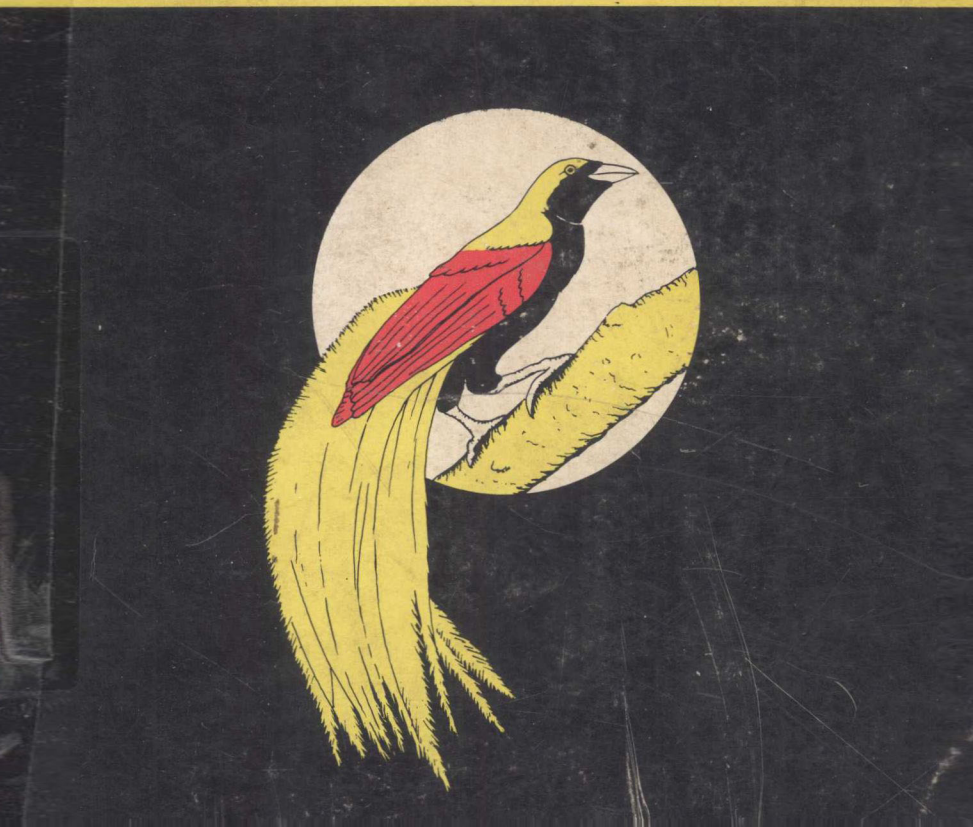
THE CONSTITUTION of PAPUA NEW GUINEA

by

JOHN GOLDRING



THE CONSTITUTION OF PAPUA NEW GUINEA

A STUDY IN LEGAL NATIONALISM

by

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FOREWORD

I commend Mr. Goldring's book on the *Constitution* of Papua New Guinea. As far as I am aware, it is the first book to deal in depth with my country's *Constitution*. I would hope that other writers, and in particular, our own countrymen will follow this lead, and keep debate on the *Constitution*, which sets down our basis for the future, alive.

Since my country attained Independence, the people of Papua New Guinea have shown that the *Constitution* is a working document. Although, as Mr. Goldring suggests, it may need improvement and development, it is clear that it is not a sterile symbol of supposed ideals.

I write this Foreword, as Prime Minister of Papua New Guinea, but that does not mean Mr. Goldring's views are in line with my own, or the Government's in every instance. However, I commend it to the public whether the interest is in the political process, the law or simply in gaining a greater understanding of the *Constitution* of my country. I would also recommend the book to concerned Papua New Guineans, since I believe it is important that we understand our nation's development.

This is a suitable opportunity for me to pay tribute to all those people who gave their thoughts and time towards creating our own *Constitution*. The role of some of these are specifically recalled in this book, but many who deserve a mention are unavoidablly left out of these pages.

I also wish to draw attention to the role of past generations of the country, now called Papua New Guinea, who laid the foundations of our new society. All of us today, owe a debt of gratitude to those who have gone before, each one contributing his or her effort to the Papua New Guinea of today.

M. T. SOMARE
Prime Minister,
Papua New Guinea.

Port Moresby,
August 1978.

PREFACE

1. Nationalism and the Constitution in Papua New Guinea

This work was originally part of a general study of the law and the legal system of Papua New Guinea which I decided to undertake after leaving an appointment at the University of Papua New Guinea in 1972. My experience in Papua New Guinea had made me very conscious of the inappropriateness of the 'imposed' law, which was the basis of the law in Papua New Guinea, to many situations which arose in that country. While work for the study was under way, Papua New Guinea became self-governing, and then independent. The *Constitution* made a formal change in the basis of all the laws of the country. It also made direct changes in the law and the legal system.

These changes were significant. They also represented an attempt by the people of Papua New Guinea, acting through their political representatives, to replace an inappropriate 'imposed' system of laws with one which was more acceptable to the people of the country. The attempt was important—indeed, an integral part of the project I had undertaken.

During a visit to Papua New Guinea at the end of 1976, I found that there was no readily available explanation of or commentary on the *Constitution*. Because of the demands on their time and energy, lawyers in Papua New Guinea who were interested in the *Constitution*, both in Government and in the University, would obviously not be able to write such a work.

It became apparent that a proper assessment of the *Constitution* as an exercise in nationalism and as a reaction to the legal or cultural colonialism of the imposed legal system would involve a detailed and critical examination of the text of the *Constitution*. This examination revealed so many fascinating aspects of law, jurisprudence and political theory, that it seemed worthwhile to write a commentary on the *Constitution* in this light. This book is the result.

2. Style of the Book

The *Constitution* of Papua New Guinea is complex, and is full of words and phrases that will, no doubt, be the subject of very detailed consideration by the courts. What the courts and the legal profession of Papua New Guinea really need is a detailed, annotated, text, in the style—perhaps inimitable—of Quick and Garran's classic work on the Australian Constitution. This book does not attempt to provide such a text; though its inadequacy will perhaps stimulate some Papua New Guinean lawyer to write such a book.

The book is not written in the style of a legal text. There are few references to decided cases—there are few decided cases on the *Constitution*. Cases in which Constitutions of other countries have

been interpreted by the courts of those countries may very well be relevant, but I have not attempted to treat the *Constitution* of Papua New Guinea in the context of comparative constitutional law—though there are references to the constitutional law of other countries, especially England and Australia.

Rather, I have treated the *Constitution* of Papua New Guinea as an exercise in legal and political nationalism. The book is written not as a text of the law: there are no footnotes, few case references, and most of the references (given in a style more common in works on social sciences) are as much to works of political science, and history as they are to legal works. The book is, of necessity, however, a commentary upon and analysis of, the text of the *Constitution* in the light of which the *Constitution* succeeds as an exercise in nationalism.

This does not mean, especially in the absence of a proper annotated constitution or dissertation on the implication of all or any provisions of the *Constitution*, that this book will not assist lawyers, judges, law students and others to understand the working of the *Constitution*. If it is used by lawyers, they should be aware that it is probably too superficial to be of great use in specific cases. It may, however, indicate arguments which may be advanced in the application and interpretation of some of the provisions of the *Constitution*. It may also assist in indicating the interrelationship of various provisions of the *Constitution*.

3. Influences

I believe that in a work such as this it is absolutely necessary to state my position on certain matters which may have influenced the content of this book.

My attitude to laws is that they are a function and a product of the societies which produce them. They are given effect, or maintained in force, because they are supported, or at least not opposed, by those in power. They are essentially the products of politics from time to time. Statute law is by definition the expression of the will of the political rulers from time to time. Judge-made law, in the modern world, does tend to reflect a preference for the *status quo*, as Professor Griffiths has recently pointed out in relation to England, though in Australia this has been recognised by some observers for some time (Griffiths 1977, Evans 1976 and works cited by him). Judge-made law can always be altered by statute. Constitutions, inasmuch as their provisions are entrenched, are different, and impinge on parliamentary sovereignty: they may not be altered by the representatives of the people as easily as other laws, and therefore the interpretation of constitutions by the courts has a more significant political role. All law is therefore at least potentially political, economic, or 'moral' in the sense that laws are the result of individual attitudes expressed in objective terms. Those attitudes are themselves determined by factors which are largely economic.

Another factor which has influenced me, apart from the views which I have formed as a result of involvement in the teaching of public law and scholarship in that area, and as a member of the

Australian Labor Party engaged in the practicalities of party politics, is experience of life, albeit for a limited period, in Papua New Guinea before Independence. The influence should be apparent even to readers of this preface. It is an influence which has convinced me that while the English common law has many benefits, it causes as much injustice as justice when applied in a community whose culture is totally different from the British culture which produced the common law.

What the British legal system has produced (though in this it is not entirely unique), in a way which is often more apparent than real, is a set of values which give pride of place to the individual. Those rights may have tended, in British law and British history, to have been subordinated to property rights, but they are valuable in themselves, and I am pleased, personally, to see many of these values embodied in the *Constitution*, and perhaps disappointed to see that there are so many possible qualifications. Apart from the *Human Rights Act* 1971, most of these rights did not form part of the law of Papua New Guinea, as Bayne (1974) pointed out. There are still aspects of the common law which in my view should be incorporated in the law of the country—trial by jury being perhaps the most important of them, though I realise that the administrative problems are considerable. Jury trial was not known to Papua New Guinea, and given that the CPC expressed great confidence in popular participation at all levels, it is perhaps surprising that trial by jury was not included as a right. It is a means of popular participation which has ensured that unjust or unpopular laws are not applied harshly or contrary to popular feeling.

However, despite my personal pleasure in seeing values of personal freedom expressed in the *Constitution*, these values are, in many cases, alien to the traditional ways of Papuans and New Guineans. In traditional societies it is more likely that the more important values were collective, rather than individual. Thus the *Constitution* reflects not a traditional society, but a society which wishes to take what is best from both its own traditions and from that part of the imposed law which is seen as being beneficial.

Since the text of this book was completed, I have had the opportunity of reading Geoffrey Sawer's *Federation Under Strain* (Melbourne, 1977), which, as a considered account of constitutional developments in Australia during the years 1972-1975, sheds additional light on the political and legal effects of the wording of the written Australian Constitution, and the conventions, if they may be called such, which "flesh out" the provisions of the written text. These Australian developments may affect the situation under the *Constitution* of Papua New Guinea, as, even if provisions of the Australian Constitution have not been copied *verbatim* by Papua New Guinea, there are definite similarities; more importantly, the institution of the *Constitution*, (to use a rather clumsy phrase), will be operated, in the early years, by judges who are Australians, and by lawyers who have studied in Australia or have been trained, in the main, by Australians. Sawer's book shows (and acknowledges, in many cases), the wisdom of some of the provisions of the Papua New Guinea *Constitution*. He refers to the requirement that the

Governor-General must act "with and in accordance with" the advice of the National Executive Council. Such a requirement would have prevented the crisis of November 1975 in Australia. He regrets that Papua New Guinea chose to have a Governor-General at all, for he, like the Constitutional Planning Committee, sees little justification for such an office. Papua New Guinea has also written into its constitutional laws much of what, in Australia, is left to "conventions"—and the vagueness of these conventions was the cause of many of the difficulties which faced the Australian Parliament in 1975. As he points out, the establishment of the Australian Senate was a political compromise, and its effects are substantially different, in legal and political terms, from those envisaged by the founding Fathers. It may very well be, that the political compromise which had led to the re-inclusion of a version of Provincial Government in the *Constitution* of Papua New Guinea, may have similar, undesired, effects on the future government of Papua New Guinea.

I am extremely conscious that the reference to Professor Sawer's most recent book is not the only occasion when I have had recourse to the Australian Constitution and to its development as a guide to the interpretation and development of the *Constitution* of Papua New Guinea. The references to decided cases and to constitutional practice in countries other than Papua New Guinea are almost exclusively to Australia. Partly this is because the Australian Constitution is the one with which I am most familiar; but it is also the *Constitution* with which the draftsmen of the Papua New Guinea *Constitution* were most familiar; and though the constitutional principles decided upon by the Constituent Assembly and the House of Assembly in Papua New Guinea, after they had considered the report of the Constitutional Planning Committee may have been totally different from those adopted by the Australian Constitutional Conventions of the 1890s, the language in which those constitutional principles are expressed draws very heavily on that of the Australian Constitution. And even at this early stage, the Supreme Court has relied heavily on the Australian precedents; it is perhaps to be hoped that the dissenting judgment of Prentice, Deputy C.J. in *Rakatani Peter* v. *South Pacific Brewery Pty Ltd* [1976] P.N.G.L.R. 537, rather than the majority judgments in that case (which are discussed in Chapter 10), will guide the courts in the future, and that they may well seek to develop indigenous principles of constitutional interpretation. However, as I seek to point out throughout the book, and especially in the final chapter, the fact that the people of Papua New Guinea have chosen a written Constitution will ensure that their political development will, whether they desire it or not, be influenced by Western European legalism.

4. Reservations

In many cases the reader may assume that the outlook for the *Constitution* of Papua New Guinea is pessimistic. That is not the impression I wish to create. I am a lawyer, and my training leads me to examine every aspect of a legal document to see as many as possible of the consequences which may flow from any language

which is used, or from the nature of any instrument which is created by a legal expression. I have tried to appreciate the motives for the choice of principles and institutions. If the examination is critical, it is because the words of the *Constitution* lead to the possibility that the courts, which, by deliberate choice, will have the vital political role of interpreting and applying the provisions of the *Constitution*, will not be able to break free sufficiently from the constraints of the common law tradition to interpret the *Constitution* in the spirit in which its framers intended it to be interpreted, so that the results may be quite different from what was intended. I have also tried to draw from the language of the *Constitution* a picture of what might happen, particularly if the rigorous requirements of the *Constitution* are over-looked in any way. This may lead to a breakdown in the institutions of State. I do not for a moment say that this is so. However, the *Constitution* requires efforts and resources to make it operate successfully. An indication of where the dangers lie may assist the people of Papua New Guinea to avoid those dangers, and perhaps this examination of the text may play some part as a rough map through the uncharted territory of the *Constitution*. Many of the institutions established by the *Constitution* may prove difficult in operation, but, with one possible exception, they are workable. My greatest scepticism is of the system of provincial government, introduced after Independence, and for purely political reasons.

5. Acknowledgments

This book was mostly written during a period of study leave from the Australian National University. That University also provided funds which enabled me to visit Papua New Guinea on several occasions between 1973 and 1978. I spent the relevant part of the study leave in the School of Law at the University of Warwick which provided an ideal atmosphere for the work and a great deal of practical assistance. Some of those who contributed and encouraged me in various ways, and whom I should like to thank especially include John Ballard, Peter Bayne, Helen Beresford, John Christensen, Diana Conyers, Jill Cottrell, Tony Deklin, Paul Dodds, Brian Ely, Jim and Janet Fingleton, Noel Gregory, Rita Harding, David Hegarty, Pokwari Kale, The Hon. Mr Justice W. J. F. Kearney, Ric Lucas, Joe Lynch, Bernard Narokobi, Tony O'Connor, Pamela Orr, Abdul Paliwala, Jim Read, Carol Ryan, Geoffrey Sawer, Bill Standish, Ilinome Frank Tarua, William Twining, Tony Voutas and Ted Wolfers; I hope that each of them will see their contribution to the book. Thanks are also due to the Prime Minister of Papua New Guinea, Mr Michael Somare, for his Foreword, and to the editorial staff of the Law Book Company for their assistance.

If I believed in formal dedications, I would dedicate this book to my former students at the Faculty of Law of the University of Papua New Guinea. They stimulated my interests in the laws of their country, and it is their very difficult task to make the *Constitution* work.

JOHN GOLDRING

Canberra,
August 1978.

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