ADAPTATION OF WESTERN LAW IN PAPUA NEW GUINEA*

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Introduction.

Justice in Papua New Guinea is at one level the rendering to each individual his rightful due. But at another level, it should entail the giving of a full and proper place to the human experiences of our race and our people. It is at this second level that my heart bleeds and longs for the day when our Papua New Guinean norms, customs, sanctions, perceptions and methods of dispute settlement will be given their fullest significance.

To use the vivid language of the Constitutional Planning Committee: 1

> The process of colonisation has been like a huge tidal wave. It has covered our land, submerging the natural life of our people. It leaves much dirt and some useful soil, as it subsides. The time of independence is our time of freedom and liberation. We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundation of our ancestral land. We must take the opportunity of digging up that which has been buried. We must not be afraid to rediscover our art, our culture and our political and social organisations. Wherever possible, we must make full use of our ways to achieve our national goals. We insist on this, despite the popular belief that the only viable means of dealing with the challenges of lack of economic development is through the efficiency of Western techniques and institutions.
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> We should use the good that there is in the debris and deposits of colonisation, to improve, uplift and enhance the solid foundations of our own social, political and economic systems. The undesirable aspects of Western ways and institutions should be left aside. We recognise that some of our own institutions impose constraints on our vision of freedom, liberation and fulfillment. These should be left buried if they cannot be reshaped for our betterment.

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* This paper was originally presented at the Third South Pacific Judicial Conference, Port Moresby, April 1977.

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1. *Final Report of the Constitutional Planning Committee 1974, Part 1,* 2/13.

Overview.

To appreciate fully the extent to which Western law has recognised Papua New Guinean customary law, it is necessary to present an overview of the colonial history of Papua New Guinea.

The Western impact occurred in two stages. The first wave of Europeans came after the explorers. They ignored the rule of law, and stole what land, gold and people they could find. Blackbirding of able-bodied men from the islands to work on plantations in Queensland went unchecked. North Solomon Islanders were enlisted by the Germans to fight against black Africans. Missionaries disrupted the traditional way of life. The law was irrelevant. Might was right.

The second stage came with the full force and authority of the law. Many of the activities which went on during the first wave were continued with a difference, and legalised. A different form of exploitation replaced the blackbirding. Under the indentured labour system, authorised by law, men were recruited to work the plantations. House boys were made of Papua New Guineans. Discriminatory laws were enacted to maintain white superiority. The Governor of Papua wrote at this time:2

> There is only one thing [the Papuans] respect, that is force ... They have the most profound respect for that ... We had first to found our Government stations, and we have been using each station as a centre from which our authority is gradually radiating ... Beyond that there is the old state of things, every tribe fighting its neighbour, so when we go into a new district we almost invariably have to fight the principal fighting tribe of the district. We never fight with them at all if we can possibly avoid it until we are in a position to make it a final and decisive move. We hardly ever have to fight twice in the same district.

The local government and centralised court systems were established and English law adopted without regard to its suitability or social consequences.

In the period immediately before Independence, however, our nationalists called for our own identity and independence, and this surge for self-identity culminated in September, 1975, when Papua New Guinea became an independent nation with its own home-grown Constitution.

In retrospect, independence has been largely a procedural matter. The *Constitution* adopted all the Western legal, political and ceremonial institutions. The Queen of England was entrenched as Queen and Head of State.3 English common law and equity were adopted as part of the underlying law.4 One year after independence, Papua New Guinea is

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2. Sir William McGregor, Conference with Australian Premiers,January 1888; Accession CP 1/1 (New Guinea Correspondence, 1885-98, in the Archives Division, Australian National Library, Canberra), Bundle 6, quoted in Edward P. Wolfers, *Race Relations and Colonial Rule in Papua New Guinea,* p.16.

3. *Constitution,* s.82.

4. *Constitution,* Sch.2.2.

gradually adopting western laws and institutions. However, a new movement - which gathered momentum under Father John Momis's leadership of the Constitutional Planning Committee5 - has already begun. It advocates a total overhaul of the legal, economic and political institutions, and is committed to true national sovereignty and self-reliance in all fields. As far as the law is concerned, this entails the creation of our own laws, based on our own world view. It means building on our own rich soil first, and then merging it where necessary with the scattered soil of the Western laws. No Papua New Guinean with a sense of pride in his culture can accept the present situation which requires him to derive the law from Western sources, based on Western wisdoms and prejudices. This situation must cease, and as far as I am concerned the sooner the better.

To summarise, the colonial process had the following effects on the legal system in Papua New Guinea:

1. The Westerners imposed their laws and legal institutions upon us without paying regard to our own institutions.

2. Western law and institutions undermined the power and initiative previously vested in traditional leaders. The village as a political and economic unit was destroyed and replaced with a perverse local government system based on doubtful propositions of equal representation. The dispute settlement mechanisms which promoted harmony, group justice, compromise, concern for the succeeding generations, compassion, mercy, forgiveness, and popular participation were replaced with narrow legalism based on professional ethics, sectarianism, the police, and the courtroom conflict. The overall effect of Western law was to take away the pride, self respect, dignity, self reliance and the sovereignty of the people, replacing these with the authority of the gun and the foreign ruler.

3. The law and the legal institutions became over-centralised, over-bureaucratised and over-professionalised. The courts lost touch with the people. Citizens who once conducted their own cases according to customary law must now go through police, solicitors, barristers, magistrates, judges and prison warders.

4. The imposition of the Western Legal system has created insecurity, fear and dependence in the minds of many of our leaders. For example, appointing the Queen as Head of State symbolises the colonial dependency syndrome of our leaders.

However, it is not suggested that our colonisers were entirely insensitive to the claims of customary law. In fact, custom has been recognised by the courts as a fairly significant source of law. The extent of its recognition is examined in the following survey of legislation and case law.

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5. See *Final Report of the Constitutional Planning Committee 1974.*

Legislative Treatment of Customary Law.

In Papua, the *Courts and Laws Adopting Ordinance* 1889, s.4., provided for the adoption of Queensland law as the basic law of Papua, subject to local enactments or promulgations and 'insofar as the laws of Queensland shall be applicable to the circumstances of the Possession.' In New Guinea, the *Laws Repeal and Adopting Act 1921*, s.16, stated:

> The tribal institutions,customs and usages of the Aboriginal natives of the Territory shall not be affected ... by this Ordinance and shall, subject to the provisions of the Ordinances of the Territory from time to time in force, be permitted to continue in existence in so far as the same are not repugnant to the general principles of humanity.

Native Regulations enacted between 1939 and 1962 provided *inter alia* for recognition of customary marriage, punishment of acts of adultery occurring between natives, and for inheritance of property of intestate natives according to custom.

The *Local Government Act* 1963 (No. 16 of 1964) enabled local councils to enact rules concerning custom, although little use has been made of this power.

The *Native Customs (Recognition) Act 1963* (No. 28 of 1963) provided for the recognition of custom in many areas, but it also imposed important limitations. This Act has been interpreted narrowly by the courts, especially in the area of criminal law.6 It has been ineffective in securing the recognition of custom, and the time has come for its repeal.

Under s.20 of the *Sorcery Act 1971* (No. 22 of 1971) the defence of provocation is available to an accused who kills a person he believes is a sorcerer. This defence merely reduces the charge from wilful murder to manslaughter. In a country where sorcery killing is an act of honour and self-preservation, this concession is inadequate.

The significance of the passing of the *Village Courts Act 1973* (No. 12 of 1974) was described by Mr. John Kaputin:7

> The major piece of legislation which attempts to place the law back in the hands of the people is the *Village Courts Act*. This piece of legislation is ... important because village communities will be able to continue to mediate and to decide disputes within those communities with the full approval of the written law of the land ...

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6. For example, in *R v Tabatu Nosei and Others* (unreported, September 1968) the accused were charged with gross indecency after taking part in a ritual ceremony. Frost J. (as he then was) decided that recognition of the custom would be contrary to the public interest under S.6(1)(c) of the *Native Customs (Recognition) Act, 1962*. Custom has been recognised in criminal cases mainly for the purpose of mitigating sentences.

7. Then Minister for Justice. J.R. Kaputin, 'The Law - A Colonial Fraud', *New Guinea* Vol.10 No.1 p.11-12.

> I see two great benefits as likely to follow the establishment of the Village Courts ... Firstly, customary law will from now on be a real part of the national law, and will stand up beside the imposed law. In the past, lip service has been paid to our law by means of the *Native Customs (Recognition) Ordinance 1963*, but, since it operated in a court structure designed for the operation of the foreign law and conceptually only capable of employing the foreign law, it could never be effective.
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> The second benefit, though more indirect, will be that the Village Courts will be a great source of information as to the content of customary law, and will be of great assistance as the imposed law is reformed.
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> I am perfectly aware of the fact that lack of information about what our people want in their laws could be a basic problem in a systematic reform of the law. But, I believe that the people's views on law and their knowledge of customary law have been ignored for too long, and will be readily available when sought. 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.

The *Business Groups Incorporation Act 1974* (No. 59 of 1974) enables customary groups to incorporate as business entities for the purpose of undertaking business activities. The Act provides for 'greater participation by local people in the national economy by the establishment by them of group business and other economic enterprises'[8] and 'the encouragement of the self-resolution of disputes within such groups, without requiring recourse to non-traditional courts.'[9] This legislation is widely used.

The *Land Groups Act 1974* (No. 64 of 1974) provides for customary land holding groups to be registered as corporate entities for purposes of modern land use.

Most importantly, the *Constitution* clearly emphasises indigenous laws and institutions. The Preamble states that the people of Papua New Guinea 'acknowledge the worthy customs and traditional wisdoms of our people ...' and 'pledge ourselves to guard and pass on to those who come after us our noble traditions ...'. The National Goals and Directive Principles declare that development is to be achieved 'primarily through the use of Papua New Guinean forms of social, political and economic organisations' and call for 'a fundamental re-orientation of our attitudes and institutions ... towards Papua New Guinean forms of participation, consultation and consensus ...'[10] Accordingly, the

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8. *Business Groups Incorporation Act 1974*, S.1(1)(9).

9. *Business Groups Act 1974*, S.1(1)(g).

10. *Constitution*, National Goals and Directive Principles, No.5. See also No. 2 and 3.

Constitution declares that the law of Papua New Guinea comprises (as well as the Constitution, the Organic Laws, Acts of Parliament, Emergency Regulations and certain pre-existing English rules of common law and equity)11 the 'underlying law',12 and it provides that 'custom is adopted, and shall be applied and enforced, as part of the underlying law'13 to the extent that it is not inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity.14 It is further provided that the principles of English law and equity adopted as part of the underlying law shall not apply if they are *(inter alia)* 'inapplicable or inappropriate to the circumstances of the country from time to time'15 or 'in their application to any particular matter they are inconsistent with custom as adopted ...16

The purpose of these provisions is to assist in the development of our indigenous jurisprudence adapted to the changing circumstances of Papua New Guinea,17 and on the fact of it they appear generous to the customs of our people. In truth, however, the scope of their application is rather limited. First, they are made subject to the odious 'repugnancy to the general principles of humanity' provision.18 Second, they are limited by the *Constitution* itself and by numerous Acts of Parliament. Third, the positive way in which the provisions adopting principles of common law and equity are expressed makes it very easy to apply English law on the ground that a custom is inapplicable or inappropriate.19 Fourth, custom is not included as a source of criminal law.20

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11. *Constitution,* s.9 and Sch.2.2.

12. *Constitution,* s.9(f).

13. *Constitution,* Sch. 2.1(1).

14. *Constitution,* Sch. 2.1(2). Sch. 2.3, 2.4 and 2.5 provide for the development of the underlying law.

15. *Constitution,* Sch. 2.2(1)(b).

16. *Constitution,* Sch. 2.2(1)(c).

17. *Constitution* Sch. 2.13 provides that an Act of Parliament shall make provision for a Law Reform Commission, which, under Sch. 2.14 has the special responsibility to investigate and report on the development of the underlying law.

18. *Constitution,* Sch. 2.1(2).

19. *Constitution,* Sch. 2.2(1)(b).

20. *Constitution,* s.37(2) provides that 'nobody may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law'.

A. The 'Reasonable Man' Test

In cases where the criminal law requires the application of a 'reasonable man' test, the average Englishman with a hat, suit and umbrella riding the Clapham omnibus has not done very well in the tropical forests of Papua New Guinea's criminal law.21

Where the courts have considered the behaviour of the 'reasonable man' for the purpose of applying the defence of provocation,22 the standard used is that of 'an ordinary person in the environment and culture of the accused'.23 The standard varies according to the degree of sophistication of the accused. An educated, urbanised and missionised person is expected to show a higher degree of self-control than a person from an area where contact with the West is minimal.24 This approach, whilst humane in its outcome, is in my view paternalistic. It assumes that Papua New Guineans are primitive and that in due course, when they are educated out of their cultural enslavement, they will behave like Englishmen in a Papua New Guinean setting.

Prentice J. (as he then was) took a similar approach in *R. v. Nobol-Bosai*25 where the accused were charged with improperly or indecently interfering with a corpse26 after they cooked and ate parts of the body of a man from another village. He acquitted the accused, saying:27

> Concepts of decency and propriety (and obscenity), appear in many places of the ordinances and laws of Papua New Guinea. Having regard to the multifarious customs, languages, dress beliefs, degrees of civilisation, and social organisations among the peoples who live in remote wildernesses, some where Europeans have yet walked only on a few occasions, one cannot conceive that the legislative would have intended to impose uniform blanket standards of decency and propriety, on all the peoples of the country ...

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21. 'The Rule of Law and the Administration of Justice in an Emerging Society', proceedings of the Conference of the International Commission of Jurists at Port Moresby, 1965, p.67.

22. *Criminal Code Act 1974* (No. 78 of 1974).

23. *R. v Hano Tine* [1963] P. & N.G.L.R., 9, 16.

24. *R. v Moses Robert* [1965-1966] P. & N.G.L.R., 180, 185-186.

25. [1971-1972] P. & N.G.L.R., 271.

26. *Criminal Code Act 1974* (No. 78 of 1974) S.241(b).

27. [1971-1972] P. & N.G.L.R. 271, 283-284. For commentary see J.A. Griffin, 'Is a Cannibal a Christian?' *M.L.J.*, Vol.1, No.2 p.79.

> In seeking to construe whether the behaviour of the Gabusi Villagers here amounted to impropriety and indecency, I conceive that I should look at the average man in the particular Gabusi community, as it was at the time of these happenings. Just as in the attempt to judge criminality in other sections of the Code (for example, concepts of provocation, reasonableness), one attempts to apply the standards of the reasonable primitive villager in his proper setting (as far as one can collate such standards), not those of the reasonable man on the Clapham Omnibus ... I consider that in assessing propriety and decency of behaviour in relation to corpses in the Gabusi area, I should endeavour to apply the standards, so far as I can ascertain them, of the reasonable primitive Gabusi villager of Daldalibi and Yulabi in early 1971.
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> On a full consideration of evidence, I have come to the conclusion that the conduct of the Ulabi Villagers and the men of Dadalibi, in eating the body of the deceased Sabasigi Villager, in all the circumstances of the case, was neither improper nor indecent behaviour on their part, being normal and reasonable behaviour on their part, being normal and reasonable behaviour for them as most primitive villagers living in the Gabusi area of the Nomad Sub District in early 1971, in the limited condition of pacification and administration to which that area had then been reduced.

The trial judge adopted a similar approach in the 'Enga Jury' case.[28] After the deceased was unsuccessfuly treated in a hospital, two village surgeons operated on him with bamboo knives and he died as a result of their treatment. The village surgeons were charged with manslaughter, and Lalor J. acquitted them on the basis that no local Enga jury would have found that the surgeons acted with reckless disregard of human life. The Full Court disagreed. Frost A.C.J. (as he then was) stated an objective test:[29]

> The trial judge took for his "man of ordinary prudence" the Enga villagers. But the Enga villager has been subject to Government and Mission influence for two decades. He votes for his candidates in the House of Assembly elections and has his Local Government Council. He has available medical treatment at hospitals which are conducted by the Government and Christian Missions, and are provided with trained medical staff and equipment. In the case of a very considerable proportion of families, he sends his children to primary and secondary schools, and, certainly in much smaller numbers, may have a son or a daughter at one of the tertiary educational institutes, including the two universities. In all the districts of Papua New Guinea the population varies from the primitive villager who has not entered the cash economy to the town or city worker but for the purposes

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28. *Prosecutor's Request No. 2 of 1974* [1974] P. & N.G.L.R. 317.

29. *Prosecutor's Request No. 2 of 1974* [1974] P. & N.G.L.R. 317, 325.

> of the law some mean must be taken, and just as certain mental attitudes are presumed, so also is some standard of knowledge to be presumed. It is sufficient, in my opinion, to state that the reasonable man is for the purposes of this case to be presumed to be one whose state of knowledge and prudence is such that he appreciates the difference in training and skill between the qualified doctor and "the village surgeon" without any medical qualification.

In my view, this case represents an unfortunate regression from the earlier subjective approach by the courts.

B. Sorcery Killing.

A number of cases involving sorcery-killing have arisen in Papua New Guinea. When several young men, women or children in a village die it is presumed by the people that a sorcerer has caused their deaths, and that more deaths are imminent. It then becomes seen as a matter of survival, and a man (usually young and sometimes quite sophisticated) will be selected by the threatened group or will volunteer to kill the sorcerer. Sorcery is the last frontier of inner consciouness for the Melanesian. No amount of Western education will remove the deep sub-conscious fear of sorcery. Nevertheless, the courts have taken an extremely inflexible view of sorcery-killing. In *Secretary for Law v. Uleo Amatasi*,30 the accused villagers were found guilty of wilful murder though they killed a sorcerer they believed to have embarked upon a course of genocide of a tribe consisting of about one hundred people.31 Defences based on insanity,32 mistake of fact33 and self-defence34 have failed, and the provisions of the *Sorcery Act 1971* have been applied restrictively. Yet the people regard sorcers as cold-blooded murderers who set upon a course of systematic termination of human life, and they endorse the old testament justice of an eye for an eye and a tooth for a tooth. The question is whether we can teach them to love their enemy through the law. I believe that the law has in this respect a very limited role.

C. Criminal Responsibility of Children

Under Section 29 of the *Criminal Code Act 1974* (No. 78 of 1974), 'a person under the age of 14 years is not criminally responsible ... unless ... at the time of doing the act ... he had capacity to know that

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30. Unreported judgement F.C.81 (1.8.1975).

31. An appeal by the Secretary for Law for an increase in the sentence of twelve months imprisonment imposed by the trial judge was, however, dismissed by the Full Court.

32. *R. v. Womein-Nanagawo* [*1963*] *P. & N.G.L.R. 72.*

33. *R. v. Manga-Kitai* [1967-1968] P. & N.G.L.R. 180.

34. *R. v. Ferapo Meata*. Unreported judgement 419 (8.3.1967).

he ought not to do the act.' This provision was discussed in *R. v. Iakapo and Iaprikila*.35 The mother of a Tolai girl aged 11 or 12 became pregnant as a result of sexual intercourse with a man of her own moiety, a matter of strict customary prohibition involving great shame and disgrace. After the baby was born, the mother ordered her daughter to bury the child alive. The daughter protested, but reluctantly complied, and as a result was charged with wilful murder. In a forward-looking judgement, Mann C.J. acquitted the girl, reasoning that:36

> It is not in my view enough to ask whether the child had the capacity to know that (for example) it should not bury babies alive, or whether it had the capacity to understand that to do so would constitute a criminal offence. A child of much less than 14 or even 7 should well understand that ... she should not bury her newly born baby brother in the garden, but would not be expected to know that this was because the Criminal Code forbade it. In the present case the question is whether, in a complex social situation, well knowing that her mother's authority was not to be challenged by her and knowing that the action ordered, though most distasteful to her, would be accepted by most of her people as a practical solution to the problem, she would have the capacity to understand that her duty was to deny her mother's authority and run away and disobey...
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> Looking at the matter without regard in the circumstances there are enough indications to show that Iapirikila regarded her mother's proposed course of conduct as wrong but having regard to the circumstances it seems to me to be clear that the child was not capable of understanding that she should disobey. I would be most reluctant to read s.29 as requiring me to ignore circumstances as powerful in their effect on a child's mind as those present in this case. It would amount to torture.

D. Provocation

In applying the defence of provocation the courts have used the 'localised reasonable man' text described above. It has been held also that the common law rule that a man can rely on his wife's adultery to establish provocation only if he catches her in *flagrante delicto* is inapplicable in Papua New Guinea.37 Insulting words alone are sufficient to establish the defence.38 Under Section 271, a wrongful act or insult offered to a person who stands in a 'fraternal' relationship to the accused may amount to provocation, and the courts have interpeted 'fraternal' widely so that it extends beyond immediate and full blood ties, to relationships 'subsisting in established native society and which, as a matter of common experience, [lead] to precisely the same

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35. [1965-1966] P. & N.G.L.R. 147.

36. *Ibid*, at pp. 150-151.

37. *R. v. Moses Robert* [1965-1966] P. & N.G.L.R. 180.

38. *Criminal Code*, S.271. *R. v. Moses Robert* [1965-1966] P. & N.G.L.R. 180, 187, *R. v. Zariai-Gavene* [1963] P. & N.G.L.R. 203, 215.

behaviour as would be encountered in the case of full blood brothers.'39

E. The Age of Consent

Whether an accused person can be acquitted completely of unlawful carnal knowledge under the *Criminal Code Act 1974* (No. 18 of 1974) S.219, where his defence is based on his belief on reasonable grounds that the girl was over 17 years of age has been the subject of judicial disagreement. In *R. v. Philip Boike Ulel* 40 Clarkson J. held that 'regard must be held for the society in which the parties lived and for the fact that one could not expect a person in that society to have any real appreciation of chronological age as opposed to apparent physical development as a test of maturity.' However, Prentice J. (as he then was) in *R. v. Wanigu*41 expressed doubts as to the correctness of this approach. Referring to Clarkson J's decision he said:42

> If His Honour means to say more than that in lieu of stating a belief in a particular age of seventeen, an accused may be heard to say some such as "I believe her to be of an age when the present written laws of the country allowed her to have intercourse" and that such an utterance might then be considered as to whether it goes sufficiently to establish beliefs as to the age of seventeen years or not in the individual case; then I would respectfully find myself constrained to disagree with His Honour's conclusion. Even if the law allows evidence to be so led, I would consider the reasonableness of belief of the individual concerned would still require to be directed and tested against a probable age of seventeen.

F. Conclusion

The decided cases show that there is much room for disagreement in the interpretation of the *Criminal Code Act 1974* (No. 78 of 1974). Clearly, an unmodified foreign Code reflects foreign notions of crime, criminality and exculpation. While the courts have given serious consideration to custom in the exercise of their criminal jurisdiction, they still apply it mainly at the stage of determining defences and sentences. There is still a reluctance to apply customary perceptions and beliefs in deciding whether or not a crime has been committed.

Judicial Treatment of Customary Law - Civil Cases.

I have drawn a distinction between civil and criminal cases for the sake of convenience, though Melanesian customary law makes no such distinction.

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39. *R. v. Yanda Piau* [1967-1968] P. & N.G.L.R. 482, 488 *per* Mann C.J.

40. [1973] P. & N.G.L.R. 254.

41. [1973] P. & N.G.L.R. 330.

42. *Ibid*, at p. 332.

A. Land Law.

About 80 per cent of the land in Papua New Guinea is held under customary land tenure, although at the time of Independence about 25 per cent of arable land was used for plantation, mission or administration purposes. Unlike England and Australia, the Crown does not have the ultimate title from which subjects may hold by fee simple.

Tracts of land were annexed by the colonial power on the basis that discovery was a source of title. This was justified by the 'waste and vacant lands' doctine, according to which a colonial officer would look around to see if any smoke was in the air over a piece of land, and, if no smoke was visible, the land was presumed to be uninhabited and was declared waste and vacant land irrespective of whether it was used for hunting or gathering food.

However, Papua New Guineans have been more fortunate than the Australian aborigines or the New Zealand Maoris, whose rights to land have been denied by the courts in decisions which reveal nothing but whiteness humbug, arrogance and assumed superiority because of superior gunpower. In Papua New Guinea, on the other hand, customary land rights have been confirmed by legislative enactments. Today, much of our land is governed by customary law. The *Land Disputes Settlement Act 1975* (No. 25 of 1975) was passed to provide 'a just, efficient and effective machinery for the settlement of disputes in relation to interests in customary land by (a) encouraging self-reliance through the involvement of the people in the settlement of their own disputes; and (b) the use of principles underlying traditional dispute settlement processes'.43

B. Sexual Intercourse in Breach of Custom

Sexual intercourse with a 'clan sister' is strictly prohibited under customary law. In *Michael Madaku v Patrick Wau*44 the defendant had sexual intercourse with his second cousin sister, the daughter of his mother's sister. The Local Court Magistrate proceeded under Section 13(c) of the *Local Courts Act 1963* (No. 55 of 1966) which provides for matters arising out of and regulated by native custom to fall within the jurisdiction of the Local Court. The magistrate determined the law according to native custom and ordered K100 damages.

On appeal Minogue C.J. excluded custom on the basis that 'the record does not disclose the scope or ambit of the custom nor how injustice would arise if it were not enforced ...' He conceded that 'it is conceivable that there are many ways in which injustice could be done to a person or persons in the community concerned if a custom which is designed to preserve the social fabric of the community be not enforced.' But on the evidence recorded he was 'unable to pronounce whether this particular custom should be enforced.' I think that there was more than adequate evidence to justify its enforcement.

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43. *Land Disputes Settlement Act, 1975,* (No. 25 of 1975), S.1.

44. [1973] P. & N.G.L.R. 124.

C. Defamation

The use of highly defamatory language is common in Melanesia. In some circumstances this is acceptable in public debate, and the more insulting the language, the higher the speaker's status. In other circumstances, use of such language is considered highly offensive, requiring compensation in cash or goods.

In *Topeu Taupa v. Tiotan Joel*45 a Tolai man uttered words which suggested that the plaintiff had lied to the administration and obtained land by trickery. A Local Court magistrate ordered the appellant to pay ten fathoms of tambu46 to the respondent. On appeal, Raine J. refused to uphold the sentence on the ground that 'there is no evidence that there was a custom, and if there was, what remedies it provided.'

In a more satisfactory judgement, Frost C.J. in *Tei Abal v Anton Parau* 47 excluded the common law rule that the precise words complained of must be brought in evidence. He stated:

> The conclusion I have reached is that pursuant to the *Constitution,* Sch. 2.2(1)(b), the common law rule relied upon is inapplicable because it is inappropriate to the circumstances of Papua New Guinea in cases such as the present in which the defamatory words are alleged to have been spoken in a vernacular which is not in ordinary usage reduced to writing and is not reasonably capable of being accurately recorded by the Judge in the language of the Court. The contrary view would mean that an action brought under the Defamation Act by a citizen for defamatory words spoken in a vernacular of that kind could never succeed.
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> I am accordingly unable to uphold this objection.

The law of defamation may become meaningless in Papua New Guinea if strict reliance is placed on the common law principle that the precise words complained of must be brought in evidence. This country has 700 language groups. It is impossible for any judge to know all of them, and therefore proof of the precise words should not be required.

D. Recognition of Customary Marriage.

Under s.55(2) of the *Marriage Act 1963* (No. 8 of 1964), customary marriages are as valid and effectual as registered marriages.

The right of the wife of a customary marriage to obtain maintenance was considered in *Darusila Kuang v. Elias Tovival*48. Although it is

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45. Unreported judgement S.C. No. N.822.

46. Traditional shell money still used by the Tolai people.

47. Unreported judgement S.C. No. N.822.

48. [1969-1970] P. & N.G.L.R. 22.

almost unheard of for a deserted wife to receive support from her husband according to custom, it was held in this case that, in the absence of statutory provisions to the contrary,49 a customary marriage should be regarded as valid for all purposes, and therefore the wife's claim for maintenance under the *Deserted Wives and Children Act 1951* (No. 33 of 1961) was upheld. This approach may lead to the imposition of rights and obligations which are not normally imposed by the customary law of the parties. In my opinion, the legal consequences of a customary marriage should be decided by customary law.

E. Custody and Adoption of Children.

While the legislation provides that custom is to be taken into account when determining custody and adoption of children,50 it also directs that custom shall not be applied where it would not be in the best interests of a child under the age of 16 years.51 The courts have in several cases declined to apply custom for this reason.52

F. Award of Damages.

The relevance of the customary obligation of the wife's family to support her after her husband's death was considered in *Mary Gugi v Stol Commuters Pty. Ltd.*53 The widow of a motor mechanic applied for damages under the *Law Reform (Miscellaneous Provisions) Act 1962* (No. 19 of 1970). The husband and wife had been living in a town in European style at the time of his death, and a child was born shortly afterwards. The wife and child returned to the wife's village, although she preferred the more sophisticated town life. In assessing damages, the trial judge found that the wife and child were entitled to assistance from members of her extended family in the village, and reduced the damages accordingly. On appeal, this finding was upheld.

G. Conclusion.

It is evident that native custom has not played a major role in the judicial process. This is indeed regrettable, and the sooner it is rectified, the better it will be for Papua New Guinea. I lament the slow response of the present legal system to the growth of an indigenous jurisprudence and law, based on our customary laws and institutions.

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49. E.g. *Matrimonial Causes Act 1963* (No. 18 of 1964), s.8.

50. *Native Customs (Recognition) Act 1963* (No. 28 of 1963), s.8(f), 9; *Adoption of Children (Customary Adoptions) Act 1969* (No. 13 of 1970).

51. *Native Customs (Recognition) Act 1963* (No. 28 of 1963) s.6(1)(d).

52. E.g. *R. v. Benhambohen and Asini* [1973] P. & N.G.L.R. 288, *Hevago-Koto v. Sui Sibi* [1965-1966] P. & N.G.L.R. 59; *R. v. John Kaupa* [1971-1972] P. & N.G.L.R. 195.

53. [1973] P. & N.G.L.R. 341.

What Can We Do?.

The colonial powers wrought a fundamental and traumatic revolution in Papua New Guinea. We need a fundamental mental revolution, a mental decolonisation, to reconstruct our legal system.

It is of primary importance that the National and Supreme Courts be staffed by Papua New Guineans. It is nonsense to argue that they are not sufficiently qualified or experienced to sit on the bench. Eight years hence, all judges should be Papua New Guineans.

The Law Reform Commission of Papua New Guinea54 has published several reports advocating the extensive use of customary laws and institutions in the development of our legal system. In its *Report on Punishment for Wilful Murder*55 the Commission proposed that the mandatory sentence of life imprisonment for wilful murder should be abolished, on the ground that killings accepted in the accused's culture - such as those motivated by sorcery or adultery - do not warrant life imprisonment. This proposal has now become law.56 Recommendations were made in the reports dealing with *Summary Offences*57 and *Arrest, Search and Bail*58 that customary sanctions involving payment of compensation and repairing damage to property should be used as alternatives to fines and imprisonment. The *Report on Adultery*59 proposes the repeal of the present law,60 incorporates Melanesian views of adultery, and utilises mediation and reconciliation. It recommends that adultery and enticement should be treated as civil wrongs, punishable by K200 compensation paid in cash or goods, and backed up by six months imprisonment in the event of non-compliance. The most important publication to date, the working paper on *Declaration and Development of the Underlying Law,*61 proposes amendments to the *Constitution* which would give customary law greater prominence, so that, if the written law did not determine the matter, one would turn first to customary law, and apply English common law only if customary law was inapplicable.

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54. Set up pursuant to the *Constitution* Sch. 2.13 and 2.14.

55. Law Reform Commission Report No. 3 *Punishment for Wilful Murder,* October 1975.

56. *Criminal Law (Amendment) Act 1975* (No. 24 of 1975).

57. Law Reform Commission Report No. 1 *Summary Offences* September 1975.

58. Law Reform Commission Report No. 4 *Arrest, Search and Bail* March 1976.

59. Law Reform Commission Report No. 5 *Adultery* February 1977.

60. *Native Regulations* (Papua) S.84; *Native Administration Regulations* (New Guinea) S.84.

61. Law Reform Commission Working Paper No. 4 *Declaration and Development of Underlying Law* September 1976.

The Working Paper on *Criminal Responsibility: Taking Customs Perceptions and Beliefs into Account* 62 proposes legislation designed to develop a criminal law which reflects the customs, perceptions and beliefs of Papua New Guineans. It proposes that a person should not be held criminally responsible for an act or omission, other than an act or omission which causes death, if the court is satisfied that the act was done under the influence of a traditional custom, perception or belief held also by other members of the customary social group to which the person belongs. Where death is caused in the same circumstances, (except where the killing amounts to revenge, or pay-back), the Working Paper recommends that the accused be found guilty of diminished responsibility killing and subjects him to three years' imprisonment only. The *Working Paper on Fairness of Transactions*63 is aimed at softening the rigours and injustice of the common law of contract. It would empower the courts to re-examine contracts and, where the justice of the case requires, write a new contract for the parties, and it emphasises the use of mediation, conciliation and arbitration. The Law Reform Commission is currently examining Family Law and Succession.

The work of the Law Reform Commission described above represents only the beginning of a long road to developing our jurisprudence, laws and legal institutions. Fortunately, many Parliamentarians and judges recognise the need to 'blend the best of our traditions and values with the new Twentieth Century values now in our society.'64

The law should aim at the attainment and fulfilment of our human values. I regard the following as basic to the social fabric of Melanesia: mediation, consensus and compromise; popular participation in dispute settlement processes; non-violent and non-competitive methods of conflict resolution; community solidarity; harmony among conflicting parties; mutual responsibility; family solidarity; foregiveness and mercy; sharing, interdependence, caring for the needy, and compensation rather than punishment. Our values include communal ownership, providing for future generations, ensuring that everyone has a home and land to grow crops.

Although there are 700 different language groups in Papua New Guinea, there is much common ground in the basic rules of customary law throughout the country. I observed the three cases which follow during the course of my research. They illustrate common aspects of customary law and customary legal processes.

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62. Law Reform Commission Working Paper No. 6 *Criminal Responsibility: Taking, Customs, Perceptions and Beliefs into Account* February 1977.

63. Law Reform Commission Working Paper No. 5 *Fairness of Transactions* October 1976.

64. The Prime Minister, Mr. Michael Somare, in a speach to the New South Wales Law Society, October 1973, quoted in [1975] P. & N.G.L.R. p. XIV.

(i) Two brothers, both university graduates, had a quarrel over certain shell money. The elder brother was paying his bride price. According to custom, his sisters and all the relatives would contribute towards the payment. During the collection, the younger brother became upset as he thought some of the shell money should be given to him or at least he ought to be named as a co-owner. The heated argument was resolved by a village elder who poured his lime on the village square. The quarrel stopped and harmony was restored. In this case, the family conceded that at least the younger brother's name should have been raised, but held that all the gifts ought to go to the elder brother for the payment of his bride price, resolving too that when the time came for the younger brother to pay his bride price, they would help him.

(ii) Two village elders were involved in a light joking session. During this session one elder insulted the older man and offended him deeply. The offended man grew a beard as a sign of unhappiness. The offending man later died. According to custom, the offended man had to hold a feast to settle his sorrow, and the obligation was on the offender to shave the beard. Since he was dead, his son, a university graduate, had to accept the customary obligation. This he did. The village and all the neighbouring villages deployed into two sides, supporting one party or the other. Food and pigs were exchanged. Cash and shell money were exchanged in the same amounts. The whole process lasted three weeks.

(iii) Two women had a bitter quarrel and fought each other. The fight arose over some cooking utensils. In the village, women wash utensils together in a stream. They often put utensils there and wash them later. One woman, the wife of the offended man in case (ii) accused several women of stealing some spoons. She was especially critical of a woman, her closest neighbour. During the quarrel, the accuser said that the accused was a foreigner who had married into their village and knew nothing about custom. The accused became angry and attacked the other woman. According to customary law, two offences had been committed. First, fighting among clansfolk or members of the same village is contrary to law. They had breached this law. Second, during a feast, it is against the law to quarrel or even fight, for all must observe the peace. The head man of the village called the two women together. In this case, the headman was the husband of the accuser and he was also the person offended in case (ii). Each woman quickly explained her position. No further questions were asked. No witnesses were called. They were each ordered to pay K10.00 and a bowl full of yams to the other. This was done. The gifts were exchanged and distributed among the villagers, ensuring that the two women and their immediate families took no share of the gifts.

These cases illustrate several features of customary law which are radically different from Western law. The people actively participate in the proceedings. There are no limitations imposed by written law. No distinction is made between civil and criminal wrongs. Police and prisons play no part. There is no distinction between judicial and executive functions. The fact that the husband of one of the women involved in case (iii) judged the case did not affect the outcome. The liabilities and rights of a deceased person pass on to his heirs. Equal gifts are exchanged upon settlement, even though on a western analysis one party would be found guilty and the other innocent. The emphasis is on restoration of human relationships, and harmony is an important end for which the legal process is set in motion. Since the social fabric of the village is thereby maintained, I see nothing wrong with this approach and would myself prefer it to being banished behind bars.

Finally, it is necessary to place increasing emphasis on the teaching of customary law at the University and the Legal Training Institute, and to apply customary law in all courts and institutions of a judicial nature. We must develop customary law through a system which avoids fossilising custom, and enables it to be restated and applied to meet the ever-changing circumstances of our people. As the Prime Minister, Mr. Michael Somare, has said:

> Most times that people come before a court they have little or no understanding of the legal principles that are at work. This is not their fault. It is the fault of a legal system that has procedures that vary too much from traditional ways of doing things, and legal rules that do not reflect the situation in which most Papua New Guineans live ...65
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> Law reform, which embodies the values of our society, is wholly a matter for decision by our people. I hope the Law Reform Commission will use the great creative energy of our customs, to shape and develop our common law. Our worthy customs indicate what we consider to be right and what is wrong.66

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65. Waigani Seminar, 1973.

66. Speach welcoming Sir Sydney Frost as the first Chief Justice of Papua New Guinea.