

# SENTENCING, CUSTOM AND THE RULE OF LAW IN PAPUA NEW GUINEA

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## Introduction

The role of custom in the official criminal law of Papua New Guinea, both before and after Independence, has been a minor one. A modest legislative attempt by the colonial administration to recognise some aspects of custom in formal criminal proceedings occurred in the Native Customs (Recognition) Act 1963. However, it is the framework for legal development provided by the Independence Constitution of 1975 which has become the focus of both the hopes and disappointments of those concerned with the development of an indigenous jurisprudence as proposed in that Constitution.

Critics of the lack of development of custom have tended to attach responsibility to the main institutions of law creation and law enforcement, notably, the National Parliament, the judiciary, and the legal profession. Institutional inertia and lack of political will are singled out in the case of the first, whilst ignorance of custom, an inflexible adherence to the common law tradition and failure to introduce custom in argument are attributed to the others. It is argued in this paper that these criticisms are based on a misunderstanding of important continuities in legal development in Papua New Guinea. Important questions concerning the nature of state law,

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custom and the changing social order during the historical period concerned have been neglected.

The constitutional framework, which envisaged an enhanced role for custom in the post-Independence legal system, must be located within the prevalent nationalist ideology of the time. This context accounts for many of both the strengths and weaknesses of the resulting constitutional scheme. A central theme within this ideology was the celebration and reevaluation of custom as an integral part of the processes of decolonisation. The emphasis upon, and at times reification of custom, served not only symbolically to sever the link with the colonial past, it also provided an important source of indigenous building material for the construction of a new national identity. The abstract visions of a Melanesian jurisprudence proffered during this period, however, rarely attempted to analyse the nature of the official legal system that formed an important part of the colonial legacy. That system was carried over at Independence with little amendment. The nationalist vision with its commitment to change and redirection neglected to address the important continuities in the form and administration of state law and the severe structural constraints that these imposed upon any radical departure in legal development. The constraints, of course, were not restricted to legal development but also applied in different ways to economic and social development.

This article examines one area in the administration of the criminal law in which custom has had some impact, namely in the sentencing of convicted offenders. The definition of custom which will be adopted for our purposes is that contained in Schedule 1.2(1) of the Constitution:

The custom and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.

An analysis of the treatment of custom in this area sheds light upon its neglect in others. It reveals that the courts have consistently treated 'custom' in criminal cases not as 'law' but rather as a 'cultural fact' that may in certain circumstances amount to mitigation. Moreover, this approach, which has demonstrated a remarkable persistency both before and since Independence, has been part of the state's broader objective of legitimating and extending its authority through the rule of law. Ultimately, custom remains peripheral

because it is seen as incompatible with the existence of the nation-state and the processes of replacing the traditional social order of stateless societies with that of the modern social order. In the latter context it is the unitary state which is supposed to exercise authority on behalf of the aggregate of individual citizens. The localised, communal and subjective qualities of custom as a means of social control are seen as largely incompatible with, and, on occasion, subversive of, the existence and extension of state authority. From such a perspective the 'integration' of 'custom' within the official legal system almost invariably leads to the marginalisation of custom through its subordination to the rules and procedures of the introduced system. What is surprising, perhaps, is not so much the continued neglect of custom in the legal system as much as the persistence of the custom/introduced law debate. The narrow and technical focus upon the alleged failure of state institutions to implement the constitutional scheme serves to obfuscate the nature and direction of the broader processes of social, political and economic development and the role of law in relation to these.

This article examines these issues under three main sections. Part One is background to the more detailed examination of sentencing and custom that follows. Part Two deals with some of the main strands in judicial thinking about law, sentencing and custom during colonialism. Part Three looks broadly at the impact of nationalism and Independence upon the treatment of custom in sentencing practice.

## Background

### *Sentencing*

In most of the criminal legislation in Papua New Guinea, a maximum penalty is prescribed for the most serious instances of the offence. Below that maximum the court will normally have a discretion in determining the form and severity of the appropriate penalty. The exercise of its discretion allows the court to articulate and discuss the wider policy behind the sanctioning of the particular behaviour and, on occasion, the broader social functions of the criminal justice system itself. This is the point at which the judges can sermonise about the role of law and punishment in the establishment and consolidation of a desired social order. Hence sentencing can provide useful insights into judicial conceptions of the wider politics of the rule of law.

*Legal Development*

Whilst most writers are agreed upon the instrumentality of law in the maintenance of authority and the pursuit of colonial economic objectives, some have attempted to identify periods of legal development distinguished by broader shifts in the nature of the administration of the colonial territory. Thus, Paliwala, Zorn and Bayne (1978), for example, identified three distinct periods of legal administration related to different development strategies:

(1) The period of classical colonialism where law served the limited economic goals of the colonial authority (from the beginning of colonisation in the 1880's until the early 1960's).

(2) The period of 'diffusion of western values' where law was employed primarily to promote individualism and diffusion of western values and behaviour (from 1963, when a United Nations Mission began the international pressure for ending colonial rule by recommending preparation for independence, until 1972).

(3) The period of 'redistribution with growth' when law was used to promote the objectives of an economic nationalism and to secure a more equitable distribution of the benefits of economic growth (from self-government in 1972 till Independence in 1975).

To ignore the changing relationship between law and the wider processes of development in Papua New Guinea is clearly fatal to adequate legal analysis. There are, however, important continuities as well as discontinuities and the former tend to be neglected in the concern to accentuate the latter. For example, much of post-Independence judicial thinking and practice on custom in criminal cases is foreshadowed in the 1960 Derham Report which envisaged a declining role for custom in the official legal system:

In criminal matters where all offences are created by a central legislative act and, it must be assumed, are created for the benefit and protection of all, the determination of whether an offence has been committed will not ordinarily be affected by local custom; but the appropriate penalty to be imposed may well be determined in the light of such custom. (Derham 1960:36).

Moreover, whilst Paliwala, Zorn and Bayne stress the economic determinants of legal development, less has been said of the ideological role of law and legal practice in the legitimation of a changing social order. An examination of sentencing practice in relation to custom raises the issue of the ideological nature of the rule of law (see Thompson 1975, 1980; Hall and Scraton 1981).

### *Colonial Legal Practice*

Throughout most of the period of colonial rule (from 1884-1975 in Papua, and 1888-1975 in New Guinea) all inhabitants of Papua and New Guinea, whether indigenous or expatriate, were formally subject to the common law and equity of England and various statutes and regulations in force in Queensland. Amongst the Queensland statutes received into the territories was the Criminal Code of Queensland which had been enacted in 1899. The Code, as in force in Queensland on 1 July 1903, was adopted in Papua (formerly British New Guinea) by the Criminal Code Ordinance 1902. It was later adopted in New Guinea, as in force in Queensland on 9 May 1921, by the Laws Repeal and Adopting Ordinance 1921. It was repealed in New Guinea but re-adopted, with some amendments, by the Laws Repeal and Adopting Ordinance 1924. In New Guinea the code was adopted only so far as applicable to the circumstances of the Territory but the adopting legislation in Papua contained no such qualification. In addition, unlike the reception provisions in Papua, the New Guinea Laws Repeal and Adopting Ordinance 1921, as subsequently amended, expressly provided that custom was to be recognised under certain circumstances:

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. (S.10).

It is clear, however, from subsequent legal practice that this recognition was not as 'law'. Custom was understood primarily in cultural terms. As one judge remarked in 1929:

There being no semblance of a legal system to serve as a foundation, Government was not faced with the problem of choice, and the only hope for posterity was of the establish-

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ment of the legal system of civilisation to the exclusion of all else. (Gore 1929: 20).

Some observers (e.g. Weisbrot 1982a) have remarked that in contrast to the system of indirect rule adopted in many former British colonies, the Australian administration refused any significant role to custom in the maintenance of social control. However, the distinction between direct and indirect rule can be overplayed in respect of Papua and New Guinea (see e.g. Gordon 1983). Traditional forms of dispute-settlement continued to flourish and develop throughout most of the country during this period. The colonial administration was never in a position to seriously challenge and prevent such practices. Moreover, customary dispute-settlement facilitated the maintenance of order in villages more effectively than the imposed system, and at no cost to the overstretched administration. A notable exception to this practice of tacit co-existence was the not altogether successful attempt by the authorities to suppress tribal fighting (Gordon 1983).

The introduced law affected indigenes and expatriates differently. The main form of law experienced by the indigenous population was criminal law in particular, the so-called Native Regulations but also the Criminal Code in the case of serious offences. The civil jurisdiction of the courts, on the other hand, was preoccupied almost exclusively with the regulation of the commercial activities of the small expatriate community (activities from which the indigenous population were largely excluded).<sup>2</sup>

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2. The law played an important role in excluding Papua New Guineans from commercial activities until well after the Second World War and it was only in the 1960's that a concerted attempt was made to remove these legal obstacles and encourage the emergence of indigenous entrepreneurs: see Paliwala, Zorn and Bayne (1978) 37-40. Under the New Guinea Companies Ordinance 1933, for example, no company engaging in agricultural, pastoral or forestry work or aerial navigation could be formed or registered unless at least two-thirds of its shares were held by or on behalf of British subjects. As New Guineans were not British subjects, this ordinance effectively prevented them from registering such an enterprise as a company. This discriminatory provision was not repealed until 1961 by the Companies Ordinance (New Guinea) Repeal Ordinance: see Wolfers 1975: 138-139 and footnote 42 at pp.143-144; Fitzpatrick 1980: 83-5.

The law was also used to restrict the production of and trade in cash crops by the indigenous population. See Fitzpatrick 1980: 83; Brookfield 1972: 79; McCarthy 1963: 79; Melrose Report 1939: 31-32.

The Regulations were a comprehensive body of restrictions, applying only to Papuans and New Guineans, which covered most aspects of daily behaviour ranging from standards of personal hygiene to a night-time curfew in the European sections of town.<sup>3</sup> Moreover, whereas the Criminal Code was administered in the Supreme and District Courts (depending on the seriousness of the offence), the Regulations were enforced through specifically designated Courts of Native Affairs and Courts of Native Matters.

The pursuit of colonial objectives sometimes entailed the conservation of certain aspects of customary practice (Fitzpatrick 1980). The maintenance of colonial authority required a certain degree of sensitivity to the impact of the introduced legal system upon established indigenous value systems and dispute settlement procedures. As the colonial administration benefited from the order secured by indigenous forms of social regulation, the task was not to eliminate them but to transform them in ways that best suited its wider objectives.

With the extension of colonial rule through law, the judges administering the Criminal Code inevitably had to deal with increasing numbers of Papuan and New Guinean defendants whose world view was framed not by the values of European society reflected in the Code but, rather, by the customary perceptions of their own traditional societies. An example would be the case of a sorcery killing, where the offender's law-breaking occurred under the influence of traditional beliefs and perceptions. In such a situation it

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3. The Native Regulations in Papua were first made under the Native Board Ordinance 1889 (No.9 of 1889) and later under the Native Regulation Ordinance 1908 (No.25 of 1909). In New Guinea the Regulations were called Native Administration Regulations and were made under the Native Administration Ordinance 1921 (No.21 of 1921). The two sets of Regulations were essentially the same in substance although the New Guinean Regulations generally carried harsher penalties. After World War II the Regulations were gradually pruned and some were abolished. In 1975 the first government of independent Papua New Guinea repealed most of the remaining Regulations following the recommendations made in the 1975 report of the Law Reform Commission: Native (Amendment) Regulations (Papua), No.63 of 1975; Native Administration (Amendment) Regulations (New Guinea), No.64 of 1975. On the impact of some of the Regulations on the daily lives of Papua New Guineans, see Wolfers 1975.

might be that the offender's customary beliefs not only exonerated his actions but, moreover, obliged him to do the prohibited act. A related issue was where the actions of the offender attracted the censure of both state law and custom. In this situation, the offender might be formally punished by the court and, thereafter be 'penalised' under custom by, for example, having to pay compensation to the deceased's kin in the case of homicide.

The practical response of the judges administering the Criminal Code was to take account of relevant customary perceptions and practices as a mitigating factor in determining sentence. This response and the manner of its implementation provide insights into the changing ideological role of law. They represent one of the ways in which the administration, while acknowledging the 'fact' of custom, sought to subordinate it to fundamental colonial objectives. This is evident in the practice of the judges of referring to wider educational objectives of the law in 'civilising' the colony. The criminal law is seen as an instrument for achieving attitudinal change as much as for attaining social control in a more coercive manner. Judicial policy was developed outside of any legislative framework and rested primarily upon individual notions of justice held by the judges and a broader concern with legitimating the rule of law. As Ottley and Zorn have pointed out, the judges in sentencing in cases involving custom developed a *modus operandi* "which permitted them to indulge simultaneously the contrary aims of strictly applying written law and lessening the injustice inherent in such application" (Ottley and Zorn 1983: 264-265).

Judicial policy was formalised rather belatedly with the enactment of the Native Customs (Recognition) Act 1963. Again, it is clear that custom is not here recognised as 'law' but as a 'cultural fact' which may influence the behaviour of 'natives'. Section 7 of this Act states that custom may be taken into account in a criminal case for the purpose of:

- (a) ascertaining the existence or otherwise of a state of mind of a person; or
- (b) deciding the reasonableness or otherwise of an act, default or omission by a person; or
- (c) deciding the reasonableness or otherwise of an excuse; or
- (d) deciding, in accordance with any other law whether to proceed to the conviction of a guilty party; or
- (e) determining the penalty (if any) to be imposed on a guilty party;



or where the court thinks that by not taking the custom into account injustice will or may be done to a person.

Section 6(1) of the same Act imposes a number of restrictions upon what constitutes custom for the purpose of section 7. Thus a custom will not be recognised where it would be repugnant to the general principles of humanity; where it is inconsistent with any legislative enactment; where its recognition would, in the opinion of the court, result in injustice or not be in the public interest; where, in a case affecting a child under 16, it would not be in the best interests of the child.

The reason for the restricted role of custom within the introduced criminal justice system does not lie, however, in the deficiencies of legislative provision. Rather it must be located within the wider processes of enforcing and extending the rule of law, whilst avoiding widespread feelings of injustice. The task of successive administrations, including post-independence governments, in this respect, has been that of establishing and consolidating legal hegemony.

## Sentencing, custom and colonialism

### *Judicial thinking*

The colonial judiciary in Papua New Guinea were not independent of the other arms of the colonial administration. At the bottom end of the judicial hierarchy the Kiap or Patrol Officer combined the roles of administrator, policeman and prosecutor, as well as those of judge and jury. At the top end, the Lieutenant-Governor of Papua for a long time combined important legislative, executive and judicial functions. It has also been noted that in the Supreme Court, which had unlimited criminal jurisdiction, "judges played a major role in the presentation of evidence in criminal trials because neither the accused nor the prosecution was represented by counsel" (Paliwala, Zorn and Bayne, 1978: 32). This blurring of the judicial and other governmental roles inevitably meant that those sitting in judgment were sensitive to the broader objectives of the colonial administration and were, perhaps, more inclined to administer justice in the light of these objectives.

The limited resources of the administration necessitated a practice of rule by consent rather than coercion in the maintenance and extension of control. Historians have noted how the particular manner in which eighteenth-century English criminal law was administered in

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the courts helped mitigate its more savage qualities (Hay, 1975). In his influential article "Property, authority and the criminal law", Douglas Hay stresses the importance of judicial discretion in sentencing in the reinforcement and extension of the state's authority through the rule of law:

... the law did not enforce uniform obedience, did not seek total control; indeed, it sacrificed punishment when necessary to preserve the belief in justice. The courts dealt in terror, pain and death, but also in moral ideals, control of arbitrary power, mercy for the weak. In doing so they made it possible to disguise much of the class interest of the law. (Hay 1975: 55).

Whilst the Criminal Code in colonial Papua and New Guinea and its administration before the courts could hardly be described as savage, the establishment of legal hegemony remained, and to an extent still remains, problematic. The sentencing practice of the judges, involving a mix of justice with mercy, may be seen from this viewpoint as designed to enhance the legitimacy of the introduced law. An opposing viewpoint would be that this practice represents an acknowledgement of weakness, a concession to the practical limits of state power during this period. Both viewpoints, however, draw attention to the partial and fragile nature of legal hegemony and both are premised on the long-term expectation that legal hegemony will be achieved.

The principles of sentencing initially employed by the judiciary were firmly based on a distinction made between expatriate and Papuan and New Guinean offenders. The Papuan and New Guinean offender was to be dealt with according to his degree of 'sophistication' and 'civilisation'. This approach was adopted with an explicit acknowledgement of the wider 'educational' impact upon the indigenous population of such a practice:

The problems of punishment in a European community are to a great extent confined to the immediate effect on the community, but in the consideration of punishment as affecting native races, future results are of far greater importance than consequences which may have the effect of instant prevention but which would be deleterious to the race as a whole. (Gore 1929: 20).

The paper from which this quotation is taken contains one of the earliest statements of judicial sentencing policy in the Territories,

prepared in the late nineteen-twenties by a colonial judge. Gore's views coincide closely with those of the then Lieutenant-Governor and Chief Judicial Officer of Papua, Sir Hubert Murray. The essence of their thinking, which has had a significant impact upon subsequent sentencing policy, is an ethnocentric notion of social evolution with a state of 'primitiveness' at one end of the continuum and a state of 'civilisation' at the other. In the short term, during what Gore refers to as 'the evolutionary period', the severity of punishment to be administered to a particular offender will depend largely upon his location along the continuum. The heavier punishment is reserved for those closest to a state of 'civilisation', with the more lenient penalty being reserved for those closest to the 'primitive' end. Sir Hubert Murray elaborated on this in the following way:

...a native murder [is punished] with a term of imprisonment, varying ... according to the circumstances of the case, and particularly according to the standard of civilisation which the accused has reached.... A native of the Port Moresby villages would be hanged for a native murder, for he knows the law as well as a white man; whereas a native less familiar with our ways might get a term of five or seven years imprisonment, and another, who had hardly been brought under control, might get off with six months, and a thoroughly untaught savage might receive only a nominal sentence. (Murray 1925: 8586).

From this initial perspective, once the state of 'primitiveness' has been transcended and replaced by that of 'civilisation' there will no longer be grounds for the perpetuation of such a distinction, and the principles of punishment, like the law, may be applied along universalist lines.

The initial judicial approach to custom in sentencing practice helps account for the subsequent underdevelopment of custom in the official legal system of the independent state. This judicial approach has shown remarkable continuity despite the efforts of Acting Justice Narakobi during his brief spell on the bench. The practice has been for the courts to treat an offender's belief in and practice of custom as synonymous with his degree of unsophistication. If development is equated with increasing 'sophistication' then the role of custom will decrease as development takes place, or is believed to take place, and punishment will become more severe.

## Judicial practice

The cases to be examined here are chosen primarily because of their articulation of the relationship between the offender's degree of unsophistication and the appropriate sentence. Running through the judicial reasoning are two related concerns. Firstly, there is the broad concern to promote the legitimacy of the introduced legal system in the minds of those subject to it. Secondly, there is concern to discourage those customary practices which obstructed the establishment and development of a national system of law.

Although normally these concerns go hand in hand there are occasions when they come into conflict, as is illustrated in the distinction made by judges between homicides arising from the custom of 'payback'<sup>4</sup>, on the one hand, and those arising from customary beliefs such as sorcery<sup>5</sup> on the other. This distinction was

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4. The concept of 'payback' or retaliation is an important social principle in dealing with 'wrongs' in traditional Papua New Guinean societies. The form of 'self-help' resorted to depends as much upon the social context within which the wrongful act occurs as upon the nature of the act itself. 'Payback' or retaliation may express itself in at least two different ways. In its simplest and most obvious form, retaliation might take the character of direct physical violence, eg. the 'payback' killing. A more indirect form of retaliation would involve sorcery, the threat of which might act as a sanction for proper conduct.

Whilst the incidence of 'payback' killings has diminished with the extension of the state and its official court system, it still occurs and remains a serious threat to state authority in certain parts of the country (Gordon and Meggitt 1985: 246).

For further ethnographic references to 'payback' and retaliation see: Kaberry 1941-2; Lawrence 1965-6; Reay 1953; Hogbin 1952; Meggitt 1977; Gordon and Meggitt 1985; Encyclopedia of Papua and New Guinea 1972 (Vol.2): 632.

5. The practice and fear of sorcery are still fairly widespread in Papua New Guinea, even in non-remote areas and among those with formal education.

Legal control of sorcery dates from the Native Board Regulations (Sorcery) No.II of 1893 in Papua. These Regulations were succeeded by the Native Regulations in Papua and the Native Administration Regulations in New Guinea (see footnote 2 above). Section 80(1) of the Native Regulations pronounced that:

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Sorcery is only deceit, but the lies of the Sorcerer frightened many people and cause great trouble, therefore the Sorcerer must be punished.

Sub-section 2 provided a maximum penalty of six months imprisonment for a variety of sorcery-related offences.

The current, and most comprehensive, legal provisions relating to sorcery are contained in the Sorcery Ordinance 1971 which was introduced to "prevent and punish evil practices of sorcery". The Ordinance, which now appears as Chapter 274 of the Revised Laws of Papua New Guinea, distinguishes between "forbidden" and "innocent" sorcery, making the practice of the former a criminal offence. 'Innocent' sorcery is defined in the First Schedule of the Ordinance as sorcery which is regarded by custom as "legitimate or harmless and not offensive in all the circumstances of the case". 'Forbidden' sorcery is defined under Section 4 as "sorcery other than innocent sorcery".

The legal recognition given to sorcery and the judicial practice of imposing light sentences upon those convicted of killing alleged sorcerers reflects official acknowledgement of the pervasive belief in and fear of sorcery among Papua New Guineans and the condemnation of and harsh punishment customarily imposed upon 'evil' sorcerers, and, in particular, those suspected of unjustifiable killings (Knauft 1985). Sir Hubert Murray, Lieutenant-Governor of Papua 1908-1940, explained the rationale behind the provisions relating to sorcery under the Regulations as follows:

The penalty imposed is perhaps sufficient to act, to a certain extent, as a deterrent, but is quite insufficient as a substitute for private vengeance.... The difference is that the Papuan looks upon sorcery as reality, whereas the European (as a rule) does not; to the former no punishment would be sufficient short of death, or at any rate a long term of imprisonment, either of which seems to us to be out of the question in the case of what is after all, according to our view, only an imaginary offence. (Murray 1912: 203)

In a review of sorcery in East Sepik undertaken on behalf of the Law Reform Commission in 1978 (L.R.C. 1978), Bernard Narokobi likewise remarked on the widely held view that the introduced system of law was not harsh enough upon the practitioners of 'evil' sorcery:

Severe punishments such as hangings and public killings are believed by many to be the only effective way of eradicating this menace. At public meetings in Maprik, Drakikir and

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elaborated upon in the case of *Secretary for law v Ulaio Amantasi and Others* ([1975] PNGLR 134).

Ten people had pleaded guilty to the murder of someone they believed to be a sorcerer and to have been responsible for the deaths of eleven people from the area. The trial judge noted what he termed the 'primitiveness' of the offenders, the recency of their contact with the outside world, and the strong beliefs in sorcery in their area, and found that they were acting in the interests of the preservation of their small society in killing the alleged sorcerer. Each accused was sentenced to an effective period of seventeen months imprisonment. The Secretary for Law launched an unsuccessful appeal to the Supreme Court against the inadequacy of the sentence. Prentice S.P.J., after referring with approval to the writings of Sir Hubert Murray and Gore J., proceeded to distinguish between 'payback' killings and sorcery killings. His view was that the latter forms of homicide merited lesser punishment and more account being taken of the degree of unsophistication of the offender, than in the case of a 'payback' killing:

It seems that in all Papua New Guinea societies the killing of an acknowledged sorcerer who has repeatedly been responsible for or has boasted of causing deaths, has been regarded as a benefit to society (unlike the payback which rebounds not on the offender personally but with cruel uncertainty, possibly on some innocent member of his line). The punishment of sorcerer killers has always been comparatively light. The judges imposing it have no doubt been conscious they were administering an imposed law which in this aspect receives little or no

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Yangouru, the popular views for stopping sorcery were capital punishment, life imprisonment or banishment from the village. (LRC 1978: 21).

There is an extensive literature on sorcery and witchcraft in Papua New Guinea. It has recently been suggested that, with some notable exceptions (Patterson 1974-5), existing theoretical approaches to sorcery in Papua New Guinea have been over-reliant upon models derived from African anthropology (Stephen 1987). It has been further suggested by the same writer that this tendency has served to obscure and distort some of the basic differences in the social functioning of sorcery in Oceania and Africa respectively. More recently attempts have been made to overcome this perceived weakness in the ethnology of Melanesian societies (Zelenitz 1981; Lindebaum 1981; Stephen 1987; Knauft 1985).

approbation from primitive villagers, comparable to the relief which many of them would receive from the elimination by that law of the payback. (id. at 136)

As Prentice S.P.J. remarked, the sentences imposed upon 'sorcerer killers' has been comparatively light when compared to those imposed upon 'payback' killers.

In *R. v Asis and Bitiman* ([1970] SC No.559), the two accused had been convicted of murdering a man who was widely reputed to be a sorcerer in an area which had been subject to administrative control for a period of only ten years. In sentencing them to three years imprisonment with hard labour, Clarkson J. referred to the 'civilising' approach in the following way:

It is of course, necessary that the prisoners and their kinsmen should grow to accept the law of the larger community of which they unknowingly form a part and in my view at this stage this is best achieved by a sentence intended to be educative and corrective rather than one calculated only to deter or to bring retribution. (id. at 2)

In a case involving similar facts, *R. v Leko* ([1970] SC No.560), where the influence of the administration was even more recent, the same judge imposed a sentence of two years with hard labour.

On the other hand, the courts have consistently taken a harder line when the custom involved has been that of 'payback' killing. Heavy penalties have been imposed despite the existence of mitigating factors such as unsophistication and recent contact. This has been particularly true of those cases where the deceased was an 'innocent victim' who had in no way individually provoked the assault against him.

The introduced criminal law and its system of administration differ substantially from traditional forms of dispute settlement in their insistence upon the attribution of individual responsibility and their rejection of the collective character of traditional retaliation. 'Payback', which might take as its object someone other than the original wrongdoer, offends judicial conceptions of individualised justice. Whereas the alleged sorcerer who is killed is, at least, individually a focus of disharmony within the community, the payback victim would appear to be chosen on a purely arbitrary basis. It thus becomes one of the worst examples of homicide the proverbial 'senseless killing' and has to be dealt with severely. However, it may

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also be that the judicial severity arises more from the perceived challenge to the state's claim to the 'monopoly of the legitimate use of physical force' within the country: the communal and legitimate character of the violence constitutes the challenge. In such cases the courts have shown little hesitation in subordinating the 'civilising approach' to the more pressing needs of state authority.

In *R. v Lakalyo Neak and Others* ([1971] SC No.632), the offenders, who were ignorant of the ways of government and still strongly influenced by their traditional perceptions, had carried out a payback killing of an innocent victim. In sentencing them to hard labour for life, Clarkson J. remarked:

This case will illustrate quite clearly the degrading and anti-social tendencies of the custom of payback which perpetuates violence and inhibits the development of a unified society. (id. at 1)

In *R. v I'uketapi and Another* ([1971-2] PNGLR 44), the two offenders were convicted of the wilful murder of another man. The victim had previously been acquitted of the killing for which he had in turn been murdered. His killing, which occurred whilst he was in custody in respect of another matter, was in accordance with the custom of 'payback' in the accused's community. The trial judge found the act of 'payback' to be "a challenge to the administration of justice in the Territory" and went on to sentence the accused to hard labour for life. In imposing this sentence rather than the death penalty, which he referred to as a form of "judicial payback", he stressed the role of the court in encouraging "acceptance of the general law as a step towards a more orderly, humane and unified society". The killing of the victim after he had been found not guilty under the official system of criminal justice and whilst still in state custody is a stark example of the conflict between aspects of traditional systems of dispute settlement and that of the state.

As the state has extended its rule there has been a progressive narrowing down of the criteria of 'unsophistication' as a mitigating factor, particularly, but not exclusively, in payback cases. In *R. v Bulda Melin and Others* ([1973] PNGLR 278) the prisoners had pleaded guilty to wilful murder as a consequence of their 'payback' killing of the deceased in a fairly remote part of the country. The trial judge, taking into account that the prisoners were "primitive" and "simple tribesmen", passed sentences ranging from two years and eight months to three years and four months. The Secretary for Law appealed against the inadequacy of the sentences. The Supreme Court,



in discussing degrees of "primitiveness", noted the proximity of the offenders' village to Mount Hagen, their exposure to regular patrols, and their ability to speak some English, and distinguished between them and "people from very remote areas with only minimal contact with Administrative officers". The appeal was upheld and heavier sentences imposed.

### Nationalism, independence and the reconstruction of custom

The governing ideology of the period between self-government (December 1 1973) and Independence (September 16, 1975) has been characterised as one of "economic nationalism" (Paliwala, Zorn and Bayne 1978: 46). The coalition government employed the law to pursue the objectives outlined in the Eight Point Improvement Programme of October 1973. Thus, for example, control over foreign investment was attempted through the establishment of the National Investment and Development Authority in 1974, whilst indigenous enterprise was encouraged under the Land Groups Act 1974 which enabled traditional groups to hold land as a corporation and work it as a group.

Many nationalist leaders believed that law had played a central role in facilitating colonial rule and made clear their intention of reappropriating law for their own purposes. The debates about the future role of law concerned both the alien and instrumental nature of colonial law, and the need to develop an indigenous legal system. These twin concerns were well expressed by Mr. John Kaputin, the first Papua New Guinean Minister of Justice:

Law only has legitimacy when it comes from the people and responds to their requirements. This truth by itself is enough to question the legitimacy of the Criminal Code.... As Minister of Justice I am obliged to ensure that our country's present laws are altered, and our future laws are framed, to fit our people and our society.... (Kaputin 1975: 11).

Such sentiments were taken up and given substance in the recommendations of the Constitutional Planning Committee which had been established to devise an autochthonous Constitution for Papua New Guinea. The final report of the committee expressed in metaphorical language the decision to break from the colonial past and to reconstruct society on the basis of traditional Melanesian values:

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We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundations of our ancestral land. (C.P.C. Final Report 1974: 1, 98 2/13).

*The constitutional framework*

Section 9 of the Constitution identifies the sources of law. These are: the Constitution; Organic Laws; Acts of Parliament; Acts of Provincial Legislatures; Subordinate Legislation; Emergency Regulations; Laws made under or adopted by the Constitution; the Underlying Law. The Underlying Law is the unwritten law to be applied on any matter on which there is no legislation. Section 20 (1) provides that an Act of Parliament shall declare and provide for the development of Underlying Law. No such Act has yet been passed. Section 20 (2) further enacts that until such time as an Act of Parliament provides otherwise, the framework given in Schedule 2 shall govern the manner of the prescription and development of the Underlying Law. The purpose of Schedule 2, according to section 21, is "to assist in the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea". Section 21 states that a Law Reform Commission shall be established for that purpose. Schedule 2.1 provides that "custom is adopted, and shall be applied and enforced, as part of the underlying law" except in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity. Schedule 2.1(3) declares that an Act may provide for the proof of custom, regulate how custom is to be recognised and enforced, and provide for the resolution of conflicts.

By Schedule 2.2 the adopted common law and equity of England are also made part of the Underlying Law unless inconsistent with the Constitution or a statute, or inapplicable and inappropriate to the circumstances of the country from time to time, or inconsistent with custom as adopted under Schedule 2.1.

Under Schedule 2.3, where a court is dealing with a matter "where there appears to be no rule of law that is applicable or appropriate to the circumstances of the country", then the court, and in particular the Supreme Court and the National Court, is under a duty to formulate an appropriate rule as part of the Underlying Law having regard to: the National Goals and Directive Principles; the Basic Rights set out in Division III.3 of the Constitution; analogies from statutes and custom; legislation and cases of countries with a

similar legal system; relevant Papua New Guinea decisions; and the circumstances of the country from time to time.

At first glance, this elaborate Constitutional scheme appeared to support the role envisaged by the Constitutional Planning Committee for custom in the independent legal system. The practice, however, has been rather different, leading one commentator to remark that:

The courts returned to business as usual after the formalities of Independence, applying the common law without hesitation or indeed consideration, as required by Schedule 2 and almost entirely ignoring the National Goals and Directive Principles and customary law. (Weisbrot 1982b: 279).

The same author, David Weisbrot, has attributed the underdevelopment of custom in the independent legal system to weaknesses in the constitutional scheme itself. Firstly, the National Goals and Directive Principles, which call for "... development to take place primarily through the use of Papua New Guinea forms of social and political organisation" (No.1(6)), are located in the Preamble of the Constitution and made non-justiciable. This, according to Weisbrot, has rendered them largely ineffectual. Secondly, despite the Constitutional Planning Committee's recognition of the need for a 'thorough-going review' of colonial legislation, the Constitution makes no reference to this matter and effectively adopted all pre-Independence laws (Schedule 2.6) as well as a number of English and Australian laws (Schedule 9). Thirdly, the sources of law provisions, especially S.9 and Schedule 2, subordinate the task of developing an indigenous jurisprudence to that of applying adopted written law. It also affords English common law and equity 'equal' status to Melanesian custom. Finally, Weisbrot disapproves of entrusting the development of a national underlying law to the judiciary (Weisbrot 1982b: 272). In a more recent review of the case-law, Roebuck, whilst acknowledging the shortcomings of the Constitutional scheme, expresses cautious optimism (Roebuck 1985).

Like many legal commentators, Weisbrot and Roebuck locate the problem (and hence its solution) within the law itself and the procedures for its administration. Whilst the Constitutional scheme is undoubtedly flawed in the manner they outline, a broader historical understanding of the nature of the relationship between custom and law in Papua New Guinea raises more fundamental issues concerning the changing role of the state and the maintenance and extension of its rule through law. A straightforward comparison between the promise and reality of legal practice since the days of Independence

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risks taking political rhetoric at face value and, more significantly, of ignoring the important continuities from the colonial period up to the present. Nor is it only in Papua New Guinea that one finds such a marked dichotomy between legal theory and practice.

The prevailing judicial approach to custom remained firmly intact despite the detailed changes advocated by the Law Reform Commission, and the subsequent efforts of the former Chairman of the Commission, Mr. Bernard Narokobi, to adopt a radically different approach during his brief spell on the bench. These two initiatives will now be examined in turn.

*Law Reform Commission*

The Law Reform Commission was established in 1975. Its role was "to assist in the development of an indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea", as the Constitution, section 21, expressed it. It set about its task with considerable energy and by 1977 had produced seven reports. Report No.7 concerned 'The Role of Customary Law in the Legal System' and the thrust of its arguments and recommendations falls squarely within the spirit of the earlier Constitutional Planning Committee Report. Part 1 of the Report dealt with the Underlying Law. The Commission produced a draft Underlying Law Bill designed to ensure the primacy of 'customary law' within the Underlying Law whilst relegating the role of the common law and other foreign law to 'exceptional circumstances'. In introducing this Draft bill, the Commission was highly critical of the post-Independence performance of the judiciary:

It was hoped the common law of Papua New Guinea would quickly develop. Unfortunately this has not happened. The judges have moved very slowly, preferring to re-adopt pre-Independence legal rules or the English common law rules than to develop new rules to suit conditions in our country. The judges have spent little time considering whether the pre-Independence law or the English law is really appropriate to the circumstances of Papua New Guinea. (L.R.C. 1977: 10)

The recommendations made in Part II of the Report were aimed at enhancing the role of custom in the determination of criminal responsibility and at taking greater account of customary beliefs and practices in determining the disposal of convicted offenders. In respect of criminal responsibility, the Report made two radical proposals. Firstly, that a person who kills, or attempts to kill or does

a serious injury to someone while acting pursuant to customary law, traditional perception or belief, should be found guilty of an offence, but be given a punishment of not more than three years imprisonment. Secondly, where a person acting pursuant to such a belief or practice, does something which does not cause death or serious injury to another, he or she should be completely acquitted.

These proposals were accompanied by safeguards designed to prevent their abuse. The accused would have to satisfy the court, on a balance of probabilities, that he or she was acting pursuant to a custom at the time of the alleged offence and that the act or omission in question was justifiable under the custom. Moreover, the proposed defence would not apply in the case of 'payback' killings.

These recommendations were based on two related views. The first is a normative view:

[T]he criminal law of a country should reflect the perceptions and world-views of the people of that country so that the criminal law reflects their view of what is criminal behaviour and what is not. (L.R.C. 1977: 47)

The second view is a pragmatic one:

A criminal law which is significantly out of line with the perceptions of people will not be respected by them and will not achieve one of its major aims, that of deterring people from anti-social, criminal behaviour. (L.R.C. 1977: 47)

These views posit relationships between law and those subject to it markedly different from those examined earlier. The Law Reform Commission considers the law as a reflection of a 'popular will'. As this 'popular will' changes then so must the law if it is to maintain its legitimacy in the eyes of those subject to it. In line with the Preamble to the Constitution, sovereignty is seen as residing in the people both directly and through their elected representatives. This view echoes that of the 19th century German jurist Friedrich Karl von Savigny for whom law was an expression of the 'spirit of the people' (*Volksgeist*) (1831). In this sense law is seen as reflecting and expressing a whole, historically-evolved cultural outlook.

Whereas law ought to reflect the popular will, custom is assumed to be synonymous with it. The nationalist view sees custom as representing the community-generated body of shared values and practices, whereas the introduced law is viewed as representing the values and

procedures of an alien society. Custom is therefore represented as the most appropriate base upon which to build an indigenised legal system.

The Law Reform Commission also made other recommendations in relation to the determination of penalties and the imposition of alternative orders. In respect of penalties, the Report stated that the "courts should be able to take cognizance of the role of the community in the criminal law" (L.R.C. 1977: 63) and recommended that courts should be able to make community orders and compensation orders. It also rejected the policy of lighter sentencing as a solution to the conflict between the concept of criminal responsibility in the Criminal Code and that under custom. The objections to the practice of mitigating sentence in such cases reflect the Commission's broader views on law. To punish someone for doing something that was legitimate under custom was seen as the enforcing of law that, by definition, did not reflect the popular will, at least as far as the particular offender and his community was concerned. Moreover:

[A] criminal justice system which punishes people for things they do not consider to be wrong cannot be effective, respected and supported. (L.R.C. 1977: 60)

The more desirable and effective solution to this conflict, according to the Commission, lay not in rendering the alien values of the Code more palatable through mitigating sentences but, rather, through their replacement with customary values that did embody the popular will. Thus, for example, the recommendation that the offence of killing another whilst acting pursuant to custom be qualitatively less serious than other killings.

An interesting paradox is that the 'radical' position espoused by the nationalists proclaimed a passive and reflective role for law, whilst the judiciary had long advocated a more dynamic, social change orientation. The differences between the established judicial position and that of the nationalists is well illustrated in the conflict of views between the Supreme Court and Acting Justice Narokobi over the role of custom in criminal cases.

#### *Narokobi A.J. versus The Supreme Court*

The work of the German sociologist Ferdinand Tonnies is instructive in looking at the competing perspectives on social order of nationalist thinking and the conventional judicial approach. Tonnies (1957) sees

modern societies as based upon impersonal, instrumental and individualised social relations - *Gesellschaft* - which are reflected in juridical conceptions of individual rights and obligations, and in procedural due process. Traditional societies he sees as characterised by reciprocal social relationships, communalism and status ordering which he refers to as *Gemeinschaft*. The latter coincides broadly with Narokobi AJ's concept of 'community' and its relationship to law and custom.

A good example of the conflict in perspective in the courts of Papua New Guinea, and the case which aroused the greatest controversy both within and beyond the legal profession, is *The State v Aumane, Wapulae and Others* ((1980) N. No.233). The four accused, who came from a remote village in Enga Province, had pleaded guilty to the killing of a woman they believed to be a sorceress responsible for at least twenty deaths. The killing occurred when the deceased attempted to escape from the custody of the accused who were escorting her to a government station to be dealt with under state law. After a lengthy examination of specific factors affecting sentence, Narokobi A.J., sitting in the National Court, imposed a term of imprisonment of three months with hard labour on each of the prisoners and ordered each of them to pay five mature pigs to the deceased's younger son immediately upon release.

Identifying himself as a 'Melanesian judge', Narokobi began by stating that there are three basic interests to be balanced in determining sentences in such cases. Firstly, there are the interests of the state with its institutions and agencies of law creation and law enforcement as well as its body of national law. Secondly, there are the interests of the particular community to which the offender belongs: tribe, clan, or village. Thirdly, there are the interests of the individual offenders themselves and the impact of any particular sentence upon them. Each of these interests must be considered and balanced in arriving at a sentence.

He goes on to challenge the conventional judicial rationalisation that the criminal law and its administration is an educative process:

The purpose of the criminal law is not to educate people, but to state very clearly that certain kinds of actions are forbidden by the law itself and are therefore made crimes or offences. And the reason is really quite simple: to announce to the society that these actions are not to be done and thus to ensure that fewer of them are done. (id. at 5)

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Whilst it is not immediately clear what the difference between the two purposes is, a look at Narakobi A.J.'s broader concerns helps clarify the distinction being made. The society referred to is the immediate society of the accused. State law contains the prescriptions of the nation-state and conveys them through criminal proceedings to the numerous and diverse societies that constitute the nation. Narakobi's objection to using criminal law as an educational instrument is that this approach assumes it is desirable and feasible to replace traditional values and practices with the western values embodied in the official legal order:

In the education of the traditional people, the assumption is that the so-called primitive people need to learn the civilised ways.... In my respectful view the proposition that the so-called primitive man should be incarcerated within a period sufficiently long to enable him to learn the civilised man's law is highly paternalistic and somewhat loaded with Eurocentric self-righteousness. (id. at 6)

His proposed solution is a 'multiplicity of values' approach which attempts to reconcile the first two sets of interests to be balanced in such cases. 'National values' ought to be promoted but in a way that does not offend the values of the offender's community:

Any civilised nation like Papua New Guinea in my view must be mature enough to accept a multiplicity of norms in its national legal universe. If this seems a distasteful principle of law in the Western jurisprudence, then it must be a unique Melanesian concept of justice as it springs from our ethnic and cultural diversity within a nation state. (id. at 11)

This approach differs markedly from the prevailing judicial approach, as the subsequent appeal against the inadequacy of sentence confirmed. One implication is that the values of each offender's community must be identified and then utilised in determining the appropriate disposal of the offender. Such an approach runs counter to the principle of parity in sentencing. At a more general level it violates the ideal of universalistic legal administration in accordance with the rule of law. It was this broader consideration that appears to have informed the earlier decision of the Supreme Court in Constitutional Reference No.1 of 1977 (*Poisi Tatut v Chris Cassimus*, [1970] PNGLR 295) that custom as part of the Underlying Law must mean "custom obtaining throughout the country". Moreover, the conventional judicial approach to mitigating factors tends to be offender-centred. It concentrates upon the particular circumstances



and characteristics of the individual offender rather than abstract notions of 'community'.

The Supreme Court upheld the Acting Public Solicitor's appeal against sentence holding that the sentences imposed by the trial court were inadequate and, moreover, that the order directing the payment of pigs as compensation was made without jurisdiction and should therefore be set aside. The five judges hearing the appeal reiterated their commitment to the established judicial practice of taking cultural beliefs, such as the belief in sorcery, into account as mitigating factors in accordance with the provisions of the Native Customs (Recognition) Act.

The differences between the views of the Supreme Court and Narokobi A.J. on some of the broader issues raised by the latter, although not directly dealt with are implicit in the following excerpt from Kapi J.'s judgment:

The purpose of criminal law, like the purpose of customary law in the village, is for the protection of society. The society is made up of individual members. In achieving the purpose of criminal law, regard must be given to the protection of the individual. The individual has constitutional rights which must be protected. However, we should not be so preoccupied with the rights of the accused or prisoner that we forget the rights of the innocent members of our villages, tribes, cities and the country who are entitled to protection against criminal behaviour; all these considerations must be carefully balanced. (*Acting Public Prosecutor v Uname Aumane and Others*, [1980] PNGLR 510: 538).

It is apparent that for Kapi J., the main difference between custom and the criminal law lies in the size of the constituencies that they regulate. He sees the primary social and legal unit addressed by the criminal law as the individual, whether his or her immediate environment be the village, the tribe, the city or the nation as a whole. Thus, the concept of 'community' which is given priority in Narokobi's thinking is diminished in this second formulation, becoming one amongst many social contexts coming between the individual and the state. (Compare Cotterrell 1984: 126.)

Another case illustrating the differences between Narokobi A.J. and his brother judges is *The State v Nitak Mangilonde Taganis of Tampitanis* ((1980) N. No.270; reported on appeal as *Acting Public*

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*Prosecutor v Nitak Mangilonde Taganis of Tampitanis*, [1982] PNGLR 299). The accused had pleaded guilty to the murder of a fellow clansman. The deceased was killed after he failed to make an adequate payment of compensation following the mistaken spearing of the accused's father during an earlier tribal fight. Following the victim's death, the accused's line in accordance with customary practice paid out K1,102 and 160 pigs. This compensation was accepted by both sides as adequate.

State counsel referred the Court to earlier Supreme Court decisions concerning sentencing principles, notably *Acting Public Prosecutor v Tumu Waria of Yogos* ([1977] PNGLR 170).<sup>6</sup> In that case, the Court cautioned that an over-emphasis on the traditional ways of the community of the accused and the degree of his sophistication would undermine the role of the Court in upholding the law of Parliament. Narokobi A.J.'s main concern was to reconcile his duty to impose punishment upon the individual offender under state law with the fact that restitution between the two disputing communities had already been achieved through the payment of customary compensation. Commenting on the failure of the Criminal Code to acknowledge customary compensation as a form of punishment, he remarked:

If the Criminal Code has not specified compensation as a form of punishment, then it is only because the Code was drafted by foreigners who had no perception of Melanesian society. The often rash, sometimes haphazard and blind application of European morality as the unspoken basis of the written law, at the expense of Melanesian sense of justice, morals and punishment, leads to anarchy and moral vacuum. In the long run, races and cultures are destroyed. ((1980) N. No.270 at 8)

In his judgment, Narokobi A.J. rejects the view of the role of the court in Papua New Guinea as a coercive device whereby the state imposes its will upon the people. Rather, he sees it as a consensual forum in which people actively participate in restoring harmony in communities disturbed by law breaking:

It should be a forum for the people to rectify wrongs amongst themselves and as a forum for the people to use to regain distorted equilibrium brought about as a result of law breaking. Offenders and offended alike must be given incentives to

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6. Also referred to: *Public Prosecutor v Yapuna Kaso*, [1977] PNGLR 209.

participate in law enforcement. As democratic subjects, the people are entitled to exercise positive efforts for achieving justice and maintaining order amongst themselves. (Id. at 9-10)

It is clear that Narakobi A.J. remains concerned with the impact of law and law breaking upon the particular community of the offender and offended. One way of moulding law enforcement to the needs of a given community is, in his view, to involve the community in the administration of justice in its area. This parallels much of nationalist thinking about the establishment of village courts.

The sentence eventually imposed was two years, nine months imprisonment. In arriving at this term, the trial judge stated that, were it not for the payment of compensation, he would have added an extra year's imprisonment. An appeal against the inadequacy of sentence was lodged by the Acting Public Prosecutor. This was upheld by the Supreme Court who substituted a sentence of six years. Whilst Kidu C.J. and Kapi D.C.J. were agreed that customary compensation is a matter that may be taken into account in sentencing in homicide cases, the third judge, Pratt J., was more reticent:

I have often wondered whether the grafting of customary compensation onto the introduced requirement of sentencing to imprisonment for a term of years in homicide cases may not contain an inherent incompatibility of concepts which can never be really resolved. ([1982] PNGLR 299 at 305)

Pratt J.'s reservations arise from the lack of detailed knowledge about the practice and role of customary compensation in Papua New Guinea. He raises the familiar issue about the practice not being uniform throughout the country. The potential for abusive and oppressive practices by the more powerful and affluent groups is also mentioned. He doubted whether "because custom must be taken into account under the Native Customs (Recognition) Act, such requirement directs that payment of compensation in homicide cases must be reflected in the matter of sentence". (id. at 306)

*Recent cases: 'the civilising mission' fulfilled?*

The most recent cases of the Supreme Court tend to confirm a hardening in the approach of the judges in sentencing offenders whose actions were influenced by customary beliefs and practices. It is now apparent, for example, that a person who commits a 'payback' murder in accordance with custom is entitled to no reduction of

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sentence because of that custom. This development fits in with the philosophy of punishment articulated by Gore and Murray in the nineteen-twenties. Their view has had considerable impact upon judicial thinking, past and present.

As recently as 1984, a Supreme Court judge presented the following view of punishment which clearly bears the hallmark of the evolutionary perspective:

It is true that in the past the Court has been imposing a moderate range of punishments because the people at that stage were very much the product of their traditional law and culture, that they could not yet control their violent nature because they could not have yet shaken off the blood lust of ages .... However, we have now advanced into the modern era and the people have had the benefit of western civilisation for some time now.... So the evolving stage of society has now come where strong penalties have to be levied which would be appropriate to the circumstances, which would not have been ... effective and meaningful in the early stages. (Supreme Court Reference No.1 of 1984, SC 280: 55, per Kaputin J.).

This hardening in judicial attitudes parallels a number of 'law and order' initiatives in other branches of the state, some of which are aimed at deterring the spontaneous and violent resolution of disputes. (Gordon and Meggitt 1985; INA and IASER 1984: Vols. I&II).

In the recent case of *Public Prosecutor v Apava Keru and Public Prosecutor v Aia Moroi* ((1984) SC No.289), the Public Prosecutor appealed against sentences of six years imposed upon two men who had pleaded guilty to charges of wilful murder. The facts were that the two respondents were villagers from the Goilala area of Central Province which had been under administrative influence for many years. The first respondent killed his daughter's de facto husband following an argument. The second respondent, who was the father of the de facto husband, killed the son of the first respondent by way of 'payback'. His victim was entirely innocent and ignorant of the first murder.

A number of important points were made by the Supreme Court in this case. Firstly, they confirmed the practice of treating sorcery killings as a special case of wilful murder. On the authority of *Acting Public Prosecutor v Umane Aumane* ([1980] PNGLR 50), the Court said that in such cases the murderer merited a sentence of between ten years and life imprisonment.

Secondly, the trial judge Los J., had referred to the first respondent's lack of sophistication as a mitigating factor. He had used as authority the pre-Independence case of *R. v Lakalyo Neak and Others* ((1971) N. No.632) in which, amongst the extenuating circumstances identified and accepted by Clarkson J., had been the extent of the influence of customary beliefs and practices upon the prisoner. Los J. went on to say that although sophistication is a matter of degree, the principle that it is a mitigating factor remains valid after Independence. The Supreme Court, hearing the appeal, agreed with Clarkson J.'s decision in *Lakalyo Neak* but only on the ground that at the time of his decision the death penalty was mandatory in such cases. With the abolition of the death sentence in 1975 considerations which were previously considered sufficient to justify not imposing that penalty were, in the Supreme Court's view, no longer necessarily sufficient to reduce what would otherwise be an appropriate penalty for 'payback' murder.

Thirdly, the Supreme Court considered the rationale for the practice of imposing less severe sentences upon unsophisticated persons. They characterised this as consisting of two considerations. First, the notion that the less sophisticated a person is, the less developed will be his or her sense of right and wrong and ability to control the passions. Second, the unsophisticated offender is ignorant of the existence of Government and official procedures of dispute settlement. Whilst agreeing with the relevance of the second consideration, the Supreme Court rejected the first on the ground that an individual's degree of sophistication is unrelated to his or her moral or spiritual qualities. Thus lack of sophistication is now acceptable as a mitigating factor only in respect of the diminishing category of persons who come from such a remote part of the country that they are unaware of the existence of government and its institutions. Applying the second consideration to the facts in this case, the Supreme Court held that neither of the two respondents would qualify for a reduction in sentence.

Finally, the Court held that "there should never be a reduction in any case for the custom of payback". This conclusion rested on the legal argument that recognising 'payback' "would not be in the public interest" under S.3 of the Customs Recognition Act (Ch.19), that it is contrary to the "general principles of humanity" under Schedule 2.1

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of the Constitution and, moreover, it is inconsistent with S.35 of the Constitution, which provides for the "Right to Life".<sup>7</sup>

The Court further referred to the state's interests and, in particular, its exclusive power to process and punish murderers. Non-state forms of retaliation, such as 'payback' killings, are represented by the Court as posing a real challenge to state authority:

[I]n all sovereign states the power to punish for murder is vested in the government which through its police force and courts catches the wrong-doer, ascertains if he committed the crime and the level of his culpability, and punishes him. The alternative, to allow the victim's relatives or tribe to redress the wrong, leads to anarchy. (id. at 9).

The appeal in this case was successful and sentences of fifteen years and life imprisonment were substituted. The decision represents a significant narrowing of the criteria of unsophistication as a mitigating factor along the lines indicated.

This approach was confirmed and further developed in the case of *Public Prosecutor v Sidney Kerua and Billy Kerua* ((1984) SC No.290). The facts here were that Sydney Kerua's estranged wife, Veronica, was living with a new man, Benedict Mali. Sydney and his brother Billy, along with eight or nine clansmen, went to Mali's house, forcibly took Veronica and Mali away with them and later subjected them both to brutal assaults. As a result of these assaults, Veronica died. Sydney Kerua received a total effective sentence of five years for the murder of his wife, wounding Mali with intent to do grievous bodily harm, and for depriving Mali of his liberty. Billy Kerua received a total effective sentence of two years nine months for the manslaughter of Veronica, wounding with intent to do grievous bodily harm, and depriving Mali of his liberty. The Public Prosecutor appealed against these sentences imposed by the trial judge.

The trial court had heard evidence of the local custom in respect of adultery. This involved killing both the adulterer and the adulteress and, after mutilating the body of the adulteress, throwing her into the river. The trial judge, Amet J., took into account the fact that

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7. The Supreme Court accepted that provocation could arise in some cases. However, the Court apparently restricted provocation to the case where the offender had killed the first killer rather than an 'innocent victim'.

the accused were strongly influenced by this custom in their behaviour.

The Supreme Court disagreed with this reasoning on the ground that the custom is not in the public interest under section 3 of the Customs Recognition Act (Chapter 19). In addition, this custom was found to be contrary to section 35 of the Constitution ("Right to Life") and repugnant to the "general principles of humanity" referred to in Schedule 2.1 of the Constitution.

In considering 3 of the Customs Recognition Act, the Supreme Court declared that to give a reduction in sentence because of a custom is to 'recognise' it within the meaning of section 3. This means in effect that no account whatsoever may be taken of a custom that is contrary to the public interest in the view of the Court. Custom can only be taken into account as a mitigating factor where it satisfies the broadly worded restrictions in the Customs Recognition Act and the Constitution.

The appeal in this case was upheld and total effective sentences of fifteen years and six years were imposed.

### Conclusion

This paper has examined the manner in which issues of custom have been dealt with in criminal cases before the superior courts in Papua New Guinea, both before and since Independence in 1975. It has been shown that despite the enactment of an autochthonous Constitution which envisaged the development of an indigenous jurisprudence, and despite the symbolic revaluation of custom during the immediate period of decolonisation, the judicial treatment of custom has remained remarkably consistent.

The early treatment of custom was not as 'law' but as a mitigating factor to be taken into account in sentencing. This practice represented an attempt by the courts to administer the introduced law in a universalistic fashion whilst minimising individual injustice. The 'civilising' approach articulated by the judges implied the progressive marginalisation of custom as the society 'modernised'. At another level, it would have been impractical for an administration with severely limited resources at its disposal, to rule through the introduced law without any concessions to customary beliefs and practices. In this respect, Gordon and Meggitt (1985) have pointed out the importance of securing the active co-operation of the

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colonised population of Enga in the process of pacification in that province. Moreover, the official criminal justice system has only had a partial impact upon Papua New Guineans for whom customary dispute settlement procedures, as they have been developed, have provided an important and continuing form of dealing with grievances.<sup>8</sup> The approach to custom in the cases examined indicates how the criminal law in Papua New Guinea has operated simultaneously at the levels of coercion and consensus in the pursuit of legal hegemony.

A major problem facing both the colonial administration and, to a lesser extent, the independent state has been the attainment of their legitimacy and authority in the face of well-established communal-based power structures. In this respect, law, both in terms of its substance and in the manner of its administration, has been an important instrument in the consolidation and extension of state authority. Judicial treatment of custom demonstrates a continuing concern with these legitimating objectives. The judges have been concerned to harness custom to wider state policy. Hence, the judicial distinction between 'payback' killings and sorcery killings: 'payback' has been perceived in political terms as a challenge to state authority

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8. The extent to which customary dispute settlement procedures prevail over the formal criminal justice system is difficult to evaluate. The INA Report expressed the general view that the state system prevails in the coastal areas, whereas in some parts of the highlands traditional-based forms of dispute settlement, particularly tribal fighting, continue to be widely resorted to:

In coastal areas with almost a century of contact with government, missions and commercial interests, the state's view of inter-group violence largely prevails. Whereas in the past disputes between the small polities of traditional times frequently flared into warfare..., today such warfare has ceased as a result of government force used in early colonial times and a long period of church and secular education. Sorcery, however, is another story ... belief in and recourse to its powers are still widespread in coastal areas.... [In the Highlands] today there has been a resurgence of intergroup violence and ... there is minimal influence of the state in rural order. (INA 1984 (Vol.1): 235)

For further references to customary dispute settlement procedures, see: Epstein 1974; Gordon and Meggitt 1985; INA 1984 (Vol.1); Meggitt 1977; Strathern 1972.



whereas 'sorcery' has been understood in a less threatening way and essentially in cultural terms.

As seen above, the vision of indigenised legal development propounded by some nationalist leaders is inconsistent in several fundamental ways with the prevalent judicial conception of the social function of criminal law and the nature of the wider social order it is designed to promote and protect. The pursuit of a Melanesian jurisprudence requires a fundamental reappraisal of overall development objectives in Papua New Guinea, a reappraisal that raises many complex issues going beyond legal development itself. In the absence of such a bold project, it is likely that custom will continue to play at most a peripheral role in the decisions of the higher criminal courts in this country.

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