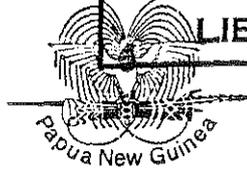


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PAPUA NEW GUINEA

CRIMINAL RESPONSIBILITY:

TAKING CUSTOMS PERCEPTIONS AND BELIEFS INTO ACCOUNT

WORKING PAPER NO. 6

FEBRUARY 1977

## PREFACE

Under the Constitution and the Criminal Code Act 1974, the criminal law of Papua New Guinea must be written law. The present criminal law of our country is English law introduced through Australia. This law reflects perceptions which are not necessarily Papua New Guinean and research has shown that the introduced law has been interpreted according to perceptions of people from other societies.

If Papua New Guinea is to develop a criminal law that reflects the customs, perceptions and beliefs of its people, legislation will be required. This working paper sets out legislative proposals designed to achieve this end.

Views and comments on the working paper are sought and should be directed to -

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and they should be submitted before Monday 18th April, 1977.

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## Chapter I. INTRODUCTION.

The work of the criminal justice system is to punish those who break the law. A person who commits a criminal offence is punished but only after an independent judicial tribunal is satisfied that he has committed the offence.

Having a criminal justice system to punish people who commit offences is often justified on the ground that this encourages people to keep the law and not commit offences. But punishment has many aims, and, unfortunately, these are inconsistent. Punishment is intended to deter particular offenders and the general public from committing offences. It also has an element of retribution. An offender who causes pain or inconvenience to others is himself made to suffer. Some punishment is intended to rehabilitate people so that they will be better able to cope in society and not offend again. Other offenders are kept in prison to stop them committing offences and to protect the community.

But what is a criminal offence? The basic humanitarian notion is that it is an criminal act (*actus reus*) done with a guilty mind (*mens rea*). There are, of course, exceptions to this idea. The offences of strict liability, like many health regulation offences, are an example. The notion of a guilty mind is often limited by the reasonableness test so that a man who says he did an act without a guilty mind is found guilty if the court thinks that a reasonable man would have had a guilty mind in the circumstances.

## 2.

The criminal law also provides defences so that a person who does a criminal act in certain exceptional circumstances can be excused. Examples of this are self-defence or when a person acts under provocation or where he makes an honest and reasonable mistake of fact about so-ething.

But behind the criminal justice system are people's conceptions of what is criminal behaviour. These conceptions vary from society to society and the law of different societies should be stated so as to reflect these different conceptions.

Most of the serious criminal offences are found in the *Criminal Code* and most of the minor offences are found in the separate *Police Offences Acts* of Papua New Guinea. These laws are based on Australian legislation which in turn is based on English criminal law.

The English criminal law developed over many centuries. Offences and defences were gradually developed and defined as English society developed. These offences and defences essentially reflect the perceptions of English people as to what behaviour should be treated as criminal and what conduct that is prime facie criminal should be excused either wholly or partially because of the context in which the behaviour occurred.

Before the English kings were strong enough to impose a centralized criminal justice system, the people settled their disputes by fighting or by the payment of compensation. As the Kings slowly imposed the centralized criminal justice system and developed the concept of the King's peace and extended it to the whole kingdom, the earlier methods of dispute settlement

were discouraged. The maintenance of law and order became the responsibility of the government and criminal behavior was punished by the state even if individuals and groups were capable of and wanted to deal with such behavior by other informal non-violent means.

In the 19th century police forces emerged in England and it became the accepted thing to take complaints of criminal behavior to the police who would bring the culprits before the courts to be dealt with according to the developed law.

This was the criminal justice system that the colonizers introduced to Papua New Guinea.

This working paper is based on the premise that the 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 behavior and what is not.

A criminal law which is significantly out of line with the perceptions of the people will not be respected by them and will not achieve one of its major aims, that of deterring people from anti-social, criminal behavior.

The Law Reform Commission has begun work on the long process of restating the criminal law of Papua New Guinea. The finalization of this work is some years ahead.

There are a large number of customary groups in Papua New Guinea and their perceptions of what is criminal behavior vary. Taking these matters into account, this working paper sets out some proposed amendments to the Criminal Code which would allow the courts to take into account the perceptions and world-views of the members of an accused persons community when deciding upon his liability for the offence.

These amendments would take into account the different perceptions of different communities in Papua New Guinea and the different perceptions of members of the same community at different stages of sophistication.

Chapter 2 of the Working Paper demonstrates the limitations imposed by the present law in taking local perceptions into account when deciding criminal liability.

The proposed amendments are set out and discussed in Chapter 3, whilst in Chapter 4 other approaches which have been suggested are set out and discussed.

## CHAPTER 2. THE RECEIVED CRIMINAL LAW

A. The African Experience

The problem of an introduced criminal law is well illustrated by Robert Seidman in his studies of the English common law criminal law in Africa.<sup>1</sup> He demonstrates how the defences available at common law were applied according to the perceptions of English people when Africans were on trial for killing witches or warlocks. Self-defence was not available to the Africans for killing witches because it was held that the act for witchcraft against which they were retaliating must be accompanied by a physical act. This was almost never the case because the act of witchcraft was often imagined by the accused. The defence of honest and reasonable belief was not accepted for policy reasons. It was held that it would be setting a dangerous precedent to hold that it was reasonable for a person to kill as a result of a superstition about witches. The reasonableness test in British colonial Africa was that of the reasonable Englishman - the man on the Clapham Omnibus - until it was replaced by the reasonable African test as a result of *Kwaku Mensah v The King* [1946] AC 83.

Insanity was not accepted as a defence, because belief in witch-craft was sometimes held by "entirely sane Africans". The defence of provocation was allowed only if the witch was killed immediately after offering provocation before there was time for passions to cool. The defence was not available if there had been a lapse of time.

As Seidman pointed out Africans who commit crimes because of pre-scientific world-views fell between the two stools of insanity and mistake. Mistake was measured by the standard of reasonableness appropriate to Englishmen and insanity was measured by African standards and "perfectly sane Africans believe in witchcraft."<sup>2</sup>

Seidman also suggests that the use in Africa of standards drawn from another society in cases involving an African's world view result in the imposition of strict liability under the guise of adherence to common law doctrines which traditionally abhor strict liability doctrines.<sup>3</sup>

Seidman's argument is based on the idea that the concept of the guilty mind (*mens rea*) is the basis of criminal punishment. Strictly speaking the common law concept of *mens rea* is not part of the law of Papua New Guinea, but we use the Criminal Code which contains provisions intended to restate and replace the concept of *mens rea*.<sup>4</sup> It is clear that the criminal law of Papua New Guinea has as one of its most important foundations the idea that people should be punished for intentionally doing what they know to be wrong.

#### B. The Papua New Guinean Experience

As will be demonstrated below, the judges in Papua New Guinea, have gone some distance in taking Papua New Guinean perceptions into account in deciding criminal liability; however the introduced law imposes significant limitations on them.

In the colonial period, the former Territories of Papua and New Guinea adopted English common law as their basic law and then adopted the Queensland Criminal Code as their criminal law.<sup>6</sup> There has been considerable debate about the proper way to interpret a code of law enacted in a country using English common law as its basic law.<sup>7</sup> The correct position is perhaps put by Gibbs J<sup>8</sup> -

The proper course in the first instance is to turn to the language of the Code itself and to construe it according to its natural meaning. However if the Code uses an expression (such as "provocation") which has acquired an accepted technical meaning, that accepted meaning may be attributed to the word if the Code itself has not defined it.

But, in Australia, judges wishing to look at the pre-existing common law, could reply upon a passage from Windeyer J in *Vallance v The Queen*<sup>9</sup> -

The Code is to be read without any preconception that any particular provision has or has not altered the law. It is to be read as an enactment of the Tasmanian Parliament. And, interesting though it is to compare it with other codes, such as that of Queensland from which it is derived, or with projected codes such as *Stephen's Code*, they cannot govern its interpretation. But it was enacted when it could be said of the criminal law that it was "governed by established principles of criminal responsibility". And for that reason we cannot interpret its general provisions concerning such basic principles as if they were written on a *tabula rasa*, with all that used to be there removed and forgotten. Rather is ch. iv of the Code written on a palimpsest, with the old writing still discernible behind.

But this passage only entitles the judges to look at the pre-existing common law. It would not authorize them in Papua New Guinea to look at the customary attitudes of the people of Papua New Guinea or their perceptions of criminality.

There is also an argument that the judges are not entitled to look even at the introduced common law, let alone at other matters.<sup>10</sup> Section 37(2) of the Constitution provides that nobody may be convicted of an offence which is not defined in legislation and for which the penalty is not set in legislation. Section 4 of the *Criminal Code Act, 1974* provides that no one is liable to be tried or punished for an indictable offence except under the Code or under other legislation. These two provisions, particularly the latter, give rise to the argument that, in relation to indictable offences at least, that only offences and defences defined in the Criminal Code and other legislation may be considered by the courts and that the courts are not entitled to look outside the legislation for any reason, including the reason given by Gibbs J, but must concentrate on the words of the Code itself. If this argument is correct any defences which do not emerge from the clear words of the Code are not part of the law of Papua New Guinea. The judges would not be entitled to take either common law defences or sociological matters into account when deciding the issue of criminal liability.

#### 1. *Provocation*

Perhaps the judges have gone further in developing the law to take local perceptions into account in relation to provocation. When the new Criminal Code came into force in November, 1975, it made it clear that provocation as defined in Section 271 could apply as a defence to a charge of wilful murder. If the prosecution failed to negative this defence, the

accused would be found guilty of manslaughter and not wilful murder. This had been the view of the majority of the judges in Papua New Guinea.<sup>11</sup>

Since 1960, at least, the judges have not required the accused to act under provocation like the reasonable Englishman, as was required in African jurisdictions till 1945, but rather as the ordinary person in the environment and culture of the accused.<sup>12</sup> The ordinary person was to be taken in sickness and in health with allowances to be made for the loss of his ability to control his emotional responses brought about the normal ills to which mankind is subject.<sup>13</sup> However the sophistication of the accused could change the standard of self-control. An urbanized person with some education and knowledge of Christian principles would be expected to show greater self-control than an uneducated person from a village in a remote part of the country.<sup>14</sup>

The Code does not refer to the point, but it has been held that it is not required for a husband to find his wife committing adultery before the defence of provocation based on adultery can be used. This is contrary to the old common law rule.<sup>15</sup>

Provocation by insulting words alone has been accepted as sufficient provocation to reduce either wilful murder or murder to manslaughter,<sup>16</sup> whilst the "fraternal" relationship referred to the definition of adultery has been interpreted to extend beyond full blood ties.<sup>17</sup>

But the preparedness of the judges to develop the law on provocation to suit local conditions is not so evident in relation to other defences. This may be for the reason that whilst the defence of provocation only reduces wilful murder or murder to manslaughter, other defences lead to a complete acquittal of the accused.

2. *Age of Consent.*

In *R v Philip Boike Ulel* the accused was charged with unlawful carnal knowledge.<sup>18</sup> It is a complete defence to the charge to prove that the accused believed, on reasonable grounds, that the girl was above 17 years of age. In giving a statement from the dock, the accused said that he thought the girl was of marriagable age. There was no evidence on the issue of whether the accused had any belief as to the girl's age in years. However, the trial judge, Clarkson J said<sup>19</sup> -

My opinion has fluctuated on this problem for some time. I have finally concluded that regard must be had for the society in which the parties lived and for the fact that one could not expect a person in that society to have any real appreciation of chronological age as opposed to apparent physical development as a test of maturity. A statement by the accused that he believed the girl to be seventeen years old would have been immediately suspect because it adopted a criterion of physical maturity still novel to indigenous members of the society from which the parties came.....

Clearly this girl was very well developed for her age.. As a member of the jury trying this case I would think it reasonable for a person assessing physical development in such terms to have believed that she was seventeen or eighteen years old. Is this what is meant by the accused when he says the girl appeared to be fit for marriage? Bearing in mind that the age of seventeen years specified in the Code is obviously selected to have some relationship to nubility I am prepared to accept that it was.

and acquitted the accused.

But in *R v Wanigu*, a case with very similar facts Prentice J (as he then was) said <sup>20</sup> -

I find myself again pressed with the decision of my brother Clarkson of 4th July, 1969, in *R v Ulel*. As I have stated before..., with the greatest respect for my brother Clarkson, I have grave doubts as to whether the statutory law may be read down in the way at least in which his judgment is sought to be interpreted.

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

This law is concerned to protect unmarried girls from intercourse while under a statutory age - originally seventeen in New Guinea, now sixteen.

The difference in view between Clarkson J and Prentice J, highlights the problems caused by a *Criminal Code* which reflects attitudes of foreign societies. Clarkson J's view is the way many Papua New Guineans perceive this matter. Consensual carnal knowledge with a girl above the age of puberty is not serious matter unless it interferes, in the case of some Papua New Guinean

societies only, with the right of the girl's father to bestow rights in her sexuality.<sup>21</sup> Prentice J's view is correct when one is interpreting the plain words of the section. The judges must interpret the law, and, if the words of the Criminal Code are clear, which unfortunately they are in this case, then the judges must give effect to them even if the result is sometimes unjust. This is the duty cast upon them by section 4 of the *Criminal Code Act*, 1974.

### 3. *Immature Age*

In *R v Iakapo and Iapirikila* a Tolai woman had a child by a member of the same moiety.<sup>22</sup> Under custom, sexual relations between members of the same moiety were prohibited. A breach of this custom was a matter of great shame. Any child of such a union would be looked after with reluctance, it would be outside the normal inheritance pattern and would be a constant symbol of shame.

Soon after the child was born, its mother, Iakapo, ordered her daughter, Iapirikila, to dig a hole and then bury the child in it. Iapirikila, who was about 12 at the time did what her mother ordered, but with great reluctance.

Mann CJ took the view that section 29 of the *Criminal Code* which provided that a person under 14 is not criminally responsible for acts which she lacks the capacity to know not to do dealt with the moral wrongfulness of the act and not its illegality. The child's capacity must be assessed in the light of the mores, customs and social order to the community in which it lived.

His Honour put it this way -

In the present case the question is whether, in a complex social situation, well knowing that her mother's authority was not to be challenged by her, and knowing that the action ordered, though most distasteful to her, would be accepted by most of her people as a practical solution to the problem, she would have the capacity to understand that her duty was to deny her mother's authority and run away and disobey. According to my understanding of the position, it would be impossible to convince the child of this, without affording her special protection or inducing a greater fear.

Looking at the matter without regard to the circumstances, there are enough indications to show that Iapirikila regarded her mother's proposed course of conduct as wrong, but having regard to the circumstances it seems to me to be clear that the child was not capable of understanding that she should disobey. I would be most reluctant to read S. 29 as requiring me to ignore circumstances as powerful in their effect on a child's mind as those present in this case. It would amount to torture.

I find the accused Iapirikila not guilty of wilful murder.

#### 4. *Cannibalism.*

It was thought by Sir Hubert Murray, Lieutenant-Governor of Papua from 1908 to 1940 and a Judge of its Central (later Supreme) Court from 1904 to 1940 that cannibalism was an offence against section 241 of the *Criminal Code* which made it an offence improperly and indecently to interfere with a dead human body.<sup>23</sup> It would appear that Smithers J was of the same opinion.<sup>24</sup> However in 1971, Prentice J (as he then was) acquitted some men from the Western Province of cannibalism by holding that the section was not apt to

cover cannibalism, and that, on the facts of the case, there had been no impropriety or indecency on the part of the accused men when they ate part of another persons body.<sup>25</sup>

But perhaps the most important aspect of the case is the way His Honour reached his decision. His Honour argued <sup>26</sup> -

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

In seeking to construe whether the behaviour of the Gabusi villagers here amounted to impropriety and indecency, I conceive that I should look at the average man in the particular Gabusi community, as it was at the time of these happenings. Just as in the attempt to judge criminality in other sections of the Code (for example, concepts of provocation, reasonableness), one attempts to apply the standards of the reasonable primitive villager in his proper setting (as far as one can collate such standards), not those of the model of exemplary conduct in English law, the reasonable man on the Clapham omnibus, I consider that in assessing propriety and decency of behaviour in relation to corpses in the Gabusi area, I should endeavour to apply the standards so far as I can ascertain them, of the reasonable primitive Gabusi villager... in early 1971.

5. *Duty of Persons doing dangerous acts.*

In 1974, the pre-Independence Full Court of the Supreme Court in what is known as the "Enga Jury" case, specifically rejected Papua New Guinean perceptions. In that case a man died after two village surgeons had operated on his chest with bamboo knives. The man had been unable to obtain satisfactory treatment at the hospitals in the area and had called in the village surgeons when his condition worsened. After his death the surgeons were charged with his manslaughter but the trial judge acquitted them because he said no jury of Enga people would have found that they acted with recklessness sufficient to constitute a criminal offence.<sup>27</sup> The Full Court brushed aside the trial judge's approach and held that as a matter of law the accused persons should not have been acquitted.<sup>28</sup> Frost ACJ (as he then was) was the only member of the Full Court to deal with the jury question, and in dealing with the question of who was a man of ordinary prudence, His Honour said<sup>29</sup> -

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

This case represents a movement back from the initiatives taken in the provocation cases in which the regionalized ordinary man test was applied without presumptions of knowledge. This earlier view was the one adopted by Prentice J (as he then was) in the cannibalism case *R v. Noboi-Bosoi*.<sup>30</sup>

6. *Sorcery.*

Sorcery-killings is the area in which the judges have been least flexible in taking local perceptions into account when deciding on criminal liability. The experience in Papua New Guinea has been similar to the experience in Africa discussed above.

Insanity has been rejected as a defence. In *R v Womeni-Nanagawa*, the accused a Menyama man believing that his young sister's unexpected death was the result of sorcery killed the person he believed to be the sorcerer.<sup>31</sup> It was argued in his defence that the accused's primitive condition and belief in sorcery was within the range of natural mental infirmity contemplated by section 27 of the Criminal Code, the insanity defence section. Ollerenshaw J rejected this "strange" defence. As in Africa, perfectly sane Papua New Guineans believe in sorcery.

The defence of mistake of fact was rejected by Clarkson J in *R v Manga-Kitari*.<sup>32</sup> As one of his explanations for killing the deceased, the accused said that the deceased was a sorcerer who he feared would exercise supernatural powers to cause his death. His Honour said that he would be reluctant to hold that just because a superstition was generally held, it was a reasonable belief.

The defence of self-defence was attempted in *R v Ferapo Meata*.<sup>33</sup> In that case the accused believed that the deceased had killed several members of his family sorcery. He gave K10 to the deceased in return for an undertaking that he would not harm any more members of the accused's family. Soon after

the accused's daughter became ill and the accused taxed the deceased with his apparent breach of faith and unsuccessfully demanded his money back. Later the accused caught the deceased unawares and killed him. His Honour held that an exercise of a power of sorcery did not constitute an assault under the Code because it was not an application of force. Self-defence could only apply when the accused was reacting to an assault.

The attempt to link the defence of reasonable mistake of fact with the defence of self-defence in this case also failed because the trial judge, Clarkson J held that the belief in sorcery was not reasonable and that there had been no assault because there was no application of threat or force by the alleged sorcerer.

One attempt has been made to reduce the harshness of the law in relation to sorcery-killings. Section 20 of the *Sorcery Act*, 1971 allows an accused who kills a person after that person has committed an act of sorcery to use the defence of provocation to reduce a charge of wilful murder to manslaughter. However, as became clear in the case *R v K.J.*, the section is of limited operation.<sup>34</sup> It operates in the following way<sup>35</sup> -

- 1). a person who kills another under circumstances which would otherwise constitute wilful murder or murder.
- 2). and who does so under an honest and reasonable but mistaken belief that,
- 3). that other has committed or is in the process of committing an act of sorcery of such a nature, judged by reference to the traditional beliefs of the social group to which the accused belongs as to be likely when directed at the accused or at some person to whom the evidence discloses the accused stood in a protective or obligatory clan relationship to deprive

the accused of the power of self-control and to induce him to assault the person who he thus believes has committed or is committing that act of sorcery.

- 4). and who does the act which causes death in the heat of passion caused by that belief on the sudden and before there is time for his passion to cool.
- 5). is guilty of manslaughter only.

Thus people who kill a person who was being accused of being a sorcerer without any belief that the person has done an act of sorcery or one which would lead an ordinary villager in their area to lose his self-control are not protected by the section.

#### 7. *Native (Customs Recognition) Act*

The *Native Customs (Recognition) Act* was enacted in 1962 after a difficult passage through the Legislative Council.<sup>36</sup> Section 7 of the Act provides -

Subject to this Ordinance, native custom shall not be taken into account in a criminal case, except for the purpose of -

- (a) ascertaining the existence or otherwise of state of mind of a person;
- (b) deciding the reasonableness or otherwise of an act, default or omission by a person;
- (c) deciding the reasonableness or otherwise of an excuse;
- (d) deciding, in accordance with any other law in force in the Territory or a part of the Territory, 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 considers that by not taking the custom into account injustice will or may be done to a person.

But Section 6 provides -

(1) Subject to this Ordinance, native custom shall be recognized and enforced by, and may be pleaded in, all courts, except insofar, as in a particular case or in a particular context -

- (a) it is repugnant to the general principles of humanity;
- (b) it is inconsistent with an Act, Ordinance or subordinate enactment in force in the Territory or a part of the Territory;
- (c) its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest; or
- (d) in a case affecting the welfare of a child under the age of sixteen years, its recognition or enforcement would not, in the opinion of the court, be in the best interests of the child.

(2) Nothing in the last preceding subsection contained shall be deemed of itself to empower a Native Local Government Council to make a subordinate enactment affecting native custom, but this subsection shall not be deemed to limit in any way the powers of a Native Local Government Council conferred by any other law in force in the Territory or a part of the Territory.

Section 6 can be used to place significant limits on the operation of section 7. This is illustrated in the unpublished case *R v Tabatu Nosei*.<sup>37</sup> In that case the accused were charged with gross indecency as a result of a traditional ceremony revived by the Hahalis Welfare Society in the Bougainville Province. Detailed evidence was called at the trial to explain the nature and meaning of the ceremony. The trial judge, Frost J (as he then was) considered this evidence was relevant to show the lawfulness of the excuse

under section 7(c) but refused to recognize the custom on the ground that it would not be in the public interest under section 6 to do so. However he sentenced to accused to the nominal sentence of the rising of the court.

Except for the purposes of bringing customary matters to the attention of the courts in order to mitigate sentence, little use has been made of section 7. The decision in *R v Tabatu Nosei* may have contributed to this, but section 7 is limited to customs and does not cover perceptions, beliefs or world view.

## CHAPTER 3. THE SUGGESTED REFORMS.

The easy part of the law reform process is to analyse the present law and point to its short comings. The hard part is to develop new laws which overcome the defects in the present law without creating new problems of their own.

The reform proposals in this chapter are an attempt to do that. The proposals are put forward for discussion and criticism. They do not represent the final views of the Commission.

It can be seen from the analysis of the cases in the last chapter that there are severe limitations on the judges developing the criminal law in a way that meets the perceptions of the Papua New Guinean people. An associated problem is that all the cases discussed in the last chapter were decided before Independence. None of them are binding on the Supreme Court and only those decisions of the Full Court of the pre-Independence Supreme Court are binding on the National Court. It is unclear whether the Judges will follow these cases in the post-Independence period.

Particularly because of section 4 of the *Criminal Code Act*, 1974, the only way to change the law to give greater regard to the perceptions of Papua New Guineans is by legislation. The Commission therefore sets out 3 associated amendments to the *Criminal Code*. The first of these would be inserted in Chapter V of the *Code*, the other three in Chapter XXVIII. -

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22A JUSTIFICATION FOR ACTS AND OMISSIONS

(1) A person is not criminally responsible for an act or omission, other than an act or omission causing the death of a person, if the court hearing the charge arising out of the act or omission is satisfied that -

- (a) the person when he did the act or made the omission was acting under the influence of a traditional custom, perception or belief; and
- (b) the particular traditional custom, perception or belief was, at the time of the act or omission the subject of the charge, held by other members of the customary social group to which the person belonged living in similar educational, religious employment or other experience.

(2) A court, when considering the issues raised by subsection (1)(b) shall not apply the technical rules of evidence, but shall admit and consider such evidence as is available.

303 UNLAWFUL HOMICIDE (AMENDMENT OF SECTION 303).

Section 303 of the Criminal Code is amended by omitting the words "or manslaughter" and inserting in their place the words, "manslaughter, or diminished responsibility killing".

307A DEFINITION OF DIMINISHED RESPONSIBILITY KILLING.

(1) Subject to Subsection (4), a person who by an act or omission unlawfully kills another person in circumstances in which the killing would have been justifiable according to the traditional customs, perceptions or beliefs of the community to which the person belongs is guilty of diminished responsibility killing.

(2) A court shall not convict a person of diminished responsibility killing unless it is satisfied that -

- (a) the person when he did the killing was acting or omitting to act under the influence of a traditional custom, perception or belief; and
- (b) the particular traditional custom, perception or belief was, at the time of the killing, held by other members of the customary social group to which the person belonged living in similar circumstances as himself with similar educational, religious, employment or other experience.

(3) A court, when considering the issues raised by subsection (1)(b) shall not apply the technical rules of evidence, but shall admit and consider such evidence as is available.

(4) Notwithstanding Subsection (1), a person who unlawfully kills another in circumstances which amount to a vengeance killing (also known as pay-back killing) is guilty of wilful murder, murder or manslaughter according to the circumstances of the case.

(5) Upon an indictment for wilful murder, murder, infanticide or manslaughter a person may be convicted of the crime of diminished responsibility killing.

#### 314A PUNISHMENT OF DIMINISHED RESPONSIBILITY KILLING.

A person who commits the crime of diminished responsibility killing is liable to imprisonment with hard labour for three years.

The scheme of the proposed amendments is that if a person kills when he is acting under a traditional belief, he will be found guilty of an offence but will given a small punishment. If he does any other acts or omissions which do not cause the death of a person, when acting under a traditional belief, he will be completely acquitted.

The killer who wishes to take advantage of the diminished responsibility killing offence will have to satisfy the court, not only that he was acting under the traditional belief at the time, but also that the belief was still held by members of his community of the same level of sophistication as himself. An accused person wishing to avoid criminal liability for other acts and omissions would have to satisfy the courts as to the same matters.

Payback killings are specifically exempted from the proposed amendments. They would continue to be dealt with under the existing law, usually as wilful murder cases.

The Constitution, in section 35, guarantees the right to life and it would be inconsistent for with the spirit of that guarantee if the law absolved killers from all criminal responsibility except in the most exceptional cases.

In relation to killing, the offence of diminished responsibility killing reflects the approach already taken by the courts namely, that the killer is found guilty and is given a light sentences which takes this approach further by placing a maximum penalty of imprisonment for three years on those found guilty. It would be expected that in most cases, people convicted of this offence would receive much shorter sentences than that and that suspended sentences, fines and short custodial sentences would often be given.

The diminished responsibility killing provision would come to the assistance of those who killed sorcerers in circumstances of self-defence or provocation, where the killers had honest beliefs that the deceased was a sorcerer with power to harm them or their relatives. There is always the risk that the provision could be used as a refuge by scoundrels, but because a person wishing to rely on the provision must prove that he was acting under a traditional belief still held by his community and his case will be subject to scrutiny by the prosecution, we believe that the chances of witch beliefs being used to cover up killings for other motives, a warning recently sounded by Dr Marie Reay, are remote.<sup>1</sup>

The provision would also come to the aid of the bush surgeons in the "Enga Jury" case who at the request of the deceased operated on him.<sup>2</sup>

The justification for acts and omissions provision would have led to the acquittal of the cannibals in *Noboi-Bosai*,<sup>3</sup> but those cannibals who ate some of the remains of their enemies in order to humiliate them further could well be convicted of an offence against section 241 of the *Code*.

The suggested provisions do not in any way deal with the age of consent question in carnal knowledge cases. This matter will have to be dealt with as a separate issue.

## CHAPTER 4. THE ALTERNATIVES

There are probably many occasions on which offences against the introduced criminal law have been committed, but which, because they are not considered offences by the people, are not reported to the authorities. Occasionally the police or the prosecuting lawyers will exercise their discretion not to proceed with an offence which is not seen as wrong in the eyes of Papua New Guineans. However the major way of ameliorating the harsh effects of the introduced law at present is by imposing light sentences.

A. Sentencing.

The approach of giving light sentences for offences not treated as wrong by society has many defects. It is unreasonable that a person who is not guilty of a crime in the eyes of his fellows should be convicted of an offence. In countries with jury systems, the juries usually refuse to convict people of offences no longer considered appropriate by the general public. A legal system which is not in accord with society's views of right and wrong is unlikely to be respected and supported.

But there is a major practical problem with this approach. The sentences imposed can vary greatly from case to case and the appeal process does not seem to have led to uniformity of principle in sentencing.

As noted above, in *R v Tabatu Nosei* the accused were charged with gross indecency as a result of a traditional ceremony revived by the Hahalis Society in the Bougainville Province.<sup>1</sup> The trial judge, Frost J (as he then was)

accepted that the behaviour in the ceremony was acceptable under custom but held that to recognize the custom would not be in the public interest under Section 6 of the *Native Customs (Recognition) Act, 1963* and convicted the accused. His Honour, however, imposed the nominal sentences of imprisonment until the rising of the court.

In *R v Ginitu Ileandi* a notorious sorcerer on Sideia Island in the Milne Bay Province committed what was believed to be an act of sorcery on the wife of one of the accused.<sup>2</sup> The husband hastily gathered the two other accused and they chased the sorcerer because they believed they had to stop the sorcerer from doing the next act in the sorcery pattern. They caught him and killed him and then gave themselves up to the police. In the circumstances of the case the defence of provocation was not available and the defence of aiding in self defence was not available for the reasons given above. The accused, although they were heroes amongst their own people, were convicted of wilful murder and sentences to imprisonment for three years.

In *Wanosa v The Queen*, the Full Court of the pre-Independence Supreme Court reduced the sentences of men convicted of a wilful murder brought about by a belief in sorcery from 10 years to 6 years.<sup>3</sup> But more recently the Full Court refused to increase the sentences of 12 months imposed on men from Sepik who killed a sorcerer.<sup>4</sup> However the majority of the Full Court, Prentice S.P.J. (as he then was) and Raine J, said they might have imposed longer sentences if they had been determining the sentences at the trial, and Saldanha J said that an effective sentence of six years would have been appropriate.

Another problem is that there are other factors which bear upon the judges when they sentence killers. They are under some pressure to impose heavy sentences on killers by "popular demand".<sup>5</sup> And there is some evidence that the judges believe in the efficacy of deterrence against killing.<sup>6</sup> These factors can lead to heavy sentences being imposed when the particular cases do not call for them.

B. Juries

Europeans had a right to trial by jury for offences which attached the death penalty. The right prevailed in Papua from 1907 to 1964 and in New Guinea from 1952 to 1964.<sup>7</sup> There is no provision for juries under the present law, but the Constitution allows for the establishment of a jury system.<sup>8</sup>

Juries can ameliorate the effect of inappropriate laws by refusing to convict but this is an indirect, improper and probably ineffective way of dealing with unsatisfactory laws. Also it is not an appropriate time to introduce juries generally throughout Papua New Guinea.

C. Assessors

In New Guinea it has been possible to use assessors in criminal trials since 1925.<sup>9</sup> In Papua, Village Councillors were occasionally used as assessors in the Courts of Native Matters from about 1928 until World War II.<sup>10</sup> Even though Sir Hubert Murray supported the development of an assessor system,

no legislation formalizing the use of assessors was ever introduced in Papua.

Through the influence of the present Chief Justice of Papua New Guinea, Sir Sydney Frost, the assessor system in New Guinea has recently been revived and assessors are occasionally used in Lae, Rabaul and Kieta.<sup>11</sup> The assessors are empowered to advise the National Court, upon request by the judge, on questions of fact, custom or usage.<sup>12</sup> But it is the judge alone who decides the guilt or innocence of the accused.

The assessor system was first developed in India<sup>13</sup> and was later adopted into many British colonies in Africa.<sup>14</sup> However it was only in Gold Coast (now Ghana) and in South Africa that assessors were empowered to decide questions of fact arising at the trial.<sup>15</sup> All questions of law remained for the judge alone to decide.<sup>16</sup>

The use of assessors in trials would leave the judges better informed about the customs of the people being tried before the courts in particular cases, but it is not a solution to the problem of recognition of the perceptions and beliefs of the people. The African experience indicates that assessors can help reduce the harshness of the introduced criminal law,<sup>17</sup> however it is this law, with its foreign concepts of criminal responsibility which the judges must apply.

The use of assessors and the provisions set out in Chapter 3 are not mutually exclusive. Assessors would probably be in a better position than most judges to assess the evidence given by defence witnesses as to the perceptions and beliefs of members of their community and they could provide a safeguard against the improper reliance upon the new "defences" suggested in Chapter 3.

#### D. Diminished Responsibility

In an article discussing sorcery and homicide in Papua New Guinea R. S. O'Regan suggested the introduction of a qualified defence of diminished responsibility for sorcery killings.<sup>18</sup> He formulated a new section for the *Sorcery Act*, 1971 as follows<sup>19</sup> -

#### 20A DIMINISHED RESPONSIBILITY

When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute wilful murder or murder, does the act which causes death under the belief that the person killed is a sorcerer who has killed by an act of sorcery, or who intends to kill by an act of sorcery the accused or any other member of the social group to which the accused belongs, is guilty of manslaughter only.

The attraction of this provision is that it reduces wilful murder or murder to manslaughter only. The normal result of this is would be that the offender would receive a lesser sentence, but he would still be liable to maximum penalty of imprisonment for life if convicted of manslaughter. But, in the view of most Papua New Guineans a person killing in the circumstances envisaged by this suggested section ought either to be acquitted entirely or subjected to only a minimum amount of punishment.

#### E. Seidman's Solution

Seidman suggested three solutions to the problems of recognition of their perception of nationals in the criminal law of a country.<sup>20</sup>

- 1). To have the 20th century rationalist man as the norm, but to take into account as a mitigating factor, on sentence, the fact that the offender did not meet this standard and could not have acted otherwise than he did.

This has long been the approach in Papua New Guinea. Whilst it is humanitarian to an extent, it is unacceptable because it results in the guilt or innocence of Papua New Guineans being decided entirely according to foreign perceptions. And that is the mischief to be disposed of if the law is to become truly Papua New Guinean.

- 2). This is really a development of 1. Once the offender has been found that the offender did the actus reus, then he is to subject to the "administrative processes of re-education" which would involve vocational training, family counselling, compulsory attendance and a job, transportation to another part of the country and the like.<sup>21</sup> In a later article Seidman suggests the creation of a defence of Outmoded Custom or Belief.<sup>22</sup> If the accused pleaded and moved that the act, otherwise criminal was done under the sway of superstition, pre-scientific belief, indigenous custom or the like, the accused would be found guilty not of the crime charged, but of the offence of Primitive Custom or Belief. On sentence the judge would consider only the question of re-education of the offender. Seidman however says that the method of re-education "lies in the area of education rather than that discussed in this paper".

This proposal, like the first, suffers from the defect of people being judged according to the perceptions of foreigners. One also has to be wary

of the desire for re-education, because this can become tyranny and people can spend long periods in detention because others wish to reform them.<sup>23</sup> Thought reform as practiced in China looks attractive from a distance; but a closer look shows that it is grossly inhuman.<sup>24</sup>

Rehabilitation through surgical procedures is another form of tyranny as can be seen from Antony Burgess' book "The Clockwork Orange" and the film "One flew Over the Cuckoo's Nest".

- 3). The third solution Seidman offers is to model the guilty mind concept more closely upon the community from which the accused comes. He rejects this approach because he believes it would not be acceptable in Africa. He says that the African leaders, highly educated in European culture, would not accept a pre-scientific standard of knowledge and behaviour. Belief in witchcraft and its equivalents cannot be accepted when building a modern industrialized society, he argues.<sup>25</sup>

Despite Seidman's arguments dismissing this third approach, we believe that this is the direction in which the appropriate solution is to be found.

FOOTNOTES

## CHAPTER 2.

1. a). R. B. Seidman, *Witch Murder & Mens Rea: A Problem of Society under Radical Social Change* (1965) 28 Modern Law Review, 46.
- b). R. B. Seidman, *Mens and the Reasonable African: The Pre-Scientific World View and Mistake of Fact*, (1966) 15 International and Comparative Law Quarterly, 1135.
2. Seidman (1966:1154).
3. Seidman (1966:1158).
4. The author of the Queensland Criminal Code, Sir Samuel Griffith said in *Widgee Shire Council v Bonney* (1907) 4CLR 977 at 981.

Under the criminal law of Queensland, as defined in the Criminal Code it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which has been the subject of much discussion.

In *Thomas v Mc Eather* (1920) St. R. Qd. 166 at 175, Cooper CJ and Lukin J said -

It seems to us that the Queensland Legislature has, by the express provisions of sections 23, 24 and 25, laid down in clean terms what the law in future should be in regard to the very much debated, very much misunderstood and very confused doctrine of what is referred to as *mens rea*, and directed that the courts on this question, but should be guided in determining the criminal responsibility of a person charged by reference to the tests prescribed by the language in those sections.

6. The English common law as statutorily received into Papua by S.4 of the *Courts and Laws Adopting Act*, (1889) (Papua), but because Papua became a British colony in 1888, (British New Guinea) the English common law was introduced then. The Queensland Criminal Code was adopted in Papua and came into operation 1st July 1903.

The English common law was statutorily received into New Guinea by S.16 of the *Laws Repeal and Adopting Act* 1921 (New Guinea) but because New Guinea had been under a British Military Government since 1914, the English common law had probably been imported between 1914 and 1921. The Queensland Criminal Code was adopted in New Guinea on the same day as the English common law was statutorily received 9th May 1921. See Schedule 2, *Laws Repeal and Adopting Act*, 1921 (New Guinea).

7. See
  - a). *Bank of England v Vagliano Bros.* [1891] AC 107 at 120 and 144-45.
  - b). *Robinson v Canadian Pacific Railway Co.* [1892] AC 48 at 487
  - c). *Brennan v The King* (1936) 55 CLR 253 at 263.
  - d). *Wallace-Johnson v The King* [1940] AC 231 at 240
  - e). *Vallance v The Queen* (1961) 108 CLR.
  - f). *Kaporonovski v The Queen* (1973) 47 ACJR 472 at 482.
  - g). R. S. O'Regan, *Codes & Common Law in Papua New Guinea*, Vol. 1 No. 1 *Melanesian Law Journal*, 5.
  - h). D.C. Pierce, *Statutory Interpretation in Australia*, Butterworths Sydney, 1974, pp 102-104.
8. Gibbs J in *Kaporonovski v The Queen* (1974) 47ALJR 472 at 482.
9. Windeyer J in *Vallance v The Queen* (1961) 108 CLR 57 at 75-76.
10. The argument is raised by R. S. O'Regan in his article, *Codes and Common Law in Papua New Guinea*, Vol 1. No. 1 *Melanesian Law Journal* pp. 5-6.
11.
  - a). Mann CJ, in *R v Hamo-tine* [1963] P&NGLR 9
  - b). Ollerenshaw J, in *R v Zariai-Gavene* [1963] P&NGLR 203.
  - c). Smithers J in *R v Nantisantjaba* [1963] P&NGLR 148.
  - d). Minogue J (as he then was) in *R v Iawe-Mama* [1965-66]P&NGLR 96.
  - e). Frost J (as he then was) in *R v Moses-Robert* [1965-66]P&NGLR 180.
  - f). Clarkson J in *R v Manga-Kitai* [1967-68] P&NGLR does not decide the matter but seems to favour the majority view. His Honour took a similar approach in *R v Oa* [1967-68] P&NGLR 26.
  - g). Selby AJ in *R v John-Bomai* [1964] P&NGLR 278, is the only judge to have taken the contrary view. His opinion has not been adopted by the other judge.
12. *R v Hamo-Tine* [1963] P&NGLR 9 at 16.
13. *R v Iawe-Mama* [1965-66] P&NGLR 96 at 103-04.
14. See a suggestion of this *R v Moses Robert* [1965-66] P&NGLR 180 at 185-86.
15. *R v Moses Robert* [1965-66] P&NGLR 180-187.
16. *R v Zariai-Gavene* [1963] P&NGLR 203 at 214-15.
17. *R v Yanda-Piaua* [1967-68] P&NGLR 482 at 488-89.
18. [1973] P&NGLR 254.
19. [1973] P&NGLR 254 at 270.
20. [1973] P&NGLR 330 at 332.

21. *Report on Questionnaire relating to sexual offences as defined in the Criminal Code*, prepared for the Department of Law, by Dr. Marilyn Strathern, February 1975, pp. 124-128.
22. [1965-66] P&NGLR 147.
23. a). J.H.P. Murray, *Papua or British New Guinea*, Unwin, London, 1912 p. 217.  
b). J.H.P. Murray, *Papua of Today*, P.S. King and son, London 1925, p. 87.
24. Smithers J, *The Rule of Law and the Administration of Justice in an Emerging Society*, in *the Rule of Law in an Emerging Society* I.C.J. Sydney 1970 p. 67.
25. *R v Noboi - Bosai* [1971-72] P&NGLR 271.
26. *R v Noboi Bosai* [1971-72] P&NGLR 271 at 283-84. For a criticism of the decision see J.A. Griffin. *Is a Cannibal a Criminal?* (1971) Vol 1 Vol 2. Melanesian Law Journal 79.
27. Unreported judgement 782, (Lalor J, 22-4-1974).
28. *Prosecutor's Request No. 2 of 1974* [1974] P&NGLR 317.
29. *Prosecutor's Request No. 2 of 1974* [1974] P&NGLR 317 at 325.
30. [1971-72] P&NGLR 271.
31. [1963] P&NGLR 72.
32. [1967-68] P&NGLR 180.
33. Unreported judgement 419, (Clarkson J, 8-3-67)
34. [1975] P&NGLR 93.
35. [1973] P&NGLR 93 at 102.
36. Legislative Council Debates Volume VI, No. 7. pp. 665-67 and Volume VI, No. 8 pp 733-34 and pp 775-79
37. Unpublished judgement September 1968, Frost J. Discussed by Frost CJ in Frost, CJ, *The use of Customary Law in the Criminal Justice System*, a paper presented to the Australian Institute of Criminology Seminar, *The use of Customary Law in the Criminal Justice System*, Canberra, March 1976, p. 15.

## CHAPTER 3.

1. Marie Reay, *The Politics of Witch Killing*, in 47 *Oceania* p. 1 (September, 1976).
2. *Prosecutor's Request No. 2 of 1974* [1974] P&NGLR 317.
3. [1971-72] P&NGLR 271.

## CHAPTER 4

1. Unpublished judgement, Frost J, September, 1958.
2. [1967-68] P&NGLR 496.
3. [1971-72] P&NGLR 90.
4. *Secretary for Law v Uleo Amantasi*, unreported judgement FC. 81 (1-8-1975).
5. Saldanha J in *Secretary for Law v Uleo Amantasi*, unreported judgement FC. 81 (1-8-1975), p. 10.
6. a). Saldanha J, *Ibid.* p. 9.  
b). Minogue CJ in *Wanosa v The Queen* [1971-72] P&NGLR 90 at 96.
7. See Jury Ordinance (Papua) 1907-1951, Jury Ordinance (New Guinea) 1951-1952. Juries were abolished in both Territories by the Jury Ordinance (Repeal) Act 1964.
8. Section 186 of the Constitution.
9. *Supreme Court Assessors Act (New Guinea)* [1925-1938]
10. See Territory of Papua, Annual Reports [1926-1927], p 39; 1927-28, p. 26 para 180; 1930-31, Appendix D, p. 26; 1932-33, p. 25.
11. The Act was brought back into use by the enacting of the *Supreme Court Assessors Regulation*, 1975.
12. *Supreme Court Assessors Act (New Guinea)*, 1925-1938. Section 5.
13. The Law Reform Committee of Uganda, First Report, Government Printer, Kampala 1967, pp. 27-28.
14. For example see Kenya Uganda, East and West Nigeria, Tanganvika and Zamzibar (now Tanzania) Nyasaland (now Malawi), Gold Coast (now Ghana), South Africa and, in the Pacific, the Solomon Islands.

15. *Criminal Procedure Code of the Gold Coast* S. 261, F.G. Richings, *Assessors in South African Criminal Trials* [1976] *Crim. L. R.* 107.
16. Richings (1976:113)
17. Sir John Gray, *Opinions of Assessors in Criminal Trials in East Africa* [1958] *J.A.L.* 5.
18. R. S. O'Regan, *Sorcery and Homicide in Papua New Guinea*, (1974) 48 *A.L.J.* 76.
19. O'Regan (1974:82).
20. Seidman (1965:59-60).
21. Seidman (1965:60).
22. Seidman (1966:1163).
23. See in the case of young offenders the case from the Supreme Court of the U.S.A. *Re Gault* 18 *L. Ed.* 2d. 527.
24. a). J.A. Cohen, *The Criminal Process in the People's Republic of China, 1949-1963*, Harvard University Press. Cambridge, Massachusetts, 1968, pp 256-261.
- b). Allyn and Adele Rickett, *Prisoners of Liberation* New York 1957,
- c). R.J. Lifton, *Thought Reform and the Psychology of Totalism*, London, 1961.
- d). Patricia Griffin, *Prison Management in Kiangsi and Yenan Periods.* (1974) 46 *China Quarterly*, 310.
25. Seidman (1965:59).

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                          b). *Provocation and Homicide in Papua New Guinea, 1971-72* 10 *University of Western Australia Law Review*, 1. Also in (1972) Vol. 1 No. 3 *Melanesian Law Journal*, 60.  
                          c). *Pruning the English Oak*, University of Papua New Guinea, 1972.  
                          d). *Criminal Guilt and Moral Fault in New Guinea in Cultures in Collision*, I. Pilowsky (ed.), 109.  
                          e). *Western Criminal Law in New Guinea*, (1974) Vol 7 No. 1 *Australian and New Zealand of Criminology*, 5.  
                          f). *Sorcery and Homicide in Papua New Guinea*, (1974) 48 *A.L.J.* 76

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