MINIMUM PENALTIES IN PAPUA NEW GUINEA - A CASE STUDY IN CRIME AND DEVELOPMENT

By

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INTRODUCTION

The minimum penalties legislation was enacted by the Papua New Guinea Parliament in May 1983 against a background of mounting concern over the incidence of crime. This concern is not a new phenomenon but has now become a perennial theme running through most commentaries on social existence in Papua New Guinea. The purpose of the legislation was to provide a powerful deterrent to criminals, actual and potential, by ensuring that offenders were subjected to a minimum period of imprisonment upon conviction by the courts. The introduction and enforcement of this legislation has aroused considerable controversy amongst politicians and officials charged with administering the criminal justice system. Some are concerned that the measures do not go far enough in imposing severe punishments on criminals; others foresee the potential for individual injustice in the administration of the provisions.

This article reviews the background to the minimum penalties legislation and examines the subsequent judicial interpretations of the provisions, as well as Parliament's response to these interpretations. It is suggested that much of the tension apparent between policy makers and the judiciary in the implementation of this legislation is due to conflicting perspectives on crime and its management. On the one hand, the policy makers are primarily concerned with the need to eradicate crime given its perceived effect upon the overall processes of national development. On the other hand, the judiciary have been concerned with protecting the rights of individual offenders within the framework provided by the Constitution. Finally, it is concluded that the ideological schism revealed in the case of the minimum penalties legislation is likely to lead to future conflict over the management of criminal justice as the state increases its interventions in this vital area of policy.

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PART ONE

Background

(i) Legislative Background

The first batch of legislation providing for minimum penalties were introduced into the Papua New Guinea Parliament on May 19 1983 and took effect on July 4 1983. The offences covered included a range of public order offences, including riot and unlawful assembly;[1] miscellaneous property offences, including damaging property,[2] breaking and entering,[3] and receiving stolen property;[4] some minor offences against the person, including assault[5] and provoking a breach of the peace;[6] as well as offences committed in the preparation[7] and organisation[8] of inter-group fighting. Although introduced by a private member, Mr. Thomas Negints, the Pangu member for Tambul Nebilyer, the measures received unanimous government support and strong opposition backing. In fact only one member of the opposition did not support it.

Three bills were enacted: the Criminal Code (Minimum Penalties) (Amendment) Bill 1983 (No.10 of 1983); the Summary Offences (Amendment) Bill 1983 (No.17 of 1983); and the Inter-Group Fighting (Amendment) Bill 1983 (No.13 of 1983). Each consisted of amendments to existing legislation whereby a minimum penalty was added to an existing maximum penalty. In some cases, an existing maximum penalty was also extended. Thus, for example, s396 of the Criminal Code (Ch262), dealing with the offence of unlawful breaking and entering, formerly provided for the following penalty:

> "Penalty: Imprisonment for a term not exceeding three years."

After amendment by s13 of the Criminal Code (Minimum Penalties) (Amendment) Act, the penalty provision now reads:

> "Penalty: Imprisonment for a term not less than three years and not exceeding five years."

These three bills were introduced and passed in the space of two hours which is an indication of how the need for an official response to crime was seen as urgent by Parliamentarians. It is also evidence of the lack of careful consideration given by the legislature to the provisions.

(ii) Law, Order And Development

As stated above, concern with crime, law and order is not a new phenomenon in Papua New Guinea. As the Clifford Report put it:

> "Through the entire colonial period and a full decade of independence, the problem of 'law and order' has been under active (sometimes almost paranoic) consideration by government and people alike."[9]

There are many different discourses on the nature of the problem and the remedies thought appropriate. Whilst some perceive the problem in terms of inadequacies within the official criminal justice system ie ineffective policing, cumbersome legal procedures, lenient punishments, others view the problem more in terms of the social tensions consequent upon rapid social and economic transformation in a developing nation, ie social inequality, unemployment, urbanisation. Nevertheless, a strand running through most discourse lies in the assertion of a significant and adverse impact of crime upon the overall processes of social and economic development in Papua New Guinea. Various observers of crime, ranging from politicians, community leaders to academics have implicitly posited a model of development in which 'crime' and 'lawlessness' figure largely as major obstacles in the way of progress. In its crudest and most populist version this model envisages a relatively smooth economic development provided the stable social conditions necessary to attract foreign investment and overseas expertise can be secured. 'Crime' is understood, from this perspective, primarily in terms of its effects in seriously hindering the establishment and maintenance of those social conditions.

Mr. Thomas Negints, in introducing the bills before Parliament, put it in the following way:

> "The widespread law and order problem was and still is to-day a sickening epidemic which is hindering the country's total social, economic and political development."[10]

Within this perspective there are two outstanding features. The first is the centrality of 'crime' in the construction of the social order in Papua New Guinea today. The myriad interactions between crime and the 'reaction to it' have become an important medium for the expression of and attempt to resolve resolution of social conflicts and contradictions in the development process itself. The second fea-

ture is the extreme sensitivity to the views of commercial interests in the face of the 'crime crisis' and the economistic analyses of crime that this has often induced.

The minimum penalties provisions appeared against a background of a mounting concern about the cost of rising crime. More abstractly, a concern with the effectiveness of 'Law and Order' in the developing nation. The recently published Clifford Report[11] gives two broad meanings of the term 'Law and Order'. The first meaning relates to traditional Papua New Guinea conceptions of the welfare of small communities. These conceptions concentrate upon community generated social cohesion, independent of state intervention. The second meaning relates to "Peace and Good Order Established by the State" and it is in this latter sense that the phrase is being used here. These concerns, then, are related to a more fundamental concern with authority, and, in particular, with the state's right and ability to maintain order. Crime and social disorder are understood as a direct challenge to this authority and hence the need for a positive and concerted response.

The empirical question of the real extent of crime in Papua New Guinea is, as the recent reports[12] have confirmed, difficult to resolve in the absence of comprehensive and reliable statistical data. A look at the popular presentation of crime is nevertheless illuminating. The newspapers in the months leading up to the introduction of Mr. Negints measures provide ample evidence of the nature and pitch of these concerns.[13]

The front page in the Niugini Nius of Monday April 11 1983, makes explicit the linkage between crime and economic development. The lead story expresses gratitude to the visiting Australian Foreign Affairs Minister, Mr. Bill Hayden, for increasing Papua New Guinea's aid by K7.3 million. Alongside it is announced that the PNG government is considering the introduction of curfews and the re-establishment of a special police task force aimed at combatting rising urban crime. The announcement comes not from a PNG government spokesperson but from Mr. Hayden himself!

On April 26 1983, under the caption "Rascals 'turning to terror'", the Vice President of the Port Moresby Chamber of Commerce announced that:

> "We are now confronted not with mere rascalism but a form of terrorism being practised on the public of Port Moresby."[14]

The concerns were not only expatriate. On the May 4 1983, Highlands premiers called for national laws to be strengthened and the court system reviewed to give the police more powers of control. They were also concerned with tribal fighting in the rural areas which, it was alleged,

> "have upset the Highlands cash economy for too long in the past. It should not be tolerated. Police are crying out for more power to deal with such instances. Maybe it is not too late for the government to reconsider such a request."[15]

The crime crisis, then, is described primarily in developmental terms. The persistence of criminal activity is portrayed as a direct threat to the economic well-being of the nation. As a result the state is placed under increasing pressure from the most influential and vocal sectors of the mainly urban communities to assert its authority in a situation presented as getting out of control. The new provisions are selectively aimed at 'high visibility' urban crimes as well as those crimes seen as inflicting immediate social and and economic damage. As Mr. Negints explained:

> "amendments increasing the penalty provisions are related to matters in the nature of public order, safety and protection of property in home. There are many others such as killing, arson and what are commonly called 'white collar crimes' ... that are left untouched."[16]

(iii) Judicial Discretion And The Separation Of Powers

Another issue raised by the debates over the minimum penalty amendments concerns the nature of the independence of the judiciary in Papua New Guinea, based as it is, upon a Westminster model of government. This broader concern with the Separation of Powers arises from the perceived effects of the minimum penalty provisions upon judicial discretion in the determination of criminal penalties. There was also concern expressed in the Parliamentary debate about the willingness of the judiciary to implement Parliament's intentions in an unchanged form.[17]

There has been a history of tension between the judiciary and administration in Papua New Guinea since independence. The general principle of judicial independence is set out in s157 of the Constitution which reads as follows:

> "Except to the extent that this Constitution specifically provides otherwise, neither the Minister responsible for the National Justice Administration nor any other person or authority (other than the

> Parliament through legislation) outside the National Judicial System has any power to give directions to any court, or to a member of any court, within that System in respect of the exercise of judicial powers or functions."

This principle provided the constitutional setting for the dispute in the so-called Premdas-Rooney Affair of 1979[18] involving the judicial handling of a deportation case and alleged acts of executive interference. The Minister for Justice, the Hon. Mrs. Nahau Rooney, was imprisoned for contempt but shortly thereafter released through the exercise by the executive of the power of mercy. This latter act led to the resignation of four expatriate judges of the Supreme Court in protest.

This tension is compounded by more generalised reservations about the appropriateness of the existing laws to the needs and circumstances of Papua New Guinea and also the need for a localised judiciary.[19] Inevitably there exists a tension between an imposed system of values and procedures and the indigenous values and systems of dispute settlement. Commenting upon the colonial origins of the Criminal Code, Mr. John Kaputin, a former Minister for Justice, stated:

> "Law only has legitimacy when it comes from the people and responds to their requirements. This truth by itself is enough to question the legitimacy of the Criminal Code."[20]

Custom, it is often said, dealt more severely with offenders than does the imposed law.[21] Mr. Bai Waiba, MP for Nipa Kutuba, speaking during the introductory debate on the Minimum Penalties said:

> "When a man submits complaints, the leaders of the village must listen to it and make decision because the man knows that the customary laws are good and fair. But the man who has caused the actual problem would go to the court of law when the case would be heard, simply because the court of law used to impose a light penalty."[22]

A final issue is the effect of the basic rights and freedoms provisions contained in the Constitution. There have been opinions expressed by those favouring a tougher approach to crime that the judicial enforcement of these rights serves to detract from effective law enforcement and crime prevention. As Mr. Kindi Lawi, MP for the Western Highlands put it:

> "It is the Constitution that says, if any Warder is found belting up a prisoner, he will be charged. Mr. Speaker, that is the only reason why today you will find that Warders do not bother giving heavy punishment to the detainees."[23]

These then are some of the strands in the debates leading to the introduction of the minimum penalties legislation.

PART TWO

(i) The Judicial Response: Minimum Penalties Or Minimum Sentences?

In this section it is intended to examine the initial judicial treatment of the minimum penalties legislation. The judges are, as it were, at the 'front line' of the minimum penalties debate. It is their traditional discretion in sentencing which has been affected by the provisions and it is they who are charged with enforcing them. Some comments from the bench on this matter have received widespread publicity and been presented as implying a united judicial opposition to the measures. Such an impression is highly misleading. Whilst the judges may have expressed particular reservations about the new laws they have consistently refused to be drawn into an open contest with Parliament over them. This is not altogether surprising in light of the still sensitive issue of the Separation of Powers.

It would likewise be misleading to attribute the judicial response to a new found submissiveness in the face of executive and administrative determination. On the contrary, the early cases confirm that the judiciary attempted to define the extent to which their discretion was eroded in a manner that left their traditional powers in this area largely intact. This attempt resulted for a time, at any rate, in the enforcement of a minimum sentences policy rather than a minimum penalties policy.

One of the earliest cases involving the new provisions was the unreported National Court decision, Laho Kerekere v Robin Miria (Unreported National Court decision) (N432)(M) of 183. The appellant had been convicted of being unlawfully on premises contrary to s20 of the Summary Offences Act 1977 (as amended) and had been sentenced by the District Court to twelve months imprisonment, that being the minimum penalty provided for the offence. The appellant appealled against conviction and sentence. Firstly, on the ground that the magistrate failed to exercise or properly exercise his dis-

cretion under ss138(1) and 206(2) of the District Courts Act and, secondly, that the sentence was in the circumstances manifestly excessive.

S138(1) of the District Courts Act empowers a court where a person is charged with a simple offence[24] and the charge is proved, to dismiss the charge or give a conditional discharge without proceeding to conviction in certain circumstances. Although refusing to interfere with the magistrate's exercise of his discretionary power Amet J, agreed with the proposition that the mere provision of a minimum penalty does not exclude the operation of s138(1) in an appropriate case.

His reasoning was that the discretionary power contained in s138(1) exists quite independently of any minimum penalties provisions, being exercisable at an earlier stage in the proceedings - namely the decision as to whether or not to proceed to conviction.[25]

Having confirmed the usefulness of s138(1) in certain circumstances, Amet J then proceeded to consider s206(2) of the District Courts Act. This latter section empowered a court to impose a fine when a penalty of imprisonment only is provided for "if it considers that the justice of the case would be better met by a fine than by imprisonment".

Counsel for the appellant produced a strong argument based largely on two pre-independence cases dealing with minimum penalty provisions contained in Customs and Dangerous Drugs legislation. These cases being Makin v Kelly (1963) PNGLR 127 and Henderson v Blackwell (1973) PNGLR: 23. The argument was that s206(2) of the District Courts Act was not excluded by the minimum penalty provision contained in s20 of the Summary Offences Act because s20 only prevented the imposition of a prison sentence of less than 12 months where a prison sentence was considered appropriate. It did not prevent the substitution of one penalty, ie a fine, for another.

Counsel for the respondent contested this interpretation arguing that it was contrary to Parliament's intention in enacting the minimum penalties provisions and, also, that s20 of the Summary Offences Act, being a later statute repeals the earlier s206(1) of the District Courts Act by implication. Amet J, in the National Court, rejected this argument on the ground that "a later affirmative enactment does not repeal an earlier affirmative enactment unless the words of the later are 'such as by their necessity to import a contradiction'"[26] and that s20 of the Summary Offences Act does not exhibit any clear intention to repeal the earlier provision and is not inconsistent with it. Therefore

"the discretionary dispositive power under s206(2) is still available to the District Court as being not inconsistent with the penalty provision of s20 of the Summary Offences Act".[27] This second finding by Amet J clearly allowed the courts - the District Courts in this case - considerable discretion in determining the form of penalty that they wish to impose upon an offender irrespective of the minimum penalties provisions. This interpretation neatly qualifies any erosion of judicial discretion by restricting the application of the mandatory minimum penalties provisions to the imposition of prison sentences, whilst leaving it open for magistrates to impose alternative forms of punishment, under s206(2), where they consider appropriate.

The Supreme Court of Papua New Guinea had its first opportunity to consider the new provisions in The Matter of The State v Danny Sunu, Namabai Walter, Iku Gagoro and Philip Haro, (Supreme Court Reference No5 of 1983). The facts were, briefly, that four people had pleaded guilty before the Chief Justice sitting in the National Court on a charge of breaking, entering and stealing under s398 of the Criminal Code. After imposing the minimum penalty of five years, the Chief Justice referred the following question to the Supreme Court under s21 of the Supreme Court Act:

> "Does a judge have a discretion under S.19 of the Criminal Code to impose some other form of punishment despite the fact that S.398 of the Code provides that the minimum penalty for breaking and entering warehouse etc ... and committing a crime therein is imprisonment for not less than five years?"

S19 of the Code is entitled 'Construction of provisions of Code as to punishments' and contains an extensive set of provisions allowing broad judicial discretion in sentencing under the Code. This discretion extends to the forms of penalty and includes a range of possible combinations of different kinds of punishment. Thus, the section empowers the court to sentence an offender liable to imprisonment to pay a fine either in addition to the prison term or instead of it;[28] it allows the court to impose a good behaviour bond instead of imprisonment in certain cases;[29] and it permits the court to suspend part of a sentence of imprisonment in other cases.[30] S19 is thus essentially an aid to sentencing under the Criminal Code, outlining the range of penalties and possible combinations.

The question for the Supreme Court in this case was how, if at all, do the minimum penalties provisions affect the judges discretion in sentencing under s19? The answer, arrived at by a majority of three to two, was that s19 is not

affected by the minimum penalty provision of s398 of the Code except insofar as imprisonment under s19(1)(a)[31] must not be less than five years.

Thus, the majority view, like that expressed earlier by Amet J in Laho Kerekere v Robin Miria (Unreported National Court Decision (N432)(M) of 1983 is that the minimum penalties provisions only effect the length of any prison sentence imposed and do not restrict the judge's discretion under s19 to impose alternative forms of punishment. The reasoning is also similar to that of Amet J in the earlier case. That is, s398, the relevant minimum penalty provision, does not expressly exclude s19.

The two judges in the minority, Bredmeyer J and Kaputin J, answered the Chief Justice's question in the negative on the basis of what they considered as the clear intention of the minimum penalties provisions to deny the options of s19. Kaputin J pointed to the qualification that prefaces s19:

> "(1) In the construction of this Code, it is to be taken that, except when it is otherwise expressly provided "[32] -

and cited it as clear evidence of the exclusion of s19. Refering to the words in the Criminal Code (Minimum Penalties) Act, Bredmeyer J concluded:

> "In my view, those words combined with the long title and even without the assistance of the movers speech in Parliament, show sufficient contrary provision and intent to deprive the court of the options of punishment given by s19."[33]

McDermott J, in the majority, failed to find any intention, either expressed or implied, on the part of Parliament of denying the judges resort to s19. His real concern, however, appears to have been with the practical consequences of an inflexible minimum penalties policy and, in particular, the possible effects upon the judiciary's exclusive jurisdiction over sentencing. Referring to the situation in which the sole redress open to offenders sentenced under the minimum penalties provisions would be executive discretion based on advice from the Power of Mercy Committee, his honour remarked:

> "Mandatory sentencing raises the spectre of general and widespread applications to the Executive involving executive hearings parallel to the judicial process of hearing and determining sentence.

This could well make the judicial sentence a sham, the real sentence would be by the Executive. This is surely not intended."[34]

The Supreme Court in this decision can be seen as doing two things. Firstly, it asserted the court's traditional control over the sentencing of offenders. Secondly, it sought to minimise any qualification upon its discretion by redefining the impact of the minimum penalties provisions affecting sentences of imprisonment alone. It did so whilst at the same time trying to re-assure Parliament that it will deal with serious cases severely, thereby acknowledging one of the major concerns behind the legislation.[35]

From these two initial cases, there followed a series of National Court decisions which amplified the scope of particular minimum penalty provisions whilst not departing from the basic interpretations of Amet J and the Supreme Court. Thus, in the case of Henry Tuk v First Constable Gori (N446(M) of 1983, Pratt J decided that s6 of the Summary Offences (Amendments) Act which imposed a six months minimum penalty for assault did not preclude a magistrate from imposing a fine, or refusing an entry of conviction, under provisions in the Local Courts Act worded similarly to the discretionary provision in the District Court Act.

According to Pratt J, section 20 of the Local Courts Act was directed to the same end as s138 of the District Courts Act. S20 of the former act reads:

"A local court is not bound to convict if the offence complained of is, in the opinion of the court, of so trivial a nature as not to merit punishment."

In addition, in His Honour's view, s206(2) of the District Courts Act had a counterpart in s19(2) of the Local Courts Act. This provision empowered a Local Court to impose a fine when a penalty of imprisonment only is provided for "if it considers that the justice of the case would be better met by a fine than by imprisonment".

In the case of Lakea Sareaka v Simon Pipi N448(M) of 1984. The appellant had been convicted on his own plea before the District Court of being unlawfully on premises contrary to s20 of the Summary Offences Act which carried a minimum penalty of one year imprisonment. The facts of the case indicated that the trial court should never have accepted the plea of guilty. Before quashing the conviction, Pratt J expressed in unequivocal terms his opinion of the minimum penalties provisions:

> "Of course, this type of situation is not the only blatant injustice which can be perpetrated by the ill-conceived, ill-advised, ill-considered, inherently illogical and draconian burst of legislation ..."[36]

The case of Peter Kekai v Munagun N453 of 1984 concerned an appeal against a sentence imposed by the District Court on the grounds of severity. The appellant had been charged with unlawful assault under s6 of the Summary Offences Act which specified a minimum penalty of six months. Whilst dismissing the appeal in view of the seriousness of the assault, Kapi DCJ acknowledged, following the earlier decision,[37] that under s206 of the District Courts Act it was open to the magistrate to impose a fine if he considered it appropriate.

(ii) The Parliamentary Response - Amending The Amendments

The line of judicial reasons developed in the above cases was abruptly cut short as a result of amending legislation specifically designed to curtail judicial discretion. Whereas the initial minimum penalties legislation was introduced by a private member, the later amendments were introduced by the Government itself, publicly demonstrating its commitment to a comprehensive minimum penalties policy.

Three measures were introduced: the District Courts (Amendment) Act (No. of 1983); the Local Courts (Amendment) Act (No. of 1983, and the Criminal Code (Amendment) Act (No. 29 of 1983).

In moving the second reading of the Criminal Code (Amendment) Bill, Mr. Boyamo Sali, the Minister for Defence and Acting Minister for Justice, announced that:

> "... the Criminal Code Act, District Court Act and the Local Court Act contain a number of provisions allowing the courts to impose an alternative punishment to imprisonment ... Mr. Speaker, the Government believes that to allow the courts to do this would be totally in conflict with the direction of this Parliament that a minimum gaol sentence should be served. The purpose of these three Amendment Bills is to remove the power of the Courts to substitute a penalty other than minimum sentence."[38]

The wording of the amending provisions allowed the courts little room for manoeuvre. Thus, s19 of the Criminal Code, was amended by the addition of the following subsection:

"(8) Where a minimum penalty is prescribed for an offence, nothing in this section authorises a court to impose any penalty other than that minimum penalty on a person convicted of that offence."[39]

In addition, s206(2) of the District Courts Act and s19(2) of the Local Courts Act, which empowered these courts, in certain circumstances, to impose a fine when a penalty of imprisonment only was provided for, were amended accordingly.[40] This was done by the addition of a third subsection to the effect that the discretionary provisions of subsection 2 were not to apply in the case of an offence covered by a minimum penalty.

The discretionary provisions contained in s138 of the District Courts Act and s20 of the Local Courts Act, however, which allowed these courts not to proceed to conviction in the case of trivial offences, were not affected by these amendments. This discretion retained by the courts, however, is of much more limited scope than the discretion formerly permitted under s206(2) and s19(2) of the two Acts.

The effects of the amendments can be seen in the case of The State v Peter Samak Bandi and Gibson Wi N462 of 1984. Bandi and Wi had been convicted of armed robbery under s386 of the Criminal Code as amended by the Criminal Code (Amendment) Act 1983 (No29 of 1983). In sentencing the two youths to ten years imprisonment with hard labour - the minimum penalty under the amended s386 - Kaputin J commented:

"All the avenues previously available to the court under S.19 of the Criminal Code which the Court could exercise under its discretion to apply in appropriate cases, have been removed."[41]

(iii) Minimum Penalties And The Constitution Supreme Court Reference No.1 Of 1984

This case was a reference pursuant to s19 of the Constitution brought by the Provincial Executive of the Morobe Provincial Government. The Supreme Court was asked to give its opinion on two questions. Firstly, whether the minimum penalties provisions contained in the Criminal Code (Minimum Penalties) (Amendment) Act (No10 of 1983), the Summary Offences (Amendment) Act 1983 (No17 of 1983), and the Criminal Code (Amendment) Act (No29 of 1983) are unconstitutional being contrary to s32(1), s36(1) and s37(3) of the Constitution. No argument being led on s32(1) and s37(3), attention was focused on s36(1), which reads as follows:

> "No person shall be submitted to torture (whether physical or mental) or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person."

The second question was - if the provisions were valid under s36(1) of the Constitution, could a court, in individual cases, give a lesser punishment under s41 and s57 of the Constitution? S41 reads as follows:

> "(1) Notwithstanding anything to the contrary in any other provision of any law, of any act that is done under a valid law but in the particular case-
> (a) is harsh or oppressive, or
> (b) is not warranted by, or is disproportionate to, the requirements of the particular circumstances or of the particular case, or
> (c) is otherwise not, in the particular circumstances reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind, is an unlawful act.
>
> (2) The burden of showing that subsection (1)(a),(b) or (c) applies in respect of an act is on the party alleging it, and may be discharged on the balance of probabilities.
>
> (3) Nothing in this section affects the operation of any other law under which an act may be held to be unlawful or invalid."

S57 provides for the enforcement of guaranteed rights and freedoms.

1. S.36(1)

By a majority of four to one, the Supreme Court judges answered the first question in the negative.

Counsel for the Morobe Provincial Government based his submissions largely upon U.S. Supreme Court decisions. He contended that s36(1) of the Constitution of Papua New Guinea was similar to the 8th Amendment of the U.S. Constitution and that the meaning attributed to the 8th Amendment by the U.S. Courts - whereby punishments disproportionate to the crime committed is considered unconstitutional - ought to be followed in Papua New Guinea.

The Chief Justice, Sir Buri Kidu, expressed reservations about the U.S. analogy and concluded that custodial sentences per se do not contravene s36(1), irrespective of whether they be maximums, minimums or left to absolute judicial discretion. In doing so he invoked the constitutionally vested legislative sovereignty of Parliament:

> "The power to make criminal laws for this country is vested in the National Parliament and not the Judiciary. Also the power to prescribe penalties for breaches of these laws is vested in the National Parliament."[42]

Kapi DCJ devoted considerably more time to the principle of proportionality as developed by the American courts but, like the Chief Justice, ultimately based his answer upon his views on legislative sovereignty. In doing so, he expressed the opinion that the U.S. Supreme Court was in breach of the doctrine of the Separation of Powers in introducing the notion of proportionality into the 8th Amendment. To do so in Papua New Guinea would be "to allow the Courts to exercise a power which is given to the Parliament to determine in relation to punishment of criminal offences".[43]

Both Bredmeyer J and Kaputin J, whilst answering the first question in the negative, acknowledged that there may be individual cases where a penalty - including a custodial sentence may be so disproportionate to the nature of the offence that it may be held inconsistent with respect for the inherent dignity of the human person or cruel or inhuman within the meaning of s36(1). Bredmeyer J cites the example of a law which imposed a thirty year mandatory sentence for a first offence of shoplifting. Minimum penalties per se, however, do not breach s36(1). Bredmeyer J cited the tempering effect of s138 of the District Courts Act, which was not affected by the District Courts (Amendment) Act 1983, and

which still allows the District court in certain circumstances not to proceed to a conviction and hence not to impose a prison sentence.

McDermott J is the only judge who dissented from the majority view on the first question. He accepts the proportionality argument and condemns the minimum penalty approach on two grounds. Firstly, it prevents the courts from taking into account mitigating factors in the sentencing of offenders. Secondly, it stops the courts from considering non-custodial forms of punishment. It is therefore, in his view, inconsistent with a policy of proportionate punishment.

2. S.41

The answer to question two is also a negative one, by a majority of four to one.

S41 comes in Division 3 of Part III of the Constitution headed Basic Rights. These Basic Rights are further subdivided into two categories: Fundamental Rights and Qualified Rights. An initial question for the judges in determining the scope of this provision was to determine whether its application was restricted to Qualified Rights, all Basic Rights or whether, indeed, it was of general application. The Constitutional Planning Committee expressed a restrictive view that the section should apply only to the degree of force or conduct of persons arresting, detaining or searching others under valid laws made under the Human Rights provisions of the proposed Constitution. The Constituent Assembly departed from this narrow interpretation, however, by formulating an extremely widely phrased s41. This issue had been touched upon in the earlier case of Premdas v Independent State of PNG (1979) PNGLR 329, but had not been authoritatively decided.

Bredmeyer J, Kaputin J and McDermott J expressed the opinion that s41 applies only in the case of constitutionally-defined basic rights, including qualified rights. On the other hand, Kapi DCJ opted for a far broader interpretation, using in support the dicta of Prentice CJ in the Premdas case (supra) to the effect that s41 should be regarded as of general application and not restricted to the support of constitutional rights. He further commented that he sees this provision as:

> "... unique because it has opened up many areas of exercise of power and discretion by authorities established by law which were previously not subject to scrutiny."[44]

He sees this section as providing a significant judicial power for the supervision of 'administrative-legal activity' by the state. This broader interpretation leads him to conclude that in certain circumstances a minimum penalty may be invalidated under s41. However, in his view, the court has no power to impose a lesser punishment.

Sir Buri Kidu CJ began by asking whether the word 'act' as used in s41(1) covers a judicial act such as the sentencing of an offender. He concluded that it did but not in those instances where the legislation gave no discretionary power to the person or authority directed to do or desist from doing something. Both Bredmeyer J and McDermott J agreed on this latter point, McDermott J stating:

> "To make sense of an 'act' in s41, it seems to me that the doer has to have some room for manoeuvre."[45]

The reasoning behind this flows from the original proposition that the judges in imposing a minimum penalty, having no discretion in the matter, are simply carrying out a legislative directive. Challenging a judicially imposed minimum sentence is therefore to indirectly challenge the legislation itself. As the Chief Justice put it:

> "It seems that if s41 is used to challenge a minimum penalty it amounts to a backdoor challenge to the legislation rather than the action taken under it and such a challenge is prohibited by the very words of s41 - 'any act done under a valid law'."[46]

Bredmeyer J agreed:

> "To say that the judge's action is harsh or oppressive or disproportionate to the circumstances of a particular case etc. is really to challenge the statute and not the judge's action."[47]

Kaputin J provided the sole dissenting judgement in relation to question two. He expressed the opinion that s41 provides a 'controlling mechanism' in the absence of which a person receiving a minimum penalty would have no avenue of redress open to him. Moreover, he stated that where an application under s41 succeeded there is power under s57 and s23(1)(a) of the Constitution to impose a lesser sentence. s23(1)(a) reads as follows:

"23 Sanctions

(1) Where any provision of a Constitutional Law prohibits or restricts an act, or imposes a duty, then unless a Constitutional Law or an Act of the Parliament provides for the enforcement of that provision the National Court may -

(a) impose a sentence of imprisonment for a period not exceeding 10 years or a fine not exceeding K10,000."

In response to the argument that challenging the imposition of a minimum penalty is really an indirect challenge of the legislation, he said:

"It simply means that the legislation is still valid but that the act done upon it becomes unlawful by operation of S.41 for that particular case only."[48]

PART THREE

DISCUSSION

In the background section to this article it was stated that much of the official discourse on crime in Papua New Guinea was informed by a populist theory of social and economic development in which 'crime' and 'lawlessness' assume a central role. A successful response to the problem of crime is thus evisaged as a prerequisite for overall development:

"With the curbing of criminal activities, Papua New Guinea can indeed enjoy a smooth comfortable recovery and progress in economic and social development." (Thomas Negints MP)[49]

The ideological construction of crime in this manner inevitably frames the range of options open to policy makers in reacting against it. Within this framework, then, crime and the reactions to it have become a metaphor for explaining aspects of the processes of development and for formulating policy. 'Crime-talk' has become the language used to elaborate upon issues as diverse as economic development, urbanisation, youth, and women, as well as those issues more literally associated with the term Law and Order. The conceptualisation of crime in this manner inevitably leads to demands for forceful initiatives on the part of the state to eradicate crime, thereby securing the pre-conditions for

social and economic development. These demands and initiatives, in turn, lead to the subsuming of juridical conceptions of individual rights to the needs of what is presented in this incontrovertible fashion as the national interest. The rights of the individual are no match for the public interest when the latter is presented as the process of national development itself.

This scenario has placed the courts in an increasingly awkward position given their institutionalised role as guardians of individual rights. This dilemma is particularly apparent in the judicial reasoning expounded in the Constitutional Reference brought by the Executive of the Morobe Provincial Government.[50] The tension between the judiciary and Parliament in the unfolding drama of the minimum penalties legislation becomes largely attributable to the growing ideological schism between the adherents of 'the crime and development' position and those adhering to a juridical individualisation of disputes and rights. This latter position is explicit in the initial attempts by the courts to temper the effects of the provisions, being primary informed by a concern with the rights of the individual offender. As seen, these initial attempts were promptly dealt with by Parliament's amendments to the original measures which have significantly reduced judicial discretion where minimum penalties are concerned. The judgments in the Morobe case, which directly addressed the issue of constitutional rights, attest to the continuation of the judicial dilemma. Whilst this case decided that minimum penalties, per se, are not unconstitutional, at least as far as s36(1) and s41 of the Constitution are concerned, the courts commitment to protecting basic rights under the Constitution was nevertheless affirmed. In the Morobe case the judicial conception of individual rights and the public interest was discussed. Bredmeyer J, for example, commented:

> "Under the heading of public interest the courts consider the nature of the crime, its seriousness as seen by the maximum penalty set for it by Parliament, the need to punish the offender, to protect society and deter others. Under the heading of the offenders interest the court considers his age, his background, his degree of participation in the crime, his previous conduct etc..."[51]

Bredmeyer J goes on to say that when Parliament establishes a mandatory penalty it does so in the public interest to the detriment of the individual interest. After remarking on the unfairness of such a policy to individual offenders he concludes that whilst minimum penalties a per se do not con-

flict with the protection afforded by s36, there are individual circumstances in which it may owing to the excessiveness of the punishment.

Kaputin J partly resolves the dilemma by adopting a far broader and more sociological approach and discussing the changing relationship between punishment and the social system in a developing society. As society develops and people become more familiar with government and laws, stronger penalties become more appropriate. Moreover, the rapid changes in a developing society bring with them many problems and there arises:

> "a legitimate need ... for strong deterrence and that the proper retributive aspect ... be taken into account which had never really been accorded its proper consideration in the early stages of societal development."[52]

The constitutional framework within which the conflict between the public interest and individual rights is negotiated is found in ss398 and 39 of the Constitution, which provide for general qualifications on qualified rights and introduce the concept of what is "reasonably justifiable in a democratic society". S39(1) provides some guidance as to the meaning of this latter concept:

> "(1) The question, whether a law or act is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind, is to be determined in the light of the circumstances obtaining at the time when the decision on the question is made."

This clearly allows for the situation, alluded to by Kaputin J in the Morobe case, whereby:

> "... a particular legislation may be unconstitutional now but that it may not be in the future when circumstances have changed to warrant the legislation to be held constitutional."[53]

The legal framework provided for by the Constitution is thus, of necessity, extremely widely drawn. It allows the judges to evaluate the social context within which a statute is enacted. It is nevertheless clear from the concerns expressed from the bench, that there is a balance to be struck between the conflicting interests and that the courts enforce this balance. This inevitably places an inhibiting influence upon the state in legislating pragmatically in the face of political pressure.

Criticism of the minimum penalties legislation is not confined to those who espouse the juridical position. Both the Morgan and the Clifford Reports have been highly critical of the measures. The thrust of these reports, however, lies not in the appropriate balance to be struck between the individual and the State. Rather, they have concerned themselves with the implications of a mandatory minimum sentencing policy against the wider workings of the criminal justice system. In particular, they have linked the measures to the 'cost' of crime, a predominant issue in official discourse on crime, and one that is more likely to receive a sympathetic hearing from policy makers. These Reports, then, are addressed to the reasoning of 'the crime and development' position.

The Morgan Report, for example, talks about the likely consequences of the policy in terms of the implications for the already overburdened court system. The Report suggests that the penalties will encourage more accused persons to plead not guilty and thereby result in a considerable increase in the length and expense of trials. Talking about the National Court, but later referring to similar consequences for District and Local Courts, the Report states:

> "If (the) large number of 'guilty' pleas changed significantly to 'not guilty' pleas, then the National Court could become over-burdened with long, expensive and unnecessary trials as defendants try to exploit possible defects in the prosecution case, to avoid a long custodial sentence."[54]

This particular concern has become an increasingly sensitive one and has further fuelled the latent tension between the judiciary and the administration. For example, Justice McDermott, former Public Solicitor, recently warned that Papua New Guinea's legal system is "just going under". He elaborated further upon the state of the National Court list in Port Moresby saying:

> "The state of the criminal list of outstanding cases in this city should be a matter of public scandal."[55]

Similarly, the Clifford Report points to the implications of the policy for the seriously overcrowded prisons in the country:

> "Whatever the wisdom of mandatory minimum sentences, the oppressive costs and potentially dangerous conditions of crowded jails, will necessitate a retreat from the simplistic 'get tough' mandatory minimum sentence policies."[56]

The Clifford Report goes on to discuss a series of options which would allow the government a 'dignified retreat' whilst not competently abandoning minimum sentences. Thus, provision could be made for lower minimum sentences which would provide the courts with greater discretion in taking account of both aggravating the mitigating circumstances. Secondly, anticipating a suggestion made by Kaputin J in the Morobe case, the Report suggested distinguishing between first-time and second offenders, with the minimum sentence applying only in the case of the latter.

This approach represents an attempt to reconcile the two positions. It remains to be seen, however, how the present government will react to such a proposal. A complete abandonment of the policy is unlikely given the government's public commitment to curbing crime and lawlessness, most recently expressed through its establishment of a Law and Order Task Force to oversee the implementation of the Forty-nine Steps designed to achieve this end. The government is, nevertheless, aware of the conflicts involved as is evidenced by the delay in the implementation of many of its proposals in order to study their wider legal and constitutional implications.

As Kindi Lawi's remarks in the introductory debate indicate, there is a genuine concern amongst some policy makers that the basic rights provisions of the Constitution do not facilitate the pursuit of an effective strategy against crime. He reiterates this view during the debate on the later Criminal Code (Amendment) Bill:

> "I blame the Constitution because it protects the prisoners ... We cannot be tough with the criminals. It used to better in the past when prisoners were used to do communal work like cleaning towns and roads. But we are looking after the prisoners because of their so-called rights and our towns have gone into bush."[57]

This concern is accentuated by the present performance of the criminal justice system with its low levels of crime detection, high incidence of 'bail jumping', long queues of outstanding cases, unsuccessful prosecutions, and, of course, the frequency of prison escapes. There is an irony here in that the minimum penalties policy adds to the pressures that the ailing criminal justice system is operating under and

further serves to undermine its effectiveness. It does so by increasing the incentive to plead not guilty and hence necessitate long and expensive trials; by encouraging more alleged offenders to jump bail and escape from custody in the knowledge that a long prison sentence awaits them upon conviction; and, by adding significantly to the already overcrowded prison population.

CONCLUSION

This article has looked at the background to the minimum penalties provisions in Papua New Guinea and the way in which they have been subsequently administered through the courts. It has been seen that the debates over this controversial body of legislation have derived from two essentially conflicting perspectives. On the one hand, there is the juridical perspective, represented by the judges, which discusses the measures in terms of their consequences for individual offenders within the criminal process.

On the other hand, there is what has been termed 'the crime and development' perspective, which views the measures as essential steps in an overall strategy designed to secure the stable social conditions necessary for overall development in the country.

Whilst the former position focuses quite narrowly upon the legal subject of the individual offender, the latter concerns itself with securing the wider public or national interest. Whilst the case of the minimum penalties legislation has not in itself led to a major conflict between Parliament and the judiciary, it has elicited indications of the likelihood of continuing tension and future conflict between the policy making and judicial apparatuses of State in the administration of criminal justice in Papua New Guinea, when the dominant presentation of crime has assumed such a metaphorical character.

ENDNOTES

1. S2 & sl Criminal Code (Minimum Penalties) (Amendment) Act (no10 of 1983.

2. S14 Summary Offences (Amendment) Act 1983 (no17 of 1983).

3. S13 Criminal Code (Minimum Penalties) (Amendment) Act (no10 of 1983).

4. S20 Criminal Code (Minimum Penalties) (Amendment) Act (no10 of 1983).

5. Summary Offences (Amendment) Act 1983 (no17 of 1983).

6. S2 Summary Offences (Amendment) Act 1983 (no17 of 1983).

7. S1 Inter-Group Fighting (Amendment) Act 1983 (no13 of 1983).

8. S3 Inter-Group Fighting (Amendment) Act 1983 (no13 of 1983).

9. Law and Order in Papua New Guinea vl: Report and Recommendations, pl.

10. Papua New Guinea Parliamentary Hansard, May 19 1983 at p22/11/2.

11. The report of the joint study on Law and Order in Papua New Guinea by the Institute of National Affairs and the Institute of Applied Social and Economic Research. Named after William Clifford, one of the researchers involved. Reported September 1984 vI and II.

12. See for example, Chapter 2 in vI of the Clifford Report, and Chapter 14 of the Morgan Report. The latter being the popular name for the report of the Committee to Review Policy and Administration in Crime, Law and Order which reported in December 1983.

13. The quality of these sources should be qualified by noting their limited and elite nature in terms of language, circulation and ownership. It would not be inaccurate to characterise the main newspapers as still being aimed primarily at the expatriate and national bourgeoisie communities. It is the views of these small but influential sections of the predominantly urban communities that these papers tend to reflect.

14. Reported in the Post-Courier (Port Moresby) April 26 1983.

15. Reported in the Niugini News (Port Moresby) May 5 1983.

16. Papua New Guinea Parliamentary Hansard, May 19 1983 at p22/11/2.

17. Papua New Guinea Parliamentary Hansard, May 19 1983 at p23/11/1.

18. Bayne, P, "Judicial Method and the Interpretation of Papua New Guinea's Constitution", Federal Law Review 11(1):121. Weisbrot, D, "Papua New Guinea: Judges and Politicians": Legal Services Bulletin 4(5):240.

19. See for example, Chief Justice Pritchard's letter of resignation published in the Post-Courier, Monday September 24 1979. Addressed to Mrs. Nahau Rooney, Minister of Justice, he states: "You have accused me and other 'foreign' Judges on the Bench of only being interested in administration of foreign laws, and not the feelings and aspirations of the Nation's political leaders (NBC news 7 pm July 20)".

20. Kaputin, J, 'The Law - A Colonial Fraud?' New Guinea v10 no1 (1975).

21. Ironically, the 'custom' referred to is often the rule of the Kiaps during the colonial period.

22. Papua New Guinea Parliamentary Hansard, May 19 1983, p28/11/2.

23. Ibid, at p27/11/2.

24. 'Simple' offences are offences that are punishable on summary conviction before either a District or a Local Court. Under s3 of the Criminal Code (ch262), offences not otherwise designated are simple offences.

25. Laho Kerekere v Robin Miria (N432)(M), Per Amet J, p3.

26. Ibid, at p7.

27. Ibid, at p8.

28. Criminal Code (ch262), s19(1)(b).

29. Ibid, s19(1)(d).

30. Ibid, s19(6).

31. S19(1)(a) reads: "a person liable to imprisonment for life or for any other period, may be sentenced to imprisonment for any shorter term; .."

32. Underlining mine.

33. In the Matter of the State v Danny Sunu, Namabia Walter, Iku Gagoro and Philip Haro (1983) SC 264, per Bredmeyer J at p16.

34. Ibid, per McDermott J, at p31.

35. Ibid, per Amet J, at p40.

36. Lakea Sareaka v Simon Pipi (1983) N448(M), per Pratt, J at p5.

37. Laho Kerekere v Robin Miria (N432)(M).

38. Papua New Guinea Parliamentary Hansard, 1983, at p 10/2/2.

39. Criminal Code (Amendment) Act 1983 (no29 of 1983) s2.

40. See s2 of the District Courts (Amendment) Act (no35 of 1983).

41. The State v Peter Samak Bandi and Gibson Wi (1984) n.462, per Kaputin J, at p4.

42. Supreme Court Reference Nol of 1984 , SC280, per Kidu CJ at p5.

43. Ibid, per Kapi DCJ at p19.

44. Ibid, per Kapi DCJ at p25.

45. Ibid, per McDermott J, at p81.

46. Ibid, per Kidu CJ at p9.

47. Ibid, per Bredmeyer J at p46.

48. Ibid, per Kaputin J at p62.

49. Papua New Guinea Parliamentary Hansard, May 19 1983, at p23/11/3.

50. Supreme Court Reference Nol of 1984, SC280.

51. Ibid, per Bredmeyer J at p33.

52. Ibid, Kaputin J at p56.

53. Ibid, per Kaputin J at p58.

55. Report of the Committee to Review Policy and Administration on Crime, Law and Order (December 1983), ch15, at p293.

55. Reported in The Times of PNG week starting February 24 1985. See also the comments of Woods J reported in the Post-Courier February 20 1985 under the title "Governments using courts - judge".

56. Law and Order in Papua New Guinea vII at p20.

57. Papua New Guinea Parliamentary Hansard, 1983, at p12/2/2.