A Marriage of Melanesian Custom Law and Westminster

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Abstract

The Melanesian way of law and justice served the people of Papua New Guinea for thousands of years. The colonial powers did not recognise custom law as a valid form of justice and replaced it with the Westminster style of courts and government. In 1973 the House of Assembly was anxious to recognise custom law but opposition from the purists and lack of a model foiled their attempts. At independence the colonial law and courts' system was accepted almost unchanged but as a possible direction for future action, it was written into the constitution that there was a duty on the courts to develop custom law as a part of what was called 'the underlying law'. This essay provides some thoughts on how this could be carried out.

The educated elite call for custom law for Papua New Guinea

As Papua New Guinea approached independence in the early 1970s custom law was a burning issue among leading Melanesians[1]. Bernard Narokobi's writing expressed the feelings of many when he wrote,

> Law may be the cornerstone of many mighty civilisations in history, but it has often been used as a sharp sword by the powerful to conquer untold numbers of powerless peoples. Law has been used to destroy cultures, civilisations, religions and the entire moral fabric of people. In Melanesia, as elsewhere, the Anglo Australian law was used, and is still being used, to do precisely that. When they (the colonial power) could not find any brick built courts, or armed and uniformed constables, or any paper codes of law, they concluded that there is neither law nor justice in Melanesia.[2]

John Kaputin (from Rabaul, the first Minister for Justice likewise wrote,

> Lawyers - and sometimes the establishment, pretend that law is a technical matter, and that it is not something for the lay-man and politicians. They say that the law is abstract and that there are universal principles, which apply equally to all men. In this country, the law was an instrument of colonialism whereby the economic dominance of the white man was established over us. In other words the law was not a set of universal and abstract principles. It was specific, and it made numerous distinctions

[1] I use the term Melanesian in the general sense that it refers to all the native people of Papua New Guinea

[2] Narokobi, B. 'History and Movement in Law Reform in Papua New Guinea' in D. Weisbrot, A. Paliwala and A.Sawyer, *Law and social change in Papua New Guinea* 1982, p. 21, Butterworths Pty Ltd.

> between the white and the black. It not only deprived us of our land, but forced us to work for the expatriate plantation owners to whom the law gave our lands. There is a danger that unless we take positive steps to affirm our rights, the colonial law will continue its stranglehold of our economic and social lives.[3]

The Reports of Constitutional Commission[4] show how strongly the intellectuals felt about the damage done by western law and the need to return to custom.

> The price of the impact of Western colonisation has been 'sapping of the initiative of our people'. In this goal (No. 106), we seek to promote our traditional ways, such as participation, consultation and consensus and a willingness of privileged persons to boldly forgo benefits to enable those less privileged to have a little more.... we do not claim these values are exclusive to Papua New Guineans. However they are in our people. Our way of life was to come to decisions by a long process of consultation and consensus. This process is a central element of true democracy and government ... this is a process which is most conducive to social harmony co-operation and common good.
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> Consultation and consensus are based on respect for the individual and his dignity. Faced with real and pressing demands of one kind or another, we may despair and resort to drastic steps. And yet, the success of our labours will ultimately depend on the extent to which the masses understand our strategies and be able to identify with these (Goal No 108).
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> Our ways emphasised the need of community. We exercise our rights in the context of our obligations to our community. We consider our village and tribal units as our greatest elements for care and support. In our village and tribal units, no one is master and no one his servant; no one is an employer and no one an employee. Most of our societies are classless and egalitarian.

The Somare Government (Pangu Party) espoused the cause of custom law and rapidly set about introducing it into the official legal system. The village court was seen as the major institution to bring back custom law and return dispute settlement to the village.

There was a common feeling among those who wrote the constitution that it must reflect village values. The difficulty lay in the fact that they had no precedent to follow, nor was there was any coherent view on how this should be done.

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[3] Kaputin, John, 1975, 'The law: A colonial fraud?' in *New Guinea* Vol. 10, pp. 4-15.
[4] Brunton, Brian & Colquhoun-Kerr, Duncan, 1984, *The Annotated Constitution of Papua New Guinea,* University of Papua New Guinea Press, p.21.

Opposition against the use of custom law

Most of the jurists in Australia, having studied the writings of judges such as Sir Hubert Murray, Judge Gore and others, believed that there was no such thing as customary law and were aghast at the thought of writing it into the constitution.

B. J. Brown, Fellow in Papua New Guinea Law, Australian National University, Canberra, outlines the thinking of the Australian jurists at the time.

> In summary the main features of a developed legal system, such as that furnished by Australia for Papua and New Guinea, are
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> (1) a legislature to create new law by regular process
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> (2) courts with compulsory jurisdiction to decide disputes
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> (3) an executive organ to ensure compliance with laws.
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> These are centralised organs and as asserted earlier all three are absent from the customary rules which constitutes the local norms. Only with compulsory jurisdiction and regular enforcement can there be anything approaching international law. [5]

Brown's 'developed legal system' is a suitable instrument for law and justice in an ideal setting. However it comes under pressure when the laws passed by parliament favour one group (such as the rich) against another (the poor); or the parties in conflict do not have an equal ability to present their case to a judge through legal representatives of equal quality; when the executive organs (the police) favour the powerful to the detriment of the powerless; and finally where justice is frustrated by criminals who buy and threaten witnesses.

Answer to the opposition against custom

Three major arguments were produced to denigrate custom. The first was that the Melanesian culture is repugnant to the general principles of humanity and could not be tolerated in a civilised world. The second was a belief that most customs were based on payback and vengeance and therefore offensive. And the third was a belief that custom was merely the customs of 1000 tribes and therefore could have no uniformity.

Tolerance is not generally a virtue of a colonial power. The colonist is quick to see the worst of the native and ready to believe the worst of his culture and customs. Seen through different spectacles, the unbiased observer can see that the violence committed by Melanesians against each other and the colonists in Papua New Guinea in no way compares with the brutality of the English army, navy, prison hulks, penal laws, child labour in the mills and mines and the slave trade. Similarly the tribal fighting which figures so prominently in the criticism of Melanesian society bears no comparison to the civil wars and wars of conquest conducted in the name of king and country in England and its colonies. Today the West is still searching for a way to restore the victim of

[5] B. J. Brown, Justice and the edge of the law: towards a people's court**,** in Brown B. J. *Fashion of the Law in New Guinea,* p.193.

crime and reform the offender but jail and punishment are still the most common response. Who then has the right to cast the first stone?

On the second complaint, payback and vengeance were indeed practiced as they are in any society but that was not the whole process of custom law. Before the coming of the colonial government, Melanesian people lived in villages and small communities. The bottom line guiding all behaviour was survival. They lived by a basic social contract which forbids murder, adultery, stealing, lying and requires sharing, respect for elders, the acceptance of social obligations and the maintenance of community relationships. This was not so much a matter of virtue and morality as it was a matter of survival. When offenders broke the social contract the crime caused the community to fracture. Factions formed, feuds developed and the village community was open to attack from enemies. Survival was threatened.

To say that custom is payback and vengeance reveals a basic cultural misunderstanding. The social contract required a process to ensure that it is observed by all. Custom begins with the notion that the first duty of justice is to mend the broken community relationships damaged by wrongdoing. To that end, the extended family of the offender would meet with the family of the victim and the community. They would talk of the damage caused done by the wrongdoing. This leads to the offender being shamed in the eyes of the community. The shame is greater because it is inflicted, not only on the individual but on the person's whole family. The extended families from both victim and offender are involved in the exchange and the offender and the family offer an apology and restitution. When this is settled the offender is forgiven, there is reconciliation and now that the relationship is repaired the community can restore the offender and get on with its life.

There are many different versions of this generic process, which vary according to the internal workings of the community. In some the process comes only after violence, in others the physical punishment is a part of the process and others again will expel the offender for a time or forever.

The advantages of the process are that

- the victim is able to scale down the trauma by confronting the offender with the hurt suffered
- the offender is able to purge his/her guilt by confession
- the offender is able to begin on the road to reform by paying restitution and receiving forgiveness
- the community are able to draw clear lines on what is acceptable behaviour by discussion and speaking out at the meeting.

The final objection of the Australian jurists was that custom was not a unified body of law but rather the customs of a thousand tribes and so impossible to codify for use in a court.

Custom law was born out of the need to maintain security of the village and the relationships between its members. Their interest was not in building a set of

rules and laws that could be written into a law journal but rather in maintaining a process that protects and strengthens the community both internally and externally[6]. Custom is less a matter of defining the offence than it is a community attitude and a process of dealing with crime. Jurists coming from a Western model look for uniformity in the **treatment of crime** in its various forms. Melanesians looked for **uniformity in the process** that preserves the security of the community.

Acceptance of the introduced colonial law

Jurists found that justice - founded on custom law, an attitude of mind and a process rather than a set of laws - was beyond their understanding, and simply too difficult to apply to the law of the land. Neither were they able to find any country which had used custom law as their model. Faced with the impossible, the House of Assembly took two steps. They asked for legislation for village courts to administer custom law and wrote into the constitution for courts to develop custom law as a part of what was called 'the underlying law and custom'.

With no model to follow, Papua New Guinea eventually accepted by default, almost without change, the law that had been imposed by the Australian colonial government.

Even the idea of the underlying law and custom having a place in the constitution was repugnant to many of the Western law purists. It was fenced round by subjecting it to 'general principles of humanity', the written law and the Constitution; and further purists insisted, as some have recorded, that

> 'the paramount aspects of the law, liberty, justice and respect to the individual embodied in the concept of the rule of law must not be insidiously, dissipated by arbitrary decision making decision-making disguised as traditional justice.'[7]

In 1977, the nature of custom was again misunderstood when the Supreme Court, thinking that custom was a set of laws and behaviours, made a ruling that any application of custom must refer to the whole country.

With the acceptance of the laws established by the Australian colonial government, a most elaborate and costly judicial system was set up with multi-level courts and processes for appeals as would be available in Australia.

Village courts

Faced with the dilemma of custom law for the villages, the legal draftsmen developed a process with two different streams. One was a simplified process of the Western court. This was the process taught to village magistrates and recommended. The other approach was the traditional mediation process. It was not taught. Many Melanesians knew what it meant in general terms but few were able to present it as a workable process for the new village

[6] This is made clear in the comments of the Constitutional Commission.
[7] Brunton, Brian & Colquhoun-Kerr, Duncan 1984, *The Annotated Constitution of Papua New Guinea,* University of Papua New Guinea press, p. 184.

magistrates. Most of those who trained the village magistrates did not know it or understand it and they actively discouraged it. As a result, only a few places used the custom law demanded by the members of the House of Assembly. The village court is not a custom court but a Western court[8].

The courts today

Today the courts in Papua New Guinea are an immense structure with judges, magistrates, lawyers, buildings and thousands of assistants. They have been loaded with a massive body of tradition, process and protocol to build up the image of an independent system based on justice and integrity. It is enormously costly. When police and jails are added to the list, law enforcement in Papua New Guinea uses up some K180[9] million of the national budget. Third world countries that have been given the Westminster system by the colonial powers, groan under its expense. Thousands of people make their livelihood from this system and they wield enormous power. Even so they deal with only a small percentage of crimes compared to the village courts and the informal sector.

In spite of the cost of running the courts and the personnel employed, judges have had to admit that they dispense only a limited justice. The courts have an enormous backlog of cases and some corrective institutes house almost as many remandees as they do prisoners. Remandees wait for months and even years to have their cases heard while high profile cases are given preference. The higher courts do not have the judges to deal with the common criminals in the villages and the settlements, and so these have had to produce their own justice. In all, the village courts and other unofficial bodies handle 80% of the crime in the country.[10]

The quality of village courts varies a great deal from place to place. Only in a few places have they fallen to the worst expectations of the Australian jurists; nor have they achieved the hopes of the members of the House of Assembly who put them in place in 1973. Their greatest strength is that they are seen and respected as the dispensers of justice for the common people. This is a truly great achievement. Their weaknesses lie in the fact that they have been neglected, starved for funds and uncontrolled in their decisions, especially with women. Magistrates are subject to bribery, wantok decisions, favoritism and when they are not paid, as is frequently the case, they use the court fines to pay themselves or refuse to carry out their duty. The unofficial courts which carry most of the crime are the response of the communities to their needs. These are the 'wari courts', the restorative justice meetings in Bougainville, the highland power brokers who negotiate demands for large compensation payments, and finally the thousands of cases which are never reported or dealt with because people, especially women and youths, do not know their rights.

[8] Lynette Parker (Possiblility of Restorative justice in PNG) believes that the village courts were a hybrid. In a certain sense they were but a what was foreign was the position of a government backed Magistrate form who there was really no appeal for the ordinary villager

[9] Figures for 2003

[10] Justice Salamo Injia at the Judicial Conference at Madang 2003, quoted from the editorial of the National Newspaper.

On several grounds, the court in its present form is not satisfactory for the ordinary people:

- The appeals process is costly and only the rich can afford a case that goes on to appeals.
- Many persons given bail fail to turn up, treating the bail as a fine.
- The court does not deal with the essentials of Melanesian justice-apology, forgiveness, restitution and reconciliation.
- The formal courts deal with only a small percentage of the criminal and civil complaints.
- Common people believe that the courts favour the rich and powerful because they can afford to hire clever lawyers who help them to pass through court without hurt.

What can be done?

For years the courts have been asking the question, 'Can Alternative Dispute Resolution (ADR) resolve our problem?'. A similar question relating to reform for village courts is being asked.

Conferences have been called and proposals drawn. A few tentative moves have been made to seek advice and help from overseas. Those who believe that Alternative Dispute Resolution can provide an answer see this as a first positive step. Those who have been immersed in the custom process would also be pleased, but would further ask that the homegrown process be the first response.

Mediation and Restorative Justice officers from Australia are still inclined to look back at the offence or the rights and wrongs of the case. The Melanesian system is less interested in these; it looks forward to how a mutually agreed solution agreeable to both can be achieved. Bougainville is a case in point.

Bougainville returns to custom law

When the crisis in Bougainville turned to civil war in the early 1990s, the courts were not only ineffective in judging guilt and innocence, but also any appointed magistrate as a government official was in danger of his life. However there were people, both men and women, who were able to recall processes in their cultural past which had been used to mediate conflicts and restore damaged relationships by reconciling individuals and groups who had been at war with each other. Working with the PEACE Foundation Melanesia they redeveloped three custom processes to replace the failed courts.

The most urgent need for Bougainvilleans in 1997 was to bring the two main contestants, the Bougainville Revolutionary Army and the Resistance, together to make peace. Here they applied the traditional process of peace making, bringing the two groups together for a peace ceremony and a sincere rejection of war. Admission of individual guilt and reconciliation with the families of the victims was not a priority and was left to be dealt with at a later date.

For crimes of one person against another, they returned to the traditional process of restorative justice[11]; and for no-fault conflicts over property, they returned to mediation. By 1998 practitioners all over Bougainville, some trained by the PEACE Foundation and some working on their own intuitive knowledge, were helping people in need of reconciliation and restorative justice.

Integrating the formal system with the informal system

There is an urgent need to provide legislation to streamline, simplify and reduce the costs of the courts. This exercise is beyond the scope of this paper. There are four urgent needs for law and justice in present day Papua New Guinea. These are to

- provide a process to deal swiftly and justly with civil and criminal cases
- provide a more workable system to the village courts, the poor person's court
- provide a way of dealing with unreported crime and crime that is at present in the hands of power brokers and others
- involve the community in its own justice system to make it an internal affair rather than one imposed externally by the police.

Papua New Guinea should beware the cultural cringe and the belief that a local process is inferior to any western one. Papua New Guinea has processes which have been developed to meet cultural needs over thousands of years and have once again proved themselves in Bougainville and elsewhere.

Justice at the level of the community: The peace and good order committee

In the communities and settlements there is a need for a just, workable system which is acceptable to the people themselves, and in which they have a major role function. Saraga settlement in Port Moresby for example, has experimented with this, and provides some guidelines. [12]

In Saraga, the community is divided into separate ethnic entities. Each group elects its own Peace and Good Order Committee (PGO committee). The main duties of the PGO committee are to oversee and maintain law and justice and maintain regular and friendly contact with the police. A most important duty is to keep people, especially the youths and first offenders, out of jail (a process called 'diversion'). In this, they work closely with the police.

The PGO committee is a gender-balanced group of recognized leaders who are prepared to work for the good of their community. They are responsible for the control of law and justice. Their aim is zero tolerance of crime. When crime is reported from within the group they are obliged to act. When crime crosses to another group they work with the PGO committee of the other group to settle

[11] The Reports of Constitutional Commission quoted earlier illustrate the same racial memories.

[12] Saraga settlement near Six Mile has been working on such a process since 1997. Morata has recently set up a similar system.

the matter. Some troublemakers receive a warning, some are sent to a mediator, some to the village court and some to the police. The effectiveness of the Saraga experiment lies in the dedication of the community leaders who make up the PGO committee, their good relations with the Six Mile police, the fact that they are active in their own justice and not merely passive recipients, and the availability of trained mediators who can handle both civil and low grade criminal cases.

In settlements where crimes are not reported or dealt with, the communities are aware of all crimes committed and have a vested interested in dealing with them. The PGO committee is in a position to deal with all crimes in its own small community. In the settlements, where relations between police and settlers are poor, it is far better that the people themselves deal with their own law and justice rather than the police. The police then become a support for the community rather than the primary responsible body.

Serious crimes can be referred to the police for action. Other crimes and conflicts are referred to the Village Mediation Centres (Village Courts) according to knowledge of situations and preference of the parties involved.

Some parties prefer the Village Court to settle the matter by court processes. If the choice is mediation or restorative justice, the matter is dealt with by this process. If the parties can reach agreement, the matter is referred to the district court for ratification. If there is no agreement the matter is referred back to the Village Court (or the District Court).

The PGO committee is in a strong position to work closely with the police and call on their assistance where necessary. In cases where diversion of young offenders is preferred, the PGO committee is the most suitable body to handle the matter. As an official body, the PGO committee is also in a position to confront police brutality where it occurs. When tension builds up between ethnic groups the members of the PGO committee are often able to deal with the matter before it escalates into a full-scale fight with weapons.

It is the duty of the PGO committee to oversee the penalties and compensation claims made for harm done. This may be a way of reducing the activities of the power brokers. PGO committee is a custom body responsible for its own behaviour and as such is not bound by strict rules, but has the opportunity to deal with each individual offence in the most suitable way. The courts have found that often they cannot provide justice and reform for cases in the settlements for offences such as murder, rape or incest because reports are lost or destroyed or there is no report. In these cases the PGO committee may decide to exile the offender for a time and make arrangements for reconciliation and forgiveness when he or she returns.

Finally, it is the duty of the PGO committee to maintain books for the decisions made and make them available to authorities who may wish to access them for the purpose of developing underlying law.

It should be no difficult matter to require the community to set up their own PGO committee system for themselves. It is in their interest; they have a major stake in it and can work with the police and the courts. Too often the

settlements complain that the police harass them because they will not cooperate. This can be changed by placing more of the policing in the hands of the community itself.

Justice at the level of the lower courts

Many of the cases that at present go to the courts are civil cases or low-grade criminal cases. It is mainly the latter that choke the system and fill up the jails with remandees (where they quickly earn their degree in crime and return the community as fully fledged criminals). These two groups are a first priority and require an immediate solution.

All civil cases and all low-grade criminal cases (where both parties agree) should be taken first to a win-win mediator or a person trained in restorative justice. Both methods are sanctified by custom and the Constitution.

Mediation should take place outside the court setting. Mediators should be trained and recognised by the court in the same way as the court recognises lawyers. If the mediation is successful, then the court ratifies it, and if it fails then the matter can go to the regular court.

As a failsafe against injustice in the mediation and restorative justice process, it is essential that both victim and offender be aware that they can always go back to the court.

The formal courts and Melanesian culture

At present criminals found guilty are usually jailed. At present there is no process which allows the offender to purge his crime or restore the victim. This failure is a failure of respect for the Melanesian culture, and for the underlying law required by the Constitution and the community. Where a criminal is sentenced to jail, there should be an opportunity for the extended family of the victim and the extended family of the offender to meet in the presence of the criminal and the victim for a process of restorative justice. This would require the use of a trained practitioner for an exercise in restorative justice.

This could be done either before or after sentencing, by a person trained in the process of restorative justice. This action would allow the victim and family to deal with their trauma by confronting the offender with the crime and speaking of psychological, financial and other damage that they have experienced in the presence sight of the community. Offenders with their families are allowed to apologise, be forgiven and to offer restitution. They may even be given the opportunity of reconciliation within their community. This provides them with a way to purge their crime internally and begin a process of reform which is not available under the present system.

Custom and the highlands culture

This paper does not deal with the application of custom law to highlanders, who have their own very different customs in these matters. A study of custom law carried out in 1983 found that broad differences exist between highlands and non-violent (less violent) coastal societies. In coastal areas where there is still a strong awareness of the custom law processes of mediation and

restorative justice, the village courts have struggled along with a form of justice.

The highland students who assisted in writing the survey in the highland regions tended to phrase customary law topics in terms of law and order and strict rules of right and wrong. In this sense, customary law of highland groups is more easily codify-able.[13] The situation in the highlands is quite different and no satisfactory solution can be offered until such time as the Melanesian ways of reconciliation, mediation and restorative justice have been tested on the ground there.

Author

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[13] Scaglion, Richard 1983, *Customary Law in Papua New Guinea, A Melanesian View, Law Reform Commission of Papua New Guinea, Monograph 2.*