

CUSTOMARY COMPENSATION LAW PROPOSALS
AND THEIR RATIONALE*

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I. *Introduction.*

The proposed law is aimed at facilitating the concept of compensatory justice through the medium of payment of wealth. To achieve this purpose, it controls and regulates the practice of compensation in accordance with traditions and customs, while at the same time attempting to prevent abuses of the institution.

II. *The Rationale of the Proposed Law.*

Customary compensation payment as a means of settling disputes is not a new phenomenon. It stems from the traditional form of retribution: restoring sociological-equilibrium in societies by the principle of a life for a life. The practice of compensation occurs at a level of cultural development when mutual and peaceful co-existence has been recognized. It replaces the primitive and inhumane form of retribution of a life for a life.

Compensation involves the exchange of material wealth, goods or even persons. When a person is held responsible for an act, wrongful or otherwise, to another person and he pays over a certain amount to the person aggrieved, the settlement is said to be made by compensation. The institution is a cultural expression of maintaining, adjusting, restoring, redefining, or creating the numerous relationships that hold society together.

In material terms, compensation expresses the value of a life lost. True, material wealth however high its value cannot be the equivalent to loss of life. However, the idea represents the closest human perceived equivalence to the value of a life lost. The same is true for compensation for injuries or for property damage or loss. In other words it is a form of restitution. But in addition, compensation also expresses more important values. It mends, restores and strengthens relationships so that society is back in order.

Further, compensation has an element of retributive sanction for breach of norms. Imprisonment under the criminal justice system is not the best equivalent. It merely locks offenders away in a sanctuary from

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their duties and obligations in society and as such it is quite fruitless in Papua New Guinea at this stage of societal evolution.

The institution is part and parcel of a broader principle that governs the people's social life. It is a very powerful institution of social control and we must therefore utilize it to the fullest extent. It would be a fallacy to abolish the practice of compensation altogether. Because then there would be no equivalent traditional institution to replace it that would perform the same teleological function of knitting society together.

True the institution if not properly administered can have a devastating effect on the social life which it is supposed to keep intact. That is, its application can be abused. This has become very noticeable in the Highlands region. We have seen that very high compensation has been demanded and paid. In fact some of the high demands indicate that the parties claiming compensation do not really want to settle, since they know that the other side will not be willing to meet the claim. So they still prefer to fight out the old scores on the battle field. Even in cases where high compensation has been met the side effects of it are quite devastating to the social life of the people. The donor clan or group becomes impoverished and its plans for development and self-improvement are disrupted. Indigenous businesses have failed because the money to finance them has been used for payment of compensation. After compensation has been paid the donor clan often waits for the chance to make a counter-demand: once a group pays a large sum as compensation it anxiously waits on the prowl for an opportunity to claim it back. As a result competitiveness develops in compensation claims which is clearly an abuse of the institution.

The members of the clan or group receiving compensation also suffer. They perpetuate a system that they themselves eventually get caught up on the wrong side. The money and goods they gain are not earned by their industry and are usually idly spent. This has caused people to become lazy at times. Sometimes squabbles occur over the distribution of money and goods. This leads to further injuries or even deaths within the clan or group itself. As a result, social and economic development - especially in the Highlands region - is severely hampered.

Concern has now been strongly voiced by the Highlands people that a law must be made immediately to control and regulate the practice of compensation with the purpose of eliminating the abuses outlined above. Although consideration has been focussed on the Highlands region we should not be complacent about its practice in the coastal areas. In fact we also see its abuses there. In any case it becomes more difficult and its abuses are much worse when the Government has to deal with claims by Provincial tribal groupings rather than with disputes between groups of a wider tribal grouping of the same locality as before.

The practice of compensation varies slightly from society to society but the basic teleological concept of the institution is the same throughout the country. Some people assert that certain aspects of the practice of compensation are not traditional - for instance they contend that injury or death by motor vehicle is not traditional and therefore customary compensation should not apply to it. This argument is superficial and reveals conceptual ignorance of the function of compensation. It is true that the introduction to Papua New Guinea societies of modern technology including the motor vehicle is a new phenomenon but the fact of death is

not a new thing. The conceptual distinction between the fact of death and how it is caused is immaterial. The teleological conception of the institution of compensation, that is, to maintain, adjust, restore or redefine the sociological-equilibrium in societies remains the same in the past, the present and will do so in the future. The function which it serves will remain constant in the future even though the practice may vary slightly according to changing circumstances. Further, traditional conceptions relating to how property damage, injury or death is caused remain the same and whether the cause is modern or otherwise is immaterial. What matters is that whoever is linked with an eventuality is imputed to be responsible, and that person is then obliged to meet the functions of compensation and thereby restore the status quo. And so death or injuries caused by motor vehicles are still perceived as being covered by customary compensation.

Nevertheless, we recommend that customary compensation should not be paid in relation to injury or death by motor vehicle, not because it is wrong to do so, but because there is already a compensation scheme in existence to take care of it. The Government has seen the necessity for requiring owners and drivers of motor vehicles to put money together in the Basic Protection Compensation Scheme to meet the eventualities of deaths and injuries as a result of the introduction of motor vehicles here.¹

The gathering of money under this Government insurance scheme is in essence no different from members of a clan or group gathering money together for customary compensation payment. In the former case owners of motor vehicles are required by law to put money together and in the latter case members of clans are obliged by custom to put money or wealth together for compensation. In fact the insurance scheme has its origin in the concept underlying customary compensation. The only distinction is that the former is run under modern organizational practices whereas the latter follows the traditional form of organization.

What this new proposal attempts to develop and control is in fact the idea of compensatory justice as opposed to securing justice based on the principle of life for life. A distinction between the two concepts is still quite blurred of course at present as far as some tribes in Papua New Guinea are concerned. For instance some high compensation payments in the Highlands have not worked effectively, because the aggrieved party continues to seek justice by payback killing to restore the status quo. But this has to be understood against the background of the social structures, ways of life and the degree of cultural development to which the people have advanced. And if compensatory payment has failed among some tribes, it is because they have not yet recognized compensatory justice as distinct from the old form of retribution of life for life. This can be seen clearly in the Highlands among some tribes. It occurs in a situation where the rival tribes are still traditional enemies. Compensatory justice on the other hand will only be recognized in a situation where the people concerned have reached a stage of mutual and peaceful co-existence. The long-term aim is to develop the concept of compensatory justice in cases where compensation would normally be applicable.

1. See the *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974* (no. 44 of 1974), as amended.

We are fortunate that at the present level of our cultural development compensatory justice can still be self-regulatory. This is why we recommend an administrative tribunal and not a court of law to deal with compensation claims. Its functions are merely to be used as a forum for negotiation and mediation as to the degree of responsibility to be imputed to the offenders and the amount of compensation to be paid. We recommend that the setting up of the administrative tribunal and the administration of the proposed law be the responsibility of the Provincial Governments. This is because each Provincial Government is in the best position to know the customs and traditions of their people and therefore able to deal most effectively with them.

Most commentators on customary compensation in Papua New Guinea have echoed the view that it would be difficult to work out a law to deal with this problem. We invite them to consider the approach we set out in the proposed bill. It does not limit, restrict or expand customs and traditions. The only restrictions it has is in the field of tribal warfare. The core of the proposed law is to regulate in accordance with tradition and to prevent deviations that amount to abuse of the system. Built into the proposed law are effective indirect controls which will help to prevent or eliminate tribal warfare. The proposed law prohibits payment of customary compensation by either party in relation to deaths, injuries or property damage suffered by the opposing groups in a tribal fight. Compensation is also prohibited in cases of payback killings or injuries.

The proposed bill although quite short has a lot in it. It is a clear cut approach that we believe could operate effectively within the fabric of the societal order. We believe that the approach embodied in the bill is the best way of handling this problem area.

III. *The Main Proposals of the Customary Compensation Bill.*

1. Responsibility For Death, Injury Or Property Damage.

Responsibility for causing death, injury or property damage shall be determined on the basis that a person or group have substantially contributed to the death, injury or damage whether by an act or an omission. Reference shall be made to customs to determine whether or not an act is a substantial contribution to the cause of death, injury or damage.

NOTES:

The majority of indigenous people do not yet fully appreciate the conceptual distinction between criminal responsibility and moral blameworthiness. Both form one concept. Under the common law of England defendants are normally found guilty only if they have committed the criminal act, and have done so with a guilty mind. But in Papua New Guinea societies defendants who lack a guilty mind and who have not themselves committed an offence are nevertheless subject to sanction for being morally responsible for the wrong. In fact many people may be adjudged guilty in addition to the person who actually commits the act according to the people's sense of

justice. The people's sense of justice is in fact conceptually based on group responsibility which is a fact of life in our societies at this stage of cultural evolution. When an offence is committed it is a wrong against the group or community to which the victim belongs. Likewise responsibility for the wrong done is not imputed to the individual offender himself but simultaneously to the clan or group from which he comes. This is how traditional order has been effectively maintained, since an individual is reluctant to commit an offence that he knows full well will place his group in jeopardy. As well, he knows he will have to meet double penalties both from the aggrieved party and also from his own group.

2. Death, Injury Or Property Damage Are Subject To Customary Compensation.

All cases of death, injury or property damage, either intentional or accidental, are subject to customary compensation.

There are two exceptions to this rule:

- (a) Death, injury or damage that are acts of payback or revenge shall not be the subject of customary compensation.

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This is to prohibit people from committing an act of payback and at the same time demanding compensation for the original death, injury or damage against them, which does happen at times. It is also a safeguard against people who commit acts of payback but deny it in order to still claim compensation for the original wrong. Once the party aggrieved by the original act commits an act of payback, not necessarily in the exact equivalence, he is not entitled to compensation. And the original offender does not have to pay compensation.

The fundamental principle is that people who take the law into their own hands will be severely dealt with. This proposal to deny payment of compensation in this context would be one effective way of getting the message across to the people not to exact their own justice but to use the proper legal process to settle their wrongs and grievances.

- (b) Death, injury or damage caused by one or both sides to each other during tribal warfare or fighting, whatever its cause, shall not be

compensated by either side. If death, injury or damage triggered off the tribal warfare, the aggrieved party by entering a tribal fight over it forfeits its right to compensation and accordingly shall not be compensated for that initial death, injury or damage.

NOTES: Each party bears its respective losses for entering the fight. This is an indirect but very effective way of curbing and possibly eliminating tribal warfare. Another fundamental reason is that it will teach the people not to take the law into their own hands. It can be contended that to prohibit compensation in this case denies the operation of the teleological functions of the institution. But when the aggrieved party resorts to warfare to achieve the status quo, this implies that compensatory justice has not been recognized yet in the particular instance. Therefore compensation has to be denied because it will not usefully serve its purposes in that regard.

3. Deaths Or Injury Resulting From Inhuman Rituals Shall Not Be Compensated.

Deaths or injury resulting from inhuman rituals shall not be compensated by the organizer of the rituals.

NOTES: In most cases in Papua New Guinea people enter and participate in rituals voluntarily. This measure attempts to prohibit and eliminate practices that are inhuman and dangerous to human health. The organizers of the rituals should still be prosecuted under the criminal law.

4. Action.

Initiation of proceedings for compensation lies with either the plaintiff or the defendant. If neither of them takes the matter up for settlement, and if there is a potentiality for payback, the tribunal should convene a compulsory meeting for mediation with a view to settling the matter by compensation.

NOTES: In Papua New Guinea societies defendants are morally obliged to bring the matter up to the authority for settlement. This is why a defendant is included as being responsible for initiating proceedings.

5. Time Limitation.

Cases of death, injury or property damage made known after three years shall be barred from proceedings for compensation. However cases

of death, injury or damage made known and brought before the authorities like the police, the Village Court, or the Tribunal within the three year period will not be so barred.

NOTES: The period of three years is proposed because a longer period would be dangerous in terms of recalling good evidence. Further it eliminates fabrication of evidence and three years is just sufficient in which the facts of a case are still fresh in the people's mind.

6. Matters To Be Heard In The Place In Which They Arise.

Any claim for compensation for death, injury or damage shall be brought before the Tribunal in the place where the incident giving rise to the claim for compensation occurred. Where it appears to the Tribunal that the matter before it should be more appropriately dealt with in another tribunal, the Tribunal may with the consent of the parties order that the matter be dealt with at a different place.

NOTES: This may occur where both parties are from the same province but involved in a case outside their province and would prefer to take the case before their own tribunal in their own province. Or even if both parties are from the province where the incident arises, they might prefer to take their matter up before another tribunal because of possible fear of retaliation existing in their own province. There would of course be other grounds also on which the parties may wish to transfer their matter elsewhere for settlement.

7. Death - Amount.

- (a) Compensation to be paid for death of a child from birth to seven years old would be K1,500 in cash or in kind.
- (b) Compensation to be paid for death of a person from eight to 60 years old would be K3,000 in cash or in kind.
- (c) Compensation to be paid for death of a person over the age of 60 would be K1,500 in cash or in kind.
- (d) The plaintiff if he so desires can apply to the National Court to claim additional compensation from the defendant based on the earning capacity of the deceased and his standing in the community if he were still alive, and it would be up to that Court to assess whatever amount it considers appropriate in the circumstances.

8. Injuries - Amount.

- (a) Injuries shall be compensated up to K1,000 depending on the nature of the injury and the wrong committed, but the Tribunal shall not award more than K1,000 in cash or in kind.
- (b) If the injuries are worth more than K1,000, then the plaintiff can apply to the National Court to claim additional compensation and it would be up to that court to assess an amount appropriate to the circumstances of the injuries and the wrongfulness of the case.

9. Property Damage - Amount.

- (a) The Tribunal will award damages or compensation up to K1,000 in cash or in kind. Assessment of property damage will be based on the value of the property lost, production lost, and/or replacement value, and on the nature of the wrong committed.
- (b) If the plaintiff considers that the damage is worth more than K1,000 he can apply to the National Court for additional compensation.

NOTES:

For Sections 7, 8 and 9: The first basic payments under ss. 7, 8 and 9 are aimed at attempting to soothe the immediate feelings and settle the dispute. But if the plaintiff is still dissatisfied with the amount of compensation, he can take the matter up to the National Court for additional compensation if the merits of the case warrant it. However, the basic rationale of this particular approach is that in regard to the economic capabilities of most people or groups, such basic rates could be readily met whereas any amounts above those could not be afforded. If awards of compensation are not readily met, then the conceptual function of the institution of compensation cannot work. Also, if the basic rates are paid quickly, in most cases this settles everything and ends the matter there and then, making it unnecessary to take the extra trouble of going to the National Court for extra compensation. Another reason why the National Court is proposed for assessment of additional compensation is for that Court to set a ceiling on the amounts of

compensation so that eventually awards of compensation will be consistent throughout the country. It should be noted that intentional and non-intentional killing, injury or damage to property have the same basic rates of compensation. However additional punishment in the form of fine or imprisonment may be inflicted by the Court for intentional killing, injury or property damage.

10. Compensation Payments May Be Reduced.

Where in respect of any death, injury or damage to property it is agreed or determined that there is liability to pay compensation, then having regard to the circumstances of the case and the ability of the party liable to pay compensation, the parties may agree, or failing agreement the Tribunal may determine, that lesser amounts than those specified in Sections 7, 8 and 9 shall be paid in satisfaction of the customary obligation to pay compensation.

NOTES: It is a feature of Papua New Guinea societies that in most cases parties can amicably settle their differences, and can set lesser amounts than would normally be paid in the circumstances. This provision allows for these instances.

11. Moka Compensation.

Payment by way of moka gift or compensation to members or allies of the donor group for participating in warfare or for the death or injury of an ally member shall not include cash or modern goods.

NOTES: This is an exception to Section 2 (b). But the practice of moka peculiar to Highlands societies is an institutionalized ceremonial function which serves many purposes and should not be destroyed. It is controlled only in the sense that it has to be kept traditional and therefore cash and modern goods are excluded from the compensation payment. The idea behind this is that the inclusion of cash adds impetus for members of the group to enter tribal fights because they know they may be compensated with money if they do. The reason for allowing customary wealth only to be paid is that the institution is an intra-group function to maintain the solidarity of the group. Therefore it should be allowed to continue so long as it is not abused.

12. Motor Vehicle Accidents.

(a) Customary compensation shall not be paid

for death, injury or property damage resulting from motor vehicle accidents.

NOTES: The rationale for this was included in the section on the rationale of the proposed law, above.

- (b) A demand for customary compensation in this context shall be a criminal offence (extortion) punishable with imprisonment.

NOTES: The Basic Protection Compensation Act² should be amended as follows:

- (a) If the driver, in fear of his or his relatives' lives pays customary compensation before that to be paid under the Basic Protection Scheme is assessed, then the equivalent amount paid under the scheme should be refunded to the driver. The remainder should be paid to the deceased's relatives.
- (b) If the driver pays more than that usually paid out under the scheme then he should bear the loss of that extra amount.

However, if the deceased's representatives take further proceedings for additional compensation under the scheme and succeed, then part of that money shall be used to meet the balance to the driver for what he has paid.

13. Customary Compensation Tribunal.

- (a) A Provincial Government may appoint a Customary Compensation Tribunal.
- (b) The functions of the Tribunal shall be:
 - (i) to provide a means whereby claims for customary compensation may be negotiated between the parties to a dispute;
 - (ii) to act as a mediator where parties to a claim for customary compensation are unable to

2. For the existing legislation, see *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974* (no. 44 of 1974), as amended.

agree as to the liability to pay compensation or the amount and type of compensation and the manner in which it is to be paid;

(iii) where negotiation and mediation fails to achieve agreement between the parties, to determine the question of liability to pay compensation and the amount and type of compensation and the manner in which it is to be paid.

(c) The parties to any negotiations, mediation or determination of any matter shall be bound thereby.

(d) The Chairperson shall upon the reaching of agreement or the making of a determination under subsection (b) make an order incorporating the terms of agreement reached.

14. Composition Of The Tribunal.

(a) The Tribunal shall consist of four persons who shall be:

(i) the Chairperson who shall be the Provincial Secretary or his nominee;

(ii) a Village Court magistrate selected by the Chairman who shall have no direct or indirect personal interest in the matter under consideration;

(iii) two persons recognised as the leaders or nominees of the parties before the Tribunal, one to be nominated by one party and the other to be nominated by the other party.

(b) Three persons shall form a quorum at any meeting of the Tribunal provided that the Chairperson or his nominee shall be present at all meetings of the Tribunal.

(c) A Tribunal shall not sit on any dispute unless both the persons referred to in subsection (a) (iii) are present at the sitting.

(d) The proceedings of the Tribunal shall be as

informal as may be practicable, so that it provides a non-controversial forum for the negotiation and mediation of customary compensation disputes.

NOTES:

For sections 13 and 14: Papua New Guinea is fortunate that at its present level of cultural development compensatory justice can still be self-regulatory. This is why we recommend an administrative tribunal and not a court of law to deal with compensation claims. Its functions are merely to be used as a forum for negotiating and mediating the degree of responsibility to be imputed to the offenders and the amount of compensation to be paid. We recommend that the setting up of the administrative tribunal and the administration of the proposed law be the responsibilities of the Provincial Governments. This is because each Government knows best the customs and traditions of their people. And further, with the spirit of decentralization of powers, it is in the best interest of their people that the Provincial Governments should take the responsibility.

15. Review.

- (a) Where the Tribunal has made an award under section 13 (b), either party may apply to the Tribunal to have the matter reviewed.
- (b) The Tribunal upon reviewing the award may take into account any fresh material which may be relevant to the matter in dispute.
- (c) Upon review the Tribunal may confirm or vary or cancel the determination.

NOTES:

This provision avoids the long and cumbersome procedures of appeal to other courts. It is better to keep the proceedings within the tribunal itself for the faster hearing of disputes. Also, it avoids the rigid rules of evidence and formalities of court proceedings, which are too far removed from the traditional manner of settling disputes. The only opening would be an application to the National Court for assessment of the quantum of additional compensation (as earlier explained).

16. Recognition Of Groups.

A Tribunal, in addition to the usual traditional groupings, may also recognize a number of persons having a common interest as a group for the purposes of proceedings before it, and may determine in what manner the group may appear or be represented before it.

NOTES: Papua New Guinea societies are organized on a kinship basis. Social relations are primarily kinship relations. But kinship in primitive societies is a social phenomenon and not simply biological; it is not even based solely on the people's ideas of procreation. This is why there may be some people with common interests who fall outside the traditional grouping of clans, tribes etc. In this case it is up to the Tribunal to recognize them as a group for the purposes of proceedings before it.

17. Criminal And Civil Law Not To Apply In Determination Of Liability For Compensation.

The Tribunal may have regard to any criminal or civil proceedings in respect of the death, injury or damage which gives rise to a claim for customary compensation, but the result of any such criminal or civil proceedings shall have no effect on the responsibility or liability of any person or group to make or pay compensation.

NOTES: See notes for section 1.

18. Sanctions - Imprisonment Of Group Leaders For Non-Payment Of Compensation.

Where an order for compensation remains unpaid for three months after the date on which it was made, the Tribunal should apply to the District Court to enforce the order by fines not exceeding K1,000 or imprisonment for a period not exceeding six months, of leaders or all of the persons who are liable for payment of compensation.

NOTES: The award of compensation by the Tribunal will have the same authority as an order of the court except that the enforcement power will lie with the District Court and not with the Tribunal itself.

IV. *Conclusion.*

Law reform is not a prerogative of lawyers only, and rightly so. Law embodies the values of the people as a whole. This is why we have to reach the public through the help of the media and public discussions for the people to express the views and values that they hold about the proposed law. The Law Reform Commission attempts 'participatory law reform' by the people of Papua New Guinea. It is vital that the community which is to be governed by the proposed law should take part by helping to frame it.