aim of such meetings is to achieve agreement and it seems equally clear that in most matters, if agreement is reached, anything may be done that is in fact agreed to. Even where such well-established matters as the rights to the use or inheritance of land are concerned, general agreement may justify almost any variation in the established or recognized rules.

The situation with regard to land tenure may be illustrated by the following brief account of some aspects of the land system among the Tolais in New Britain. All land is split into large areas—village land—and, within those large areas, into smaller areas of “clan” or “vunatarai” (to use the Tolai word) land. The boundaries of the large areas are well known to the residents though there are, of course, disputes about the boundaries from time to time. Those boundaries remain fairly constant though there may be some transfers of portions of land, particularly on the margins, between adjacent villages if residents move from one village to another. Within the general area of land ascribed to one village there will be found isolated portions that belong to some nearby village.

The Tolai people are split into two moieties, having different names from place to place, but nevertheless identifiable. Within the moieties there are vunatarai, or kinship groups, descended from a named common ancestor real or mythical. The vunatarai holds land in scattered areas of varying sizes. Rights to use these areas of land are held by all the male members of the vunatarai, and as a rule the administration of such rights is organized by the senior male of the vunatarai. Disposal of vunatarai lands to another vunatarai, however, can only be carried out with the consent of the male members and the mothers of male children who are too young to participate.

There are two forms of transfer of land from one vunatarai to another. Under the first (called Totokom) a portion of land is rented by one vunatarai from another for a short period for the planting of subsistence crops. Under the second (I Kil Ia) a sale of land between vunatarai takes place. An individual of one vunatarai may wish to acquire some land from another vunatarai. He would ordinarily approach the senior male member of the other vunatarai in the village in which the land lay. To discuss the sale the senior

¹⁴ This is taken from an account given to the writer by Dr. A. L. Epstein who spent some time on anthropological investigation with the Tolai people in New Britain in 1959–1960. See EPSTEIN, *THE ADMINISTRATION OF JUSTICE AND THE URBAN AFRICAN* (1953).

member would then convene a meeting, usually not only of the members of the *vunatarai* in that village but also of at least the senior members of his *vunatarai* in other villages. If their unanimous agreement could be achieved the land would be sold for a price agreed upon.

The man who bought the land would ordinarily accept the fact that it becomes part of his *vunatarai*'s land and is not for him to dispose of but will descend upon his death for use in accordance with the customary rules. If, however, the individual who arranged the purchase desired the land to become his in the sense that he could dispose of it himself and direct its transmission on his death (for example to his sons instead of to his sister's male children as would ordinarily be the course of descent), then he may arrange this according to his wishes if he can obtain the unanimous consent of the equivalent meeting of his own *vunatarai*. Almost any imaginable variation of terms for agreement and sale may be discovered in particular transactions carried through in recent years with respect to land; their security is based upon approval by the appropriate meetings of accepted persons rather than upon accordance with any established rule.

Recent years have brought pressures for changed practices. The introduction of European-type markets and the growing of cash crops (mainly copra and cocoa) have naturally led to changes in thought about the buying and selling of land. In particular it has led to changes in thought about the individual land user's interest in his land. If a man plants an area of land to produce recurrent cash crops from cocoa, and if his sons help him over the years to tend and harvest the crop, it is not surprising that both father and sons come to think that he, and they in their turn, should have the benefit of the use of that land. Under the traditional system of inheritance, however, the sons would have no claim on the death of their father. On the contrary their male "cousins" would claim not only the land but the cocoa trees established upon it.

The changed conditions of agriculture are causing considerable troubles in the communities concerned. The point to be noted here is that even if the indigenous communities cannot deal satisfactorily with the changes as a general "legislative" problem, they can solve particular cases if agreement can be reached among the groups concerned, whatever the applicable customary rules may have been said to be in the past. Agreement is commonly difficult to achieve, however, and the rapidity of change in actual use is such that troublesome cases are appearing much more frequently than can be dealt with satisfactorily by such methods.

For many years ordinances directed to the conduct of the inferior courts, principally concerned with the affairs of the indigenous communities, have directed those courts to apply native custom except where it is repugnant to

laws of the Territory.¹⁵ Such directions were very general and did not specify what customs were intended or how they were to be ascertained. They were enacted when it was general policy to interfere as little as possible in the life of the indigenous communities, consistently with the government's policy of providing assistance towards improvements in health, economics and agriculture within those communities. Since the policy has been the present one of moving towards self-government as quickly as possible, it has still been argued that the native communities ought to be encouraged to conduct their own judicial functions according to their own customs in all respects where it is possible to do so consistently with ultimate central control of law and order. But that argument rests on two assumptions: (1) that the customs of the indigenous communities are able to meet the needs of these communities not only as they are now but as they will be; and (2) that the customary rules exist and can be known and applied by a system of courts that extends over the whole Territory. The first of those assumptions is false; and the second is true only to a very limited extent.

As to the first assumption, the customs of the numerous distinct indigenous communities may be quite well suited to enable them to survive as subsistence, agricultural and hunting communities. They are not appropriate to enable larger communities to develop, to deal with problems that involve more than one community or to solve problems raised by contact with European agriculture, manufacture and commerce, or even European influence in personal relations increasingly spread by the various missions. Many indigenous communities have already been so disturbed by the presence of European government, European enterprises and European missions that their customary laws and procedures are incapable of solving the problems that face them.

More and more the difficult problems that face the more advanced indigenous communities and require judicial resolution, are those that involve individuals from more than one community, the breakdown of native customs in the face of European influence, and the participation of indigenous peoples in European-type enterprises of a kind that the customary structure did not comprehend and for which it has no answers. Such problems cannot be solved by the customary decision-making processes without inviting not merely a European on the one hand and an indigenous judicial system on the other but also generating a multiplicity of separately developing bodies of law to govern similar cases.

The second assumption, as has been said, is true only to a very limited extent. Once a problem goes beyond the sphere of clearly established customary rules of conduct, known to a sufficient number of members in any given

¹⁵ *E.g.*, New Guinea Native Administration Regulations § 57(2) (1924) requires courts for native affairs to take judicial notice of native customs.

community, the question becomes one not of whether to apply customary rules but of who shall decide the problem. Is it to be each indigenous community as it sees fit in the light of its knowledge and experience? Or is it to be some authority linked with a government having responsibilities for the future of the whole Territory? It is clear, it is suggested, that the commitment to the development of a self-governing community comprehending the whole Territory makes it necessary that it should be the latter. This does not mean, of course, that it is a question of all or nothing. It does not mean that all questions and rules must be produced by some central authority. It does mean, however, that the question of what is appropriate to be decided at a local level and what is appropriate to be decided at some more centralized level has to be faced. The answer will be given not only in light of the actual facts and conditions existing in the various local communities concerned, but in light of the over-all constitutional structure envisaged for the new nation. But the nature of that problem should not seem strange to Western thinkers and particularly not to those who have learned to live in a federation. It may be assumed that a wise government will take account of well-established customs in making general laws and will assume that interference with local customs must be justified by considerations that necessarily override local interests.

The question of the role of the courts can be touched upon only briefly. In one sense it is the role that courts, once they emerged as independent institutions, have always played. In another sense, however, it is a rather special role. Until comparatively recently law as applied by the courts has been seen in the main as a rather conservative instrument, following rather than leading developments in the community concerned. In Western societies today, of course, it is seen as much more than this. It is seen as an instrument not only for the regulation of but for the development of communities. In Pound's terms it is one very important instrument for social engineering.¹⁶ How much more important is the law, and the courts as institutions applying the law, as instruments of social engineering, when the task faced is not merely to improve but rather to transform a social and economic structure?

In the long run it would be disastrous if the inferior courts, those in direct communication with the inhabitants, represented the dividing line between European ways and indigenous and customary ways. If on the other hand they can be *one* of the institutions which enable separate small communities, and in particular their leaders, to be involved in an activity, which, to be successful, must be seen as one part of a much larger organization, then they may be an important factor in the development towards self-government.

¹⁶ INTERPRETATIONS OF LEGAL HISTORY 156 (1923).