

ATTACKS ON JUSTICE – PAPUA NEW GUINEA

Highlights

Against a backdrop of inter-communal violence and the worsening of law and order in the region, the police have reportedly been carrying out abuses, including against detainees, while enjoying impunity. While the Supreme Court and National Court are generally considered to be independent of the government, local and village courts have often been subject to severe pressure, resulting in justice being severely compromised. Prosecutors, who are underpaid, are open to corruption, which continues to be of concern generally in political and public bodies.

BACKGROUND

Papua New Guinea (PNG), a country of 5.5 million people composed of several ethnic groups, gained independence from Australia in 1975. It is a member of the Commonwealth and is a constitutional hereditary monarchy. Since 1952, the Head of State has been Queen Elizabeth II, who is represented by a Governor-General (since 2004, Sir Paulius Matane). The National Executive Council is the Executive's Cabinet, whose members are appointed by the Governor-General on the recommendation of the Prime Minister. The unicameral parliament has 109 seats, 89 elected from open electorates and 20 from provincial electorates. The last general elections were held in June 2002.

In 1988, a conflict erupted when the Bougainville Revolutionary Army (BRA) started to fight for the independence of the island of Bougainville and for financial compensation for land occupied by the Bougainville Copper Mine (jointly owned by the PNG Government and the Australian mining company Conzinc Rio Tinto). Some 7,600 civilians were killed during the fighting or died as a result of the armed operations. In 2001, the government signed a peace agreement with the Bougainville rebels and in March 2002 Parliament adopted legislation allowing for autonomy in Bougainville, leading to the withdrawal of the army. In October 2004 the government agreed to a draft constitution for an autonomous Bougainville.

Papua New Guinea has been plagued by ethnic violence, most dramatically in 2003 when more than 500 people died in armed clashes. Dozens of people died in 2004 in further episodes of ethnic violence. Police impunity, the excessive use of force by its officers and corruption at all levels of government are endemic problems.

Although the death penalty has not been used since 1957, in 2004, the government started preparing for the resumption of executions. The criminal justice system too is facing major problems, in particular long pre-trial periods.

Papua New Guinea is a party to the *Convention on the Elimination of all Forms of Discrimination against Women*, to the *Convention on the Elimination of All Forms of Racial Discrimination* and to the *Convention on the Rights of the Child*.

THE JUDICIARY

PNG's legal system has a common law background and its higher courts follow procedures similar to those of other common-law countries. Customary law is incorporated as part of the underlying law. There are virtually no judicial services in Bougainville.

Papua's national judicial system consists of the Supreme Court of Justice and the National Court of Justice ([Constitution](#), section 99 (2)(c) and section 155 (1)). Below them, there are magistrates and community or village courts.

The Supreme Court and National Court are comprised of the Chief Justice, the Deputy Chief Justice and other judges. Currently, there are eighteen judges and three acting judges. The National Court has unlimited jurisdiction, which is exercised by a single judge. It deals with the majority of civil and criminal cases and also hears appeals from lower courts. There are resident National Court judges in a number of regional centres.

The Supreme Court is the final court of appeal and has original jurisdiction on constitutional matters. It sits as a bench of three or five judges. The Supreme Court includes all the judges of the National Court other than acting judges (Constitution, section 161). It is based in the capital, Port Moresby, and also sits in some regional centres.

At independence in 1975, the higher court judges were predominantly expatriates, including a number of Australians. Now nearly all judges are PNG citizens. In 2001, the first PNG woman was appointed to the Supreme Court, Justice Catherine Davani.

Other courts may be established, under section 172 of the Constitution. Qualified magistrates appointed by the Judicial and Legal Services Commission under the *Magisterial Service Act* may constitute the District Court. Tribunals may be established outside the national judicial system, as may arbitral or conciliatory tribunals. Their powers to impose penalties are limited. The Constitution also provides for courts that may deal with matters primarily by reference to custom or in accordance with customary procedures or both (Constitution, section 172 (2)).

Village courts were established in 1974, under the *Village Courts Act* of 1973, and are now governed by the [Village Courts Act 1989](#), and *Village Courts Regulation* 1974. There are many hundreds of these courts in both rural and urban areas. These courts consist of at least three lay magistrates appointed from the local village or community by the Minister for Justice. One of their objectives is to mediate disputes to obtain just and amicable settlements. They may apply customary dispute resolution methods. Their jurisdiction is limited to minor offences and customary law cases. They may impose fines or community service but not imprisonment. Appeal is to the local or district court magistrate and there is a supervising magistrate in each province.

There have been criticisms that the application of customary law dispute procedures may disadvantage women, especially those who are victims of domestic violence.

These claims are not universally supported (see Michael Goddard, "Women in Papua New Guinea's Village Courts", – Discussion Paper 2004/3, ANU Research School of Pacific and Asian Studies, "State Society and Governance in Melanesia"; see also, [Australian Institute of Criminology](#)).

The PNG courts are responsible for upholding the Constitution and the rights it protects.

Judicial appointment and independence

The PNG Constitution provides for the independence of the national judicial system: section 57 states that "neither the Minister responsible for the National Justice Administration nor any other person or authority (other than the Parliament through legislation) outside the National Judicial System has any power to give directions to any court ... in respect of the exercise of judicial powers or functions".

The Chief Justice is appointed by the head of state on the advice of the National Executive Council. The current Chief Justice is Sir Mari Kapi. Other judges and magistrates are appointed by the Judicial and Legal Services Commission. This commission consists of the Minister for Justice, the Chief Justice, the Deputy Chief Justice, the Chief Ombudsman and a member of Parliament appointed by the Parliament. The commission has adopted "Judges' Appointment Criteria and Guiding Principles" to enhance the independence of the appointment processes.

The only grounds upon which a judge, the Public Prosecutor, the Public Solicitor or Chief Magistrate may be removed from office are their inability to perform the functions and duties of their office, misbehaviour or misconduct in office.

Any action to remove the Chief Justice requires a tribunal to be appointed by the head of state. For the other judicial officers, the Judicial and Legal Services Commission may appoint a tribunal to investigate the matter and may then remove the person on notice. The tribunal must consist of judges or former judges of PNG or other countries (Constitution, section 181). These removal procedures have not been used as yet.

There is a separate annual Budget Appropriation Bill for the judiciary, which follows consultation between the Chief Justice and the government. The judges of the National and Supreme Courts have salaries appropriate for their office.

The term of appointment for judges is normally ten years for PNG citizens. This term may be extended or renewed. Non-citizens are appointed for three years, also renewable. Acting judges are appointed for up to 12 months. This is said to be in order to help easing an unexpected increase in workload or to temporarily occupy a vacancy or fill in during the absence of a judge. This does not appear in the Constitution. These term appointments have applied for many years, and apparently are not considered to undermine the authority of the courts.

Corruption

Currently, there are pressures on the judiciary at all levels, due to increasing lawlessness in the community and continuing problems of corruption in political and public bodies.

Nevertheless, the Supreme Court and the National Court appear to be well regarded, and are generally considered to be independent of government. While there are clearly risks for the judicial system in a country that is affected by allegations of corruption in government and business, a 2003 report of [Transparency International](#) excluded the judiciary (and the media and ombudsman) from its comment that most government institutions are tolerant of or passive towards corruption. The PNG Courts have reportedly adjudicated matters according to law, with little regard to circumstances, culture or political affiliation. No allegations of government interference or threats to the Supreme and National Courts and no allegations of judicial corruption in these courts have come to light. There does not appear to be any significant criticism of the higher level judiciary in PNG or any action to undermine independence.

The Supreme Court can rule on the legality of the acts of the executive and declare laws unconstitutional. It has used these powers, and has dealt with a number of highly charged political issues. Its decisions have been respected. A number of appointed and elected leaders have been convicted under leadership and criminal codes and dismissed from office.

The respect held for the superior courts does not necessarily apply to the local and village courts. The Catholic Bishops' Conference of PNG stated in 2001 that the Supreme Court and National Courts enjoy an outstanding reputation. However, district, local and village courts are not always well regarded because they have at times experienced great pressure in places where political or ethnic rivalries exist, resulting in justice being misplaced. (see Catholic Bishops' Conference of PNG and SI, Annual General Meeting in Goroka, 27 April 2001, "Statement on Corruption in PNG")

There was an attempt in the 1980s to introduce mandatory sentencing for some cases, but this was opposed and did not proceed.

Pacific Judicial Conference and other international relations

PNG participates in the Pacific Judicial Conference each year. The aim of the conference is to strengthen the rule of law in the Pacific region. The 16th conference, to be held in Vanuatu in 2005, will consider a "Statement of Principles on Judicial Independence for the Pacific region". The Pacific Judicial Conference member countries include American Samoa, Australia, Cook Islands, Federated States of Micronesia, Fiji islands, French Polynesia, Guam, Hawaii, Kiribati, Marshall Islands, Nauru, New Caledonia, New Zealand, Niue, Northern Marianas, Palau, Papua New Guinea, Samoa, Solomon islands, Tokelau, Tuvalu, Tonga and Vanuatu. PNG participates in the Asia-Pacific Judicial Educators Forum based at the Philippine Judicial Academy, Supreme Court of the Philippines, in Manila. The PNG judiciary has an observer member of the [Australian Institute of Judicial Administration](#) (AIJA).

LEGAL PROFESSION

The functions of the office of Public Solicitor, established under the PNG Constitution (Section 177(2)), are “to provide legal aid, advice and assistance for persons in need of help”, in particular to “provide legal aid, advice and assistance to any person when directed to do so by the Supreme Court or the National Court”. Anyone aggrieved by a refusal of the Public Solicitor to provide legal aid may apply to the Supreme Court or the National Court.

PROSECUTORS

The Constitution (Section 156) provides for the law officers of PNG to be the principal legal adviser to the National Executive, the Public Prosecutor and the Public Solicitor. The Public Prosecutor and the Public Solicitor may be removed from office only for inability to perform the functions and duties of the office, for misbehaviour or for misconduct in office.

PNG prosecutors have been criticized for failing to maintain high standards, as a result of which prosecutions have been dismissed. It has been observed that prosecutors are not paid well, which may lead to a risk of corruption.

ACCESS TO JUSTICE

There have been serious delays in hearing criminal cases, resulting in long periods of pre-trial detention. A lack of judges and of other resources has contributed to these delays.

There have been allegations of human rights abuses by the police, involving violence against detainees. If prosecutions follow, it could be expected that the higher courts would deal with these independently.

The Australian Government has agreed to provide help to PNG in the form of an Enhanced Co-operation Programme (ECP), which aims “to help address PNG’s development challenges” and deliver “assistance in the areas of law and order, justice, economic management, public sector reform, border control, and transport security and safety”. Under the ECP, 64 of 210 Australian police and 32 of 64 officials have now been deployed, with the remainder to be in place by March 2005. Australia will also provide four extra judges for the National and Supreme Courts.