

3. In the Courtroom

The colonial law was part of the colonial wave which came without invitation and without warning, toppling Papua New Guinean societies, destroying its laws and institutions.

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In Chapter 2, I introduced Michel Foucault's arguments concerning the connection between law and other normative discourses, and how writers on colonialism have highlighted the effective use of introduced sexuality norms and laws in governing colonised populations. In the colonial territories, a completely new paradigm of norm, boundary and discipline was established through the imposition of colonial laws. I described how the system of Native Regulations, which governed the intimate lives of villagers in minute detail, was supported by the discourses of medicine and Christianity, and how decolonisation and modernity have seen the emergence of the social groups who support the imposition of these discourses onto the social body.

Meanwhile, the introduced Anglo-Australian legal system, technically supreme from the outset, was mainly concerned with governing the colonists themselves, and only intruded into the lives of the colonised in situations of serious crimes and land disputes vis-à-vis the colonists. As I describe in this chapter, the introduced system gradually took over, and the Native Regulations were eventually abandoned.²

Policing the boundaries: The modern role of law in society

The classic interpretation of Foucault's thinking on law has been termed the 'expulsion thesis.' It holds that pre-modern law was identified with a repressive form of power exercised by the sovereign over transgressors, but was later displaced by the regulatory schemes of modern 'bio-power,' exercised over

1 Bernard Narokobi, 1980, *The Melanesian Way: Total Cosmic Vision of Life*, Boroko: Institute of Papua New Guinea Studies, 144.

2 David Weisbrot, 1988, 'Papua New Guinea's indigenous jurisprudence and the legacy of colonialism,' *University of Hawai'i Law Review* 10(1): 1-45, 2; and see *R v Womeni-Nanagawo* [1963] PNGLR 72.

whole populations by surveillance and self-discipline. Modern individuals become self-regulating, law's role is diminished, and it is 'expelled' from modern society.³

This classic 'expulsion thesis' of law has recently been challenged.⁴ Ben Golder and Peter Fitzpatrick argue that far from vanishing, law has merely retreated to identify and police the boundaries which divide the normal from the abnormal, the licit from the illicit. But law cannot be given once and for all.⁵ While it seems deterministic when it punishes transgressions and renders all within the boundary as legitimate, at the same time its illimitable capacity to be open to change puts it constantly into negotiation with resistance and transgression.⁶ It can affirm the boundary between the normal and the abnormal, the legitimate and the illegitimate. Or it can adjust the boundary, either outward to render normal and legitimate that which previously was not, or inward, to create new abnormality and illegitimacy. This process of response is at the heart of each case decided by judicial process, each alteration to the statute book made by the legislature, each law reform initiative undertaken at society's behest. It is a process powerfully evident in the development of sexuality laws in Papua New Guinea (PNG), which I describe and discuss in this chapter.

Civilising the primitive: Colonial criminal law

Except where modifications have been made as the result of the coming of Europeans, New Guinea is still almost unbelievably primitive ... at the present time, the world would be acting in ignorance if it did not appreciate the primitive and unique character of the conditions in the Territory and the size of the basic civilizing tasks to be completed.

Commonwealth Minister for Territories Paul Hasluck, 1960.⁷

PNG's state legal system is based on that of the administering colonial power, Australia, which in turn was based on that of its colonial power, Britain. Australia introduced versions of this legal system into both territories, Papua and New Guinea, albeit with slight variations between the two which were not resolved until around the time of Independence in 1975—and some not even then. The specific system introduced was based primarily on the laws of

3 For the clearest exposition, see Alan Hunt and Gary Wickham, 1994, *Foucault and the Law: Towards a Sociology of Law as Governance*, London, Boulder, Colorado: Pluto Press.

4 Ben Golder and Peter Fitzpatrick, 2009, *Foucault's Law*, Abingdon: Routledge.

5 *Ibid.*, 78–80.

6 *Ibid.*, 64.

7 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 23 August 1960: 259 (Paul Hasluck, Minister for Territories).

Queensland, because during the early part of the colonial era, Australian policy tended towards a hope that the two territories might one day become part of Queensland.⁸

This Anglo-Australian legal system is known as the common law system, and is one of the two great legal systems of the West, the other being civil or Continental law.⁹ Civil law systems are aimed at formulating prospective rules of conduct, usually written out fully in a 'code.' By contrast, the English common law is formed primarily by judges. The general principles of the common law are believed always to have existed. Each individual case examines closely the particular situation of facts before it, and by minute inspection and construction 'discovers' the law in ever-increasing clarity, thereby elucidating and illustrating these general principles. Written laws or 'statutes' (known as Acts, Ordinances, Regulations etc., depending on which legislating body makes them and their position in the legal hierarchy) are usually drawn up to vary old rules which are no longer satisfactory or appropriate, or to fill gaps in the common law. For many decades, the common law system of PNG has relied increasingly on statutes.

The criminal law

The *Criminal Code* was drawn up and enacted in the light of many centuries' experience in the English community, during which time the community was thereby enabled to advance to a much higher social status. The *Code* inevitably expresses concepts of social responsibility in terms known to an advanced and civilized society.

P&NG Chief Justice Mann, 1963.¹⁰

The common law is usually conceived of as being divided into two streams: criminal and non-criminal (the latter known, confusingly, as 'civil'). Civil law in the common law system is concerned with adjudicating and adjusting relations between parties, while the criminal law concerns itself with matters considered so serious and disruptive of social order that the state must step in and exact penalty from the perpetrator of the injustice.

The division of law into criminal and civil law has a long history reaching back for centuries in England.¹¹ Serious interpersonal wrongs offended the entire realm, and were punished either by the king, as sovereign of his subjects, or the

8 John Ballard, 1979, 'Ethnicity and access in Papua New Guinea,' unpublished, 10.

9 Continental law is followed in the Pacific only in French territories.

10 *Regina v Kauba-Paruwo* [1963] P&NGLR 18, 20.

11 R.P. Roulston, 1975, *Introduction to Criminal Law in New South Wales*, Sydney: Butterworths, 1-4; Harvey Wallace and Cliff Roberson, 2001, *Principles of Criminal Law*, 2nd ed., Boston: Allyn and Bacon, 11.

church, which had powers over all matters ecclesiastical and adjudicated such matters as defamation, witchcraft and drunkenness, and the whole range of matters arising from the relations between the sexes: incest, marriage, bigamy, abortion, sexual assault, 'fornication' and unnatural sex.¹²

The Enlightenment of the late-eighteenth century prompted the incorporation of individual rights into English criminal law. These rights acted largely as a safeguard for the middle class against the aristocracy,¹³ and included the concept that justice should be done to individuals and the law should be clearly stated and known in advance, without the need for recourse to textbooks and law reports.¹⁴ And so began a move towards codification, or the total restatement by statute of the English criminal law, resulting in a model which was exported to most English colonies and territories, starting with India in 1860.¹⁵

In Australia, the states of Queensland, Tasmania and Western Australia adopted a form of this code. The Queensland *Criminal Code* was then exported to the territories of Papua and New Guinea. Along with other statutory sources of criminal law, such as the former Police Offences Ordinances now replaced by the *Summary Offences Act 1977*, and the detailed Native Regulations which applied only to the indigenous population, this Code formed the bulk of the criminal law system by which the colonised were kept in order.

This system, based as it was on a concept of a superior authority vested with the power (and the wisdom) to adjudicate and punish serious wrongs, was completely alien to PNG societies.¹⁶ Despite their diversity, areas of uniformity could be discerned in traditional legal systems: mediation, self-regulation, self-help and compensation redressed wrongs and restored harmonious relations according to the needs of the moment rather than past precedent.¹⁷ But these processes were ignored by the colonists in their 'civilising' project, while much of the criminal law remained incomprehensible or inimical to the colonised.¹⁸ Even in German New Guinea, where the colonists displayed no desire to transform

12 Sir James Fitzjames Stephen, 1883, *A History of the Criminal Law of England Vol. 2*, London: Macmillan; Roulston, *Introduction to Criminal Law in New South Wales*; Bruce L. Ottley, and Jean G. Zorn, 1983, 'Criminal law in Papua New Guinea: code, custom and the courts in conflict,' *American Journal of Comparative Law* 31: 251–300; Wallace and Roberson, *Principles of Criminal Law*, 2nd ed.

13 Alan W. Norrie, 1993, *Crime, Reason and History: A Critical Introduction to Criminal Law*, London: Weidenfeld and Nicolson.

14 H.F. Morris, 1974, 'A history of the adoption of codes of criminal law and procedure in British Colonial Africa, 1876–1935,' *Journal of African Law* 18(6): 6–23, 6.

15 Sir James Fitzjames Stephen, 1883, *A History of the Criminal Law of England Vol. 3*, London: Macmillan; Norrie, *Crime, Reason and History*.

16 Peter Lawrence, 1969, 'The state versus stateless societies in Papua and New Guinea,' in *Fashion of Law in New Guinea*, ed. B.J. Brown, Sydney, Melbourne, Brisbane: Butterworths, 15–37.

17 Cyndi Banks, 1993, *Women in Transition: Social Control in Papua New Guinea*, Canberra: Australian Institute of Criminology, 143–45; Ottley and Zorn, 'Criminal law in Papua New Guinea', 255–58.

18 Law Reform Commission of Papua New Guinea, 1977b, *Report No 7: The Role of Customary Law in the Legal System*, Waigani: Law Reform Commission of Papua New Guinea, 47.

existing cultures by absorbing them into their own introduced administrative and legal systems,¹⁹ the first criminal regulations extended to the colonised were simply an extension of German criminal law, and no attempt was made to adapt them to local circumstances.²⁰

Reforms

Laws and courts

Although the system for the administration of justice in the Territory has probably been reasonably adequate for times when the dominating aim was to bring order, and the benefits of European administration, to a primitive and dispersed people without greatly disturbing their existing ways of life, it is not adequate to aid the achievement of the aims for the Territory to which the Commonwealth of Australia appears to be presently committed.

*Derham Report, 1960.*²¹

The early colonial view that the 'primitive' way of life of the colonised should be left undisturbed gradually gave way to a goal of advancement towards self-government at some time in the foreseeable future, and the 1960s saw significant legal as well as political development. In 1959, the Australian Government appointed David P. Derham, Professor of Jurisprudence, to enquire into the system of the administration of justice in the Territory and make suggestions for its improvement.²² As a result of his report (*Derham Report*),²³ the Courts of Native Affairs were abolished from 1963 and a unified system of law was to be applied to all.²⁴ The court system was revised into a single-line hierarchy, from the 'inferior' Local and District Courts, presided over by magistrates, up to the first 'superior' court, the Supreme Court, usually in the person of a single judge.²⁵ One of the main tasks of the Supreme Court was to try serious criminal

19 Alan M. Healy, 1987, 'Monocultural administration in a multicultural environment: the Australians in Papua New Guinea,' in *Colony to Coloniser: Studies in Australian Administrative History*, ed. J.J. Eddy and J.R. Nethercote, Sydney: Hale & Iremonger, 207–24, 216–17.

20 Edward P. Wolfers, 1975, *Race Relations and Colonial Rule in Papua New Guinea*, Sydney: Australia and New Zealand Book Company, 65.

21 David Plumley, 1960, *Report on the System for the Administration of Justice in the Territory of Papua and New Guinea*, Melbourne: report to the Minister for Territories, Melbourne (*Derham Report*), 5.

22 *Ibid.*, 1.

23 *Ibid.*

24 For a fascinating view on this process, see Rachel Cleland, 1984, *Pathways to Independence: Story of Official and Family Life in Papua New Guinea from 1951 to 1975*, Cottesloe, WA: R. Cleland, 218–28; and for analysis, see Peter Sack, 1989, 'Law, custom and good government: the Derham Report in its historical context,' in *Papua New Guinea: A Century of Colonial Impact, 1884–1984*, ed. Sione Latukefu, Port Moresby: National Research Institute and University of Papua New Guinea, 377–97.

25 L.K. Young, 1971, *Outline of Law in Papua and New Guinea*, Sydney, Melbourne, Brisbane: The Law Book Company Ltd., 56–63. The terms 'inferior' and 'superior' refer to the courts' extent of jurisdiction and place in the court hierarchy.

cases. Parties dissatisfied with the decision of the Supreme Court could appeal to the highest court in the Territory, the Full Court, usually constituted by three judges together. A further appeal lay in special cases to the Full Court of Australia.²⁶

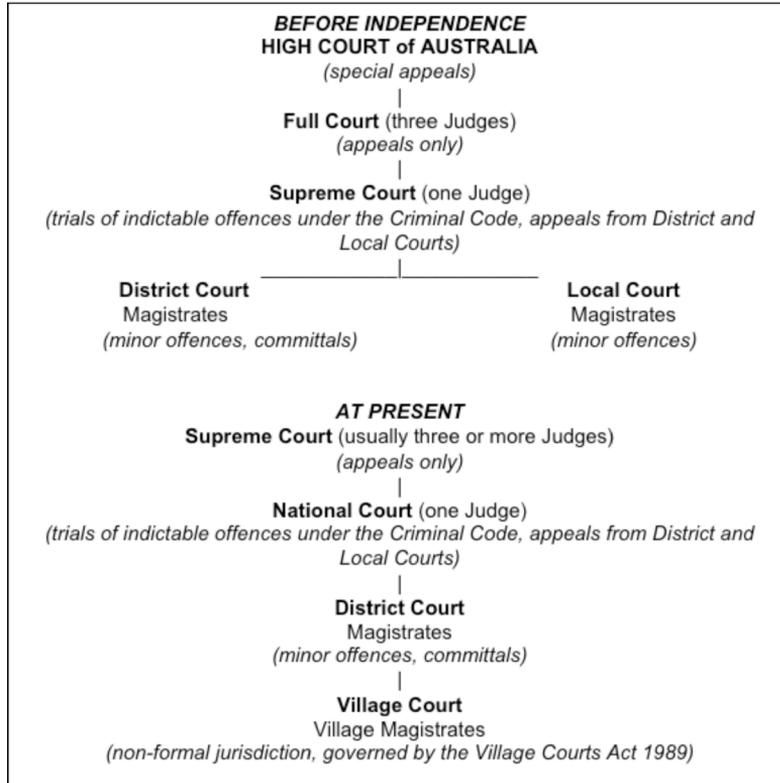


Table 3.1. Formal court system in PNG before and after Independence.

Source: Image created by Christine Stewart.

At Independence, the PNG Supreme Court was renamed the National Court and the Full Court was named the Supreme Court,²⁷ but otherwise their functions and form remained largely the same. A system of ‘Village Courts’ was established outside the formal court hierarchy and subject only to the *Constitution*, to adjudicate on specified customary issues.²⁸ The Village Courts have continued to mediate and adjudicate customary matters and disputes, although their relationship to the formal legal system has sometimes exceeded, or varied greatly, from that originally intended.²⁹

26 The special right of appeal to the High Court of Australia was not abolished until Independence: *Papua New Guinea Act (No.2) 1974* (Cth) Section 9.

27 *Constitution* Part VI Division 5.

28 *Village Courts Act 1974*.

29 For background see Jean G. Zorn, 1990, ‘Customary law in the Papua New Guinea Village Courts,’ *Contemporary Pacific* 2(2): 39–66. For analysis and discussion of the performance of Village Courts, see

Paul Hasluck's initiatives following the *Derham Report* also established the current institutional framework of criminal justice. The western law concept of 'crime' relies on the premise that crimes are committed against the state in general rather than against individuals. They should therefore be dealt with by agents of the state: police with a monopoly over the use of legitimate force to maintain internal order; centralised courts which focus only on individual rights and responsibility and ignore the social context of crime; and a penal system designed to punish the offender but ignore the victim.³⁰

Independence and law reform

The many liberation movements of the 1960s and 1970s emerging in Australian political life—espousing decolonisation and the civil rights of ethnic, gender and sexual minorities, opposing the Vietnam War, and so on—also impacted on the emerging intelligentsia of PNG in its decolonisation era.³¹ Self-government and Independence were imminent, and a political system was to be set in place which would best suit the needs of a new nation.³² Legal transformation was seen as crucial to this process. The law was no longer to be imposed from outside. The new nationalists, including Chief Minister Michael Somare, called for 'a system of laws appropriate to a self-governing, independent nation ... it must respond to our own needs and values. We do not want to create an imitation of the Australian, English or American legal system.'³³

e.g., Melissa Demian, 2003, 'Custom in the courtroom, law in the village: legal transformations in Papua New Guinea,' *Journal of the Royal Anthropological Institute* 9: 97–115; M. Goddard, 2005, *The Unseen City: Anthropological Perspectives on Port Moresby, Papua New Guinea*, Canberra: Pandanus Press; David Lipset, 2004, "'The Trial': A parody of the law amid the mockery of men in post-colonial Papua New Guinea,' *Journal of the Royal Anthropological Institute* 10: 63–89; Jean G. Zorn, 1994–95, 'Women, custom and state law in Papua New Guinea,' *Third World Legal Studies*, 169–205; Zorn, 2003, 'Custom then and now: the changing Melanesian family,' in *Passage of Change: Law, Society and Governance in the Pacific*, ed. Anita Jowitt and Tess Newton Cain, Canberra: Pandanus Books, 95–124.

30 Sinclair Dinnen, 1998, 'Criminal justice reform in Papua New Guinea,' in *Governance and Reform in the South Pacific*, ed. Peter Larmour, Canberra: National Centre for Development Studies, The Australian National University, 253–72, 254–55.

31 I recall a UPNG classmate intently reading Dee Brown's classic *Bury My Heart at Wounded Knee*; a student march to protest the overthrow of the Allende regime in Chile; an emerging student leader starting a Black Power movement; and my many woman friends urging me to join their women's action movement. Much of this activity was confined to the academic and political circles of Port Moresby, but these friends and students were nevertheless the Papua New Guineans destined to become future leaders in many walks of life; and see Jean G. Zorn, 2010, 'In memory of Bernard Narokobi,' *Pacificurrents* 1.2 and 2.1, online: intersections.anu.edu.au/pacificurrents/zorn_memorial.htm, accessed June 2010.

32 Donald Denoon, 2005, *A Trial Separation: Australia and the Decolonisation of Papua New Guinea*, Canberra: Pandanus Books, 70–83.

33 Abdul Paliwala and David Weisbrot, 1982, 'Changing society through law: an introduction,' in *Law and Social Change in Papua New Guinea*, ed. David Weisbrot, Abdul Paliwala and Akilagpa Sawyerr, Sydney, Melbourne, Brisbane, Adelaide, Perth: Butterworths, 3–12, 4.

This new system, part of what was sometimes dubbed the ‘Melanesian Way’,³⁴ was in reality a mixture of local customs, the principles of Christianity, the ideals of human rights, and ‘tradition’ as conceived for various socio-political purposes. Custom was to be researched, constructed and where necessary formulated *ab initio* to provide a basis for this new system. Village Courts were established and directed to apply custom, not law, to a specified range of matters at village level.³⁵ The PNG Law Reform Commission commenced operations shortly before Independence, when it received a statutory mandate to ‘make recommendations in relation to the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of Papua New Guinea society and of individual members of that society.’³⁶

Even before the establishment of the Law Reform Commission, the Crown Law Department, soon to become the Department of Justice, began work in 1973, proposing a review of the criminal law with a view to undertaking a thorough reform in order to bring the laws more into line with people’s perceptions of unacceptable behaviour. In 1974, the reform process commenced by replacing the adopted criminal code of each territory with a unified *Criminal Code*.³⁷ Part of the review process was a review of sexual offences, already under way.³⁸ The report was completed in 1975, with a note that it could be of use to the Law Reform Commission, which had already commenced operations with reviews of the minor offences found in the Native Regulations and the Police Offences Ordinances.³⁹ A comprehensive overhaul of these laws was recommended by the Commission to Parliament and reforms were enacted.

Soon after Independence however, the PNG government lost interest in law reform, especially as it related to social issues. It appeared more preoccupied with roads and bridges, schools and hospitals, and the march towards ‘development.’⁴⁰ Bernard Narokobi describes the slow demise of successive

34 Narokobi, *The Melanesian Way*; Narokobi, 1989, *Lo Bilong Yumi Yet: Law and Custom in Melanesia*, Suva: Institute of Pacific Studies of the University of the South Pacific and the Melanesian Institute for Pastoral and Socio-Economic Service.

35 These courts however appear to have developed in many places into a system based on principles of justice developed in an ad hoc manner, with little regard to accepted customary norms: see Demian, ‘Custom in the courtroom, law in the village’; Michael Goddard, 2009, *Substantial Justice: An Anthropology of Village Courts in Papua New Guinea*, New York and Oxford: Berghahn Books.

36 *Law Reform Commission Act* (Chapter 18) Section 9(1)(e).

37 Schedule to the *Criminal Code Act* 1974.

38 Marilyn Strathern, 1975, *Report on Questionnaire Relating to Sexual Offences as Defined in the Criminal Code*, report prepared for New Guinea Research Unit, Boroko, Papua New Guinea.

39 Law Reform Commission of Papua New Guinea 1975a, *Report No.1: Report on Summary Offences*, Waigani: Law Reform Commission of Papua New Guinea; Law Reform Commission of Papua New Guinea 1975b, *Report No. 2: Report on Abolition of Native Regulations*, Waigani: Law Reform Commission of Papua New Guinea.

40 Peter King, Wendy Lee and Vincent Warakai, 1985, ‘Editors’ Introduction,’ in *From Rhetoric to Reality? Papua New Guinea’s Eight Point Plan and National Goals after a Decade*, ed. Peter King, Wendy Lee and Vincent Warakai, Waigani, Papua New Guinea: University of Papua New Guinea Press, 1–14, 2; Bernard Narokobi, 1982, ‘History and movement in law reform in Papua New Guinea,’ in *Law and Social Change in Papua New Guinea*, ed. David Weisbrot, Abdul Paliwala and Akilagpa Sawyerr, 13–24, 20.

governments' interest in reforming the law and introducing custom into the legal system, which was still dominated by the 'Eurocentric prejudice' that, in the absence of an indigenous legal system, the only choice was to introduce 'the legal system of civilization.'⁴¹

The proposed review of the *Criminal Code* was never completed,⁴² despite some further comment and work.⁴³ In 1992, when I was working for the Law Reform Commission, Commissioners directed the re-commencement of work on the review of sexual offences in the *Criminal Code*, which led to the coordination of Commission activities with the National AIDS Committee, a committee operating at the time to advise the Secretary for Health on HIV/AIDS matters.⁴⁴ This strategy proved successful but sidelined the Commission's criminal review work.⁴⁵

The only other significant reform of relevance in PNG is contained in the recently enacted *Criminal Code (Sexual Offences and Crimes Against Children) Act 2002* which made extensive amendments to the *Criminal Code*, mainly in order to accord with PNG's international obligations under the *Convention on the Rights of the Child* (CRC).⁴⁶ This amendment was the result of extensive work on family and sexual violence which started in 2000,⁴⁷ and replaced much of the archaic wording of the original Code; rendered gender-neutral many of the offences previously associated only with women and girl victims; introduced major reforms relating to child sexual abuse (including child prostitution and child pornography); and criminalised rape within marriage.⁴⁸ The Bill was

41 Narokobi, 'History and movement in law reform in Papua New Guinea,' 22. He was echoing the words of Justice Gore, long-time colonial judge.

42 See Law Reform Commission, *Report No. 1: Report on Summary Offences*: 7.

43 Marilyn Strathern, 1976, 'Crime and correction: the place of prisons in Papua New Guinea,' *Melanesian Law Journal* 4(1): 67–93.

44 The term 'HIV/AIDS' is no longer internationally acceptable: UNAIDS, 2011, *UNAIDS Terminology Guidelines (January 2011)*, online: http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/jc1336_unaids_terminology_guide_en.pdf, accessed 8 June 2011.

45 I was the Commission's representative on the Committee. My preliminary work on HIV management law at that time resulted in several publications. See Christine Stewart, 1993, *Law, Ethics and HIV/AIDS: Existing Law of Papua New Guinea*, report prepared for Law Reform Commission of Papua New Guinea and Papua New Guinea Department of Health, Boroko, Papua New Guinea; Law Reform Commission of Papua New Guinea and Papua New Guinea Department of Health; Stewart, 1993, 'Existing law on HIV/AIDS in Papua New Guinea,' in *Law, Ethics and HIV: Proceedings of the UNDP Intercountry Consultation, Cebu, Philippines 3–6 May, 1993*, ed. Robert A. Glick, New Delhi: United Nations Development Programme, 133–50; Christine Stewart and Pascoe Kase, 1993, 'Law, custom and the AIDS epidemic in Papua New Guinea,' in *Law, Ethics and HIV: Proceedings of the UNDP Intercountry Consultation, Cebu, Philippines 3–6 May, 1993*, ed. Robert A. Glick, New Delhi: United Nations Development Programme, 63–76, and eventually led to the production of the *HIV/AIDS Management and Prevention Act 2003* under the AusAID-funded programme NHASP.

46 *Convention on the Rights of the Child*, GA res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September, 1990.

47 See Christine Bradley, 2001, *Family and Sexual Violence in PNG: An Integrated Long-term Strategy*, Institute of National Affairs, Discussion paper no. 84.

48 For a detailed description and discussion, see John Y. Luluaki, 2003, 'Sexual crimes against and exploitation of children and the law in Papua New Guinea,' *International Journal of Law, Policy and the Family*

brought to Parliament as a private Member's Bill by the Minister for Social Welfare and Development Dame Carol Kidu M.P., widow of former Chief Justice Sir Buri Kidu. She was in the anomalous position of having promoted much of the work which produced the Bill but was unable to move it as a government Member as it was outside her portfolio, and she was unable to secure the official approval of an almost completely male-dominated Cabinet for it to be moved by the Minister for Justice. However, once it reached the floor of Parliament, it was successfully passed.

A further law, the *HIV/AIDS Management and Prevention Act 2003*, prohibits discrimination against people presumed to be infected or affected by HIV. The law was crafted to ensure that criminalised groups were afforded this protection. Again, the scope of this law was restricted by similar Westminster principles of Ministerial portfolio responsibility. HIV matters were the responsibility of the Minister for Health at the time, while responsibility for the laws criminalising sexual activity came within the portfolio of the Minister for Justice.⁴⁹ Hence a law dealing with HIV could not directly decriminalise either sex work or sodomy, but at least some measure of protection against discrimination has been provided.

To sum up, the only major response to the call for reform to accord with 'our own needs and values,' as Chief Minister Somare put it in the epigraph above, was in the establishment of Village Courts, set up to dispense customary justice. But their jurisdiction was seriously circumscribed by the law which established them.⁵⁰ Otherwise, the state legal system has remained unchanged in any major way. Most of the criminal law reforms proposed by the Law Reform Commission were never completed or implemented.

Foreign laws criminalising sexuality were introduced into PNG by direct legislative action, but recent reform initiatives have so far failed to remove them from the statute book. Changes to the law however can come about in another way: through reliance on case decisions which interpret that legislation or prior principles of common law. Both these routes have been taken in defining and setting parameters for the criminalisation of prostitution and sodomy in PNG. I deal first with the criminalisation of the sex trade, or prostitution, as the law prefers to name it.

17(3): 275–307.

49 While preparing the Bill for this Act (see n45), I was dismayed at the limitations which the portfolio system of government placed on our ability to take any initiatives towards decriminalisation.

50 *Village Courts Act 1989* Part V. Excesses of jurisdiction occurred frequently, sometimes to the extent of infringing constitutional rights. However they could be, and often were, corrected by appeal to the formal courts, as I have discussed above.

Defending public decency: Criminalising the sex trade

The two pillars upon which our society is founded are the Christian principles and the fountains of wisdom and good sense of our people: our customs.... Looking at custom in general, it is plain that it was a matter of a very serious affront to the dignity of the family if a woman was to sell her body for reward. In many communities such a thing was not heard of.... However, it was a custom in some Melanesian communities for men to lend their wives or daughters or sisters as part of hospitality package [*sic*] to a visitor.

Acting Justice Narokobi, Lae 1980.⁵¹

The law and the prostitute: From Victorian England to modern PNG

Helen Self traces the beginnings of prostitution legislation in England to mediaeval ecclesiastical control of sexuality.⁵² From the sixteenth century, the break-up of the monasteries saw massive displacement and increased marginalisation and poverty of the peasantry. Single and pregnant women were a burden on the community, so domestic service was pauperised and prostitution was subsumed with vagrancy as a potential cause of disorder. Women selling sex for survival were cruelly punished. In the nineteenth century, the Industrial Revolution instigated further population movements and a penalisation of ‘vagrants,’ including single women. For the first time, in 1824, the term ‘common prostitute’ was deployed to distinguish a group of women as separate and identifiable legal subjects. Its vagueness meant that any poor woman was suspect.⁵³ The 1860s saw the introduction of the UK Contagious Diseases Acts, designed to prevent the spread of venereal disease among troops quartered in garrison towns by acknowledging the necessity of prostitution and subjecting it to regulation.⁵⁴ These Acts were repealed not long afterwards, but this did not result in the decriminalisation of prostitution. Rather, moves towards social purity and the fear of white slave trafficking made soliciting in public places

51 *Monika Jon and Others v Dominik Kuman and Others* (Unreported) N253, 8 August 1980 (*Monika Jon’s Case*).

52 This account is based on Helen J. Self, 2003, *Prostitution, Women and Misuse of the Law: The Fallen Daughters of Eve*, London and Portland OR: Frank Cass Publishers.

53 *Ibid.*, 37–40.

54 Walkowitz, 1982, *Prostitution and Victorian Society: Women, Class, and the State*, Cambridge England; New York: Cambridge University Press.

an offence from 1885 onwards.⁵⁵ This drove prostitutes off the streets and into the arms of pimps, so an offence of 'living on the earnings of prostitution' was created at the end of the nineteenth century.

Although some writers consider that the regulation and criminalisation of prostitution and associated activities have been the norm throughout the English-speaking world,⁵⁶ others challenge this view, arguing that the system was limited and site-specific, and pointing among other instances to the many African colonies which failed to introduce such regulation.⁵⁷ Australia itself was originally a heterogeneous collection of colonies, with varying attitudes to the regulation of sexuality and sex work. For example South Australia, never having been a penal colony and therefore having no garrison to protect from disease, did not introduce prostitution regulations, while Queensland and New South Wales, the states from which much of early PNG law derived, did. Various factors underpinned the readiness by the administration of the PNG Territories to accept the criminalisation of prostitution: concern about the apparent licentious behaviour of some villagers, for example;⁵⁸ and most noticeably, the Wau gold rush of 1926, which occasioned a regulation preventing single white women from entering the Territory of New Guinea in an effort to exclude prostitutes—a prime example of the deployment of colonial law to regulate the (female) colonists rather than the colonised.⁵⁹

However, it was not the letter of the law so much as the desire to proscribe prostitution which governed the colonial Administration's attitude to the growing sex trade. In 1960, a District Officer in Papua wrote to the Director of the Department of Native Affairs, pointing out that the repeal of the *Prisons Ordinance* (Papua) had inadvertently effected a repeal of Regulation 85 of the *Native Regulations* (Papua) which had hitherto prevented 'female natives' from engaging in prostitution.⁶⁰ He explained that he had encountered 'a fairly flagrant case of prostitution' and wished to proceed against the woman. He opined that there was a need to maintain some measure of sanction over prostitution, particularly on stations where there are collections of 'single men with money to

55 Self, *Prostitution, Women and Misuse of the Law*, 42–44, 53.

56 Philippa Levine, 2003, *Prostitution, Race, and Politics: Policing Venereal Disease in the British Empire*, New York: Routledge; Christine Harcourt, Sandra Egger and Basil Donovan, 2005, 'Sex work and the law,' *Sexual Health* 2(3): 121–28, 121.

57 Richard Phillips, 2005, 'Heterogeneous imperialism and the regulation of sexuality in British West Africa,' *Journal of the History of Sexuality* 14(3): 291–362.

58 Jan Roberts, 1996, *Voices from a Lost World: Australian Women and Children in Papua New Guinea before the Japanese Invasion*, Alexandria, NSW: Millenium Books, 97.

59 Maria Lepowsky, 2001, 'The Queen of Sudest: white women and colonial cultures in British New Guinea and Papua, in *In Colonial New Guinea: Anthropological Perspectives*, ed. Naomi McPherson, Pittsburgh: University of Pittsburgh Press, 125–50, 144; Roberts, *Voices from a Lost World*, 55, 198. Wau is the name of a township and colonial subdistrict in the mountains to the south-west of Lae, in Morobe Province.

60 The wording of the corresponding offence in the *Native Administration Regulations* (New Guinea) Section 87 was considerably broader: 'Any native woman who practices prostitution ...'

spare.’ The Secretary for Law advised the Director that there was no suggestion that a new regulation should be brought into operation, and agreed that there was no offence of soliciting in Papua which could be used (although there was a soliciting offence in New Guinea). He did however conclude that ‘it may be noted that under Section 4 of the *Vagrancy Ordinance* a person in fact a common prostitute and who wanders in any place of public resort (inter alia) and behaves in an indecent manner may be convicted of an offence.’⁶¹

Prosecutors appear to have taken the hint. Joan Johnstone in her study of Gumini sex work in Port Moresby in the late 1960s noted that women were regularly prosecuted under the Territory of Papua’s *Vagrancy Ordinance*. She attended several District Court hearings, and noted that ‘the Court cases involving *bisnis-meris* which I observed each lasted approximately ten minutes. The woman accused was brought in by a policeman who stood before the magistrate. The police prosecutor then said to the woman in Tok Pisin, abruptly: “You got work? You got house? You got money?” to which the women almost invariably answered, “No,” to each question.’ The police prosecutor would then address the magistrate, still speaking in Tok Pisin, ‘This woman has no work, no house and no money. She is a vagrant,’ and the magistrate would convict her.⁶²

Despite the fact that the law of the Territory of New Guinea had both a soliciting offence in the *Police Offences Ordinance* Section 38 and a prostitution offence in the *Native Administration Regulations*, it seems that vagrancy legislation was used there as well in prostitution cases. A newspaper report from 1969, for example, tells of a Rabaul woman who was imprisoned for two weeks ‘for having insufficient means of support,’ the wording of the charge under vagrancy legislation, upon her admission that she received \$20 from an act of prostitution.⁶³ Vagrancy was also the charge used in Lae in an attempt to control the growing numbers of women arriving in the town via the Highlands Highway to sell sex.⁶⁴ It is understandable that the use of vagrancy legislation might have been convenient when proof of selling sex could not easily be adduced, but its use in this instance, where a confession was forthcoming, is surprising. Whether they realised it or not, the prosecutors involved were actually echoing the vagrancy control processes of the sixteenth to nineteenth centuries in the UK, as described above. The incongruity of a conviction in the Territory of New Guinea for insufficient means of support of a woman who admitted to receiving \$20 (a good deal of money in 1969) seems to have escaped the officers involved in this particular instance of the dispensation of justice.

61 PNG National Archives Accession No.64 Box 1316 File N1-6-7, letter W.A.Tomasetti, District Officer, to Director, Department of Native Affairs, Konedobu, 23 May 1960.

62 Johnstone, ‘The Gumini *Bisnis-Meri*,’ 227.

63 ‘Tolai woman gaoled for two weeks,’ *Post-Courier*, 19 November 1969, 20. It can be inferred from the report that this woman sold sex regularly, but her (known, named) pimp was acquitted of any wrongdoing.

64 E.g., ‘Get out of town, court tells 4 vagrants,’ *Post-Courier*, 4 April 1975, 9.

Prosecuting prostitution in an independent nation

At Independence, the new state attempted to follow emerging trends to law reform world-wide. The PNG Law Reform Commission took just three months to prepare and present its first report, on 'the appropriate means of restating and modernizing the law relating to Summary Offences.'⁶⁵ The Commission noted the need for such laws to enable people 'to live together harmoniously in the Papua New Guinea of today.' The police offences laws of Papua and New Guinea were written decades earlier, and adopted virtually unchanged from countries whose culture differed greatly from the cultures of PNG. A new summary offences law was recommended, which should be 'written very carefully to include only those offences which most of the Papua New Guinea people think are wrong. Care must also be taken to limit the powers of the policemen and the courts and protect the rights of the people.'⁶⁶

Regarding prostitution, the Commission said that the present laws were 'most unsatisfactory.' It recommended the retention of offences relating to brothels, and living off the money made by prostitutes, but saw no point in retaining the offence of soliciting found in the New Guinea law, or extending that offence to Papua. It considered that sufficient laws already existed to control prostitutes who were causing trouble in public places, and to control the spread of venereal disease.⁶⁷

The Commission also recommended the repeal of the 'lawful means of support' provisions of the Papuan *Vagrancy Ordinance* and the equivalent provisions of the New Guinea *Police Offences Ordinance*,⁶⁸ although the fact that these vagrancy laws were used to prosecute prostitution was not mentioned in the Commission Report. Instead, reference was made to their use in attempting to curb urban migration and rising unemployment in the formal employment sector, but the majority, with only one dissenting voice, held the view that, using the criminal law to control social and economic problems is not only ineffectual but also inappropriate and unnecessary.⁶⁹ The Commission concluded by requesting the retention of the summary offences reference, in order to investigate whether any further measures should be taken regarding prostitution.⁷⁰ But this work was never completed.

65 Law Reform Commission, *Report No. 1: Report on Summary Offences*, covering letter to the Minister for Justice. 'Summary offences' or 'police offences' are minor offences prosecuted in inferior courts.

66 *Ibid.*, 6.

67 *Ibid.*, 22.

68 *Ibid.*, 14.

69 *Ibid.*, 15.

70 *Ibid.*, 22.

The Tale of Anna and Monika

The Summary Offences Bill prepared by the Commission was enacted by the National Parliament in 1977. But the reforms which abolished soliciting and vagrancy laws did not daunt the police, who started charging women under Section 55(1) of the new *Summary Offences Act 1977*, which reads: 'A person who knowingly lives wholly or in part on the earnings of prostitution is guilty of an offence.'

In 1978, just one year later, the new law was tested before the National Court in Rabaul in *Anna Wemay's Case*.⁷¹ Four women, through the Public Solicitor,⁷² appealed against their conviction and sentence for 'living on the earnings of prostitution.' The women had admitted to 'being prostitutes' and having sex for money. The Australian judge, Justice Wilson, reasoned that he had to decide whether, 'the prostitute herself, as distinct from the madam, the tout, the bully, the protector, or the pimp, may be convicted of a breach of s. 55(1).'⁷³ Common sense would seem to say: no. The Law Reform Commission had already said: no. And the wording of the Act itself seems to support an answer of: no. Section 55 goes on to state

(2) The fact that—

- (a) a person lives with, or is constantly in the company of a prostitute; or
- (b) a person has exercised some degree of control or influence over the movements of a prostitute in such a manner as to show that that person is assisting her to commit prostitution,

is prima facie evidence that that person is knowingly living on the earnings of prostitution.

This can be taken to indicate that the section is concerned with criminalisation of pimping (the other two sections of Part VII deal with keeping a brothel and suppression of brothels). On the whole, then, the preferable view would seem to be that the prostitute herself does not commit an offence.

In support of this interpretation, the appellants asked the judge to consider what the Parliament may have intended when passing the Act. They urged him to consider the report of the Law Reform Commission. He was asked to take into account the fact that the repealed *Police Offences Ordinance* (New Guinea)

⁷¹ *Anna Wemay and Others v Kepas Tumdual* [1978] PNGLR 173 (*Anna Wemay's Case*).

⁷² An Office established to provide legal aid, mainly in criminal matters: *Constitution* Sections 175–6.

⁷³ *Anna Wemay's Case*, at 174.

had contemplated three classes of offender: the prostitute who solicits, the male persons living off the earnings of prostitution, and the keeper of a brothel or a 'house of ill repute.' He was asked to agree that the first of these offenders, the prostitute, had been omitted from the 1977 Act.

But the judge would have none of it. He declared: 'It is beyond question that a prostitute who is paid money for services rendered by her as a prostitute which money she would not otherwise have available to her for living purposes but for the fact that she was a prostitute is living at least in part on the earnings of prostitution.'⁷⁴ He did not consider that the word 'male' might have been omitted from the new Act so as to conform to the constitutional guarantee of freedom from discrimination on the grounds of sex, as it is termed in the *Constitution*, or to bring the female 'madam' into the purview of the Act. He did not consider the possibilities of male prostitution and the effect of the wording of both the old and the new law. He did not acknowledge that the ordinary meaning of words in a statute is only to be taken where there is no ambiguity. He did not even acknowledge the possibility of any ambiguity at all in Section 55. He simply followed a process of strict, literal interpretation of the law, which, he decided, led him to conclude that a woman living on the earnings of her own prostitution was committing an offence under Section 55(1). Even if he were to consider the history of the legislation of police or summary offences, he thought that

it might be argued that, when the legislature repealed and did not re-enact the section dealing with prostitutes who solicit and when the legislature widened the scope of the provisions regarding those who live on prostitution (by deleting the word 'male'), it intended that prostitutes who, by virtue of the very nature of their occupation or 'profession,' make a living or seek to make a living by having sexual intercourse with men for reward, fall within the ambit of s. 55(1).⁷⁵

If the challenge had been successful, it would have legalised prostitution. A challenge two years later almost succeeded, when a similar case, *Monika Jon and Others v Dominik Kuman and Others* came before the National Court.⁷⁶ Again, the women involved admitted to receiving money, or money was found on them, so they were convicted in the District Court under Section 55(1). This time, however, the presiding judge was Acting Justice Narokobi, Papua New Guinea's leading proponent of the development of an autochthonous jurisprudence,⁷⁷ and formerly Chairman of the Law Reform Commission when its *Report No. 1* was prepared. Naturally enough, he considered that 'it would be useful in ambiguity and if it would help to discern the will or intent of the legislature,

74 *Ibid.*, at 177.

75 *Ibid.*

76 *Monika Jon's Case*.

77 Fully expounded in Narokobi, *Lo Bilong Yumi Yet*.

to look to the report of the Commission.... It would be a chase after a soulless intent if courts were to restrict their inquiry to the four corners of a statutory enactment, in cases of uncertainty.’⁷⁸

He was now invited to distinguish *Anna Wemay’s Case*, and that is what he did. He noted that each woman had admitted to a single act of sex for which she received money. There was no evidence of any intent to sell sex on an ongoing basis, no course of conduct. He held that a person making a living out of prostitution would be committing a crime, but not the ‘so called “K2.00 bush” lady,’ and acquitted all three appellants.

But he was not invited, nor did he attempt, to overturn Wilson J’s decision in *Anna Wemay’s Case*, although he could have done so, as the National Court is not bound by its own prior decisions. Today, women continue to be charged under Section 55(1) of the *Summary Offences Act*.⁷⁹ Moreover, Narokobi AJ’s reasoning is not followed. It seems to have escaped both police and prosecutors that *Monika Jon’s Case* requires proof of a ‘course of conduct.’

Gendering prostitution

Another point that has largely escaped law-enforcers is that of the gendering of the offence. From the outset, the legal system assumed that it was a woman selling (or being sold for) sex—the Native Regulations of both territories are specific in this regard.⁸⁰ The *Police Offences Ordinance* of New Guinea at Section 38 refers simply to a ‘common prostitute who solicits, importunes or accosts,’ but the related offences of pimping and brothel-keeping at Section 79 refer to use of a house ‘by a female for purposes of prostitution’ and ‘any male person ... living wholly or in part on the earnings of the prostitute.’ It was this gendering which so concerned the Law Reform Commission in its review, and which produced the carefully crafted gender-neutral language of the *Summary Offences Act*, one result of which enabled prosecutions of male prostitutes. But it seems that this never happened, despite the courts already being aware of male prostitution around the country. One such example is Siune Wel.

⁷⁸ *Monika Jon’s Case*.

⁷⁹ See discussion of *Monika Jon’s Case* above, and my discussion of the Three-Mile Guesthouse Raid in Chapter Five. In 2004, the charges in the raid prosecutions were all laid under this provision.

⁸⁰ *Native Regulations* 1922 (Papua), Regulation 79(6) and (7), in which latter sub-regulation she is termed an ‘abandoned and dissolute woman’; *Native Administration Regulations* 1924 (New Guinea): Regulations 86 and 87, where the terminology is more direct: ‘any native woman who practices prostitution.’

The Tale of Siune Wel⁸¹

In 1972, Siune Wel of Simbu District in the Highlands was fifteen years old. He had already spent time in prison in Lae the previous year for 'permitting acts of carnal knowledge' (sodomy) and for vagrancy, and possibly other minor offences too. Now he was back in Kundiawa, the Simbu District headquarters, and back to hustling. He had sold sex on several occasions to Yawi, a prison warder. One night he also offered sex to Yawi's friend Sitai, another warder. It seems that Sitai informed the police, and all three were arrested.

Charge sheets drawn up for both Yawi and Sitai noted that each 'appeared to have been the victim of a male prostitute.'⁸² This apparently was the subjective opinion of the police who drew up the charge sheet, but was then reflected in the decision of the court. Yawi and Sitai, the sexual penetrators in each case, pleaded guilty and were discharged on recognisance of \$50 to be of good behaviour for one year. Wel, on the other hand, who originally claimed rape and then pleaded guilty, was sentenced to nine months in hard labour.

In similar vein, *Kausigor's Case*,⁸³ related and discussed in detail below, opens with two men meeting in a Wewak tavern in 1969, and agreeing to have sex. Money was exchanged before the two left together. It would not have been possible at the time to lay a charge of selling sex in either case, as the law still applied to prostitution by females only. But the case shows that the courts and the police were not unaware that males were involved in prostitution. Other cases refer to the purchase of sex by expatriates,⁸⁴ and Robert Aldrich notes that in 1959 the then Chief Justice of PNG was expressing concern about 'more than a suggestion' of male prostitution.⁸⁵ So even the court record extending back before Independence showed that males sold sex. Nevertheless, the prostitute, whether a submissive victim or a transgressing agent, continued to be gendered female.

It is at this point that an overlap between the criminalisation of selling sex and homosexual activity becomes apparent, so it is appropriate that I now examine the criminalisation of sodomy in the received law of PNG.

81 Based on *R v Siune Wel* PNG National Archives Accession 454 Box 14625 Crown Prosecution File 5-9471; *R v Hugh William Sitai* PNG National Archives Accession 454 Box 14625 Crown Prosecution File 5-9468; *R v Yawi Huaimbore* PNG National Archives Accession 454 Box 14625 Crown Prosecution File 5-9474 (*Siune Wel* cases).

82 A poor-quality photocopy, made by the PNG National Archives, is in my possession.

83 *R v Clemence Mandoma Kausigor*; *R v Piki Piliu* (Unreported) FC3, 7 November 1969 (*Kausigor's Case*).

84 E.g., *R v Bates* (Unreported) SC255, 9 October 1962.

85 Robert Aldrich, 2003, *Colonialism and Homosexuality*, London and New York: Routledge, 252.

Enforcing sexual morality: Criminalising sodomy

The Tale of Frank and Johnny⁸⁶

You entered a [hotel] room with an adult European ... [and] started having sexual intercourse with each other ... the Hotel security members ... upon seeing you through the louvres naked ... alerted the management and the police.... Your lawyer has specifically ask[ed] that I consider ... that it was a consented act of intercourse between two adults and no one sustained any injury.... Carnal knowledge against the order of nature is a serious and heinous offence ... it is ... 'the behaviour of animals and must be stopped' ... as a result of your action you have placed you, your parents and members of your immediate family vulnerable to ridicule, shame and sexual advances.... I now commit you and sentence you to two years imprisonment in hard labour.

Acting Justice Pitpit to Johnny Mala, 1996.⁸⁷

Frank, the 'adult European' in this case, had always been careful. He grew up knowing he was 'different,' knowing what he liked, but he had formed no relationships. He knew male-male sex was illegal in his home country, he had heard occasional reports of men being caught, so when he first went to work in PNG, he avoided the gay set around town. He was too scared.

Frank was responsible for the financial and accounting matters of a large business enterprise with branches country-wide, and his work took him to several of these locations. He was keenly aware that his sexuality made him an excellent target for blackmail, even kidnapping. But he had never heard of anyone being arrested.

It was in PNG that he had his first sexual experience, formed some life-long friendships, even met 'the love of his life.' Apart from that, he established many good friendships among the Papua New Guineans he met at work and after hours. In small provincial towns, there was nothing else to do in the evenings but to go to the local club. 'Nice people, no complications, good times,' he recalls. Some of these relationships were sexual, some were not. His partners were usually older men, with reason to hide. Many were married—Frank knew that

86 Compiled from interview 12 November 2005 and the text of a letter Frank (not his real name) wrote to friends on 6 December 1996, shortly after he fled Papua New Guinea.

87 *The State v Johnny Mala*, (Unreported, Unnumbered) National Court; CR 96 of 1997; 25–26 February 1997 (*Johnny Mala's Case*). I acquired a copy of the case decision from friends. However, the file was missing from the National Court Registry when I searched during fieldwork 2006–07, although the case appeared in the Register.

the pressure on PNG men to marry and maintain a semblance of ‘respectability’ was enormous. Many of his friends were from the armed forces. In fact, the only hint of blackmail he ever encountered came from a policeman he entertained one night. ‘I can have you arrested for this,’ the man said afterwards. Frank paid him off and left town. ‘Who would I report it to?’ he asked wryly.

For nearly twenty years, Frank lived worked and travelled in PNG, maintaining his caution, enjoying his friendships and his relationships. He still doesn’t know why it went wrong when he met Johnny. He was near the end of a regular visit to a provincial town. He dined at his hotel with some PNG friends. Johnny was among them, and indicated that he wanted to spend the night with Frank. Frank recalls that Johnny claimed to be twenty, although the sole daily newspaper report elected to put his age at nineteen, thereby setting up the somewhat sensational headline: ‘Teenager jailed for sex “against the order of nature.”’⁸⁸

Frank is sure that he closed the curtains, and thinks the breeze from the ceiling fan must have blown them aside. Still, it could not have been easy for the lurking security guard to spy on them. In his subsequent statement, the security guard claimed he suspected a drugs or arms deal. But that is not what he saw. However, he knew enough of the law to call the police anyway.

A total of six policemen and three security guards burst into the room, and the pair was taken off to the local police station, where after some banter and deliberation, the sergeant decided not to hold them overnight, joking that the cells were already full with about seventeen of ‘the *real* perpetrators of crime.’⁸⁹ The pair returned next morning to be charged. Even then, the police assured them that prison would not be involved. More probably they would face a hefty fine, but Frank might be deported. Johnny himself was laughing off the whole incident, and saw no reason to dissemble. But Frank was concerned. He paid the K500 bail for himself and Johnny, and returned to Port Moresby with his committal hearing still not completed. There he was advised quietly by lawyers, employers and friends to ‘do a runner.’

He took their advice, packed lightly and was taken to the airport by a friend next morning, ‘a nervous wreck.’ Would the police be there? What if his name was already on the Immigration list? But by an amazing stroke of good luck, it was the very day Michael Jackson arrived in Port Moresby in his 707 jet, and all attention was focused on this big event. Frank boarded his flight safely and fled.

Nearly ten years later, back home, Frank still has not fully recovered. The police had asked so many questions, and wanted full disclosure of all his income, assets and liabilities, all taken down on police forms. He was too frightened even to

88 ‘Teenager jailed for sex “against the order of nature,”’ *Post-Courier*, 23 April 1997, 12.

89 Frank’s account of the sergeant’s words.

start his own business, so found a job and spends his time going to work, coming home—and communicating as best he can with friends in Papua New Guinea. He is very concerned about Johnny, but has been unable to contact him. He was horrified to learn of the two-year prison sentence imposed on Johnny.⁹⁰ Maybe it was greatly reduced with parole?

Frank still doesn't know why the police came down so hard on him and Johnny. He has only a few vague ideas, but no real theories. Perhaps the police were just bored stiff in a little provincial town, and looking for something to occupy themselves? He wishes that the security guard had taken the opportunity to make some fast money—Frank would gladly have paid him off. He wishes that Johnny had not urged complete honesty in the first place. If Johnny had left town as well, surely the police would not have bothered chasing him—they probably only persisted with Johnny's case, Frank surmises, because they had missed out on him, the wealthy expatriate. His feelings of loss have been compounded by guilt.

Law, rights and morality

Johnny Mala's Case is one of the very few recent sodomy cases which involve consenting adults in private.⁹¹ It raises but does not question the law's continued right to intrude 'into the bedroom,' to the extent of imprisoning one of those involved, and requiring the other to abandon his career, his friends and much of his identity and personal security.

In PNG, the English-law crimes of same-sex activity were imported in the Native Regulations of both Territories, and the *Criminal Code*. The New Guinea Regulations from 1936 contained an offence of 'Indecent Practices':

Any native who, whether in public or private, commits an act of indecency with another male native, or procures another male native to commit an act of indecency with him, or attempts to procure the commission of any such act by any male native with himself, shall be guilty of an offence.

Penalty: Imprisonment of six months.⁹²

The Papuan Regulation was less explicit:

Any native who indecently assaults any other native shall be liable on conviction to imprisonment for any period not exceeding Six months.⁹³

⁹⁰ See *Johnny Mala's Case*.

⁹¹ For a summary of cases of forced sodomy or cases involving under-aged participants, see Appendix 4.

⁹² *Native Administration Regulations* (New Guinea) Regulation 105.

⁹³ *Native Regulations* (Papua) Regulation 87.

The Regulations applied only to 'natives.' The *Criminal Code* was employed to prosecute sodomy by male colonialists. For all of the twentieth century, the Code offences were:

208. *Unnatural offences.*

(1) A person who—

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature,

is guilty of a crime.

Penalty: Imprisonment for a term not exceeding 14 years.

210. *Indecent treatment of boys under 14.*

(2) A person who unlawfully and indecently deals with a boy under the age of 14 years is guilty of a crime.

Penalty: Imprisonment for a term not exceeding seven years.

211. *Indecent practices between males.*

(1) A male person who, whether in public or private—

- (a) commits an act of gross indecency with another male person; or
- (b) procures another male person to commit an act of gross indecency with him; or
- (c) attempts to procure the commission of any such act by a male person with himself or with another male person,

is guilty of a misdemeanour.

Penalty: Imprisonment for a term not exceeding three years.

These sections were renumbered Sections 210, 211 and 212 by the *Criminal Code Act 1974* which amalgamated and revised the Codes of the two Territories. The subsequent 2002 amendments to the *Criminal Code* altered the wording but not the substance of (now) Section 210, replacing 'carnal knowledge against the

order of nature' with 'sexually penetrates.'⁹⁴ Section 211 was repealed altogether, as 'indecently dealing' with an underage boy is now covered by gender-neutral offences of child sexual abuse which appear elsewhere in the Code. A person who sexually penetrates a child under sixteen is liable to imprisonment for a maximum twenty-five years, or life if the child is under twelve years, or if a relationship of trust, authority or dependency existed between the offender and the child (Section 229A). Section 212, 'Indecent practices between males,' remains unchanged.

Laws such as the sodomy law may or may not be enforced, as Ryan Goodman has discussed. When in 2005 the Fijian High Court declared its sodomy law to be unconstitutional, churches and even the Attorney-General were appalled.⁹⁵ By contrast, Nauru has a legal system very similar to and sometimes derived directly from that of PNG, as the two former colonies were both administered by Australia. The Queensland *Criminal Code* was adopted there also, but to my knowledge there has never been any prosecution under Code Section 208. In my experience, Nauruans are highly 'tolerant' of gays and transvestites, seeing nothing unusual in their behaviour.⁹⁶ Greg Dvorak reports the same 'tolerance' in the Marshall Islands, although he does not discuss the legal situation there.⁹⁷

But tolerance of this nature has not been the case in PNG. Robert Aldrich describes how mission and administration combined in PNG to stamp out such 'immoral behaviour ... inherent in the barbarity of Melanesia.'⁹⁸ His exhaustive survey of cases of homosexuality before the colonial courts revealed that, nearly every year, at least a few cases came to court, mainly involving indigenes until the mid-1950s. This he attributes both to opportunity for such activity in PNG, and the increasing vigilance of the courts, particularly in the immediate post-World War II years.⁹⁹ Cases may well have been heard under the Native Regulations of both territories.

Aldrich gleaned much of his information from newspaper reports and the casebooks of Justice Gore covering the years 1948 to 1953, a period before official case reporting started in 1963, providing further details of homosexuality

94 This term is defined in a new Section 6 as the introduction to any extent of a penis, other body part or object into the vagina, mouth or anus, and is used generally throughout the 2002 amendment.

95 'Fiji AG disagrees with court's view on homosexuality,' *Fiji Times* (online), 30 August 2005, <http://www.fijitimes.com>, accessed 1 September 2005. And see Nicole George, 2008, 'Contending masculinities and the limits of tolerance: sexual minorities in Fiji,' *The Contemporary Pacific* 20(1): 163–89.

96 I worked in Nauru drafting legislation from 1997 to 2000.

97 Greg Dvorak, 2014, 'Two sea turtles: intimacy between men in the Marshall Islands,' in *Gender on the Edge: Transgender, Gay and other Pacific Islanders*, in Niko Besnier and Kalissa Alexeyeff, Hong Kong: Hong Kong University Press, 184–209. But see critique of language of 'tolerance' therein.

98 Aldrich, *Colonialism and Homosexuality*, 247. Aldrich's materials—archival documents, court records and other sources, published and unpublished—reach back far earlier than those I accessed independently, limiting myself mainly to the period from 1963, the year when official case reporting commenced.

99 *Ibid.*, 251–52.

cases.¹⁰⁰ Summaries of carnal knowledge cases in the National and Supreme Courts appear at Appendix 3. A considerable number of cases of consensual homosexual activity, often involving expatriates, came before the courts in this late colonial era. By contrast, most such encounters coming before the courts in recent times have involved underage boys;¹⁰¹ and the forced sexual encounters recorded all occurred in prison.¹⁰² *Johnny Mala's Case*, involving neither forced sex nor sex with minors, is a notable exception.

An analysis of some of these cases of consensual sex between males, together with the two National Court prostitution cases, reveals much about the ways in which legal discourses of sexuality were developed and employed in PNG, before and after Independence, to create outgroups in contrast to which the lawmakers could measure and regulate themselves.

Creating the rules

The people who are dominant in society, who really have the means of social control, are those who dictate the laws.

Margaret Davies: law professor, feminist and legal theory critic.¹⁰³

How were rules of the law developed in PNG's colonial and post-colonial contexts? Despite the professed impartiality of legal decision-making, the introduced system contained processes which assisted the expatriate judges of the colonial era to make decisions based on their own moral views.¹⁰⁴ These rules and processes became so thoroughly embedded in the legal discourse that after Independence, despite some efforts directed to change, they were strengthened rather than diminished or altered. Judges were able to ignore customary beliefs. They were even able to collude with administrative processes to name and condemn entire categories of sexual offenders.

Laws are 'dictated,' as Margaret Davies puts it above, in two ways: through direct legislative intervention, and through the process of judicial decisions in cases brought before the courts. These two processes differ in certain basic respects. Legislation is passed by the legislature, on the basis of laws prepared

100 Ibid., 254.

101 The most recent record of conviction appears in a report by Annette Sete, 'Sodomist gets 21 years jail term,' *Post-Courier*, 20 May 2008, 6, telling of the imprisonment of a man in East New Britain for a total of twenty-one years for acts of oral and anal sex with thirteen boys.

102 Summaries of Reported and Unreported cases, and of plea and trial decisions extracted from judges' notebooks, appear at Appendices 3 and 4.

103 Margaret Davies, 2008, *Asking the Law Question*, Sydney: Law Book Co., 101.

104 For discussion of the 'hidden' sexism of judges revealed in rape case judgements, see Zorn, 2010, 'The paradoxes of sexism: proving rape in the Papua New Guinea courts,' *LAWASIA Journal* 2010: 17–58.

in general terms by the executive to implement predetermined government policy. The decisions of judges in individual cases determine the actual efficacy or otherwise of the general legislative prescription. It may be confined to a limited set of fact situations leading to a narrow interpretation, or it may be applied widely to a range of circumstances and subjects, some of whom may not even be aware that they have broken the law.

Legislature and judiciary are both representative of those 'dominant in society.' But they may also be in conflict.¹⁰⁵ Legislation may be drawn up to counter a court decision which conflicts with government policy. Courts may not like to be told how to decide cases, and strive to find ways to circumvent legislative provisions. This conflict was less evident when PNG was a colony and the colonists comprised both legislators and judiciary. The content of laws was determined according to colonial ideas of social regulation. The right to impose alien norms through the introduction of foreign laws, including norms pertaining to the control and management of sexualities, was barely questioned. The social norms of the colonised, in the form of their customary laws, were rarely taken into consideration.

At Independence, legislative power and the right to devise policy passed to the citizens of the new state, who immediately initiated moves to bring existing law into line with indigenous social norms by various law reform initiatives.¹⁰⁶ Law reformers proposed new laws, legislators approved them, and lawyers tested them before the courts. But reform was not always successful, and it was inevitable that tensions and conflicts would arise. Political power may have been handed over, but judicial power continued to be exercised by expatriate judges, aided by expatriate (and expatriate-trained) lawyers who appeared before them. Although these practitioners were now to be guided by indigenous constitutional principles rather than Australian policy, they were not able to throw off their own cultural beliefs and biases overnight. Meanwhile, the normative systems of the formerly colonised were in the process of undergoing their own changes.

105 Roscoe Pound, 1908, 'Common law and legislation,' *Harvard Law Review* 21(6): 383–407; R.S. Geddes, 2005, 'Purpose and context in statutory interpretation,' *University of New England Law Journal* 2005(2): 5–48.

106 As proposed in Constitutional Planning Committee, *Final Report of the Constitutional Planning Committee* and mandated in the *Constitution* (particularly the Preamble and Schedule 2).

Custom and law

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.

Oliver Wendell Holmes Jr, American jurist, 1881.¹⁰⁷

In order to achieve this correspondence, the ‘actual feelings and demands of the community’ should be understood and taken into account in legal proceedings. For PNG, it could be assumed that these feelings and demands should include reference to the customary laws adhered to, if not by the whole society, then at least the societies of the disputants. But when the colonial courts and legal systems and the ‘native’ regulatory and court systems were combined in 1963, this is not what happened. The law, in content, form and process, was the state law of the metropole, modified only marginally to suit local circumstances. The Tale of Kausigor and Piliu illustrates one of the few attempts to take account of customary perceptions of sexuality.

The Tale of Kausigor and Piliu

In 1969, Clemence Kausigor and Piki Piliu met in a tavern in Wewak, headquarters of the East Sepik District. Kausigor was drinking with friends, Piliu was working with a construction gang nearby. A deal was struck whereby Kausigor paid Piliu ten shillings and the two men retired to some bushes by the beach,¹⁰⁸ where they were observed by a passer-by who immediately told Piliu’s brother. The brother called the police, both were charged, pleaded guilty and were each sentenced to three years’ imprisonment.¹⁰⁹

The Public Solicitor immediately arranged an appeal on their behalf against the severity of the sentence.¹¹⁰ One matter relied upon by the trial judge in sentencing was a statement by the arresting officer in the court documents that homosexuality was ‘completely against local custom.’¹¹¹ But at the appeal

107 Oliver Wendell Holmes Jr, 1881 [1968], *The Common Law*, London, Melbourne: MacMillan, 36.

108 In 1969, Australian pre-metric currency was being used in the Territories.

109 *R v Clemence Mandoma-Kausigor and Piki Piliu* PNG National Archives Accession No. 454 Box 8139 Crown Prosecution File 5-8019 (*Kausigor’s Trial*).

110 PNG National Archives Accession No.957 Box 13774 Crown Prosecution File No. PA 20 (*Piliu’s Appeal*); PNG National Archives Accession No.957 Box 13775 Crown Prosecution File No. PA 21 (*Kausigor’s Case*) Appeal Book 20-21.

111 Antecedent reports on the two accused in *Kausigor’s Trial*. The antecedent report is part of a case file compiled by police: see Appendix 2.

hearing, Father Heineman, a priest with sixteen years' experience in the Sepik area, made a lengthy written statement and then was cross-examined on it.¹¹² The court summarised his evidence as follows:

He expressed the view that before European contact homosexual behaviour between males may have been contrary to the customs of the people of the Sepik District. However, since the introduction of the contract labour system which involves men moving away from their wives and families for long periods and the housing of them together in large dormitories with no organised recreation nor recreation facilities this type of behaviour has become very common and widespread in areas where there are large labour lines. Sepik men returning to their villages at the end of their contracts of employment on plantations have introduced homosexual behaviour into the villages with the result that such behaviour has become quite common. It is not approved by those who do not indulge in it and in his opinion the people think it deserving of punishment but would consider it amply punished by sentences of two to three months imprisonment. He went on to opine that the Sepik people regard such behaviour between consenting males to be less serious than sexual intercourse between unmarried girls and men. The latter behaviour is disapproved as it interferes with brideprice and exchange arrangements and prior arrangements made in relation to the girl's marriage and with other family interests involved in the customary methods of negotiating marriages. Homosexual behaviour between males is not seen as a serious offence because the people do not see it as a threat to their society and its traditions.¹¹³

Others however took a different view. An expatriate Superintendent of Police deposed that in his experience

in certain areas of the Sepik, mainly the River Sepik area, homosexual behaviour between males is frowned upon, and in the majority of areas it is not accepted as being part of the native custom. I do agree that the homosexual behaviour does occur to some degree because of the fact that many Sepik are being employed as single labourers on plantations.¹¹⁴

A Police Constable from Kausigor's village stated in his affidavit that what Kausigor did 'is against the custom of the people of my village. It is regarded as a wrong in the eyes of the people and it is a big shame.'¹¹⁵ And a District

112 *Kausigor's Case*, transcript of cross-examination. Try as I would, I could not locate a copy of the actual affidavit, although I found a letter referring to the fact that it had been attached.

113 *Ibid.*

114 *Ibid.*, affidavit of Bryan Alan Beattie, 25 June 1969.

115 *Ibid.*, affidavit of Jimu Kunare, 25 June 1969.

Officer, hastily contacted through the Department of District Administration in Port Moresby,¹¹⁶ denied claims of homosexuality on plantations, explaining that after a hard day's physical labour, workers preferred to relax with friends, and if they sought sex, the local women would oblige for a fee. He contended, somewhat surprisingly in the light of the ongoing anthropological and legal evidence to the contrary, that the Administration was aware of only one case of plantation homosexuality.¹¹⁷

The appeal court took these arguments into account. The evidence showed that any previous abhorrence of local custom, if indeed this had been the situation, had been dissipated. The three-year sentence was reduced to eighteen months.¹¹⁸

Custom in the law

In the colonial era, some attempts were made both by the courts and the legislature to admit evidence of custom.¹¹⁹ But overall, any suggestion of a sympathetic approach to custom by the Australian colonists is challenged. Alan M. Healy describes the Australian method of colonial legal administration in its colony as the antithesis of the British approach in Africa, which was one of 'indirect rule' aimed at including indigenous peoples and their decision-making practices and the melding of custom with the state legal system. Healy considers that from the beginning of Australian rule

the entire bent of Australian policy—well illustrated in the legal system—amounted to an attempt at decreed grassroots assimilation, grounded in entirely ethnocentric postulates, and ignoring or overriding indigenous tradition.¹²⁰

It was an outcome of 'unrelieved paternalism, predicated on the antique notion of a natural hierarchy of peoples and cultures.'¹²¹ He considers that, even after World War II, native courts and the development of laws based on custom were strongly resisted, and systems were imposed from Canberra:

116 *Kausigor's Trial*, letter from Acting Crown Solicitor to Director, Department of District Administration, 25 June, 1969.

117 *Kausigor's Case*, notes on discussion with District Officer Harley Rivers Dickinson.

118 *Ibid.*

119 Peter Bayne, 1975, 'Legal development in Papua New Guinea: the place of the common law,' *Melanesian Law Journal* 3(1): 9–39; David Weisbrot, 1982, 'Integration of laws in Papua New Guinea: custom and the criminal law in conflict,' in *Law and Social Change in Papua New Guinea*, ed. Weisbrot, Abdul Paliwala and Akilagpa Sawyerr, Sydney, Melbourne, Brisbane, Adelaide, Perth: Butterworths, 59–103; Ottley and Zorn, 'Criminal law in Papua New Guinea.'

120 Allan M. Healy, 1997, 'Colonial law as metropolitan defence: the curious case of Australia in New Guinea,' in *European Impact and Pacific Influence: British and German Colonial Policy in the Pacific Islands and the Indigenous Response*, ed. Hermann J. Hiery and John M. MacKenzie, London: Tauris Academic Studies, 214–30, 216.

121 *Ibid.*, 218.

In fact, the legal system has been inherently dysfunctional from the early days of administration, with its motive forces being extraneous objectives, fear and paradigms—in defence of Australian interests—rather than the need to develop law and legal structures having intrinsic cultural meaning.¹²²

In New Guinea, the establishment of the western legal system included the principle that

the tribal institutions, customs and usages of the aboriginal natives of the Territory shall not be affected by this Ordinance and shall, subject to the provisions of the Ordinances of the Territory from time to time in force, be permitted to continue in existence in so far as they are applicable, apply to the Territory.¹²³

The *Derham Report* discussed the inclusion of custom in the court system at some length, in its deliberations upon the desirability or otherwise of ‘Native Courts.’¹²⁴ The author expressed concern that local customs would not be adequate to meet the needs of a developing society, and that the customs of a multitude of different communities, although they would be around for a long time yet, could not be known and applied in court. The report’s concern with the relationship of ‘law’ and ‘custom’ should be viewed in the context of the political and ideological climate of the time, based in social Darwinist theory and setting privileged concepts like ‘law,’ ‘justice’ and ‘good government’ against a vague notion of ‘custom,’ but the result of this ‘Hasluck/Derham’ approach was to dismantle the *kiap* system of justice and replace it with ‘proper’ courts dispensing ‘law’ rather than justice.¹²⁵ Courts specifically concerned with ‘native matters’ should be established as part of the general judicial system, and so the now-defunct Local Courts were born. Matters to be decided by custom should be clearly specified, as should the matter of what is meant by custom, and how a custom is established. But ‘in criminal matters where all offences are created by central legislative act and, it must be assumed, are created for the benefit and protection of all, the determination of whether an offence has been committed will not ordinarily be affected by local custom; but the appropriate penalty to be imposed may well be determined in the light of such custom.’¹²⁶

The *Derham Report* also referred to a draft Bill which would direct all courts to take judicial notice¹²⁷ of native institutions, customs, usages and rights and to

122 *Ibid.*, 226–27.

123 *Laws Repeal and Adopting Ordinance 1921–1939* (New Guinea).

124 *Derham Report*, 34–37.

125 Sack, ‘Law, custom and good government,’ 377–79, 388, 395.

126 *Derham Report*, 36.

127 ‘Judicial notice: The courts take cognisance or notice of matters which are so notorious or clearly established that formal evidence of their existence is unnecessary.’ P.G. Osborne, 1964 [Fifth ed.], *A Concise*

give effect to them.¹²⁸ So in 1963, the Native Customs (Recognition) Bill, based in part on similar legislation in Ghana and the British Protectorate of Solomon Islands,¹²⁹ was presented to the Legislative Council. Section 4 of the Bill provided a definition of custom as, 'the custom or usage of the aboriginal inhabitants of the Territory obtaining in relation to the matter in question at the time when and the place in relation to which that question arises, regardless of whether or not that custom or usage has obtained from time immemorial.'

In introducing the Bill, J.K. McCarthy, Director of Native Affairs, had explained that this definition was necessary, as

in ordinary English law custom is considered to be something which has existed from time immemorial. It is quite obvious that such a concept would not adequately describe the state of native custom at any given stage in the territory. Circumstances are continually occurring which were never before envisaged and accordingly custom is, to some extent at least, continually changing and adjusting itself to fit these changing circumstances.¹³⁰

However, the *Derham Report's* suggestion that judicial notice be taken of custom (a process which would have entrenched customary rules in the legal system) was omitted from the Bill as presented, on the grounds that custom's natural development would thereby be stifled.¹³¹ Overall, McCarthy claimed, the Bill was designed to 'regularize the position of native custom in the laws,' to assist 'a gradual development towards uniformity and the development of truly national rather than a village or clan sentiment.'¹³² Custom was to be pleaded as a question of fact, necessitating the production of witnesses to explain and attest to it, rather than as a question of law, to be argued by counsel.

The Bill had a stormy passage, opposed by many expatriate Members on the grounds that it was a retrograde step:

If you are to have social and economic progress the conflict between stone age customs and modern civilization must be minimized, not given increasing importance ... [t]here should be a desire to get forward to English Common Law rather than cling to the shackles of the stone age (Mr Hurrell).¹³³

Law Dictionary, London, Sweet & Maxwell, 178.

128 *Derham Report*, 35.

129 C.J. Lynch, 1968, 'Aspects of political and constitutional development and allied topics,' in *Fashion of Law in New Guinea*, ed. B.J. Brown, Sydney, Melbourne, Brisbane: Butterworths, 39–69, 63.

130 Territory of Papua and New Guinea, *Legislative Council Debates* VI:7, 26 February 1963: 665 (Mr. McCarthy).

131 *Ibid.*

132 *Ibid.*, 666.

133 *Ibid.*, 666 (Mr Hurrell).

It would certainly rob the law of one of its most important aspects and that is consistency.... Most people will agree that within quite a short space of time very few, if any, of these customs will be important ... an insane Bill (Mr Downs).¹³⁴

Attempts were made by the Bill's opponents to limit the operation of the proposed law, but these were defeated.¹³⁵ Predictions that customs would or should soon die out were still being made five years later (in 1968, not long before *Kausigor's Case* was heard and decided) by Geoffrey Sawer, Head of the Department of Law, Research School of Social Sciences, The Australian National University. He considered that 'education, economic development, the breakdown of traditional group-boundaries, and the growth of towns will erode the "custom consciousness" of the people, especially the young, and make necessary other rules of social order.'¹³⁶

The Ordinance contained three notable features. Firstly, the definition of custom contemplated its fluid and changing nature, a definition to be repeated in the *Constitution*.¹³⁷ Secondly, no suggestion was made, as had been the case in British colonies in Africa, that custom should be codified. It was generally considered that PNG custom was too changeable, too much a matter of 'an influence on action ... rather than ... a principle,' as C.J. Lynch the Legislative Draftsman put it.¹³⁸ But this view was challenged, not least by Lynch himself,¹³⁹ and then far more stridently by the Constitutional Planning Committee and particularly Narokobi, one of the Committee's legal advisers, who wrote, some years after Independence:

My personal position then (as it is now) was that custom should form the basis of our unwritten law. Common law and equity should be available only as subsidiary sources of law to be drawn upon to supplement the already rich customary laws, values and practices of PNG.

My position was that if Independence was to mean anything, we must free ourselves from the imposed web of laws, built up over the years, based on social conditions in England and Australia.¹⁴⁰

The third and most significant feature of the *Native Customs (Recognition) Ordinance*, from the point of view of ordinary Papua New Guineans who for

134 Ibid., 666–67 (Mr Downs).

135 Ibid., 733, 777, 778 (Mr Downs).

136 Geoffrey Sawer, 1968, 'Introduction,' in *Fashion of Law in New Guinea*, ed. B.J. Brown, Sydney, Melbourne, Brisbane: Butterworths, 9–13, 12.

137 *Constitution* Schedule 1.2(1); definition of 'custom.'

138 Lynch, 'Aspects of political and constitutional development and allied topics,' 62.

139 Lynch's opposition to former Minister for Territories Paul Hasluck's insistence on the wholesale adoption of common law is discussed in Healy, 'Colonial law as metropolitan defence,' 223.

140 Narokobi, 'History and movement in law reform in Papua New Guinea,' 17.

many years, even after Independence, appeared in court only as defendants in criminal trials, was that it severely limited the application of custom in criminal matters:

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

- (a) ascertaining the existence or otherwise of a state of mind of a person;
- (b) deciding the reasonableness or otherwise of an act, default or omission by a person;
- (c) deciding the reasonableness or otherwise of an excuse;
- (d) deciding, in accordance with any other law in force in the Territory or a part of the Territory, whether to proceed to the conviction of the guilty party,

or where the court considers that by not taking the custom into account injustice will or may be done to a person.¹⁴¹

The Ordinance became an Act upon Independence, and was later retitled the *Customs Recognition Act*.¹⁴² The *Constitution* envisaged that this retention was an interim measure,¹⁴³ to be replaced eventually by a system termed the ‘underlying law,’ which was to be developed by the courts and the legislature based largely upon the *Constitution* itself and its underlying National Goals and Directive Principles, and on customary principles.¹⁴⁴ Attempts were made by the Law Reform Commission to amplify and clarify this development,¹⁴⁵ but the *Underlying Law Act* prepared there in 1977¹⁴⁶ was not passed until 2000, in a form somewhat at variance with the Commission’s earlier draft.¹⁴⁷

The *Constitution* had retained the definition of custom as ‘the customs and usages of indigenous inhabitants of the country existing in relation to the

141 Native Customs (Recognition) Ordinance, Section 7.

142 All colonial Ordinances were retitled Acts at Independence: *Constitution* Schedule 2.4.6.(2). The *Interpretation (Interim Provisions) Act* 1975 provided that the expression ‘native’ shall be read as a reference to ‘automatic citizen,’ but this posed many problems. See ‘Preface,’ to the *Revised Laws of Papua New Guinea*, 7. The problem in relation to this law was resolved by renaming the Ordinance under the Revision of Laws process 1973–1981.

143 Jennifer Corrin Care and Jean G. Zorn, 2001, ‘Legislating pluralism: statutory “developments” in Melanesian customary law,’ *Journal of Legal Pluralism and Unofficial Law* 46: 49–101, 81.

144 *Constitution* Section 9, Schedule 2.3 and 2.4. See analysis in C.J. Lynch, 1976, ‘The adoption of an underlying law by the Constitution of Papua New Guinea,’ *Melanesian Law Journal* 4(1): 37–66.

145 Law Reform Commission, *Report No 7: The Role of Customary Law in the Legal System*.

146 *Ibid*.

147 Discussed at length in Corrin Care and Zorn, ‘Legislating pluralism’; and Jean G. Zorn and Jennifer Corrin Care, 2002, ‘Everything old is new again: the Underlying Law Act of Papua New Guinea,’ *LAWASIA Journal* 2002: 61–97.

matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.' The *Underlying Law Act* also kept this definition, but applied it to a new term 'customary law,'¹⁴⁸ probably in the hope that lawyers and judges would be more comfortable recognising custom if it had the connotation of a 'real' system of law.¹⁴⁹ Peter Sack considers that such legislative initiatives as the *Native Customs (Recognition) Ordinance*, the *Village Courts Act*, Schedule 2 of the *Constitution* and the *Underlying Law Act* were merely part of the original 'Hasluck/Derham approach' intended to 'domesticate and emasculate "custom" by "legalising" it, rather than replacing it with a new form of legitimacy' and in this it was 'astonishingly successful.'¹⁵⁰ This process of legalising was not confined to legislative initiatives, as case law on criminalised sexualities shows.

Considering custom

The issue which so concerned the Full Court judges in *Kausigor's Case* was to determine whether homosexuality was 'customary' in the Sepik. It concerned the lawyers as well: during preparations for the hearing, when the Public Solicitor sent Father Heineman's affidavit to the Crown Solicitor,¹⁵¹ the latter immediately launched several attempts to find deponents to counter this testimony.¹⁵² But the court was not quite sure how to deal with this evidence of changing custom before it. It said, 'We have come to the conclusion that there is fairly widespread homosexuality in the Sepik area, that *there is no tribal or village custom which allows or condones this type of behaviour*, that it brings opprobrium to those deviates who are found out, but that it is not regarded as seriously as fornication [emphasis added].'

This perceived want of custom is in hindsight surprising. Nobody seemed prepared to take account of the anthropological record, available decades before 1972, of ritual practices in PNG and specifically in the Sepik involving sexual activity between males.¹⁵³ The lawyers had plenty of time to research and present this evidence, as the appeal dragged on and even required rehearing due to the illness of the Chief Justice. Instead, both sides relied upon the evidence of *kiaps*, a policeman and a priest. The court itself could have looked more carefully at

148 *Underlying Law Act*, 2000, Section 1, definition of 'customary law.'

149 Corrin Care and Zorn, 'Legislating pluralism,' 74.

150 Sack, 'Law, custom and good government,' 395.

151 *Kausigor's Case*, Public Solicitor to Crown Solicitor, 20 June 1969.

152 *Ibid.*, Crown Solicitor to Director of District Administration, 25 June 1969; affidavits of Bryan Alan Beattie and Jimu Kunare, both deposed on 25 June 1969. The testimony of the District Officer Mr Dickinson referred to in the Full Court judgement has not survived.

153 E.g., Gregory Bateson, 1936, *Naven: A Survey of the Problems Suggested by a Composite Picture of the Culture of a New Guinea Tribe Drawn from Three Points of View*, Cambridge: Cambridge University Press. Although later writers emphasised the disconnect between 'ritual homosexuality' and sexual practices born of desire, as I describe in Chapter 4, at the time a submission along these lines may have carried some weight.

the definition of 'custom' in the *Native Customs (Recognition) Ordinance*, before it so readily concluded that there was in fact no such custom. Nevertheless, it did concede that

we consider that the learned trial Judge was influenced by the statement in the antecedent report that the present offences were completely against local custom which in the context indicates an attitude approaching abhorrence and has given it special weight. The statement does not carry the implication, as the evidence now before us shows, that the force of local custom has become greatly weakened in the observance or that the offence was not regarded by the people as meriting a long term of imprisonment.

It seems that John Comaroff's claim, that part of the *lawfare* process of the imposition of colonial law involves the denigration of custom and the outright criminalisation of cultural practices which are considered 'repugnant',¹⁵⁴ is borne out by the practice of the PNG courts. The sodomy laws were imported wholesale and, where they were called into question, they were staunchly upheld. The 'odious' repugnancy test has prevailed. It was enshrined in the definition of custom in the *Constitution*,¹⁵⁵ and it has guided the courts both before and after Independence, whether or not they have acknowledged the fact.

Ultimately even Narokobi, that staunch advocate for customary law, found himself caught in a dilemma in *Monika Jon's Case*, noting that wife-lending was customary in some traditional societies. But he also observed that

looking at custom in general, it is plain that it was a matter of a very serious affront to the dignity of the family if a woman was to sell her body for reward. In many communities such a thing was not heard of. Our custom in general, came close to Islamic Law, the Law of Moses too, that the proper punishment for such an offence was stoning to death.

He resolved the dilemma he perceived not by recourse to custom, but in a far more legalistic way. He drew a distinction between occasional occurrences of cash-for-sex and the ongoing occupation of selling sex. To prosecute the former was tantamount to prosecuting a woman for prostitution. What the law aimed to do, he argued, was to prosecute not the individual, but the trade, the commercialisation of sex. His distinction to a large degree paralleled that described by Alan M. Wojcicki in South Africa, where brothel-based commercial

154 A principle which Narokobi termed 'odious.' See Narokobi, 'Adaptation of western law in Papua New Guinea,' 57; and see his comments in 'History and movement in law reform in Papua New Guinea,' 17.

155 Schedule 2.1(2). The test was done away with upon the enactment of the *Underlying Law Act 2000*, which substituted a test of conformity with Constitutional National Goals and Directive Principles, and basic constitutional rights and freedoms.

prostitution is highly stigmatised on the basis that it is western, more visible and more threatening to male prestige and power, whereas survival sex sold in shanty-town beer-taverns has far greater social acceptance.¹⁵⁶

Narokobi was making another distinction, too. A staunch advocate of equality and rights for all, he nevertheless drew a line between the village and the settlement masses on the one hand and the urbanised wealthy on the other. He was supporting a class distinction, although as was his way, his support was for the *grassroots*, and his condemnation was reserved for the emerging *elites*.¹⁵⁷

The maintenance of class

Law may be the corner stone of many mighty civilizations in human history, but it has often been used as a sharp sword by the powerful to conquer, and hold subject, the powerless. Law has been used to destroy cultures, civilizations, religions and the entire moral fabric of a people.

Bernard Narokobi.¹⁵⁸

In Chapter 2 I discussed the ways in which PNG's society was stratified, by race initially and then by class. The division formerly manifested primarily along racial lines was gradually transformed into one divided along power and economic lines, as the PNG *elites* emerged.

Within general categories, though, further divisions were established and maintained.¹⁵⁹ Pre-Independence, class divisions in the metropole were exported to the colonies, as many writers have shown.¹⁶⁰ There, all subordinated members of the plural society—white women, the colonised—were defined in relation to the supreme position of the white male. White men who transgressed the

156 Alan M. Wojcicki, 2002, 'Commercial sexwork or *Ukuphanda*? Sex-for-money exchange in Soweto and Hammanskraal area, South Africa,' *Culture, Medicine and Psychiatry* 26: 339–70.

157 See Jean Zorn's delightful and heartfelt memorial to Narokobi. Zorn, 'In memory of Bernard Narokobi.' She relates many instances of his irreverence, his belief that every Melanesian should live the simple village life, and how he exemplified this by maintaining dress of bare feet and laplap, and napping on the carpeted floor of his Waigani office.

158 Narokobi, 'History and movement in law reform in Papua New Guinea,' 13.

159 Foucault, 1997 [2004], '*Society Must be Defended*': *Lectures at the Collège de France, 1975–76*, London: Penguin Books: 60–62.

160 E.g., Aldrich, *Colonialism and Homosexuality*; Bulbeck, *Australian Women in Papua New Guinea*; Philip Howell, 2004, 'Sexuality, sovereignty and space: law, government and the geography of prostitution in colonial Gibraltar,' *Social History* 29(4): 445–64; Richard Phillips, 2002, 'Imperialism and the regulation of sexuality: colonial legislation on contagious diseases and ages of consent,' *Journal of Historical Geography* 28(3): 339–62; Ann Laura Stoler, 1995, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things*, Durham and London: Duke University Press; Stoler, 2003, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*, Berkeley: University of California Press.

boundaries, by such means as 'going native' or displaying outrageous behaviour, were liable not only to ostracism but also to physical ejection from colonial society. And this is what happened to Christopher Leech.

Tale from a *Boihaus*¹⁶¹

Leech was a British ex-RAF intelligence officer stationed at the army barracks near Lae. Early in 1972, Leech met a former boyfriend, Peter Yaku, at a hotel in Lae. They re-established the relationship, liaising at Yaku's place, a room in a *boihaus* [domestic quarters] in the backyard of a house in the town. The *boihaus* had three rooms in all, one Yaku's, one apparently a laundry/bathroom, and the third occupied by a collection of Buang people from the mountains south of Lae, including one Gwakarum. Gwakarum had left his home village as a teenager and, now aged thirty, had a wife and young child living with him in the single room, along with two relatives and their families.¹⁶² Gwakarum had had no formal schooling, although he was assessed as 'comparatively civilised and intelligent.'¹⁶³ As was later revealed, he had had several brushes with the law, and had been imprisoned briefly on a few occasions.

On the second or third occasion that Gwakarum heard Leech's car drive up, late at night, he got up to spy on them. From behind the part-open door, he saw Yaku penetrate Leech. Afterwards, Yaku emerged to fetch a bucket of water for washing, and Gwakarum quickly hid behind a hibiscus bush and went on watching. In all, he thought he was watching for about fifteen minutes, but after the excitement was over, and the two men in the room were relaxing with beer and cigarettes, he went to the police station to raise the alarm. He returned with a police Sub-Inspector, who found the pair sitting on the concrete floor of the room in their underwear and arrested them both.¹⁶⁴

This all took place in February 1972. Both were committed for trial in March, but for various technical reasons, the trial itself did not take place until September. Yaku failed to appear in court, so Leech was tried alone.¹⁶⁵ Despite his lawyer's

161 *R v C.E.C. Leech and Peter Yaku*, PNG National Archives Accession 454 Box 14619 Crown Prosecution File 5-9354; PNG Supreme Court Archives Box 2038 SCRA Prentice J Notebooks 1972, 37–38 (*Leech Trial*).

162 PNG National Archives Accession 454 Box 14648 File Nos. 9956, 9958 (*Gwakarum Trials*). This multiple occupancy was and still is not uncommon. In the decade before Independence, indigenous migrants were pouring into Lae, and their impact in the town provided material for several anthropologists of the time. See John Lucas, 1972, 'Lae—a town in transition,' *Oceania* 42(2): 260–75; Lorraine Zimmerman, 1973, 'Migration and urbanization among the Buang of Papua New Guinea,' Ph.D. thesis, Detroit, MI: Wayne State University; Ian Willis, 1974, *Lae: Village and City*, Melbourne: Melbourne University Press. The migrants included a large cohort of Buang people from the mountains to the south-west who often found work as domestic servants.

163 *Gwakarum Trials*, Antecedent Report George Gwakarum 11 July 1973.

164 Statements of George Gwakarum and Sub-Inspector Anton Daniel at Committal hearing, 16 March 1972, *Leech Trial*.

165 Backing Sheet, *Leech Trial*.

attempts to show inconsistencies in Gwakarum's evidence, reminding the court that it was uncorroborated, and even hinting at untoward motives, Leech was convicted and sentenced to three months in hard labour. The judge said,

I find distress and distaste in this kind of case. It is tolerated in many communities. It carries a maximum penalty of 14 years, in most cases for debauchery of the young. I am aware that in some parts of the Territory it is looked upon with great distaste, while there is less disfavour in other parts.... I think the neighbour acted reasonably.¹⁶⁶

The judge in this case was a comparative newcomer to the Territory bench. Two years earlier, in February 1970, William James Prentice, a Sydney barrister and devout Catholic,¹⁶⁷ joined six other expatriate judges on the Supreme Court bench. In December of that year, while on circuit in Wewak, he heard the case of John Passum, a young married man, well-educated, who was in prison for assault. There he had anal intercourse three times with another inmate who eventually resisted and complained to the prison authorities. On a guilty plea, Justice Prentice sentenced Passum to a mere one extra month's imprisonment.¹⁶⁸

The Crown Prosecutor sought to differ from the fledgling judge. In his subsequent Circuit Report, he commented that he considered the sentence 'totally inadequate.' After summarising the mitigating factors, he proceeded to make much of Passum's prior convictions for drunkenness, stealing and assault. He referred to the Full Court decision the previous year in *Kausigor's Case*, compared the backgrounds of the two convicts and then the two sentences. Passum was the better-educated man (and by implication, more 'civilised'), was married and had worked as a broadcaster, whereas Kausigor had no education, was a villager and the crime was said to be against local custom. The Full Court on appeal had only reduced Kausigor's sentence to eighteen months.¹⁶⁹

The Acting Crown Solicitor agreed and wrote to the Acting Chief Crown Prosecutor, recommending that a copy of the judgement in *Kausigor's Case* be given to the judge's associate with a request that it be brought to His Honour's attention.¹⁷⁰ So Justice Prentice was warned, but nevertheless he handed down a comparatively light sentence to Leech. However, this was still enough to destroy the Englishman. Even before he was released from prison, the Police Commissioner wrote to the Secretary for Law, recommending deportation. He claimed that

166 Crown Prosecutor's Notes, *Leech Trial*.

167 Pers. Comm. G.R. Stewart, September 2006, Stewart, my father, shared chambers with Prentice when both were at the NSW bar in the 1950s and 1960s.

168 *R v John Passum*, PNG National Archive Accession No.454 Box No.9621 File No.8596.

169 *Ibid.*, Crown Prosecutor's Circuit Report.

170 *Ibid.*, Letter from Acting Crown Solicitor to Acting Chief Crown Prosecutor, 29 December 1970.

at the time of passing sentence Mr. Justice Prentice expressed the view that LEECH was an undesirable person to remain in Papua New Guinea ... it is believed he will have difficulty in obtaining employment in this country. It is anticipated, he will soon become a destitute person. There is also no doubt that LEECH will continue to offend in this manner and will corrupt other local persons.... His deportation from Papua New Guinea is strongly recommended.¹⁷¹

Leech was deported early in 1973.¹⁷² Meanwhile, his partner Yaku was recaptured, and preparations were made for his trial. But then the star prosecution witness, the spy Gwakarum, disappeared. He was finally located in June the following year—in prison in Lae, charged with stabbing an expatriate to death during a burglary.¹⁷³ The case against Yaku was crumbling fast. On 5 July 1973, the Public Solicitor (who provided defence counsel in most Supreme Court trials against indigent Papua New Guineans) wrote to the Secretary for Law requesting that the case against Yaku be dropped.¹⁷⁴ The Acting Crown Prosecutor, in a Minute to his Prosecutors, opined that, ‘consideration should still be given as to whether or not this prosecution should proceed on the grounds that acts of sodomy between consenting adults ought not generally to concern the state. Without expressing any definite opinion on the matter, my view is that our time and that of Defence Counsel could be more profitably employed.’¹⁷⁵

Other government lawyers agreed. A Senior Crown Prosecutor responded that he understood Leech had been convicted principally because of the inexperience of his private practitioner defence counsel, and that Leech was ‘probably the principal offender.’¹⁷⁶ The Crown Solicitor said that he thought it likely that the witness Gwakarum was prompted to go to the police because a European was involved, and did not anticipate that Yaku should be prosecuted.¹⁷⁷ The case against Yaku was eventually dropped,¹⁷⁸ but that was too late for Christopher Leech.

An undesirable person

The irony of this case was that if Leech had not been spied upon by someone alleged to harbour anti-European sentiments,¹⁷⁹ it is likely that nothing would have come of the matter. By the late colonial period, homosexual encounters

171 Ibid., Letter from Commissioner of Police to Secretary for Law, 4 December 1972.

172 Ibid., Letters from Director, Trade and Industry, to Secretary for Law, 15 December 1972, and from Comptroller of Customs to Legislative Draftsman, 13 February 1973.

173 *Gwakarum Trials*.

174 *Leech Trial*, Letter from Acting Public Solicitor to Secretary for Law, 5 July 1973.

175 Ibid., Minute of Acting Crown Prosecutor, 25 July 1973.

176 Ibid., Minute of Senior Crown Prosecutor of 30 July 1973.

177 Ibid., Minute of Crown Solicitor to Secretary for Law, 31 July 1973.

178 Ibid., Notation on Cover Sheet shows the *nolle prosequi* was entered at Lae, 13 August 1973.

179 According to the Crown Solicitor's comments described in the *Leech Trial*.

were tacitly accepted, provided they were kept relatively discreet and did not involve clearly under-aged boys.¹⁸⁰ But as this case shows, social divisions in the colony were still resisting attack. Liaisons between white men and native women in the Territory were not disapproved of, although marriages were.¹⁸¹ White women were still to be protected and discouraged at all times from sexual contact with native men.¹⁸² Sex between a white and a native man was in some ways even worse: it offended both racial and gender taboos.¹⁸³ But it happened and, as Aldrich notes, was ‘frequent enough to require vigilance.’ The views of homosexuality in colonial PNG implicit in records of the time had it that ‘Europeans bore some responsibility for corrupting “natives”. The appropriate treatment for those involved, it appeared, was to make certain that the white man left the territory speedily, and to pay off the “native”.’¹⁸⁴

It was easy to deport undesirables from the post-war colony. Gloria Chalmers describes how, in the 1950s, a £30 bond was required from all expatriates, male and female, to cover the fare out of the country should they be required to leave for inappropriate behaviour, such as homosexual advances, a drinking problem, even a ‘questionable role in the German Army.’¹⁸⁵ Chilla Bulbeck too refers to the deportation of immigrant whites who did not come ‘up to the mark’—in other words, those who threatened the status of white men.¹⁸⁶ Leech had met with his lover in the cramped space of a *boihaus*, was discovered sitting on the floor wearing only his underpants, and was accused of permitting a black man to sodomise him. He had clearly crossed the divide, and had to go. The speed with which the police responded to Gwakarum’s alarm was remarkable. The state of undress of the couple and the fact that they were sitting on a bare concrete floor were considered to amount to sufficient corroborative evidence. The judge was prepared to find that the witness Gwakarum (soon to be convicted of murdering an expatriate) was credible and had acted reasonably. The Crown Solicitor thought that Gwakarum was motivated to go to the police by distaste at the conduct of a ‘European.’ And the Police Commissioner had already imagined a dismal future of destitution and continued depravity for Leech before he was even released from prison. Nobody involved in the deportation process contradicted this. But once he was out of the country and out of the way, and the matter of his partner Yaku was under consideration, the story changed.

180 Aldrich, *Colonialism and Homosexuality*, 260–62; Nelson, Taim Bilong Masta, 181.

181 Nelson, Taim Bilong Masta, 168–69; Bulbeck, *Australian Women in Papua New Guinea*, 198; and see Andrew W. Lind, 1969, *Inter-Ethnic Marriage in New Guinea*, New Guinea Research Bulletin No. 31, Port Moresby: New Guinea Research Unit.

182 See the *White Women’s Protection Ordinance 1929*.

183 See Aldrich, *Colonialism and Homosexuality*, 250–52 for details of convictions.

184 *Ibid.*, 252–53.

185 Gloria Chalmers, 2006, *Kundus, Cannibals and Cargo Cults: Papua New Guinea in the 1950’s*, Watsons Bay, NSW: Books & Writers Network Pty Ltd., 25.

186 Bulbeck, *Australian Women in Papua New Guinea*, 196.

Suddenly, the 'consenting adults in private' theme emerged. The witness was motivated by anti-white sentiments. If Leech was the principal offender, this made Yaku virtually an innocent party.

This 'innocent victim' theme of colonial times could not be sustained after Independence, as the conviction of the Papua New Guinean Johnny Mala in *Johnny Mala's Case* shows. But the threat of deportation of expatriates still remains—Frank, Johnny Mala's lover, was threatened with it.

In support of the grassroots

Monika Jon's Case shows a different road but a similar imperative around class construction. In it, Narokobi described the Law Reform Commission's initiative as a 'middle-of-the-road' attempt to decriminalise prostitution.

What was legislated against were brothels and making a living out of prostitution. If a person makes a living out of prostitution he or she would be committing a crime.... Neither the Law Reform Commission which tried to canvass the views of all sections of the community before it made its recommendations, nor the Parliament which consists of elected representatives ever intended this legislation to punish the so called 'K2.00 bush' lady.¹⁸⁷

He affirmed this stance in interview in 2005, although he may well have 'refreshed his memory' before the interview.¹⁸⁸ At any rate, I suggest that what he seemed to be attempting was a recasting of the Law Reform Commission's equality standpoint into a kind of reverse elitism. The *elites* should stick to legitimate ways of earning wealth (and status): the *grassroots* were entitled to glean whatever they could by any means available, including some questionable sexual practices.

Narokobi was clearly sympathetic to all three of the women in *Monika Jon's Case*. Two were arrested following a tip-off at the main wharf in Lae after a night spent on board ship with some Filipino seamen, who paid them for their services. But Kuragi Ku was arrested by police who saw her receiving money for sex, and then publicly strip-searched her to find monetary 'evidence' of prostitution. She claimed it was an act of defiance against her husband.

On Friday my husband did not give me money, he was drinking and slept elsewhere drinking beer, one of my friend told me. I was angry, I left [took off] all my clothes and followed him into the bush my husband saw me and ran away with some beer. I was angry and I took three men

187 *Monika Jon's Case* at 9.

188 Interview B. Narokobi, Wellington, NZ, 16 November 2005.

into the bush, and they paid me K2.00 each and after that, I returned and was eating betelnut near Eriku Store and they arrested me [I was arrested].... I want to make him angry so I got [took] the money.¹⁸⁹

Narokobi often tried to find the ‘middle road’ between customary perceptions and principles, and the strictures of the imported law.¹⁹⁰ Hence he took great care to claim that he did not intend to convict the three ‘so called “K2.00 bush” lad[ies],’ while at the same time condemning the ‘professional’ prostitute. It is unfortunate that his fine distinctions were not observed in future arrests and convictions. It is even more unfortunate that he did not uphold in their entirety the recommendations of the Law Reform Commission in decriminalising all acts of selling sex, regardless of the status of the seller and whether or not the acts were occasional or continuous. If he had done so, the Commission’s decision would finally have been implemented, prostitution would have been decriminalised, and much of the present-day police power over sellers of sex, which I describe in Chapter 5, would never have existed.

Text or context

Sex is placed by power in a binary system: licit and illicit, permitted and forbidden ... power’s hold on sex is maintained through language, or rather through the act of discourse that creates, from the very fact that it is articulated, a rule of law. It speaks and that is the rule.

Michel Foucault, 1978.¹⁹¹

It is not only the content of the law that has impacted upon the colonised of PNG. Many of the basic principles and processes of the law as practised in PNG have led judges to conclusions which make little or no sense to a lay person. This is illustrated in several ways through the *Mama Kamzo* cases.

The Tale of Mama Kamzo¹⁹²

In the early 1970s, the practice of drafting plantation labour on a two-to-three-year contract basis was still thriving, although recruiters were ranging further

189 *Monika Jon’s Case*, 3–4. For more extensive discussion of forms of negative agency exercised by wives angry at their husbands or male relatives, see Holly Wardlow, 2006, *Wayward Women: Sexuality and Agency in a New Guinea Society*, Berkeley and Los Angeles, CA: University of California Press, 75–89.

190 In *State v Luku Wapulae* (Unreported) N233, 4 June 1980, a case of witch-killing, Narokobi AJ devised a defence of ‘diminished responsibility,’ a compromise verdict which did not meet with the Supreme Court’s approval: *Acting Public Solicitor v Uname Aumane, Aluma Boku, Luku Wapulae and Piope Kone* [1980] PNGLR 510.

191 Michel Foucault, 1978 [1976], *The Will to Knowledge: The History of Sexuality: Vol. 1*, London: Penguin Books, 83.

192 Taken from the unreported trial decision *R v Mama Kamzo* (Unreported) SC 671, 17 February 1972, (*Mama Kamzo’s Trial*); reported appeal case *R v M.K.* [1973] PNGLR 204 (*Mama Kamzo’s Appeal*); and Crown Prosecution file CP File Mama Kamzo: PNG National Archives Accession 454 Box 14,612/5-9218 (*Mama Kamzo File*).

afield. The previous year, a young Wabag lad, Mama Kamzo, was recruited from his home village in the far west of what was then the Western Highlands District to work on the Lolorua rubber plantation outside Port Moresby. He was not alone—a number of clansmen or *wantoks* were working there already. One at least was closely related enough to be called ‘brother.’ Kamzo was around seventeen years old, and had no formal schooling. This was his first paid employment.¹⁹³

His foreman, or *bosboi*,¹⁹⁴ on the plantation was one Debozina.¹⁹⁵ Kamzo’s file showed references to previous sexual advances by Debozina to Kamzo, and to other young men as well.¹⁹⁶ One day in October 1971, Debozina sought out Mama Kamzo. The lad had failed to tap one or more of the rubber trees at the end of his line, apparently because they were infested with ants.¹⁹⁷ When they both went to inspect the trees, Debozina told Kamzo to bend over, took down both their shorts, and penetrated Kamzo. Afterwards, Kamzo grabbed both pairs of shorts and fled across the plantation to tell his brother, who advised him to go to the European manager. The manager told him to go back to work and the matter would be dealt with later.

Next day the police arrived, questioned both men, and arrested them both. Nobody was more surprised than Mama Kamzo. At the committal hearing in Port Moresby District Court, his statement was translated thus:

At my own village we do not have sexual intercourse with male persons but we do have sexual intercourse with females. I came with [cooperated with?] the police to lodge my complaint to the police about the man who had sexual intercourse with me but the police turned around and they placed me in the lock-up for nothing. I wait for a period of 2 months to have my trial.¹⁹⁸

Debozina tried to claim that Kamzo had initiated the sex. Kamzo on the other hand said he had submitted because he knew Debozina had a knife, and he feared that it would be used. And in fact Kamzo’s *wantoks* had searched Debozina’s shorts and found a pocket knife.

Although the prosecution tried to find ways to support Debozina’s claim that Kamzo had initiated the encounter, then fled afterwards for no apparent reason

193 Antecedent Report Mama Kamzo in *Mama Kamzo File*. An Antecedent Report is usually prepared by the interviewing officer on arrest, and presented to the Court upon conviction or upon a plea of guilty.

194 For a description of the role of the *bosboi*, see D.C. Lewis, 1996, *The Plantation Dream: Developing British New Guinea and Papua, 1884–1942*, Canberra: The Journal of Pacific History, 270–71.

195 Unfortunately, Debozina’s archive file was empty, so I was not able to learn where he came from.

196 *Mama Kamzo File*, Crown Prosecutor’s Circuit Report.

197 *Ibid.*, Statement Debozina Karawa to police.

198 *Ibid.*, committal hearing 21 December 1971 in the Port Moresby District Court. It appears that he had spent the two months in custody on remand.

and only grabbed Debozina's shorts to be used as evidence,¹⁹⁹ the trial judge was having none of it. He did not believe Debozina. On the other hand he did not believe that Kamzo submitted out of fear of personal violence, though he did acknowledge that Debozina was older, was Kamzo's superior, and Kamzo was clearly afraid of him. Kamzo had done little more than submit, and after spending more than four months in prison, he was acquitted early in 1972, with a warning to stay away from men like this in future.²⁰⁰

But the Crown lawyers did not let the matter rest there. They were concerned that permitting this decision to stand would allow all receptive partners to sodomy to plead spurious coercion, as women were then alleged to do in rape cases.²⁰¹ The Chief Crown Prosecutor wrote urgently to the Crown Solicitor proposing a Full Court appeal against the decision.²⁰² He was extremely worried that mere 'submission' meant that 'an adult person may escape responsibility for what otherwise would be a crime carrying a maximum penalty of 14 years hard labour.' This made it a serious matter, and stringent tests should be applied. 'There must be some reasonable proportion between the seriousness of the offence and the steps that must be taken to prevent it by this [*sic*] whose duty is to not "permit" it.'

But this argument only makes sense if certain legal presumptions are taken into account, chiefly that which says that ignorance of the law is no defence: every person is presumed to know the law.²⁰³ It did not matter that Kamzo was a young, uneducated man from a remote village, in an alien environment. He was presumed to be aware that sodomy was not just a wrong but a crime in the eyes of the law; that both parties to an act of sodomy were committing a serious crime; that he had a duty to prevent its commission, no matter who was attempting to perpetrate it; that he could only escape responsibility if the offending act had occurred independently of his will or he had been coerced by real fear of violence; and that his view of his position relative to his older superior was immaterial.

The Chief Crown Prosecutor not only presented four pages of legal argument in his letter, he also suggested the terms by which the trial judge should refer the matter to the Full Court. Handwritten notations on the letter indicate that this

199 Ibid., Crown Prosecutor's Circuit Report.

200 Ibid., Prosecutor's notes on trial.

201 But see Zorn, 'The paradoxes of sexism,' 55–58; Jean G. Zorn, 2012, 'Engendering violence in the Papua New Guinea Courts: sentencing in rape trials,' in *Engendering Violence in Papua New Guinea*, ed. Margaret Jolly, Christine Stewart with Carolyn Brewer, Canberra: ANU E Press, online: <http://press.anu.edu.au?p=182671>, accessed 4 April 2014.

202 *Mama Kamzo File*, Chief Crown Prosecutor to Crown Solicitor, 21 March 1972.

203 Currently Section 23, *Criminal Code*.

course of action was approved, the referral was duly processed, and three judges of the Full Court sat to decide this crucial point of law: the true meaning of the word 'permit' in Section 208.

The judgement is the sort of text which greatly interests lawyers but very few other people, apart of course from those intimately involved. Their Honours discussed the issue at length, drawing on precedent from English, Irish and Australian cases for their decision. Eventually they decided that the term 'permits' means nothing more than 'allows.' Mere fear of harm is not enough to avoid the charge of permitting the offending action. If Kamzo had resisted, he would not have 'allowed' the act to be committed upon him. But he did not resist. However, at least the law provided a happy outcome for Mama Kamzo. Upon his release, he had apparently headed home, and there, presumably, he stayed. The law does not permit anyone to be tried twice for the same offence.²⁰⁴

Mama Kamzo may have escaped conviction (though not several months' incarceration as a remandee awaiting trial), but the legal principle was established in PNG law. This was created through the decision-making processes employed by PNG's colonial lawyers and judges, which were coloured by their Anglo-Australian legal heritage. They took an approach to law which is based on the premise that all law is man-made, by sovereign or legislature, and only awaits discernment by judges from general basic principles in increasingly refined detail. This approach severely restricts the courts' discretion and requires minutely detailed inspection of the meaning of words.²⁰⁵ The approach is known as 'positivism,' which is based on the idea that legal systems are 'posited' by people. Law is separated from social and political contingencies, must have an identifiable origin to be valid, and must be applied as written by judges.²⁰⁶ In the interpretation of statutes, a 'literalist' or 'plain meaning' approach is adopted, whereby the words in a statute must be given their plain and ordinary meaning, no matter how improbable that may be.²⁰⁷

But anti-positivism was emerging in the 1970s. In the USA, a pragmatic approach which focused on the logic of experience, rather than principles and rules, was

204 Known as the double jeopardy or *autrefois acquit* rule: *Criminal Code* Section 17.

205 Davies, *Asking the Law Question*, 47; Geddes, 'Purpose and context in statutory interpretation'; Jean G. Zorn, 1992, 'Common law jurisprudence and customary law,' in *Legal Issues in a Developing Society*, ed. R.W. James and I. Fraser, Port Moresby: University of Papua New Guinea, 103–27, 104.

206 Davies, *Asking the Law Question*, 47, 58, 100. See also Jean G. Zorn, 2006, 'Women and witchcraft: positivist, prelapsarian, and post-modern judicial interpretations in PNG,' in *Mixed Blessings: Laws, Religions, and Women's Rights in the Asia-Pacific Region*, ed. Amanda Whiting and Carolyn Evans, Leiden: Martinus Nijhoff, 61–99, 80n67, where she explains that positivism was originally intended as 'a safety measure, keeping aristocratic judges from picking "laws" out of thin air and applying them so as to send unlucky members of the thieving classes to Australia or worse,' but soon became a stringent process.

207 Catriona Cook et al., 2001, *Laying Down the Law* [6th ed.], Sydney: Butterworths, 229.

gaining ground.²⁰⁸ It was termed then ‘legal realism,’ or more recently ‘legal pragmatism,’²⁰⁹ and was first developed by the American jurist Oliver Wendell Holmes Jr in 1881, in his famous book *The Common Law*. It permitted courts to discover the law in the real lives of those before them and in the social conditions pertaining beyond the courtroom door.²¹⁰ This approach actually has an ancient and honourable lineage, from an English case of 1584.²¹¹ However, it was read down to apply only in situations of ambiguity or inconsistency of meaning. It made little impression on Anglo-Australian common law theory of the time, though,²¹² and was only adopted in Australia in the 1980s.²¹³

The colonial judges were nevertheless aware of the movement towards legal realism. In *Kausigor’s Case*, the Full Court made an attempt to take local sentiments into account, although it concluded that

we must confess to some difficulty in this sphere of human behaviour in this Territory in determining what are the ‘felt necessities of the time, the prevalent, moral and political theories’ which Oliver Wendell Holmes Jr speaks of as having a good deal more to do than the syllogism in determining the rules by which men should be governed.... What then should be done in this case which is one of sexual intercourse between two adult consenting males for all practical purposes in private. There is no question of corrupting or seducing youth and no element of force. We have accepted what is said about the attitude of the people.²¹⁴

Such attention to legal realism was rare, though. By and large, Australian judges in PNG, both before and after Independence, were clearly of positivist bent. This is clear in the way the Supreme Court ruminated at length on the meaning of the single word ‘permit’ in *R v M.K.* It is clear also in the way Justice Wilson came to his decision in *Anna Wemay’s Case*. He chose to ignore the history of the legal reform, and the possible purpose behind it. He decided that there was no ambiguity in the wording of the Act, and he therefore needed to look no further than ‘the ordinary and natural meaning’ of the words. By doing so, he decided that ‘it is beyond question that a prostitute who is paid money for

208 Davies, *Asking the Law Question*, 32.

209 Susan Haack, 2005, ‘On legal pragmatism: where does ‘the path of the law’ lead us?’ *American Journal of Jurisprudence* 50: 71–105. In the interpretation of statutes in Australia, the approach was termed ‘purposive’: Cook et al., *Laying Down the Law*, 229.

210 Oliver Wendell Holmes Jr, 1881 [1968], *The Common Law*, London and Melbourne: Macmillan, 32.

211 *Heydon’s Case* (1584) 3 Co Rep 7a, 7b; 76 ER 637, 638 (*Heydon’s Case*).

212 Davies, *Asking the Law Question*, 34.

213 Cook et al., *Laying Down the Law*, 236–37. See also Mark Tunick, 2002, *Ethics, Morality, and Law*, Oxford Reference, online: <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t122.e0313>, accessed 3 October 2006; Elizabeth A. Martin and Jonathan Law, 2006, *legal positivism*, Oxford Reference, online: <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t49.e2224>, accessed 3 May 2007.

214 *Kausigor’s Case*.

services rendered by her as a prostitute which money she would not otherwise have available to her for living purposes but for the fact that she was a prostitute is living at least in part on the earnings of prostitution.’²¹⁵

It was not only the Australian judges who embraced positivism. The first PNG lawyers were educated in this mode, or at least were greeted in the courtroom by positivist judges. They had little choice but to bow to their superiors and permit themselves to be engulfed in lengthy debate as to literal meanings, so that by the time their vanguard came to the bench in the early 1980s, the positivist approach to the law was firmly entrenched in PNG jurisprudence. The outstanding exception was Narokobi, who endeavoured to incorporate a consideration of custom, and the ‘real world’ of PNG at Independence, into his judgements. But he received scant support from his brother judges, both expatriate and Papua New Guinean.²¹⁶

The positivist approach also led the Full Court to dismiss any suggestion that customary beliefs and principles should be taken into account, even though the trial judge had observed that ‘Debozina was the “boss-boi,” that the accused was a much younger man, and that Debozina had discovered the accused in a neglect of duty, so that it would be natural for the accused man to be afraid that he would be reported to the manager and thus get into trouble.’²¹⁷

The reference here to the age difference between the two may well have been an acknowledgement that the court was aware of the extent of power of an older over a younger man in the PNG village context (and Kamzo was fresh from a remote village). But the implications of this observation on custom are overlooked in the appeal court’s lengthy and might I add somewhat tedious deliberations on the implications of the word ‘permits’ in the *Criminal Code*. Considerations of customary norms played no part in their decision. Detailed analysis of English and Australian cases, referring to the use of the word ‘permits,’ did.

Why was no appeal made to custom in order to establish Kamzo’s state of mind and the reasonableness of his actions? Yes, he had been acquitted by the trial court and could not therefore be rearrested. But even so, one might have thought that the defence team, in this case the Public Solicitor, could have made some effort to raise the application of the *Native Customs (Recognition) Ordinance*, if only on principle. We know that the Crown instigated the appeal because its lawyers considered that the trial judge had made ‘an error of law in a matter of principle of such importance that the judgement should not be permitted

215 *Anna Wemay’s Case*, 177.

216 For an outstanding exposition of the treatment of Narokobi’s judicial forays into legal realism, see Zorn’s discussion of the Supreme Court’s treatment of Narokobi AJ’s judgement in *Aumane’s Case*. Zorn, ‘Women and witchcraft.’

217 *Kamzo Trial*, 4. The term *boss-boi* refers to a foreman or overseer.

to stand as an authority.’²¹⁸ But we do not know what the Public Solicitor’s opinion was. There is no record in the Crown Prosecutor’s file and no reference in the case decision to defence counsel’s argument. We can only surmise that it never occurred to the latter to raise the issue of customary norms which require obedience to elders and superiors to show, for example, the ‘state of mind of the accused’ when his superior began forcing sex on him.

As well as the issues created by the positivist approach, and the application of a legal ‘presumption’ such as that which provides that ignorance of the law is no defence (even for a totally uneducated Engan lad experiencing colonial ‘civilisation’ for the first time), other legal processes give rise to strange outcomes. Problems arose with the form of the *Criminal Code*. A Code is not just a law setting out general principles which are then applied (or not) to the facts of each case, it is intended as a complete statement of the law, and it limits courts and judges somewhat more than a body of criminal law dispersed through various Acts.²¹⁹ Chief Justice Mann in his 1963 judgement in *R v Kauba-Paruwo*,²²⁰ in upholding the supremacy and relative fixity of the *Criminal Code*, said that if he were free to evolve the law according to common law principles, he would be able to apply it somewhat differently and indeed more leniently. But he was bound to follow the provisions of the *Criminal Code* as they stood, and hence could not adapt its definitions to suit the circumstances of the Territory.

The same principle was applied in the case of *R v John Bomai*,²²¹ though with a slightly better outcome for the accused. Bomai killed a man who had accused him of sodomy, was charged with wilful murder, and claimed a defence of provocation. This defence appears twice in the *Criminal Code*, with somewhat different parameters in each place. The judge carefully dissected both sections, again applying the positivist approach.

In my opinion the word, where it appears in [Section 304] should be read in its ordinary dictionary meaning. If a person is suddenly induced to do an act which causes death, and if the inducement causes him to act in the heat of passion and before there is time for his passion to cool, then I consider that such inducement constitutes provocation.²²²

A successful defence of provocation under one section leads to complete exculpation, but under the other, only reduces a murder charge to one of

218 CP File Mama Kamzo above, letter of Crown Prosecutor to Crown Solicitor of 21 March 1972.

219 As in the United Kingdom, NSW, Victoria and South Australia.

220 *Regina v Kauba-Paruwo* [1963] PNGLR 18. In this case, His Honour opines that the Code ‘expresses concepts of social responsibility in terms known to an advanced and civilized society.’

221 *R v John Bomai* [1964] PNGLR 278.

222 *Ibid.*, 281.

manslaughter. And this latter, the judge decided, was the only one available to the accused, 'regarding him as "a reasonable Chimbu" I am satisfied that his self-control was overborne and the crime committed in "the heat of passion".'

There is an anomaly here, however. Judges may have claimed to espouse positivism, and the ordinary dictionary meaning of the word, and the belief that the law is and always has been there for all to discern. But they were nevertheless affected by extraneous factors. Firstly, whether they consciously realised it or not, they were guided by social morals: their own, or those of the colony (or ex-colony, in the case of Justice Wilson). Through court decisions, they constructed their own legal discourse, and obliged the populace to adhere to it. It then became a matter of numbers. Narokobi tried to persuade the judges to accept his view of PNG law as a living, growing thing, guided by custom and common sense, PNG-style. But he was alone, and ultimately could not prevail.

Using the rules

Before rules, were facts; in the beginning was not a Word, but a Doing. Behind decisions stand judges; judges are men; as men they have human backgrounds. Beyond rules, again, lie effects: beyond decisions stand people whom rules and decisions directly or indirectly touch.

Karl Llewellyn, scholar of legal realism, 1931.²²³

One major defect in the positivist approach to judicial decision-making is the assumption that there can be only one plain meaning to a word. Implicit in this is the assumption that the meaning is informed by a uniform social system, with shared moral and political values. This has hardly been the situation in PNG, where the application of the metropole's legal system to every person within the entire country created a huge political and ethical chasm, foregrounding the mores of the colonists and marginalising the diverse customs, principles and beliefs that constitute PNG societies. It was inevitable that the values of the colonists should predominate at the outset. *Lawfare* was waged spectacularly well in sexuality cases in the colonial courts—its weapons were the processes of the law and the beliefs of the expatriate judges. As the founder of legal realism, Oliver Wendell Holmes Jr points out,

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices

223 Karl Llewellyn, 1931, 'Some realism about realism—responding to Dean Pound,' *Harvard Law Review* 44(8): 1222–64, 1222.

which judges share with their fellow-men, have had a good deal more to do with the syllogism [*sic*] in determining the rules by which men should be governed.²²⁴

Felt necessities

Justice Wilson in *Anna Wemay's Case* was clearly proud of himself when he proclaimed that

it is likely that these four appellants are the first four prostitutes ever to be prosecuted in Papua New Guinea under this section. They may indeed hold the doubtful distinction of being the first prostitutes ever to be prosecuted in this country for any offence directly appertaining to their calling or, as it is sometimes called, their 'ancient profession.'²²⁵

The judge himself may well hold the 'doubtful distinction' of being the only judge anywhere in the common law world, so far as I can ascertain, to have used this standard provision, intended to criminalise pimping, to apply to the prostitute herself. I can only surmise that it was personal bias on his part which led him to take such an emphatically adverse stand on the matter. It was 1977, Independence had arrived and the *Constitution* had established that in interpreting statutes and principles of common law, the circumstances of the country and other relevant matters should be taken into account.²²⁶ But this was a judge particularly renowned for advancing his personal opinions on a range of matters. He came to PNG from the South Australian Bench, first for a brief term as Acting Judge in 1973, and then to a substantive appointment at the commencement of the 1978 legal year on 1 February. In South Australia, he had charged that the Dunstan Government, renowned for its progressive approach to law reforms including the reform of sodomy laws, had attempted to interfere with his judicial independence. The incident gave rise to a Royal Commission, which in its Report in December 1976 completely exonerated the government. Rather, it took an unfavourable view of Justice Wilson's proclivity to attribute improper motives to those who opposed him, his inability to appreciate an opposing point of view and his insistence in maintaining his own, and his prevarication as a witness.²²⁷

Justice Wilson decided *Anna Wemay's Case* in May of 1978, not long after he took up his PNG appointment, and soon followed it with another innovative

224 Holmes, *The Common Law*, 5.

225 *Anna Wemay's Case*, 178.

226 *Constitution* Schedule 2.

227 Account and quotations taken from David Weisbrot, 1980, 'Judges and politicians Pt II: the Wilson affair,' *Legal Service Bulletin* 5(5): 214–17, 216–217. Weisbrot was at the time a lecturer in law at UPNG.

decision in August,²²⁸ a cannibalism case where the accused were charged with ‘improperly interfering’ with a dead body. To decide whether the action was ‘improper,’ the judge had to measure the action against what he decided were the current standards of common propriety of the community. In doing so (and in finding the accused guilty) he advanced the proposition that the modern ‘reasonable man’²²⁹ in PNG was no longer an ordinary person in his environment and culture, but a new creation, the ‘moderate Melanesian.’²³⁰ The ‘reasonable man’ standard in English law is actually an objective legal test: how would any reasonable man, not just the particular individual on trial, act and react in these circumstances?²³¹ Justice Wilson’s standard of the ‘moderate Melanesian’ has been considered by one commentator, at least, to be ‘a giant step backward’ in determining the impact of custom in criminal charges.²³²

The following year, 1979, Justice Wilson became involved as an appeal judge of the Supreme Court in what has been termed PNG’s first constitutional crisis, the ‘Rooney Affair,’ which revolved around an exchange of letters between Nahau Rooney, then Minister for Justice, and Justice Prentice, by then Chief Justice. The judges considered that the Minister’s letter impugned the integrity and impartiality of the court, the judges, the justice system and the *Constitution*, and imprisoned Rooney for contempt of court,²³³ an incarceration from which Prime Minister Somare released her the following day. Thereupon, five judges including Chief Justice Prentice and Justice Wilson tendered their resignations.

There followed what has been called the ‘Wilson Affair.’ After the Somare government was toppled in a vote of no confidence in March 1980, Justice Wilson, who had not formalised his resignation, wrote to the new Prime Minister, Julius Chan, offering to reconsider his decision to resign; to assist in a confidential manner in the preparation of a report on the state of the judiciary and the constitutional crisis; to advise on ‘the attitudes of past and present judges of the Supreme Court and the motivations and allegiance of the proposed

228 *The State v Aubafu Feama & Ors* [1978] PNGLR 301.

229 In the common law, the ‘reasonable man’ personifies the objective standards of the community, against which individual actions and beliefs are tested. See J.F. Hookey, 1968, ‘The “Clapham Omnibus” in Papua and New Guinea,’ in *Fashion of Law in New Guinea*, ed. B.J. Brown, Sydney, Melbourne, Brisbane: Butterworths, 117–35.

230 ‘The average contemporary Papua New Guinean will be one with average attitudes to matters of life and death and to matters relating to food which is good to eat. He will not be a man given to histrionics or extreme abhorrent reactions, but, on the other hand, he will not be lacking in some emotional feeling and he will have the ability to think. He will be affected by the traditions of his ancestors and he will be aware that he is living in a changing world. He will be a villager in heart and in practice—a moderate Melanesian man.’ *Anna Wemay’s Case*.

231 See Hookey, ‘The “Clapham Omnibus” in Papua and New Guinea,’ for a discussion of the difficulties in applying the English standard to the pre-Independence territories.

232 David Weisbrot, 1979, ‘Judges and politicians,’ *Legal Service Bulletin* 4(6): 240–45, 244.

233 *Public Prosecutor v Nahau Rooney (No.1)* [1979] PNGLR 403; *Public Prosecutor v Nahau Rooney (No.2)* [1979] PNGLR 448.

Somare appointees'; to establish a committee (on which he would be willing to serve) to advise Cabinet on the legal implications of the Rooney Affair; and to discuss these matters with the Prime Minister in person.

When this letter was eventually leaked later that year and tabled by the Somare-led Opposition in Parliament, Prime Minister Chan swiftly gagged debate. Justice Wilson officially remained on the Bench until the end of 1980, 'retiring' on 1 February 1981,²³⁴ but his last known bench appearance pre-dated the leaking of the letter.²³⁵

Weisbrot comments that the suggestions contained in Justice Wilson's letter 'would seem to bind the judiciary to the political scene in a way that neither Mrs. Rooney nor any other politician would ever dare suggest, and to present a far more serious threat to the independence of the judiciary than Rooney's public criticisms.'²³⁶

What Justice Wilson did was 'definitely completely outside established judicial ethics then and now,' to quote another government lawyer of the time (later to become a judge himself). It seemed at the time, even to those who did not know of his South Australian background, that he was simply trying to look after himself because he had nowhere else to go.²³⁷

It is sad to reflect that this was the judge who presumed to create new law in relation to prostitution, while presenting himself as dispensing impartial justice in the form of a positivist approach which refused to contemplate the background to the making of the *Summary Offences Act*. I can only speculate on the reasons for his hard-line positivist decision in *Anna Wemay's Case* which refused to take current circumstances into account. I believe however that he was greatly influenced by his version of the Australian middle-class (which at that stage still meant 'professional expatriate') view of what form the new society ought to take. As Jean G. Zorn puts it,

The predominant myth common to almost all formal legal systems is that judges decide cases based solely on reason and logic. Emotion, bias, prejudice and the judge's own personal values are presumed to play no part.... [t]here is no place for emotion, bias or prejudice in that process;

234 As the legal year starts at the beginning of February each year, it is probable that Justice Wilson had already departed PNG before the end of 1980.

235 *Smedley v the State* [1980] PNGLR 379, in which hearings concluded on 13 June 1980.

236 David Weisbrot, 1980, 'Judges and politicians Pt II: the Wilson affair,' *Legal Service Bulletin* 5(5): 214–17, 215.

237 Pers. Comm. by email from Justice R.K. Woods, 21 November 2007.

there is no place for personality: the applicable rules are supposed to be applied equally to everyone, regardless of power relations based upon socio-economic class, or race, or gender.²³⁸

But as legal realists suggest, by contrast,

Judges are men and therefore, their political and moral convictions inevitably influence their decisions ... law must be seen as connected to existing political processes and institutions ... because judges, lawyers, legal academics and others associated with the law *are* predominantly privileged in terms of gender, race and class, law is not only not separate from politics, it is also not separate from the power which its personnel have over less privileged people.²³⁹

Justice Wilson's 'political and moral considerations' and the power he exercised have contributed much to the present situation and the current popular view of those who sell sex in PNG today. His refusal to admit highly relevant evidence and his insistence on a blinkered application of positivist principles were manifestations of his own belief that the criminal status of prostitution should be maintained, regardless of any wishes to the contrary expressed by the emerging nationalists of the Independence era. A chance offered to the National Court, in the person of Narokobi AJ, slipped by, and no other challenge has since been mounted. Justice Wilson's judgement stands.

Consenting, adults, in private

The tale of Frank and Johnny illustrates how PNG law can intrude upon the sexual conduct of adult individuals conducted in private, harming no-one, but nevertheless leading to disastrous consequences. The element of consent was debated at great length in *R v M.K.*, which decided that lack of consent, unless expressed vociferously, was no defence. The question of adulthood has never been seriously in contention. Mama Kamzo was probably under eighteen. Siune Wel was clearly under-aged. But until 2002, the *Criminal Code* in Sections 210 and 211 only countenanced an age defence for a boy under fourteen. *Kausigor's Case* and *Leech's Case*, as well as *Johnny Mala's Case*, all concerned acts in private, and the right to privacy is guaranteed under the *Constitution*. But this has never been raised in the PNG courts, although it has been used to effect decriminalisation elsewhere, for example in Fiji.²⁴⁰

The fact that prostitution also involves these three elements seems to have escaped the lawmakers entirely. Criminalisation both in PNG and elsewhere

238 Zorn, 'The paradoxes of sexism,' 24.

239 Davies, *Asking the Law Question*, 163.

240 *Nadan v The State* [2005] FJHC 1 (Fiji Islands).

has been based largely on the harm done to society in general, by disturbing public order through street soliciting;²⁴¹ offending Christian principles;²⁴² and by constructions of the prostitute as ‘vectors of disease.’²⁴³ No objection has ever been raised to a prosecution or other police action on the grounds that sex has taken place between consenting adults in private.

The behaviour of animals

Carnal knowledge against the order of nature is a serious and heinous offence. It is ... the behaviour of animals and must be stopped.

Pitpit AJ in *Johnny Mala’s Case*

In 1975, immediately before Independence, the Full Court sat to decide whether the pre-Independence Supreme Court had imposed an adequate sentence on Kabua Dewake.²⁴⁴ Dewake, while visiting with *wantoks* in Port Moresby, had taken a three-year-old boy to the beach and there effected a minimal penetration of the child’s anus. The Supreme Court judge imposed a sentence of four months, and the prosecution appealed to the Full Court, which increased the sentence. The Chief Justice, delivering the judgement, said that the judge should have given consideration to ‘the impressions a forcible incident such as this might have on a child’s mind ... [and] the strong concern ... of the people of Papua New Guinea not only for the general care of children, but that young children should not be exposed to sexual treatment such as this which is regarded throughout the country as a matter of gravity.’

Many years later, two National Court judges tried separate cases of sodomy in prisons. In the first, Justice Brunton heard that a man serving a sentence for rape of a woman had forced himself on another prisoner.²⁴⁵ The accused claimed that such sexual activities were common in prisons, and that he had ‘lost control of himself.’²⁴⁶ The judge, while not endorsing this claim, nevertheless acknowledged that ‘homosexuality is a personal disposition, not a medical condition or a social affliction,’ and considered that no purpose would be served by extending the prisoner’s sentence: it might even ‘aggravate his antisocial tendencies.’

241 *Wolfenden Report*: §229; Self, 2003, *Prostitution, Women and Misuse of the Law*, 24, 37; *Police Offences Ordinance* (New Guinea) Section 38.

242 Self, *Prostitution, Women and Misuse of the Law*, 22; *Mónica Jon’s Case*.

243 Walkowitz, *Prostitution and Victorian Society*.

244 *Secretary for Law v Kabua Dewake* [1975] PNGLR 100.

245 *State v John Puwa Bui* (Unreported) N944, 14 December 1990.

246 See Adam Reed, 2003, *Papua New Guinea’s Last Place: Experiences of Constraint in a Postcolonial Prison*, New York and Oxford: Berghahn Books, 116-119.

The following year, Justice Jalina tried a case of sodomy in another prison.²⁴⁷ It appeared that the accused had ‘threatened the victim into submission.’ But this judge took a different view of the incident. ‘This kind of behaviour must be stopped,’ he declared. ‘It is the behaviour of animals.’ He referred to *Secretary for Law v Kabua Dewake* to support his decision.

This is the case from which Acting Justice Pitpit derived his language and his approach in *Johnny Mala’s Case*. It is hard to follow his line of reasoning, other than to assume that he was in general agreement with Justice Jalina as to the repugnance of sodomy in general. But otherwise, the two cases had little in common—and even less in common with *Secretary for Law v Kabua Dewake*, which concerned inappropriate dealing with a three-year-old child. *State v Pos* involved non-consensual sex. But Johnny Mala was an adult (although reported as a ‘teenager’); he was engaged in an act of consensual sex; and it was most definitely being conducted in private. The judge added that he had rendered his family and relatives ‘vulnerable to ridicule, shame and sexual advances,’²⁴⁸ which he seemed to think increased the heinousness of the offence, although the last threat is a little hard to understand as a consequence of his actions. These two judges appear to have been greatly affronted by occurrences of homosexual activity, and despite attempts at reasoned judgement, seem to have allowed their prejudices to dictate their reactions and reasoning.

The conflation of consensual and forced sex, of sex between adults and sex with children, into the one crime of ‘sodomy’ when it involves anal penetration of one male by another, has been greatly assisted by the widely diverging penalties provided under the *Criminal Code*. Section 210, forbidding ‘carnal knowledge against the order of nature,’ carries a maximum penalty of fourteen years imprisonment, whereas ‘Indecent treatment of boys under 14’ provides only seven years. ‘Indecent practices between males’ at Section 212 is a mere misdemeanour with a penalty of only three years. If anal penetration can be proved, prosecutors will naturally indict for the offence with the greatest penalty. Hence ‘sodomy’ charges involving forced sex or under-aged ‘victims’ incite public outrage, while consensual sex between adults in private, which can only come to the attention of the law if a spy witnesses the occurrence or a confession is forthcoming, is tarred with the same stigmatising brush, as the utterly evil ‘sodomy.’

247 *State v Pos* [1991] PNGLR 208.

248 *Johnny Mala’s Case* above, 3.

Conclusion

The law operates more and more as a norm, and ... the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.

Michel Foucault.²⁴⁹

Foucault's history of the law's control of sexuality in Western Europe claimed that mediaeval ecclesiastical law's control of sin and power over death became transformed from the eighteenth century to the state's power over life. Laws which criminalise sexual conduct represent an exercise of social power through the control of human bodies. Those who have the power in society make the rules, as Margaret Davies observes. The laws that they make regarding sexuality are based in the moral rules they have devised or adopted.

An illustration of this is provided by the English jurist Lord Devlin's argument²⁵⁰ in opposition to the proposal in the United Kingdom in 1957 to decriminalise sodomy.²⁵¹ Lord Devlin argued that there is a 'public morality' which determines the principles of law, and enables the criminal law to intervene when the social fabric is threatened. Constructing a public morality and creating a threat to the social fabric are done by processes that operate largely by exclusion—of the criminal, the insane, the sexually deviant and so on. Prostitution and sex between males were criminalised in the Anglo-Australian law which was introduced into the PNG colony. Despite subsequent reforms overseas, and attempts at reform in PNG at Independence, the expatriate and expatriate-influenced legal practitioners used the forms and processes of the law to support their own views on these matters, and no reform has yet been effected. In post-colonial society, the legal discourse of proscription has been taken up by the dominant *elites* of society, and developed even further than in the former metropole.

We can draw several conclusions from this survey of the legislation and the case law interpreting it. The criminalisation of selling sex has persisted, despite reform attempts at Independence, because an expatriate judge used techniques of interpretation to preserve the moral regime established by the introduced legal system—his legal system. He dismissed the attempts at reform, and even congratulated himself on pioneering a 'new' principle of law which maintained the status quo. The irony of his using an apparently positivist approach is that the positivism/realism divide is not entirely true for PNG. Judges of the colonial

249 Foucault, *The Will to Knowledge: The History of Sexuality: Vol. 1*, 144.

250 Patrick Devlin, 1960, *The Enforcement of Morals*, London: Oxford University Press.

251 *Wolfenden Report*.

and immediate post-colonial era claimed to espouse positivist principles, but whether they knew it or not, they were affected by normative standards—the standards of their own communities of the metropole, of the colonists rather than the colonised. Through their decisions, they obliged the colonised to adhere to an introduced normative regime. Meanwhile, the true pioneer of reform, former Law Reform Commission Chairman Narokobi, was apparently not sufficiently sure of himself to overturn a more senior judge's ruling (he was only an acting judge) or alternately was drawn by the popular rhetoric of the 'prostitute' as a glamorous seductress to make his careful distinction between that character and the PNG reality of the *tukina busmeri*.

Another reality overlooked by those who dispense the law is that sex has been sold by males as well as females, but still the prostitute is gendered female in the eyes of those who administer and dispense the law, and males selling sex are penalised for the sexual act, not the commercial transaction. This may be due to the larger penalty attaching to sodomy, or to the fact that male judges find the thought of the male-male sexual acts concerned more abhorrent than that of women indulging in commercial (and therefore, wanton, casual) sex. The criminalisation of consensual sex between adult males in private has also persisted, despite reforms overseas. The law, in the persons of judges and legislators, has retained the right to intrude into the realm of private morals in PNG. Customary principles, practices and attitudes are ignored. Legal pronouncements and manipulation of legal language have succeeded in removing almost entirely the distinction between consensual, private sex and brutal force. No participant is spared.

The situation now at law is that if you are selling sex, and can be proved to be living to a reasonable extent on your earnings, you can be arrested, prosecuted and fined up to K400 or imprisoned for up to a year. If you are male, and unlucky enough to be spied upon and caught in the act of sex with another male, you can also be prosecuted, with far worse consequences: up to fourteen years in prison, and possible deportation for non-citizens.

But this is not all that criminalised outgroups can suffer. As I explained in Chapter One, Goodman demonstrates that the very fact of criminalisation can affect society's opinions and treatment of those criminalised. It may not be enough to look only at the operation of the law. In order to understand the historical antecedents of sexualities which fall outside the norms of today, and the lived experiences of those criminalised by those norms, we must step out of the courtroom and onto the streets of Port Moresby today.

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