

# Incorporating Custom Law into State Law in Melanesia<sup>1</sup>

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In the last 30 years, our people in Papua New Guinea have been going to distant places to learn conflict resolution techniques. In the meantime more than a hundred countries in the Western world are writing into their laws the custom law processes that Melanesians have used for thousands of years. The Western court system has failed to provide justice to the victim and reform to the offender with the result that we are experiencing more crime, more jails, and a world where every day brings more terrible stories of murder and violence.

In 1993 I was working with an NGO in Port Moresby training squatter settlers in conflict Resolution skills. I was invited to Bougainville in 1994 during the Civil war to conduct similar training there. The civil war in Bougainville had put an end to any formal law and justice process. There were no police or courts. The Bougainville Revolutionary Army ran their portion of the country with an ad hoc rule of murder, violence, and torture against the opposition and the civilian population. The Papua New Guinea Army and Bougainville Resistance acted in a similar manner in fighting the Revolutionary Army.

To solve their problem the common people returned to custom law, to maintain their quality of life. This was not easy. The power of the chiefs to administer custom law had been officially forbidden by the Colonial government for almost a hundred years. But there were few magistrates and patrol officers and the needs for mediation and reconciliation were urgent. So unofficially, the leaders of the people continued their role in a diminishing and abbreviated fashion.

I had no knowledge of this until I went to Bougainville and met John Tompot, a very minor chief who was taking a leading role in redeveloping Custom law. He attended one of the courses that I was conducting and he told me that it sounded similar to what he was doing, based on the traditional customary approaches. I sat in on one of his restorative justice cases and I was converted. For the next four years we worked together with other Bougainville mediators to rediscover the custom law and write manuals for teaching it to other trainers.

After six years in Bougainville I went to the Australian National University and in a book called *Breaking Spears and Mending Hearts* I reported my experiences of custom law as it was used in Bougainville during the crisis years

Prof. John Braithwaite, Law program Research School of Social Science, Australian National University. A leading authority on restorative justice described the book as:

A landmark study of reconciliation and restorative justice in action. Profound and inspiring in its holistic view of justice, this book draws on the wisdom of the people of Bougainville as they heal the wounds of their civil war. In the process, Bougainville shows the world how Indigenous people can reclaim their justice system, at times applying restorative justice even to solving and healing crimes as serious as murder. This book shows how a peoples' peace can prevail over a war that was a product of colonisation.

**Taim bilong timbuna** (The times of the ancestors)

In the past, the Colonial government believed that custom law was no more than the 'law of payback: an eye for an eye and a tooth for a tooth. This was incorrect. In the small village communities in Bougainville, the largest of which may have some eighty families, feuding and killing of neighbours

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<sup>1</sup> Paper presented as part of the International Diploma in Restorative Justice at Queens University, 10 July 2007.

were not options. Any feud that used payback killing as a way of achieving justice fractured the community and killed off some of the most powerful defenders of the village. Enemy villages from over the mountain soon saw an opportunity, attacked the village and it disappeared forever.

### **The law of social contract**

Melanesians, as hunter-gatherers and later in settled villages, developed a social contract. This was a common feature of all small communities and is enshrined in Decalogue of the Bible: Thou shalt not kill, steal, lie, commit adultery, rape or gossip (Weitkamp p.76) Melanesians followed social contract long before it was given to Moses on Mt. Sinai. In Melanesia there were also the social obligations of gift-giving, mutual assistance (a village banking system), and care for the young and old.<sup>2</sup> It was a system made to support the quality of life in the community.

Melanesians followed the contract, not because they were good and virtuous, but because they knew that if they did not, they did not survive. Survival as the bottom line was the measure of all cultural behaviours. Those who provide most for survival received favoured treatment and those who provided little received less. Women and children, as in most societies at the time, were on the bottom of the list for favours, but they had their ways and were not unduly oppressed.

Life for the villager was usually good but it was not a "garden of Eden". Three things were a major threat to the "gutpela sindaun" These were the danger of raids from enemy villages, the threat of sorcerers, and powerful greedy leaders who considered themselves above the law.<sup>3</sup>

### **House of Assembly accepts custom law**

In 1973, the new Papua New Guinea House of Assembly included a number of educated and articulate young men who had experienced racial discrimination, persecution by government officials and loss of ancestral land at the hands of western courts. They wanted reform.<sup>4</sup> One of their decisions was to reintroduce custom law.

Some of the Australians in the administration supported this as a way of dealing with the impossibility of the courts reaching out into the distant parts of the country. But there were also strong opposing voices from jurists in Australia who thought that custom law meant payback and the customs of a thousand tribes. They pointed out that law based on customs had no separation of powers and no common way of dealing with the variety of customs of the thousand tribes. They did not know of the existence of custom law based on the social contract.

### **State and custom law**

Democracy is considered to be a most just form of government. However it has a major fault in that the members of Parliament are usually the rich and the powerful, something that is reflected in the laws that they make. These laws invariably protect their own property, power and prestige. The needs of the poor

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<sup>2</sup> The motive was not altruism. People seek mutually beneficial outcomes. If the rule of reciprocity is observed by exchange of goods and services and the emphasis is on mutual obligations and restored relationships, each party will derive advantages from the other. (Lawrence, 1969 p29)

<sup>3</sup> This system can only work when parties and decision-makers know each other, when it is adapted to the social setting of disputes, is familiar to all, when access to information is easy, and where the power of every person involved is properly held in balance by the power of others. Beckman p.25

<sup>4</sup> "The law was ... specific, made numerous distinctions between the white and the black. It not only deprived us of our land, but forced us to work for the expatriate plantation owners to whom the law gave our lands." (Kaputin Minister for Justice, 1975 p.21). "The price of the impact of western civilization has been the sapping of the initiative of our people." Buntun 1984)

and powerless get much less attention and in criminal law there is no attempt to restore the victim or reform the offender. Melanesians, however, do not willingly accept the win-lose solution to a conflict reflected in western criminal law. In fact, this was the major complaint against the introduction of western law into Papua New Guinea.

In spite of opposition from Australia, custom law was adopted by the House of Assembly and village courts were set up to apply it. What was remembered of custom law was reintroduced into village courts, written into the Constitution, and used in the Supreme Court and National Court. However there were significant limitations imposed, and because there was no custom law model for the new government to follow, colonial law was accepted almost unchanged.

Only this year, after more than 30 years, have judges arranged for the introduction of legislation to introduce mediation and restorative justice into all the courts of the land from village courts to the Supreme Court.

### **New Guinea and the Customs of a Thousand Tribes**

We are conversant with the Western system of justice: The Laws of the land are made by Parliament and administered by the courts. In New Guinea, Melanesian communities developed their own customs according to their needs: the customs of a thousand tribes made by the community are administered by custom law.

#### **Custom Law**

Custom law was developed to administer the social contract and the customs of the people. It is important to know that it was administered by the leaders of villages with only about eighty families. Leaders had many social obligations to others in the village and they may have been inclined to favour them in decision-making. However, the smallness of the village and the possibilities of sanctions ranging from sorcery to exile constrained them and kept them reasonably honest.

Custom law is an outstanding model of justice but it would be a mistake to believe that it was the deliberate work of a very virtuous people. Rather it was the accidental response of a people responding to a basic impulsive need for security.

The overriding philosophy of all Melanesian custom law was to bring peace, mend broken relationships, provide satisfaction for all stake holders and so get on with life.

Custom law was made up of four connected processes. For convenience, I will call those by names that everyone will recognise but at the same time warn the reader that without explanation, the names may be misleading. The four processes of custom law are Consensus, Reconciliation, Mediation and Restorative justice.

#### **Consensus**

Consensus is one of the survivors in Melanesian society of custom law. Even today it is still alive and well. In the villages people gather to speak about anything that brings harm to the community. Common conflicts are gossip, sorcery, failure of fishing, a garden blight or immoral behaviour. When custom law was used, talk to solve a problem went on for as long as required: days, weeks, months or longer. Often the other three processes of custom law were called on to help produce a settlement. But even decisions were open-ended and could always be called back for further talk.

Geoffrey M. White an anthropologist working in the Solomon Islands saw in it a similarity to the

sacrament of reconciliation.

People see disentangling as a cleansing, a moral cleansing and instrumental means of ex-creating personal conflicts that could prove injurious. It is like the communion service, in that one must be clean moral a before going to the Sacrament.

The disentangling puts a symbolic seal on old wounds and conflicts. It certifies that social relations and personal thoughts/feelings/power are now in an express state of solidarity, thereby threatening neither self nor community. The activity has been Christianized in some respects such as the now customary presence of a priest to listen as people speak their minds (White, 1991. p 193.)

### **Reconciliation**

Reconciliation was used to deal with violent episodes within extended families, clans, villages, and between tribes. The first step was to suspend fighting permanently so that people could get on with their lives. At this stage there was no confession of guilt for wrongs done. Instead there was a meeting of all stake holders who exchanged native wealth, food and pigs. Many lengthy speeches provided guarantees of an end to hostilities and peace for all to move freely.

In Bougainville, reconciliation was the main instrument for ending the civil war. During the nineties, hundreds of reconciliations took place throughout the island to bring peace to the damaged communities. They were often repeated after intervals of one, two or five years to confirm the treaty. At these, there could be confession of guilt and a promise of restitution to bereaved families.

Reconciliation is unique to Melanesian Custom law. Justice and forgiveness go together. People I spoke to did not seem to feel that it was a virtuous act. They saw it as a necessary act of will for getting on with life, rather than something emotional. (Howley 2002.102-118)

State law has no equivalent to this, and attitudes in the western world are different. Forgiveness is not highly regarded and justice has come to mean, punishment and legalised vengeance. It is legal payback handed out by the court instead of the victim.

### **Mediation**

Melanesian mediation had the same general philosophical aim as reconciliation: to mend broken relationships and bring peace to the community. Although it is said that Melanesians did not differentiate between civil and criminal offences, in fact mediation was used for civil matters such as land disputes, and any property disputes; restorative justice was for criminal matters

Working in Bougainville, we found that in any conflict the story had to be told. But it was a relatively simple matter to move the emphasis away from the story itself to solutions to the problem. The decisions arrived at were the result of negotiation on the solutions available. To use the stories of the various parties to determine the exact truth of what had happened as a basis for mediation was an invitation to chaos. A well managed Melanesian mediation is more likely to look forward to the possibilities of a mutually satisfying decision, so that both parties get something they need and can come away satisfied with the result.

Court administered decisions on land disputes in Melanesia have had a difficult history because they are based on the story and evidence. They do not have the latitude to settle for a win-win solution and a mutually acceptable solution.

It was unusual for parties to refuse mediation or fail to come to an agreeable solution. But if either of these occurred then the solution was to wait till courts were re-established.

In the West today much of the mediation is driven by the needs of insurance companies and is conducted under a court-style process with lawyers, evidence and decisions based on the facts. That is not the case with mediation in Bougainville.

### **Restorative justice**

For a thousand years, Western law has regarded justice more in terms of the individual rights to property, prestige, power and has written laws defining them. It is enforced with retributive action. Until recently the duties of care and justice that the nation owes to all its citizens have taken a second place. There has been an increase in crime. Law enforcement, courts and jails have become major industries and a terrible drain on the budget of any country.

Many people have looked for change. In recent years, some countries in the West have begun to turn to a process used successfully by Melanesians for thousands of years; a process which Melanesians call custom law and which the West calls restorative justice.

Melanesians recognised that complete redress for crime was not possible, so custom law provided a ritual punishment to replace the feud and payback killing. It included the extended families of victim and offender and the community. The offender was called on to accept the shame of his behaviour and offer an apology and restitution to the family of the victim. The family of the victim and the community faced the offender with the harm he had done to the victim and set the amount of the restitution in native wealth. After this they accepted the apology and the families organised a ceremony of forgiveness and reconciliation at which the offender was restored to the community.

The psychological impact of telling the offender about the suffering they had experienced cleansed much of the trauma suffered by the victim. The expression of shame, apology, restitution and forgiveness provided the offender with a lasting readiness to reform his conduct.

Restorative justice and a ritual punishment was the ideal. However, in some Melanesian communities restorative justice included retribution, expulsion from the community, exile or even execution. (Howley 2002, 122, 124-5)

### **Custom Law eroded by the colonial administrations.**

One hundred year of colonial government and western cultural ways have caused great damage to custom and almost extinguished the knowledge custom law.<sup>5</sup>

Very few village magistrates know the processes of custom law, and this vague memory is easily perverted by fear, self interest, public pressure, human respect, shame or coercion by some Bigman with his own agenda. When this happens the media get the story, tell it to the world and our village courts are shamed and disgraced.

### **What is needed?**

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<sup>5</sup> Every colonisation and pacification of tribal territories has led to the swift decline in, and often destruction of, the native political and legal systems. The leaders lose their power to declare war and peace. They cease to function as independent heads of politically autonomous units. They and their followers become subjects of foreign governments. (Poposill, 1981 p. 97)

Village courts handle an estimated 80% of all the crime in PNG. They are accepted by the village people because they provide a quick, understandable, reliable, service that is generally fair and free of archaic court jargon.

Training in custom law is an urgent priority. There have been failures and mistakes due to ignorance and "smart" youths are trying the strength of the magistrates with their "superior knowledge". Also there have been instances of people bringing their own lawyers into the court to demand the law of the courts. The village courts which uphold the rule of law for Papua New Guinea need the essential training to do their work.

All village magistrates need to be trained in the processes of custom law (consensus, reconciliation, mediation and restorative justice). This is not an impossible task because training is available at both Divine Word University and Peace Foundation Melanesia.

### **A final word**

A recent village court forum placed great stress on the administration side of the courts and this is important. However, in the effort to have an efficiently run court system it must always be remembered that outcomes are the most important part. The village courts must always be judged by the justice that they provide not the efficiency of the administrative processes. Are the courts honest and free of corruption? Are women and children treated with respect and justice? Are the courts free from interference from Bigmen and politicians? Are the magistrates themselves men and women free of serious fault? Do the magistrates use mediation and restorative justice or work their own understanding of custom?

Donors seem to be willing to put large sums of money into administration but less into training of magistrates. These measures of the worth of the courts are most important. Our people will not thank us if the courts are efficiently run but fail to dispense justice.

### **The taste of the food is more important than the reputation of the cooks in the kitchen**

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28 June 2007