

CUSTOM IN THE COURTS

Criminal Law (Compensation) Act of Papua New Guinea

CYNDI BANKS*

In an attempt to integrate aspects of custom into the western-based criminal justice system, the Criminal Law (Compensation) Act was enacted in Papua New Guinea in 1991. The content and effect of this legislation, which empowers the National and District Courts to order the payment of compensation in addition to any other punishment imposed for a criminal offence, are discussed. The prevalence, nature and rationale for the payment of compensation under custom are considered, providing the context within which the legislation was enacted. The effect and application of the Act are explained through an examination of decisions of the National Court where orders for compensation have been made under the Act or where the Act has been considered generally. In conclusion, some comments are made on the scope of the legislation, and the policy it reflects, and some proposals put forward for amendment to the Act.

The relationship between law and custom is crucial when examining the impact of western formalized legal systems on custom-based societies such as in Papua New Guinea and has been the subject of much debate within the field of legal anthropology (see for example, Bohannan 1965; Hoebel 1954; Hart 1961; Moore 1978; Nader and Todd 1978; Pospisil 1978; Yabsley 1984). The debate revolves around the relationship between custom, or inner controls (constituting internalized belief systems based on cultural notions) (Pospisil 1978:63; Yabsley 1984:4; Hart 1961: 54-6) and codified law, or outer controls (comprising of rules and regulations externally imposed on members of a society by one or more persons, who have enough power and influence to coerce the less influential members of the society to submit to the imposed rules) (Pospisil 1978: 30). Codified law can be based on custom (internalized control systems), but Hart argues that this is not mandatory for the particular rule to be classified as law (1961).

In Papua New Guinea the colonial administrations failed to take custom fully into account in the introduced system of justice (Banks 1993). Melanesian notions of traditional dispute settlement and the different value systems were not fully accommodated. However, patrol officers (*kiaps*) 'unofficially' took some customs into account by encouraging the locals to settle some of their own disputes, using custom which neither they, nor the administration, considered repugnant. *Kiaps* permitted the locals to settle disputes which were based on customs unfamiliar to them (Townsend 1968). There were exceptions, especially in matters concerning women. In such cases *kiaps* regularly interfered in the customary solutions. When the separate court system was abolished and the *kiaps* judicial powers were handed over to the local/district courts the separation between the customary techniques of social control and the introduced system of justice became acute. Even though the local court had some power to recognize

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