NOTE: LAW REFORM COMMISSION WORKING PAPER NO. 6 - CRIMINAL RESPONSIBILITY: TAKING CUSTOMS, PERCEPTIONS AND BELIEFS INTO ACCOUNT.

Criminal responsibility in Papua New Guinea has been governed, since 1902, by the provisions of the Queensland Criminal Code, as adopted.1 Drafted in 1897 by Sir Samuel Griffith2 as a replacement for the common law of crimes, and scattered statutes,3 the principles of criminal responsibility embodied in the Code are drawn from the common experience of western *gesellschaft* societies, with their emphasis on the rights and obligations of the individual, and without reference to traditional, or *gemeinschaft* societies like Papua New Guinea, where the emphasis is on traditional social relationships and often on group responsibility.4

While New Guinea's adoption of the Code and other Queensland legislation was qualified by the phrase "so far as the same are applicable to the circumstances of the Territory",5 the adoption in Papua brought in the Code without any qualification,6 even though the earlier *Courts*

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1. The *Criminal Code Ordinance* of 1902 (No. 7 of 1902), s.1, adopted Queensland's *Criminal Code Act* 1899 (63 Vic. No. 9) in the Territory of Papua. The Act was adopted in the Territory of New Guinea in 1921, by the *Laws Repeal and Adopting Act*, (No. 1 of 1921) Schedule 2, and later repealed and re-adopted, with some amendments, by the *Laws Repeal and Adopting Ordinance* 1924 (No. 1 of 1924). Prior to the entry into force of the Act, the English common law applied by virtue of the *Courts and Laws Adopting Act* 1889 in Papua. New Guinea was under German rule until 1914, and under British military rule from 1914 until 1921, when it was made a Class "C" League of Nations Mandate under Australian administration.

2. Then Chief Justice of Queensland, he was later named the first Chief Justice of the High Court of Australia after federation in 1901.

3. See Sir Samuel Griffith, "Explanatory letter to Attorney-General Queensland with Draft Code", *Queensland Parliamentary Papers C.A.* 89-1897, iii; excerpted in Edwards, Hayes and O'Regan *Cases on the Criminal Code* (1969).

4. See F. Tonnies, *Community and Society* (1957) (edited and translated from the original German by C.P. Loomis).

5. *Laws Repeal and Adopting Act* 1921, s.13.

6. See *Regina v. Ebulya* [1964] PNGLR 200, 221: "It is to be observed that the *Criminal Code of Queensland* was adopted as and to be the law of [Papua] without the qualification of circumstantial applicability or of repugnancy to existing laws." The Court went on to say, however, that parts of the Code were clearly inapplicable and unenforceable, such as those calling for trial by jury, or granting rights of appeal to a 'Full Court", which did not exist at the time of the adoption. *Id*, at 221-222.

and Laws Adopting Ordinance 1888,7 adopted generally the law of Queensland as the basic law of Papua, subject to local legislation, "so far as the laws ... are applicable to the circumstances of the Possession".8

In 1974 the two adopting enactments, together with all subsequent amendments, were repealed and replaced by the *Criminal Code Act*.9 The new Act, which has application throughout Papua New Guinea, is virtually identical to the Queensland Code, and makes no changes in the provisions dealing with criminal responsibility.10

Customary law and perceptions have played a role, albeit a small one, in the administration of criminal justice in pre- and post-Independence Papua New Guinea. In New Guinea, the *Laws Repeal and Adopting Ordinance* 1921 provided, in keeping with the terms of the Mandate Agreement,11 that.

> The tribal institutions, customs and usages of the aboriginal natives of the Territory shall not be affected by this Ordinance and shall, subject to the provisions of the Ordinances of the Territory from time to time in force, be permitted to continue in existence in so far as the same are not repugnant to the general principles of humanity.12

No legislative enactment specifically recognised customary law in the Territory of Papua, although in practice the colonial courts did receive and consider evidence as to custom.13

In 1963, the *Native Customs (Recognition) Act*14 was promulgated, and for the first time provided a systematic scheme for dealing with customary law throughout Papua New Guinea. Section 6 of the Act provides for the recognition and enforcement of custom, except where such custom: (a) is repugnant to the general principles of humanity, (b) is inconsistent with written law; (c) is not in the public interest or where its recognition or enforcement would result, in the opinion of the court, in injustice, or (d) would adversely affect the welfare of a minor.

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7. No. 4 of 1888.

8. Section 10.

9. No. 78 of 1974. Schedule 2 contains the listing of repealed acts.

10. Cf. sections 22-36 of the Act and of the Queensland Code.

11. See W.E. Thomasetti, "Australia and the United Nations; New Guinea Trusteeship Issues from 1946-1966", *New Guinea Research Bulletin No. 36* (1970), at p.11.

12. Section 10.

13. This is clear from a survey of *Annual Reports* prepared by the Lieutenant-Governor of Papua in the 1920's and 1930's.

14. No. 28 of 1963.

The application of custom to criminal cases is restricted by section 7 of the Act to:

> a) ascertaining the existence or otherwise of a state of a mind of a person,
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> b) deciding the reasonableness or otherwise of an act, default or omission by a person;
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> c) deciding the reasonableness or otherwise of an excuse;
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> d) deciding, in accordance with any other law in force ... whether to proceed to the conviction of a guilty party; or
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> e) determining the penalty (if any) to be imposed on a guilty party, or where the court considers that by not taking custom into account injustice will or may be done to a person.

Taken together, sections 6 and 7 have operated, in conjunction with a judiciary that prefers common law precedent to customary law ascertainment, to severely limit the role accorded custom in the criminal process. In practice, custom has sometimes been utilised in cases involving provocation as a defense,15 and is often used at the sentencing phase in deciding on a punishment to suit the accused,16 but is rarely relied upon in determining the ultimate questions of criminal responsibility.17

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15. See, e.g., *R.v. Hamo-Tine* [1963] PNGLR 9; *R. v. Iawe-Mama* [1965-66] PNGLR 96; *R. v. Moses Robert* [1965-66] PNGLR 180; and *R. v. Yanda-Piaua* [1967-68] PNGLR 482, where wilful murder is reduced to manslaughter because of provocation. Section 20 of the *Sorcery Act* 1971 (No. 22 of 1971)expressly states that an act of sorcery may be a wrongful act or insult for the purposes of the defence of provocation, even where the act did not occur in the presence of the accused, and directs the court to look at the traditional beliefs regarding sorcery held by the social group to which the accused belongs.

16. See Chalmers and Paliwala, *An Introduction to the Law in Papua New Guinea* (1977) at p. 101.

17. The Village Courts, established under the *Village Courts Act* 1973 (No. 12 of 1974), deal almost exclusively with customary law, and handle many "quasi-criminal" offences which are set down in the *Village Court Regulations* (s.25), such as injury to person or property, theft, disturbing the peace, sorcery, defamation, and the breaking of a customary rule (after the accused has been warned by the court). See Chalmers and Paliwala, *op. cit.*, at p.87. The sanctions available to the Village Courts in criminal cases are fines up to K50, or community work orders of up to four weeks. Indictable offences under the Criminal Code are heard by the National Court after commital by the District Court. Summary offences are generally heard by the District Court. In practice it appears that the Village Courts handle relatively minor criminal matters, but more serious matters are set for indictment under the Code. which provides for far greater sanctions against the offender.

In February 1977, the Law Reform Commission of Papua New Guinea circulated its Working Paper No. 6: *Criminal Responsibility: Taking Customs, Perceptions and Beliefs Into Account*, which proposes amendments to the Criminal Code which would alter the present provisions on criminal responsibility.18

The Working Paper suggests the addition of a section 22A, to Chapter V of the Code, which would provide that:

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

Thus, an act or omission, not causing death, coloured by a customary belief would be completely free from criminal responsibility if the accused could show that others from his customary social group in similar circumstances would have believed and acted likewise.

At the Law Reform Commission's Seminar on the Underlying Law, held at Goroka in April 1977, this provisions was debated and the general feeling was that its enactment would result in an anomalous situation whereby an accused who beat his victim *nearly* to death or who caused serious or permanent injury would be absolved from all criminal responsibility, whereas if the victim died the accused would be liable for imprisonment. The Law Reform Commission's final report will apparently modify this provision to reduce the anomaly, removing from the ambit of s.22A those acts or omissions which cause death *or grievous bodily harm*.19

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18. The working paper has been circulated for discussion purposes only, and does not represent the final views of the Commission or a formal submission to Parliament.

19. Personal communication.

The Commission's proposal would also create a new level of unlawful homocide,20 known as "diminished responsibility killing", by adding a s.307A to the Code:

> (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.
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> (2) A court shall not convict a person of diminished responsibility killing unless it is satisfied that -
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> > (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
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> > (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.
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> (3) A court, when considering the issues raised by subsection (2) shall not apply the technical rules of evidence, but shall admit and consider such evidence as is available.
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> (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.
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> (5) Upon an indictment for wilful murder, murder or manslaughter a person may be convicted of the crime of diminished responsibility killing.21

The punishment for a diminished responsibility killing would be a maximum term of imprisonment for three years with hard labour, under the proposed new s.314A, whereas the punishment for manslaughter, under s.314, may be as severe as life imprisonment with hard labour.

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20. See s.303, which lists wilful murder, murder, infanticide and manslaughter as crimes resulting from an unlawful homicide.

21. Presumably, a modification in s.22A to include grievous bodily harm would also require the creation of a new assault offence, on the order of "diminished responsibility assault".

It should be noted that the infamous "pay-back killings", which are sometimes justified on the grounds of custom and tradition, have been specifically excepted from the provisions on diminished responsibility killing, it being the feeling of the Commission that the practice must be dealt with sharply and curtailed as soon as possible.

A final report, containing a proposed bill, is expected to be released by the Law Reform Commission in early 1978.

--- DAVID WEISBROT.