The Melanesian Way: Law and Justice before the Arrival of the White Man

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Abstract

For the past thirty or forty thousand years the people of Papua New Guinea have lived in small communities. In that time they have developed a law and justice system based on a social contract which forbids murder, adultery, stealing and other behaviours that would endanger the quality of life in the community. The law was maintained by a community process administered by the Bigman and his council. Its primary aim was to mend the relationships and then find justice through apology, restitution, reconciliation and restoration of the victim and offender to the community. Payback and revenge certainly did occur but eventually the community settled its affairs according to this Melanesian way. The colonial powers did not know of the Melanesian way and introduced the Westminster system. A marriage of the two would be not only possible but the most suitable for Papua New Guinea.

In recent years it has become clear that the people of Papua New Guinea have suffered rather badly from published literature. This is especially true of books written before World War II, much of which has depicted Melanesians¹ as dirty, lazy, lacking any virtue, ignorant, unintelligent, depraved, and perhaps even sub-human.

Some of this was mere travellers' tales, to sell books to those who would enjoy the vicarious experience of an explorer in strange lands; some came from the belief of the inherent superiority of the Whiteman who could produce wondrous artefacts and feats of engineering that no mere native could achieve; some was the result of people trying to protect the special position of power over an unlettered people; and some the result of prejudice, ignorance and xenophobia.

Few of these people felt the need to balance the ledger and look at the dark side of their own history while they related tales of savagery and depravity, nor did they fairly consider their own civilization compared to the life style of the Melanesian. Writers ignored the fact that during the previous eight hundred years England had spent more than half of its years involved in war, either civil of external. They did not look at the child slavery considered necessary to run the mills and the mines. They seemed unaware of the injustice caused by the belief that property was used to define status and one's position in life, nor did

¹ In this paper the word Melanesian is used to cover all the different ethnic groups of Papua New Guinea not only the Melanesian groups.

they question the God-given-right of the nobility to protect their property rights and enjoy an extraordinary class distinction. They seemed unaware of the legal system, which had used, as a matter of course, the most dreadful tortures to gain confession and send victims to execution in a most cruel and barbarous manner. There was no reference to the horrors of the jails where men, women, murderers, common criminals, petty thieves and the insane were all herded in together with little supervision, nor to the fact that when the jails and the old un-seaworthy ships (hulks) were full of criminals, they exported them in their thousands to America and later to Australia. Nor did they allude to the common superstitious beliefs in which witches and warlocks ruled the night with their attendant spirits and the torture and burnings handed out to suspects.

Most Missionaries believed that without the assistance of Christianity, all Melanesians were doomed to everlasting hell. They believed that no one could achieve goodness without the commandments and the saving grace of Christianity. However, thinking Melanesians saw it otherwise. They knew that from time immemorial their villages were bound by a social contract, without which the peace and security of village could not exist. They knew that if people flouted the social contract the village would fragment and their enemies would come and annihilate them.

So when the missionaries told them that they did not have the commandments they could truthfully reply, 'Our own commandments are much stricter than yours. We believe in God and our ancestor spirits; we honour the elders of our community; we have laws against lying, stealing, cheating, murder and adultery just as you do. As well as this we have other laws which we consider the mark of true community people. Our laws require the people to share and maintain good relationships throughout the community even when they do not like some of their neighbours. The white men whom we see wandering through our lands do not keep your commandments and we see very few white men who show respect, share, or maintain good relations with their fellows. Finally we wonder at the inconsistency between the native laws passed to keep us in our place and the egalitarianism of the good news of Jesus Christ.'

It is a fact that most of the shameful behaviour that was reported by travellers, colonists and missionaries could be supported by many examples of murder, tribal fighting, infanticide, torture and the greed of powerful men just as it is in any community but it was not the norm in Papua and New Guinea. The normal villager lived a peaceful life, bound by the community, the garden and the customs of their people.

Melanesian law

Of particular interest in this paper is the fact that the colonial government and the officers of law enforcement in Papua and New Guinea failed to realize that the Melanesian people did already have their own laws and processes by which the laws were enforced.

Judge Gore in 1929 wrote:

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 establishment of a legal system of civilization to the exclusion of all else.²

Sir Hubert Murray, the Lieutenant Governor of Papua from 1906 to 1940, put forward the belief that the Papuan people had no law except 'private vengeance' on crimes committed against them as individuals. He related the most bizarre crimes that came to his attention as a judge and placed them in a context that would imply that they were the normal behaviours of all Papuans. In his writings for the public he portrayed Papuans as rather simple, grown up children with no moral values but their immediate needs and so they were given to all kinds of anti-social vice³.

It hardly surprising that he failed to see the reality of the village legal system because, as he himself admitted, (in his thirty six years in the country) he had picked up enough Motu to follow the exchanges in court but he never learned enough Motu to carry a conversation with Papuans except through an interpreter. ⁴ Given the fact that the local people are adept in telling people what they want to hear, one must be careful of some of Murray's reported anecdotes.

Origins and development of law and justice

The present form of law in the western world comes out of a variety of traditions and to examine it in context it is of value to go back to the earliest forms of law and justice.

Custom law goes back into the earliest history of the human race where people came together for mutual protection and lived as hunters and gatherers. Out of necessity and for their own safety, they developed the law of social contract. The earliest written record of law and justice was the Code Hammarubi (2380 BC). It was based on the social contract, which forbade such things as murder, rape, stealing, adultery, gossiping, cheating and lying within one's own community. The law had little to do with virtue and goodness, but was rather a necessary strategy to avoid conflicts and dissention, which would bring internal trouble and expose the people to external attack.

The Jews made no difference between the law of the land and the laws of God. Retributive punishments, such as stoning to death and mutilation were listed in Leviticus but were mostly ignored. Tribal behaviour was governed by the word Shalom that was not only a greeting but also an expression of their belief in justice and peace. Biblical justice showed a partiality towards those who were

² Gore, 1928-29 'Punishment for Crime among the Natives: Territory of Papua Annual Report', in *An Australian Colony in the Making*, P. S. King, London, p. 20.

³ Murray, 1925 Papua Today, Chapter 3 Crimes and Criminals, Murray, Hubert, 1925, King and Son, London, pp. 56-72.

⁴ Ibid.

oppressed and impoverished. It was clearly on the side of the poor, recognising their needs and those of the disadvantaged. Biblical justice showed a development of moral sense and reached its culmination in the saying of Jesus, 'You have heard it said an 'eye for an eye' but I tell you- do good to those who harm you.'

When the Romans came to power they built up a body of law, hoping to regulate and develop a unified system of justice common to the whole Empire. They introduced the idea that justice was a set of codes to settle conflicts between people groups and the state. A just decision was one which strictly followed the letter of the law but was not necessarily fair or morally right. Although Roman law was the rule in the towns, in the countryside and the villages, custom law based on the needs of the people was still the norm for the communities throughout the empire.

When the Roman Empire collapsed, Europe was invaded by barbarian tribes and, for the next five or six hundred years, Europe was the playground of wandering tribes who preyed on the rural population with murder, rape and arson.

Gradually the common people gathered around the monasteries and the fortified homes of men (the new nobles and petty kings) who had gathered small armies for their own protection and with them they struck an informal deal. The de facto agreement was 'We will be your servants if you will protect our people'. But in doing this, the common people lost their freedom and their land and from this time on, they lived under two sets of laws. Among themselves they still had the custom law but in their relations with the noble, the law of the ruler replaced their custom law. With the ruler the law was what he said it was to be, and where he had an interest he ruled in his own favour. He owned the people body and soul. They lost their land and their freedom and for their security against the armed tribes they paid the lord, rent in kind, in service to his house and to his army.

The Westminster system

This was the situation when the French Prince, William invaded England in 1066 and became King. The villages and small communities had to a great extent operated under custom law but under the powerful Norman King and his followers, all was lost to the King and he made his own laws to protect his property and his power and the power of his faithful nobles. The position of the Kings and the nobility was strengthened by collaboration with the church. Together they drew up the doctrine confirming the Divine right of Kings and the sin of anything that might offend his person. The law existed for the common people but the King and by extension the nobility were above the law.

When an offence such as murder was committed, the King's courts tried the offender and collected the fine paid in compensation from him because his act of murder had robbed the King of his property (one of his people). Thus the king's law denied the victim and his clan compensation for the loss suffered.

Courts took the place of custom law and lawyers took over the role of both victim and offender in settling disputes. The King (Crown) became the central leader for settling disputes and deliberately and forcibly corrupted the community justice system. It took the justice role and the ownership of justice away from the clan, thus making custom law approach impossible. Greedy kings and nobles were always short of money to fight their wars and so were quick to find their subjects guilty and often extracted double restitution or confiscated their whole property. Frequent attempts were made to control the excesses of the courts but generally the changes were to the advantage of the wealthy and to the disadvantage of the poor.

Over the years, the merchants and traders gradually forced the kings into granting a parliament. It was however a parliament of the rich and powerful not of or for of the common people. It was an instrument of the top levels of society to protect their property and serve their will. Property became the measure of nobility and the parliament used its instrument to pass its own laws for its own benefit. Laws were written to protect the power property and prestige of the wealthy classes against the lower classes and the common people with little education or advantages. Justice became the written law as interpreted by the professional judges and lawyers.

The main instrument of enforcing the law for the State was retributive justice. Vengeance punishment became the norm for dealing with crime and conflicts. Public brutal punishments served as a symbol of the power of the State and the way of showing its strength to the common people. To obtain confessions suspects were tortured and mutilated, hanging was a common punishment and abandoned ships were filled to overflowing with people sent to prison for petty theft.

The laws passed by parliament did not claim to be just but were directions to the judges and courts on how crimes should be punished or conflicts settled. This was the situation until well into the 18th and 19th Century. Reformers who saw the shocking injustice of the system, which favoured the rich against the poor, had attempted to change the laws and the punishments for a hundred years with little success⁵ because it was deeply entrenched and endorsed by a religious belief that each strata of society had its destined place as regulated by God himself. Those in authority believed that change would surely bring about rebellion against the state and the church.

Beginning in 1878 a conference of jurors met regularly over a period of twelve years searching for ways to bring more justice into the system. They had hoped to bring justice closer to the people by making the law more understandable and more available. Minor changes were made but there was little hope of obtaining any basic changes because those in power had a vested interest in the system as it stood and any changes, which threatened their power, prestige and property, were fiercely resisted.

 $^{^{5}}$ One success was the legislation against torture of suspects to get a confession in the middle of the 18^{th} century.

In the 20th century further changes have been made and laws passed by Parliament have made it possible to obtain an improved form of justice but the laws are still written to protect power and property and the courts are still bound by the letter of the law rather than justice.

Even today British Justice as it is practiced is less about justice than it is about a set of laws for the use of the courts to punish crime and settle conflicts between individuals and groups. It is not possible to legislate true justice. It is only possible to make the laws which are best suited to approach just dealings between people and leave the application of those laws to the court.

It is left to the custom law to attempt to insist that justice is fair to all parties.

History of law and justice in Papua New Guinea

Before the coming of the colonial government, Melanesian people lived in villages and small communities. As well as the basic social contract, Melanesians also had many positive customs to strengthen relationships. They considered their relationships with each other as the ropes which bound the community together in a strong social unit. Social obligations were based on the giving and receiving of gifts. When someone assisted another in building a house, providing food or performing a service there was an obligation to repay the favour. In this way every person built up a bank balance of hundreds of obligations and credits to others in the village. This net of relationships was a basic safety net for the village.

The ruling body in the village was the Bigman and his council of persons selected for their skills in various interest groups such as gardening, hunting, land boundaries, sorcery and relationships. Although the leaders were sometimes referred to as chiefs, it is useful to understand that while a chief had coercive powers to enforce his will, a bigman had only persuasive powers to gain cooperation. Thus he was usually the man most skilled in using the relationship network of debts and credits to attain his ends.

Because there was no formal paid social service or government, it was accepted practice for the bigman, who was himself the government, to take his share of wages from the advantages that his good government brought to the community. Although the Bigman himself decided what a just share for his services was, he was still under control. He lived in the village with his people who always had access to him and had a variety of sanctions to draw down on him if he became too greedy. The greedy Bigman could be pulled into line by the threat of sorcery, desertion or even physical violence.

The way in which he used his skills decided the quality of life in the village community. As with others he was bound by the social contract and a good Bigman normally followed the forms of restorative rather than retributive justice in administering the social contract.

When someone broke the custom laws or failed to fulfil his social obligations the village fell into factions and people began to argue and quarrel among themselves. To service the social contract Melanesian had developed ways of dealing with conflicts, known today as the Melanesian way. This was used whenever a conflict arose in the village or the gardens or fishing failed. Contests over fishing, hunting or property rights, sorcery and immoral behaviour as related to the social contract all could be treated by the Melanesian way. In spite of the Melanesian ideal there were times when insults, stealing, adultery or murder did bring instant retaliation against the suspects but there was still the image of the ideal community. In it the people would sit down and discuss among themselves what custom laws had been broken, what ancestral spirits offended or what social obligations were being ignored. The person or persons who had offended would eventually speak out, apologize and make a return gift to the community or victim who had been offended and the offender would be forgiven and returned to the community.

When this was not done fighting would break out in the village/community and there would be ongoing feuds and strife. It is certain that many villages and communities have been obliterated by disease or internal conflict over the years and their place and land taken by others because the whole community was in disarray.

It was the use of the Melanesian way or the failure to do so, that made the difference between communities, which were peaceful or violent and fractured according as their leaders behaved. If the leaders in the community settled their differences using talk, consensus and mediation, the village community was peaceful healthy and happy but if they failed everyone suffered.

The demise of custom law in Papua and New Guinea

When the colonial powers came to Papua and New Guinea they could not find any of the trappings of law and justice that had grown up in the West. There were no courthouses, no judges, no written laws and no lawyers. Because they could not see any of the evidence of the Western court they declared that the natives of Papua and New Guinea had no law - only customs. And projecting from their own experience of Western law, they believed that the village leaders interpreted them for their own benefit.

There is no doubt that many Bigmen did interpret the law and custom for their own benefit and that of their friends, but they had always to beware of the sanctions which the community possessed to bring them back into line.

However with the arrival of the colonial government the village bigman and his council were put aside and disempowered because the government did not even know of their existence. The government replaced the traditional structure with a village constable (or Luluai). The government administrators believed that their method was a success, because it provided access to the villages by the Patrol officers and the Kiaps. However the truth was that the government representatives in the village could not operate effectively. The Luluai or

village constable, unlike the bigman, was a single person with no support group and it was very difficult for any Melanesian to work without a support group. The loss of powers of the bigman and his council weakened the internal processes of law and justice in the villages and in only a few places has this been recovered. The effects of this are illustrated in today's lack of control in villages and town settlements.

Custom law

Custom law is the process, which concentrates on bringing a peaceful solution to both parties and the community. There is a ritual shame and punishment of the offender, apology, restitution, forgiveness, and reconciliation, which reunites the community through a ceremony of forgiveness.

An example is perhaps the easiest way of understanding the Melanesian way of restorative justice for dealing with crime.

John Tompot is an ordinary villager whose education never went beyond Grade 6. He is chief of Toitoi, a hamlet of about eight houses, which remained neutral during the Bougainville crisis of the 1990s; it did not join either the Bougainville Revolutionary Army (BRA) or the Resistance.

During the crisis, we couldn't call on our village courts to resolve the conflicts. However I knew that there was a way to resolve conflicts handed down from our ancestors that the elders used to talk about. I received some training from an NGO and began using the old way as best I could.

It was soon after this training that a Resistance commander approached me for help. He was being accused of murder, which would lead to compensation claims, damage to his good name and retaliations by the community. The mediators arranged a meeting with the Resistance commander and the mother of the dead youth who was leading the accusations. (The whole village attended the meeting.) At the meeting, the mediators assisted everyone involved to explain clearly what had happened. After many hours of discussion, it became apparent that the Resistance commander had provided the gun used in the murder but had not been involved in it himself. He also revealed the names of the three young men who actually murdered the youth. The meeting ended when the murdered youth's family agreed to pay K10 as a mark of apology to the Resistance commander. This small amount of money was acceptable because the victim's supporters agreed that the Resistance commander did not kill the youth and wanted to provide some sign that they recognised this

Three days later, the mediators arranged a separate meeting with the offenders and their parents including village elders. More people from the same village also attended. First of all, we explained what the Resistance commander had said. Then one of the boys stood up and said: 'Yes. We were the ones who killed that boy. We cannot hide anything. We shot him

when we were patrolling on the road. It was about the middle of the morning when we were about to reach their village. The youth was trying to run away and a dog was barking at us. Suddenly I fired at him because we believed he was a BRA soldier trying to run in order to get his rifle and shoot us'. (Their small village was suspected of being a BRA base.)

The meeting ended in the late afternoon and they suggested a time for reconciliation.

During the mediation, the mother of the victim suggested that the offenders should pay *to'siisii* (which in our language means 'to take away the tears from the victims eyes') amounting to K50 and two lengths of shell-money each. The offender's family replied that this amount was too little and that they would pay K100 as well as the shell-money as *to'siisii*. The victims accepted the request and the mediation ended. It was a day in which it seemed that the dead boy's soul was with us as we cried and shook hands together.

The story illustrates the following elements of Melanesian treatment of crime:

- 1. a community meeting in the presence of the interested parties and the extended families of the victim and offender to talk about and clarify the whole matter:
- 2. a confession by the offender and apology offered by the whole extended family;
- 3. the offer of gifts to show sorrow and provide restitution where suitable;
- 4. acceptance of the gift and restitution;
- 5. a ceremony of forgiveness and something to mark the occasion; and
- 6. the offender returned to the community.

Moreover, there are often variations according to special needs:

- 7. Forgiveness may be withheld for a time to provide counselling or temporary exile (for incest or rape of a minor).
- 8. The restitution must cover the loss or physical damage done by the offender.
- 9. The extended family must provide someone as a supervisor to a person who is a wife beater or who behaves badly when drunk.

Justice is therefore seen as an affair in which the whole community takes part and bears its share of the responsibility. Justice for the Melanesian is essentially a restoration of the broken relationships and it aims at satisfying all parties not merely following a set of rules laid down by a law making body to deal with conflicts. The spirit of the law is more important to the Melanesian than the letter.

Melanesian experience is that such reconciliation is effective, and even if it were not fully effective they would prefer it for a variety of reasons. The Melanesian way restores peace; it keeps the offender in the community instead of in a distant jail, a place that makes people into inured and more effective

criminals. After the reconciliation the community is stronger because the process of justice redefines the beliefs and values of the community. They believe that the criminal who purges his guilt by confession, apology, forgiveness, restitution and restoration is already on the road to reform. Once settled by a competent mediator in the eyes of the community the custom process rarely breaks down. Shame followed by forgiveness is a major feature of the Melanesian process and it is this formula which produces the enduring effect of the Melanesian peacemaking.

Westerners who see this process, feel that it is a beautiful reconciliation but of little enduring benefit because there are no sanctions and no punishment. Most people who have been raised in the culture of retributive justice see punishment as an essential part of justice even though the evidence is clear that retributive justice is ineffective in controlling crime and reforming criminals. None the less the gut feeling remains that if the offender is not punished, he is being handed a license to repeat his behaviour. Finally there is a certain strong belief that punishment is necessary either because it is customary or the victims demand vengeance.

Shame

A major component in the success of the Melanesian way of treating crime is the powerful influence of shame. Shame is a distinct feeling in which the person understands himself as fundamentally bad in the eyes of others. It is a devaluation of self, a sense of worthlessness, humiliation, and failure. In Melanesia it is the most common social control to maintain conformity in a community. The person shamed loses respect in the eyes of community and his most urgent need is to regain the esteem of his family and peers. Any behaviour liable to bring about shame is to be avoided at all costs. Shame, forgiveness and reconciliation are the basis of the application of custom law.

Shame is most effective when the individual is shamed in the eyes of those whom he considers to be significant role models. A normal well-behaved citizen fears shame in the eyes of the community but does not fear the criticism of criminals. The powerful businessman fears shame in the eyes of other businessmen but not of the poor whom he robs. The tribal fighter who kills people of an enemy group can feel pride in the eyes of his tribe or clan but he is not shamed by the opinion of the outside community. The young man on the edge of a *raskol* gang will sometimes do something to get himself into trouble with the police so that he can gain pride in the eyes of his gang leader. It is at this stage, before he is taken to a formal court, that he is still open to shame for his family and clan.

In a restorative justice meeting, the community speaks of the damage caused by the behaviour of the wrong doer and they are at the same time building a barrier of shame against future similar behaviours in the community. Shame without forgiveness causes the victim to become hardened in his crime. The criminal who goes to jail usually has no chance to purge his crime. As a result he is never forgiven or reconciled. Any person sent to jail should have the opportunity to go through a process of shaming, apology, forgiveness, restitution, and forgiveness before the sentence is carried out. Shame followed by repentance and forgiveness is a very powerful instrument for the reform of the offender and building the strength of the community. Shame builds conscience and is there when other controls fail. It is a process which strongly influences the children of the community.

Police targeting an ethnic group or criminal gang and labelling them as criminals will certainly isolate them and encourage them in their criminal tendencies and gain followers for them. Being isolated, they suffer shame only in the eyes of the clan or gang but not in the eyes of the community. Open public shaming puts pressure on parents, teachers, and others to ensure that they engage in private shaming to build community values. In communities and settlements where PEACE Foundation Melanesia⁶ has been operating the communities are beginning to return to the traditional ways when they are unable to get justice through the police or the courts.

Dissatisfaction with the courts

Melanesians generally are dissatisfied with the justice system in the courts of Papua New Guinea. Even though more than a hundred years have passed since the introduction of British justice they are aware of the expectations of their own culture and remain unconvinced that the courts are capable of providing justice. The Melanesian is more interested in the spirit of the law as it is embodied in the social contract than he is in a body of written laws, which judges and lawyers interpret them for him. The following table shows the main sources of their dissatisfaction.

Westminster Justice	Custom Law Justice
Law defines what is prohibited.	Law responds to the social contract of
	prohibitions and social obligations.
Justice focuses on guilt and	Custom focuses on the harm done to
abstract principles.	the victim and community.
Crime is a violation of laws	Crime is defined as harm to people and
defined by the governing body.	relationships in the community.
The court differentiates between	Crime is related to all harm and
criminal and civil.	conflicts.
The individual must take full	Individual responsibility is measured in
responsibility for what he has	a holistic context of the social
done; the social and political	environment.
context are unimportant.	
The court goes back into the past	Custom looks to the future and is a

⁶ PEACE Foundation Melanesia is a non-government organization founded by Bernard Narokobi to search for processes which will bring greater justice to the grass roots people. In Bougainville, squatter settlements of Port Moresby and other places, it has been providing people with training in restorative justice and mediation.

⁷ Zehr, Howard, 1995, *Changing Lenses: A New Focus for Crime and Justice*, Herald Press, Scottdale, PA, p. 180.

and is an inquiry into guilt.	search for solutions
The court focuses on the letter of	Justice is tested by damage to person
the law.	and community.
Justice is defined by rules and	Custom sees the spirit of the law as
procedures.	most important.
The state, which makes the laws,	Custom sees the people and community
is regarded as the victim.	as the victim.
The state and the offender are	The needs and rights of victims are
seen as primary parties.	considered equally important.
The focus of justice is on	The focus of custom law is on mending
inflicting punishment.	relationships.
Relationships are irrelevant.	Relationships are central.
The nature of crime is obscured	The conflict or nature of the crime is
by court argument.	important to a solution.
Justice claims to be neutral and to	Justice considers the nature of the
treat all equally.	individuals involved.
Justice is opposed to change.	Custom is active, seeking to transform
	what is wrong.
Guilt can be purged only with	Guilt is forgivable however there is an
punishment.	obligation to restitution.
Justice is opposed to mercy.	Justice is based on repair of damage &
	reintegration of offender and victim.
The court decision is based on	Justice is based on the needs of the
what a person deserves.	individuals and community.
Justice is win-lose and is divisive.	Justice claims to bring people together.
Justice is slow, sometimes taking	Justice is quick, coming immediately
months or years.	after a cooling down period.

Is marriage between the custom law and the Westminster system possible?

It is clear that the Westminster system does not meet the needs of the people. It is equally clear that the custom law cannot meet the needs of the modern world with its contracts, big business and all the complexities of the global economy. It would be ridiculous to throw out the present court system but it would be a calamity to ignore the possibilities of custom Law that has served Papua New Guinea and a greater part of the world for thousands of years. A further paper, however, will deal more thoroughly with this matter.

Author

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