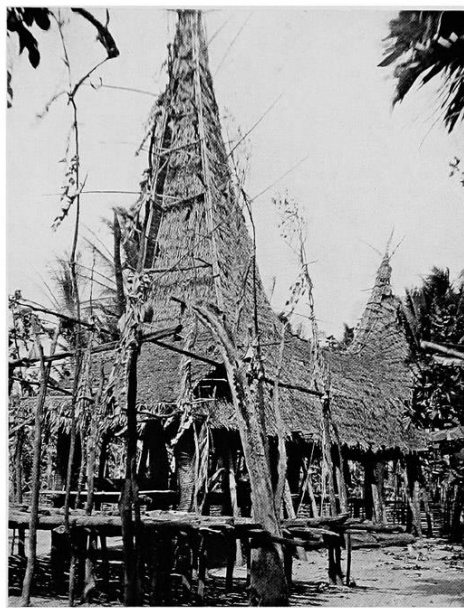




# MONASH University



SORCERER'S HOUSE, KEREPUA.

[38]

The western legal response to sorcery in  
colonial Papua and New Guinea

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A thesis submitted for the degree of Doctor of Philosophy at

Monash University in 2020

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## Abstract

For most of the twentieth century Papua New Guinea was subject to colonial administration by the Commonwealth of Australia. Papua, originally as the Anglo-Queensland condominium of British New Guinea from 1884, was an external territory from 1906 to 1975; and New Guinea, originally under a Mandate of the League of Nations from 1922, consequent on Imperial Germany's defeat in the First World War. The legal regime of the territories was that of the introduced common law.

Colonial administrators had to respond in their 'native policy' to the endemic fear of sorcery among the Melanesian population, which frequently resulted in irruptions of localised murderous violence. While refusing to acknowledge its possible reality, the administration nonetheless aimed at the beliefs under the schema of 'Forbidden Acts' by way of the *Sorcery Ordinance 1893*, which criminalised acts of sorcery; and dealt with the ensuing violence under the *Criminal Code*, introduced from Queensland, in trials characterised by punctilious attention to procedure and an amelioration of sentence, taking into account the role of traditional beliefs.

Sorcery charges were heard by legally-untrained administration officers, known as kiaps, who combined executive and judicial roles. Sorcery-related violent crime was heard before the few expatriate judicial officers. In the 1960's, subject to international pressure for decolonisation, political and legal reforms led an expanded expatriate judiciary to elaborate the 'reasonableness' of the indigenous accused, referencing the Empire-wide jurisprudence of the Judicial Committee of the Privy Council. This was especially where an accused had, by reference to customary beliefs, been 'provoked' into murdering a purported sorcerer. However, this perpetuated a hierarchy of the applicability of the common law's defences, grounded in an unbridgeable colonial difference, and based on race and degrees of Europeanisation.

The thesis considers the roots of this approach in the historical response of the common law to allegations of witchcraft in England and its American colonies; and in the legalistic approach of proscription and prosecution across the Empire, focusing on the contemporary experience in the colony of Kenya. It also focuses on the impact of the *Sorcery Act 1971*, introduced by a predominantly indigenous Legislative Assembly,

and on the exceptions to the western approach to sorcery epitomised by the career of Bernard Narokobi and the work of the Papua New Guinea Law Reform Commission.

The thesis concludes that the documentary evidence of the response to the irrational beliefs in sorcery by way of criminalisation and court process shows that the colonial legal system of Papua and New Guinea both operated as an integral part of the wider Australian legal system and constituted an example of — rather than an exception to — the broader legal approach of the common law to magic in the British Empire.

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## **Declaration**

This thesis is an original work of my research and contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signature: .....

Print Name: ...Mel Anthony Keenan

Date: .....

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## **Publications during enrolment**

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## Acknowledgements

The photograph on the front page shows a sorcerer's residence in Kerepuna, Milne Bay, from K Mackay, *Across Papua, Being An Account Of A Voyage Round, And A March Across, The Territory Of Papua, With The Royal Commission*, (London: 1909), <http://gutenberg.net.au/ebooks19/1900061h.html>

## Table of Contents

Chapter One — Introduction .....	13
Introduction .....	13
A Paper Empire made by lawyers? .....	15
Background to the topic .....	18
Research findings .....	20
Structure .....	24
Methodology .....	26
Chapter Two — ‘The first grandchild of the British Empire’: British New Guinea, Papua and Mandated New Guinea .....	30
Introduction .....	30
Legal imperialism in the South Pacific .....	31
British Protection .....	37
Sir Arthur Gordon and the Fijian Connection .....	43
Becoming Australian .....	46
The New Guinea Mandate .....	51
Conclusion .....	57
Chapter Three — A ‘benevolent type of police rule’: the colonial administration and its understanding of sorcery .....	60
Introduction .....	60
The establishment of the ‘Murray System’ .....	61
The Murray Administration and anthropology .....	65
The Administration and Sorcery .....	67
Defining the ‘mischief’ – the nature of sorcery beliefs .....	70
Sorcery versus Witchcraft .....	72
Sorcery research in the early twentieth century .....	74
Anthropological work after the Second World War .....	79
The Second World War and the end of the Murray System .....	81
The ‘zephyrs of change’ in Papua and New Guinea .....	85
Hasluck the martinet Minister for Territories .....	87
A tentative legislature .....	90
Conclusion .....	95
Chapter Four: Sorcery law and legal practice in Papua and New Guinea .....	98



Introduction.....	98
A paternal form of justice .....	99
Enforcing the Sorcery Ordinance.....	102
Sorcery in the courtroom .....	113
The judicial new deal .....	122
The reasonable Papuan? .....	125
Conclusion.....	138
Chapter Five: Witchcraft, the common law and the Empire.....	140
Introduction.....	140
Witchcraft and the law in early modern Europe .....	141
Crown, church and courts in England .....	144
Witchcraft trials across the Atlantic.....	148
Evidence and the end of belief .....	151
Belief and colonial difference.....	154
The legal establishment of British East Africa.....	156
Witchcraft and the law in Kenya .....	163
Witchcraft-related violence and the criminal law .....	169
‘Law and disorder’ in Kenya.....	176
Conclusion.....	177
Chapter Six: The <i>Sorcery Act 1971</i> and its Discontents.....	179
Introduction.....	179
The evolution of sorcery beliefs .....	180
Sorcery in the House .....	182
Changes wrought by the <i>Sorcery Act 1971</i> .....	186
Sorcery in the contemporary public discourse .....	188
The Sorcery Act on trial .....	192
Custom and the colonial law across the Empire .....	201
Custom and land claims .....	205
Family and custom.....	210
The jurisprudence of Bernard Narokobi and sorcery law reform.....	216
The dream of Yale Gesie.....	224
Conclusion.....	225
Chapter Seven – Conclusion.....	227

Introduction.....	227
The quest.....	228
The findings - unembarrassed legal colonialists? .....	233
Appendix 1 – The Punishment for Crime Among Natives 1930 .....	237
Appendix 2 – Forbidden Acts .....	245
Bibliography .....	249
Legislative instruments .....	249
Parliamentary Debates .....	250
Case law.....	250
Parliamentary Committees .....	254
Law Reform Commissions.....	254
Commissions of Inquiry, etc.....	255
Annual Reports.....	256
Patrol Reports – Territory of Papua and New Guinea.....	257
Official Papers .....	260
Private Papers .....	261
Newspapers.....	261
Secondary Sources .....	262



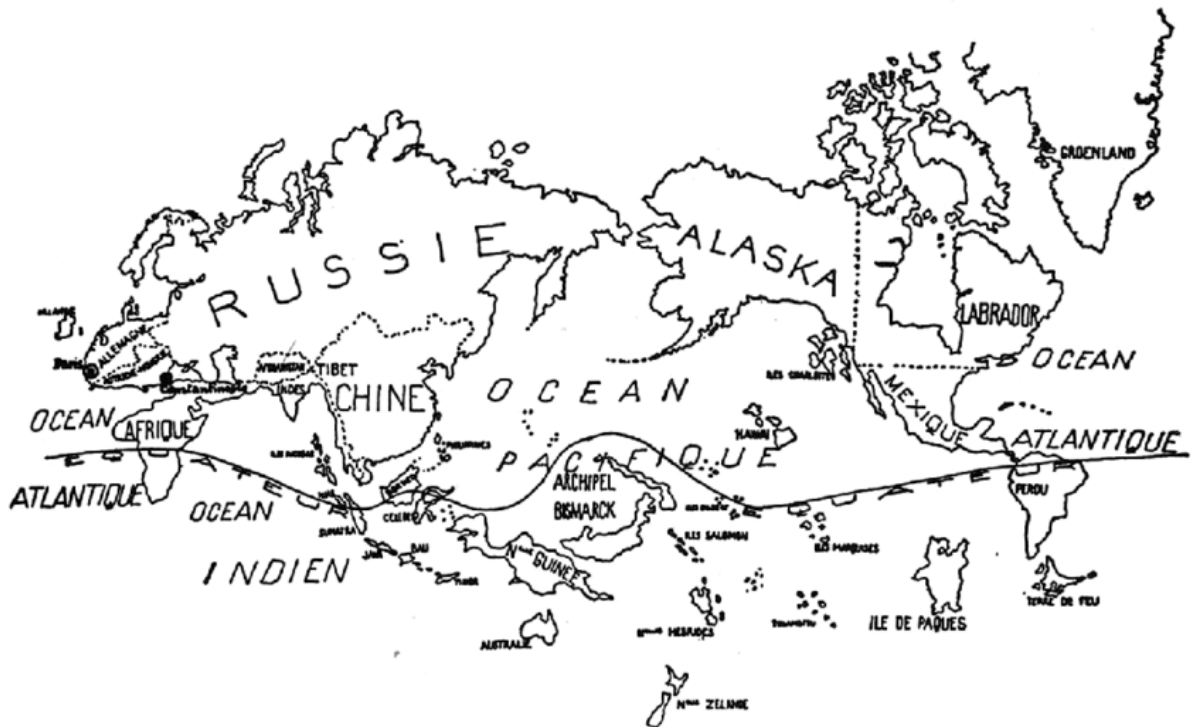
### *Imperial Federation*

Map of the world showing the extent of the British Empire in 1886 including British New Guinea.<sup>1</sup>

When they make impetuous demands upon us, when they require us, as in the case of New Guinea, to challenge one of the Great Powers of Europe on account of injuries which to us seem visionary, we may be right and wise in declining; but we might so decline as to show them that we understand their feelings, respect their ambition, regard even their impatience as a sign that they are zealous for the greatness of Oceania. Kind words cost nothing, and kind words would be precious to these far-off relations of ours, for they would show that the heart of England was with them.<sup>2</sup>

<sup>1</sup> 'Statistical information furnished by Captain J.C.R. Colomb, MP formerly R M A Mclure & Co, Queen Victoria Street, London. British territories coloured in red. Published as Supplement to *'The Graphic'*, July 24th, 1886'. On its origins, see Pippa Biltcliffe, 'Walter Crane and the *Imperial Federation Map Showing the Extent of the British Empire* (1886)', (2005) 57(1) *Imago Mundi*, 63.

<sup>2</sup> James A Froude, *Oceania, or England and her Colonies* (Longmans Green & Co, London, 1912), 221.



*Le Monde au Temps des Surréalistes (The Surrealist Map of the World)*

Like their Dadaist counterparts, Surrealist artists and writers employ the map in direct opposition to those cartographic performances sanctioned by colonial enterprise, warfare, and the globalizing project of modernity.

...the Pacific rather than the Atlantic occupies the center of the drawing, thus banishing Europe (and its ethnocentrism) to the edge of the page and the end of the earth...<sup>3</sup>

<sup>3</sup> Anon., *Le Monde au Temps des Surréalistes* (The Surrealist Map of the World), *Variétés*, Brussels, 1929, Dee Morris and Stephen Voyce, 'Avant-Garde, II: Surrealist Map of the World', *Counter Map Collection* <https://jacket2.org/commentary/avant-garde-ii-surrealist-map-world>



# Chapter One — Introduction

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Were it our object to preserve native culture intact, we should leave magic alone. But that is not our object. We are bound to admit the necessity for change, and one of the first steps in the progress which the world at large demands of the native must be towards the replacement of magical thinking by true thinking.<sup>1</sup>

## Introduction

On 28 May 2013, the National Parliament of Papua New Guinea repealed that country's *Sorcery Act 1971*. In introducing the *Sorcery (Repeal) Bill 2013* to the Legislative Assembly, the Minister for Justice and Attorney General, Kerenga Kua, argued that the Sorcery Act 'belonged to another era'.<sup>2</sup> The aim of this thesis is to examine the legal treatment of the practice of sorcery in that 'other era' by the Anglo-Australian colonial administrations of Papua and New Guinea for the better part of a century, from 1884 to (roughly) 1975. Specifically, how did the colonisers use the legal processes of proscription and prosecution under the *Sorcery Ordinance 1893* and the *Sorcery Act 1971* to attempt both to stamp out the irrational beliefs in the reality of sorcery, and the mischief of violent crime directly attributable to the endemic belief in its effective practice?<sup>3</sup>

Study of the legal history of the British Empire recently has flourished: connections and conflict between metropole and periphery; legal careers crossing colonial boundaries; the evolution and adaptation of the common law — all have come under scrutiny.<sup>4</sup> Law's movements traversed and connected distant territories and histories, producing competing and complementary geographical and temporal understandings of empire, place, and belonging.<sup>5</sup> This thesis aspires to contribute to that body of work by examining an element of the

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<sup>1</sup> F E Williams, *The Blending of Cultures: An Essay on the Aims of Native Education*, (Port Moresby, 1935), 20.

<sup>2</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 28 May 2013, Kerenga Kuia MP, 41.

<sup>3</sup> The definitional issues surrounding 'sorcery' are canvassed in detail in Chapter Three. However generally, we can adopt the definition proposed in the *Dictionary of the social sciences*, that sorcery is 'a performance or alleged performance by a magician (sorcerer) which is, in itself, technically possible but which, from a scientific point of view, could not be the cause of consequences attributed to it – especially the consequences of bringing evil upon others': *Dictionary of the social sciences* (UNESCO, London, 1964), 684-685.

<sup>4</sup> Leading examples are Martin J Wiener, *An Empire on Trial: Race Murder and Justice under British Rule 1870-1935*, (Cambridge University Press, Cambridge, 2009); Shaunnagh Dorsett and John McLaren, *Legal Histories of the British Empire: Laws, Engagements and Legacies* (Routledge, London, 2015); and Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press, Cambridge, MA 2016).

<sup>5</sup> Renisa Mawani and Iza Hussin, 'The Travels of Law: Indian Ocean Itineraries' (November 2014) 32(4) *Law and History Review*, 733.

development and application of the common law in Papua and New Guinea. In doing so, it aims to consider the colonial legal past on its own terms, rather than offering up an 'addressing and redressing of historical processes in which law is often implicated, if not inculpated'.<sup>6</sup>

The value of this thesis is to open up for historical legal examination what has been a very under-examined component of the British Empire. Indeed, for both the British and the German colonisers, their New Guinean colonies were 'undeveloped malarial backwaters of empire coming at the end of a long list of global dependencies'.<sup>7</sup> Nonetheless, what legal scholars Laura Benton and Lisa Ford have described as 'imperial law talk' was to be found even in this brackish backwater. Benton and Ford have argued for the development of a sense of unified legal constitutional endeavour across the British Empire in the later nineteenth century in which:

...Canada, New South Wales, and the Cape shared constitutional space with India, Ceylon, and Sierra Leone, not because race did not matter or because the colonies were deemed equivalent, but because imperial law talk was flexible enough to be inclusive without aspiring to universalism.<sup>8</sup>

In order to consider how this notion of an Empire-wide shared approach to legality ultimately impacted upon the expression of the traditional beliefs of indigenous Papua New Guineans, we need to examine what is denoted in this thesis by the expression 'the western legal response to sorcery in colonial Papua and New Guinea'.

At the outset, it is important to recollect that what were the colonial territories of Papua and New Guinea denote the eastern half of the large island known more generally as New Guinea. 'Papua' is of uncertain etymology, but may derive from a Malay word meaning 'frizzly-haired'.<sup>9</sup> It was in use by the Spanish to describe parts of the island of New Guinea and adjacent islands as early as 1527, and by the Portuguese to describe their inhabitants a decade later.<sup>10</sup> 'New

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<sup>6</sup> Paul McHugh, 'The politics of historiography and the taxonomies of the colonial past: Law, history and the tribes' in Anthony Musson & Chantal Stebbings (Eds) *Making Legal History Approaches and Methodologies* (Cambridge University Press, Cambridge, 2012), 166. On this tension, see also the view of Daniel J Boorstin, historian at the University of Chicago and later Librarian of Congress: 'The subservience of legal historian to practicing lawyer has been avowed by many other of the ablest legal historians... Often one is led to believe that the legal past exists only for the convenience and cultivation of the practicing lawyer': D J Boorstin, 'Tradition and Method in Legal History' (Jan 1941) 54(3) *Harvard Law Review*, 424.

<sup>7</sup> James Boutilier, 'Papua New Guinea's colonial century: reflections on imperialism accommodation and historical consciousness' in Deborah B Gewert and Edward L Schieffelin, *History and ethnohistory in Papua New Guinea*, (Sydney University Press, Sydney, 1985),

<sup>8</sup> Lauren Benton & Lisa Ford, n 3, 15.

<sup>9</sup> See J H F Sollewun Gelpke, 'On the Origin of the name Papua', *Bijdragen Tot de Taal-, Land- en Volkenkunde*, 149, 1993, 318 <http://www.papuaweb.org/dlib/bk1/kitlv/bki/gelpke-1993.pdf>

<sup>10</sup> *Ibid.*, 318.

Guinea' is the English version of the Spanish 'Nueva Guinea', the name given to the whole island by the Spanish explorer Yñigo Ortiz de Retez. This was bestowed due to the alleged resemblance of the local inhabitants to the peoples of Guinea in West Africa, when de Retez purported to claim the whole island for Spain in 1545. The Dutch subsequently — and much more successfully — claimed the western part of the island as part of the Netherlands East Indies in 1828; since 1969 it has been the Irian Jaya Province of the Republic of Indonesia.<sup>11</sup>

From the perspective of Australians involved in their own colonial undertaking, these imperialist moments were merely a prelude to the blessings of Anglo-Australian rule. In 1903 Staniford Smith, one-time Acting Administrator of Papua, declared, after the Dutch proclamation in 1828, there ensued an 'interval of repose' in which the uncolonised eastern half of the island of New Guinea:

...was forgotten and the Papuan was destined to remain undisturbed by the busy white man until Britain's children in Australia... awoke to their responsibilities, and became the claimants on the brown man's inheritance.<sup>12</sup>

Staniford Smith was referring to the Territory of Papua, which comprised the south-eastern quarter of the island of New Guinea from 1883 to 1975. In 1884 — prompted by the precipitate acts of the administration in colonial Queensland — the British Government proclaimed a protectorate over it as British New Guinea. By Letters Patent on 18 March 1902 the Territory was placed under the authority of the new Commonwealth of Australia, becoming the external territory of Papua in 1905. In 1884, Germany had formally taken possession of the northeast quarter of the island of New Guinea, which was thereafter known as Kaiser-Wilhelmsland or German New Guinea. After the German defeat in World War I, the former German colony was administered by the Australian Government as a League of Nations Class C Mandate, until the Japanese invasion in December 1941. In 1949, the territories were administratively united as the Territory of Papua and New Guinea, renamed Papua New Guinea in 1971.

### A Paper Empire made by lawyers?

It is impossible to assess the nature of the colonial administrations response to sorcery-related crime without a full awareness of that ebb and flow of colonial administrative policy which gave parameters to its application: the entire panoply of policymaking, the legislative process, law

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<sup>11</sup> On the Dutch in West Papua, see, e.g., Nino Viartasiwi, 'The politics of history in West Papua - Indonesia conflict' (2018) 26(1) *Asian Journal of Political Science*, 141.

<sup>12</sup> Staniford Smith, *British New Guinea: with a preface on Australia's policy in the Pacific*, (P W Niven & Co, Melbourne, 1903), 7. Over a century later, Smith's assumptions of superiority and turn of phrase make for some uncomfortable reading, e.g., 'Now that inter-tribal wars have ceased, these modern Othellos find their occupation gone, and being a somewhat indolent race they do little beyond occasional fishing, hunting and canoe building', 24.

enforcement and judicial decision-making. Therefore, an immediate issue for consideration is the intertwining of the processes of colonialism with those of the introduction or 'reception' of Western law.

As we will see in Chapter Two, the South Pacific was divided up as part of the global imperial scramble of the European powers in the late nineteenth century. However, the creation by the British of the Western Pacific High Commission, and the eventual extension of British 'Protection' over south-east New Guinea, is best characterised as a policy of extending British sovereignty over her own subjects. This was inspired to some extent by the criminal activities of Australians — especially Queenslanders — kidnapping Pacific Islanders to work on sugar plantations.<sup>13</sup> To this extent, the common law actually 'arrived' in Papua and New Guinea before any structures of colonial administration, in that any British residents were technically subject to the jurisdiction of the Western Pacific High Commission. This part of the thesis does not go into detail about the evolution of the application of the common law in British territories; rather it is an overview of practice in the Pacific, which gives some support to the proposition of Australian historian W Ross Johnston that the British presence in the South Pacific was 'a paper empire created by lawyers'.<sup>14</sup> As we will see in detail in relation to British East Africa in Chapter Five, the use in the nineteenth century of the legally ambiguous territorial concept of 'Protection' was one in which the humanitarian impulse behind matters such as the effort to combat slavery was often entangled with an expansionary imperialising project.<sup>15</sup>

In the context of this thesis, the term 'western' is convenient shorthand for 'Anglo-Australian'. The expression itself refers both to the fact that Papua was a colony of Great Britain and Australia successively, and that the Australian systems of colonial government, public administration and law were so thoroughly imbued with and deliberately modelled on those of England as to signify a practical continuity. However, following the views of Edward Said's key work *Orientalism*, 'western' has a much broader import in the context of colonialism. This is namely a framing of thought which assumes that the liberal, rational values of the European Enlightenment are universally applicable.<sup>16</sup> It therefore creates a hierarchy of 'civilisation' in which a society's position on a developmental scale is determined with reference to its

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<sup>13</sup> Ray Evans, Kay Saunders & Kathryn Cronin, *Race relations in colonial Queensland: a history of exclusion, exploitation and extermination* (UQ Press, Brisbane 3rd Ed, 1993); and Doug Munro, 'The Labor Trade in Melanesians to Queensland: An Historiographic Essay' (Spring 1995) 28(3) *Journal of Social History*, 609.

<sup>14</sup> See W Ross Johnston, *Sovereignty and Protection: a Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Duke University Press, Durham NC, 1973).

<sup>15</sup> Benton and Ford give the example in a different territorial sphere of the British promise to shelter Sinhalese subjects in Ceylon from the tyrannical monarch justifying the invasion of the Kingdom of Kandy: Benton and Ford, n 6, 12.

<sup>16</sup> Edward W Said, *Orientalism* (Penguin, London, 1995), 7-9.



similarity to the post-Westphalian liberal state. Whilst the notion of ‘the Enlightenment’ is conceptually broad, one of its main premises is ‘the rise of the sciences and an “enlightened” — non-superstitious — rational philosophy and world view’.<sup>17</sup> Enlightenment thinkers aimed, as far as was possible, to ‘bind assent in iron chains of mathematical and logical deduction’ so as to unfailingly ‘guide the mind along from necessary truth to necessary consequence’.<sup>18</sup> Or, as historian Roy Porter describes it, the Enlightenment is ‘a story of the disenchantment of the world, a move from a time when everything was ensouled... towards a present day in which the soul is no longer an object of scientific inquiry, though mind may still just be’.<sup>19</sup>

The unspoken, but unquestioned, assumptions of European superiority necessarily influenced the nature of the conceptual spread of the common law, facilitated as it was by the geographic spread of British imperialism. One only needs to refer to J H Merryman's classic definition of the expression 'legal tradition' as:

...a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and polity [and] about the proper organisation and operation of a legal system and about the way law is or should be made, applied, studied, perfected and taught.<sup>20</sup>

According to Merryman, the civil law, common law and socialist law traditions make up the bulk of what is referred to as ‘the law’, and each of these ‘express ideas and embody institutions that have been formed in the European historical and cultural context’.<sup>21</sup> African American legal scholar Kenneth B Nunn maintains that what is referred to as ‘the law’ in Western societies is actually ‘a particular social construction that exhibits cultural attributes peculiar to European and European-derived societies...an artifact (*sic*) of a Eurocentric culture [which is] dichotomous, hierarchical, analytical, objective, abstract, rational, complex and secular’.<sup>22</sup>

As good sons of the Enlightenment — and they were sons, rather than daughters — the colonial administrators and common lawyers of Papua and New Guinea would have found nothing to disagree with in this characterisation of the law and laws they were applying and enforcing. They certainly would not have found controversial Margaret Davies’ argument that

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<sup>17</sup> Margaret Davies, ‘Race and Colonialism: Legal Theory as “White Mythology”’ in Margaret Davies, *Asking the law question* (Thomson Reuters, 2<sup>nd</sup> ed, Pyrmont, 2017), 317.

<sup>18</sup> Steven Schapin, *The Scientific Revolution*, (University of Chicago Press, Chicago, 1998), 116-117.

<sup>19</sup> Roy Porter, *Flesh in the Age of Reason*, (Norton, New York, 2005), 27.

<sup>20</sup> J H Merryman, *The Civil Law Tradition* (Stanford University Press, 2d Ed, Stanford 1985), 2.

<sup>21</sup> *Ibid.*, 2.

<sup>22</sup> Kenneth B Nunn, ‘Law as a Eurocentric enterprise’ (1997) 15(2) *Law and Inequality: Journal of Theory and Practice*, 339.

the Western concept of law 'excludes the possibility of law existing outside its domain yet within its 'own' territory; it excludes questions about its own existence, presuming instead its own legitimacy'.<sup>23</sup> Indeed, to assess the claims of the universality of the common law by highlighting its necessarily Eurocentric nature is not to impute to the few colonial judges of Papua and New Guinea any deliberate policy of a racist application of the law to the indigenous defendants who came before them. Rather, it highlights the fact that they viewed the common law as 'a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage',<sup>24</sup> and makes explicable the limits on the creation of a jurisprudence within the Territory which recognised and took into account the lived experience of those defendants. This was not the least when it came to cases of the violent murder of purported sorcerers heard before the justices of the Supreme Court. As we will see by a close examination of the relevant case law in Chapters Four and Five, law makers, judges, prosecutors and defenders all were bound by their backgrounds and education to maintain the legitimacy of the colonial administration by way of the 'artful use of ritual and authority... constant self-congratulatory references to the majesty of the law, [and] the unconscious reliance on European traditions, values and ways of thinking'.<sup>25</sup> Inherent assumptions of colonial difference inhibited any dramatic reordering of that law and its traditions in the Territory, tempered by the development and application of a necessarily culturally relativist approach to the criminality of indigenous defendants.<sup>26</sup> As English legal academic Thomas Poole encapsulates it, the common law 'seems to inculcate in those who work and study within it a certain *mentalité* or habit of mind which, while not static, does show quite strikingly similar qualities across otherwise very different eras'.<sup>27</sup> Or, one might say, the same era, but otherwise very different colonial settings.

## Background to the topic

The source of the thesis topic was the reflection on two quite different and seemingly unrelated issues. The conceptual interest in sorcery beliefs evolved from my curiosity as to how rational

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<sup>23</sup> Davies, n 11, 322.

<sup>24</sup> Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European & Comparative Law*, 114. Note, however, that Legrand was vehemently objecting to the possibility of this.

<sup>25</sup> Nunn, n6, 365. Nunn also asserts that African law students are handicapped by the fact that they are 'taught to think in narrow, rule-bound terms, and to write in the detached, sparse, technical style that lawyers favor (*sic*)', but one might reasonably query whether this disadvantage is limited to African students.

<sup>26</sup> The conflict between universalism and relativism is particularly pronounced in the contemporary literature on human rights law. See, e.g., Nana Kwame Agyeman and Alfred Momodu, 'Universal Human Rights 'Versus' Cultural Relativism: the Mediating Role of Constitutional Rights', (2019) 12 *African Journal of Legal Studies*, 23. Nonetheless, cultural relativism has a European lineage stretching back to Michel de Montaigne's 1580 essay 'On the Cannibals', in which he 'posited that men are by nature ethnocentric and that they judge the customs and morals of other communities on the basis of their own particular customs and morals, which they take to be universally applicable': Mayanthi Fernando, 'Cultural Relativism: Introduction', *Oxford Anthologies*, <https://www.oxfordbibliographies.com/view/document/obo-9780199766567/obo-9780199766567-0003.xml>

<sup>27</sup> T Poole, 'Constitutional Exceptionalism and the Common Law' *LSE Legal Studies Working Paper 14/2008* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1269271](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269271)

public policy decision-makers deal with deeply-held but irrational beliefs. This was piqued by the ongoing battles in the United States public schools systems of 'teaching the controversy' about evolution.<sup>28</sup> This approach by anti-evolutionists aims to expose spurious flaws in evolutionary theory in the attempt to have biblical creationism, or its more palatable version, 'intelligent design' taught alongside evolution in public schools. This has been described by the American secular humanist Center for Public Inquiry as the 'decades-long attempt by creationists either to minimize the teaching of evolution or to gain equal time for yet another form of creationism in American public schools'.<sup>29</sup> The issue briefly came to prominence in the Australian public sphere in 2005 after comments by the then-Federal Minister for Education, Science and Training, Dr Brendan Nelson at the National Press Club:

As far as I'm concerned, students can be taught and should be taught the basic science in terms of the evolution of man, but if schools also want to present students with intelligent design, I don't have any difficulty with that. It's about choice, reasonable choice.<sup>30</sup>

In a horrified response, the Australian Academy of Sciences noted in an Open Letter that to teach intelligent design as science would 'throw open the door of science classes to similarly unscientific world views — be they astrology, spoon-bending, flat-earth cosmology or alien abductions'.<sup>31</sup> As a result of the furore, the Minister 'clarified' his position, noting that intelligent design should be restricted to religion or philosophy classes.<sup>32</sup>

Now to turn to the irrational belief which is the subject of this thesis. In New South Wales, the English *Witchcraft Act 1735* was only removed from the statute books in 1969 by way of the *Imperial Acts Application Act* of that year. The latter Act repealed all imperial enactments in force in England at the time of the passing of the *Australian Courts Act 1828* (Act 9 George IV Ch 83), so far as they were in force in New South Wales. By way of contrast, the Papua New Guinean *Sorcery Act 1971* remained in force until its controversial repeal in 2013. This was based largely on the fact that most people in contemporary Papua New Guinea continue to believe in sorcery, despite their genuine adherence to one form or another of mainstream Christianity, or their level of education.

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<sup>28</sup> See generally, Andrew J Petto and Laurie R Godfrey (Eds), *Scientists Confront Creationism: Intelligent Design and Beyond*, (WW Norton, New York, 2004).

<sup>29</sup> Barbara Forrest, *Understanding the intelligent design creationist movement: its true nature and goals*, Position Paper from the Center for Inquiry Office of Public Policy, <https://web.archive.org/web/20110519124655/http://www.centerforinquiry.net/uploads/attachments/intelligent-design.pdf>, retrieved 15 March 2020.

<sup>30</sup> <https://www.theage.com.au/national/intelligent-design-an-option-nelson-20050811-ge0o8e.html>

<sup>31</sup> <https://www.smh.com.au/national/intelligent-design-not-science-experts-20051021-gdmain.html>

<sup>32</sup> *Ibid.*

## Research findings

The existence and application of this common law worldview predicates the fundamental premise of this thesis. This falls into two closely related parts. The first is that there were the existence of a number of significant historical factors which distinguished the establishment of colonial administration in Papua and New Guinea which might reasonably have been expected to differentiate the development of the law there in relation to indigenous beliefs in sorcery or witchcraft from other parts of the Empire. The second is that, somewhat counter-intuitively, this did not eventuate. Rather, the original approach of criminalising sorcery, combined with the courts' amelioration of the application of the law to sorcery-related violent crime — with reference to the jurisprudence of the Judicial Committee of the Privy Council at the apex of imperial legal decision-making<sup>33</sup> — place the experience in Papua and New Guinea squarely within the common legal historiography of the empire. In operating in this manner, the administration of the criminal law embodied what American historian Martin Wiener has encapsulated as the 'endemic tension between everyday racial inequality evident throughout the Empire and the deep rooted liberal premise of British justice that extended everywhere in the Empire'.<sup>34</sup>

The first of these significant historical factors is the unusual way in which Papua and New Guinea came to be a constituent part of the British Empire. The nineteenth century English historian Sir John Seeley famously proposed that Britain's Empire had been acquired in a 'fit of absence of mind'.<sup>35</sup> Whether or not this is a disingenuous assessment, we will see in the thesis that British New Guinea in 1884 became part of the empire very much in spite of the original view of the Imperial Government, after a false start from the over-zealous colony of Queensland sought to carve out its own colony: hence the moniker for the Territory of Papua of 'The First Grandchild of Empire'.<sup>36</sup> This disjuncture set the tone for that disengagement at the highest political levels which was to bedevil the prospects for its good administration,

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<sup>33</sup> Encapsulated by Viscount Dunedin in the 1927 decision of *Robins v National Trust Co* [1927] AC 515 at 519, on appeal from Canada:

...when an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled the Colonial Court, which is bound by English law, is bound to follow it.

Kenneth Nunn would no doubt argue that the ubiquity of Privy Council decisions can only be accepted if 'the culture of England is accepted as a paradigm for all other cultures, everywhere. And English culture can only be accepted as paradigmatic if it is believed in some way to be superior or "better" than others': Nunn n 6, 360.

<sup>34</sup> Michael J Wiener, n 3, x.

<sup>35</sup> 'There is something very characteristic in the indifference which we show towards this mighty phenomenon of the diffusion of our race and the expansion of our state. We seem, as it were, to have conquered and peopled half the world in a fit of absence of mind': Sir John R Seeley, *The Expansion of England*, (MacMillan, London, 1914), 8.

<sup>36</sup> The expression comes from travel writer Beatrice Grimshaw's *Papua the Marvellous, Country of Chances*.

compounded by the high costs of the maintaining the colony for little financial return. Papua New Guinean issues rarely captured the attention of Commonwealth politicians and public servants — let alone average Australian voters. Hubert Murray's biographer noted that 'irregular communications and lack of public interest in Australia allowed him wide scope in government'.<sup>37</sup> Paul Hasluck, the long-serving and active Minister for Territories in the 1960s, felt that the portfolio was effectively the end of his political career, as it 'was not highly esteemed and... of scant political significance'.<sup>38</sup>

The second distinguishing factor is that this policy vacuum at the highest levels of government magnified the opportunities for leading individuals in Papua and New Guinea — Sir William MacGregor from 1888 to 1898 and, most importantly, Sir Hubert Murray from 1906 to 1940 — to cast 'native' legal policy according to their wont. As we will see in Chapters Two and Three, MacGregor and other senior figures in British New Guinea such as Sir Francis Winter, Hugh Romilly and Sir George Le Hunte were avowed disciples of the protective colonial practices which had been adopted by Sir Arthur Gordon in Fiji. Hubert Murray continued these policies, adopting a 'scientific' approach with reference to contemporary anthropological research, much of which was undertaken in Papua and New Guinea before, during and after his long tenure.

This is not to attempt to explain the role of leading administrators in Papua and New Guinea as an instance of Carlyle's *Great Man Theory*, those 'leaders of men, these great ones; the modellers, patterns, and in a wide sense creators, of whatsoever the general mass of men contrived to do or to attain'.<sup>39</sup> Rather, it is simply to highlight the fact that the lack of policy interest gave these administrators much more opportunity to impress their personal mark on the Territory than would have been the case had they been under greater scrutiny. Moreover, it was an approach which survived the shift in the exercise of personal power from Port Moresby to Canberra under the martinet Hasluck, until the Australian Government began to take an active interest in Papua and New Guinea under international scrutiny in an age of decolonisation. The rush towards self-government, and then independence, under the Gorton and Whitlam administrations in the 1970's was designed to avoid Australia the embarrassment of being 'the last colonial power on earth'.<sup>40</sup> Writing from the viewpoint of Australia as

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<sup>22</sup> Francis J West, 'Toward a Biography of Sir Hubert Murray, Lieutenant Governor of Papua 1908-1940' (May 1962) 31(2) *Pacific Historical Review*, 151.

<sup>38</sup> Paul Hasluck, *A Time for Building: Australian Administration in Papua and New Guinea 1951-1963* (Melbourne University Press, Melbourne, 1963), 6.

<sup>39</sup> Thomas Carlyle, *On Heroes, Hero-Worship, and The Heroic in History*, (Frederick A Stokes, New York, 1894) <https://www.questia.com/library/157869/on-heroes-hero-worship-and-the-heroic-in-history>

<sup>40</sup> *Economist*, London, 21 May 1960, quoted in Ian Downs, *The Australian Trusteeship: Papua New Guinea 1945-1975* (Canberra, Australian Government Publishing Service, 1980), 233.

imperialist ruler, William Hudson, divided Australian rule in Papua New Guinea into three periods, characterised as:

...the rather sleepy, poor decades to 1945, the years from 1945 to the early 1960s when real efforts were at last made to transform the condition of indigenous society; and a final decade when... Australian governments moved away from an imperial role faster even than most New Guinean opinion actively sought.<sup>41</sup>

Despite claims of a 'scientific' approach, Hubert Murray was always a colonial administrator first. All customary practices were viewed through the lens of that proper administrative practice which promoted order.<sup>42</sup> Ongoing anthropological research had much to say about the centrality of sorcery beliefs to the lives of his indigenous charges, ever since Malinowski had urged a consideration of it as a social phenomenon, devoid of any western preconceived ideas or ready-made definitions.<sup>43</sup> However, to the administrators and lawyers of the colony, the belief in the omnipresent nature of sorcery was one of the defining constituent characteristics of the 'Otherness' of the indigenous defendant. Later work of anthropologists Murray and Rosalie Wax highlights the fundamental disjuncture between the worldviews of colonised and coloniser:

We think of ourselves as the believers in causal law and the primitive as dwelling in a world of happenstance. Yet the actuality is to the contrary: It is we who accept the possibility and logic of pure chance, while for the dweller in the magical world, no event is 'accidental' or 'random', but each has its chain of causation in which Power, or its lack, was the decisive agency.<sup>44</sup>

Thus, the failure of the colonists to see sorcery as one of the key explanatory factors for the vicissitudes of daily village life was as incomprehensible to the Melanesian worldview as was the belief in the power of the sorcerer to the Anglo-Australians. The policy approach of the colonial administration is effectively summarised by a Statement given in the House of Representatives by Minister Hasluck in 1960, even as international pressures began to mount for decolonisation:

Except where modifications have been made as the result of the coming of Europeans, New Guinea is still almost unbelievably primitive... There was no single religious belief and nothing in the nature of a priesthood but only the fear of the dead and the power of the sorcerer.<sup>45</sup>

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<sup>41</sup> W J Hudson, *New Guinea Empire: Australia's Colonial Experience*, (Cassell Australia, Melbourne, 1974), x.

<sup>42</sup> Hubert Murray, *Native Administration in Papua*, (Port Moresby 1929), 14.

<sup>43</sup> Bronisław Malinowski, *Crime and Custom in Savage Society - An Anthropological Study of Savagery* (Kegan Paul, Trench, Trubner & Co., London, 1926), 15-16. Emphasis added.

<sup>44</sup> Murray Wax & Rosalie Wax 'The Notion of Magic' (December 1963) 4(5) *Current Anthropology*, 495.

<sup>45</sup> Australia, *Parliamentary Debates*, House of Representatives, 23 August 1960, 259.

The approach 'in the field' to beliefs in the practice of sorcery can perhaps best be summarised by a 1943 Patrol Report from Higaturu, near the end of the Kokoda Track. The young local officer, or *kiap*, dealt with allegations against the occupants of a small remote village from one of their own. Having considered the matter, and concluding that there was no evidence of sorcery, he 'gave the people a good talking to', and 'all parties seemed to part "good friends"'.<sup>46</sup>

Successive colonial administrators despised beliefs in sorcery for the very real fear it provoked and for the murderous violence it incited among indigenous communities. Both of these results potentially threatened the power of the administration by weakening its claims to be the provider of peace and security to those it had colonised by way of its supposed monopoly on the exercise of violence. Indeed, without an effective *Pax Australiana* in Papua and New Guinea, the administration lost its legitimacy,<sup>47</sup> such that, unlike some other traditional beliefs, there could be no ground given to sorcery by the colonisers. Accordingly, any legal response which would have the desired effect of alleviating the widespread fear of the sorcerer and stemming the resulting violence was excluded by the prevailing disbelief in the possibility of the effective practice of sorcery amongst the colonisers. One can imagine the knighted Papua New Guinea administrators Sir William MacGregor, Sir Hubert Murray, and Sir Paul Hasluck all would have liked to sit down the entire Melanesian population, give them a good talking to about the impossibility of sorcery, and send them all off 'good friends'.

Despite my feeling very much like James M Donovan's 'lawyer with a dilettante's understanding of anthropology',<sup>48</sup> the thesis undertakes an examination of the anthropological information available to Australian administrators, together with more recent work which gives more substance and nuance, and which removes the study of sorcery in Melanesian societies from the shadow of work previously done in British colonial possessions in Africa. As we will see in Chapters Four and Six, the colonisers faced not one, but many, highly complex belief-structures rooted in magic, all of which played a core role in the cosmology of Papua New Guineans. However, despite the variety of belief, there is considerable evidence to suggest that there was a widespread understanding of the bifurcation of magical practice between

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<sup>46</sup> 28.11.43 PO to DO of Mambere Patrol Reports Northern District, Higaturu 1943-1944. National Archives of Papua New Guinea, Accession 496.

<sup>47</sup> 'This was the basic legitimation for introducing 'law and order' in a place where until then only an anarchistic 'state of nature' had existed. Thus there was a collision between radically different cultural concepts and practices in respect of violence and social order': Joachim Görlich, 'The Transformation of Violence in the Colonial Encounter: Intercultural Discourses and Practices in Papua New Guinea' (Spring 1999) 38(2) *Ethnology*, 161.

<sup>48</sup> James M Donovan, *Legal Anthropology: An Introduction*, (Altamira Press, Plymouth, 2008), 148.



‘sorcerer’ and ‘witch’. In a crude summary, the former was at the centre of traditional society, a bulwark to the chief and someone to be respected and feared in his own right; while the latter sat at the margins of that society, despised and feared.

In 1979 American anthropologist Marty Zelenietz researched on behalf of the Papua New Guinea Law Reform Commission the effects of sorcery in Kilenge, West New Britain Province. Writing in 1981, he argued that colonial administrators had believed that laws against sorcery would operate as ‘progressive tools of social change’.<sup>49</sup> However, their own worldview inhibited the resolution of the tensions which were inherent in adopting legislation prohibiting sorcery:

On the one hand, they recognised the importance of sorcery and witchcraft as systems of beliefs and actions in indigenous cultures. On the other hand, their own upbringing in cultures which stressed scientific empiricism did not allow the administrators to accept the validity of native beliefs. Thus they faced the challenge of saying that sorcery and witchcraft did not exist, and yet writing laws that would make these non-existent phenomena illegal.<sup>50</sup>

## Structure

Chapter Two (The First Grandchild of Empire: British New Guinea, Papua and mandated New Guinea) examines the establishment of the Territories of both Papua and New Guinea. On the one hand, the expansion of the British Empire in the south west Pacific is an example of the nineteenth century practice of extending legal jurisdiction with the aim of reining in errant British subjects. On the other, the actual establishment of the Protectorate was a result of the Colonial Office’s characteristic cautious legality throughout the 1870’s and early 1880’s being overtaken by a Wilhelmine Germany keen to take its place in the sun by expanding its maritime empire in the region. While the Colonial Office had rebuffed the 1883 attempt of the government of colonial Queensland to claim south eastern New Guinea as a colony of its own, a practice apparently unparalleled in the annals of imperial history, the creation of German New Guinea resulted in an Anglo-Queensland condominium over the Protectorate — the First Grandchild of Empire. The fact that former German New Guinea became a mandated territory of the Commonwealth of Australia in 1921 under the League of Nations in 1921 meant that both Territories effectively became Australian colonies due to Anglo-German imperial rivalries played out in the south west Pacific.

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<sup>49</sup> Marty Zelenietz, ‘Sorcery and Social Change: An Introduction’ (1981) 8 *Social Analysis*, 12.

<sup>50</sup> *ibid.*, 12. Thus, in 1983 American lawyers Bruce Ottley and Jean Zorn noted that, as the colonial administration adhered to the belief that sorcerers possess no effective magical powers, ‘no Papua New Guinean sorcerer had been charged with murder under the Criminal Code in connection with a death said to be the result of sorcery’: Bruce Ottley and Jean Zorn, ‘Criminal law in Papua New Guinea: Code, Custom and the Courts in conflict’ (1983) 31 *The American Journal of Comparative Law*, 279.



The tenacious — if often tenuous — legality which characterised these unusual processes might have been expected to result in a distinctive mode of applying the English common law to the indigenous inhabitants, not the least in respect of crimes committed *inter se*, of which sorcery-related violence was the exemplar. Beginning with Sir William MacGregor, administrators in Papua did put into effect the express Australian policies of governing in the best interests of the Papuans, subject to the shoestring budgeting and benign neglect of the Commonwealth Government. However, as we shall see in Chapter Three (A ‘benevolent type of police rule’: the colonial administration and its understanding of sorcery), the establishment and enforcement of the law and legal processes in Papua and New Guinea fitted within colonialist approaches which stressed the universal applicability of the common law, as noted above.

Unable to implement contemporary models of ‘Indirect Rule’, Sir Hubert Murray in his long tenure continued the paternalistic enforcement of Native Ordinances which he had inherited from MacGregor. These included the 1893 Sorcery Ordinance, designed to bring allegations of evil sorcery and sorcery-related violence before the colonial courts. It was not until after the havoc wreaked by the Japanese invasion in the Second World War, and the global pressure to decolonise, that policy makers in Canberra took a new approach to the colonial administration and to the administration of justice in particular.

Chapter Four (Sorcery law and legal practice in Papua and New Guinea) examines the practical implementation of the 1893 Sorcery Ordinance, and the application of the criminal law generally to sorcery-related violence. The colonisers could not permit the integrity of court processes to be tainted by any recognition of the role of the beliefs in sorcery. However, from the very beginnings of colonialism, these beliefs were taken into account in the course of sentencing, a practice ‘codified’ by the administration in 1929. As a result of the new approach in the post-World-War II era Supreme Court justices crafted a more sophisticated response to sorcery-related violence by way of the ‘reasonableness’ of the indigenous accused, often provoked into murder through very real fear of the power of the sorcerer.

Chapter Five (Witchcraft, the common law and the Empire) contextualises the legal response to sorcery in Papua and New Guinea in an historical continuum and as an Empire-wide experience. The historical context is provided by considering the criminalisation of witchcraft practices in pre-modern England and in the First British Empire. This had evolved into a disavowal of the belief in witchcraft as a matter for enlightened opinion, which was the touchstone for the response of twentieth century common lawyers. The place of colonial Papua and New Guinea in the Empire is provided by an examination of the contemporaneous situation in colonial Kenya. Here, East African courts also combatted witchcraft with the

combination of criminalisation and prosecution, subject to the prerogative of mercy, which situated the commission of crimes within customary beliefs of the accused and their communities.

Chapter Six (The *Sorcery Act 1971* and its discontents) examines the pivotal role played by the *Sorcery Act 1971* as the final stage in the western legal response to sorcery in colonial Papua and New Guinea. As a product of a Legislative Assembly dominated numerically by indigenous Papua New Guineans, the Sorcery Act had a decisively Melanesian flavour. However, it was sufficiently similar to the Sorcery Ordinance which it superseded to allow the Supreme Court to continue to develop its response to sorcery-related crime

### Methodology

This thesis is very much a work which considers the ‘view from the top’ and, in doing so relies on the published works of colonial administrators, anthropologists and lawyers. This is not simply a question of availability and accessibility. There is undoubtedly a distinct paucity of some of the most basic original records available in relation to the administration of justice; Paul Hasluck maintained in his *A Time for Building* that there were no reserve stocks of either Territory’s Ordinances to be had in Port Moresby at the end of World War II.<sup>51</sup>

Rather, it is in the very public nature of these documents that we discern the colonisers creating a reproducible legal narrative, one to which reference would be made by their successors from Administrator down to the ‘man on the ground’ in his Highlands fastness. By considering the legal information contained in the Annual Reports of Papua and New Guinea; the publications of administrators such as MacGregor, Winter, Murray and Gore; the kiaps’ Patrol Reports from throughout the Territories; the decisions of the Supreme Court; and the later specific works on the criminal law by resident lawyers such as Rob O’Regan, we can identify the imposition of the Empire-wide response of the criminalisation of the practice of sorcery by way of statute law enforced before the common law native courts of the kiap. These sources are contextualised by primary and subordinate legislation and case law from a range of jurisdictions; law reform reports; Hansards of various legislatures; reports of Parliamentary Committees and Royal Commissions of Inquiry; contemporary newspaper articles; and legal and anthropological journal articles. Fortunately, many of these resources are readily available in Australian libraries and archives. Moreover, as we have (fortunately) moved on from the days of poring over microfiche, online sources are extraordinarily rich and completely invaluable repositories of primary information.

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<sup>51</sup> Hasluck, n25, 38.

The thesis would not have been possible without the collation of the Papua New Guinea Primary Materials by the Pacific Islands Legal Information Institute ([www.paclii.org](http://www.paclii.org)), which are generally the sole source for case law from the period. While Paclii has been invaluable, it should be acknowledged that, unfortunately, it is generally not amenable to pinpointing references. Other key sources have been the digitisation of Papua and New Guinea newspapers by the Australian National Library, and of decades of kiap reports held by the University of California San Diego, all available online. The latter in particular seems to be a rich seam waiting to be fully mined by researchers on any one of a wide range of aspects of the Australian experience in Papua New Guinea.

Despite the fact that the thesis focuses on the published work of colonial lawyers and administrators, it is not unlikely that additional insights could have been gleaned from visiting Papua New Guinea. Unfortunately, when a trip to Port Moresby was in its early stages of preparation, violence in the city rendered it too unsafe. Hopefully, other researchers will be able to address this lacuna in the future.

The other work on the topic of this thesis is Jonathan Aleck's 1996 Australian National University doctoral thesis, *Law and Sorcery in Papua New Guinea: A Reconsideration of the Relationship Between Law and Custom*.<sup>52</sup> Aleck notes that his approach is:

...cross-disciplinary, situated at the often turbulent confluence of emergent streams of thought in socio-legal theory, comparative law and legal anthropology. It is, moreover, an approach which bespeaks a method that has been deliberately fashioned with a view to the reconceptualisation of certain conventional propositions concerning the theoretical foundations of law in Papua New Guinea, and a corollary reformulation of extant patterns of legal reasoning and practical judicial decision-making.<sup>53</sup>

Aleck therefore adopts a highly critical reading of the rationality of the common law as it was implemented in Papua New Guinea.

As set out above, I accept that the worldview of the colonial decision makers was one of the western enlightenment, and that that view had been reinforced by their training as common lawyers. However, as a work of legal history, this thesis is not concerned with reformulating the ensuing legal reasoning and practical judicial decision-making. Rather, it examines how the practical implementation of the law by way of proscription and prosecution attempted to deal with the fear and violence engendered by the belief in sorcery in Papua and New Guinea.

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<sup>52</sup> [https://openresearch-repository.anu.edu.au/bitstream/1885/109331/4/b19963890\\_Aleck\\_J.pdf](https://openresearch-repository.anu.edu.au/bitstream/1885/109331/4/b19963890_Aleck_J.pdf)

<sup>53</sup> *Ibid.*, 56, under the heading 'Approach and Method'. Citations have been removed.

It does so by situating that approach within the historical approach of the common law and the contemporary practice across the British Empire, with reference to that published case law, which was, by its very nature, intended to be an Empire-wide yardstick for the far-flung judicial decision-makers. Accordingly, this thesis does not reflect Aleck's approach.

The uncritical 'reception' of the common law in both Papua and New Guinea is an important component in the thesis. In this regard, I considered the applicability of two theoretical frameworks, namely legal transplant theory and path dependency. However, although I refer to legal transplant theory in Chapter 4, with specific reference to the pioneering work of Alan Watson, I have not adopted it as a theoretical framework. This is because it does not address the practicalities of the creation *ex nihilo* of an entire legal system – as opposed to a system of customary law – in the Territories, one in which the executive and judicial arms were barely separate until changes introduced in the 1960's as part of the wider move towards decolonisation. Instead, in this thesis I predominantly rest upon legal historical narrative and highlight the documentary and case law incidences that manifest the colonial legal framing and mindset.

Similarly, whilst there is a body of scholarship on path dependency theory,<sup>54</sup> it is suggested that this theory would not assist in explaining either the decisions made by the colonial administrators in relation to the proscription of sorcery, or the colonial courts in adjudicating cases of sorcery-related murder. Rather, the thesis references the former in the context of disseminated written colonial 'best practice', given a wide interpretation by the men on the ground; and the latter in the context of the jurisprudence of the Privy Council.

Finally, taking a chronological approach to judicial decisions in both Papua and New Guinea and in British African colonies creates the potential for a lack of delineation between offences committed by accused sorcerers or witches on the one hand; and prosecutions arising from

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<sup>54</sup> In her important article 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86(2) *Iowa Law Review* 601, American law professor Oona Hathaway noted that:

...[i]n broad terms, path dependency means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage: 603-604.

Hathaway examines what she identifies as three strands of path dependency ultimately to propose that common law courts should take a more 'relaxed' view of *stare decisis*: 663-665.

One of the key insights of Hathaway's article is that change will only occur in judicial decision-making in a common law system where the 'costs' associated with the change are outweighed by those associated with adhering to precedent. I can appreciate why this would be particularly apposite to the difficulties encountered in independent Papua New Guinea in having courts apply customary law, even having regard to the 1975 Constitution (and, much later, the *Underlying Law Act 2000*) rather than relying on judicial precedent.

the (often fatal) violence directed against reputed sorcerers or witches on the other. However, the thesis contains such a considerable examination of the legislative proscription of acts of sorcery as to make the delineation clear as the general approach in the colonies, as opposed to dealing with the murders under the general criminal law, mitigated by reference to prevailing traditional beliefs.

Moreover, it is an important element of the thesis that these are, to a considerable extent, two sides of the one coin. In evolving a response to the murder of sorcerers, the colonial courts had to take notice of the proscription of acts of sorcery as evidence of the colonial administrations' recognition of the prevalence of traditional belief in their efficacy, as a means of calibrating the reasonableness of the individual defendant.

# Chapter Two — ‘The first grandchild of the British Empire’: British New Guinea, Papua and Mandated New Guinea

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What would Englishmen think were the Shetland or Orkney Islands allowed to fall into foreign hands?<sup>55</sup>

## Introduction

In 1904 the Irish novelist and travel writer Beatrice Grimshaw was engaged by the London *Daily Graphic* to report for its readers on the Pacific Islands, writing tourist publicity for the Cook Islands, Tonga, Samoa, Niue and New Zealand, and on the prospects for settlers in Fiji. When she visited Melbourne in 1908 she twice called on Prime Minister Alfred Deakin, who commissioned her to publicise the pressing need for both settlers and capital in Australia's new Territory of Papua.<sup>56</sup> The title of this chapter comes from her ensuing work *Papua the Marvellous, Country of Chances*, published by the Commonwealth to attract British investors. In Port Moresby she stayed for some time with Hubert Murray, who had arrived as chief judicial officer in what was then British New Guinea, in 1904. Combining executive and judicial roles in one, Hubert Murray was to dominate life in the Australian ‘garrison settlement’ of Papua until his death in 1940.

This chapter will not consider the legal response to sorcery in Papua and New Guinea. Rather, it will examine the imperial acquisition of the south eastern portion of the landmass of the island of New Guinea as first the Protectorate of British New Guinea, and then the Territory of Papua; and then the north eastern portion as the Mandated Territory of New Guinea. In doing so, it will show how the anomalous process of the Australian colonies gaining a colony of their own nonetheless fell within the strict legalism of the expansion of the scope and scale of the British Empire. That is to say, British imperial enlargement in the south west Pacific began as an expanded legal jurisdiction to limit the potential for wayward British subjects to provoke conflict with other imperial powers in the region, resulting in the Western Pacific High

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<sup>55</sup> An Australian, *The Australian crisis: or Ought New Guinea and the Western Pacific Islands to be annexed?* (London: 1883), 6.

<sup>56</sup> Eugénie Laracy & Hugh Laracy, ‘Beatrice Grimshaw: Pride and Prejudice in Papua’ (1977) 12(3) *The Journal of Pacific History*, 159.

Commission. Tension with Imperial Germany ended in the division of eastern New Guinea into German and British territories in the 1880's. Successive administrators of British New Guinea and then Papua were influenced by liberal notions of Empire to implement administrative and legal structures which, while heavily paternalistic, nevertheless aimed to promote the welfare of the indigenous population, even when compared with their neighbours in what was to become the Mandated Territory of New Guinea. As we will see throughout the thesis, this provided the background for the legal response to sorcery which was characterised by strict adherence to common law criminal practice, ameliorated by the acknowledgment of its centrality to indigenous beliefs.

### Legal imperialism in the South Pacific

Although Britain was undoubtedly keeping a close eye on her European rivals in the Pacific in the late nineteenth century, it was ultimately her zealous Australian colonies which pressed for the incorporation of Papua New Guinea into the Empire. Rather than scrabbling over colonial spoils, much of British activity in the Pacific had entailed the gradual extension of legal jurisdiction over erring British subjects — not the least of whom were blackbirders, kidnapping island workers for Queensland's sugar plantations. This jurisdiction was brought about by an August 1877 Order in Council, which established the High Commission for the Western Pacific<sup>57</sup> in the wake of the cession of Fiji to the British Crown in 1877.

The Order in Council establishing the High Commission provided the High Commissioner only with the power to make regulations for the government of British subjects or 'for securing the maintenance (as far as regards the conduct of British subjects) of friendly relations between British subjects and those authorities and persons subject to them'.<sup>58</sup> Thus, in 1881 the High Commissioner, Sir Arthur Gordon, complained to London that whereas he could punish British subjects for offences committed against Pacific Islanders, he had no power in the event of native outrages against Europeans. Despite these concerns, the Colonial Office held its ground and refused to give Gordon such powers, as it was not prepared to 'interfere on behalf of persons voluntarily placing themselves in positions of danger in a savage country', not the least of which was Fiji.<sup>59</sup> Indeed, while colonial administrators such as Gordon and William MacGregor considered the High Commission to be a political instrument for extending Britain's power and influence, the view of Conservative Colonial Secretary Lord Carnarvon was that it was an experiment in providing order and jurisdiction without assuming sovereignty; and the

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<sup>57</sup> *Order in Council, dated 13th August, 1877, for the Better Government of Her Majesty's Subjects in some Islands and Places in the Western Pacific Ocean.*

<sup>58</sup> Article 24, *ibid.*

<sup>59</sup> J M Ward, *British Policy in the South Pacific 1786-1893*, (Australasian Publishing Co, Sydney, 1948), 280.

civil servants at Whitehall considered it a judicial instrument to check kidnapping.<sup>60</sup> The key influence of Gordon's Pacific policies on practice in Papua and New Guinea will be considered later in this chapter.

The limited view taken by the Imperial authorities of Britain's role in the region is shown by the fact that when Captain John Moresby of the HMS *Basilisk* purported to take possession of three islands off the east coast of New Guinea on 24 April 1873, the requisite ratification by the Crown was not forthcoming. Nonetheless, in considering Australia's acquisition of external territories, Alan Kerr argues that it is likely that the publication of Moresby's *Discoveries and Surveys in New Guinea* in 1876 stimulated interest in the region. Indeed, as Admiral Moresby, he was to attend the reading of William MacGregor's paper on the administration of British New Guinea at the Royal Colonial Institute in 1894.<sup>61</sup>

Concerned with Russian Imperialist designs, in Sydney the indefatigable Rev John Dunmore Lang had waxed lyrical on New Guinea as *A Highly Promising Field for Settlement and Colonization* as early as 1872, with a view to making Sydney the mother city of 'flourishing colonies' in the Western Pacific.<sup>62</sup> However, in 1878 the Australian Colonization Company still failed to gain permission from the Colonial Office to form a settlement on the north-east coast of New Guinea.<sup>63</sup> Despite these rebuffs, in that same year Gordon stressed to the Colonial Office that annexation of New Guinea was becoming inevitable, given that the alternative was 'a practical acquiescence in the establishment there of a reign of lawless violence and anarchy... a course which we cannot creditably adopt', proposing also that it should be the headquarters of the Western High Commission.<sup>64</sup> However, Gordon's conclusion was based not on an imperialist imperative, but by the disorder he feared necessarily arising from an influx of unsavoury characters in the wake of an expected – but unrealised – gold rush near Port Moresby. There is, therefore, a very strong argument that in the institution of the High Commission the common law preceded any concrete imperial presence in the south west Pacific, including in Papua and New Guinea.

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<sup>60</sup> This was similar to the other experiments which Britain had utilised in West Africa and the Malay States: see W David McIntyre, 'Disraeli's colonial policy: The creation of the Western Pacific High Commission, 1874–1877' (1960) 9(35) *Historical Studies: Australia and New Zealand*, 285.

<sup>61</sup> Alan Kerr, *A federation in these Seas: An account of the acquisition by Australia of its external territories, with selected documents* (Canberra: 2009), p 12.

<sup>62</sup> John Dunmore Lang, 'New Guinea - a highly promising field for settlement and colonization, and how such an object might be most easily and successfully effected' (1871) 5 *Transactions of the Royal Society of New South Wales*, 35.

<sup>63</sup> See John D Legge, 'Australia and New Guinea to the establishment of the British Protectorate, 1884', (1949) 4(13) *Historical Studies: Australia and New Zealand*, 35-38.

<sup>64</sup> An Australian, n 1, 27.



Ultimately, jurisdictional niceties were rendered otiose by the island's Queensland neighbours: as Hank Nelson suggests, Papua New Guineans were subject to the tyranny of proximity.<sup>65</sup> Supposedly concerned by the increasing German presence in the south west Pacific, in 1883 Queensland Premier Thomas McIlwraith ordered Henry Chester, the Police Magistrate on Thursday Island, to formally annex New Guinea and adjacent islands in the name of the British government, which he did by proclamation on 4 April. Chester's flag-raising underwhelmed Rev William Lawes of the London Missionary Society, who had been resident in Port Moresby since 1874:

There must be some mistake somewhere. We would much rather not be annexed by anybody, but if there was any probability of a foreign power taking possession of New Guinea, then let us have British rule: but as a crown colony, not as an appendage to Queensland.<sup>66</sup>

Queensland's Governor Sir Arthur Kennedy had left the colony in May 1883 and died in Aden *en route* to London, his last official act having been to sanction the annexation of New Guinea, subject to approval by the Colonial Office.<sup>67</sup> Therefore, the Queensland Parliament was opened on 26 June 1883 by the Administrator, Sir Arthur Palmer, who asserted that the imminent annexation by an unnamed foreign power had led to Queensland's action; it was imperative that New Guinea and the adjacent islands would form 'part of the future Australian Nation'.<sup>68</sup> Before issuing the instructions to Chester, Premier McIlwraith had in fact proposed to the Colonial Office that Queensland take formal possession of New Guinea and bear the costs of its government. However, as McIlwraith had not seen fit to wait for the reply from London, his therefore unilateral action was soon disallowed by Lord Derby, Conservative Secretary of State for the Colonies, on the basis that a colonial government had no authority to annex other colonies. Nonetheless, given that in the early 1870's the Colonial Office under the Liberal Lord Kimberley had actively encouraged New South Wales to annex Fiji, it would appear that the rejection was based more on fears in London of Queensland's hunger for native labour, than on fine constitutional points.<sup>69</sup> In his 1903 book *British New Guinea*, Western Australian Senator Staniforth Smith, subsequently Commissioner for Crown Lands

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<sup>65</sup> Hank Nelson, *Taim Bilong Masta*, (ABC Books, Sydney, 1982), p 218.

<sup>66</sup> Brian Jinks, Peter Biskup and Hank Nelson (Eds), *Readings in New Guinea History*, (Angus & Robertson, Sydney: 1973), 32-33.

<sup>67</sup> P Boyce, 'Kennedy, Sir Arthur Edward (1810–1883)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/kennedy-sir-arthur-edward-3943/text6209> accessed 21 March 2013.

<sup>68</sup> Kerr, n7, 16-17.

<sup>69</sup> See E Drus, 'The Colonial Office and the Annexation of Fiji', (December 1950) 32 *Transactions of the Royal Historical Society*, 96-99.

in the Territory of Papua, suggested that Derby had rejected Queensland's bid 'activated by petty spleen', simply because the Imperial Government had not first been consulted.<sup>70</sup>

However, Queensland's particular inappropriateness to be a colonial power – its 'trail of villainy' in misleading and maltreating New Guinea recruits for the cane fields<sup>71</sup> – was a recurrent theme of British concerns as to the future place of a New Guinea subject to Australian influence in the late nineteenth century. This trail of villainy arose from the abuse of Pacific islanders brought to work in Queensland's vital agricultural sector, most prominently on sugar cane plantations. Between 1863 and 1904, over 62,000 Melanesians provided the colony with indentured labour, with New Guinea and other islands providing about 16,200 workers. Melanesians living in Queensland peaked at 11,500 in 1883.<sup>72</sup> Many of them were 'engaged' for back-breaking work without any real understanding of the nature or extent of their indentured service. More brutally, there was outright kidnapping of islanders, described contemporaneously as 'blackbirding'. Blackbirding practices included tricking men onto ships and then sailing away to Queensland, or the straightforward ambushing and seizing of them from their villages.<sup>73</sup> Thus, in its February 1884 Report, the Imperial Government's Royal Commission into the working of the Western Pacific Orders-in-Council expressed deep concerns as to the fitness of the Queensland Parliament, an oligarchy which could not 'but be influenced to a greater or less degree by its own selfish interests'.<sup>74</sup> These fears were not easily dispelled. In 1894, when William MacGregor sought to change his title from Administrator of British New Guinea to Lieutenant Governor, the Colonial Office was concerned that it would be seen as making him subordinate to the Governor of Queensland, and part of 'a deep-laid plot to hand over the natives to the care of Queensland planters'.<sup>75</sup> Ninety years later, leading Papua New Guinea jurist Bernard Narokobi described Queensland as the 'home of slavery' which continued to be the 'frontier of reactionary governance',<sup>76</sup>

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<sup>70</sup> Staniford Smith, *British New Guinea: with a preface on Australia's policy in the Pacific*, (P W Niven & Co, Melbourne, 1903), 8. Marjorie Jacobs also noted that, among permanent officials, the disapproval related more to the method than the principle: Marjorie G Jacobs, 'The colonial office and New Guinea, 1874–84', (1952) 5(18) *Historical Studies: Australia and New Zealand*, 111.

<sup>71</sup> See generally Peter Corris, 'Blackbirding' in New Guinea Waters, 1883-84: An Episode in the Queensland Labour Trade' (1968) 3 *The Journal of Pacific History*, 85.

<sup>72</sup> O W Parnaby, *Britain and the Labour Trade in the Southwest Pacific* (Duke University Press, Durham NC, 1964) 203.

<sup>73</sup> Reid G Mortensen, 'Slaving in Australian courts: Blackbirding cases 1869-71' 4 *Journal of South Pacific Law*, 1. See also E V Stevens, 'Blackbirding. A Brief History of the South Sea Islands Labour Trade and the Vessels engaged in it' (1950) 6(3) *Journal of the Royal Historical Society of Queensland*, 3.

<sup>74</sup> *Report of the Royal Commission appointed to enquire into the Working of the Western Pacific Orders-in-Council*, Parliamentary Papers (Great Britain), February 1884, Vol. IV, 793.

<sup>75</sup> Roger B Joyce, *Sir William MacGregor* (Oxford University Press, Melbourne, 1971), 119.

<sup>76</sup> Bernard M Narokobi, *The Melanesian Way* (Institute of Papua New Guinea Studies, Suva, 1983), 80.

namely the 'Hillbilly Dictatorship' of Joh Bjelke-Petersen.<sup>77</sup> Nonetheless, despite being himself a considerable owner of cane fields, Premier McIlwraith always maintained publicly that the annexation of New Guinea was not based on any such desire, but simply to ensure that the colony did not gain any 'undesirable neighbours'.<sup>78</sup>

The annulment by the Colonial Office of Queensland's action outraged expansionist opinion in the Australian colonies, with Victorian Premier James Service deriding Derby's decision as 'one of the most melancholy and marvellous illustrations of political imbecility' ever recorded.<sup>79</sup> In a June 1883 article, the Melbourne *Age* lambasted the timidity of contemporary colonial governors, noting that the increase of Empire had not been brought about by waiting for orders from Downing Street. The *Age* also managed to intertwine chauvinism with that other staple of nineteenth century colonial journalism, anti-Catholicism, noting that it 'did not want Protestant missionaries disturbed, as Mr Pritchard was at Tahiti, or Jesuit missions extended by the same means as in Annam', (i.e., French Indo-China).<sup>80</sup> Similarly, Premier Service, who had been described by Alfred Deakin as a 'sturdy, stiff-necked, indomitable and canny' Scot,<sup>81</sup> was strongly influenced by the arguments of Presbyterian missionaries against any extension of French power in the Pacific, particularly in the New Hebrides. By contrast – and perhaps typically – commercial circles in Sydney believed that increased trading by any nationality would only add to the city's prosperity, as long as free trade prevailed.<sup>82</sup>

In a pamphlet dedicated to Prime Minister Gladstone entitled *The Australian crisis: or Ought New Guinea and the Western Pacific Islands to be annexed?*, 'An Australian' railed that in the wake of Queensland's admittedly 'high-handed assumption of Imperial powers' the 'claqueurs of British assertiveness were on the alert, whilst sober statesmen shook their heads'. In urging the annexation of New Guinea, the Australian colonists had not come as 'suppliants for some light favour', but as 'Englishmen to whom their country has given a great destiny' and who welcomed the opportunity to be associated with the Imperial Government 'in a work which

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<sup>77</sup> In the 1970's, Bjelke-Petersen outmanoeuvred both Labor Prime Minister Gough Whitlam and Liberal Prime Minister Malcolm Fraser to stop the cession to Papua New Guinea of any of Queensland's territory in the Torres Strait: see, e.g., 'Joh revered over Torres Strait border dispute', <https://www.sbs.com.au/news/joh-revered-over-torres-strait-border-dispute>

<sup>78</sup> Tom McIlwraith cited by William MacGregor in 'British New Guinea: Administration', 'British New Guinea: Administration' (1894-95) 26 *Proceedings of the Royal Colonial Institute*, 214. See also Tony Gough, 'Tom McIlwraith, Ted Drury, Hugh Nelson and the Queensland National Bank 1896-7', (November 1978) 3(9) *Queensland Heritage*, 3.

<sup>79</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 1885, 214.

<sup>80</sup> An Australian, n1, p 16.

<sup>81</sup> Geoffrey Serle, 'Service, James (1823–1899)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/service-james-4561/text7483>, published first in hardcopy 1976, accessed online 16 February 2020.

<sup>82</sup> Jacobs, n 18, 114-115.

must assuredly be done one day, and can as certainly be best done now'.<sup>83</sup> The author's jingoism was such that he maintained that there was no requirement to wait for Imperial legislation to give effect to the purported annexation by Queensland: rather, the imperial mission was of such import that Queen Victoria had the same self-evident right to assume jurisdiction over the southern coastline of New Guinea as she had in respect of the islands of the Torres Strait, supposedly done by way of Letters Patent issued to the Queensland Governor.<sup>84</sup> This was asserted perhaps in ignorance of the facts that the islands' annexation in 1879 had only taken place after 'much shilly-shallying' on the part of Queensland, despite the urging of the Colonial Office.<sup>85</sup> Even that process had been defective, and had required remedying by the Imperial *Colonial Boundaries Act 1895*.

Nonetheless, many Australians held Lord Derby personally responsible for halting the expansion of empire, with the *Sydney Morning Herald* thundering that he was not a man 'in whom we can confide and on whose judgment and promptitude we can rely'.<sup>86</sup> The *Colac Herald* reported that Derby had been burnt in effigy in Rosedale, rural Victoria – 'As the charred remains fell to the ground, the chorus of "Rule Britannia" was sung'.<sup>87</sup> Also, despite the official caution in London, there had been some popular support in Britain for Queensland's move, as the *Pall Mall Gazette* of 20 November 1884 crowed that the purported annexation 'betoken[ed] the reinvigoration of England, the arrest of the tendency toward decrepitude and decay, and promises for the Empire a new lease of life'.<sup>88</sup>

In fact, Derby was coming to the conclusion that annexation of New Guinea was inevitable, but he was opposed by much of the Cabinet, especially Gladstone. Experienced civil servants had no confidence in the capacity of any Australian colony to rule native peoples – let alone Queensland — and groups such as the Aborigines' Protection Society were disturbed by the grim history of blackbirding in the region.<sup>89</sup> Gladstone appears to have been confirmed in his opposition by correspondence received from Sir Arthur Gordon, by this time Governor of Ceylon. Gordon wrote to Gladstone in scathing terms of the proposed Queensland annexation:

...I can hardly conceive any government more unfit for such a task... a small and, for the most part, ignorant, and selfish oligarchy, of another race, having interests directly opposed

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<sup>83</sup> An Australian, n1, 40.

<sup>84</sup> *ibid.*, 37.

<sup>85</sup> Jacobs, n 17, 111.

<sup>86</sup> *Sydney Morning Herald*, 25 December 1884. <https://trove.nla.gov.au/newspaper/article/13574698>

<sup>87</sup> 'Lord Derby Burnt in Effigy', *Colac Herald*, 6 January 1885,

<https://trove.nla.gov.au/newspaper/article/90354155>

<sup>88</sup> Quoted in Donald C Gordon, *The Australian Frontier in New Guinea: 1870-1885* (Columbia University Press, New York 1951), 256.

<sup>89</sup> Jacobs, n17, 111. See also Graeme Powell, 'A Diarist in the Cabinet: Lord Derby and the Australia Colonies 1882-85' (2005) 51(4) *Australian Journal of Politics and History*, 489.

to those of the natives themselves; but there is a special unfitness in the case of Queensland.<sup>90</sup>

In full flight, Gordon contrasted the Queensland proposal with the Liberal project of extending local self-government in India which Gladstone was then considering:

Will the same hands ... deliberately make over the millions of New Guinea, I will not exactly say to slavery... but to the absolute control of those who will despise – use — and destroy them?<sup>91</sup>

Accordingly, on 2 July 1883, Derby announced in the House of Lords that, in the absence of a foreign threat, Queensland's purported annexation had been disallowed, as Governor Kennedy had exceeded his authority in sanctioning it.<sup>92</sup> Nonetheless, he did give the House a vague assurance that eastern New Guinea was within the range of Britain's interests, such that it would be considered an unfriendly act on the part of any foreign power to establish a settlement there.<sup>93</sup>

### British Protection

Before the end of the year, Derby had concluded that the Imperial Government would have to acquiesce in the Australian demand for a protectorate, although Gladstone remained unmoved.<sup>94</sup> A lull in the clamour for intervention in New Guinea had ensued, in which the first move was actually made by Derby. In May 1884 he invited the colonies to contribute £15,000 towards the establishment of a High Commissioner in New Guinea, an action directed not towards hastening annexation, but prompted by German complaints about the unwelcome presence of Queensland blackbirders in the islands off the north-east coast.<sup>95</sup> Spheres of economic and political interest were intimately connected in the south-west Pacific. Economic historian of the British Empire David Fieldhouse argues that, as British settlers and German traders in the region feared the economic consequences of political action by the other power, imperialism grew from 'a crisis of confidence on the periphery'.<sup>96</sup>

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<sup>90</sup> Paul Knaplund, 'Sir Arthur Gordon on the New Guinea question, 1883' (1956) 27(7) *Historical Studies: Australia and New Zealand*, 330.

<sup>91</sup> *ibid.*, 331.

<sup>92</sup> 'A Governor or any official holding authority under Government exercises that authority within the limits of the jurisdiction assigned to him; but beyond those limits, as I understand the matter, his commission does not go; beyond those limits he ceases to be invested with any official power... The action of the Governor of Queensland, therefore, in this matter, has left things where they were': The Earl of Derby in the House of Lords, 2 July 1883, [https://api.parliament.uk/historic-hansard/lords/1883/jul/02/motion-for-papers#column\\_18](https://api.parliament.uk/historic-hansard/lords/1883/jul/02/motion-for-papers#column_18)

<sup>93</sup> Jacobs, n 17, 113-114.

<sup>94</sup> Powell, n36, 492.

<sup>95</sup> *ibid.*, p 116.

<sup>96</sup> David K Fieldhouse, *Economics and Empire, 1830-1914* (Cornell University Press, Ithaca, 1973), 441.

Thus, it was not crimson ties of blood, or grand imperial partnerships, which would stir the Colonial Office to action, but being wrong-footed by an economically expansionist German Reich. While the British had been telegraphing their plans in the Pacific, Bismarck had been characteristically artful; in June 1884, he announced that he would extend protection to German traders in Africa and the Pacific wherever they had established a commercial preponderance.<sup>97</sup> Thus, only a year after rejecting Queensland's claim, the Imperial Cabinet felt obliged to accept Derby's proposal that a British Protectorate be declared over eastern New Guinea. This was done in the face of Gladstone's disdain, who described the Australian claim as 'mere piracy'.<sup>98</sup> The continuing desire to placate Germany in the Pacific caused that claim to be limited to south eastern New Guinea, but both Derby and Sir Robert Herbert, Permanent Under-Secretary at the Colonial Office, thought that the claim could peaceably be expanded northwards. This false sense of security endured until the shock declaration of the German Protectorate over north eastern New Guinea on 3 November 1884 as *Kaiser-Wilhelmsland*.

Three days later, Commodore James Erskine of the Royal Navy steamed into Port Moresby on *HMS Nelson*, hoisted the Union Jack, and proclaimed Queen Victoria's protection over British New Guinea. The D'Entrecasteaux Islands subsequently were added by Lieutenant Commander Ross, who was asked in December 1884 to hoist the flag to the 'extreme limit of the German boundary', which had also been proclaimed that month by Germany hoisting the flag at various points.<sup>99</sup> Commodore Erskine assured the local chiefs of the benevolent nature of their new rulers:

Always keep in your minds that the Queen guards and watches over you, looks upon you as Her children, and will not allow anyone to harm you, and will soon send Her trusted officers to carry out Her gracious intentions in the establishment of this Protectorate.<sup>100</sup>

While it is easy to dismiss these words as standard imperialist platitudes, Erskine's promise was taken very much to heart by members of his audience and their descendants. The supposedly intimate connection between the monarch and her far-flung subjects was commonplace amongst supporters of imperialist expansion; commentators such as historian J A Froude noted that the loyalty of British subjects worldwide was principally to the Queen

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<sup>97</sup> Hans Ohff, 'Empires of enterprise: German and English commercial interests in East New Guinea 1884 to 1914', (PhD thesis, University of Adelaide, 2008), 63.

<sup>98</sup> Powell, n36, 492.

<sup>99</sup> J L Whittaker, N G Gash, J F Hookey and R J Lacey, *Documents and readings in New Guinea history* (Jacaranda Press, Brisbane, 1975), 460.

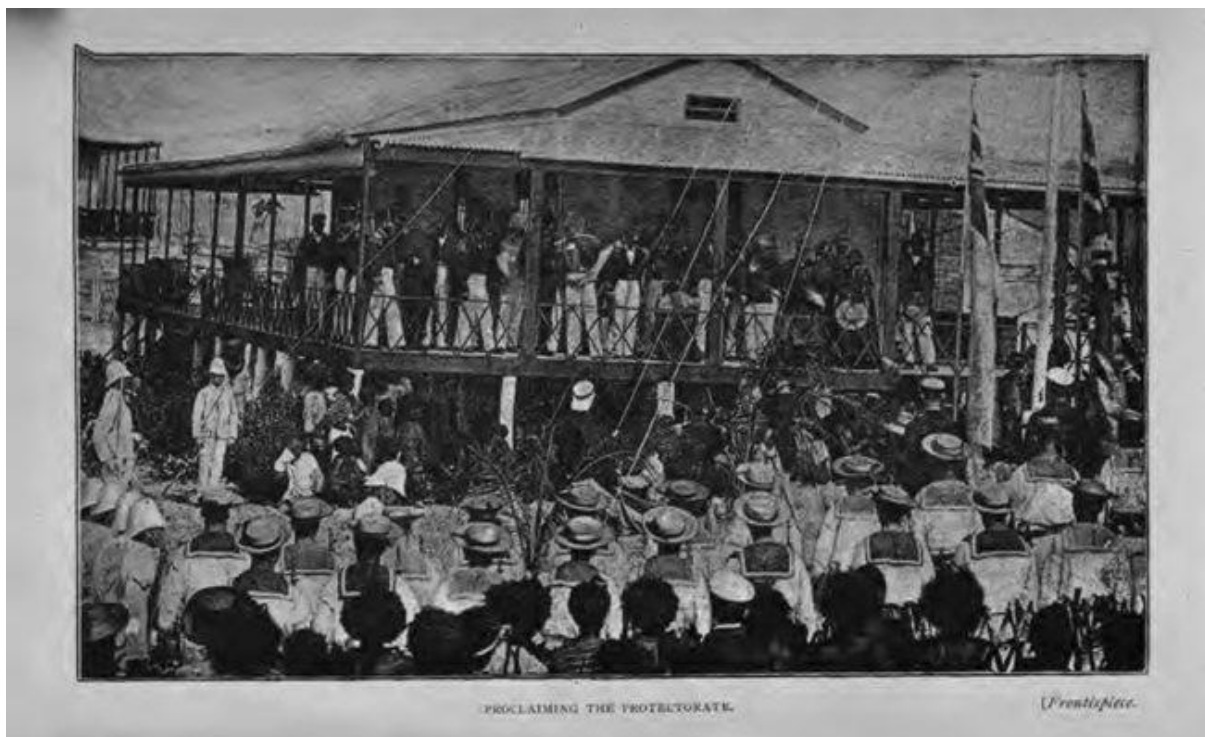
<sup>100</sup> Gavin Souter, *New Guinea: The Last Unknown* (Angus & Robertson, Sydney, 1963), 62.



personally.<sup>101</sup> The Marquis of Lorne – Canadian Governor-General from 1878 to 1883 and Victoria's son-in-law for considerably longer — emphasized the Queen's role as a unifying force throughout the Empire. He rhapsodised that her name alone had:

... acquired a magic force, the strength of which can only be realized by those who have heard the national anthem sung by men, women, and children in regions many thousands of miles distant from England.<sup>102</sup>

In 1912, Papuan Administrator Hubert Murray noted that Erskine's 1884 address had been translated into Motu by the Rev William Lawes, and was thereafter regarded as 'a fundamental part of the Papuan Constitution which is not to be altered by legislation', despite the changes in the legal nature of the colony.<sup>103</sup> Moreover, the 'Erskine Pledge' was the subject of consideration by the High Court as recently as 1973, when Chief Justice Barwick noted in *Papua and New Guinea v Daera Guba* that its effect was that the law in the Territory recognised that no acquisition of land from Papuans would be recognised by the British, other, of course, than acquisition by Her Majesty or by persons on her behalf.<sup>104</sup>



Commodore Erskine at Port Moresby - 6 November 1884<sup>105</sup>

<sup>101</sup> James A Froude, *Oceania, or England and her Colonies*, (Longmans Green & Co, London, 1912), 221–22,

<sup>102</sup> John Douglas Sutherland, Marquess of Lorne, *Imperial Federation* (London, 1885) [http://www.archive.org/stream/imperialfederati05londuoft/imperialfederati05londuoft\\_djvu.txt](http://www.archive.org/stream/imperialfederati05londuoft/imperialfederati05londuoft_djvu.txt)

<sup>103</sup> Hubert Murray, *Papua or British New Guinea*, (T M Unwin, London, 1913), 74.

<sup>104</sup> See Barwick CJ in *Papua & New Guinea v Daera Guba* (1973) 130 CLR 353, 397.

<sup>105</sup> Charles E Lyne, *New Guinea: An Account of the Establishment of the British Protectorate over the Southern Shores of New Guinea* (Sampson Low, Marston, Searle & Rivington, London, 1885), Frontispiece.

On 22 November 1884 Major General Sir Peter Scratchley was appointed Special Commissioner for the new Protectorate, with Instructions enjoining him to make it clear to the natives that the Queen was taking them under her protection with their best interests in mind. A military engineer, Scratchley proposed that New Guinea be governed as a Crown Colony, with the Governor having such judicial powers as would allow him to deal summarily with minor matters, referring more serious offences to the Courts of Queensland.<sup>106</sup> In an early despatch to London, Scratchley mentioned that he had met Sir Arthur Gordon, who had been good enough to afford him 'much valuable information and advice'.<sup>107</sup> Scratchley was also in receipt of advice from Captain Cyprian Bridge, one of Gordon's Deputy Commissioners, who had had a keen interest in enforcing the anti-blackbirding laws, especially against Queenslanders. Like Scratchley, Bridge believed that there were high hopes of making a success of the new colony, given the right methods. Nonetheless, he recognised that what might appear suitable to political decision-makers in Britain and the Australian colonies might be 'utterly unsuited' to New Guinea and its native population. Bridge advised Scratchley that the indigenous New Guineans were owed 'as a debt of honour, a strong, judicious, and just government', to prove that England could 'occupy the country of barbarians without harming and destroying them'.<sup>108</sup>

Scratchley considered the village organisation he encountered to be a chaos of authorities in which each man, other than conforming to 'certain established customs', was a law unto himself. As villages had up to three chiefs — sometimes including a sorcerer-chief — Scratchley's solution was to establish a Government-elected one on the colonial payroll.<sup>109</sup> Thus, shortly after landing at Port Moresby in August 1885, he recognised the local headman Boevagi as chief of the district,<sup>110</sup> and instructed him to refer all complaints to him, whether amongst his community or against Europeans. Twenty-five of the so-called sub-chiefs were similarly advised that they were to regard Boevagi as their chief and refer to him 'in all cases requiring arbitration'. At his death in 1886, Boevagi was derided by Deputy Commissioner Anthony Musgrave as the 'mild-mannered but wholly useless holder of the stick of office among the Motuans'.<sup>111</sup>

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<sup>106</sup> G Seymour Fort, *Report on British New Guinea, From data and notes by the late Sir Peter Scratchley, Her Majesty's Special Commissioner* (Government Printer, Melbourne, 1886), 23.

<sup>107</sup> Scratchley to Secretary of State for Colonies, 15 January 1885, cited in J Mayo, 'From Protectorate to Possession: British New Guinea 1884-88' (December 1975) 21(3) *Australian Journal of Politics & History*, 57.

<sup>108</sup> Bridge, n47, 565; Bridge to Scratchley, 11 February 1885, cited in Mayo, n52, 58.

<sup>109</sup> Seymour Fort, n51, 15. Anthony Musgrave and Hugh Romilly were Deputies for Scratchley.

<sup>110</sup> Quoted in W P Morrell, *Britain in the Pacific Islands* (Clarendon Press, Oxford, 1961), 403.

<sup>111</sup> Seymour Fort, n51, 8. Fort eventually accompanied Sir Henry Loch, Governor of Victoria from 1884 to 1889, when the latter went to South Africa as High Commissioner, as private secretary. There he played an important role in establishing the administration of the Protectorate of Bechuanaland: Mayo, n55, 69.



However, as the new colony only had that power to deal with criminal incidents that previously had inhered in the Western Pacific High Commission, its precarious legal system was designed to regulate unruly British subjects, and not to govern a territory inhabited by large numbers of natives, who – unlike the Fijians — had never even sought British rule. Unsurprisingly, problems of legal jurisdiction soon arose. In his role as one of Queensland's leading lawyers, Premier Samuel Griffith had advised Scratchley that the Western Pacific Order-in-Council gave him no power to make regulations having the force of law, and specifically no power to deal with native offences against Europeans, unless they somehow could be regarded as acts of war which could be dealt with by the proverbial whiff of grapeshot from the Royal Navy. Scratchley circumvented this fundamental inconvenience by 'a certain latitude' in the interpretation of his Instructions, combined with the occasional 'discreet overstepping' of the bounds of his real authority,<sup>112</sup> so that among his earliest actions was in fact the investigation of a number of crimes committed by Europeans against indigenous Papua New Guineans.

Despite this unanimity of views of the Territory's legal position, in one of the few cases from Papua and New Guinea to be heard by the High Court of Australia, in 1973 Barwick CJ held that Griffith's analysis and that of the Law Officers was 'erroneous': it had been in 1884 and remained so. In *Papua and New Guinea v Daera Guba*, an appeal on the validity of the *Papuan Land Ordinance 1911*, Barwick CJ concluded that 'so far as acquisition of authority over the Papuans was concerned, it should have come with the declaration of the Protectorate'. He based this on the following view of the process:

... the extent to which the Crown obtains power over British and non-British persons in a Protectorate depends very much on the purposes for which the Protectorate is proclaimed and the situation in the area of the Protectorate, particularly as regards local sovereignty or authority... The express purpose of establishing the Protectorate was to protect the Papuans, both from foreigners, British subjects and, indeed, from themselves in order that they might enjoy the use of their land in peace. That purpose could not be carried out without exercising authority both over the foreigners and the Papuans as well as over British subjects.<sup>113</sup>

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<sup>112</sup> John D Legge, *Australian Colonial Policy: A Survey of Native Administration and European Development in Papua* (Sydney, 1956), 34.

<sup>113</sup> (1973) 130 CLR 353, 391.

Nonetheless, Barwick CJ noted that it was 'quite proper... to remember that the then current view was to the contrary', such that Scratchley's Instructions denied him the authority which, in Barwick's opinion, necessarily accompanied the declaration of the Protectorate.<sup>114</sup>

A means of impressing upon the local tribes that the colonial presence could be a force for good soon presented itself, when in mid-1885 the Queensland government returned 500 men taken to work on the cane fields. Scratchley was keen to associate his administration with this process, concluding that it would show that he meant to rule with justice for all, to 'protect their lives and property from their neighbours, as well as from whites'. Resident Magistrate Hugh Romilly later recalled being less optimistic, noting that the 'returned natives' were very hostile.<sup>115</sup> More specifically for the ultimate application of English criminal law to indigenous Papua New Guineans, Scratchley also investigated the murder of a Captain Miller on Normanby Island, the southernmost of the D'Entrecasteaux group. Miller's murder had been unprovoked, but it was ascertained that it was in effect payback for the deaths of local villagers who had been blackbirded. When the murderer Diravera came voluntarily to *HMS Dart* with compensation payment for the death,<sup>116</sup> the ship's captain detained him and took him to Port Moresby. However, Scratchley did not sentence him to death, because to do so 'in the face of him having voluntarily paid what, according to his standard of justice, was a full penalty for his deed, would have been revenge and not justice'.<sup>117</sup> Unfortunately Scratchley was not to oversee the growth of the Crown Colony; having contracted malaria, he died at sea en route to Australia in December 1885. Scratchley's real achievement is the creation and setting in motion of the framework and government and the inauguration of a policy of governing Papuans which, seen in the light of the colonial attitudes prevailing in many places in his days, was creditable for its humanity and fair play.<sup>118</sup>

In the wake of Scratchley's death, John Douglas — erstwhile Liberal Premier of Queensland, but by this time government resident and magistrate at Thursday Island — acted in the position of Administrator until 4 September 1888, when British New Guinea was finally annexed as a Crown Colony. By this time only Queensland, New South Wales and Victoria maintained their

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<sup>114</sup> (1973) 130 CLR 353, 391.

<sup>115</sup> Scratchley to Secretary of State, 26 August 1885, cited in H H Romilly, *From my Verandah in New Guinea* (David Nutt, London, 1889), 222.

<sup>116</sup> Described by Malinowski in *Crime and custom in savage society*, (1926) p 115 as *lula*, the peace-making price; and by Scratchley as *wergild*, the payment in Anglo-Saxon society made to the family of a slain man by his killer or the killer's family as compensation, atonement, and to avoid reprisals, famously referred to in *Beowulf*, lines 156-158 and at lines 456-472:

<sup>117</sup> Seymour Fort, n51, 13.

<sup>118</sup> Harry Jackman, 'Sir Peter Scratchley: Her Majesty's Special Commissioner for New Guinea' (1969) 3(1) *Journal of the Papua and New Guinea Society*, 51.

financial support for British New Guinea. In early 1887 their governments sent representatives to London, where it was agreed that following full annexation they would jointly guarantee revenue of £15,000 per annum for period of 10 years, after which time Britain would withdraw, leaving New Guinea to be administered either by Queensland with financial help from New South Wales and Victoria, or by a federated Australian Government, if there were one. However, after this agreement, and despite the earlier sound and fury, once the *British New Guinea (Queensland) Act 1887* was passed to facilitate this, matters relating to New Guinea rarely rated a mention even on the floor of the Queensland Parliament, let alone in the wider public discourse in the colonies. Thus, William MacGregor's biographer Roger Joyce identified two statements in the House in 1890 and 1892 denying the use of New Guinea as a potential field for labour recruiting; one reference in 1891 to the strategic danger of German New Guinea; and an 1895 question suggesting fears of New Guinea competition in sugar growing.<sup>119</sup>

### Sir Arthur Gordon and the Fijian Connection

The period between the proclamation of the Protectorate and annexation had also witnessed a number of Australasian inter-colonial gatherings. In December 1885, Dr William MacGregor, Government Medical Officer for Fiji and Deputy Commissioner for the Western Pacific High Commission, represented Fiji at the meeting of the Federal Council of Australasia in Hobart.<sup>120</sup> In the course of debate on the future of the New Guinea Protectorate, he argued that protection of the indigenous population ought to be the chief aim of any future administrator. In doing so, he attracted the interest of Queensland Premier Samuel Griffith, who had been a fierce opponent of McIlwraith's in the use of Pacific labourers on the Queensland cane fields, and who was eventually to outlaw the practice. Griffith and MacGregor shared a background of rising to positions of influence from modest beginnings propelled by hard work and intellectual ability, and they shared an interest in the treatment of indigenous peoples by colonial settlers. Griffith became convinced that MacGregor was the best man to be administrator of British New Guinea. His recommendation, supported by MacGregor's existing reputation at the Colonial Office, soon secured MacGregor the position.<sup>121</sup>

That reputation was based on MacGregor's service with Sir Arthur Gordon in both the Seychelles, where Gordon had been impressed with MacGregor's efforts in exposing abuses of the African labourers on the Seychelles' sugar plantations, and in Fiji. In stark contrast to

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<sup>119</sup> Roger B Joyce, 'The British New Guinea Syndicate Affair of 1898' (1954) 5(1) *Journal of the Royal Historical Society of Queensland*, 784-785.

<sup>120</sup> Roger B Joyce, 'Sir William MacGregor and Queensland' (1973) 9(4) *Journal of the Royal Historical Society of Queensland*, 83.

<sup>121</sup> *Ibid.*, 784-785.

MacGregor's background, Gordon had been born to the apogee of the Liberal aristocracy – he was a younger son of Lord Aberdeen, Prime Minister from 1852 to 1855 – and the Colonial Office posted him to Fiji as part of a deliberate experiment in the government of a potentially difficult new colony.<sup>122</sup> When Fiji finally had been annexed in October 1874, the Conservative Colonial Secretary Lord Carnarvon offered him the governorship; and Sir Robert Herbert impressed upon him that he was the man for the job, noting that it was 'of great importance to appoint a specially able and trustworthy man whom the colonies happen to prefer'.<sup>123</sup> Herbert's views of the Australian colonies were particularly influential, as he had been personal secretary to Sir George Bowen, the first Governor of separated Queensland, and then became first Premier of Queensland from 1859 to 1866, then again briefly in 1866. Undoubtedly it would not have harmed his career that he was Lord Carnarvon's cousin and classmate at Eton.

Described as an aristocrat by birth and an autocrat by inclination,<sup>124</sup> Gordon had a profound distrust of the motives of British settlers in the Pacific and the potential for their catastrophic impact upon indigenous populations. His appointment to Fiji was evidence of the continuing influence of that humanitarian strand within British colonial policy which could be directly traced back to the abolitionist movement which culminated in the *Slavery Abolition Act 1833*, and which had since turned its attention to that maltreatment of Queen Victoria's native subjects that fell short of outright slavery.<sup>125</sup> Gordon set out to protect indigenous Fijians by ruling indirectly through 'traditional' chiefly structures, even though in doing so he engaged in a form of tradition inventing; 'invented tradition' is understood to mean a set of practices which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past, no matter whether that continuity is in fact spurious.<sup>126</sup> He therefore effectively quarantined indigenous Fijians from settler exploitation by making difficult the alienation of indigenous land and establishing the importation of Indian labour to work on the cane fields from 1879 onwards. Despite his traditionalist flights of fancy, it has been argued that what was distinctive about Gordon was a realisation that the native society he encountered in Fiji was an integrated and complex system which required an equally

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<sup>122</sup> Deryck Scarr, *Fragments of Empire: A History of the Western Pacific High Commission 1877-1914* (ANU Press, Canberra, 1968), 25. See also Peter France, 'The Founding of an Orthodoxy: Sir Arthur Gordon and the Doctrine of the Fijian Way', (March 1968) 77(1) *The Journal of the Polynesian Society*, 6.

<sup>123</sup> J K Chapman, *The career of Arthur Hamilton Gordon, first Lord Stanmore, 1829-1912*, (University of Toronto Press, Toronto, 1964), 157.

<sup>124</sup> Scarr, n69, 24.

<sup>125</sup> L Veracini, 'Emphatically Not a White Man's Colony' (2008) 43(2) *The Journal of Pacific History*, 190-194.

<sup>126</sup> Eric Hobsbawm & Terence Ranger (Eds) *The invention of tradition* (Cambridge University Press, Cambridge, 1992). For Fiji, see John D Kelly, 'Gordon Was No Amateur: Imperial Legal Strategies in the Colonization of Fiji' in Sally Engle Merry & Donald Brenneis, *Law & Empire in the Pacific: Fiji and Hawai'i* (SAR press, Santa Fe, 2003).

integrated policy response.<sup>127</sup> This was a colonialist approach put into practice not only in Fiji, but in New Guinea under MacGregor. It was also one which easily could be a description of the approach of Hubert Murray in Papua in the twentieth century.

As MacGregor felt that New Guinea was the only place left to prove that British colonial rule need not destroy its indigenous subjects, it would be up to his administration to make this dream 'a noble reality'.<sup>128</sup> MacGregor's early efforts to protect indigenous New Guineans from abuse and exploitation confirmed, the *Cooktown Courier* thought, that he was a 'nigger lover' stifling the 'legitimate trade of white men'.<sup>129</sup> Gordon's direct influence on MacGregor is shown by the fact that, although he remained in Fiji after Gordon's postings to New Zealand and then Ceylon, he wrote to his mentor when the New Guinea post was in the offing that, should he obtain the position, it would be his duty to plant there the 'Gordon approach' to native administration. Later in respect of his *Native Employment Ordinance 1892*, MacGregor enthused that Gordon would see 'how the doctrines of the Gordon school are applied', noting that the mere fact that it was highly appreciated by the Queensland Government suggested that 'after all, Qld may not be so bad as represented'.<sup>130</sup>

In 1898 MacGregor left British New Guinea to become Lieutenant Governor of Lagos, in southern Nigeria. His *Native Council Ordinances 1901* there set up provincial and district councils and a central Native Council to advise the colonisers on Yoruba traditions and to carry out day-to-day governance, thereby implementing a form of indirect rule which had been impossible in New Guinea, a process which would be made famous by his gubernatorial neighbour, Sir Frederick Lugard of Nigeria, in his 1922 book *The Dual Mandate in British Tropical Africa*.<sup>131</sup> Nonetheless, if the traditional rulers refused to do MacGregor's bidding, he had no compunction in replacing them. Ironically, given his fraught relationship with successive Queensland Governors, MacGregor ended his colonial career as Governor of Queensland in July 1914, before retiring to Scotland. In the year of his death there, he argued

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<sup>127</sup> Sara H Somer, 'Idealism and Pragmatism in Colonial Fiji: Sir Arthur Gordon's native rule policy and the introduction of Indian contract labor' (1984) 18 *The Hawaiian Journal of History*, 145.

<sup>128</sup> See Report of the *Royal Commission of inquiry into the present conditions, including the method of government, of the Territory of Papua, and the best means of their improvement*, 1907, xv. Indeed, MacGregor was concerned that he might be 'transplanting too much of British culture too rapidly and ... opening the country for the benefit of the 'sons of English gentlemen'', and he came to prefer Australian to British control of the Papuans: Joyce, n21, xv.

<sup>129</sup> *Cooktown Courier*, 2 October 1884, quoted in Hank Nelson, 'The Swinging Index: Capital Punishment and British and Australian Administrations in Papua and New Guinea, 1888-1945' (1978) 13(3) *The Journal of Pacific History*, 130.

<sup>130</sup> MacGregor to Gordon, June 1886, Stanmore Papers 49203, quoted in Chapman, n66, 304.

<sup>131</sup> Lewis H Gann and Peter Duignan, *The Rulers of British Africa 1870-1914* (Croom Helm, London, 1978), 210.

that the basis upon which native administration had been carried out under the British flag in the Pacific could be studied by anyone, by examining its history in Fiji and in Papua.<sup>132</sup>

In addition to his legal policy relating to the commission of offences by Papua New Guineans, MacGregor's wider approach included closing British New Guinea to large concessions and discouraging settlers, a policy which Joyce argues was based on that paternalistic interpretation of his task inherited from Gordon.<sup>133</sup> However, in his own words, MacGregor described the motive for the colonial project in somewhat mercenary terms – 'for our own ends' — and stressed that this object needed to always be borne in mind when dealing with the natives.<sup>134</sup> Writing in the 1960s, the journalist Osmar White considered that MacGregor's indigenous policy was based on 'the conventional sense of duty inculcated by the Colonial Office', but White concluded that MacGregor nonetheless lived up to his own dictum that one of the first duties of Anglo-Australian colonisers would be to deal 'justly and righteously' with indigenous New Guineans.<sup>135</sup> In considering MacGregor's tenure, Joyce concluded that, as it was expected that he would develop British New Guinea economically for the ultimate benefit of the Empire, his native policies had to be compatible with that end, so that it was only fair to bear in mind that he did not have free rein to choose and enforce those policies he might have preferred.<sup>136</sup>

### Becoming Australian

Historian of the colonial Pacific Patricia O'Brien argues that by the time of Federation on 1 January 1901, Australia's own version of the Monroe Doctrine meant that keeping Papua New Guinea and other territory adjacent to the mainland out of the grasp of competing imperialist powers overrode apprehensions about accepting the financial burden of administering British New Guinea.<sup>137</sup> Accordingly, the young Commonwealth agreed to take on this responsibility, and Prime Minister Barton moved in the House of Representatives in August 1901 that British New Guinea be accepted as a Territory of the new Commonwealth of Australia and that £20,000 a year be voted for five years as an interim measure to meet the costs of administration.<sup>138</sup> Finally, on 15 March 1902 Letters Patent were issued in London to

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<sup>132</sup> Interview with MacGregor, published after his death, 'Rule in the Pacific', *Sydney Sun*, 13 July 1919, in Roger B Joyce, 'Sir William MacGregor and Queensland' (1973) 9(4) *Journal of the Royal Historical Society of Queensland*, 103-104.

<sup>133</sup> Joyce, 'The British New Guinea Syndicate Affair of 1898', n63, 776.

<sup>134</sup> Patricia O'Brien, 'Remaking Australia's Colonial Culture?: White Australia and its Papuan Frontier 1901-1940', (2009) 40 *Australian Historical Studies*, 101.

<sup>135</sup> Osmar White, *Parliament of a Thousand Tribes*, (Heinemann, London, 1965), 48.

<sup>136</sup> Joyce, *Sir William MacGregor*, n21, 213.

<sup>137</sup> O'Brien, n81, citing Frank Crowley (Ed), *A Documentary History of Australia: Vol 3 Colonial Australia 1875-1900* (Thomas Nelson, Melbourne, 1980), 130-32, 146, 166.

<sup>138</sup> Australia, *Parliamentary Debates*, House of Representatives, 22 August 1901, 7092.

that effect, although the only practical consequence of ending Anglo-Queensland control was the substitution of the Governor-General for the Governor of Queensland.

However, O'Brien suggests that one can differentiate the Commonwealth's approach with reference to the importance of 'native welfare': the overall tone of Parliamentary debate continued that which had characterised MacGregor's rule in that Australian colonial power should benefit indigenous Papuans. Thus, Prime Minister Reid pledged that Australia would be 'friend and protector' to Papuans;<sup>139</sup> and Deakin declared that Papua belonged first to the Papuans, whose well-being should come 'in most respects even before that of men of our own colour'.<sup>140</sup> This concern was inextricably linked to the desire of the new nation to take its place as a civilised — and civilising — colonial power. Hugh Mahon, the Australian Labor Party Minister for External Affairs and friend of Hubert Murray, made this explicit by stating that it was in the national interest to show the world that Australians were prepared to deal 'gently, equitably and even generously' with the Pacific's indigenous peoples.<sup>141</sup> Managing the new Territory well was vital to the future interests of the Australian colonisers in their aim to be the paramount power in the south Pacific, a role which would 'inevitably increase the respect in which Australia will be held by other nations, and will also cause her voice to be listened to with deeper attention in the councils of the Empire'.<sup>142</sup>

In examining motivations in this rare period in which Papua registered on the political radar, O'Brien concludes that the Commonwealth politicians hoped for a new mode of colonial relations, a matured Australian national image which would replicate international standards of English-speaking imperial powers like the United States in the Pacific.<sup>143</sup> O'Brien cites American historians Frederick Cooper and Ann Laura Stoler to the effect that this repackaged imperialism has been described as an attempt by colonisers in the late nineteenth century to develop a new era of 'imperialist morality' which would replace the brutality of the existing colonial systems.<sup>144</sup> While the change in philosophy did little to change the colonised's experience of empire, imperialists reassured themselves that this new mode was based upon replicating in the colonies the accepted norms of modern European societies, namely, 'stable

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<sup>139</sup> O'Brien, n 77, 97.

<sup>140</sup> Australia, *Parliamentary Debates*, House of Representatives, 23 August 1906, 3345.

<sup>141</sup> Australia, *Parliamentary Debates*, House of Representatives, 4 August 1903, 3008.

<sup>142</sup> *Royal Commission of inquiry into the present conditions, including the method of government, of the Territory of Papua, and the best means of their improvement*, 1907, pp I-li.

<sup>143</sup> O'Brien, n 77, 96.

<sup>144</sup> Cooper and Stoler argue that by the 1880's, Europe's power elites were 'taking pains to reassure each other... that their coercion and brutality were no longer frank attempts at extraction, but reasonable efforts to build structures that were capable of reproducing themselves', such as 'stable government': Frederick Cooper and Ann Laura Stoler, *Tensions of Empire: Colonial Cultures in a Bourgeois World* (University of California Press, Berkeley, 1997), 31.

government, orderly commerce and wage labour, a complex structuring of group boundaries, racial categories, and the regulation of sexual and social interactions'.<sup>145</sup>

Regardless of lofty ambitions, in the cut and thrust of Parliamentary business controversy over proposals for the full prohibition of alcohol in the would-be Territory meant that a Bill to establish the basis for its administration languished in the Commonwealth Parliament.<sup>146</sup> This delay created an administrative vacuum in Port Moresby: although the Administrator was responsible to the Governor-General, the Commonwealth continued to disclaim any responsibility for the administration of Papua.<sup>147</sup> Prime Minister Deakin finally crafted a compromise on the prohibition issue, and the Bill received the Royal Assent on 16 November 1905, with British New Guinea becoming the Australian Territory of Papua. All laws passed by the Papuan Legislative Council were to be reserved for the assent of the Governor-General, and provision was also to be made for maintaining the laws in force, including local laws and customs to the extent that they were 'not repugnant to general principles of humanity or to the laws in force'.<sup>148</sup> By this date, MacGregor's successor as Administrator, Sir George Le Hunte, had been appointed Governor of South Australia. Another veteran of the colonial project in Fiji, Le Hunte had been appointed Gordon's Private Secretary in 1875 and served as Judicial Commissioner for the Western Pacific High Commission from 1883 to 1887. Determined to maintain and further MacGregor's policies, including controlling European settlement,<sup>149</sup> the drawn-out negotiations as to the colony's status and the foot-dragging in Federal Parliament meant that he spent much of his tenure outside New Guinea pleading for funding to keep the colony financially afloat — as early as 1900 he had warned the Queensland Governor that without some alternative source of finance the colony would soon be bankrupt to the tune of £7,000.

Once Le Hunte had left Port Moresby, the limitations of the remaining senior administrative staff came to the fore, marked by a litany of factionalism and infighting. It has been suggested that the only common qualification among MacGregor's staff had been a lack of relevant experience.<sup>150</sup> The title 'Interregnum' has fairly been bestowed upon the period between Le Hunte's departure and the appointment of Hubert Murray as Administrator of Papua in 1907,

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<sup>145</sup> O'Brien, n 77, 98.

<sup>146</sup> Herbert J Gibbney, 'The Interregnum in the Government of Papua, 1901–1906' (December 1966) 12(3) *Australian Journal of Politics and History*, 345.

<sup>147</sup> F J West, 'The Beginnings of Australian Rule in Papua' (March 1957) 9(1) *Political Science*, 39.

<sup>148</sup> Kerr, n14, 28.

<sup>149</sup> D Langmore, 'Le Hunte, Sir George Ruthven (1852–1925)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/le-hunte-sir-george-ruthven-7162/text12371> accessed 18 September 2013.

<sup>150</sup> Gibbney, n92, 342.



an appointment which came about as the result of a 1906 Royal Commission into Papua's administration appointed by the Commonwealth.<sup>151</sup> On 13 September 1906, the Royal Commissioners arrived in Port Moresby and travelled throughout the Territory for the next two months.<sup>152</sup> The Royal Commissioners were Col J A K Mackay, Member of the NSW Legislative Council; W E Parry-Okeden, formerly Police Commissioner of Queensland; and Charles Herbert, formerly Government resident and Judge in the Northern Territory, Member for the Northern Territory in the South Australian Parliament and subsequently long-serving deputy chief judicial officer for the Territory of Papua.<sup>153</sup> According to Herbert Gibbney, contemporary views of the Royal Commission varied between it being a 'cleaning of the Augean stables of British colonialism' by the young Commonwealth, or the handiwork of one 'ambitious man hungry for power', namely, one Hubert Murray.<sup>154</sup> Certainly, Murray's evidence to the Royal Commission savaged his colleagues in the Papuan Administration, and left open the way for his appointment. In their February 1907 Report, the Commissioners concluded that European settlement had been discouraged by a policy of native protection which allegedly worked to destroy the very natives it was designed to protect, by plunging them into 'a condition of peaceful sloth'. Therefore, awakening the indigenous Papuans from their 'lotus-eater's' dream was imperative to save them from 'the fate of most aboriginal races.'<sup>155</sup> The Commissioners also concluded that a 'vigorous forward policy, so far as white settlement is concerned' was timely.<sup>156</sup>

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<sup>151</sup> 'Interregnum' was an expression used disingenuously by Murray himself: see his *Papua or British New Guinea*, n48, 90.

<sup>152</sup> Its full title was 'British New Guinea—Royal Commission of inquiry into the present conditions, including the method of government, of the Territory of Papua, and the best means of their improvement'.

<sup>153</sup> The Letters Patent were issued on 27 August 1906 and the Royal Commission reported on 20 February 1907.

<sup>154</sup> Gibbney, n87, 341.

<sup>155</sup> *Report of the Royal Commission*, 1907, xiii.

<sup>156</sup> *Ibid.*, v.



THE ROYAL COMMISSION AT SAMARAI.

CENTRE—Col. the Hon. J. A. K. MACKAY, C.B., M.L.C. (Chairman).  
 RIGHT—Mr. Justice C. E. HERBERT (Commissioner). Mr. E. HARRIS (Secretary).  
 LEFT—Mr. W. E. PARRY-OKEDEN, I.S.O. (Commissioner). GEORGE BELFORD.

[Frontispiece.]

‘HAVING always felt a deep interest in the dark races, I was naturally anxious to visit Papua...’

The Royal Commissioners in action, from Colonel Mackay’s *Across Papua*.<sup>157</sup>

In his subsequent derring-do book on the conduct of the Royal Commission, *Across Papua*, Commission Chair Mackay noted that the European residents felt that Papua was being governed ‘solely as a close preserve for the native race’.<sup>158</sup> Murray saw his task as policing the violent excesses of power of white entrepreneurs, missionaries and government officers; therefore, any resort to violence on the part of the Administration was a failure of rational administration itself.<sup>159</sup> While Murray’s policy on indigenous issues can be viewed as a continuation of that of MacGregor — a ‘benevolent tradition’ of European development tempered by protective safeguards for the Papuans<sup>160</sup> — he enhanced this by a realisation that it required a systematic approach, rather than ad hoc responses to matters as they arose.

<sup>157</sup> Kenneth Mackay, *Across Papua, Being An Account Of A Voyage Round, And A March Across, The Territory Of Papua, With The Royal Commission* (Witherby & Co, London, 1909), Frontispiece.

<sup>158</sup> *Ibid.*, p viii.

<sup>159</sup> Andrew Lattas, ‘Humanitarianism and Australian Nationalism in Colonial Papua: Hubert Murray and the Project of Caring for the Self of the Coloniser and the Colonised’ (August 1996) 7(2) *Australian Journal of Anthropology*, 142-3.

<sup>160</sup> Legge, n57, 133-134. A P Elkin agreed - see his ‘The Place of Sir Hubert Murray in Native Administration’ (September 1940) 12(3) *The Australian Quarterly*, 28.

Thus he quoted with approval Sir Charles Bruce, author of *Broad Stone: Problems of Crown Colony Administration*, to the effect that the British had long maintained that they held their colonies in trust for their indigenous peoples' own benefit.<sup>161</sup> However, by the early 1920's, Murray had become acutely aware that this was not the policy being implemented in the neighbouring Mandated Territory of New Guinea, entrusted to Australia in the wake of the Imperial German loss in the First World War.

### The New Guinea Mandate

As noted above, in 1884 the German Empire formally took possession of the northeast quarter of the island of New Guinea and put its administration in the hands of a chartered trading company formed for that purpose, the *Neu Guinea Kompanie*. In 1899, the German Imperial Government assumed direct control of the territory, thereafter known as German New Guinea.<sup>162</sup> In addition to *Kaiser-Wilhelmsland* itself, New Pomerania (New Britain), the Bismarck Archipelago, the northern Solomon Islands, the Carolina Islands, Palau, Nauru, the Mariana Islands and the Marshall Islands comprised the colony of German New Guinea. In April 1886 the British and German Governments had agreed on the north-south boundary at Berlin; the Dutch and the British were not to agree on the western boundary until 16 May 1895. The dividing line between what was from 1884 to 1905 British New Guinea, and from 1906 to 1945 the Australian Territory of Papua on the one hand; and what was from 1884 to 1914 German New Guinea and from 1920 to 1945 the Mandated Territory of New Guinea on the other, was the latitude of 141° running from the east coast to the central ranges.

Shortly after the beginning of hostilities between the British and German Empires in August 1914, Australian troops moved into *Kaiser-Wilhelmsland* and nearby islands, the first Australians to fight and die in World War I. Despite German confidence being so high that they expected the return of New Guinea because of its nickel deposits and strategic position, as well as the cession of New Caledonia, by 21 September 1914 the isolated German forces surrendered.<sup>163</sup> German New Guinea remained under Australian military control throughout the War, during which period four systems of law theoretically operated: the Australian forces were subject to military law; relations between Australians and inhabitants of German New Guinea were determined by international law; and relations between inhabitants continued to be subject to those laws in force at the time of the surrender, as well as to customary law.<sup>164</sup>

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<sup>161</sup> Hubert Murray, *Review of the Australian administration in Papua from 1907 to 1920*, (London, 1920), viii.

<sup>162</sup> The other imperial power vaguely represented was France; on the criminal debacle that purported to be *Nouvelle France* on New Ireland, see Bill Metcalfe, 'Utopian Fraud: The Marquis de Rays and La Nouvelle-France' (2011) 22(1) *Utopian Studies*, 104.

<sup>163</sup> Peter Overlack, "'Bless the Queen and Curse the Colonial Office': Australasian Reaction to German Consolidation in the Pacific 1871-99' (September 1998) 33(2) *The Journal of Pacific History*, 151.

<sup>164</sup> Nelson, 'The Swinging Index', n72, 136.

Journalist Osmar White argued that the chequered history of the administration of the law must have seemed nonsensical to the indigenous New Guineans, in that 'the Government outlawed inter-tribal fighting, but had fought and expelled the Germans'.<sup>165</sup>

At the Paris Peace Conference in 1919, Prime Minister Hughes argued vociferously that the former German colony should be annexed to Australia on the grounds of national security, and as compensation for the Australian losses in the war. Indeed, Hughes claimed that the interests of Papua New Guineans themselves would be 'best conserved by direct annexation'.<sup>166</sup> There was some popular support for this proposal. In January 1919, the Melbourne *Argus* maintained that, while Australians were reluctant imperialists, the negotiators at Versailles should give the former German New Guinea to Australia, as 'control by Australia will be in the interests of Australia's safety'.<sup>167</sup> According to Hughes' own (self-serving) account, once British Prime Minister Lloyd George had suggested that if Australia persisted in annexation, he could not guarantee the use of the Royal Navy to protect New Guinea, Hughes '... having exhausted [his] stock of vituperative words in English ... fell back upon Welsh – the ideal language for giving full expression to the emotions and passions'.<sup>168</sup>

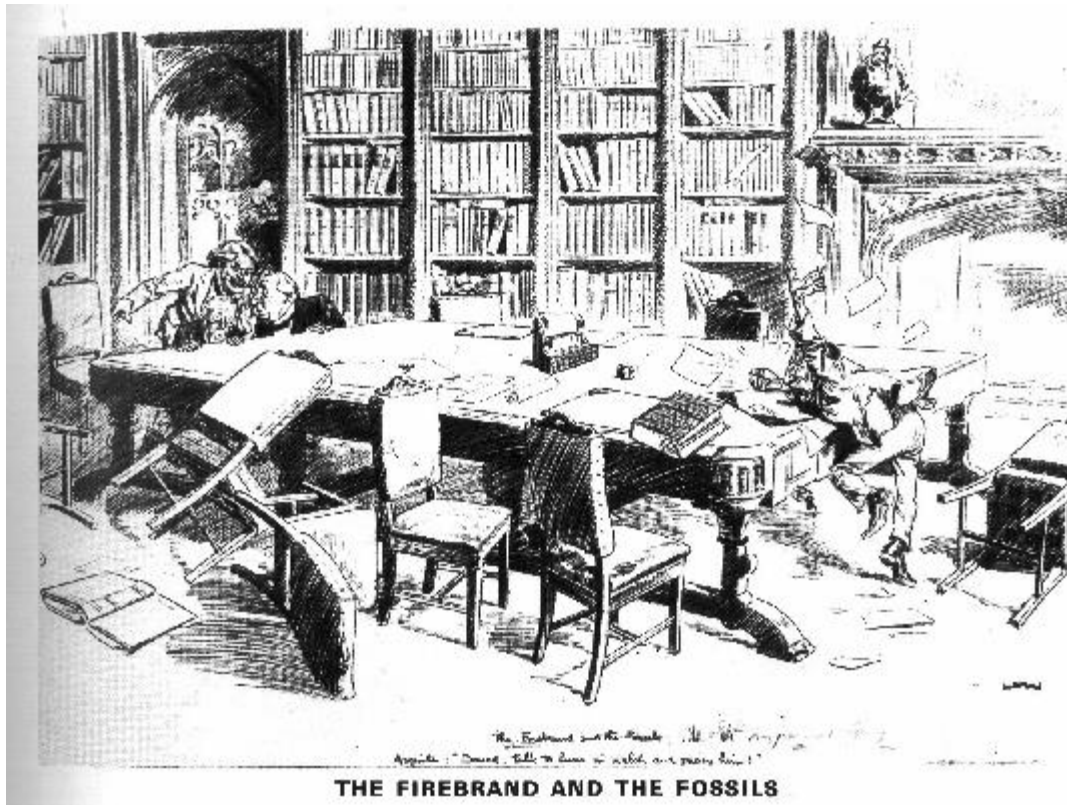
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<sup>165</sup> White, n78, 119.

<sup>166</sup> W M Hughes, quoted in W Hudson, *Billy Hughes in Paris: The Birth of Australian Diplomacy* (Thomas Nelson, Melbourne, 1978), 92-96.

<sup>167</sup> *The Argus*, 28 January 1919, <https://trove.nla.gov.au/newspaper/article/1423936?searchTerm=New%20Guinea&searchLimits=-state=Victoria||l-title=13||l-decade=191||l-year=1919||l-month=1>

<sup>168</sup> Quoted in W J Hudson, *New Guinea Empire: Australia's Colonial Experience* (Cassel Australia, Melbourne, 1974), 66.



'Asquith: Speak to him in Welsh, David, and pacify him!'

Australian Prime Minister W M Hughes in full flight at the Paris Peace Conference <sup>169</sup>

Despite the ferocity of Hughes' arguments for direct annexation, German New Guinea became a Class C Mandate under the auspices of the newly-formed League of Nations. The mandate system was in effect a compromise between the fifth of Woodrow Wilson's famous Fourteen Points for Peace, which required colonial claims to be considered with reference to the principle of self-determination and no outright annexation of enemy colonies on the one hand, and the victors' desire for just such annexation of the territories of the defeated German, Austro-Hungarian and Ottoman Empires on the other.<sup>170</sup> It was embodied in Article 22 of the Covenant of the League of Nations:

To those colonies and territories which as a consequence of the Late War ceased to be under the sovereignty of states which formerly governed them, and which are inhabited by Peoples not yet able to stand by themselves under the strenuous conditions of the modern

<sup>169</sup> D Low (1891–1963), *The Imperial Conference*, pen and ink, pencil; 43.2 x 61.2 cm, [nla.cat-vn2423061](https://nla.cat-vn2423061). David Low/Solo Syndication, <https://www.nla.gov.au/stories/blog/behind-the-scenes/2016/06/01/billy-abroad>

<sup>170</sup> 'The compromise represented by the Mandates System was that between the idealism of British radicals and socialists, given practical political force by the entry of the United States into the first world war, and the desire of the British, French and Dominion governments to retain unfettered possession of the colonial and Middle-Eastern territories that they had conquered': Andrew J Crozier, 'The Establishment of the Mandates System 1919-25: Some Problems Created by the Paris Peace Conference' (Jul 1979) 14(3) *Journal of Contemporary History*, 483.

world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

... [Therefore] the tutelage of such Peoples should be entrusted to advanced nations [to be] exercised by them as mandatories on behalf of the League.

American political scientist Ernst Haas argued that the very creation of Class C Mandates was designed to meet those territorial demands of the Empire Dominions personified by Hughes: not only were the claimed areas to be ruled as integral components of the respective Dominions, but their description was phrased as to apply particularly to New Guinea, Samoa, and South West Africa — without actually naming them.<sup>171</sup> Haas notes that more generous mandate provisions were supported by British Liberal and Labour politicians, but opposed by the French and the British Dominions. He concluded that, by recasting Wilson's mandate principle, Lloyd George succeeded in maintaining imperial harmony.<sup>172</sup>

In the Pacific, Australia finally gained responsibility for the northern half of the eastern portion of the island of New Guinea; New Zealand received Samoa, which it had been eyeing covetously since the 1870s;<sup>173</sup> and Japan received the scattered German possessions in the Caroline, Mariana and Marshall Islands, the former two having been bought by Germany from Spain in 1899. The Mandate document itself did not reach Australia until 6 April 1921. The following day, Governor General Lord Forster issued a Proclamation bringing the *New Guinea Act 1920* into force on 9 May 1921, from which date Military Administration ceased and Civil Administration was established. The most important Ordinance was the *Laws Repeal and Adopting Ordinance 1921* which provided that German laws should cease to apply to the Territory, substituting other statutes together with the principles and rules of common law and equity in force in England, as the basis of the law of New Guinea, subject to the modifications by Ordinance made by the Governor-General. Section 10 of the Ordinance specified that tribal institutions, customs and usages should continue as far as they were not repugnant to the general principles of humanity.<sup>174</sup>

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<sup>171</sup> 'Confronted with French and Dominion claims for annexation and with Lloyd George's scheme for a threefold distinction between various kinds of mandates, Wilson attempted to shame his adversaries into submission and failed. The redoubtable Mr. Hughes, backed by M. Clemenceau, proved too determined': Ernest B Haas, 'The Reconciliation of Conflicting Colonial Policy Aims: Acceptance of the League of Nations Mandate System' (November 1952) 6(4) *International Organization*, 533.

<sup>172</sup> *Ibid.*, p 535.

<sup>173</sup> The German takeover of Samoa had been viewed as 'New Zealand's Alsace', looted property that had to be regained: New Zealand Liberal Premier Richard Seddon, cited in Overlack, n101, 149.

<sup>174</sup> Melissa Demian notes that not only was this repugnancy provision maintained in the Constitution of the Independent State of Papua New Guinea, but that the repugnancy clause 'crops up with intriguing regularity in

Although Australia was required to report annually on the Mandated Territory to the League of Nations' Permanent Mandates Commission, the reporting obligations were not particularly onerous. Indeed, the main reason Australia's exercise of its mandate responsibilities escaped the opprobrium of the Commissioners was that it appeared quite enlightened when compared with that of the South Africans in former German South West Africa, resulting in 'a mandate managing reputation' that was much better than successive Commonwealth governments deserved.<sup>175</sup>

Chafing at even this limited oversight, Hughes did his utmost to ensure that the Papuan indigenous policies of Hubert Murray would not be put into effect into mandated New Guinea after the War. In establishing a Royal Commission in 1919 to consider such policies, Hughes felt obliged to appoint Murray as chairman, but saddled him with fellow Commissioners Atlee Hunt, head of the External Affairs Department, and Walter Lucas, the local manager of shipping company Burns Philp, which had owned land throughout the island as early as 1896, including the largest plantation in New Guinea at the time, and a quarter of all the trading stations.<sup>176</sup> The affection with which Burns Philp was regarded by Australian expatriates in the Mandated Territory is shown by the fact that it was known from its initials as 'Bloody Pirates'.<sup>177</sup> Three reports were presented: a majority report of all three members; the report of Atlee Hunt and W H Lucas; and that of Murray. Unsurprisingly, the Commission's majority report opposed amalgamating New Guinea and Papua; declared that indigenous interests should not override economic development; and prescribed the expulsion of all Germans and the expropriation of their assets.<sup>178</sup> Murray warned that Australia should not expect easy profits from New Guinea, noting that as recently as 1913 colonial trade there had represented only one half of one percent of metropolitan Germany's imports and exports.<sup>179</sup>

New Guinea's first civil administrator, Brigadier-General Evan Wisdom, took over from the Australian military administration in March 1921. Unlike Murray in Papua, Wisdom had no qualifications of colonial administration – a former member of the Western Australian Parliament with a distinguished First World War military career, he most recently had been

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this unaltered state in the legal utterances of Papua New Guinean judges': Melissa Demian 'On the Repugnance of Customary Law' (2014) 56(2) *Comparative Studies in Society and History*, 509.

<sup>175</sup> Roger C Thompson, 'Making a Mandate: The Formation of Australia's New Guinea Policies 1919-1925', (June 1990) 25(1) *The Journal of Pacific History*, 83.

<sup>176</sup> Joyce, 'The British New Guinea Syndicate Affair of 1898', n63, 778.

<sup>177</sup> Nelson, *The Swinging Index*, n72, 58.

<sup>178</sup> Parliament of the Commonwealth of Australia *Interim and final reports of the Royal Commission on late German New Guinea*, 1920, 81.

[https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/HPP052016004747/upload\\_pdf/HP052016004747\\_1920-21\\_29.pdf;fileType=application%2Fpdf#search=%22publications/tailedpapers/HPP052016004747%22](https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/HPP052016004747/upload_pdf/HP052016004747_1920-21_29.pdf;fileType=application%2Fpdf#search=%22publications/tailedpapers/HPP052016004747%22)

<sup>179</sup> *Ibid.*, 81.



chair of the Central War Gratuities Board.<sup>180</sup> Despite Wisdom's efforts at amelioration, the Mandate's sacred trust was quickly overshadowed by 'the assumed rights of returned servicemen and the greed of individuals and companies',<sup>181</sup> to such an extent that Murray feared the pressure on the Commonwealth Government of Australian businessmen who advocated also the exploitation of Papua.<sup>182</sup> Hughes had made his Nationalist Party's New Guinea policies clear in a policy speech in the course of the 1922 federal elections:

After a great struggle we were given the Mandate, and with it great and ever growing responsibilities...Whilst the value of the territory to Australia is primarily one of Defence, the Nationalist Government is pursuing a broad National policy which promises great economic advantages to Australia and the Islands generally.<sup>183</sup>

However, the Australian Government did not disregard its Mandate responsibilities altogether. In 1924 Colonel John Ainsworth, retired Chief Native Commissioner of Kenya, was appointed to tour New Guinea to report on administrative arrangements, especially as they affected indigenous New Guineans. Wisdom at first appreciated Ainsworth's work, but eventually expressed frustration with his egoism and the fact that Ainsworth was 'obsessed with the idea that everything revolves round Kenya'.<sup>184</sup> Ultimately, Ainsworth wrote a damning report about the 'often so capricious administration of justice, the poor quality of some of the district officers and the absence of any overall administration policy'.<sup>185</sup> The report, tabled in the Commonwealth Parliament in September 1924, criticised almost every function of the New Guinea Administration. Moreover, he noted that the Europeans occupying the lower-grade clerical positions in New Guinea were not, as a rule, of a class that 'should be employed by the Government in a black-man's country',<sup>186</sup> a position he contrasted with colonial policy in Britain's African colonies. However, even Murray — who agreed with much that Ainsworth said — was amazed at observations about New Guineans which seemed to put them centuries in advance of Papuans, and at Ainsworth's inability to appreciate Australian opposition to Asian migration and the financial limitations of the New Guinea administration.<sup>187</sup> Nonetheless,

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<sup>180</sup> R McNicoll, Wisdom, Evan Alexander (1869–1945), *Australian Dictionary of Biography*, <http://adb.anu.edu.au/biography/wisdom-evan-alexander-9160>

<sup>181</sup> P Cahill, 'A Prodigy of Wastefulness, Corruption, Ignorance and Indolence': The Expropriation Board in New Guinea 1920 – 1927' (June 1997) 32(1) *The Journal of Pacific History*, 24.

<sup>182</sup> O'Brien, n101, 106, citing Hubert Murray to Gilbert Murray, 21 September 1921.

<sup>183</sup> W M Hughes, *Speech delivered at North Sydney, NSW, October 20th, 1922*, Australian Federal Election Speeches, <https://electionspeeches.moadoph.gov.au/speeches/1922-billy-hughes>

<sup>184</sup> Thompson, n111, 79.

<sup>185</sup> *Ibid.*, 79–80.

<sup>186</sup> Parliament of the Commonwealth of Australia, *Report on administrative arrangements and matters affecting the interests of natives in the Territory of New Guinea*, 10 September 1924, 12.

<sup>187</sup> Edward P Wolfers, *Race relations and colonial rule in Papua New Guinea* (Australia and New Zealand Book Co, Sydney, 1975), 90.



with respect to the legislative framework within which the Administration dealt with indigenous issues, Edward Wolfers argues that New Guinea's *Native Administration Regulations* were so similar to those in Papua from 1923 onwards that, by the onset of World War II, Murray's 'paternalism and interventionist protectionism' had gradually come to New Guinea.<sup>188</sup>

## Conclusion

We have seen in this chapter how Anglo-German imperial rivalries played out in the south west Pacific to force the hand of Whitehall to acquire what was to become the young Australian Commonwealth's external Territory of Papua. The influence of the Western Pacific High Commission and the potential of the possibly unique Anglo-Queensland condominium over the Protectorate of British New Guinea – the First Grandchild of Empire – might have been expected to result in a distinctive mode of colonial governance there. However, the attendant processes fell within that cautious and parsimonious expansion of legal sovereignty over the Queen's subjects which characterised British imperial expansion in the mid- to late-nineteenth century. The later territorial 'acquisition' of bordering German New Guinea was effectively an Australian spoil of war, although arguably fought for more forcefully by Prime Minister W M Hughes in the Peace Conference than by the Australian troops on the ground.

Our main interest in the establishment of what were to become Australian colonial administrations in both Territories is whether their exceptional nature had a formative influence on the imposed legal system which was to administer justice among the Territories' indigenous populations. One factor which provides the backdrop to the creation and implementation of a legal structure for the administration of justice in Papua and New Guinea was the absence of the Territories from Australian political discourse. This was the case other than at times of upheaval, which effectively were limited to the jingoism over Imperial German ambitions in the 1880s; sensational press coverage of mistreatment of indigenous workers in Mandated New Guinea in the 1920's;<sup>189</sup> and the existential threat of the Japanese invasion in 1942. This gave successive Administrators the latitude to module and implement policy.

Inspired by the example of Sir Arthur Gordon in Fiji, Sir William MacGregor, aided by Sir Francis Winter as chief judicial officer, maintained in Papua a connection with the liberal British imperial ideology of the early nineteenth century. With one of its sources the Abolition Movement, this approach was closely tied to the ideals of trusteeship and improvement, which 'taken together conferred a moral imperative to the imperial mission'.<sup>190</sup> Thus, the

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<sup>188</sup> *Ibid.*, 90.

<sup>189</sup> Thompson, n111, 83-85.

<sup>190</sup> See, e.g., Karuna Mantena, 'The Crisis of Liberal Imperialism', (May-August 2010) 11 *Politique, culture, société*, [https://www.histoire-politique.fr/documents/11/dossier/pdf/HP11\\_Mantena\\_pdf\\_200510.pdf](https://www.histoire-politique.fr/documents/11/dossier/pdf/HP11_Mantena_pdf_200510.pdf). Note however,

Administration tended to put into effect Prime Minister Alfred Deakin's declaration that Papua belonged first to the indigenous Papuans.<sup>191</sup>

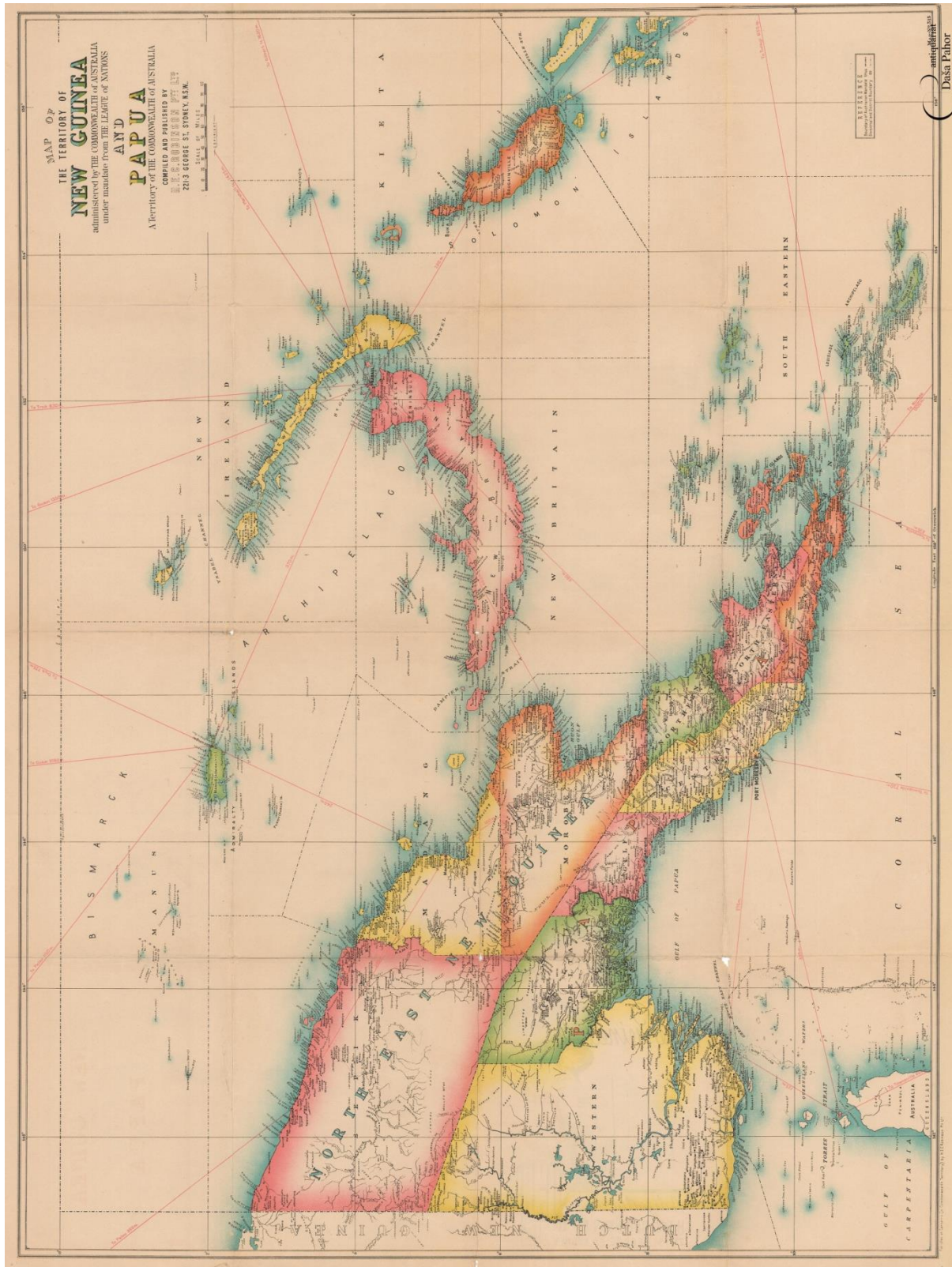
The small European community in Papua chafed at the limitations put on their ability to exploit the Territory's 'native resources'. However, unlike other parts of the Empire, this community was never of sufficient numbers or political weight to effectively counteract the Administration's policies. In New Guinea, economic interests more effectively pressured decision-makers at the Commonwealth level for a freer hand. However, as we have seen, the paternalistic legislative regime which governed the lives of indigenous Papuans had – almost by a process of osmosis – came to apply in the Mandated Territory as well.

In the following chapter we shall see how, influenced by enlightened native governance views, and with little oversight from the Commonwealth, Hubert Murray achieved what became known as 'Murray System'. This was built on the basis of the control made possible by the Native Ordinances in Papua, and effectively, in New Guinea. This would address practically the mischief of the beliefs in the malevolent practice of sorcery in the Territories until the political and legal strictures finally came to be influenced by global processes of de-colonisation.

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that Mantena is arguing that in administrations such as that of Cromer in Egypt and Lugard in Nigeria, the day of liberal imperialism had passed.

<sup>191</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 23 August 1906, 3345.



The cartographical spread of civilisation -  
Mandated New Guinea and the Commonwealth Territory of Papua in 1930.<sup>192</sup>

<sup>192</sup> HEC Robinson, Sydney. <https://fineartamerica.com/featured/map-of-papua-new-guinea-1930-andrew-fare.html>

# Chapter Three — A ‘benevolent type of police rule’: the colonial administration and its understanding of sorcery

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In a country of which it has been said that it provides administrative difficulties probably unequal in the history of the Empire, he governs, some would say that he reigns, with a mastery and a devotion worthy of most outstanding success.<sup>1</sup>

## Introduction

This Chapter takes up where we left the observation that Hubert Murray’s policies in Papua had come also to be applicable in Mandated New Guinea, in enforcing the control over indigenous lives by way of the Native Regulation first established by William MacGregor. It therefore examines the relationship between the colonial administration and sorcery as a social phenomenon. In doing so, the Chapter contextualises the attitudes and actions of key players in the development and application of public policy in Papua and New Guinea. This reflects the key position of the thesis that the policy vacuum at the highest levels of Australian government magnified the opportunities for leading individuals to have a greater impact on the administration of the law.

Murray prided himself on being receptive to advances in anthropology, but only to the extent that they did not impinge upon good government, and the maintenance of order. As sorcery could not be so characterised, its practice would not be tolerated by the Administration. It is important therefore to consider to what exactly were Murray and the agents of the colonial administration in the field so bitterly opposed. Accordingly, we will examine the ‘mischief’ at hand, that is the nature of sorcery beliefs, as studied by waves of European anthropologists. The most famous of these was Bronisław Malinowski in his famous works on the role of sorcery and the nature of law among the Trobriand Islanders, *The Argonauts of the Western Pacific* (1922) and *Crime and Custom in Savage Society* (1926).

In the 1960’s the Administration, — effectively headed by Minister for Territories Paul Hasluck from 1951 to 1963 — felt external political pressures to decolonise. In order to situate the

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<sup>1</sup> French Missionary Fr Andre Dupeyrat on Hubert Murray in his leading 1935 work on the Yule Island mission, *Papouasie: Histoire de la Mission 1885-1935*, quoted in A P Elkin, ‘The Place of Sir Hubert Murray in Native Administration’ (September 1940) 3 *The Australian Quarterly*, 35.



ongoing legislative response to sorcery and sorcery-related crime, we will then observe the slow and faltering steps toward a responsible and representative legislature in the Territory from the 1950's to the early 1970's.<sup>2</sup>

### The establishment of the 'Murray System'

In 1904 Hubert Murray had been appointed as a judge in what was still the Crown Colony of British New Guinea; after the 'Interregnum' he would be Lieutenant-Governor and Chief Judge of Australian Papua until his death there in 1940. Murray maintained that in taking over the administration of Papua in 1906, the Commonwealth Government had set a consistent policy aim of the welfare of the indigenous Papuans as its chief objective, and he unambiguously held that it was his duty to the Commonwealth to put this policy into practice.<sup>3</sup> He did not underestimate the magnitude of the endeavour, given that in 1912 he noted that even minor reforms should not be allowed to take priority when British subjects were 'roasting one another alive within twenty-four hours of Port Moresby'.<sup>4</sup> Nonetheless, the very fact that during the period of his Lieutenant-Governorship there were eight Governors-General of the Australian Commonwealth tends to suggest not merely that he was considered the right man for the job, but that that job was not coveted by any other Vice-Regal aspirants.

In taking on the role, Murray knew that there was no Papuan apparatus of 'government' through which he might run an administration according to Frederick Lugard's famous concept of 'indirect rule', expounded in his 1922 work *The Dual Mandate in Tropical Africa*.<sup>5</sup> Lugard and other colonial administrators and theorists envisaged a form of colonial rule which could shun recourse to violence against indigenous populations, as it would employ their ongoing obedience to traditional authorities.

Lugard's *Dual Mandate* proposed Britain's role in her tropical African colonies as one of trustee for the advancement of the subject races, and for the development of the material resources of the colonial territory for the benefit of mankind. According to Lugard, the key to success was administrators who were the products of the English system of public schools and great universities, which produced 'an English gentleman with an almost passionate conception of

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<sup>2</sup> The nature of colonial legislatures is one the key matters in academic consideration of the connection between the common law and the later 'democratic credentials' of ex-colonies: see, e.g., Gita Subrahmanyam, 'Ruling Continuities: Colonial Rule, Social Forces and Path Dependence in British India and Africa', March 2006 44(1) *Commonwealth & Comparative Politics*, 84 and Ronald J Daniels, Michael J Trebilcock, & Lindsey D Carson, 'The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies' (Winter 2011) 59(1) *The American Journal of Comparative Law*, 111.

<sup>3</sup> Murray to Minister for Home and Territories, 24 May 1928, quoted in *ibid.*, 28.

<sup>4</sup> *Ibid.*, 27.

<sup>5</sup> F Lugard, *The Dual Mandate in British Tropical Africa*, (William Blackwood, Edinburgh, 1922).

fair play, of protection of the weak, and of 'playing the game'.<sup>6</sup> These were the chaps whom Lugard felt would not fall prey to that 'subtle moral deterioration which the exercise of power over inferior races produces in men of a different type and which finds expression in cruelty'.<sup>7</sup> Of course, Lugard had attended Rossall School 'for the sons of Clergymen and others' in Lancashire, founded in 1844 as a sister school to Marlborough College.<sup>8</sup> Although unlikely to take the same view of Lugard's alleged results of such an education, Eric Hobsbawm maintains that in the wake of the *Public Schools Act 1868*, schools such as Marlborough and Rossall were given free rein to 'elaborat[e] that anti-intellectual, anti-scientific, games-dominated Tory imperialism which was to remain characteristic of them'.<sup>9</sup>

Whilst Murray was familiar with Lugard's work,<sup>10</sup> he found little in it of assistance in Papua, given that the indirect rule requires structures through which it could be effected; the limited concept there even of chieftainship meant that every district was its own unique problem for the administration to solve, such that the entire territory had to be occupied step by step.<sup>11</sup> He therefore adopted Sir Donald Cameron's practical view that, where there was no recognisable administrative or legal authority, direct rule was the only option.<sup>12</sup> This contextualises the immediacy of the interaction between colonisers and colonised which characterised Murray's rule, which he described in his 1935 publication, *The Machinery of Indirect Rule in Papua*. Stressing the 'Exceptional Case of Papua', Murray argued that in the absence of any 'native Courts or laws of any kind' the colonial Administration had been required to:

...establish Courts and apply laws of our own; Direct Rule, it must be admitted of the most barefaced nature... However...we show our loyalty to the Indirect method by giving full effect to native custom, as far as this is possible'.<sup>13</sup>

Despite this expression of loyalty, we will see that Murray had no compunction in deciding which customs were to be given effect and which were to be proscribed, what cultural studies

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<sup>6</sup> Lugard, n 4, 132. Morris and Read note that the successful candidate appointed to the administrative service of the Colonial Office, 'would in the vast majority of cases have been both to a public school and to one of the older universities, and the ideal candidate combined a distinguished athletic record with a creditable academic performance': H F Morris and James S Read (Eds), *Indirect Rule and the Search for Justice: Essays in East African Legal History* (Indirect Rule and the Search for Justice), (Clarendon Press, Oxford 1972), 11.

<sup>7</sup> Lugard n 4, 132.

<sup>8</sup> Margery Perham, Lugard's official biographer, maintains that at Rossall, Lugard 'encountered high winds and a hard life, some bullying and the anguish of being short of pocket-money, but got a good classical education': Margery Perham, 'Lord Lugard: A Preliminary Evaluation' (July 1950) 20(3) *Africa*, 230.

<sup>9</sup> Eric Hobsbawm, *Industry and Empire: From 1750 to the Present Day* (Penguin, Rev Ed, London, 1999), 147.

<sup>10</sup> Hubert Murray, *Native Administration in Papua*, (Native Administration) (Port Moresby: 1929), 3.

<sup>11</sup> Hubert Murray, *The Scientific Aspect of the Pacification of Papua*, (Port Moresby, 1932), 8. See also Murray, *The Machinery of Indirect Rule in Papua* (*Machinery of Indirect Rule*), (Port Moresby, 1938), 2.

<sup>12</sup> Murray, *Machinery of Indirect Rule*, n 11, 2-3.

<sup>13</sup> Nonetheless, Murray noted that Sir Harry Moorehouse in the neighbouring British Solomon Islands maintained 'preconceived notions for grafting on the Solomon Islands the principles of Indirect Government borrowed from experience in Nigeria': *ibid.*, 2-3.

academic Ben Dibley has described as the line between the tolerable and the intolerable, with the latter falling within the colonial rubric of 'repugnant to humanity', and therefore having to be suppressed.<sup>14</sup> Accordingly, Murray noted in *The Machinery of Indirect Rule* that the punishment of sorcery was one of the few instances where the law had been compelled to recognise native custom. This was solely 'to prevent, to some extent, the retaliatory violence' caused by its practice.<sup>15</sup>

In putting more generally his version of the Commonwealth's indigenous policies into effect, Murray expressed gratitude that some of his inherited staff had learnt from MacGregor and Le Hunte to avoid that assumption of superiority which was 'so fatal to anything like sane administration'.<sup>16</sup> However, these would undoubtedly have been an enlightened few. Attitudes among European residents generally were typified by a letter to the *Papuan Times* of 13 March 1913, in response to an earlier article entitled 'Prestige of the White Race':

Insolence from native servants is not tolerated outside of Port Moresby, but here in port a paternal Government seems to indirectly encourage the native, unintentionally no doubt, but none the less damaging on that account. Some of the Government officials do not seem to be able to see beyond their billets.<sup>17</sup>

In Mandated New Guinea — perhaps taking its lead from *The Bulletin's* banner, 'Australia for the White Man' — from 1925 to 1942 the *Rabaul Times* had as its slogan, 'The white man's most valuable weapon in this country is the prestige of the white race'.<sup>18</sup> Murray remained unperturbed and unprovoked by such views, musing that it was interesting in Papua to 'find oneself one of a group of white men sitting in easy chairs and smoking cigarettes in a shady verandah... railing at the indolence of the natives who are toiling in the sun outside'.<sup>19</sup>

Nonetheless, racial tensions were inherent in what even Murray acknowledged was effectively a garrison settlement, upholding the 'cause of civilisation'.<sup>20</sup> This necessarily impacted upon the administration of justice. The use of collective punishment was a hallmark of frontier colonialism which Murray as Administrator opposed, instead referring matters to the processes of the common law, and thereby distinguishing Papua from contemporary practice

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<sup>14</sup> Ben Dibley 'Assembling an Anthropological Actor: Anthropological Assemblage and Colonial Government in Papua' (2014) 25(2) *History and Anthropology*, 263.

<sup>15</sup> Murray, *Machinery of Indirect Rule*, n 8, 2.

<sup>16</sup> *Ibid.*, p 4.

<sup>17</sup> Hank Nelson, *Taim Bilong Masta*, (ABC Books, Sydney: 1982), p 167.

<sup>18</sup> Hank Nelson, *Papua New Guinea: Black Unity or Black Chaos?* (Middlesex, UK: Penguin Books, 1972), p 70.

<sup>19</sup> *Annual Report for Papua 1921-22*, 8.

<sup>20</sup> Hubert Murray, 4 July 1930, quoted in Hank Nelson, 'The Swinging Index: Capital Punishment and British and Australian Administrations in Papua and New Guinea, 1888-1945' (The Swinging Index), (1978) 13(3) *The Journal of Pacific History*, 142-143.

in the ongoing 'colonial' frontiers on the Australian mainland.<sup>21</sup> However, although he was also an opponent of capital punishment generally, Murray considered its use in Papua necessary to uphold the slow progress of civilisation, and he was twice restrained from carrying out capital sentences during the brief Prime Ministership of James Scullin. In his study of capital punishment in Papua and New Guinea, historian Hank Nelson notes that Murray advised successive Commonwealth Ministers that the murder of a European should be punishable by hanging, and that the rape or attempted rape of a European woman likewise; but that the murder of a Papuan need not result in a capital sentence unless there were exceptional circumstances.<sup>22</sup>

Indeed, the only Papuans hanged for crimes against other Papuans had either been government office holders or murderers of office holders: between 1888 and 1914 only three Papuans were hanged for offences against other Papuans.<sup>23</sup> Hank Nelson considers that Murray was obliged to implement harsher policies than he would otherwise have supported, in order to avert even more savage reprisals from the white community and avoid 'the horrors of a racial war', and notes that whereas in Mandated New Guinea hanging was a method to secure government control, that was not the case in Papua.<sup>24</sup> Lattas suggests that Murray opposed the thesis of natural born slaves, which influenced some colonial theorists, and attributes this opposition to the Catholicism to which Murray had returned by the time of his return from the Boer War. Nonetheless, when German Catholic Missionaries pleaded for an exemption from property expropriation in Mandated New Guinea, Murray objected that, as long as they could form a German outpost with 'their activities cloaked by their missionary garb', New Guinea could never be a 'peaceful, harmonious and prosperous colony of the Commonwealth'.<sup>25</sup>

Murray answered white critics of his protective indigenous policy by citing Britain's own imperial standards as the basis for the Australian practice of colonialism.<sup>26</sup> To bolster the rational basis of his indigenous policies he turned to the one field of practical study which he believed shared his aim of the ultimate unity of the human race, namely anthropology. It is

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<sup>21</sup> See P O'Brien, 'Remaking Australia's Colonial Culture?: White Australia and its Papuan Frontier 1901-1940', *Australian Historical Studies*, Vol 40, 2009, p 104, citing Murray's experience during the Boer War. These also solidified his position against collective punishments: C D Rowley, *The Australians in German New Guinea 1914 – 1921* (Melbourne: Melbourne University Press, 1958), p 192; West, *Hubert Murray*, 2-9.

<sup>22</sup> Nelson, n20, 142-143.

<sup>23</sup> *Ibid.*, 135

<sup>24</sup> *Ibid.*, 152.

<sup>25</sup> P Cahill, "'A Prodigy of Wastefulness, Corruption, Ignorance and Indolence": The Expropriation Board in New Guinea 1920 – 1927' (June 1997) 32(1) *The Journal of Pacific History*, 6.

<sup>26</sup> Hubert Murray, *Papua of To-day or an Australian Colony in the Making*, (PS King, London: 1925), viii.



important to note here that Murray considered that the British form of colonialism was the only one capable of being practised 'scientifically', as argued in his 1932 publication, *The Scientific Aspect of the Pacification of Papua*. Murray's direct involvement in the anthropological field is further evidenced by his leadership of the Australasian delegates to the 1926 Tokyo Pan-Pacific Science Congress, and his presidency of the meeting of the Australian and New Zealand Association for the Advancement of Science in 1932. Anthropology would provide Australian colonial administrators with the sense that their practices were built upon this basis of universality and rationality.

### The Murray Administration and anthropology

There is a considerable corpus of material on Murray's adherence to the tenets of contemporary anthropology, with observers concluding that he simply used it to bolster his own opinions and give an additional veneer of intellectual respectability to his administration.<sup>27</sup> Nonetheless, by the time Malinowski's *Crime & Custom* was published in 1926, Murray had very publicly embraced the view that anthropologists could usefully contribute to the Australian colonial administration. While he took from the functionalists' view of anthropology an overarching concept of the Papuan as 'trapped within interdependent frameworks of thought',<sup>28</sup> he was not averse to using these frameworks when it suited him. In the wake of a small-pox scare in 1912-1913, he told the local people that a very dangerous and powerful sorcerer had conjured up a very bad sickness, but that as the government was stronger, when the sorcerer saw its mark – i.e., the small-pox injection – he would realise he was beaten and would give up, 'foiled and baffled',<sup>29</sup> thereby channelling the beliefs into the service of what the Administration viewed as the public good. Australian historian Ben Silverstein posits that Murray may in this instance have been adopting Lugard's suggestion in the *Dual Mandate* that, when introducing new concepts, 'patient explanation... will be well rewarded, and new

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<sup>27</sup> See especially G Gray, "'Being Honest to my Science": Reo Fortune and JHP Murray, 1927-1930', (1999) 10(1) *The Australian Journal of Anthropology*, 56. Anthropologists generally did not impress Murray, and he dismissed the speculative, evolutionary anthropology of the time as 'purely fantastic; the alleged facts being unsupported by evidence, and the inferences forced': F West (Ed), *Selected Letters of Hubert Murray* (Oxford University Press, Melbourne, 1970), 53. In her 1977 MA thesis at the Australian National University, *The Career of F E Williams, Government Anthropologist of Papua, 1922-1943*, Deidre J F Griffiths claimed that Murray's chief medical officer, W M Strong, was appointed to the role of government anthropologist merely so that Murray could say that he had an anthropologist. Similarly, J E Cashen, in a 1973 BA Hons thesis at the University of Adelaide, *F E Williams: The Dilemmas of a Government Anthropologist*, took the view that Murray's eagerness for an anthropologist was 'mere eye-wash' to allow him to present his own 'common-sense' views as 'scientific'. See the discussion in I C Campbell, 'Anthropology and the Professionalisation of Colonial Administration in Papua and New Guinea', (1998) 33(1) *The Journal of Pacific History*, NN 9, 72.

<sup>28</sup> Andrew Lattas, 'Humanitarianism and Australian Nationalism in Colonial Papua: Hubert Murray and the Project of Caring for the Self of the Coloniser and the Colonised' (August 1996) 7(2) *Australian Journal of Anthropology*, 154.

<sup>29</sup> Papua, *Annual Report for 1919-1920*, 106.

methods may often be clothed in a familiar garb'.<sup>30</sup> Silverstein argues that the result of Murray's efforts was 'the co-option of indigenous narratives into the colonial state', in the absence of indigenous chiefs or political systems.<sup>31</sup>

As early as 1916 Murray sought the assistance of a government-appointed anthropologist; however, the role of any successful applicant ultimately would be to reconcile indigenous Papuans to colonial rule by giving the administration the tools to 'do what we want by methods which will be the least distasteful to the natives concerned'.<sup>32</sup> To effect this, in the 1920's Government Anthropologists were appointed to both Papua and New Guinea; a cadet scheme was introduced; and a Chair of Anthropology was established at the University of Sydney, so that the cadets and senior colonial staff could receive instruction in anthropology in relation to native administration. The focus of the course was the eminently practical one of 'the application of anthropological methods to Colonial administration and the effects of the contact of Europeans with native peoples',<sup>33</sup> to further Murray's view of the potential for anthropology to illustrate how extant indigenous social practices might be tailored to normalise and stabilise the colonial order.

In 1922 Murray appointed F E Williams as Assistant Government Anthropologist,<sup>34</sup> sending him to the Purari in the Gulf of Papua to investigate what became known as the 'Vailala Madness'. This had emerged in 1919 as what would seem to be the first manifestation of a Melanesian Cargo Cult, in which the Elema people irrupted into violence due to a cult which promised that the dead — who were white — would 'return from the west on a ship or aeroplane laden with guns sufficient to expel the Europeans from Papua and with goods sufficient to establish a paradise on earth'.<sup>35</sup> Williams' remit was to advise Murray on questions of practical administration, thereby assisting the Administration in 'dovetailing existing customs into the new civilisation'.<sup>36</sup>

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<sup>30</sup> See Lugard, n4, 9.

<sup>31</sup> Ben Silverstein, 'Indirect Rule in Australia: A Case Study in Settler Colonial Difference', in Fiona Bateman & Lionel Pilkington, *Studies in Settler Colonialism: Politics, Identity and Culture*, (Palgrave Macmillan, London, 2011), 98-99.

<sup>32</sup> Campbell, n22, 71.

<sup>33</sup> R Firth, 'Anthropology in Australia 1926-1932 — And After' (September 1932) 3(1) *Oceania*, 1-2.

<sup>34</sup> Williams described government anthropologists as 'rare birds among that large genus of queer birds to which anthropologists in general are admitted to belong': 'Creed of a Government Anthropologist, Presidential Address to the *Australian and New Zealand Association for the Advancement of Science*, January 1939' (Oct 1940) 34 *Mankind*, 396.

<sup>35</sup> A Belgrano van Fossen, 'The problem of evil in a millennial cult: the case of the Vailala Madness' (November 1979) 2 *Social Analysis*, 72.

<sup>36</sup> John Hubert Murray, *Anthropology and the Government of Subject Races*, (Port Moresby, 1921), 14.

Williams went on to make detailed studies of traditional Papuan society, undertaking extensive field work which required long periods of village life. He concluded that the means of maintaining the indigenous 'will to live' was the substitution of traditional practices with Christian rituals and sport; a policy which found support in a functionalist approach which aimed to make social change acceptable on local terms.<sup>37</sup> This resulted in one instance in which Papua fits neatly in the pattern of colonial administration throughout the Empire, as it has been argued that sport was the British Empire's 'chief spiritual export', serving in the capacity of political symbol, moral metaphor and cultural bond'.<sup>38</sup> Williams certainly sought to transfer the traditional 'competitive group spirit' to games of cricket and football, often played with 'such commendable fury as to recall the head-hunters' raid, without, as far as our records go, any heads being actually severed'.<sup>39</sup> For his part, in spreading Anglo-Australian concepts of law and order, Murray acknowledged that some of the older Papuans might regret 'the more stirring days of their youth'. As the Administration had stopped all the excitement attached to raiding, etc., the colonisers had to do their best to convert 'the disappointed raider into a more or less industrious husbandman'.<sup>40</sup>

Overall, however, Williams considered that functionalism could not provide the colonial administrator with the necessary moral criteria for judging which traditional practices could not be modernised, but had to be eradicated. In a 1935 publication on native education in Papua he bemoaned those who seemed to take the view that native institutions were worthy of preservation in their own right.<sup>41</sup> His official view was that, as the colonisers had 'shattered the Neolithic complacency' of the Papuan and swept him off his feet, the least they could do was set him right again.<sup>42</sup> It would not be long before Williams' own complacency about the immutability of the Australian colonial presence in Papua and New Guinea would also be shattered, beyond any hope of repair.

### The Administration and Sorcery

What is unarguable about Murray's lengthy tenure is that when the demands of anthropology and those of public order conflicted, as a good colonial administrator, public order always took precedence. Therefore, determining whether or not a traditional custom should be allowed to continue was always predicated upon to what extent it was viewed by the coloniser as

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<sup>37</sup> See Firth, n33, 4.

<sup>38</sup> John A Mangan, 'In pursuit of perspective: the other empire of sport – cultural imperialism for confident control and consequent legacies' (2011) 28(17) *The International Journal of the History of Sport*, 2611.

<sup>39</sup> F E Williams, *The vailala madness and other essays*, (University of Queensland Press, Brisbane, 1976), 223.

<sup>40</sup> Murray, *Native Administration*, n10, 20.

<sup>41</sup> Williams noted that Murray was 'happily free from any obligation – and usually from any inclination – to preserve the old culture *in toto*': F E Williams, *The Blending of Cultures: An Essay on the Aims of Native Education (The Blending of Cultures)*, (Port Moresby, 1935), 2.

<sup>42</sup> *Ibid.*, 4.

congenial to the progress of the colonial project in Papua. If, as Murray described it, the custom led to *disorder*, it had to be suppressed without equivocation. As the practice of sorcery was the exemplar of a custom which led to disorder, he rejected outright anthropological arguments for a nuanced approach based on the centrality of sorcery beliefs to indigenous society:

We punish **sorcery** with six months' imprisonment, but only sorcery which is practised with intent to kill or injure – 'black magic' in short; and we punish it because it creates disorder by encouraging retaliatory murders and other acts of violence on the part of the relations of the man who has been bewitched...

And here, occasionally, we find ourselves at variance with our friends the Anthropologists. The misunderstanding ... arises from the different degree of importance which Administrators and Anthropologists attach to the maintenance of law and order.<sup>43</sup>

Murray was referring here to the *Sorcery Ordinance 1893*, enacted by his predecessor William MacGregor for British New Guinea, which made it a criminal offence for natives to practice or pretend to practise sorcery, or to possess sorcery implements.<sup>44</sup> Rob O'Regan notes that, to reinforce the focus on 'black magic' or 'evil sorcery', Murray issued a Circular Instruction to Papuan Magistrates to the effect that it was the intention of the Sorcery Ordinance not to interfere with such practices as charms and magic connected with gardens or with hunting, fishing, etc.<sup>45</sup> The continuing prevalence of evil sorcery practices as an ongoing problem for the colonial administration is evidenced by the fact that Murray frequently returned to the theme of sorcery in his many publications.<sup>46</sup> He suggested that indigenous Papuans felt that the statutory punishment was too light to be effective, but countered that care ought to be exercised in imposing a heavy penalty for what was actually 'an imaginary offence'. Rather, it should instead be thought of as a form of trickery, as set out in the 1893 Ordinance, which declared that sorcery was 'only deceit'. The impact of this ambivalence will be considered in detail in Chapter Four.

Not all Europeans in the colony were quite as unreflective as to the assumptions of cultural superiority inherent in the legal response to sorcery beliefs. Bingham Hely had noted that, even at the end of the nineteenth century, not much time had elapsed since 'people of our own race had a firm belief in things as preposterous as those in which the Papuans believe

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<sup>43</sup> Murray, *Native Administration*, n 10, 14. Emphasis in the original.

<sup>44</sup> The punishment was a fine not exceeding £3, or imprisonment for up to 6 months, in the first instance: cl 10 of the Sorcery Ordinance.

<sup>45</sup> *Circular Instruction No 45*, cited in Rob O'Regan, 'Sorcery and homicide in Papua New Guinea' (1974) 48 *Australian Law Journal* 76, nn 34.

<sup>46</sup> For example, *Native Administration; The Response of the Natives of Papua to Western Civilisation*, 1929; and *The Machinery of Indirect Rule*, n 11, 1935.

now'.<sup>47</sup> While Hely may have been referring to lingering beliefs in the practice of witchcraft in Europe, it is worth remembering that the sway of traditional Christian beliefs remained at the apex of British society as the Empire expanded in the later nineteenth century. A key tenet of this was trust in the efficacy of human prayer to effect changes in the physical realm. Thus, the Privy Council<sup>48</sup> had in 1831, 1832, 1833, and 1849 approved prayers for relief from cholera. However, this came to an end in 1853, when Conservative Home Secretary Lord Palmerston, believing in the scientific cause of the disease, declined the request from the Presbytery of Edinburgh to appoint a fast day to stop its spread.<sup>49</sup> Even as recently as 1871, a small committee of the Cabinet and Privy Council which included Gladstone had telegraphed orders to the clergy for prayers to be offered up for the recovery from typhoid of the Prince of Wales.<sup>50</sup> When he duly recovered, the Privy Council issued a special prayer of Thanksgiving; and 27 February 1872 was proclaimed a day of national thanksgiving. *The Guardian* lauded the service at London's St Paul's Cathedral – attended by the Sovereign and her heir – as 'a solemn recognition of the direct and personal working of the Hand of God in things of this life' and as 'a distinct National Proclamation of Faith in the reality of special and personal Providence'.<sup>51</sup>

Returning to Papua, Murray conceded in enforcing the 1893 Ordinance that the sorcerer believed in his power as unreservedly as did his victim. His writings show that his abhorrence of sorcery practices was not solely due to the fact that they were a cause of the disorder of retaliatory violence. Despite having fought in the Boer War, Murray maintained that he had never realized what fear 'really meant' until he saw it in the eyes of an indigenous Papuan terrified by the potential wrath of a sorcerer.<sup>52</sup> He therefore felt that by suppressing sorcery he was freeing indigenous Papuans from that genuine fear which he felt blighted their whole existence:

Sorcery... is very real to the native, who in many parts of the Territory, is hardly free for one moment from the fear of sorcery, from the cradle to the grave, throughout the whole of his demon haunted life.<sup>53</sup>

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<sup>47</sup> Roger B Joyce, *Sir William MacGregor*, (Oxford University Press, Melbourne, 1971), 189.

<sup>48</sup> This is the formal advisory body to the monarch of the day, as opposed to the Judicial Committee of the Privy Council.

<sup>49</sup> Frank M Turner, 'Rainfall, Plagues, and the Prince of Wales: A Chapter in the Conflict of Religion and Science', (May 1974) 13(2) *Journal of British Studies*, 48.

<sup>50</sup> *Ibid.*, 59.

<sup>51</sup> *Ibid.*, 60.

<sup>52</sup> Hubert Murray, *The Response of the Natives of Papua to Western Civilisation* (Port Moresby, 1929), 14.

<sup>53</sup> Murray, *The Machinery of Indirect Rule*, n11, 9.

Similarly, looking back on his career in British New Guinea and then Papua, Resident Magistrate CAM Monckton noted that sorcery on the north-east coast of New Guinea was 'no child's play, and the shadow of the fear of it is over the whole tribal life'.<sup>54</sup>

The anthropologist Ian Hogbin was active in the colonial endeavour, providing advice on 'native affairs' to both the Murray Administration in Port Moresby and successive Australian Governments. In 1934 he had researched in Wogeo, in the Schouten Islands, where he found that sorcery known as *bwab* or *muj*, and *yabou* was thought responsible only for serious illnesses which were not fatal, and for deaths following a very short illness, respectively.<sup>55</sup> As with Malinowski, Hogbin considered that belief in this magic operated as a modifier of social behaviour:

The fear that he will be bewitched if he refuses to pay his debts may well be sufficient to make a man pay up, just as similar fears may prevent thefts. I do not suggest that everyone lives in constant dread of the consequences of offending other people, but merely that *muj* is a check against temptation.<sup>56</sup>

Somewhat callously, Hogbin noted that the reverse of the social benefit of sorcery was that although *yabou* in particular provided an excuse for 'putting vagabonds and habitual criminals out of the way', it might also lead to the murder of 'perfectly harmless persons'. Nonetheless, he remained confident that the spread of European civilisation would render this outcome 'necessarily... impossible'.<sup>57</sup>

In order to assess the reasonableness of the colonial administrators' response to combat sorcery-related crime, it is important to understand at the outset what sorcery meant to both the colonisers and the colonised. To do so requires an examination of that anthropological information available to Australian administrators, together with more recent work which gives more substance and nuance, and which removes the study of sorcery in Melanesian societies from the shadow of work previously done in British colonial possessions in Africa.

### Defining the 'mischief' – the nature of sorcery beliefs

In their mission efforts from the nineteenth century onwards, Europeans in Papua New Guinea felt confident that they were operating in a spiritual *terra nullius*. As believers not only in a supreme being, but The Supreme Being, Christians of all denominations viewed the cosmology of native Papuans and New Guineans as at best a combination of magic and

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<sup>54</sup> C A W Monckton, *Some experiences of a New Guinea resident magistrate*, (J Lane, London, 1921), 189.

<sup>55</sup> H Ian Hogbin, 'Sorcery and Administration' (September 1935) 6(1) *Oceania*, 3-4.

<sup>56</sup> *Ibid.*, 10.

<sup>57</sup> *Ibid.*, 18.

superstition, and at worst the work of the Devil. Fr Heinrich Aufenanger SVD, writing on the Central Highlands in the 1960s, considered witchcraft and sorcery together as:

...an evil, supernatural power, which a man or a woman acquires from a bad, personal spirit or spirit-like being, and which he or she uses for asocial purposes, for doing harm to people and animals.<sup>58</sup>

Nonetheless, Catholic missionaries, aided by anthropologists in their midst such as Fr Andreas Gerstner SVD, at least tended to promote scientific views on the existence and practice of sorcery. By contrast, the Protestant South Seas Evangelical Mission attributed it to 'local spirits taking possession of individuals at the behest of the Devil';<sup>59</sup> and as recently as the 1990's, Seventh Day Adventists held that witchcraft came from *Spirit Nguni*, the Bad Spirit, and is 'real and terrifying'.<sup>60</sup>

While the practice of magic may well have been shrouded by the 'dusk of legality' in the homelands of the common law, it will be seen that among the myriad indigenous tribes of Papua New Guinea it more than held its own in the bright light of day. For many Melanesians, there was no line drawn between the visible and invisible worlds, both of which uneasily shared the same physical space within the boundaries of their small communities. However, while living members of the community were subject to rules handed down from time immemorial, the human dead and spirit beings were capricious, and needed to be kept propitiated by ritual:

Within the total cosmic order... order, predictability and morality are the characteristics of *human* society. It is these characteristics which men, through ritual, attempt to impose on the unpredictable, non-reciprocal and thus amoral forces of the non-empirical realm.<sup>61</sup>

Having regard to the perceived need to keep these cosmic forces in balance, the use of sorcery was not judged by Melanesians as being necessarily in and of itself a malevolent or benevolent force. Rather, it is the context in which humans drew upon, and operationalized, this power which made it creative or destructive, 'good', or 'bad'.<sup>62</sup>

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<sup>58</sup> Cited in Philip Gibbs, 'Engendered Violence and Witch-killing in Simbu' in M Jolly, et al (Eds), *Engendering Violence in Papua New Guinea*, 2012, <http://epress.anu.edu.au/apps/bookworm/view/Engendering+Violence+in+Papua+New+Guinea/9211/cover.html>, 22.

<sup>59</sup> P Gibbs, P and J J Wailoni, 'Sorcery and a Christian Response in the East Sepik', in F Zocca, 'Sanguma in Paradise', (2009) 5 *Melanesian Mission Studies*, 6.

<sup>60</sup> Pamela J Stewart and Andrew Strathern, 'Witchcraft, Murder and Ecological Stress: A Duna (Papua New Guinea) case study', *Discussion Papers Series*, No 4, 1998, James Cook University, 24.

<sup>61</sup> Michelle Stephen, 'Contrasting Images of Power' in Michelle Stephen, (Ed) *Sorcerer and Witch in Melanesia*, (Melbourne University Press, Melbourne, 1987), 269. Emphasis in the original.

<sup>62</sup> *Ibid.*, 271.

## Sorcery versus Witchcraft

Much ink has been spilt by anthropologists as to whether there is within primitive societies a recognisable, or even worthwhile, distinction between sorcery and witchcraft. The starting point for such a distinction is the pivotal 1937 work on the Zande of Central Africa of E E Evans-Pritchard, a student of Malinowski's. Evans-Pritchard posited that the existence of magical beliefs generally was an attempt to 'explain the inexplicable and control the uncontrollable by societies with only limited technological capacity to cope with a hostile environment'.<sup>63</sup> In the wake of Evans-Pritchard's work, the following distinction between sorcery and witchcraft has been proposed:

Sorcery is a performance or alleged performance by a magician (sorcerer) which is, in itself, technically possible but which, from a scientific point of view, could not be the cause of consequences attributed to it – especially the consequences of bringing evil upon others; whereas

Witchcraft is a quality or attribute or capacity of witches which has the consequence that they bring evil upon others even though they themselves, in their ordinary human capacity, go through no specific technical performance to achieve this end.<sup>64</sup>

In the Papua New Guinean context, the linguist Leonard Glick argued that the sorcerer's capacity to harm depended on his ability to control extrinsic magical powers by way of incantation; whereas a witch can inflict sickness or death on simply by willing evil on them, the sorcerer possesses powers inherited or acquired as an intrinsic part of his or her person.<sup>65</sup> Thus, Charles Seligman reported among the Roro-speakers around the mouth of the St Joseph River in 1910, that a 'well-known sorcerer' had explained to Captain Barton, while the latter was Resident Magistrate of the Central Division, that he had no choice but to be a sorcerer, as 'his father had been a sorcerer before him, and it was but natural that the power should pass to him'.<sup>66</sup>

However, subsequent researchers have questioned the value of theoretical distinctions which fail to be replicated on the ground.<sup>67</sup> In the context of Papua New Guinean beliefs, the issue also has been clouded by the somewhat uncritical tendency to view Melanesian practice in

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<sup>63</sup> V W Turner, 'Witchcraft and Sorcery: Taxonomy versus Dynamics' (Oct 1964) 34(4) *Africa*, 315.

<sup>64</sup> Entry on 'Sorcery (Also witchcraft)' in *Dictionary of the social sciences*, (UNESCO, London, 1964), 684-685. Note that this article cites Malinowski in 1926 as an instance of ethnography providing 'many instances of 'legal' sorcerers'.

<sup>65</sup> Leonard Glick, 'Sorcery and witchcraft', in I Hogbin, *Anthropology in Papua New Guinea: Readings from the Encyclopaedia of Papua and New Guinea* (Melbourne University Press, Melbourne: 1973), 182.

<sup>66</sup> Charles G Seligman, *The Melanesians of British New Guinea* (Cambridge University Press, Cambridge, 1910), 279.

<sup>67</sup> It has been suggested that Evans-Pritchard's work only really applied to the Azande, and not to other African tribes: see Turner, n 58, 319-320.



the light of African research which Michelle Stephen argues has resulted in 'collaps[ing] Melanesian sorcery into African witchcraft — thus obscuring the very nature of sorcery in Melanesia'.<sup>68</sup> It has been posited that, rather than considering practitioners of sorcery and witchcraft either separately or together as a cultural phenomenon, the researcher actually faces a 'whole range of holders of mystical, destructive powers who play very different social roles'.<sup>69</sup>

Whilst undoubtedly contested, I would suggest that the distinction is not a mere academic quibble. As early as 1922, Malinowski's work noted the distinction among the Trobrianders:

...by far the deepest dread and most constant concern of the natives are with the *bwaga'u*, the entirely human sorcerers, which carry out their work exclusively by means of magic. Second to them in the quantity of magical output, and in the frequency of their exploits are the *mulukwausi*, the flying witches...

... Whereas men would admit to being a *bwaga'u*, a woman would never directly admit to being a *yoyova*.<sup>70</sup>

A significant amount of anthropological work since the Second World War has confirmed that the purported sorcerer had a normative power status which was denied to the alleged witch. In the Melanesian context, Michele Stephen argues that where the imputation of destructive mystical powers is used as a means to gain social influence, the matter at hand is sorcery, but where 'it unavoidably leads to social ruin', we are dealing with witchcraft.<sup>71</sup> Moreover, sorcery rather than witchcraft played an integral part in the relentless cycle of tribal warfare and payback, the suppression of which was one of the main aims of the Australian colonial project in Papua and New Guinea. Thus, the very processes of colonialism which worked towards the eradication of traditional 'sorcery' may have inadvertently allowed traditional 'witchcraft' to flourish. Nonetheless, throughout the thesis, unless this distinction is of particular situational relevance, the term 'sorcery' will be used generally to denote magical practices in Papua New Guinea.

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<sup>68</sup> Michelle Stephen, 'Introduction', in Michelle Stephen (Ed) *Sorcerer and Witch in Melanesia*, (Melbourne University Press, Melbourne, 1987), 11.

<sup>69</sup> Michelle Stephen, 'Contrasting Images of Power', *ibid.*, 263.

<sup>70</sup> Bronisław Malinowski, *The Argonauts of the Western Pacific* (G Routledge & Sons, London, 1922), 293. 'The Mailu are afraid of the darkness *all of the time* owing to their belief in male sorcerers whose threat is persistent and unrelenting. The Trobrianders are afraid of the dark *some of the time* owing to their belief in female witches whose threat is occasional and contingent': Michael W Young (Ed), *Malinowski Among the Magi: 'The Natives of Mailu'* (Routledge, London, 2002), 39.

<sup>71</sup> Michelle Stephen, 'Contrasting Images of Power', in Stephen, n61, 288.

### Sorcery research in the early twentieth century

At the outset of a 1969 article highly critical of the work of Bronisław Malinowski, anthropologists Murray and Rosalie Wax cite American anthropologist Alexander Goldenweiser to argue that, when compared with the institutions of Western civilisation, magic had always been 'judged as inadequate and ranked as negative'.<sup>72</sup> They went on to note that, when compared specifically with religion, magic led 'a less pompous existence, in the dusk of legality and social recognition'.<sup>73</sup> Although anthropologists now tend to treat magic and religion as on a belief continuum, this had not been the case in the early twentieth century.<sup>74</sup> The academic separation of magic from religion was essentially the result of James Frazer's 1900 work, *The Golden Bough*. Although Frazer did relate magic closely to religion, he consigned it to an earlier stage in the evolution of belief systems. This apparent distinction is of particular importance to the perception of sorcery magic among the colonisers in Papua and New Guinea, as Frazer's work was of seminal influence on the fieldwork of Malinowski. Australian anthropologist Bruce Kapferer has stated that Malinowski's approach towards Trobriand magic was 'an extension of... Frazerian intellectualism'.<sup>75</sup>

The first academic work in British New Guinea on sorcery was that of Charles Seligman, who joined the Cambridge University expedition to the Torres Strait in 1898, and returned in 1904.<sup>76</sup> In his ensuing book, *The Melanesians of British New Guinea*, Seligman pithily defined sorcery as 'magical practices directed towards the production of disease and death'.<sup>77</sup> He concluded that the practice of sorcery among that the Roro-speaking tribes he studied was such an unremarkable component of everyday life that they regarded it in the abstract 'with no more horror or fear than Europeans in their prime regard old age and death'.<sup>78</sup> Sorcerers themselves

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<sup>72</sup> Murray Wax and Rosalie Wax, 'The Notion of Magic' (December 1963) 4(5) *Current Anthropology*, 495.

<sup>73</sup> *Ibid.*, 496.

<sup>74</sup> Thus, American anthropologist Dorothy Hammond concluded in 1970 that magic was 'not an entity distinct from religion but a form of ritual behaviour and thus an element of religion... [The distinction] not only falsified the relation between religion and magic, and led to obscurantism concerning magic, but it has also given rise to a truncated concept of religion as a whole'. Dorothy Hammond, 'Magic: A Problem in Semantics' (December 1970), 72(6) *American Anthropologist*, 1355.

<sup>75</sup> B Kapferer, 'Outside All Reason: Magic, Sorcery and Epistemology in Anthropology', (Fall 2002) 46(3) *Social Analysis: The International Journal of Social and Cultural Practice*, 5.

<sup>76</sup> The pioneering work of Cambridge Expedition continued to resonate through the twentieth century, as its genealogical research in particular was used as evidence by the Murray Island plaintiffs in *Mabo v Queensland (No 2)* 175 CLR 1: Anita Herle, 'Objects, agency and museums: continuing dialogues between the Torres Strait and Cambridge', Laura Peers and Alison K Brow (Eds), *Museums and Source Communities: A Routledge Reader* (Routledge, London, 2003), 195.

<sup>77</sup> Seligman, n66, 281.

<sup>78</sup> *Ibid.*, 279.

were often regarded as a guarantee of protection from the hostile sorcery of neighbouring villages.<sup>79</sup>

Seligman was one of the first to document the impact which the colonial presence had had upon sorcery practices. He was told of the following encounter in Inawi, in the Mekeo district:

Two Inawi natives, both old men, quarrelled... One collected some faeces belonging to the other, and... took them to Mangemange, a Rarai man, who formerly had a great reputation as a sorcerer. He asked Mangemange to so treat the faeces that the man from whom they were derived would die. Mangemange, who is a village constable, replied that he now wore government clothes and would have nothing to do with the matter, and ordered one of the villagers to take the faeces to Inawi and to throw them into the river there. This was done.<sup>80</sup>

Seligman was followed on the ground by his much more famous student Malinowski, who undertook ground-breaking field work among the tribes of the Trobriand Islands off the eastern coast of New Guinea in 1915 to 1918. In the first work arising from his research, *The Argonauts of the Western Pacific*, Malinowski elaborated the revolutionary approach to anthropological research which he had put into effect on the Trobriand Islands:

First, the anthropologist conducting field work must have scientific goals and values; second, the best and perhaps only way to competently study another culture is to actually live in it; and third, a researcher must apply a number of special methods of collecting, manipulating and fixing his evidence.<sup>81</sup>

Malinowski discovered that to the Trobrianders — as to Melanesians generally — human death rarely came ‘naturally’ in the way Europeans took for granted. With the exception of deaths of warriors in battle or the very old, death was generally assumed to have been caused by deliberately-wished malevolence. If, for example, a hunter was killed by the fall of a heavy tree branch, the western response would be that it was highly unfortunate that he had been in the very spot where the combination of the impersonal forces of natural physical decay and the pull of gravity caused the branch to fall. For a Trobriander, there was no coincidence that the hunter happened to be there at that very time; rather, it had been willed by someone who wished to bring about his death. From the occurrence of the death, kinsman would work backwards to establish what earlier social interaction had brought about this response. Moreover, as the belief that well-being depended ultimately on the assistance offered by kin,

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<sup>79</sup> *Ibid.*, 279.

<sup>80</sup> *Ibid.*, 283.

<sup>81</sup> Malinowski, n70, 6.

'simply dying' would imply neglect and bereaved family members search for other explanations.<sup>82</sup>

In this process we clearly can see parallels with the pattern of slighted neighbours being 'recognised' as witches, particularly in the pivotal periods of the Witchfinders in the English Civil War and the Salem Witch Trials, as the godly sought to explain their misfortunes as the handwork of the Evil One, which will be discussed in Chapter Five. The difference is very much one of degree – a handful of individuals singled out in England and Colonial America as opposed to entire communities in Papua New Guinea on guard against the ill-will of their neighbours. Thus, when the social anthropologist Reo Fortune was researching on the small island of Dobu in the early 1960's, he discovered that the entire male population was 'engaged in making sorcery spells against their neighbours'.<sup>83</sup> In suggesting that rivalry, suspicion and tension create an atmosphere which helps validate sorcery beliefs, Michelle Stephen could be describing Massachusetts or Essex, just as readily as the New Guinea Highlands.<sup>84</sup>

Similarly, where a person became ill, it was not a question of ascertaining the biological cause, but of identifying the party who had ensorcelled the sick person. That spell-caster would then have to be mollified in some way; or the kin of the sick person would utilise counter-magic to undo the original sorcery. If the person died from the illness, either the wrong sorcerer had been identified, or the counter-magic had not been powerful enough to overcome the original magic. In much later work among the Kove of New Britain, Ann Chowning ascertained that where an illness was drawn out, the victim's kin assume that the sorcerer wanted to be bought off; otherwise he would kill his victim quickly.<sup>85</sup>

Given the prevalence of sorcery beliefs and practices, Malinowski argued that the Trobrianders believed man to be 'but a plaything of the powers of sorcery, of evil spirits and of certain beings, controlled by black magic'.<sup>86</sup> This magic was 'a primeval possession' of the Trobrianders; they had no concept of it being made or invented at some point in time, whether past, present or future, so that any addition to its content by an actual human being would simply render the magic 'spurious'.<sup>87</sup> As early as 1912, Murray had noted that the Trobrianders had suffered terribly from venereal disease, the treatment of which was made more difficult by the fact that they considered it due not to biological causes, but to sorcery, or to 'the breach

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<sup>82</sup> P Gibbs, P and J J Wailoni, n54, 66.

<sup>83</sup> Reo Fortune, *Sorcerers of Dobu: the social anthropology of the Dobu Islanders of the Western Pacific* (Duttin, New York, 1963), 204.

<sup>84</sup> James W Turner, 'Sorcery, Sin and Power in Melanesia Containing Time' (2002) 86 *Anthropos*, 432.

<sup>85</sup> A Chowning, 'Sorcery and the Social Order in Kove', in Stephen, n68, 154.

<sup>86</sup> Malinowski, n70, 293.

<sup>87</sup> Bronisław Malinowski, *Magic, Science and Religion and Other Essays*, (Boston, Mass. Beacon Press, 1948), 74-75; and n 70, 400.

of some of their totem laws'.<sup>88</sup> The onset of this new disease – undoubtedly the result of interaction with Europeans – contrasted with the timelessness of sorcery-illness and therefore had to be made to fit within its framework.

The ubiquity of sorcery beliefs did not dissuade Malinowski of the eminent practicality of the Trobrianders, who had recourse to magical explanations only when they had exhausted the more mundane possibilities. In doing so, he further distinguished the 'practical' ends of magic from the intangible, long-term goals of Trobriander religious practice, in keeping with his magic/religion dichotomy he adhered to as a disciple of Frazer.<sup>89</sup> Moreover, he concluded that the use of sorcery was intimately linked to the power of the chief, and the ability to inflict punishment which was at the core of that power:

If anyone offends him, or trespasses upon his authority, the chief summons the sorcerer, and orders that the culprit shall die by black magic. And here the chief is powerfully helped in achieving his end by the fact that he can do this openly, so that everybody, and the victim himself knows that a sorcerer is after him. As the natives are very deeply and genuinely afraid of sorcery, the feeling of being hunted, of imagining themselves doomed, is in itself enough to doom them in reality.<sup>90</sup>



Bronisław Malinowski blending in with the natives - Trobriand Islands 1918<sup>91</sup>

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<sup>88</sup> Hubert Murray, *Papua or British New Guinea*, (London: 1912), 119. The Trobriands, named after d'Entrecasteaux's ship's navigator, are now officially referred to as the Kiriwina Islands.

<sup>89</sup> Malinowski, n 70, 67-70.

<sup>90</sup> Malinowski, n 70, 64-65. S Dein, 'Psychogenic death: individual effects of sorcery and taboo violation', (November 2003) 6(3) *Mental Health, Religion & Culture*, 200.

<sup>91</sup> London School of Economics, <https://blogs.lse.ac.uk/lsehistory/files/2017/06/Malinowski-with-Trobriand-Islanders-1918.jpg>

It is worth noting that the experience of sorcery-induced death is by no means limited to Papua New Guinea, but is a phenomenon which has been identified across many cultures, including Latin America, Africa, the Caribbean, and amongst indigenous Australians. Referred to by anthropologists as 'voodoo death', or psychogenic or hex death, it is said to be best conceptualized as a particular form of extreme culturogenic stress. Across cultures psychogenic death results from the *nocebo* effect, from the Latin 'to harm'. It is characterised by 'extreme hopelessness and the belief that nothing can be done to help' the supposed victim.<sup>92</sup>

Despite Malinowski's assessment of Trobriander *realpolitik*, he concluded that sorcery was ultimately 'a beneficent agency, of enormous value for early culture'. However, this conclusion would appear to have more to do with the use of sorcery as a primitive legal inhibitor of crime than as a constituent part of the autocratic rule of chiefs buttressed by sorcerers, in a Melanesian version of the alliance between throne and altar. Murray and Rosalie Wax have suggested that, in portraying the worldview of the Trobrianders, Malinowski is occasionally 'more skilful at rationalizing Trobriand ways within [that] of the Western reader, than he is in portraying the view points of the actors themselves'.<sup>93</sup> Moreover, as a man of his times, Malinowski rarely factored in the impact of the contemporary processes of colonisation on the belief systems which he was documenting.

In his seminal *Crime & Custom in Savage Society*, Malinowski made explicit the need to consider each society's practices on its own terms, rather than viewing them darkly through the glass of Western notions of law:

We shall see that by an inductive examination of the facts, *carried out without any preconceived idea or ready-made definition*, we shall be enabled to arrive at a satisfactory classification of the norms and rules of a primitive community, at a clear distinction of primitive law from other forms of custom, and at a new, dynamic conception of the social organization of savages.<sup>94</sup>

Having cast aside this prejudice, Malinowski's study of the Trobrianders led him to broaden the scope of what could be categorised as 'law', recognising it as a felt obligation arising from the binding mutual reciprocity of rights and duties, one which operated to foster a group's

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<sup>92</sup> S Dein, n 91, 200. See also Clifton K Meador 'Hex death: voodoo magic or persuasion?' (1992) 85 Southern Medical Journal, 244; and Rachel Brazil, 'Nocebo: the placebo effect's evil twin', (March 2018) 300(7911) *The Pharmaceutical Journal*.

<sup>93</sup> M Wax and R Wax, n67, 497. This is immediately after they note that, not only did Malinowski submerge himself in the daily life of a primitive people, but he 'presented his observations with a natural eloquence that leads the reader to feel that he, too, journeys in the canoes or recites magical spells in the gardens'.

<sup>94</sup> Bronisław Malinowski, *Crime & Custom in Savage Society*, 15-16. Emphasis added.

social cohesion.<sup>95</sup> Thus he saw the function of acts such as initiation was to create 'mental habits and social usages of inestimable value to the group and its civilisation'.<sup>96</sup>

Malinowski famously characterised 'law' in his introduction to Hogbin's 1934 *Law and Order in Polynesia* as follows:

In such primitive communities I personally believe that law ought to be defined by function and not by form, that is we ought to see what are the arrangements, the sociological realities, the cultural mechanisms which act for the enforcement of law.<sup>97</sup>

In recasting the approach in this manner, Malinowski effectively breathed new life into structural functionalism, which was to dominate anthropological research throughout the British Empire. By providing tools to assess how cultural and legal norms might provide the cohesive framework for the 'natives' over whom they ruled, functionalism clearly served the needs of colonial administrators in assessing their responses to individual practices, such as sorcery.<sup>98</sup>

### Anthropological work after the Second World War

In the latter half of the twentieth century, this work of the early anthropologists was supplemented by a considerable amount of sorcery fieldwork. One of the most wide-ranging examinations was the 1974 work of Australian anthropologist Mary Patterson. Patterson posited that 'sorcery and witchcraft in Melanesia referred to 'the belief, and those practices associated with the belief that one human being is capable of harming another by magical or supernatural means'.<sup>99</sup> Her conclusions as to the geographic spread of sorcery beliefs are worth quoting at some length:

Melanesian witchcraft is confined almost exclusively to a relatively small area which corresponds with that encompassed by the trading expeditions of the *kula* exchange ring: the Trobriands, Amphletts, Dobu and adjacent regions of Fergusson and Normanby in the D'Entrecasteaux, and the Southern Massim area of Papua... Among the Huli of the Southern Highlands a certain deity is believed to take possession of women, forcing them to bewitch men; the Gururumba of the Eastern Highlands believe that both men and women may be witches, but only women are ever accused: the Kuma of the Western Highlands

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<sup>95</sup> James M Donovan, *Legal Anthropology: An Introduction*, (Lanham, Maryland: 2008), 100.

<sup>96</sup> Malinowski, n81, 41.

<sup>97</sup> Bronisław Malinowski in H Ian Hogbin, *Law and Order in Polynesia: A Study of Primitive Legal Institutions*, (Harcourt Brace, New York, 1934), lxiii.

<sup>98</sup> See Peter Lawrence, 'The Ethnographic Revolution' (June 1975) 45(4) *Oceania*, 259. In this address at the University of Sydney, Professor Lawrence noted that Britain's African colonies were regarded as 'a sort of finishing school for the more successful English scholars'.

<sup>99</sup> Mary Patterson, 'Sorcery and Witchcraft in Melanesia', (December 1974) 45(2) *Oceania*, 132.

attribute the power of witchcraft to men, women and even children and all may be accused.<sup>100</sup>

Within these boundaries, Patterson discerned a range of variations. Whereas the Kuna of the Highlands believed in sorcery and witchcraft but attributed almost all illness to the malevolence of spirits, the Garia of the Madang region attributed almost all illness and death to the malevolence of human agents.<sup>101</sup> Moreover, even within one tribal grouping, what was 'sorcery' could be subject to many interpretations. Writing on the Maring people of Jimi Valley in the Highlands, American anthropologist Edward Li Puma noted that sorcery had variable, contested, and ambiguous legitimacy:

...variable because its legitimacy is situationally specific; contested because what counts as sorcery and its appropriateness in a particular context is open to debate; and ambiguous because often some agents are and remain uncertain about its presence and/or legitimacy in a given situation.<sup>102</sup>

While not necessarily agreeing with Malinowski's conclusion that sorcery was ultimately a benevolent societal force, Patterson did agree with his observation that the wielders of power tended to monopolise the practice of sorcery, or access to it; sorcerers were tolerated because of this chiefly protection, and because their sorcery was to be used only against outsiders.<sup>103</sup> This view was supported by the work of Ann Chowning on Kove sorcery; but not by Ross Bowden, who saw Kwona sorcery as 'primarily an ideology motivating people to resolve their differences and work towards social harmony'.<sup>104</sup> Patterson covered in detail a range of complex variants in societal structure within her region of research, and compared these variations with the coterminous patterns of sorcery accusation. For the purposes of this thesis, it is sufficient to note that she ultimately formulated a hypothesis which correlated differing emphases on sorcery and witchcraft as the explanations for disease and death with differences in the 'constancy of the parish groups of effective males', i.e., whether marriage traditions in a given tribal group were endogamous or exogamous for the male partner.<sup>105</sup>

In subsequent work in the Wahgi Valley of the Western Highlands, anthropologist Marie Reay maintained that, to the Kuma, magic was a 'blend of fact, culturally standardized fantasy, and ambiguity between the two'.<sup>106</sup> In contrast with the vital role the practice of sorcery played in

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<sup>100</sup> *Ibid.*, 145.

<sup>101</sup> *Ibid.*, 136.

<sup>102</sup> Edward LiPuma, 'Sorcery and Evidence of Change in Maring Justice' (Spring 1994) 33(2) *Ethnology*, 152.

<sup>103</sup> Patterson, n 99, 150.

<sup>104</sup> Michelle Stephen, in Stephen, n68, 10.

<sup>105</sup> Patterson, n99, 160.

<sup>106</sup> Marie Reay, 'The Magico-Religious Foundations of New Guinea Highlands Warfare', in Stephen, n68, 100.



the preparation of and participation in inter-tribal warfare, witchcraft (*kum*) was envisaged as an actual creature which lodged in a person's abdomen, thereby substituting its malignant will for that of the host. An individual was first convicted of being a witch and only then was blame laid for recent deaths; the ensuing conviction was meant to future-proof the village against more deaths, rather than atone for the earlier ones.<sup>107</sup>

However, by being able both to blame the *kum* — rather than the human host — and to assume that the *kum* could eventually move on, social relationships fractured due to witchcraft accusations could be repaired, and exiled witches allowed to return to the village.<sup>108</sup> Thus, as with purported demonic possession amongst Europeans, this differentiation between practitioner and practice — witch and magic — provided a means of reincorporation within the traditional community structure for those who admitted what was in effect innocent participation.

### The Second World War and the end of the Murray System

Hubert Murray was not to live to see the devastating impact of the Second World War on Papua. Held in high regard by many indigenous Papuans, after his death at Samarai in February 1940 he was given a ceremonial Motuan burial, prior to the collapse of the old order and the Murray System. In its time, Murray's administration garnered praise from sources as varied as missionaries<sup>109</sup> and anti-imperialists.<sup>110</sup> In 1921, J W Burton, a pacifist Methodist Minister with an interest in Christian Unity, and later President-General of the Methodist Church in Australasia,<sup>111</sup> described Murray's record in Papua as 'one of the great assets of our Commonwealth':

...the name of Judge Murray will be mentioned by succeeding generations with reverence, and by the native people with affection. Any criticism to which he is subjected is mainly from those lower and commercial members of our community, who see in his policy an end of their selfish schemes of exploitation.<sup>112</sup>

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<sup>107</sup> *Ibid.*, 93. The inquiry is dealt with in detail at 95-98, and Reay noted that as recently as 1982, the son of a 'bigman' had requested a witch inquiry into his father's death, 101.

<sup>108</sup> *Ibid.*, 108.

<sup>109</sup> The President of the (Australian) Aborigines' Friends' Association, Rev J H Sexton, argued that Murray 'put into actual practice a programme of betterment of the natives unexcelled in any part of the world': *A Review of the Native Administration in New Guinea: The Re-introduction of the Murray Regime advocated*, (Adelaide: 1949), np.

<sup>110</sup> Murray was 'a humane administrator [who] for thirty years tried to safeguard the natives from the worst evils of white exploiters: L C Rodd, *Australian Imperialism*, (Sydney: undated), 24. Rodd was a Sydney Christian Socialist married to the novelist Kylie Tennant.

<sup>111</sup> A W Thornley, 'Burton, John Wear (1875-1970)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/burton-john-wear-5438/text9231>.

<sup>112</sup> J W Burton, *The Australian Mandate in relation to our duty to the native races* (Australian Christian Student Movement, Melbourne, 1921), 13.

Surveying British imperialist practice in the Pacific, W P Morrell concluded that Murray's steady extension of the remit of colonial authority basically continued the work of MacGregor and Le Hunte, and that '[w]hatever has sometimes been said to the contrary', Murray's rule was an Australian variation on a British theme.<sup>113</sup> This link was made explicit in MacGregor's Introduction to Murray's 1912 *Papua or British New Guinea*, in which MacGregor declared that the natives of Papua would 'receive fair and just treatment so long as Mr. Murray rules over Papua... Had it been otherwise I should never have written this introduction'.<sup>114</sup> Nonetheless, although he aimed to implement policies which he perceived as in the best interests of indigenous Papuans, Murray's methods remained essentially those of control, law and order, and petty discipline. Indeed, Lord Hailey, successively Governor of the Punjab and of the United Provinces, and later the author of an influential *Survey of British colonial practice in Africa*, in 1948 summarised Murray's system of administration as 'no more than a well-regulated and benevolent type of police rule'.<sup>115</sup>

Writing on Australia's colonial experience in New Guinea, W J Hudson maintained that Murray was caught by the three prongs of 'social conditions, the administrative and anthropological theories of his time, and his own preconceptions about the objects of administration'.<sup>116</sup> Hank Nelson suggests that the tragedy of Murray's career was that he served for so long that policies which had been progressive at the beginning of his tenure had become discriminatory and damaging by the end of it.<sup>117</sup> Indeed, writing in 1960, A M Healy argued that Murray had 'placed Papuan administration in a strait-jacket' as he was determined that Papuans would exercise no authority until they 'advanced' according to European notions'.<sup>118</sup> However, the importance of this continuity of colonial administration is that, not only were Murray's policies of 1940 to be compared with those of his in 1906, but they continued a humanitarian imperialist imperative which harked back to MacGregor in the 1890s, Gordon in the 1870s, and the abolitionists in the 1830s. Thus, Ian Campbell's conclusion that it would be both 'unhistorical and unreasonable' to expect that Papua would be the scene of dramatic achievements in Australian colonialism seems eminently fair.<sup>119</sup>

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<sup>113</sup> W P Morrell, *Britain in the Pacific Islands* (Clarendon Press, Oxford, 1961), 425.

<sup>114</sup> Sir W MacGregor, Introduction, Hubert Murray, *Papua or British New Guinea*, 28.  
<http://gutenberg.net.au/ebooks12/1202531h.html#intro>

<sup>115</sup> Hailey's introduction to Lucy P Mair, *Australia in New Guinea* (Melbourne University Press, 2<sup>nd</sup> ed, Melbourne 1970), xv-xvi. See, e.g., Frederick Pedler, 'The Contribution of Lord Hailey to Africa' (July 1970) 69(276) *African Affairs*, 267. For her part, Lucy Mair had worked with the ALP Minister for Territories, Eddie Ward.

<sup>116</sup> W J Hudson, *New Guinea Empire: Australia's Colonial Experience*, (Cassell Australia, Melbourne, 1974), 14.

<sup>117</sup> Hank Nelson, n17, 20.

<sup>118</sup> See Roger C Thompson, 'Hubert Murray and the Historians' (November 1986) 10(1) *Pacific Studies*, 81.

<sup>119</sup> Campbell, n27, 69.

In January 1942 the Japanese Imperial Army took Rabaul, the capital of the Mandated Territory. The debacle partly was facilitated by that general Australian disinterest in Papua and New Guinea prior to the war which meant that there was little exchange of potential security information even between the two Territories. Civil administration in both Territories stopped on 12 February 1942, and Murray's successor — his half-nephew Leonard Murray — left Port Moresby with members of the Legislative and Executive Councils, to be replaced by the Australian New Guinea Administrative Unit [ANGAU] in the following month.<sup>120</sup> The Japanese then used Rabaul as the base for their unsuccessful drive towards Port Moresby and onto Australia. Fighting continued until the Japanese surrender in August 1945, after which civil administration of Papua and New Guinea was restored under the Provisional Administration of the Territory of Papua-New Guinea.<sup>121</sup>



Sir Hubert Murray's coffin on a Royal Australian Air Force trailer.  
Port Moresby, 28 February 1940 <sup>122</sup>

<sup>120</sup> Brian Jinks, 'Blaming the victim: Leonard Murray and the suspension of civil administration in Papua' (1982) 28(1) *Australian Journal of Politics and History*, 47.

<sup>121</sup> Pursuant to the Commonwealth *Papua-New Guinea Provisional Administration Act 1945*, which received the Royal Assent before the end of the war in the Pacific, on 3 August 1945.

<sup>122</sup> Negative by N Tracy, Australian War Memorial, <https://www.awm.gov.au/collection/C25575>

In the wake of criticisms of the lack of discipline among the Australian troops stationed in Port Moresby, their former commandant Major General Basil Morris countered by engineering an inquiry into the precipitate collapse of civil government and the flight of the administration.<sup>123</sup> In 1944 a Commission of Inquiry was held under Victorian barrister John Vincent Barry KC. Commissioner Barry had been counsel assisting the Commission into the Japanese air-raid on Darwin in 1942, and had represented Eddie Ward MP before the Royal Commission into the Brisbane Line the following year. In his report, Barry made a pithy and penetrating summation of the prevailing policy relationship between Australian and Papua and New Guinea at the time of the Japanese invasion, one which is applicable to any period since the Commonwealth had taken responsibility for Papua in 1906:

It is no overstatement to say that until the geographical existence of New Guinea was forced upon Australians by the grim possibility of imminent invasion the Territories were considered as areas so remote from Australian life that they rarely entered into political consideration. In the circumstances the achievements of the Papuan Administration had been remarkable.<sup>124</sup>

Barry found that the under-supported and under-resourced Leonard Murray had been the prisoner of circumstances of a kind 'so over whelming and so foreign to anything with which his experience and training had made him familiar', and concluded that neither he nor the members of the Legislative and Executive Councils had failed in their public duty to safeguard the Territory.<sup>125</sup> However, despite this exoneration, Leonard Murray was not reappointed as Administrator of Papua.

In 1946, his successor as Administrator, Jack Keith Murray (no relation), gave the annual Macrossan Lecture at the University of Queensland. He argued that Australian unpreparedness for the Second World War caused a loss of that 'priceless good' of basic security among Papua New Guineans, to be replaced by 'a memory of fear and a new knowledge of the impermanence of the seeming-solid institutions of European order'.<sup>126</sup> Similarly, Legge, writing in 1956, argued that the experiences of the war helped to stimulate the forces of change in native society, awakening new desires and creating new incentives, not from the traditional leaders, but from 'new men of experience'.<sup>127</sup> The war had exposed

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<sup>123</sup> Jinks, n120, 48-51.

<sup>124</sup> J V Barry, *Report of the Commission of Inquiry into the Circumstances Relating to the Suspension of the Civil Administration of the Territory of Papua in February, 1942*, (Melbourne, 1945), 51.

<sup>125</sup> *Ibid.*, p 56.

<sup>126</sup> J K Murray, 'The Provisional Administration of the Territory of Papua-New Guinea: Its Policy and its Problems' *John Murtagh Macrossan Memorial Lecture for 1946* (University of Queensland, Brisbane, 1949) 6.

<sup>127</sup> John D Legge, *Australian Colonial Policy: A Survey of Native Administration and European Development in Papua*, (Angus & Robertson, Sydney, 1956), 227.

the shallowness of the previous fifty years of the colonial project, and laid bare the need for a new basis for the relationship between Australia on the one hand and Papua and New Guinea on the other.

### The 'zephyrs of change' in Papua and New Guinea

In 1939, Hubert Murray had written:

It may seem rather ridiculous that New Guinea natives should ever be independent — yet we contemplate the independence of the Philippines, and in a hundred years the New Guinea natives might easily be the equal of the Philipinos (*sic*) of to-day.<sup>128</sup>

However, by 1961 Parliamentary Draughtsman C J Lynch considered that '[i]f the winds of change blew across Africa in 1960, at least a zephyr touched Australia's Territory of Papua and New Guinea'.<sup>129</sup>

Even as fighting continued in the Pacific, the *Papua New Guinea Provisional Administration Act 1945* combined the Territories of Papua and New Guinea in an administrative union; subsequently, under s 13 and s 14 of the *Papua and New Guinea Act 1949*, an Administrator appointed by the Governor-General was to head the government of the combined Territory, and provided for a Legislative Council, a judicial organisation, a public service, and a system of local government. The Administrator was to be under the purview of International Trusteeship System of the United Nations, a system which was largely the work of the Australian Dr H V Evatt.<sup>130</sup> The Trusteeship Agreement had replaced the Mandate of the defunct League of Nations as and from 13 December 1946, and was ratified by s 6 of the Papua and New Guinea Act. Among the basic objectives of the trusteeship system was progressive development towards self-government or independence as was appropriate, considerably different from Murray's own view that the colonisers might 'be led too far and too fast by an excess of devotion to our own particular fetish, which, in the case of Australians, takes the shape of an advanced democracy'.<sup>131</sup>

On 4 February 1944, the Directorate forwarded directly to the Prime Minister under a covering letter from the Commander-in Chief, claiming a much wider Pacific role for Australia in the post-war period. It is highly optimistic and presents colonial development as an extension of Australia's national interest:

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<sup>128</sup> Francis West (Ed), *Selected Letters of Hubert Murray* (Oxford University Press, Melbourne, 1970), 22.

<sup>129</sup> C J Lynch noted this in his 1961 article 'A New Constitution for Papua and New Guinea' (June 1961) 70(2) *The Journal of the Polynesian Society*, 243.

<sup>130</sup> On the role of Evatt, see, e.g., W J Hudson, *Australia and the Colonial Question at the United Nations* (Sydney University Press, Sydney, 1970), 24.

<sup>131</sup> Murray, *The Machinery of Indirect Rule*, n11, 7.

The Australian government ... has a unique opportunity to make an interesting reversal of the normal and use policy on the highest moral level... to protect not only the future of the native peoples of the Pacific but the strategic security of Australia. It may be that we are confronted with one of those rare moments in history when morality coincides with expediency.<sup>132</sup>

Finally, the Directorate urged a new strategy of planning a political constitution and economy for Australia's colonial territories which would be permeated by 'the principle of the paramountcy of native interests'.<sup>133</sup> This approach recommended itself to ALP Minister for External Territories Eddie Ward, who, in 1945, appointed Keith Murray as Administrator of the Provisional Administration, a deliberate attempt at creating a forward-looking sense of loyalty to the new united Territory of Papua and New Guinea, rather than 'lingering allegiance' to either the former Mandate or Papua.<sup>134</sup> Murray stressed that the only return from Australia's expenditure in Papua and New Guinea would be the 'contentment and friendship of a million neighbours' who were helped towards freedom from want or fear, largely by increased emphasis on education.<sup>135</sup>

The fundamental priority after the Second World War remained the restoration of the shaken confidence of Papuans and New Guineans in Australian administration, and implementing some form of New Deal required more than 'the magic touch of Ministerial decision'.<sup>136</sup> As the thrust of policy came more from Evatt — who, despite conservative claims, balanced the idealism of trusteeship with a consolidation of Australia's economic interests in Papua and New Guinea<sup>137</sup> — Ward tended to have limited involvement in his Territories portfolio. However, whereas Hubert Murray had been given *carte blanche*, the increased attention from Canberra meant that Keith Murray's effective implementation of consistent policy was hampered by delays in receiving Ministerial approval and support. It has been argued that his experience of this haphazard approach left Murray unprepared for the heightened level of

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<sup>132</sup> Quoted in Brian Jinks, 'Australia's Post-War Policy for New Guinea and Papua' (Apr 1982) 17(2) *The Journal of Pacific History*, 93-94.

<sup>133</sup> *Ibid.*, 93-94.

<sup>134</sup> Ian Downs, *The Australian Trusteeship: Papua New Guinea 1945- 1975*, (Canberra: 1980), p 16.

<sup>135</sup> Australian Department of Territories, *Information Handbook: visit of the United Nations Visiting Mission to the Trust Territory of New Guinea*, 1953, 8.

<sup>136</sup> J D Legge, *Australian Colonial Policy: A Survey of Native Administration and European Development in Papua*. (Sydney: 1956), p 225.

<sup>137</sup> Emma Ede, 'Internationalist Vision for a Postwar World: H V Evatt, Politics & the Law' (BA Honours Thesis, University of Sydney, 2008), 66.

scrutiny which characterised the approach of the Liberal Ministers, Percy Spender and Paul Hasluck, after the election of the Menzies Government in 1949.<sup>138</sup>

Tellingly, Spender had alleged that the lack of plans for economic development was due not only to socialism, but partly to what appeared to him to be 'an exaggerated anthropological emphasis' by the local administration, which seemed to view the Territory as 'a large museum of which they were the devoted custodians'.<sup>139</sup> Historian Brian Jinks argues that, among the deeply conservative European population in Papua New Guinea, anyone associated with Ward and the Directorate were damned by that association.<sup>140</sup> Given the conservative opposition, it is unsurprising that in September 1951 Keith Murray was given an Assistant Administrator in the person of Donald Cleland, Chief of Staff to the Military Administration during the war, and deeply involved in Liberal politics in Hasluck's own state of Western Australia.

### Hasluck the martinet Minister for Territories

By the time of Cleland's appointment, Spender had moved on to be the Ambassador to the United States. He was succeeded as Minister for External Territories by Paul Hasluck, described by historian of the Pacific Donald Denoon as '[t]he martinet who knew exactly what Papua New Guineans needed to know... a patrician Liberal from Perth'.<sup>141</sup> Unlike his predecessors, Hasluck had no additional portfolio responsibilities, and for the next twelve years put his considerable energies into the role, severely curtailing the Administrator's decision-making and policy roles. In easing the Labor appointee Keith Murray into retirement and replacing him with Cleland as Administrator in January 1953, Hasluck warned off any rivals to pre-eminence in Territory affairs. This was despite the fact that Hasluck considered the Territories Ministry to effectively be the end of his political career, as it 'was not highly esteemed and ... of scant political significance'.<sup>142</sup>

In his 1976 political autobiography, Hasluck indicated that at the outset of his time as Territories Minister he discerned from those few Australians who actually took an interest that Papua and New Guinea would be best administered along the lines of the more enlightened pre-war British practice in Africa; but he soon concluded that this was an obstacle to change

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<sup>138</sup> Downs, n 126, 86.

<sup>139</sup> Quoted in Hudson, n110, 50.

<sup>140</sup> On the role of the Directorate in setting policy in the immediate post-war period see Jinks, n132, 86.

<sup>141</sup> Donald Denoon, *A Trial Separation: Australia and the Decolonisation of Papua New Guinea*, 24. <http://epress.anu.edu.au/?p=185491>

<sup>142</sup> Paul Hasluck, *A time for Building*, (Melbourne University Press, Melbourne, 1976), 6.



which could not be allowed to continue. Famously, he stated that on his first visit in July 1951 he had been dismayed by the prevalence of the trappings of Raj-style colonialism:

... an officers' mess full of temporary gentlemen in white ducks giving a repertory club performance of a pukka sahib who had just come in from a damned awful day of taking up the white man's burden... [N]ever before in my life had I come across so many Australians who had lost so quickly any capacity to clean their own shoes or pour themselves another drink without the attention of a 'boy'.<sup>143</sup>

To what extent this state of affairs was fostered by the Administrator himself is arguable, but what would appear to be Keith Murray's own draft of the *Papua and New Guinea Act 1949* includes provision for a High Commissioner of the Territory, who for all ceremonial purposes, was to 'enjoy the same status, precedence, dignities and privileges as a Governor of a British Crown Colony'.<sup>144</sup> This, however, did not appear in the Act's final form. According to Brian Jinks, Murray proposed he be appointed Lieutenant-Governor, with an Administrator and two Deputies, possibly in Lae and Rabaul. However, Jinks also suggests that, this apparent self-aggrandisement was more a case of attempting to strengthen his hand against J R Halligan, the Territories Departmental Secretary, and the conservative white clique, derided by Australian historian Paul W van der Weur as 'little Rhodesians'.<sup>145</sup>

Hasluck argued publicly that, as Port Moresby was no more remote from Canberra than the outlying Australian capitals, its administration was clearly an Australian one, rather than colonial.<sup>146</sup> However, in definitively moving the locus of power to Canberra, Hasluck effectively continued the approach of Hubert Murray both in terms of centralised decision-making and a mentality of superiority.

Throughout his tenure as Minister for Territories, Hasluck never once visited another colony. Unlike Hubert Murray — who at least read widely on international approaches to colonial issues before concluding that they were not applicable to Papua — Hasluck tended to repeatedly re-invent the colonial wheel in a manner in which a prime determinant was his own 'obdurate insularity'.<sup>147</sup> Ultimately, Jinks concludes that not only was Hasluck in Canberra of

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<sup>143</sup> *Ibid.*, 13 and 15.

<sup>144</sup> J K Murray Papers, Fryer Library, UQFL91, Box 3.

<sup>145</sup> P W van der Veur 'Political Advancement in Papua-New Guinea 1964-1965' (1966) 1 *The Journal of Pacific History*, 178.

<sup>146</sup> Paul Hasluck, *Australia's Task in Papua and New Guinea*, (Australian Institute of International Affairs, Melbourne, 1956), p 4.

<sup>147</sup> A M Healy, 'Hasluck on Himself' in A Ward, T Voutas, and B Jinks, *The Hasluck years: Some observations: the administration of Papua New Guinea, 1952-63*, (La Trobe University Research Centre for Southwest Pacific Studies, Melbourne, 1979), 32-33 and 35.

no assistance to Papua New Guinea, but he made things much worse in his determination to dominate the Territory and its Administration, with a tenure characterised as a 'dull *ad hocery*'.<sup>148</sup> Moreover, his paternalistic, gradualist approach was at odds with the post-War zeitgeist of dismantling of empires, such that Sir Hugh Foot dismissively referred to Hasluck as 'the District Officer of New Guinea'.<sup>149</sup>

In 1960, the United Nations created a Decolonisation Committee, and in a revealing encounter two years later, French Foreign Minister Maurice Couve de Murville told a young Gough Whitlam that it was only a matter of time until effective international pressure would be brought to bear on Australia as a colonial power. This depended only upon whom the UN 'had to eat first'; and while it might 'take another four or five years' for the remaining Portuguese and Spanish African territories to be 'digested', attention would then 'no doubt turn to New Guinea'.<sup>150</sup> The potentially deleterious impact of Australia's rule in Papua and New Guinea continued to be highlighted as the 1960s wore on. In an article in *Pacific Affairs*, British political scientist Michael Leifer correctly opined that Australia, 'remote, isolated and anxious about political support from her so-called "great and powerful allies among the free nations of the world", [was] not inclined to become the Portugal of Southeast Asia'.<sup>151</sup>

The global progress to decolonization had started when, in February 1960, British Prime Minister Harold Macmillan had famously asserted to the South African Parliament that 'winds of change' made the independence of Britain's African colonies inevitable.<sup>152</sup> By June 1960, even Australian Prime Minister Robert Menzies commented that if, in doubt when it came to ending colonial rule, colonial powers should go sooner rather than later. However, where Papua and New Guinea was concerned, sooner was still open to 'latitudinarian interpretation'.<sup>153</sup> Historian A M Healy, then Research Fellow in Pacific History at the Australian National University, characterised contemporary Australian public opinion and policy as 'stolidly and obstinately static'.<sup>154</sup>

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<sup>148</sup> According to Jinks there were four styles of administration in Papua and New Guinea: managerial paralysis; bureaucratic obstruction; well-intentioned muddling; and energy, ruthlessness and regular emotional appeals for money: Brian Jinks, 'Hasluck's Inheritance: Papua New Guinea in May 1951', Ward, Voutas and Jinks, n 148, 28.

<sup>149</sup> Downs, n126, 275.

<sup>150</sup> 22. A 452/1 62/1161, External Affairs to Territories, July 6, 1962, quoted in Denoon, n141, 30.

<sup>151</sup> Michael Leifer, 'Australia, Trusteeship and New Guinea', *Pacific Affairs*, Vol. 36, No. 3, Autumn 1963, p 255.

<sup>152</sup> On the evolution of Macmillan's views, see Ritchie Owendale, 'Macmillan and the Wind of Change in Africa 1957-1960' (June 1995) 38(2) *The Historical Journal*, 455.

<sup>153</sup> David Goldsworthy, *Losing the Blanket: Australia and the end of Britain's Empire*, (Melbourne University Press, Melbourne, 2002), 175.

<sup>154</sup> A M Healy, 'The Foot Report and East New Guinea', (Sep 1962) 35(3) *The Australian Quarterly*, 12.

Given this disconnect with international realities, it is not surprising that the real key impetus to change came about as the result of the observations of outsiders. On 7 July 1961, the United Nations Trusteeship Council decided to send a regular visiting mission to the Trust Territories of Nauru and New Guinea in 1962, to be composed of persons nominated by the Governments of Bolivia, India, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.<sup>155</sup> Despite this, in October 1961 Sir James Plimsoll, the Australian Permanent Representative to the United Nations, was still blandly assuring the General Assembly that self-determination and the right of the people to choose their own form of government were Australia's objectives in Papua and New Guinea.<sup>156</sup>

The United Nations delegation was chaired by Sir Hugh Foot, previously Governor of Cyprus. While acknowledging that the undertaking in New Guinea after the Japanese surrender presented 'a challenge and opportunity with few parallels in the history of under developed areas', the Foot Report was critical of the gradualism of the colonial administration and recommended to the Australian Government that the pace of self-determination be hastened.<sup>157</sup> The principal propositions put forward in the Report were a full economic survey by the World Bank; a new program of university and higher education; and immediate preparations for the election of a representative Parliament (of about one hundred members) to be elected from a common roll.<sup>158</sup> Commenting on the Foot Report, A M Healy noted that colonial Europeans could be relied upon to deride the very idea that the locals could even be considered as subjects for self-government, because 'defensive self-interest generates a will to conceptual stagnation'.<sup>159</sup> However, the mounting pressure could not be ignored indefinitely. One key result which impacted upon the legal framework of the Territory administration was the steps taken from the 1950's onwards to establish a legislature for Papua and New Guinea.

### A tentative legislature

The *Papua and New Guinea Act 1949* originally provided for an Executive Council 'to advise and assist the Administrator', consisting of not less than nine official members. In November

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<sup>155</sup> The Terms of Reference were set on 11 July 1961, with specific reference to the *Declaration on the Granting of Independence to Colonial Countries and Peoples* adopted by the United Nations General Assembly on 14 December 1960.

<sup>156</sup> Sir J Plimsoll, 'Statement on Australian Policies to the General Assembly 13 October 1961' *Current Notes on International Affairs*, Canberra, October 1961. Sir Andrew Cohen, the British representative to the United Nations Trusteeship Council, noted in respect of Papua New Guinea that Australia had 'a very backward area on which they are spending a great deal of money; it is very important to them strategically; and it is going increasingly to the object of criticism in the United Nations': quoted in Goldsworthy, n146, 43.

<sup>157</sup> *Report of the 1962 United Nations Visiting Mission to the Trust Territory of New Guinea* (New York, 1962), para 122 and para 268 respectively. <https://digitallibrary.un.org/record/1299090?ln=en>

<sup>158</sup> *Ibid.*, para 134.

<sup>159</sup> Healy, n155, 19-20.

1951 the Legislative Council for Papua and New Guinea first sat with three elected European members and three nominated native members, namely Merari Dickson (Papua), Simogun Peta (New Guinea) and Aisoli Salin (New Guinea Islands). Matters could only be brought before the Council by the Administrator, who was not bound by any ensuing advice. Nonetheless, if the Administrator did refuse to accept advice, he had to report to the Minister his reasons. Section 36(1)(c) of the Act blandly provided that the elected members should possess such qualifications as were provided by Ordinance and should be elected, as provided by Ordinance, by electors of the Territory. Ultimately, clause 8 of the *Legislative Council Ordinance 1951* drastically limited the franchise, by making it a disqualification to be an alien or a native. This was exacerbated by the fact that, unlike the remainder of the Commonwealth, enrolment was not compulsory, as Hasluck felt that this would 'solidify the restrictive nature of the roll'.<sup>160</sup>

Both the make-up of the Council and the composition of the electoral roll clearly evidence that the mind-set of the Australian administrators *vis-a-vis* indigenous Papua New Guineans had barely evolved since the tenure of Hubert Murray. Admittedly, however, they did face genuine difficulties characteristic of the Territory, such as its division into myriad language groups, and the limitation on any appointed member effectively 'representing' anyone other than his immediate kin.

A series of enactments in 1960 paved the way for elections to a more representative Legislative Assembly in 1964. These were the *Papua and New Guinea Act (No. 2) 1960*; and the *Legislative Council Ordinance 1960*, the *Administrator's Council Ordinance 1960* and the *Public Works Committee Ordinance 1960*, passed by the Legislative Council for the Territory of Papua and New Guinea. The 1964 elections for ten 'special' electorates for non-natives and 44 'open', were characterised by Ian Downs, District Commissioner of Goroka, as 'typically Australian', in that there was 'a lack of preparation followed by frenetic activity'.<sup>161</sup> The result, Downs concluded, was that, while the Australian Government had created a Parliament for the Territory, it had not created a parliamentary system.<sup>162</sup> However, as Downs also noted, while the system was justifiably to be criticised, there was 'no Melanesian model and one...had to be invented'.<sup>163</sup> Nonetheless, as that would-be 'system' was a slavish copy of arcane English and Australian procedure, with little thought for the handicaps this placed on the indigenous Members, it has been said that as 'a school for parliamentary procedures [the

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<sup>160</sup> Hasluck, n142, 42.

<sup>161</sup> Downs, n 134, 311.

<sup>162</sup> *Ibid.*, 311.

<sup>163</sup> *Ibid.*, 307.

Assembly] was inept, but as 'a school for the government of an independent country, it was grotesque'.<sup>164</sup>



The original native members of the Legislative Council at its inauguration in 1951.

From L to R Aisoli Salin, New Guinea Islands; Merari Dickson, Papua; and  
Simogun Peta, New Guinea Mainland.<sup>165</sup>

According to David Fenbury, head of the Administrator's Department from 1962 to 1969, both Parliamentary democracy and the rule of law in Papua and New Guinea were jeopardised because the inherent difficulties were aggravated by the language issue; the danger of failure derived from the 'mysterious fineries in which to many non-Europeans, they had been draped'.<sup>166</sup> Indigenous members expressed their dissatisfaction with this fundamental issue. In January 1965, Palau Maloat, MHA for Manus, deplored to the House the fact that '[t]hree times we have met and each time we have been deluged with papers. We have taken them to our rooms, but they are meaningless'.<sup>167</sup> In summing up the performance of the original

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<sup>164</sup> Denoon, n141, 57 and 59.

<sup>165</sup> Leslie W Johnson, *Westminster in Moresby*, pages not numbered, [https://openresearch-repository.anu.edu.au/bitstream/1885/111462/1/b20360046-Johnson\\_L\\_W.pdf](https://openresearch-repository.anu.edu.au/bitstream/1885/111462/1/b20360046-Johnson_L_W.pdf)

<sup>166</sup> International Commission of Jurists, Australian Section, *The rule of law in an emerging society: report of the proceedings*. Sydney 1970. Conference convened by the Papua and New Guinea Branch of the International Commission of Jurists, held in Port Moresby, 7-14 September 1965, 76.

<sup>167</sup> Papua New Guinea, *Parliamentary Debates*, Legislative Assembly, 19 January 1965, 379.

nominated members, Parliamentary Draughtsman C J Lynch unsurprisingly concluded in 1972 that they all remained weak on procedures despite increasing use of their opportunities [and] they all had problems of communication associated with language'.<sup>168</sup> It would not be until March 1973 that the Administrator was able to advise the Third House (1972-75) of steps being taken to have explanatory notes in English, Pidgin and Police Motu attached to Bills to be considered. Ian Grosart of the Australian School of Pacific Administration has argued that the failure to adapt traditional parliamentary procedure resulted from the 'emphasis on increased political integration and uniform development as primary objectives'.<sup>169</sup> He also opined that non-English speakers were being tolerated as a necessary but essentially interim phenomenon' such that the provision of translators and interpreters would have resulted in 'irresistible pressures to undermine what was felt to be a necessary qualification'.<sup>170</sup>

However, I would suggest that the better view is that it is an emanation of the underlying unchallenged belief in the universal superiority and applicability of those procedures, at one with the colonialist viewpoint of the common law. Moreover, it reflects the high-handed and determined centralisation in Canberra of policy-setting and decision-making not only with the Minister, but eventually with senior Departmental officers. Hasluck's unlikely successor was the Country Party Queenslander Ceb Barnes, who remained Minister until the dying days of the McMahon Government in 1972.<sup>171</sup> Dame Rachel Cleland, wife of the Administrator, describes Barnes and his Departmental Head, Warwick Smith, as 'the unwitting fathers of independence',<sup>172</sup> given that they exhibited a much more 'colonial' attitude, promoting 'backward-looking officers and tough types', whilst making things difficult for the more forward-looking among the administration.<sup>173</sup> Thus, on his appointment as Administrator in 1967, senior diplomat David Hay was informed by Smith that his job was

...to carry out Canberra's policies in such a way, and in harmony with the Government's long-term objectives in relation to the Territory, that the process of change is a smooth one and that a program of balanced development can be progressively achieved without divisive effects.<sup>174</sup>

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<sup>168</sup> D Stone, 'Papua New Guinea's House of Assembly: Some Aspects of the Old and the New', (1972) 7 *The Journal of Pacific History*, 166.

<sup>169</sup> I Grosart, 'Native Members in the Legislative Council of the Territory of Papua and New Guinea 1951-1963', (1966) 1 *The Journal of Pacific History*, 162-163.

<sup>170</sup> *Ibid.*, 152.

<sup>171</sup> Donald Denoon suggests that the Country Party might have wanted their man in the Territories portfolio to prevent Papua New Guinea from undercutting Australian farmers: Denoon, n141, 44.

<sup>172</sup> R Cleland, n147, 322.

<sup>173</sup> *Ibid.*, 345-346.

<sup>174</sup> Downs, n134, 286.

Nonetheless, it would be unfair to suggest that this was solely the view of Australia's conservative government. In 1958 at the Summer School of the Australian Institute of Political Science, Arthur Calwell, then Deputy Leader of the Federal Opposition, had argued that Australia was obliged to prepare Papuans and New Guineans for self-determination at a date perhaps '30 or 50 years ahead or more'.<sup>175</sup>

Unsurprisingly, a significant shift in Australian domestic politics was required to provide the impetus for real development in the administration of Papua New Guinea, bringing about changes at breakneck speed by Territory standards. In response to a January 1970 visit from the Federal Leader of the Opposition, Gough Whitlam, Minister Andrew Peacock bestowed a raft of decision-making powers on the Administrator's Executive Council and the Ministerial Members of the House of Assembly.<sup>176</sup> The only exclusions were the judiciary, the enforcement of law and order, external affairs and trade, and large-scale development projects. By June 1972 Peacock was speaking of Papua New Guinea 'moving rapidly to self government and independence', although he stopped short at setting a date.<sup>177</sup>

When Whitlam next visited as Australian Prime Minister in February 1973, he maintained that, as the country was no longer willing to be a colonial power, his Government would give independence within the lifetime of the current Australian Parliament.<sup>178</sup> Upon self-government on 1 December 1973, the final Territory Administrator, Les Johnson, became Australian High Commissioner. Papua New Guinean academic John Waiko has described the process pithily:

Australia more or less carved out what Australia wanted Papua New Guinea to be in the area, put this in a briefcase, left it in a house, walked out the front door. Papua New Guinea came in the back door, got the briefcase, and when they opened it, inside was an Australian institution.<sup>179</sup>

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<sup>175</sup> John Wilkes (Ed), *New Guinea and Australia*, Papers read at the 24th summer school of the Australian Institute of Political Science, held at Canberra, 25-27 January 1958 (Angus & Robertson, Sydney 1958), 118-19.

<sup>176</sup> See A S Peacock, Speech to the Victorian Branch of the Australian Institute of International Affairs, 21 August 1972, in Brian Jinks, Peter Biskup and Hank Nelson (Eds), *Readings in New Guinea History*, (Angus & Robertson, Sydney: 1973), 437.

<sup>177</sup> Address to the New South Wales Branch of the Australian Institute of International Affairs, Sydney 8 June 1972, reprinted in the debate on the *Papua New Guinea Bill 1975*, Australia, *Parliamentary Debates*, House of Representatives, 28 August 1975, 731.

<sup>178</sup> Australia, *Parliamentary Debates*, House of Representatives, 10 October 1972, 2297.

<sup>179</sup> Quoted in H Nelson, *Taim Bilong Masta*, (ABC Books, Sydney: 1982), 218.





A royal farewell — Queen Victoria's great-great-great-great grandson at the independence celebrations of Papua New Guinea, 11 September 1975.<sup>180</sup>

## Conclusion

In this chapter we have considered the colonialist approaches which underpinned the establishment of the legal regime in Papua. Hubert Murray was cognisant of the tenets of Indirect Rule as they were being implemented in other parts of the Empire. However, the acephalous nature of much of indigenous society in Papua and New Guinea meant that there was very limited possibility of the Administration ruling through traditional, chiefly structures. Moreover, he had to balance the welfare of the indigenous population with the governance expectations of Commonwealth Ministers and the small expatriate community. Therefore, he continued the paternalistic enforcement of Native Ordinances which he had inherited from William MacGregor. These included the 1893 Sorcery Ordinance designed to bring allegations of evil sorcery and sorcery-related violence before the colonial courts.

Murray prided himself on being receptive to advances in anthropology as a means of understanding — and therefore ruling — the indigenous peoples of the Empire. In Papua and New Guinea this understanding was enhanced by a steady stream of anthropological and ethnological research. Not the least of these was the pioneering work on native law produced

<sup>180</sup> <https://www.abc.net.au/news/2015-09-15/prince-charles-in-png/6775868>

by Bronisław Malinowski, which informed that of subsequent generations of anthropologists in the field. Nonetheless, Murray was always a colonial administrator first; all customary practices were viewed through the lens of best administrative practice. Ongoing anthropological research had much to say about the centrality of sorcery beliefs to the lives of his indigenous charges, ever since Malinowski had urged a consideration of it as a social phenomenon, devoid of any western preconceived ideas or ready-made definitions.<sup>181</sup>

However, the belief in the efficacy of sorcery encouraged 'disorder' and set the sorcerer up as an alternative locus of power to the colonial administration. Therefore, it was a mischief which simply could not be tolerated. It had to be dealt with by the processes of the criminal law, simplified for 'natives'. This militated against the development of a nuanced approach to sorcery beliefs in the text of the law itself and in its practice. The result was a legal policy approach to sorcery and sorcery-related crime that barely evolved from the date of the enactment of the Sorcery Ordinance in 1893. This approach was as 'stolidly and obstinately static' as A M Healy's characterisation of Australians' views on the Territory generally, up until the 1960's.<sup>182</sup>

The seeming permanence and efficacy of the 'Murray System' cemented the limited interest Australian policy makers had in the governance of the Territory up until the Second World War. The devastation of the War brought a realisation in some policy-making quarters that the chaos wrought by the Japanese invasion required a new approach to the administration of the Territory. However, Paul Hasluck's shift of the locus of power from Port Moresby to Canberra from 1958 onwards continued the trend of personal dominance which had characterised the administration of both MacGregor and Murray, and left little room for reflection or experimentation. Given the Minister's reticence to share decision-making with the Territory Administration, it is hardly surprising that there was an absence of initiatives to do the same with the 'natives' in Port Moresby.

When international pressure in the 1960's finally forced Canberra to move to devolve power to Port Moresby, the response was simply to graft Westminster-style procedures onto a unicameral legislature. This was despite their limited relevance — or, indeed, intelligibility — to the indigenous elected members. While there were undoubtedly considerable difficulties specific to Papua New Guinea to be overcome, the assumption of a 'one size fits all'

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<sup>181</sup> Bronisław Malinowski, *Crime and Custom in Savage Society - An Anthropological Study of Savagery* (Kegan Paul, Trench, Trubner & Co, London, 1926), 15-16.

<sup>182</sup> Healy, n155, 12.

Parliament inhibited the ability of those indigenous members to operate as law-makers in an independent state.

In the next chapter we will examine how the mischief of sorcery and sorcery-related crime was dealt with on a quotidian basis in the kiap courts. We will then consider the response of the justices of the Supreme Court of Papua and New Guinea once the same 'zephyrs of change' we have considered in respect of independence in this chapter came to waft across the Territory's judiciary in the 1960s and 1970s.

# Chapter Four: Sorcery law and legal practice in Papua and New Guinea

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Many years must pass before the belief in sorcery disappears, but should this ever be the case the problem of serious crime in Papua will be solved so far as such a solution is possible.<sup>1</sup>

## Introduction

This chapter examines the hearing of sorcery accusations in the Court system throughout the colonial period. These processes are characterised by two recurring themes. The first is that on the one hand, the Administration did not wish to reify sorcery beliefs as an alternative locus of power by acknowledging them in statute and through prosecution; on the other, it needed to control the violence emanating from sorcery beliefs, which required both statute and prosecution. The second is that sorcery's combination of secrecy and ubiquity meant that there would only be few convictions, and what was often viewed as desultory sentences, which limited the confidence of indigenous Papua New Guineans in the efficacy of western law. Thus, in November 1904 British anthropologist Charles Seligman was informed by a Port Moresby 'hereditary chief' that there was then a sorcerer in remand on a charge of sorcery, whom the chief feared would not be gaoled by the Government long enough, but would soon be out to carry out his threat to put 'medicine' in all the wells.<sup>2</sup>

Sir Les Johnson, Administrator of Papua New Guinea from 1970 to 1974, summarised these tensions and their results as follows:

Given that evidence was often produced by illiterate policeman and unsophisticated villagers, there were many occasions when an offender who every villager knew was guilty escaped the consequences of his act through some mysterious legality argued learnedly in English before a be-robed judge and a bemused audience... the law came into disrepute, and there was a lessening regard for its observance.<sup>3</sup>

This shows that, even this late in the colonial period, the administration continued its policy of proscription and prosecution throughout the Territory, even when the application of the

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<sup>1</sup> Hubert Murray, *Papua or British New Guinea*, (T M Unwin, London, 1912), 245 -246.

<sup>2</sup> Charles G Seligman, *Melanesians of British New Guinea* (Cambridge University Press, Cambridge, 1910), 171.

<sup>3</sup> Leslie W Johnson, *Colonial Sunset*, (University of Queensland Press, Brisbane, 1983), 177.

processes of the law caused frustration among villagers who saw 'known' sorcerers either being found not guilty or giving sentences of insufficient deterrence.

Despite the limitations of the extant written records, they do illustrate the evolving nature of the colonial administration itself and of its application of the common law to indigenous Papuans and New Guineans. That is to say, the tenor of the earliest Reports from British New Guinea up until the 1950's is one of the criminal law applied in a pared-back, rudimentary form, unashamedly as an arm of the administration's pacification of the natives and the extension of the *Pax Australiana*. By comparison, in the law reports of the 1960's – which are themselves a sign of a maturing and more independent judiciary – we can discern the same 'zephyrs of change' that characterised the faltering steps to some form of real indigenous participation in the Legislative Assemblies in the lead up to independence.

### A paternal form of justice

The Colonial Office had instructed William MacGregor to introduce into British New Guinea a judicial system that was as summary and simple as possible, recommending the examples of African colonies such as Bechuanaland and Zululand.<sup>4</sup> In 1888 MacGregor appointed Francis Winter as the colony's Chief Judicial Officer and Deputy Administrator. Winter was a Queensland-trained lawyer whom MacGregor knew as acting Attorney-General of Fiji, and whom he considered to have good knowledge of laws and regulations 'suitable for the government of native races'.<sup>5</sup> Winter remained in the position until 1903 — including two periods as acting Administrator — during which time he gave serious consideration to the inherent difficulty of convincing Papuan New Guineans of the benefits of adopting the impersonalised processes of justice which characterised the common law. Nonetheless, he concluded that, as the entire ethical system of the indigenous Papuan was based on compensation for what would in the common law be 'crimes' for which the community would seek justice, only time and experience could convince that it was safer to 'leave the State to extort the 'payment' for a crime'.<sup>6</sup>

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<sup>4</sup> See Roger B Joyce, *Sir William MacGregor*, (Oxford University Press, Melbourne, 1971), 182.

<sup>5</sup> 'Widely read, a profound thinker, possessed of a singular charm of manner, simple and unaffected to a degree, Winter was a man that [sic] fascinated every one with whom he came in contact. I don't think he ever said an unkind word or did a mean action in his life. Every officer in the Service, then and later, took his troubles to him, and every unfortunate out of the Service appealed to his purse': C A W Monckton, *Some experiences of a New Guinea Resident Magistrate* (J Lane, London, 1925), 12.

<sup>6</sup> Francis Winter, *Annual Report, British New Guinea 1893-94*, 65. Winter was knighted in 1900 (see *The Irish Bomfords 1617 to the Present*, <http://www.bomford.net/IrishBomfords/Chapters/Chapter18/Chapter18.htm>); authored a slim tome on *The Latent Military Strength of India* at the beginning of the First World War; and died in Melbourne in 1919.

Inspired by his Fijian experience, MacGregor established a Native Administration Board to consider matters bearing on 'native welfare', as he believed that unrestricted interaction with Europeans would probably impede his prime objective of pacification and the imposition of British law.<sup>7</sup> The new colony adopted the laws of Queensland, although they were soon complemented with a separate *Native Affairs Ordinance 1889* written in simple English and translated into Motuan, the language of the people of the Port Moresby district.<sup>8</sup> MacGregor was adamant that a paternal form of justice was the most suitable for people 'stepping out of savagery and barbarism into civilisation';<sup>9</sup> he saw his duty as eliminating their attendant evils, beginning with putting an end to the ceaseless tribal conflicts.<sup>10</sup> In so doing, MacGregor quite deliberately cut at the roots of traditional New Guinean society, with the law as one of his main tools.

MacGregor was soon presented with the opportunity to impress upon Papuans his determination to enforce individualised British standards of criminal justice. In January 1889, Francis Winter sentenced to death the ringleaders of the unprovoked murder of Captain John Ansell in Chad's Bay, near Samarai. Practice in the colony was that, after a death sentence had been imposed, the Administrator-in-Council had the power to review the decision, but the Administrator acting alone had the ultimate right to overrule the advice of the Council. Winter advised in the Executive Council that all the sentences should be commuted, due to the facts that this was a first trial in the locality and that everyone in the district was implicated, and to his opinion that mercy would be a more effective means way of encouraging future submission to the law. Supported by Bingham Hely, Resident Magistrate and Member of the Legislative and Executive Councils,<sup>11</sup> MacGregor disagreed, hoping that imposing very public capital punishments would undermine traditional custom. He rejected outright the suggestion that the indigenous murderer should receive leniency because it had been 'customary for the Papuans to treacherously butcher each other'.<sup>12</sup> The sentences were duly carried out, with the two executions at Chad's Bay witnessed by a crowd estimated in one newspaper report as amounting to '1000 natives'.<sup>13</sup> MacGregor concluded that the effect of the captures, trials and executions upon the Papua New Guineans had been profound, and his hope that a policy of

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<sup>7</sup> Osmar White, *Parliament of a Thousand Tribes*, (Heinemann, London, 1965), 45.

<sup>8</sup> Joyce, n4, 182.

<sup>9</sup> Joyce, n4, 120.

<sup>10</sup> *Ibid.*, p 141.

<sup>11</sup> MacGregor had inherited Hely, whom he regarded as 'lazy and flatulent', from the Protectorate: *ibid.*, 152

<sup>12</sup> Joyce, n4, 184.

<sup>13</sup> See the Californian *Daily Alta*, Vol 80, No 76, 17 March 1889, <http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=DAC18890317.2.6>

severity in the Ansell murder would avoid future murders was supported by the Colonial Office.<sup>14</sup>

During MacGregor's tenure, some 418 Papuans were charged with murder, of whom two thirds were committed to trial, resulting in 138 guilty verdicts with death sentence; however, in only eleven of those instances was it carried out, and all of those prior to June 1894. It is noteworthy that ten of those judicial executions were for the murder of Europeans.<sup>15</sup> At first glance this statistic may seem a straightforward case of colonialist racism, in that the life of a European was more valuable than that of an indigenous Papua New Guinean. However, it is perhaps more fairly characterised as recognising that the murder of a European would not be subject to the potential mitigation offered by traditional processes of inter-tribal fighting. Therefore, any murders which did not fall within the scope of this tradition would be punished with the full weight of British law and the noose.

On the issue of the payback killings, Roger Joyce considered that MacGregor could have shown more sympathy and understanding towards native society, by reference perhaps to the anthropological work being undertaken by Charles Seligman in the Torres Straits in the 1890's. However, as the Cambridge University expedition of which Seligman was a part did not arrive on Thursday Island until April 1898, this is unfair to MacGregor. Nonetheless, anthropologist Michael Goddard maintains that the customs which MacGregor interpreted as motivating murder were in many cases also transgressions within Melanesian societies, in which they were regarded as seriously as they were by the Administration and subject to a wide range of punishments. In Goddard's view, applying the broad rubric of 'native custom' to outlawed practices, including sorcery, simply meant that they were 'not recognisable as components of the contemporary Western cultural experience'.<sup>16</sup> Moreover, despite his desire to impose European conceptions of law and justice, MacGregor was well aware of the danger of attempting to introduce radical changes in custom — including sorcery — in a society where there was no concept of abstract impartial justice.<sup>17</sup> Nonetheless, he proceeded to criminalise

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<sup>14</sup> MacGregor to Gordon, cited in Joyce, n4, 132 and NN 35, J Bramston to Colonial Office, 14 February 1889. Sir John Bramston was an English-born lawyer who became a leading politician in Queensland in the 1860's. In 1876 he returned to England and was an influential voice on Australian affairs at the Colonial Office for the next two decades.

<sup>15</sup> Joyce, n4, 184-185.

<sup>16</sup> Michael Goddard, 'The Snake Bone Case: Law, Custom, and Justice in a Papua New Guinea Village Court', (September 1996) 67(1) *Oceania*, 53.

<sup>17</sup> *Annual Report for British New Guinea 1897-8*, 28.



sorcery practices by way of the *Native Regulation Board Ordinance of 1893* [the 1893 Ordinance].<sup>18</sup>

MacGregor was convinced that the majority of the indigenous Papuans approved warmly of the suppression of sorcery and considered at the very beginning of its implementation that it was ‘already manifest that this Regulation will be productive of considerable good’.<sup>19</sup> He subsequently reported that in their anxiety to rid themselves of sorcery, in many places the Papuans had ‘voluntarily delivered to the Government the garbage used as a sort of fetish’.<sup>20</sup>

### Enforcing the Sorcery Ordinance

At the very outset, the Preamble to the 1893 Ordinance highlights the ambiguity which characterised the Administration’s response. Although sorcery was ‘only deceit’, as ‘the lies of the Sorcerer frighten many people and cause great trouble... the Sorcerer must be punished’. Therefore, clause 10 of the Ordinance provided that any native was liable to a fine not exceeding three pounds or in default of payment to imprisonment for any period not exceeding six months in the first instance, if he:

- (a) practises or pretends to practise sorcery;
- (b) threatens any person with sorcery whether practised by himself or any other person;
- (c) procures or attempts to procure any other person to practise or pretend to practise or assist in sorcery;
- (d) is found in possession of implements or “charms” used in sorcery; or accepts payment or presents in the shape of food or otherwise when the obvious intention of making such payments or presents is to propitiate a Sorcerer.

‘Native’ was broadly defined to include an aboriginal native of Papua, New Guinea, or adjacent islands; together with any indigenous Australians, Pacific or East Indian islanders and Malaysians who ‘live[d] after the manner of the aboriginal native of Papua or of the islands adjacent’. Clause 10(d), banning the possession of implements or charms used in sorcery, was not in the original Ordinance, but was added in 1911 revision. Later, in New Guinea, the *Native Administration Regulations 1924* outlined the same range of offences for sorcery as Papua, such that the practice of sorcery there carried a penalty of payment of three pounds,

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<sup>18</sup> Note that the original 1893 offence of sorcery was remade, most latterly as Regulation 80 of the *Native Regulations 1939*, but it will be referred to as the 1893 Ordinance throughout the thesis to avoid any potential confusion.

<sup>19</sup> *Annual Report for British New Guinea 1892-93*, vi-vii.

<sup>20</sup> William MacGregor, ‘British New Guinea: Administration’, (1894-95) 26 *Proceedings of the Royal Colonial Institute*, 214.

or imprisonment for six months, or both. These Regulations were enforced by the Patrol Officer in his judicial capacity, which we will consider in detail below. Ironically, the administration was effectively precluded from dissecting a body to ascertain whether the person had died from sorcery, as it constituted an offence of interfering with a dead body under s 236 of the Criminal Code.

Half a century later, the explorer Lewis Lett's *The Papuan Achievement* adhered to the colonial Administration's line that sorcery was a myth,<sup>21</sup> and therefore not amenable to punishment. However, Lett considered that the 'almost contemptuous' light sentences given to convicted sorcerers had the effect of denting a sorcerer's reputation, as a few months in jail reduced him to the level of any other Papuan offender.<sup>22</sup> Interestingly, Hubert Murray held the opposite view to Lett, considering that the light sentences prevented Papuans from informing against a sorcerer who would soon return and 'wreak vengeance upon the person who betrayed him to the Government'.<sup>23</sup> These divergent observations highlight one of the key components of the approach to indigenous crime in the Murray System, namely a strict adherence to criminal procedure, ameliorated at the sentencing stage by an acknowledgment of the traditional social framework in which crimes such as murder were not only justifiable, but often obligatory. Thus, in his seminal *The Law of Primitive Man*, leading American anthropologist E Adamson Hoebel notes that, contrary to Christian notions of the sanctity of human life, actions which support the viability of a community, such as infanticide, invalidicide, senilicide and suicide, in subsistence societies are privileged acts of 'socially approved homicide'.<sup>24</sup>

In Chapter Two, we noted the fundamental limitations on Commissioner Sir Peter Scratchley's ability to enforce the criminal law against either indigenous Papuans or European residents in British New Guinea. The framework for the approach to criminal justice throughout the Empire was that, where a territory was 'conquered' or 'ceded', and there was an established system of civilised (usually European) law prevailing in that territory, it continued in operation until changed by the conquering (always European) power.<sup>25</sup> Diverse examples are the continuation of Dutch-Roman law in various African colonies, and that of French or Spanish

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<sup>21</sup> Looking back to the turn of the twentieth century, Magistrate CAW Monckton recalled Winter himself confiding in him that he had not once found any direct evidence that a sorcerer had caused a death, despite the fact that occasionally the sorcerer made no secret of his 'guilt': Monckton, *Taming New Guinea*, (Dodd Mead and Company, New York, 1922), 187.

<sup>22</sup> Lewis Lett, *The Papuan Achievement*, (Melbourne University Press, Melbourne, 1944) 48.

<sup>23</sup> Murray, n1, 210.

<sup>24</sup> E Adamson Hoebel, *The Law of Primitive Man* (Harvard University Press, Cambridge, Mass, 1967), 74.

<sup>25</sup> See, e.g., *Campbell v Hall* (1744) 1 Cowp 204; *Fabrigas v Mostyn* (1773) 20 St Tr 181; *Union Government Minister of Lands v Whittaker's Estate* [1916] App Div (S.A.) 203.

law in the Caribbean.<sup>26</sup> With respect to Ceylon (modern Sri Lanka) it was been said that 'the Roman-Dutch law... was like an old kadjan roof; as it got older it let in the outside elements, and they were mainly English law'.<sup>27</sup>

The contrary approach was that, in the absence of any countervailing system of law in British New Guinea, English law was necessarily the law of the Territory, as it was apiece with the Australian colonies and New Zealand as 'settled colonies'.<sup>28</sup> Unsurprisingly, given that New South Wales was a penal settlement, English criminal law had been imported into the colony from the first settlement, under Letters Patent issued in 1787. Uncertainty around the applicability of other English laws was clarified by s 24 of the *Australian Courts Act 1828*. Nonetheless, thirty years later Lord Chancellor Cranworth despaired in the 1858 appeal from New South Wales in *Whicker v Hume*:

Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies... Who is to decide whether they are adopted or not? This is a very difficult question.<sup>29</sup>

Finally, in the 1889 decision of *Cooper v Stuart*, the Judicial Committee of the Privy Council [the Privy Council] has long been assumed to have affirmed that New South Wales was to be treated as a settled colony.<sup>30</sup>

The advent of the common law in the territories of Papua and New Guinea is therefore described as a process of 'reception'. Practically this was enhanced by the introduction of the *Courts and Laws Adopting Ordinance (Amended) of 1889*, especially s 3 and s 4;<sup>31</sup> and for Mandated New Guinea, the *Laws Repeal and Adopting Ordinance 1921*.<sup>32</sup> The adoption of

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<sup>26</sup> For example, see respectively, Roger Gocking, 'Colonial Rule and the 'Legal Factor' in Ghana and Lesotho', (1997) 67(1) *Africa*, 61; and Dorcas White, 'Some Problems of a Hybrid Legal System: A Case Study of St Lucia' (Oct 1981) 30(4) *The International and Comparative Law Quarterly*, 862.

<sup>27</sup> Sir Ivor Jennings & Henry W Tambiah, *The Dominion of Ceylon* (Stevens and Sons, London, 1952), 198. *Kadjan* (or *cadjan*) are woven mats made from coconut palm leaves, used for roofing and walls.

<sup>28</sup> However, on the reliability of the relevant case law, see Bruce McPherson, 'The Mystery of Anonymous (1722)', March 2001 ALJ 69. Moreover, although Sir Edward Coke is hailed as the authority for the inevitability of the transmission of the common law, he himself did not believe that British subjects enjoyed common law rights other than in England: D J Hulsebosch, 'The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence' (Autumn 2003) 21(3) *Law and History Review*, 439.

<sup>29</sup> (1858) 7 H.L.C. 124, 161 (11 E.R. 50, 65), an appeal from New South Wales.

<sup>30</sup> (1889) 14 App Cas 286, 291-293. See generally Alex C Castles, 'The Reception and Status of English Law in Australia', 1963 2 *Adelaide Law Review*, 1.

<sup>31</sup> The *Courts and Laws Adopting Ordinance 1888* had created the Central Court of British New Guinea as a court of record. The Ordinance conferred on the new court criminal jurisdiction over all crimes and offences against the law (s 8); and such civil jurisdiction as the Supreme Court of Queensland exercised in that colony, according to the laws then governing such matter or cause in Queensland (s 10).

<sup>32</sup> Section 2 of the *Courts and Laws Adopting Ordinance (Amended) of 1889* adopted for British New Guinea as at 17 September 1888 the statutes of Queensland, and s 3 adopted Imperial statutes and laws; s 4 adopted the 'principles and rules of common law and equity that for the time being shall be in force and prevail in England'. Sections 13, 14 and 15 of the *Laws Repeal and Adopting Ordinance 1921* adopted for Mandated New Guinea

the existing principles and rules of common law and equity, qualified by the bland use of the phrase 'so far as the same shall be applicable to the circumstances of the Possession', reflects one of the major themes of an Empire-wide common law. This is the tension between a strict judicial adherence to the law and laws of England, which theoretically reached back in history to 'time immemorial' on the one hand; and the novel practical needs of colonial judges and administrators on the other. This balancing act did not necessarily come naturally to expatriate judges when deciding upon the applicability of custom. In an 1882 decision, the Chief Justice of the Gold Coast (now Ghana) held that a local custom had to date back to 1189, to satisfy the English criterion of 'time immemorial', a decision which was not overturned there until 1925.<sup>33</sup>

The parameters of this conflict were delineated by Lord Denning's famous 'English Oak' observation in the 1956 decision of *Nyali Ltd v Attorney General*, on appeal from Kenya.<sup>34</sup> Denning held that one could not transplant English common law to the colonies and 'expect it to retain the tough character which it has in England'.<sup>35</sup> Rather, while much of its content could be applied universally, English common law also had:

...many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands.<sup>36</sup>

Undoubtedly the most thorough review of the reception of the common law in Papua and New Guinea was made by Rob O'Regan in the early 1970's, after his experience as a practising lawyer and then Professor of Law at the University of Papua New Guinea. O'Regan concluded that the preferable approach was for courts to apply specific common law rules when the circumstances of the relevant colony were such that they had practical applicability.<sup>37</sup> In observing in his April 1971 article 'Pruning the oak' that English law 'just happened to be the

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Queensland statutes, Imperial statutes and laws, and the Ordinances of Papua respectively, 'so far as the same shall be applicable to the circumstances of the Territory'

<sup>33</sup> *Mensah v Winabob* (1925) Div Ct Judgments 1921-5. See also L C Green, "'Civilized" Law and "Primitive" Peoples' (1975) 13(1) *Osgoode Hall Law Journal*, 233. Greene additionally notes *Anguilla v Ong Boon Tat* (1921) 15 SSLR 190, 193, to the effect that, as the history of Singapore only began in 1819, 'that in itself conclude[d] the matter'.

<sup>34</sup> [1956] 1 QB 1.

<sup>35</sup> [1956] 1 QB 16.

<sup>36</sup> [1956] 1 QB 1, 16-17.

<sup>37</sup> Rob S O'Regan, 'The Common Law Overseas: A Problem in Applying the Test of Applicability' (Apr 1971) 20(2) *The International and Comparative Law Quarterly*, 345.

one with which the colonial administrators in Papua and New Guinea were most familiar'<sup>38</sup>, O'Regan expressed a view of the practicalities of 'legal transplantation' which was soon to be elaborated by Scots legal historian Alan Watson in his seminal *Legal Transplants: An Approach to Comparative Law*. Watson argued that laws develop across jurisdictions by transplanting, 'because [a] foreign rule was known to those with control over law making and they observed the (apparent) benefits which could be derived from it'.<sup>39</sup> O'Regan also prefigures the view of American legal historian Michael H Hoeflich to the effect that reception is 'both possible and explicable so long as one recognizes that the most important group for reception of legal rules is the legal elite'.<sup>40</sup>

O'Regan maintained that an introduced common law system such as Griffith's Queensland Criminal Code could still effectively operate in Papua and New Guinea, by means of 'pruning the English oak' to local peculiarities, rather than abolishing the existing system, noting that judges had usually been 'realistic, indeed sometimes even adventurous, in relating the words of the foreign code to the cultural context in which they must operate'.<sup>41</sup> He considered that this was the view of Barton J in *Delohery v Permanent Trustee Co of New South Wales* to the effect that Watson LJ in *Cooper v Stuart* had held that 'that part of the common law which is suited to a more advanced state lies dormant until occasion arises for enforcing it'.<sup>42</sup> Whether or not a jurisdiction was sufficiently 'advanced' would appear to be a question of judicially ascertainable fact. As Ollerenshaw J noted in 1966 in *R v Womeni Nanagam*, whatever the arguments in favour of the Courts modifying the Queensland Criminal Code to address the lived existence of indigenous Papua New Guineans, it was 'doubtless' considered that their 'standards, beliefs, customs and so forth could and would be taken into consideration by the judges upon the question of the proper punishment in each case'.<sup>43</sup>

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<sup>38</sup> Rob S O'Regan, 'Pruning the English Oak', (November 1972) 5(3) *The Comparative and International Law Journal of Southern Africa*, 282.

<sup>39</sup> See Alan Watson, 'Comparative Law and Legal Change', (1978) 37 *Comparative Law Journal* 313 at 315. Indeed, it more recently has been suggested that we confine 'legal transplantation' to the imperial transplanting of law to colonies... 'Legal reception' should be confined to the Great Reception of Roman law, and possibly to statutes which use the phrase 'on the topic x the law of y shall be received into jurisdiction z': Andrew Harding, 'The Legal Transplants Debate: Getting Beyond the Impasse?' in Vito Breda, *Legal Transplants in East Asia and Oceania*, Cambridge University Press, <https://doi.org/10.1017/9781108605991>

<sup>40</sup> Michael H Hoeflich, *Law, Society and Reception: The Vision of Alan Watson*, (1987) 85 *Michigan Law Review*, 1089.

<sup>41</sup> Rob S O'Regan, 'Pruning the English Oak', (November 1972) 5(3) *The Comparative and International Law Journal of Southern Africa*, 283. Nonetheless, he did acknowledge that it was ultimately 'an alien importation - a Caucasian product exported to Melanesia without any serious attempt to relate it to the particular needs and conditions of its new home': *ibid.*, 282.

<sup>42</sup> (1904) 1 CLR 283, 291.

<sup>43</sup> *R v Womeni Nanagam* [1963] P&NGLR 72, p 79.

The original textual source of judicial adventurism in Papua was the 1898 Memorandum of Francis Winter, in which he noted that the Native Magistrates Courts of British New Guinea administered justice under 'a special code' which provided for milder penalties.<sup>44</sup> While Winter acknowledged that, by traditional mores, acts of murder amongst indigenous Papuans were justifiable, to allow the verdict of a common law court to be influenced by that fact would be 'pernicious'. On the other hand, it was perfectly reasonable to regard them as a 'sufficient palliation to warrant a commutation of the sentence'.<sup>45</sup> As the Murray System matured in the Territory of Papua, this sentencing practice was more generally 'codified' by Justice Ralph Gore in his *The Punishment for Crime Among Natives*, annexed to the 1929-30 *Annual Report for Papua*, and written at Murray's behest, and attached to this thesis in full as Appendix 1.

In Gore's strident view, as the colonisers in British New Guinea had found 'no semblance of a legal system', the only option was to fully import one 'to the exclusion of all else'.<sup>46</sup> Nonetheless, in view of the quotidian realities facing courts in Papua, the traditional practices of common law criminal sentencing had to be augmented by the following considerations in determining the punishment for indigenous crime:

(1) No previous knowledge of the Government or only a vague idea of the Government existing: The native becomes a criminal only because of the law which somebody, of whom he has never heard, has imposed upon him. In justice the Court cannot award any punishment at all.

(2) Some knowledge of the existence of the Government but inability to resort thereto for the punishment of crime: The native can scarcely be executed to refrain from resorting to his own primitive method of redressing wrong merely because somewhere to his knowledge there is a Government existing... Crime is never countenanced and arrest and trial follow as necessary sequence but the delinquent cannot receive punishment for following his natural bent when nothing has effectively provided to supplant it.

(3) Crime committed arising out of native custom: The native custom which supplies the motive is such an ingrained part of his social system that to him it is no wrong to commit crime in obedience to it. The urge, too, is so great that although he may have acquired a sufficient conception of the law's demands, he is mentally incapable of

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<sup>44</sup> Francis Winter, 'Memorandum by the Chief Judicial Officer on the Administration of Justice, in Connection with the Natives of the Possession, During the Last Decade', *Annual Report for British New Guinea 1898-99*, 70.

<sup>45</sup> *Ibid.*, 70.

<sup>46</sup> Ralph T Gore, 'The Punishment for Crime Among the Natives', *Annual Report for Papua 1928-29*, 20.

resisting the impulse of his tribal creed. The Courts regard crime committed in obedience to inherent native custom in the light of criminal responsibility. The untutored savage can be likened to the child of tender years who knows not the difference between right and wrong or to the person of natural mental infirmity which deprives him of the capacity to control his actions. But, in truth, they are neither children nor persons of mental infirmity when the law relieves of total criminal responsibility, but the Courts take it upon themselves to relieve them of a measure of criminal responsibility because of the motive which urged the crime.

(4) The degree of advancement made through contact with civilisation: The delinquent is to receive punishment for his crime and the amount of it depends on the degree of advancement he is considered to have made, arrived at by a review of many and varied circumstances. It is inconceivable that he should be awarded punishment in equal degree to that which would be given to a European for corresponding crime when he is void of that moral sense which binds the actions of the European with the law which the latter himself has helped to create. What he is awarded is something much less, hoping for the day when he will emerge from the slough of ignorance and savagery on to the firm ground of civilisation.

(5) The decline of population in a particular tribe: The Administrative Government, therefore, must rely upon the Courts to assist where necessary in its endeavour to preserve the race for an uplifted posterity. This consideration influences the Court when the delinquent is a member of a tribe which is decreasing or concerning which there is the fear of a decrease and then particularly when a number is charged with committing a crime in company.<sup>47</sup>

After Hubert Murray himself, Ralph Gore looms largest in the application of the criminal law in Papua both before and after World War II. Born in Glen Innes, New South Wales in 1888, he had been associate to Chief Justice Sir Samuel Griffith in 1915 and 1916, before serving with the AIF in France. Having been appointed Acting Judge in 1926 to try a matter in Ononge, in 1928 he succeeded Charles Herbert as judge of the Central Court of Papua, when the latter was appointed Administrator of Norfolk Island after eighteen years' service. Gore deeply admired Murray, whom he considered was 'equipped the best to assume the important task of imposing upon a primitive people the jurisprudence of a civilised society'.<sup>48</sup> However, Gore had scant interest in accommodating native custom by way of contemporary anthropology, noting, for example, that in all his experience the Mekeo Papuan was 'the most steadfast liar'

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<sup>47</sup> *Ibid.*, 20-21.

<sup>48</sup> Justice Ralph Thomas Gore Collection, Fryer Library, University of Queensland, UQFL88, 88/154.

he had ever encountered.<sup>49</sup> Nonetheless, on being appointed to the newly-established Supreme Court of Papua-New Guinea in 1945, he felt that 'the native population should be made aware that the law was being applied for its protection'.<sup>50</sup> Moreover, as we have seen with Hubert Murray's willingness to invoke the power of the sorcerer to ensure smallpox vaccinations,<sup>51</sup> Gore was not beyond keeping a dog in the Rigo courtroom, given the local belief that no one could tell a lie with a dog present.<sup>52</sup>

Gore maintained in *Punishment for Crime Among Natives* that the paramount object of punishment was the prevention of crime. In considering this, Arie Freiberg has noted that, together with conformity with Western standards such as the extensive list of Forbidden Acts, 'crime', as defined by colonial lawyers such as Gore, was 'part of the assimilative ideal' in Papua and New Guinea.<sup>53</sup> This seems a sentiment that Gore would have heartily endorsed.

In his 1965 memoirs, *Justice versus Sorcery*, Gore sneered that, while anthropologists might discern some form of criminal law in pre-colonial Papua, the 'freakish customs' of the indigenous Papuans could not 'impress practical lawyers':

It was indeed fortunate that no primitive legal system...existed because it was easier and more in accord with the idea of a civilizing process to apply the system under which the white settlers lived. But while the system had become conventional with white settlers through moral demands over the ages, it needed some softening when applied to a primitive people ethically opposite.<sup>54</sup>

Typical of the work is Gore's contention that, as Papua New Guineans were 'infants in history', they had no right to be 'arrogant or demanding', given that anything worthwhile they had learnt had been gleaned from their European colonisers.<sup>55</sup> In December 1965 the book received a favourable review in the *Pacific Islands Monthly*, effectively the journal of white settlers in the Pacific. The review noted that, fifty years after its publication, *Justice versus Sorcery* would evidence the true atmosphere of the changes in the Pacific of the mid-twentieth century, which they described as 'the period of "colonialism"'.<sup>56</sup> Not everyone was as enamoured as the

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<sup>49</sup> 'From Macaulay's "Essay on Warren Hastings" I gather than the Bengali is a pretty adept liar. I cannot see how the Bengali can be better than the Mekeo': Ralph T Gore, *Justice versus Sorcery* (Jacaranda Press, Brisbane, 1965), 49.

<sup>50</sup> *Ibid.*, 127.

<sup>51</sup> *Annual Report for Papua 1919-1920*, p 106

<sup>52</sup> Gore, n 46, 100.

<sup>53</sup> Mary Dauntton-Fear & Arie Freiberg, *"Gum tree" justice: Aborigines and the Courts*, 1977, Australian Institute of Criminology, p 16. <https://aic.gov.au/publications/archive/gum-tree-justice>

<sup>54</sup> Gore, n 46, 75.

<sup>55</sup> *Ibid.*, 218.

<sup>56</sup> *Pacific Islands Monthly* (December 1965), 95.



*Pacific Islands Monthly*. Zelman Cowen's 1966 review of in *The Melbourne Age* highlighted that Gore was swimming against the global political tide, and concluded that '[t]he celebrated winds of change blow too hard... in New Guinea as elsewhere' for Gore's views to prevail. He ironically noted that 'Mr Gore contents himself with a narrative which is always interesting, although it may not go very deep'.<sup>57</sup>



Shades of Gilbert and Sullivan — (L-R) Rev Philip Strong, Col J K Murray, Archbishop Reginald Halse, Rev Geoffrey David Hand, Justice Ralph Gore, and visiting bishop, Anglican Cathedral, Dogura, Milne Bay, c.1950.<sup>58</sup>

However, despite Gore's obvious limitations from a liberal perspective, there was a contemporary view to the effect that he had imbibed enough of the humane tradition of MacGregor, Winter and Murray to positively impact on the administration of justice. This evidence suggests that in Papua and New Guinea the criminal law continued to be influenced by the Territories' quite different histories. In 1952, Gore's former associate, Michael Groves, published a series of articles in the *Australian Law Journal* on 'The Criminal Jurisdiction of the

<sup>57</sup> *Sorcery versus Justice* reviewed by Zelman Cowan in *The Melbourne Age*, 22 January 1966.

<sup>58</sup> Jack Keith Murray Collection, UQFL91, Album 1, item 167.

Supreme Court of Papua-New Guinea'.<sup>59</sup> Groves had studied history and law at Melbourne University, but lived in Port Moresby from 1947 to 1948, where he finished his degree by correspondence, while working with the Court. Subsequently he studied anthropology, undertaking doctoral research by way of a comparative study of three Motu villages.

Groves noted that cases arising in New Guinea almost exclusively were heard by Justice Phillips, those in Papua by Gore, and that 'the whole pattern of criminal law' was derived from two different traditions.<sup>60</sup> According to Groves, punishment was more severe in New Guinea than in Papua; there were many more death sentences in the former mandated Territory, carried out in the local villages; and generally longer periods of incarceration. He considered that the crucial difference was that in New Guinea punishment was 'assessed on the basis of what are perceived to be the ethical standards of European civilisation'. Obviously admiring of the Murray system, Groves suggested that Papuan judges — like Papuan Lieutenant-Governors — had been 'patriarchs', whereas New Guinea judges had to be 'technicians', and concluded that, in the absence of a jury, it may be that 'a benevolent and knowledgeable patriarch would be preferable to a painstaking technician as arbiter in matters of justice'.<sup>61</sup>

There is evidence relating to sorcery trials which supports Groves' contention. In February 1957, the *Melbourne Age* and the *Sydney Morning Herald* reported on a Supreme Court decision in Wewak in which forty death sentences were handed down in the wake of tribal warfare, a situation described by Keith Jackson as 'a feast where [the May River people] murdered and cooked 25 of their invitees'.<sup>62</sup> Adopting the usual government response to bad press, the Department of Territories ordered a report from the colonial Administration in Port Moresby as to the nature of sentencing for murder in the Papua and New Guinea courts. In responding to Minister Paul Hasluck in September 1957, Administrator Donald Cleland echoed Sir William MacGregor in the 1890's to the effect that the increase of reports of the crime of murder in the Territory was due to the increasing expansion of the Administration's authority and the concomitant ability to apprehend and try murderers in more remote areas, rather than to any actual increase in violent crime.<sup>63</sup> The report broke down the murder trials

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<sup>59</sup> Namely, 'The Criminal Jurisdiction of the Supreme Court of Papua-New Guinea' Parts 1& 2 in the *Australian Law Journal*.

<sup>60</sup> Michael Groves, 'The Criminal Jurisdiction of the Supreme Court of Papua-New Guinea Part 1 Introductory' (1952) 25 *Australian Law Journal*, 583-4.

<sup>61</sup> 'Papua has been fortunate that its patriarchs have indeed been benevolent': Michael Groves, 'The Criminal Jurisdiction of the Supreme Court of Papua-New Guinea Part 2', (1952) 25 *Australian Law Journal*, 639.

<sup>62</sup> Keith Jackson, *A Kiap's Chronicle 14: Ambunti*, [https://asopa.typepad.com/asopa\\_people/2017/07/a-kiaps-chronicle-14-ambunti.html](https://asopa.typepad.com/asopa_people/2017/07/a-kiaps-chronicle-14-ambunti.html)

<sup>63</sup> Cleland to Minister, 12 September 1957, *Crime of murder by natives in Papua and New Guinea – Policy*, NAA, A452, 1963/3262.

into a number of categories. These included murders which were attributable to 'sorcery', which between 1949 and 1957 accounted for 102 murder charges out of a total of 453.<sup>64</sup>

The information annexed to Cleland's response to the Secretary of the Department of Territories show that judges originally in Papua gave lower sentences for the sorcery-related murders than those from New Guinea. In March 1956 Bignold J sentenced one Iumari for the murder of a purported sorcerer to three years with hard labour, and in October 1956 recommended a sentence of eight years for Waidiri of Warawadidi, which was commuted to three by the Port Moresby administration; and in October 1956 Kelly J had handed down a three years' sentence to one Sobai-Wamun.<sup>65</sup> By contrast, in August 1956 Phillips CJ had sentenced Kango of Miruma, to ten years with hard labour. This was despite the fact that, as the report noted, Kango had 'genuinely believed that the deceased had effected the death of his son by sorcery'.<sup>66</sup>

Admittedly, for statistical purposes, this number of cases barely constitutes a sample. Nonetheless, the difference in the length of sentences is stark. However, this is not to suggest any great personal divide between the approaches of the judges of the formerly divided Territories. On the one hand, we have seen Justice Gore's views of the nature of indigenous defendants. On the other, Sir Beaumont (Monty) Philips had been made Chief Judge in 1949 and then appointed over Gore as the first Chief Justice in 1954. According to his entry in the *Australian Dictionary of Biography*, his decisions in New Guinea, especially in land cases, were 'enlightened in their sympathy for the needs and rights of the native peoples, and... often badly received by the white community'.<sup>67</sup> For his part, reflecting in the 1970's, Paul Hasluck concluded that Phillips CJ in New Guinea and Gore J in Papua made a 'distinction between cases in which they made judgments as lawyers and those in which they made judgments on what would be best for all concerned, including the accused'.<sup>68</sup> Rather, it would appear that Groves has correctly identified differing approaches in Papua and in New Guinea to the accepted deterrent effect upon the indigenous populations.

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<sup>64</sup> *Ibid.*, Annexure B.

<sup>65</sup> Schedule to letter Cleland to Secretary of the Department of Territories, 13 July 1957, 3 and 5 respectively, NAA, A452, 1963/3262.

<sup>66</sup> *Ibid.*, 4.

<sup>67</sup> Paul J Quinlivan, 'Phillips, Sir Frederick Beaumont (1890–1957)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/phillips-sir-frederick-beaumont-8034/text14007>, published first in hardcopy 1988, accessed online 14 February 2020

<sup>68</sup> P Hasluck, *A time for Building*, (Melbourne University Press, Melbourne, 1976), 177. Hasluck also concluded that indigenous Papua New Guineans had 'little or no concept of justice as a concept with merit in itself', *ibid.*, 179.

## Sorcery in the courtroom

Whether they were patriarchs or technicians, the sorcery-related laws which judges were enforcing had evolved little since their institution under MacGregor in British New Guinea. Although the official gazettal of the 1893 Ordinance had all the trappings of British best administrative practice, as noted by Winter, all charges relating to the practice of sorcery were dealt with in the Papuan Native Courts, unless there were allegations of the use of poison, in which case the matter was dealt with as an indictable offence in the Central Court at Port Moresby.

While judicial officers travelled throughout the Territory on circuit, the Native Courts were presided over by the local representative of colonial authority, generally referred to as a *kiap*, a *Tok Pisin* word derived from the German 'kapitan'.<sup>69</sup> Two local chiefs had been appointed as Magistrates under MacGregor, whom he found to be 'more moderate, more just and better officers than could reasonably have been expected'.<sup>70</sup> However, these seem to have been the last native magistrates in Papua or New Guinea until the 1960's. Looking back in 1990, Dame Rachel Cleland argued that the *kiap* court system suited the indigenous notion of justice, as it was characterised by:

...the simple face-to-face hearing of the dispute when either an acceptable compromise was reached between the parties or, when necessary, justice was meted out and the wrongdoer taken away.

She considered that the administration of justice in the Territory had to be 'sound, because good order depended on it'.<sup>71</sup>

This practice, together with other factors set out below, resulted in staggeringly high conviction rates for charges of sorcery and other 'Forbidden Acts' under the various Native Ordinances, an experience characterised by Peter Bayne as 'diametrically opposed to common law principles'.<sup>72</sup> Proceedings were, of course, in English, requiring at least one interpreter, first from English into Motu and then into any one of a range of local languages. From 1907 to 1966, Papuan law provided for four-man juries only in cases involving Europeans charged with a capital offence; the situation was similar in New Guinea from 1951 until 1964. Writing in 1925, Murray considered that the interpreters generally worked well, although he despaired

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<sup>69</sup> Hank Nelson, *Taim Bilong Masta*, (ABC Books, Sydney, 1982), 33.

<sup>70</sup> *Annual Report for British New Guinea 1891-92*, 34, Appendix I.

<sup>71</sup> Sean Dorney, *Papua New Guinea: People, Politics and History since 1975* (Random House, Sydney, 1990), 288. Dame Rachel Cleland is cited not as an authority on the *kiap* system per se, but as one of the key representatives of the colonial administrators and their assumptions as to what was 'best' for indigenous Papuans in a legal system

<sup>72</sup> Peter Bayne, 'Legal Developments in Papua New Guinea: The Place of the Common Law' (1975) 3(1) *Melanesian Law Journal*, 21.

of their ‘maddening habit’ of refusing to interpret evidence which they did not believe, or evidence – for example, of the practice of sorcery — of which they think the judge will not approve.<sup>73</sup>

Sir William MacGregor had believed that the spread of effective colonial authority throughout British New Guinea by means such as the 1893 Ordinance would result in an apparently great increase of crime, while, actually, its quantity would be ‘in the inverse ratio’.<sup>74</sup> In other words, the extension of the application of English criminal law, coupled with the introduction of the tidy civil service mentality of assiduous reporting, would result in an apparent increase in crime, which in reality was merely an increase in their detection and reporting. Indeed, there was a steady increase,<sup>75</sup> so that by the time of MacGregor’s 1897-98 Annual Report there had been 29 sorcery charges in the Eastern District, resulting in 19 convictions; and nine in the Eastern Division and two in the Western District, all of which resulted convictions.<sup>76</sup> This was in stark contrast to the two prosecutions for sorcery resulting in two convictions in the year the Ordinance was introduced.<sup>77</sup> The following year, Winter noted in his report on the Port Moresby Gaol that prisoners did not report any fear of sorcerers. He therefore wondered whether being in Her Majesty’s care meant that ‘the sorcerer was either afraid to injure them or had no reason for doing so’.<sup>78</sup>

Despite the increase in these figures, charges relating to sorcery were often among the fewest laid annually under the Native Regulations. For example, in Daru in the Western Division in 1906-1907, a total of 228 Forbidden Acts were tried, consisting of the following:

69	Assault
66	Threatening language
33	Adultery
20	Lying Reports Adultery
16	Neglecting and refusing to repair and renew their houses
14	Stealing

<sup>73</sup> Hubert Murray, *Papua of To-day or an Australian Colony in the Making* (London, 1925), <http://dro.deakin.edu.au/eserv/DU:30111594/murray1925papatoday-text.htm>

<sup>74</sup> *Annual Report for British New Guinea 1893-94*, xii.

<sup>75</sup> In the 1893-94 Report, there were four charges: *Annual Report for British New Guinea*, xii. The following year there were five sorcery charges in the Eastern District and two in the Central District: *Annual Report for British New Guinea*, xii. In 1895-96 there were nine sorcery charges in the Eastern District and two in the Central District: *Annual Report for British New Guinea*, xi.

<sup>76</sup> *Annual Report for British New Guinea 1897-98*, xii and xiv respectively.

<sup>77</sup> *Annual Report for British New Guinea 1893-94*, xv.

<sup>78</sup> Francis Winter, *Annual Report for British New Guinea 1898-99*, xxi.

5	Neglecting to send a child to school
4	Stealing coconuts
3	Pandering <sup>79</sup>
2	Disobeying the lawful order of magistrate
2	Refusing to appear at Court for trial
1	Giving false evidence
1	Extortion
1	Sorcery
1	Obstructing roads
1	Careless use of fire. <sup>80</sup>

Similarly, in 1910-11 in the Central Division, which included Port Moresby, there were only three sorcery charges, as opposed to 83 for gambling; and in Mekeo there were no sorcery charges at all, but 155 cases of 'refusing to clean roads'.<sup>81</sup> An example of the enforcement of the full gamut of Forbidden Acts, taken from the much later *Annual Report for 1949-1950*, is attached to the body of the thesis as Appendix Two.

In a rare early example of detailed reporting of a sorcery charge, we find that in 1898 in hearings at Saguana, locals Sarimu and Dami were charged with sorcery practice, found guilty and sentenced to three months, in the following circumstances:

The culprits were the father and uncle of a lad arrested by the village police for an aggravated assault on an old woman. They threatened extinction of crops and food supplies generally; also the death of the village constable, etc. As they have held a reputation as 'puri puri' men for some years, the people were very frightened, and considerable trouble ensued, as the village constable was chary of arresting the men or reporting the matter to the constabulary. I anticipate that the punishment inflicted will have a salutary effect on the professors of the 'black art' in the district'.<sup>82</sup>

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<sup>79</sup> In one of the handful of the contemporary references to British New Guinea, in his 1899 review of the legislation of the Empire, Sir Courtenay Ilbert, Parliamentary Counsel and later Clerk to the House of Commons, noted that New Guinea had 'enriched our criminal terminology by passing a law against "pander"': Courtenay Ilbert 'Introduction to the Review of the Legislation of the Empire for 1898', (1899) 1 *Journal of the Society of Comparative Legislation* (NS), 452.

<sup>80</sup> *Annual Report for Papua 1906-07*, 39.

<sup>81</sup> *Annual Report for Papua 1910-11*, 85 and 89 respectively.

<sup>82</sup> *Annual Report for British New Guinea 1897-98* RM Western Division 2 July 1898; Appendix L, 83, 21 May 1898, 4.



Until the 1960's, these annual submissions from local Resident Magistrates on the administration of their Divisions are one of the key sources on the outcomes of prosecutions under the 1893 Ordinance, together with the Patrol Reports on which they are based, and the Administrator's own report to the relevant Commonwealth Minister. Social anthropologist Andrew Lattas maintains that the Annual Reports were the very type of document which masked the inherent racism of the colonial administration, in that their apparent dispassionate reporting 'mimed an empiricism and objectivity which seemed to offer protection against prejudice'.<sup>83</sup> Specifically, Lattas argues that the trial reports were of interest because they provided psychological portraits of the 'native mind', a mind which was 'capable of being administered, [and] capable of justifying the power structures which developed around it to shape and control it'.<sup>84</sup> However, from the practical viewpoint of the administrators and lawyers, rather than 'miming' objectivity, both the reports and the processes which they recounted – admittedly deeply flawed processes – were attempts at what was believed to be universally applicable common law practices. Nonetheless, their application to indigenous defendants were undoubtedly constrained by the unbridgeable gap of difference between the colonist applying the law and the colonised enduring it.

Certainly the Reports vary in quality and level of detail across the years. In Papua from 1915 to 1919 there are no Resident Magistrate Reports; in the 1922-23 Report there was no reference at all to administration of justice, let alone reports relating to the existence or prosecution of sorcery; and during the Great Depression, Murray noted that '[c]onsiderations of economy have suggested the reduction of the Annual Report to the smallest possible compass'.<sup>85</sup> Nonetheless, they do allow for a picture of the enforcement of the anti-sorcery provisions in the Territory to be drawn. Recurring motifs are the tenacity of the beliefs in sorcery;<sup>86</sup> the dependence on the vigilance of the administration-appointed Village Constables

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<sup>83</sup> Andrew Lattas, 'Humanitarianism and Australian Nationalism in Colonial Papua: Hubert Murray and the Project of Caring for the Self of the Coloniser and the Colonised' (August 1996) 7(2) *Australian Journal of Anthropology*, 153. F E Williams argued in 1935 that such prejudice was 'no doubt one of the methods [the colonisers] adopt for defending our sense of superiority... any approach to sameness or equality may stir our resentment': Williams, *Blending of Cultures: An Essay on the Aims of Native Education*, (Port Moresby, 1935), 6.

<sup>84</sup> Lattas, n78, 154.

<sup>85</sup> *Annual Report for Papua 1929-30*, 1.

<sup>86</sup> However, in the Report for 1903-04 from the Eastern Division, RM Campbell unusually suggested that sorcery seemed to be on the decline in many parts there. Nonetheless, he did acknowledge that it would take 'time and patience to lessen this evil to any great extent'; and that same year the Report from RM Campbell of the South East Division noted that there had been revenge killing for the sorcery death of a child eaten by an alligator at Avatan, 75.

to bring matters to the Native Court;<sup>87</sup> and the unwillingness of indigenous Papuans to give evidence.<sup>88</sup>

In his Report from the Western Division in 1913-14, Resident Magistrate W N Beaver noted that the small number charged with sorcery there, i.e., five, did not represent the extent of its practice, given that generally the locals 'through fear or other causes' did not bring complaints against a sorcerer, let alone give evidence in the Native Court.<sup>89</sup> The following year, he noted in respect of the paucity of charges in Kokoda Village that either the area was 'extremely virtuous', or that the Village Constable was a 'trifle inactive in his duty'.<sup>90</sup> The observation bolsters Beaver's view of the limitation of indigenous Papuans enforcing the law, to the effect that nearly all of the Native Magistrates succumbed to that 'stumbling-block of the official Papuan, blackmail, or extortion, or pay-back', with the last such officeholder leaving the position due to keeping the 'fines' he had imposed on defendants.<sup>91</sup>

Beaver's 1920 memoirs, *Unexplored New Guinea*, included the description of the trial of a famous sorcerer named Baii, worth recounting in detail:

...eventually a few witnesses were secured and the trial opened. Opened, but was never completed. For not one of the witnesses had the courage to repeat in Baii's presence the statements that he had made readily outside the Court. Baii was conducting his own defence; and he did it by saying nothing at all. As each witness was brought in, Baii, leaning carelessly on his stick, gave him one look, cold and threatening from under his drooping lids. And that one glance was enough. The witness, nervous already, collapsed under this new threat, and fell to the floor in a fit. Witness after witness was led in, caught the famous sorcerer's eye, and dropped to the floor to be carried out by the attendant police. As the strange proceedings went on the interpreter began to show signs of collapse, and even the police were affected, and in the end the case had to be dismissed for want of any shred of evidence against the prisoner.<sup>92</sup>

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<sup>87</sup> RM Griffith of the Gulf Division maintained that the Village Constables were 'in the hands of the sorcerers and hopelessly afraid of them': *Annual Report for Papua 1906-07*, 42

<sup>88</sup> Thus, RM Higginson at Cape Nelson in the North East Division noted that 'sorcery cases were few, but only due to the difficulty of getting reliable evidence against the sorcerer': *Annual Report for Papua 1906-07*, 54; and RM H J Ryan for the Delta Division noted that 'unless the implements of his art are actually found in his possession, little else than a statement that he is a puri-puri man can be got from the remainder of his village, though doubtless the death of at least one person is laid to the account of his occult powers': *Annual Report for Papua 1918-19*, 85.

<sup>89</sup> *Annual Report for Papua 1913-14*, 71.

<sup>90</sup> *Annual Report for Papua 1914-15*, 53.

<sup>91</sup> W N Beaver, *Unexplored New Guinea: A record of the travels, adventures, and experiences of a resident magistrate amongst the head-hunting savages and cannibals of the unexplored interior of New Guinea* (Seeley, Service & Co, London, 1920), 29.

<sup>92</sup> *Ibid.*, 136. In his Report for 1914-15, in which he recorded ten convictions for sorcery for ten charges laid, Beaver mused that he was 'not quite sure whether the sorcerer, like the poet, is born, not made... Occasionally



The efficacy of criminalisation as the fundamental approach of the Administration to combating sorcery is contested even among these contemporary sources. In his 1895-96 Report, the Western Division's Resident Magistrate maintained that 'no law or native regulation' would have much effect in stamping out its practice.<sup>93</sup> However, in 1910 Charles Seligman found his research in the Roro and Mekeo districts impeded, due partly to the 'very real fear of the results of government interference' in the wake of the criminalisation of sorcery acts.<sup>94</sup> In the 1911-12 Report from the Trobriand Islands Assistant RM Bellamy maintained that imposing the maximum sentence of six months' imprisonment under the 1893 Ordinance early in the year had resulted in no further cases of 'sorcery intimidation'.<sup>95</sup> However, it was a careful balancing act for the Administration – in the same year, the Report from the North East Division noted that any excessive interest of colonial officers in sorcery tended to be 'an admission that the sorcerers are really guilty of causing the deaths or other misfortunes'.<sup>96</sup>

By the end of the 1950's the colonial administration's writ by and large ran across the full extent of the Territory. This was not, however, to suggest that the kiaps were not still adjudicating sorcery cases as a matter of course. In his comparative study of administrative colonialism in Kelantan, Malaya, and the Eastern Highlands, Charles Hawksley maintains that by the late 1940's a combination of sorcery's ineffectiveness against the colonisers; the influence of Christian missionaries; and the prosecution of practitioners and the owners of sorcery implements led to a decline in 'traditional magical practices'.<sup>97</sup> To support this, he notes that in the Central Highlands District in 1947-48 there were only two convictions for 'practise sorcery' and one for 'possession of sorcery implements' in the Court for Native Affairs.<sup>98</sup> However, this assertion is undermined by the fact that, as Hawksley also notes, in 1954/55, there were 31 sorcery convictions in the Eastern Highlands, across the sub-districts of Goroka, Kainantu and Chimbu.<sup>99</sup> In order to assess this, we are fortunate to have access

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it is taught. I have in my mind the case of an individual is training his two brothers-in-law to succeed him in the profession. I find that in another instance a certain individual paid £1 8s sterling as the price of his initiation': Beaver, *Annual Report for Papua 1914-15*, 50.

<sup>93</sup> *Annual Report for British New Guinea 1895-96*, p 66.

<sup>94</sup> Seligman, n2, 278.

<sup>95</sup> R L Bellamy Assistant RM, *Annual Report for Papua 1911-12*, 117. His successor as Resident Magistrate maintained that a 'general spirit of contentment' prevailed, as '[m]atters which would result in murder are now decided by the Government': *Annual Report for Papua 1918-19*, 63.

<sup>96</sup> Report from Cape Nelson, North East Division, *Annual Report for Papua 1911-12*, 126-7.

<sup>97</sup> Charles M Hawksley, *Administrative Colonialism: District Administration and Colonial Middle Management in Kelantan 1909-1919 and the Eastern Highlands of Papua New Guinea 1947-1957* (PhD thesis, University of Wollongong, 2000), 328.

<sup>98</sup> *Ibid.*, 328.

<sup>99</sup> *Ibid.*, 330 and 369, NN 35.

to the other main source of 'man on the spot' records in Papua and New Guinea, namely the Patrol Reports submitted by kiaps. These have been digitised from microforms held at the University of California, with the permission of the National Archives of Papua New Guinea.<sup>100</sup> Therefore, consideration will be given both to Patrol Officers' Reports from 1945 to 1960 in the Kainantu sub-district, and a sample of those from across the Territory.

The report from Kainantu to the District Officer of 29 May 1945 highlights the 'good sign' of only one allegation of sorcery made during the patrol, such that it was concluded that 'the old suspicions of each other are dying down'.<sup>101</sup> However, this sanguine view is not confirmed in subsequent Reports. In a letter to the Director of the Department of Native Affairs in August 1955, Ian Downs, District Officer, noted that every Patrol Report for Eastern Highlands 'emphasised the problem of sorcery' such that if the administration did nothing else 'but free the people of their fear of this, then we will have helped them immeasurably'.<sup>102</sup>

The typical Patrol Officer perceived and reported on sorcery practices in accordance with the way in which it impacted on his differing local roles. One role was as enforcer of the Native Regulations in the Court of Native Affairs, in which the reporting of sorcery cases is often of a fairly cursory nature. Thus, the report of the patrol in the Taira Census Division in August to September 1956 notes as follows:

26.08.56 Convened Court for Native Affairs for one case of sorcery at Obura.

10.09.56 Convened Court for Native Affairs for three cases of sorcery at Norai'eranda.<sup>103</sup>

The other role was as the transmitter of Western civilisation. In exercising this great responsibly, sorcery continues to appear to be as fearsome an opponent in the 1950's as it was in the earliest reports from British New Guinea:

The importance sorcery plays in the lives of the South Fore and the unshakable belief in it are important factors that will have to be contended with for some time to come, and the conviction that some person or group has resorted to sorcery could lead to a flare up of

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<sup>100</sup> With respect to current usage of the digitised resource, there was approximately 500 views a month to the PNG Patrol Reports collection on average between April 2019 and April 2020. Cristela Garcia-Spitz, Digital Initiatives Librarian & Curator of the Tuzin Archive for Melanesian Anthropology, UCSD, Pers comm, 22 April 2020.

<sup>101</sup> *Patrol Reports, Eastern Highlands District, Goroka, 1944 – 1945*, National Archives of Papua New Guinea, Accession 496.

<sup>102</sup> *Patrol Reports, Eastern Highlands District, Kainantu, 1955 – 1956*, National Archives of Papua New Guinea, Accession 496.

<sup>103</sup> Patrol of 14 August to 14 September 1956, *Patrol Reports, Eastern Highlands District, Kainantu, 1956 – 1957*, National Archives of Papua New Guinea, Accession 496.

tribal fighting at any time. Their belief in sorcery alone remains unaffected by the changes. In their minds all deaths and sicknesses are caused by sorcery worked by an enemy.<sup>104</sup>

However, a new theme of the post-war Reports for Kainantu is that both the officers of the Administration and indigenous Papuans use the court process under the Sorcery Ordinance as a specific weapon in their own broader fights against sorcery. In July 1951, the Patrol Officer reported that fighting was prevalent between the Aga villages and local groups, due to sorcery. While he spent an unsuccessful time attempting to convince the Aga that sorcery was 'only psychological', he settled for telling them to bring cases of sorcery to Kainantu where they could be dealt with in the Court of Native Affairs without recourse to fighting.<sup>105</sup>

In a report on patrols of the Taira Census Division in September and October 1954, the Patrol Officer expressed regret that people there felt that the only way to avenge sorcery was by responding with sorcery. However, he was very pleased to 'see the odd sorcerer brought up before the court' and considered that '[a]s the faith of the people [in the court process] increases, so shall the number of exposed sorcerers also increase'.<sup>106</sup> Also in October 1954, after hearing a case of sorcery at Kenkasa in the Fore Linguistic Area, the Patrol Officer became exasperated with the locals bringing to him complaints of sorcery as a means of harassing their fellow villagers:

I advised the people that from that day on I would not tolerate further detection of sorcery by cooking food, and that I would prosecute the next person who came to me and said 'So-and-so has made sorcery against us'...<sup>107</sup>

In that same Report, the Patrol Officer noted that every matter raised by the locals in South Fore was grounded in sorcery; and that the each member of the group tried to make use of sorcery charges to settle scores with another group in respect of a dispute which had arisen years beforehand.<sup>108</sup>

Not all the Forbidden Acts prohibited by the Native Ordinances were simply 'crimes' devised by the colonial Administration. Rather, as Richard Waller has noted in the case of colonial

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<sup>104</sup> Patrol of 19 October to 1 November 1954, *Patrol Reports, Eastern Highlands District, Kainantu, 1952 — 1954*. National Archives of Papua New Guinea, Accession 496.

<sup>105</sup> Patrol to the Fore Group, 9-28 July 1951, *Patrol Reports, Eastern Highlands District, Kainantu, 1949 — 1952*. National Archives of Papua New Guinea, Accession 496.

<sup>106</sup> Patrol of 11-18 September 1954 and 29 September — 8 October 1954, *Patrol Reports, Eastern Highlands District, Kainantu, 1952 — 1954*, National Archives of Papua New Guinea, Accession 496.

<sup>107</sup> *Patrol Reports, Eastern Highlands District, Kainantu, 1952 — 1954*. National Archives of Papua New Guinea, Accession 496.

<sup>108</sup> *Patrol Reports, Eastern Highlands District, Kainantu, 1952 — 1954*, National Archives of Papua New Guinea, Accession 496.

Kenya,<sup>109</sup> both kiaps and judges on the one hand, and indigenous villagers on the other, considered that evil sorcery was something which ought to be eradicated. Despite the anxiety among indigenous Papua New Guineans as to the effectiveness of the criminal process in protecting them from sorcerers, the Patrol Reports for just one area of the Eastern Highlands over the relatively short period of a decade provide ample evidence that villagers were resorting to the colonial legal system. This squarely places the colonial experience of Papua and New Guinea within the recent efflorescence of 'subaltern studies' which conclude that throughout the Empire the colonised were not simply passive recipients but had recourse to the courts of the colonisers for the purposes of dispute resolution and for the protection of life and property.<sup>110</sup>

The potential procedural limitations of the Administration's traditional approach of sorcery charges being heard by kiaps without legal training were later highlighted in the Supreme Court. In a December 1973 appeal from Kerema, in the Gulf Province, Prentice J in *Aravapo v R*,<sup>111</sup> found that irregularities at the local court level amounted to a substantial miscarriage of justice within the meaning of s 43(3) of the *Local Courts Ordinance 1963*. One of the issues was that the three defendants were tried together without obvious consent, which the Supreme Court had found to contribute to a mistrial in the 1970 decision of *Kereku v Dodd*.<sup>112</sup> Another issue in *Aravapo* was that the charges laid were of an unsatisfactorily uncertain nature, namely, 'on various days of various months 1973 at Lelefiru he did pretend to be a sorcerer'. Moreover, much of the evidence was inadmissible, even under the extensive special evidentiary provisions in the Second Schedule to the Sorcery Act. These provisions included that, in considering at trial the question of the existence or effect of a traditional belief or of its being generally held in a social group, a court:

- (a) is not bound to observe strict legal procedures or to apply technical rules of evidence; but
- (b) shall –
  - (i) admit and consider such relevant information as is available (including hearsay and expressions of opinion); and
  - (ii) otherwise inform itself as it sees fit.

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<sup>109</sup> Richard D Waller, 'Witchcraft and Colonial Law in Kenya' (Aug 2003) 180 *Past & Present*, 274.

<sup>110</sup> See, e.g., the overview on studies relating to Colonial India in K M Parker, 'The Historiography of Difference' (Fall 2005) 33(3) *Law and History Review*, 685-695.

<sup>111</sup> [1973] PGSC 77 (6 December 1973).

<sup>112</sup> [1969-70] PNGLR 176 (15 April 1970).

As the appellants had already served four months of sentences of five months' imprisonment with hard labour by the time of the appeal, Prentice J did not consider that the expense and inconvenience of new trials was warranted, despite 'allegations of sorcery being of such potential seriousness in this community', and so allowed the appeals and quashed the convictions. The decision is a brief one, in which Prentice J's exasperation is palpable

I consider I should state how important to my view, are prosecutions for sorcery. In capital cases this Court is repeatedly met with the excuse, that the victim was, or was thought to be, acting as a sorcerer. In imposing punishment for the murders of such alleged sorcerers, the Supreme Court can do little other than advise the prisoners that evil sorcery is illegal, and that they should seek for evidence of the practice of sorcery and take their complaints to police and Administration officers. When such complaints are made it is of the highest importance that the alleged sorcery be properly investigated and any subsequent court proceedings be properly conducted. It is obvious that any failure in investigation or court process, which results in a successful appeal from a conviction, may have the double effect of enhancing the alleged sorcerer's reputation (which is very often a principal tool of trade), and of weakening belief in the power of the law to deal with sorcerers and to protect the public.<sup>113</sup>

Sir William Prentice went on to be the second Chief Justice of the independent State of New Guinea in 1978. He resigned, along with four other Justices in 1982 the wake of the 'Rooney Affair', which is dealt with in Chapter Six. The significance of his line of reasoning lies in its rarity. It is a statement directly linking the careful investigation and trial of allegations of breach of the Sorcery Act at the kiap level to those prosecutions for murders which would find their way to the Supreme Court. In a structure of criminal law characterised by the gulf between the beliefs of expatriate judges and of the sorcerer-killers appearing before them, it was vital that the judges could point to the efforts of the colonial Administration to defend village people from the sorcerers in their midst.

### The judicial new deal

It was not until the 1960's that pressures external to Papua and New Guinea were brought to bear on the relatively *ad hoc* administration of criminal justice, as the zephyrs of change which wafted across the process of legislating wafted across its implementation. This meant that the administration was able to shift the focus in the criminal justice system in respect of sorcery-related crime. Rather than the threat of the sorcerer as an alternative locus of power, courts began to more carefully address the criminal liability of indigenous Papuans and New Guineans who believed that their acts of murder were necessary to protect their families – and

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<sup>113</sup> [1973] PGSC 77 (6 December 1973).

sometimes their whole communities – from acts of sorcery; even Justice Gore had conceded this in his *Punishment for Crime Among the Natives*.<sup>114</sup> Thus, with respect to the murder of accused sorcerers, from the early 1960's onwards, courts were adopting and adapting the common law's forms of mitigation. This was largely based on the development of what might be termed an 'indigenous reasonableness', particularly as it related to provocation, and, more contentiously, mistake of fact and insanity. O'Regan concludes that to say that sorcery causes injury or personal discomfort is to admit its reality and the efficacy of its power; if sorcery does not exist it cannot have these consequences and therefore cannot be an assault.<sup>115</sup>

This new approach was facilitated by changes to the court system initiated by Minister Hasluck. In 1961 he informed the House of Representatives that the administration of justice in a 'dependent and primitive society' such as Papua New Guinea, required 'high standards in the Bench, the accessibility of the Courts to the people, the confidence of the people in the Courts and the habit of relying on the Courts to protect the personal rights and property of the individual'.<sup>116</sup> In 1959 Hasluck had appointed Australian constitutional lawyer David Derham, later the foundation Dean of Law at Melbourne's Monash University, to review the administration of justice in Papua and New Guinea. Derham noted that while the extant system had brought order to the frontier, it was not sufficient for a society undergoing such change; while law and justice had been introduced 'in form' this was only 'haltingly and slightly as to their reality and substance'.<sup>117</sup> As a result of Derham's Report, in 1963 the Courts for Native Affairs were replaced by Local Courts and District Courts, although a lack of qualified magistrates often meant the continuation of the kiap on a part-time basis.

That same year policy was introduced to draw judges for the District and Supreme Courts from the senior ranks of the Australian legal profession, such as John Minogue, handpicked by Hasluck from the Victorian Bar,<sup>118</sup> and Gresley Clarkson QC, President of the Law Society of Western Australia at the time of his appointment. The Supreme Court was led by Chief Justice Sir Alan Mann, a Victorian appointed (he said) to create 'an independent system of courts of

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<sup>114</sup> *Annual Report for Papua 1929-30*, 22.

<sup>115</sup> Rob O'Regan, 'Sorcery and homicide in Papua New Guinea' (1974) 48 *Australian Law Journal*, 80. O'Regan here is referring to the belief that an 'assault' required the objective application of some physical force by an accused assailant, which could not be applicable to the belief of an indigenous Papuan that physical suffering had been inflicted on them by way of sorcery.

<sup>116</sup> Hon Paul Hasluck MP, Minister for Territories, *Justice in Papua and New Guinea*, Australia, *Parliamentary Debates*, House of Representatives, 24 October 1961, 1.

<sup>117</sup> D P Derham, *Report on the System for the Administration of Justice in the Territory of Papua and New Guinea*, 1960, p 5, quoted in G H Boerhringer and D Giles, 'Criminology and Neocolonialism: the case of Papua New Guinea' (Fall-Winter 1977) 8 *Crime and Social Justice*, 61.

<sup>118</sup> Peter Ryan, 'Minogue, Sir John Patrick (1909–1989)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/minogue-sir-john-patrick-14974/text26163>, published first in hardcopy 2012, accessed online 17 May 2020.

a much higher level of proficiency'.<sup>119</sup> As a result, more sophisticated approaches in line with common law practice elsewhere in the common law empire came into play. Derham also proposed a system of Village Courts, partly independent of Australian judicial principles, but this was opposed by Hasluck. Michael Goddard maintains that one reason for the development of Village Courts *after* self-government was due to a view that the colonial legal system had been 'unjustly censorious of custom and customary law and that the latter should be restored and preserved'.<sup>120</sup>

The Supreme Court came to see its role as educating Papua New Guineans to accept the Criminal Code, which was not simply a derivation of Australian colonial law, but 'an expression of the ethical precepts common to all civilized societies'.<sup>121</sup> Judges therefore reworked Justice Gore's 1929 view in *Punishment for Crime Among Natives* that the paramount object of punishment was the prevention of crime. Thus, in the 1970 decision of *R v Asis*,<sup>122</sup> Clarkson J, sitting at Madang, sentenced two admitted sorcerer-killers to only three years imprisonment. While he acknowledged that it was necessary that they and their kinsmen should 'grow to accept the law of the larger community of which they unknowingly form a part', that would be best brought about by a sentencing regime intended to be 'educative and corrective rather than one calculated only to deter or to bring retribution'.<sup>123</sup>

This overarching aim was spelt out particularly clearly by Wilson AJ in the 1973 conspiracy to defeat the course of justice decision of *R v Lida*:

Social relationships based on kinship and materialism have had for this defendant a greater importance than the questions of universal moral duty. I accept that he may have found it difficult to understand a legal system based on moral obligations and impartial justice emphasising the nature of the wrong rather than the sliding scale system according to the relationships involved. I must therefore be flexible and understanding. I must be sensitive of the fact that a British system of Justice is being adapted to the conditions and modes of life of indigenous people. This defendant as an indigenous person should not be punished without the fullest consideration being given to all his circumstances, including his native background, his mode of life and the customs applicable to him.<sup>124</sup>

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<sup>119</sup> D Denoon, *A Trial Separation*, 75.

<sup>120</sup> M Goddard, 'The Snake Bone Case: Law, Custom, and Justice in a Papua New Guinea Village Court' (September 1996) 67(1) *Oceania*, 50.

<sup>121</sup> B Ottley and J Zorn, 'Criminal law in Papua New Guinea: Code, Custom and Courts in Conflict', (1983) 31 *American Journal of Comparative Law*, 279.

<sup>122</sup> [1970] PGSC 4, 16 March 1970.

<sup>123</sup> [1970] PGSC 4, 16 March 1970.

<sup>124</sup> *R v Lida* [1973] PGSC 62 (17 September 1973).

Immediately after his decision in *Lida*, in *R v Kilape Wilson* AJ considered a payback killing unrelated to sorcery in Hewa Census Division, described by him as ‘a remote and primitive part of the Western Highlands of New Guinea’. Having regard to the 2013 reintroduction of capital punishment in Papua New Guinea, Wilson AJ’s words are particularly prescient:

The law must be seen to be tough in its attitude to unlawful killing. The law after all proscribes it, even though native custom in some circumstances sanctions it. If the Court is seen to be too soft, then the general populace of Papua New Guinea may exert pressure upon their politicians to legislate for harsher penalties and even for the mandatory death penalty. My duty requires me not to be any more lenient than I have been in dealing with these defendants.<sup>125</sup>

Balancing the fairness requirements of the situation of an individual accused with societal expectations of deterrence and retribution was undoubtedly a complex undertaking. In the post-Second World War period expatriate counsel and judges in the Territory turned to their training to apply traditional common law notions of culpability in order to effect the task. At the base of this process was the question — while fatal violence against a sorcerer (the *actus reus*) might not only be proven but proudly admitted, could it be said that the intent to offend (the *mens rea*) was present, having regard to the very real fear which the sorcerer’s supposed acts inspired?

### The reasonable Papuan?

While the general rule of the common law is that no crime can be committed unless there is *mens rea*,<sup>126</sup> the adoption of this concept was the result of an evolutionary process. Originally, Anglo-Saxon law echoed the very traditions of Papua and New Guinea, in that a person harmed had a right to be compensated or to avenge the harm, regardless of whether it was deliberate or accidental, practices which feature heavily in the most famous work of that era’s literature, *Beowulf*.<sup>127</sup> By the thirteenth century, the revival of the study of Roman law and the development of canon law influenced the application of the criminal law in England, resulting ultimately in a requirement of a subjective guilty mind as the foundation of legal guilt. Again echoing much later colonial practice, the change was originally implemented by the procedural device of judges continuing to convict of the old felony law, but secure in the knowledge that the king would pardon the miscreant, thereby avoiding a capital sentence.<sup>128</sup> This change in

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<sup>125</sup> *R v Kilape* [1973] PGSC 63 (18 September 1973).

<sup>126</sup> *Williamson v Norris* [1899] 1 QB 7, 14, Lord Russell CJ.

<sup>127</sup> See, e.g., D D Day, ‘Hands across the Hall: The Legalities of Beowulf’s Fight with Grendel’, (July 1999), 98(3) *The Journal of English and Germanic Philology*, 313.

<sup>128</sup> F B Sayre, ‘Mens Rea’ (April 1932) 45(6) *Harvard Law Review*, 980.



approach was memorably described in the early twentieth century by legal historian J W Jeduwine:

...the Western World suddenly ceased to regard murder, arson, rape and theft as regrettable torts which should be compensated by payment to the family. Such and other serious offences came to be regarded not only as sins for which penance was required by the Church, but as crimes against society at large to be prosecuted by the community through its chief.<sup>129</sup>

The basis for this rule rests on the principle that society needs to be protected from the harmful consequences of values and beliefs which deviate from those that are normative.<sup>130</sup> The centrality of this nexus between personal blameworthiness and the needs of societal equilibrium was summarized in *Sauer v United States* an American Federal Court decision which considered the capacity of a mentally-ill defendant:

Whatever we may conclude to be the objectives of the criminal law, one traditional result has been punishment. Functioning under such a system, our society does not assess punishment where it cannot ascribe blame. It is inimical to the morals and ideals of an organised social order to impose punishment where blame cannot be affixed.<sup>131</sup>

Sir Samuel Griffith himself in *Widgee Shire Council v Bonney*<sup>132</sup> famously disavowed the need to consider *mens rea* when applying his Queensland Criminal Code. Nonetheless, subsequent judges and authors have noted that equivalent concepts are 'widely employed in a variety of guises'.<sup>133</sup> Specifically, for our purposes, under the previous s 301 of the Queensland Code, a person who unlawfully killed another, intending to cause his (*sic*) death or that of some other person, was guilty of wilful murder. In the 1938 High Court decision of *R v Mullen*, Latham CJ held that the mental element in the crime of wilful murder was thereby expressed by that reference to intention, which reflected the English common law requirement of 'malice aforethought'.<sup>134</sup> Therefore, the better view was that *mens rea* remained an essential element of an offence under the Queensland Code unless expressly excluded, e.g., by offences of

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<sup>129</sup> J W Jeduwine, *Tort, Crime and Police in Medieval Britain: a review of some early law and custom*, p 84, cited in G Parker, 'The Evolution of Criminal Responsibility', (1971) 9(1) *Alberta Law Review* 9, 47.

<sup>130</sup> R Leikind, 'Regulating the Criminal Conduct of Morally Innocent Persons: The Problem of the Indigenous Defendant' (1986) 6 *Boston College Third World Law Journal*, 166.

<sup>131</sup> 241 F.2d 640, 648 (Ninth Cir 1957), cited in Leikind, n119, 166.

<sup>132</sup> (1907) 4 CLR 997, 981.

<sup>133</sup> M R Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal*, 159.

<sup>134</sup> (1938) 59 CLR 124, 136. Mullen involved the same scenario of a defendant claiming that the victim had been accidentally shot during a struggle as the seminal United Kingdom case on intention, *Woolmington v DPP* [1935] AC 462.

absolute or strict liability,<sup>135</sup> and as adopted in Papua and New Guinea, it divided 'unlawful killings' into the following categories:

- (i) Wilful murder, where a person unlawfully kills another, intending to cause his death or that of some other person;
- (ii) Murder, where a person kills when intending to do the victim or another person grievous bodily harm, and to persons who kill in connection with a felony or violent crime; and
- (iii) Manslaughter, which comprised all unlawful killings 'under such circumstances as not to constitute wilful murder, murder or infanticide'.<sup>136</sup>

Pursuant to the *Criminal Code Amendment Ordinance 1907*, the punishment for wilful murder remained as a capital sentence, that for murder a life sentence. Under s 2 of that amending Ordinance, instead of being pronounced, the death sentence might simply be recorded, where the Court was of opinion that a recommendation should be made for Royal mercy. For completeness, s 305 of the Criminal Code as amended by the *Criminal Code Amendment (Papua) Ordinance 1965* provides as follows:

- (2) If a Court finds that a person committed the crime of wilful murder it shall thereupon consider whether there existed extenuating circumstances such that it would not be just to inflict the punishment of death, and if it finds that those circumstances existed the Court may impose a sentence of imprisonment for life or for such lesser term as the Court thinks just.
- (3) Where the Court does not make a finding of extenuating circumstances within the meaning of the last preceding subsection, an appeal by the convicted person against the severity of sentence shall lie on the ground that such circumstances existed.
- (4) The questions of whether extenuating circumstances exist and, if so, what weight is to be given to them are questions to be decided in the light of the facts of, and the circumstances of and surrounding, each individual case.

In a 1971 appeal unrelated to sorcery, *Ivoro v R*, the Full Court divided on the definition of 'extenuating circumstances' in s 305(2) of the Criminal Code which would operate to exclude the infliction of the death penalty.<sup>137</sup> All three justices agreed that each case had to be decided on its own facts. However, Frost ACJ and Kelly J found that the mental history of the appellant was such that it would not be in accordance with 'the moral and ethical standards of this

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<sup>135</sup> See A Hemming, 'Why the Queensland, Western Australian and Tasmanian Criminal Codes are Anachronisms' (2012) 31(2) *University of Tasmania Law Review*, 1.

<sup>136</sup> While anyone who committed wilful murder, murder or manslaughter was liable to imprisonment with hard labour for life, as 'liable to' set the upper extreme of sentencing options; courts gave significantly lesser sentences for manslaughter: see, e.g., *Passingan v Beaton* [1971-72] PNGLR 206.

<sup>137</sup> *R v Ivoro* [1971-72] PNGLR 374 (30 November 1971).

community to execute a man, however heinous his crime might be, whose capacity to control his actions was affected'. Prentice J, while expressing a hope that capital punishment might be abolished in the Territory, did not find that there were extenuating circumstances and went on to note that he had to construe and apply s 305(2) in:

...the setting of the circumstances of this country, the dispositions and natures of its peoples, the type and prevalence of crime there, the specific pacification and the law and order situation into which it was designed to fit, and possibly that it was passed by a largely indigenous House of Assembly.<sup>138</sup>

One of the underlying tenets of the common law which undoubtedly fashioned the disparate views of the court in *R v Ivoro*, is the 'reasonableness' of the actions of an individual – the proverbial 'man on the Clapham omnibus', that symbol of the sensible Englishman:

The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.<sup>139</sup>

Taking the omnibus for a spin in the colonies, in the 1946 decision of *Kwaku Mensah v The King*, the Privy Council, when determining who was a 'person... of ordinary character' for the purposes of ascertaining whether or not provocation was applicable to reduce a murder charge to one of manslaughter, held that the relevant standard was that of 'the ordinary West African villager'. However, the Privy Council went on to stress the importance of the 'knowledge and common sense' of juries in such trials, a luxury unavailable to indigenous defendants in Papua or New Guinea.<sup>140</sup> The case was on appeal from the Gold Coast, later Ghana, whose Criminal Code was considered by the Privy Council to reproduce the common law of England in all material respects.<sup>141</sup>

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<sup>138</sup> [1971-72] PNGLR 374 (30 November 1971).

<sup>139</sup> Reed LJ in *Home Limited v The Common Services Agency* [2014] UKSC 49, [1]-[4].

<sup>140</sup> [1946] AC 83.

<sup>141</sup> There also existed a West African Court of Appeal [WACA]. Based in Sierra Leone, it was the appellate court for the British colonies of Gold Coast, Nigeria, Gambia, and Sierra Leone. First established in 1867 as the appellate court for British possessions in western Africa, it was abolished in 1874, but was revived in 1928, finally becoming defunct with the independence of the relevant states. Decisions of the WACA also could be appealed with leave to the Judicial Committee of the Privy Council.

It is noteworthy that the existence of an objective standard in provocation only dates back to the beginning of Victoria's reign;<sup>142</sup> by 1869, the defence required 'such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion'.<sup>143</sup> In Papua and New Guinea, s 271 of the Code defined 'provocation' relevantly as any wrongful act or insult of such a nature as to be likely when done to any ordinary person, or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, paternal, filial, or fraternal relation... to deprive him (*sic*) of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered. However, in *R v Kauba-Paruwo*,<sup>144</sup> where the defendant had been provoked by one person but retaliated against another as authorised by customary law, the court was unwilling to go outside the provisions of the Code. Nonetheless, Mann CJ noted that if the Court had been free to 'evolve a Common Law basis for the operation of the defence of provocation... it might appear that the established practice of striking back against the nearest clan relative ought to be recognised as carrying a different degree of criminal responsibility'.<sup>145</sup>

Referencing *Kwaku Mensah*, in June 1960 Mann CJ decided *R v Hamo*, which arose out of the same inter-clan fighting that gave rise to *R v Kauba-Paruwo*. He held here that the expression 'ordinary person' in s 268 of the Criminal Code meant 'an ordinary person in the environment and culture of the accused', such that 'a reasonable native of the area in which the accused lived (in this instance a particularly rugged Highlands area) but having no unusual disabilities or personal idiosyncrasies and objectively regarded' was a reasonable person. Mann CJ concluded that, on the facts before him, 'any able-bodied Chimbu... would be... very likely, in similar circumstances to lose his power of self-control'.<sup>146</sup> That same month in *R v Gamumu*, Mann CJ used the construction 'in all the circumstances was likely to deprive a village native living in the cultural environment of the accused of the power of self-control'.<sup>147</sup>

In 1963, the *Native Customs (Recognition) Ordinance* [Recognition Ordinance] came into force, under which native custom was to be recognised and enforced by, and could be pleaded in, all courts, except in so far, as in a particular case or in a particular context:

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<sup>142</sup> *R v Kirkham* (1837) 8 C & P 115, 119.

<sup>143</sup> Keating J in *R v Welsh* (1869) 2 11 Cox C C 336.

<sup>144</sup> [1963] PNGLR 18 (23 July 1960).

<sup>145</sup> *R v Kauba-Paruwo* [1963] PNGLR 18 (23 July 1960). While it would be interesting to further investigate the interaction between provocation and communal responsibility, as the extract from *R v Kauba-Paruwo* highlights, the Supreme Court did not consider that it was able to expand to the village community the operation of provocation, set out expressly here by Mann CJ. Accordingly, there is no real scope to do so.

<sup>146</sup> *R v Hamo* [1963] PNGLR 9 (23 July 1960).

<sup>147</sup> [1960] PNGLR 1 (6 June 1960).

- (a) it was repugnant to the general principles of humanity;
- (b) it was inconsistent with an Act, Ordinance or subordinate enactment in force in the Territory or a part of the Territory;
- (c) its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest; or
- (d) in a case affecting the welfare of a child under the age of sixteen years, its recognition or enforcement would not, in the opinion of the court, be in the best interests of the child: s 6(1) of the Recognition Ordinance.<sup>148</sup>

Despite suggestions that custom in Papua and New Guinea could be ‘as fickle as Cleopatra and not nearly as accessible’,<sup>149</sup> the Recognition Ordinance put into statute the Supreme Court’s evolutionary approach to the reasonable indigenous person whose crimes needed to be culturally situated for justice to be served. In June 1963, Ollerenshaw J decided the case of *R v Zariai*, in which the defendant, from the small Goilala village of Ganiawi, had killed his wife after she had said to him, *inter alia*, ‘You eat my excreta. I have had intercourse with all men and the Village Constable. You can come up when I have had intercourse with some men and you can eat the grease off my private parts’. Ollerenshaw J held that for the purposes of provocation, the ‘reasonable man’ was a reasonable Papua New Guinean.<sup>150</sup> In doing so, he referred to jurisprudence of Justice Kriewaldt in the Northern Territory, who had developed the view that in trials of aborigines there, the reasonable man was a reasonable aborigine and ‘not a reasonable Englishman or white Australian’. In the unreported 1956 decision of *R v Muddarubba*, Kriewaldt J directed the jury that in determining whether or not the defendant had been provoked into killing the victim, they should consider whether the average member of the defendant’s tribe would have lost his self-control in similar circumstances and would have retaliated in the same manner as the defendant.<sup>151</sup> Kriewaldt J, in turn, was referring back to an earlier Australian jurisprudential tradition in which cultural relativism was at least acknowledged in the trials of indigenous defendants. In the 1840 decision of *R v Billy*,<sup>152</sup> Chief Justice Dowling of the New South Wales Supreme Court held that:

...in applying the law of a civilized nation to the condition of a wild savage, innumerable difficulties must occur. The distance in the scale of humanity between the wandering, houseless man of the woods, and the civilized European, is immeasurable! For protection, and for responsibility in his relation to the white man, the black is regarded

<sup>148</sup> See, e.g., its application by Minogue CJ in *Madaku v Wau* [1973] PNGLR 124, 13 December 1972.

<sup>149</sup> B Brown, ‘Outlook for Law in New Guinea’ (Jun 1971) 41(4) *Oceania*, 248.

<sup>150</sup> *R v Zariai* [1963] PNGLR 203.

<sup>151</sup> Cited in Dauntton-Fear & Freiberg, n50, 16.

<sup>152</sup> [1840] NSWSupC 78 (7 November 1840).

as a British subject. In theory, this sounds just and reasonable; but in practice, how incongruous becomes its application! As a British subject he is presumed to know the laws, for the infraction of which he is held accountable, and yet he is shut out the advantage of its protection when brought to the test of responsibility.<sup>153</sup>

On this same interpretive trajectory, in the 1965 decision of *R v Moses Robert*, Frost J concluded that an accused who had lived in Port Moresby for some years before murdering his pregnant wife was a 'sophisticated native', for whom the test for provocation was 'the ordinary native Papuan living and working ... in Port Moresby' – although still not of course the standards expected of 'a civilized European'.<sup>154</sup> Nonetheless, Frost J held that for provocation to be available as a defence, the criminal act must have been committed in the heat of passion; that is the accused must have ceased to be the 'master of his own understanding'. On the evidence, while the accused was undoubtedly angry, Moses had not stabbed his wife in the heat of passion, but by way of revenge or through a sense of grievance or 'deliberate chastisement'. Therefore, Frost J concluded that the standard of this 'civilised Papuan' was inapplicable, and he convicted Moses of wilful murder. This was despite the eloquent submission of Rob O'Regan, as defence counsel, to the accused's state of mind:

...the accused's long exhausting journeys through the rain over a period of about seven hours looking for his wife, the sight of her coming from Upi's room in circumstances indicating that adultery had been committed, had such an effect on the accused that his self-control snapped and he stabbed her with the nearest available weapon.<sup>155</sup>

Similarly, in the 1963 decision of *R v Nantisantjaba*, Smithers J had held that the defendant's wife's actions, though making him angry, were not such as to deprive an ordinary native of the power of self-control.<sup>156</sup> He noted that on the facts, the statutory reference to 'sudden provocation' which entailed 'elements of shock, surprise, or gravity which may cause spontaneous unreasoning passionate action' were not applicable to the actions of the accused.

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<sup>153</sup> According to Peter Sutton, this quote is from a decision of Willis J quoted in Edward John Eyre, *Journals of Expeditions of Discovery into Central Australia and Overland from Adelaide to King Georges Sound, in the years 1840-1841* (first published 1845, 1997 ed) Vol 2, 495; Peter Sutton, 'Customs Not in Common: Cultural Relativism and Customary Law Recognition in Australia' (2006) 6 Macquarie LJ 161. However, the phrasing is Dowling CJ's: see *R v Billy* quoted from the *Sydney Herald* in the *Australasian Colonial Legal History Library*, <https://www8.austlii.edu.au/au/special/colonialhistory/>

<sup>154</sup> [1965-66] PNGLR 180 (1 March 1965).

<sup>155</sup> [1965-66] PNGLR 180 (1 March 1965).

<sup>156</sup> *R v Nantisantjaba* [1963] PNGLR 148.

In 1968 in *R v Yanda Piaiua*, the court further calibrated this indigenous reasonableness test. This was to the effect that, if the subjective elements required for the defence of provocation existed, the objective elements may be satisfied even though the provocative act consisted only of a fist blow to the face whereas the retaliation consisted of 'an attack with an obviously lethal weapon such as an axe carried out with such violence as to indicate a plain intention to kill'. This depended upon an almost certain expectation that the ordinary peaceful citizen living in the cultural environment of the accused, almost to the point of certainty, would retaliate in such a manner. In determining the appropriateness of a defence of provocation Mann CJ held that he had to apply the test by reference to a village native living as he is required to do in his primitive environment:

Such a man is "culturally conditioned" to immediate reaction and especially so in response to sudden attack. He is conditioned to the presence of lethal weapons always at the ready, and to the fact that survival requires, and has required throughout the experience of his people, readiness for immediate attack or escape. In this kind of society matters can be talked about afterwards but there is no time to arrive at a fully considered decision as to the course that should be taken.<sup>157</sup>

He therefore found that such an ordinary, peaceful ('so far as this can be applicable') citizen, almost to the point of certainty, would have behaved in the circumstances 'just as the accused... did behave'.<sup>158</sup>

This nexus between the degree of civilisation and criminality influenced decisions other than those considering provocation. In 1971 in *R v Noboi*, Prentice J had to consider the case of defendants jointly charged with improperly and indecently interfering with a dead body contrary to s 236(2) of the Code.<sup>159</sup> The evidence established that each of the accused, who lived in the hinterland between the coastal swamps of the Fly and Strickland Rivers and Mount Basavi where cannibalism was not uncommon, had consumed parts of the body of a native from another village recently killed. Prentice J held that the 1902 adoption of the Queensland Code could not have been intended to render 'indecent and improper' the post-mortem rituals of indigenous Papuans. Rather, he held that he had to apply the standards of 'the reasonable primitive Gabusi villager of Dadalibi and Yulabi in early 1971 having regard to the 'limited condition of pacification and administration to which that area had then been reduced'. On this point, Prentice J noted that, both Crown and Defence counsel had tendered evidence of custom under the Recognition Ordinance. *Noboi* is of particular interest in that the remoteness of the Gabusi had required the court to use as interpreter one Musu, an 'acknowledged

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<sup>157</sup> *R v Yanda Piaiua* [1967-68] PNGLR 482

<sup>158</sup> *R v Yanda Piaiua* [1967-68] PNGLR 482.

<sup>159</sup> *R v Noboi* [1971-72] PNGLR 271.

sorcerer', who was then serving a three and a half years' sentence in Port Moresby, for the 'murder of a rival sorcerer'.<sup>160</sup> Unfortunately there are no other records to be found relating to Musu. For reasons which cannot be ascertained from the judgment itself, a more extensive version of this decision is included in the Papua New Guinea Law Reports as *R v Bosai*.<sup>161</sup>

However, this view on the applicability of the Criminal Code to cannibalism did not long survive independence. Bolstered by the Constitutional obligation to develop the national community as a whole, Wilson J in 1978 in *Feama v The State* had 'no difficulty in accepting that the legislature would have intended to impose uniform blanket standards of decency and propriety on all the peoples of the country, especially appertaining to conduct with regard to dead bodies'.<sup>162</sup> He therefore sentenced each of the cannibalistic accused to 15 months' imprisonment with hard labour, which he considered achieved 'some balance between the often complex and... competing purposes of sentencing'.

Of perhaps more direct relevance is the 1971 decision of the Full Court in *R v Wanosa*, an appeal from a decision of Kelly J sitting at Goroka. In *Wanosa*, the accused were convicted of the murder of one Mipi Kafoyare, a sorcerer. In the course of the hearing of the appeals against the sentences of ten years' imprisonment with hard labour, further evidence was adduced to the appeal court as to the nature of Mipi's conduct, his practices as a sorcerer, and that he had been hired to kill a member of the accuseds' village, including from Sabumei Kofikai, Member of the House of Assembly for Goroka.<sup>163</sup>

Despite the intervention of two World Wars, the pacification of the Territory and the evolution of the 'reasonable Papuan', in his consideration of the additional evidence, Minogue CJ made comments which could equally have been made in an Annual Report submitted to MacGregor in the 1890's:

It is generally believed in the district that a sangguma can kill his victim by either magical or physical means... The village people are afraid of these men and of the powers they claim to have. There was other evidence that there has been great reluctance to report killings by sangguma to the authorities because as was said this is a matter for the people themselves to deal with in their own way. In my view this is probably because of fear of magic being used against an informant. ...Taking the view that I do that Mipi was killed by angry and excited men in what they reasonably conceived to be proper and necessary defence of their kin against a real and murderous enemy, I am of opinion that a proper

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<sup>160</sup> *R v Noboi* [1971-72] PNGLR 271.

<sup>161</sup> [1971] PGSC 56 (11 August 1971).

<sup>162</sup> [1978] PNGLR 301 (22 August 1978).

<sup>163</sup> *Wanosa v R* [1971] PNGLR 90 (28 April 1971), Minogue CJ and Clarkson & Raine JJ.



sentence would be one of six years' imprisonment. This is a sentence which has a real element of deterrence and which at the same time will allow the education of the prisoners in the basic requirements of law and order and good citizenry which our corrective institutions are so well able to carry out.

... I am convinced that they had no sense of guilt for what they had done and rather regarded themselves as having eliminated in defence of their village a person who, whilst alive, was a threat to the lives and safety of its inhabitants — as indeed he was.

I am fully aware of the incidence of homicide particularly in the Highlands, and of the necessity for stern deterrent measures, but I feel that killing brought about by a belief in sorcery will for some time to come need special and individual treatment.

In an adultery-related homicide, in 1962 Smithers J held in *R v Rumints-Gorok* that the ordinary man in Papua was 'the ordinary native living the rural life of low standard led by the accused and his relatives'.<sup>164</sup> The following year he wrote of sorcery-related crime that consideration had to be given to the genuine belief that killing the purported sorcery was not only justified, but 'a perfectly moral act'. Nonetheless, as killing arising out of suspected sorcery remained illegal, punishment also remained necessary.<sup>165</sup>

There appears to be only one instance reported in the case law in which an accused attempted to use the defence of insanity, based on the fundamental unreasonableness of the belief in sorcery which had led to murder. Under s 27 of the Code a person was not criminally responsible for an act if at the relevant time they were in such a state of 'natural mental infirmity' as to deprive them of the 'capacity to know that [they] ought not to do the act'. In the context of sorcery killings, the defence was considered in the 1962 decision of *R v Womeni*, where the defendant had been charged with the murder of a sorcerer who had allegedly brought about the death of his sister.<sup>166</sup> Counsel for the defence put the argument that 'natural' in s 27 meant 'unsophisticated' and 'infirmity' meant weakness, and he submitted that all of the defendants' beliefs — including in the efficacy of sorcery — pointed to such a lack of sophistication as to constitute the naturally mentally weak condition envisaged by the provision. Ollerenshaw J rejected out of hand the argument on the grounds that a lack of sophistication could not be equated with natural mental infirmity. Moreover, the endemic belief

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<sup>164</sup> [1963] PNGLR 81, 83.

<sup>165</sup> R Smithers, 'Law and the Territory of Papua and New Guinea' (1963) 4 *Melbourne University Law Review*, 218.

<sup>166</sup> [1963] PNGLR 72 (18 July 1962).

in sorcery throughout Papua and New Guinea meant that the defendant's own beliefs could not be said to indicate a diseased mind, given that 'killings... by way of retaliation for the death of a relative believed to have been brought about by sorcery, commonly feature in the lives of many other primitive native peoples of these Territories... and contribute a not inconsiderable volume to the work of this Court'.<sup>167</sup>

Bruce Ottley and Jean Zorn summarised the situation with regards to the possibility of insanity as a mitigating factor in relation to feared acts of sorcery as follows:

Defendants were permitted neither the mistake defence, on the grounds that the belief in sorcery is by English or Australian standards unreasonable, nor the insanity defence, although any Englishman or Australian who claimed he had killed because he believed in magic would be considered insane.<sup>168</sup>

Finally, in the 1966 case of *R v Hatenave-Tete and Loso-Sarafu*,<sup>169</sup> Ollerenshaw J found that the accused Loso was in a state of 'automatism' at the time of the murder of the purported sorcerer. On the facts, three of Loso's relatives had recently died and their deaths were generally attributed to sorcery. It was a tradition among the village of Asariyufa that when one is possessed she is capable of identifying the sorcerer or leading a party to where the sorcerer lives. On the day of the murder, Loso began to tremble and jump and shout in a manner consistent with one possessed of the spirit of a recently deceased relative, and did indeed lead a group of about fifty people to Ketarabo, where she denounced the deceased the sorcerer responsible. Automatism was a separate defence from insanity, under s 23 of the Code, which Ollerenshaw J considered to be 'more or less cheek by jowl with ss. 26 and 27'. Therefore, a reasonable doubt existed that she was 'not acting independently of her will, that hers was not involuntary conduct, that she was not insensible or unconscious of what she was doing, that she had control over her actions in the sense that her mind went with them, that her conduct was conscious and voluntary or whatever phraseology one cares'.<sup>170</sup> Nonetheless, the specific facts of *Hatenave* are unlikely to be replicated.

Thus, the post-Derham Supreme Court took the reasonable man off the Clapham omnibus and situated his propensity to be provoked within a hierarchy of civilisation in which Europeans unquestionably remained at the apex, while indigenous Papuans and New Guineans took their places depending on their varying degrees of Europeanisation. Or to define it geographically,

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<sup>167</sup> [1963] PNGLR 72 (18 July 1962).

<sup>168</sup> Ottley and Zorn, n110, 266.

<sup>169</sup> [1965-66] PNGLR 336 (16 August 1966).

<sup>170</sup> [1965-66] PNGLR 336 (16 August 1966).

having regard to decision such as *R v Moses Robert*, the availability of provocation in particular, centred on the white community in Port Moresby and radiating out from across the wider Territory. While the judges undoubtedly felt that they were not only bringing additional sophistication to the application of the criminal law, but were doing their best to apply traditional customs, the formalism of their approach was subject to criticism. Bernard Narokobi argued that the very *concept* of reasonableness assumed that once Papua New Guineans were educated out of their primitiveness, they would behave like 'Englishmen in a Papua New Guinea setting'.<sup>171</sup> As for the wilful murder defence of provocation, in a society where sorcery killing was 'an act of honour and self-preservation', he argued that this concession was inadequate.<sup>172</sup>

Anthropologist Peter Lawrence decried this outcome. He noted that if western law was applicable only where there had been extensive contact with Europeans, the villager was placed in a position where he had to think in terms of two radically different systems.<sup>173</sup> Another vocal contemporary critic was American legal academic Jean Zorn, then a law lecturer at the University of Papua New Guinea Law Faculty, where she established the course in customary law, and after independence, a member of the Papua New Guinea Law Reform Commission. Writing in 1971, Zorn argued that the defence of provocation had 'served the Supreme Court well', in that it:

...squared with the court's image of Papua New Guineans as excitable people, quick to anger and childlike in their inability to control their emotions and behaviour.... [and] allowed the court to avoid the issue of whether customary law offered a justifying rationale for an offender's behaviour and thus to avoid a direct showdown between the customary and imposed legal systems.<sup>174</sup>

She noted that the Supreme Court responded to custom in many more cases by reducing the length and severity of sentences than it did by accepting defences that relieved the accused of criminal responsibility.<sup>175</sup> This is undoubtedly true, but is hardly surprising. It shows that the Australian-born and -trained judiciary not only struggled to undertake the oak transplantation role of Lord Denning's colonial judiciary, but also that they continued that combination of strict application of the common law and the amelioration of its consequences in quick succession

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<sup>171</sup> Bernard M Narokobi 'Adaptation of Western law in Papua New Guinea' (1977) 5(1) *Melanesian Law Journal*, 58.

<sup>172</sup> *Ibid.*, 55

<sup>173</sup> International Commission of Jurists, Australian Section, *The rule of law in an emerging society: report of the proceedings*. Sydney 1970. Conference convened by the Papua and New Guinea Branch of the International Commission of Jurists, Port Moresby, 7-14 September 1965.

<sup>174</sup> Ottley and Zorn, n110, 266.

<sup>175</sup> *Ibid.*, 266.

that had characterised the response to crimes inspired by indigenous custom since the establishment of British New Guinea.

On the cusp of Papua New Guinean independence, the Supreme Court decided the case of *Secretary for Law v Amantasi*,<sup>176</sup> in which ten accused had pled guilty to the murder of a local sorcerer, who was believed to have caused the death of eleven local tribespeople. Unusually, the Secretary of Law had appealed against the inadequacy of the trial judge's sentences of 12 months, because it was of the nature of an intentional payback killing, and that it was elaborately planned. Prentice SPJ, with whom Raine J agreed, rejected that the case was in fact a Highland payback killing, which were to be distinguished from the planned killing of a purported sorcerer.<sup>177</sup> He found that this was a case where pre-eminently a consideration for survival and education of the group was that which should prevail over all other objects of punishment. Many of the tribespeople involved lived:

...in desperate contest with an extremely hard environment, with only the barest contact with other races, and minimal knowledge of the Government and the world that is advancing from outside to engulf them for better or for worse.

Referencing Murray in *Papua Today* and Gore J's *Punishment for Crime Among the Natives*, Prentice SPJ held that the court's task remained one of marrying 'the government's sociological task to the imposition of the Criminal Code by varying sentences for murders from the most severe to the notional'. He also noted that, on the facts of the murder, extended sentences for the accused could actually threaten the very existence of the small tribe.<sup>178</sup>

In dissent, Saldanha J held that the Full Court of the Supreme Court's own precedent was that in cases of wilful murder more than derisory sentences should be imposed despite the primitiveness of the offenders. As far as deterrence was concerned, he saw no need to distinguish between 'a typical payback killing in the stone-age tradition and the killing of reputed sorcerers', given that '[s]o-called sorcerers are not always what they are reputed to be and are entitled to what little protection the law can afford them'. Although he acknowledged that there were still 'pockets here and there' to which the Murray System remained apposite,

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<sup>176</sup> [1975] PNGLR 134.

<sup>177</sup> In practice, this distinction was not always easy to make. Payback killing has been defined as 'a retaliatory homicide that is usually carried out by the kin of the deceased': see Shaun Larcom, 'Internalizing Legal Norms: An Investigation into the Legitimacy of Payback Killings in the New Guinea Islands', (2015) 49(1) *Law and Society Review*, FN5 181. However, Sinclair Dinnen notes that payback 'may express itself in at least two different ways. In its simplest and most obvious form, retaliation might take the character of direct physical violence, e.g., the 'payback' killing. A more indirect form of retaliation would involve sorcery, the threat of which might act as a sanction for proper conduct': Dinnen, 'Sentencing, Customary Law and the Rule of Law in Papua New Guinea'. (1988) 27 *Journal of Legal Pluralism*, 30.

<sup>178</sup> *Secretary for Law v Amantasi* [1975] PNGLR 134 (1 August 1975).

the Court had to view the accuseds' crimes in the context more generally of a country which was 'poised on the threshold of independence'.<sup>179</sup> As the crime of wilful murder was one of 'the most heinous known to the law' the imposition of light sentences tended to bring the law into contempt and may in some quarters encourage the view that they are a licence to kill', as they had neither 'retributive value nor a deterrent effect'.<sup>180</sup>

The two views embody the manner in which the law relating to the belief in the practice of sorcery in Papua and New Guinea paralleled the evolution of the colonial administration more generally. Allegations of sorcery as a colonial criminal offence came within the remit of what African historian Katharine Luongo has described in relation to Kenya as 'the fabled 'men-on-the-spot' in the course of their duties... developing colonial governmental "best practices"'.<sup>181</sup>

## Conclusion

In this chapter we have examined the crux of the thesis. Even before any of the study of the phenomenon of sorcery we have seen in Chapter Three that colonial administrators were well aware of both the endemic nature of the belief in its reality and efficacy, and that those beliefs were at the root of many of the homicides across the expanding area in which the Administration's writ ran. Taking his cue from the Colonial Office's injunction to create a legal system as simple as possible, William MacGregor adopted the laws of neighbouring Queensland, supplementing them with a *Native Affairs Ordinance* in 1889 which was effectively to govern the legal regulation of indigenous Papuans and New Guineans until independence.

Soon thereafter, the 1893 Sorcery Ordinance criminalised a range of practices relating to the practice of sorcery. As MacGregor and his chief judicial officer Francis Winter were good Sons of the Enlightenment, it also dealt with the *pretence* of such practices, harking back to the English *Witchcraft Act* of 1736, which as we shall see in Chapter Five aimed at preventing and punishing 'any Pretences' to witchcraft, pursuant to which 'ignorant Persons [were] frequently deluded and defrauded'. Thus, the Preamble to the 1893 Ordinance thundered that, as 'the lies of the Sorcerer frighten many people and cause great trouble... the Sorcerer must be punished'.

The colonial administration recognised that many of the acts categorised as 'crimes' by the common law were embedded in the traditional mores of subsistence societies whose nearest

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<sup>179</sup> [1975] PNGLR 134 (1 August 1975).

<sup>180</sup> [1975] PNGLR 134 (1 August 1975).

<sup>181</sup> Katherine A Luongo, 'Motive Rather than Means: Legal Genealogies of Witch-Killing Cases in Kenya' (2008) 48 (189/190) *Cahiers d'études africaines*, 36, NN 3.

neighbours were often their bitterest enemies in the battle for scarce resources. While they could not allow the integrity of the processes of the common law to be compromised by any official acknowledgment of this, it was practice for these customs to be taken into account in the course of sentencing. As we have seen, this practice was codified by Gore J in 1929, at the behest of Hubert Murray. Sorcery charges, together with other acts forbidden to the indigenous population alone, were heard and recorded in Reports by the administration's 'men on the ground'. These were the Australian kiaps, who combined executive and judicial roles, a process described by Peter Bayne as 'diametrically opposed to common law principles'.<sup>182</sup> Nonetheless, their Reports show that indigenous Papuans and New Guineans took advantage of the imposed court process to bring sorcery charges against their fellow villagers.

During the 1960's, in the jurisprudence of the Supreme Court we see attempts to bridge the gap between the fundamental cognitive orientations of the Enlightenment and indigenous Papua and New Guineans with reference to the Empire-wide jurisdiction of the Privy Council. This was effected by acknowledging the 'reasonableness' of sorcery-related violent crime in the communities of the indigenous accused. This was especially the case where the accused had, by reference to customary beliefs, been 'provoked' into murdering a purported sorcerer. However, in doing so, they perpetuated a hierarchy of the applicability of the protections of the common law grounded in an unbridgeable colonial difference, and based on race and degrees of Europeanisation.

Accordingly, the next chapter situates the legal response to sorcery in Papua and New Guinea within the history of the enforcers of the common law. It does this by considering the response of the common law to allegations of the practice of witchcraft in pre-modern England and in the First British Empire, in Britain's Atlantic colonies. It then examines the contemporaneous situation in colonial Kenya, which will show that the approach of the courts of Papua and New Guinea were in this regard squarely in the mainstream of the administration of the law in the British Empire, and therefore in its historiography.

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<sup>182</sup> P Bayne, n65, 21.

# Chapter Five: Witchcraft, the common law and the Empire

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The identification of witches belongeth not to every man, but is to be done Judicially by the Magistrate, according to the forme and order of the Law.<sup>1</sup>

You white men are destroying the community. The witches ... are doing what they please, because they know we can no longer kill them as we used to.<sup>2</sup>

## Introduction

In dealing with criminal sanctions for the practice of sorcery, the colonial legal authorities in Papua and New Guinea operated within an inherited framework of criminalisation which had been applied to similarly alleged practices centuries beforehand. Based on almost universal contemporary Christian beliefs in witchcraft in Europe, the seeds of the common law's response were sown in the Henrician Reformation of the 1530's. This set in train legislation which brought into the common law courts prosecutions for the practice of witchcraft, especially the alleged practice of *maleficium*, the deliberate inflicting of harm on persons and property. Court practice then evolved in tandem with the spread of Enlightenment thought over the next two hundred years.

This chapter therefore considers first that developing legislative regime and the content of trials held under its auspices in England and later in her Atlantic possessions in what is known as the first British Empire.<sup>3</sup> These processes were characterised by the shared belief between prosecutors and accused in the reality and efficacy of witchcraft. Accordingly, in order to gain a perspective on the impact of colonial difference in colonial Papua and New Guinea, the chapter then examines the contemporary legal response in the British territories in East Africa, especially the Colony of Kenya, the source of the second quote above. It focuses on the

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<sup>1</sup> M Gaskill, 'Witchcraft and Evidence in Early Modern England', *Past and Present*, No 198, February 2008, p 40.

<sup>2</sup> 'Old chief' quoted in the introduction to C Clifton Roberts, *Tangled Justice* (MacMillan, London, 1937), 3-4.

<sup>3</sup> 'Throughout its long usage there has been a rough consensus as to what is meant by the term 'first British Empire', even if some points have been contested. There has never been any doubt about the geographical extent of the first Empire. It was an Atlantic Empire, based on North America and the West Indies. The spread of British dominion into Asia, Africa, and Australasia was one of the indications that the first Empire was giving way to a second one': P J Marshall, 'The First British Empire' in R Winks, *The Oxford History of the British Empire: Volume V: Historiography*, published to *Oxford Scholarship Online* October 2011.

development of Witchcraft Ordinances and the criminal trials in superior courts of witchcraft-related violence and murder.

A common theme of all of these historical examples is the fundamental antagonism between socially acceptable and unacceptable belief systems. The former stand on their own, usually bolstered by the power of the authority of Christian Church and State. The latter are defined in opposition to the former, and as a threat to them, whether as diabolic pact in Mediaeval Christendom; the poison of heresy in the post-Reformation and Counter-Reformation world; or as insidious native superstition in the colonies of Europe. Sociologist of religion Thomas O'Dea has defined religion as 'the manipulation of non-empirical or supra-empirical means for non-empirical or supra-empirical ends'.<sup>4</sup> In contrast, he defined magic as 'the manipulation of non-empirical or supra-empirical means for empirical ends'.<sup>4</sup> With religious belief, the recitation of certain accepted formulae is believed to gain entry to the next world; with witchcraft, occult recitation of different formulae is believed to gain advantage or to inflict harm in this one. In the historical context, leading anthropologist Keith Thomas restricts the term 'witchcraft' to mean 'the employment (or presumed employment) of some supernatural means of doing harm to other people in a way that was generally disapproved of by the mass of society'.<sup>5</sup> In doing so, he concluded that English witch beliefs were in fact 'more suitable for comparison with African ones than is sometimes appreciated'.<sup>6</sup> As will be seen, it was this concept of the aim of inflicting harm which was at the core of the response of the common law in England to allegations of witchcraft.

### Witchcraft and the law in early modern Europe

In the pre-modern era, when the services of unskilled medical practitioners were often more dangerous than the malady, devout Christians had recourse to 'wise women' and 'cunning folk', whose traditional modes of healing were based on knowledge of the medicinal qualities of herbs, together with recourse to amulets, charms and incantations. They did not consider that this conflicted with the tenets of their faith. Indeed, the mental world of the cunning folk has been characterised as a 'conglomeration of Roman Catholic doctrine, magic practices, animism, paganism and common sense'.<sup>7</sup>

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<sup>4</sup> Cited by Nachman Ben-Yahuda, 'The European Witch Craze of the 14<sup>th</sup> to 17<sup>th</sup> centuries: a sociologist's perspective' (July 1980) 86(1) *The American Journal of Sociology*, 2-3.

<sup>5</sup> Keith Thomas, 'The Relevance of Social Anthropology to the Historical Study of Witchcraft', in E G Breslaw, (Ed), *Witches of the Atlantic World: A Historical Reader & Primary Sourcebook*, (New York University Press, New York, 2000), 47.

<sup>6</sup> *Ibid.*, 47.

<sup>7</sup> See David D Hall, 'Witchcraft and the Limits of Interpretation' (June 1985) 58 *New England Quarterly*, 277.



The changing nature of witchcraft beliefs in Europe was inextricably bound up with developments in Christian theology, whether in the cloisters of the Middle Ages or on the battlefields of the Reformation. Ultimately, belief in the Christian duty to eradicate witches was based on passages in the Old Testament, especially 'Thou shalt not suffer a witch to live'; and 'A man also or woman that hath a familiar spirit, or that is a wizard, shall surely be put to death: they shall stone them with stones: their blood shall be upon them.'<sup>8</sup> Despite these biblical injunctions, the early Church paid little attention to the question of witchcraft. St Augustine in the fifth century declared that witchcraft and satanic power were impossible, as God alone had the power to suspend the laws of nature. Indeed, rather than a concern as to the reality of popular beliefs in the efficacy of local witchcraft, much of the Church's interest arose from the alleged magical practices of her own learned clerics.<sup>9</sup> Thus, in 1258 Pope Alexander IV specifically instructed Inquisitors not to deal with cases of witchcraft, unless they had a 'manifest taste of heresy'.<sup>10</sup>

However, Church attitudes hardened in the wake of the popularity and strength of medieval heresies such as Catharism, so that by 1484 the Bull *Summis desiderantes* of Pope Innocent VIII not only recognised the existence of witches, but urged the Mediaeval Inquisition to see to 'correcting, imprisoning, punishing and chastising' such witches, 'according to their deserts'. In the wake of the Bull, in 1487 the German Dominican Inquisitors Kramer and Sprenger published their *Malleus Maleficarum* – the 'Hammer of the Witches', with *maleficarum* being the feminine plural – which detailed the manner in which suspected witches could be tortured.<sup>11</sup> Although it was condemned by the Church, the *Malleus* went on to become the textbook for secular European witch trials for centuries. It imprinted on the popular imagination the image of the witch not only as a practitioner of magic whose

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<sup>8</sup> *King James Bible*, Exodus 22:18 and Leviticus 20:27 respectively. The *New Jerusalem Bible* translates these verses as: 'You will not allow a sorceress to live' and 'Any man or woman of yours who is a necromancer or magician will be put to death; they will be stoned to death; their blood will be on their own heads'.

<sup>9</sup> On this aspect, see M D Bailey, 'From Sorcery to Witchcraft: Clerical Conceptions of Magic in the Later Middle Ages' (Oct 2001) 76(4) *Speculum*, 965.

<sup>10</sup> Isabel Iribarren, 'From Black Magic to Heresy: A Doctrinal Leap in the Pontificate of John XXII' (March 2007) 76(1) *Church History*, 40.

<sup>11</sup> See, e.g., Heinrich Kramer, *Malleus Maleficarum*, The Third Part, Second Head, Question XIII, *Of the Points to be Observed by the Judge before the Formal Examination in the Place of Detention and Torture. This is the Eighth Action* <http://www.malleusmaleficarum.org/downloads/MalleusAcrobat.pdf>. Brian Levack notes that 'the use of torture in witchcraft cases was the single most important factor in increasing the number of victims. Not only did it secure a large number of convictions, but the subsequent torture of confessing witches to force them to name their accomplices accounted for hundreds of additional executions': Brian P Levack, *Witchcraft and the Law*, in Brian P Levack (Ed), *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America*, 475-476.

malevolence caused suffering to her neighbours, but as the cohort of the Devil who flew through the air at night on her way to Sabbaths to worship him.

The core of the Church's own attack on witches was the continuing notion of witchcraft as *heresy*, particularly as a perversion not only of Catholic doctrine but of practice as well, as the Witches' Sabbath inverted the norms and forms of the Mass.<sup>12</sup> The medieval Catholic Church had provided 'magic' of its own in the form of ritual blessings to ward off evil, and placed a myriad of saintly intercessors between each man or woman and their God. The Reformation did away with these unbiblical practices, and Protestant preachers stressed believers' precarious individual relationship with God, which could be jeopardised at any time by their own failings. Reformation historian Robert Scribner links this anxiety to the Protestant view of a 'moralized universe' in which the failings of one would be visited upon whole communities by Divine wrath.<sup>13</sup> Novel political divisions in the wake of the Reformations and Counter-Reformations complicated the situation: as charges of heresy were weapons of the opposing sides of the religious divide, witchcraft was easily conflated with the heresy of one's opponents. Ultimately, witch persecutions were most prevalent in those parts of Europe such as southern Germany where what was to be the majority religion remained fiercely contested throughout the seventeenth century.

While the causes of the various witch-crazes throughout Europe remain historiographically contested,<sup>14</sup> it is undoubtedly the combination of popular and learned belief in the reality of witches and their potential to cause harm within a community which led to a State-directed legal response to allegations of witchcraft. Certainly, the bitter religious struggles involving both the elites and the peasantry created an atmosphere of suspicion which was conducive to the ensuing 'witch-craze', defined by Hugh Trevor-Roper as:

...the inflammation of [witch-beliefs], the incorporation of them, by educated men, into a bizarre but coherent intellectual system which, at certain socially determined times, gave to otherwise unorganised peasant credulity a centrally directed, officially blessed persecuting force.<sup>15</sup>

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<sup>12</sup> As the Waxes note, rather than 'characterizing magic as an empirically inaccurate or logically fallacious system of philosophy, the Christian saw it is an impious, evil and blasphemous perversion of religiosity': Murray and Rosalie Wax, 'The Notion of Magic' (December 1963) 4(5) *Current Anthropology*, 497.

<sup>13</sup> Robert W Scribner, 'The Reformation, Popular Magic and the "Disenchantment of the World"' (Winter 1993) 23(3) *The Journal of Interdisciplinary History*, 485-486.

<sup>14</sup> See, e.g., Norman Cohn's *Europe's Inner Demons: The Demonization of Christians in Medieval Christendom* (Granada, London, 1976) and Brian P Levack's *The witch hunt in early modern Europe* (Routledge, 4<sup>th</sup> Ed, London, 2015).

<sup>15</sup> Hugh R Trevor-Roper, *The European Witch-Craze of the 16<sup>th</sup> and 17<sup>th</sup> Centuries* (Penguin, London, 1967), 9.

The development and subsequent enforcement of a de-ritualised and largely de-sacralised form of Christianity by the State in England led to the identification of the practice of witchcraft as a heretical threat from Recusants within, coupled with continental Catholicism as a heretical threat from without. In an age, when 'the fires of bigotry kindled by the Reformation were still burning under full draft',<sup>16</sup> the crime of witchcraft took upon itself the nature of spiritual treason, directed against God, just as temporal treason was directed against the earthly ruler. Interestingly, in contrast to the situation in England and particularly Scotland, the only witch trials held in Ireland were among Protestant settlers from either of those two countries.<sup>17</sup>

### Crown, church and courts in England

The roots of what came to be the pattern of a legislative response to witchcraft in England lie not only in the ferment of the Reformation, but more particularly in the success of the establishment of a Protestant State Church, buttressed by common lawyers who nonetheless jealously guarded their domain from ecclesiastical encroachments.<sup>18</sup> It is unsurprising then that the first Act criminalising witchcraft came in the course of the Henrician Reformation. The *Witchcraft Act* of 1542 made witchcraft a capital offence, and forbade:

...the use, devise practice or exercise... any Invocations or conjurations of Spirits witchcrafts enchantments or sorceries to the intent to find money or treasure or to waste consume or destroy any person in his bodily members, or to provoke any person to unlawful love, or for any other unlawful intent or purpose.

The wording clearly shows that the 1542 Act was directed at *maleficium*, rather than the heresy of a compact with the Devil. *Maleficium* entailed causing harm to others by the use of magic. It encompassed allegations such as causing people or livestock to sicken and die; destroying crops by summoning bad weather; and 'turning' butter or spoiling food.<sup>19</sup> All of these were of vital import to small agrarian communities, living close to subsistence level. Such allegations also highlight the communal expectations of reciprocity, whose transgression often prefigured the hostility between accused and accuser in English witchcraft trials. Moreover, by making witchcraft a felony, the 1542 Act removed it from the remit of the ecclesiastical courts and gave it to those of the common law. As such it was a tentative step towards the 'secularisation'

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<sup>16</sup> Daniel J McKenna, 'Witchcraft: An Obsolete Crime' (1928) 13 *Marquette Law Review*, 19.

<sup>17</sup> Marijke Gisjsuijt-Hofstra, Brian P Levack, and Roy Porter, *Witchcraft and Magic in Europe: The Eighteenth and Nineteenth Centuries* (The Athlone Press, London, 1999), p 142

<sup>18</sup> See, e.g., David C Smith, 'Remembering usurpation: the common lawyers, Reformation narratives and the prerogative, 1578–1616' (November 2013) 86(234) *Historical Research*, 619.

<sup>19</sup> Thus, victims of witchcraft in the Essex Assize indictments between 1560 and 1680 had endured 'two barns burnt down, twenty brewings of beer spoilt, one windmill bewitched, cheese prevented from forming, and four gallons of cream prevented from becoming butter': Alan MacFarlane, *Witchcraft in Tudor and Stuart England: A Regional and Comparative Study* (Taylor & Francis, London, 1999), 152, NN21.

of the legal response to the practice of witchcraft. Michael Devine posits that making witchcraft and the use of magic a secular felony fitted with Henry VIII's broader aim of diminishing the authority of the ecclesiastical courts and thus the independence of the Church in England.<sup>20</sup>

The 1542 Act was repealed by Henry's son and successor Edward VI in 1547. It remained a dead letter during the reign of Mary I, when such matters returned by default to the jurisdiction of the ecclesiastical courts, as part of her aim to re-establish the Catholic Church's juridical pre-eminence in England, referred to by her sister and heir Elizabeth I as 'the tyme of our late dere sister Quene Mary, at which tyme the Crowne and regiment of this Realme was subdued to the forryne auctoritie'.<sup>21</sup> As Mary's fruitless attempt at Counter-Reformation gave way to the final forms of the Church of England under Elizabeth, Parliament enacted the *Act Against Conjuracions, Enchantments and Witchcrafts* in 1562, returning the crime of witchcraft to the remit of the common law courts. Unlike the 1542 Act, Elizabeth's Act demanded the death penalty only where harm had been caused, providing that lesser offences were to be punishable by a term of imprisonment.<sup>22</sup> It had been urged as an early priority of the new regime by leading proponents of the Elizabethan Settlement such as Bishop John Jewel of Salisbury, to counter the threat of witchcraft as an internal threat to the State as 'a vestigial hangover from the popish superstitions prevalent in earlier, unreformed times'.<sup>23</sup>

While Jewel's view was undoubtedly widely held, it was not the only one in late sixteenth century England. The Puritan Member of Parliament Reginald Scot — together with St Augustine, as we have seen above — rejected the very possibility of magic or witchcraft operating independently of the work of God. As a reformed Protestant, Scot took Jewel's views on the connection between Catholicism and belief in witchcraft further. He argued in his 1584 book *The Discoverie of Witchcraft* that magic was a 'cousening art' only to be taken seriously

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<sup>20</sup> Michael Devine, 'Treasonous Catholic Magic and the 1563 Witchcraft Legislation: The English State's Response to Catholic Conjuring in the Early Years of Elizabeth I's Reign' in M Harmes and V Bladen, (Eds) *Supernatural and Secular Power in Early Modern England* (Farnham and Burlington, Ashgate Publishing, 2015), 68.

<sup>21</sup> From the 1562 letters patent for the examination of the statutes of cathedral chapters, quoted in Roger B Manning, 'The Crisis of Episcopal Authority during the Reign of Elizabeth I' (Nov 1971) 11(1) *Journal of British Studies*, 20.

<sup>22</sup> If the victim was only 'wasted consumed or lamed in his or her Bodye or Member', or had their goods or chattels 'destroyed wasted or impayred', first offenders suffered imprisonment for one year, 'without Bayle or Mayneprise, and once in every Quarter of the said Yere, shall in some Market Towne, upon the Market Daye or at such tyme as any Fayer shall bee kepte there, stande openly upon the Pillorie by the Space of Six Houres, and there shall openly confesse his or her Erroure and Offence'. Any second such offence incurred a capital sentence: 1563, 5 Elizabeth 1 c16, *An Act agaynst Conjuracions Inchantmentes and Witchecraftes*. <https://statutes.org.uk/site/the-statutes/sixteenth-century/1563-5-elizabeth-1-c-16-an-act-against-conjuracions-inchantments-and-witchcraft/>

<sup>23</sup> Peter Elmer, 'Witchcraft, Religion, and the State in Elizabethan and Jacobean England' in Peter Elmer (Ed) *Witchcraft, Witch-Hunting, and Politics in Early Modern England*, (Oxford University Press, Oxford, 2016) 17.

by 'children, fooles, melancholike persons and papists'.<sup>24</sup> Perhaps reflecting the equivocal nature of belief in the efficacy of witchcraft, and despite the fact that the 1562 Act gave broad, inquisitorial powers to county justices to undertake the initial stages of witchcraft prosecutions, of those 258 people indicted at the Home Circuit Assizes up until 1600, only fifty nine were found guilty.<sup>25</sup> The Home Circuit consisted of the heavily-populated areas of Essex, Hertfordshire, Kent, Middlesex, Surrey and Sussex. Unfortunately, a nation-wide comparison cannot be made, as Elizabethan records do not survive for any other circuits.

In 1603, Elizabeth I was succeeded by her cousin the Scot James VI, who had very public views on witchcraft, having famously both written on the subject and personally interrogated suspected witches.<sup>26</sup> In James's original realm both the practice of witchcraft and consulting with witches were capital offences, and witchcraft trials were said to be conducted with 'cruel and credulous superstition'.<sup>27</sup> Thus his *Witchcraft Act* of 1604 no longer focused on the malicious intent of the accused, but on the pact with evil spirits and devils, which became a felony punishable by death. Indeed, in his *Institutes of the Lawes of England*, Chief Justice Sir Edward Coke defined a witch as 'a person that hath conference with the Devil, to consult with him or to do some act'.<sup>28</sup>

However, as the 1604 Act did not include any specific ways of proving the *maleficium*, the common law courts turned to contemporary criminal procedure. On this point, a fundamental difference between the common law in England and its later colonies, and the Roman law of Scotland and the European Continent was that, under the latter, the use of torture had been revived to extract confessions from alleged witches.<sup>29</sup> While torture could be used in England in very serious cases, such as treason, it was only pursuant to a warrant issued by the sovereign or the Privy Council and was very rarely used in witchcraft trials. This may go some way to explaining the fact that there was no English edition of the *Malleus* produced — by contrast, between 1486 and 1700 it was issued in Latin sixteen times in Germany and eleven times in France.<sup>30</sup>

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<sup>24</sup> Reginald Scot, *The Discoverie of Witchcraft*, <http://www.gutenberg.org/files/60766/60766-h/60766-h.htm>

<sup>25</sup> Gaskill, n 1, 42.

<sup>26</sup> Lawrence Normand & Gareth Roberts (Eds), *Witchcraft in Early Modern Scotland: James VI's Demonology and the North Berwick Witches* (University of Exeter Press, 2000), 87-104.

<sup>27</sup> R D Melville, 'The Use and Forms of Judicial Torture in England and Scotland' (Apr 1905) 2(7) *The Scottish Historical Review*, 225.

<sup>28</sup> Thomas, n 5, 61.

<sup>29</sup> On their revival on the continent and connection to Roman law theories of proof, see Heikki Pihlajamäki, 'Swimming the Witch, Pricking for the Devil's Mark: Ordeals in Early Modern Witchcraft Trials', (2000) 21(2) *The Journal of Legal History*, 35.

<sup>30</sup> Keith Thomas, *Religion and the Decline of Magic* (London: Penguin Books, 1971), 523





Frontispiece from Matthew Hopkins' *The Discovery of Witches* (1647), showing witches identifying their familiar spirits.<sup>31</sup>

There is one remarkable exception to this general pattern of exoneration by the common law court process, and indeed the reticence to use torture. This was the efforts of the self-styled 'Witchfinders', the Puritans Mathew Hopkins and John Sterne in Essex, during the English Civil War. To obtain evidence, the Witchfinders used practices which in the twenty-first century would be described as 'enhanced interrogation techniques', such as sleep deprivation. By these means, the Witchfinders purported to discern the 'marks' of a witch as a preliminary to trial. In doing so, between 1645 and 1647 they led to the arrest of nearly 300 men and women

<sup>31</sup> National Portrait Gallery, <https://www.npg.org.uk/collections/search/portrait/mw134815/Matthew-Hopkins>

and effectively caused the deaths of 230, either by way of judicial execution after trial, or in crowded local prisons in which disease was rife.<sup>32</sup> As with Europe generally, women were disproportionately accused of witchcraft, and none more so than socially dislocated widows and spinsters whose poverty made them a drain on the welfare of their neighbours and the sparse resources of their communities.<sup>33</sup> As Letitia Fairfield noted in a 1946 article 'The Supernatural in the Law Courts', it was no coincidence that the 'bent old witch with her stumbling gait and long pointed chin' of tradition provides 'a clinical picture of osteomalacia, a starvation disease'.<sup>34</sup>

However, the exceptionalism of the Essex witch hunts can be attributed largely to the unique combination of the social upheaval of the Civil War and the strength of local Puritanism.<sup>35</sup> As Michael Gaskill notes, while it might seem surprising that localities so under siege should bother to hunt for witches in their midst, the Essex witch trials were linked by religious feeling to the progress of the Parliamentary cause in the Civil War. As witches 'besieged the soul... the sense that victory in the field depended on godliness at home made hunting them feel like part of the war effort' on behalf of the godly.<sup>36</sup> This response of a Dissenting Protestant community under physical siege to identify and try witches in their midst played out in the First British Empire on the other side of the Atlantic in the late seventeenth century, in the Massachusetts Bay Colony town of Salem.

### Witchcraft trials across the Atlantic

The same religious conflict within English Protestantism which had precipitated the Civil War also had led to the foundation in 1630 of the Massachusetts Bay Colony in North America by Puritans persecuted by the hierarchy of the Church of England. As American legal historian W E Nelson notes, Puritanism was both a theology and a political theory — the main goal of the Puritan founders of the Colony was 'to establish orderly communities within a well-ordered

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<sup>32</sup> 'Fatal illness was so common it had a name: gaol fever': M Gaskill, *Witchfinders: A Seventeenth Century English Tragedy* (John Murray, London: 2005), p 55.

<sup>33</sup> Interesting exceptions to this gender bias are the preponderance of men amongst the indigenous Sami charged in the witch trials in Finnmark, the northernmost county of Norway, between 1621 and 1644 (Rune Hagen 'The witch-hunt in early modern Finnmark', (2000) 16(1) *Acta Borealia*, 43); and in Normandy, where between 1564 and 1660, the typical accused was 'not an old woman', but 'a shepherd who might be either an old man or a teenager': William Monter, 'Toads and Eucharists: The Male Witches of Normandy, 1564-1660' Autumn 1997) 20(4) *French Historical Studies*, 563.

<sup>34</sup> Letitia Fairfield, 'The Supernatural in the Law Courts with Special Reference to the Witchcraft Act, 1735' (1946) 14 *Medico-Legal & Criminological Review*, 30.

<sup>35</sup> Referring to early eighteenth century Scotland, Lizanne Henderson notes that in a 'climate of Presbyterian moral panic, it is perhaps little wonder that a slight surge in the persecution of witches and charmers can be seen. They had been, after all, for quite some time, the natural targets or scapegoats in times of social and spiritual crisis': see Lizanne Henderson, 'The survival of witchcraft prosecutions and witch belief in south-west Scotland' (April 2006) 85(1) *The Scottish Historical Review*, 62.

<sup>36</sup> Gaskill, n27, 73.

polity grounded on Puritan values'.<sup>37</sup> Thus, the Puritan Magistrates and Ministry worked together to create 'a godly commonwealth in which self-restrained leaders restrained the sins of others'.<sup>38</sup> Not content with the English anti-witchcraft legislation, the 1641 Massachusetts *Body of Liberties* included the following:

If any man or woeman be a witch, (that is hath or consulteth with a familiar spirit,) They shall be put to death.

Allegations of witchcraft had certainly been made in the colony prior to the 1692 Salem trials. However, its courts generally had urged pleas of guilty, and then set a punishment that allowed an accused to 'reinstate herself in the social web', rather than imposing the death penalty.<sup>39</sup> Instead of seeking out witches, the common lawyers in Massachusetts had generally exercised restraint. Thus, it was not uncommon for an allegation of witchcraft to be followed by an action by the accused for slander, rather than a trial of the alleged witch.<sup>40</sup>

As with the Essex witch trials, the Salem Trials in the winter of 1692 were the result of an extraordinary combination of events, in addition to the familiar social and inter-familial tensions of an agrarian community. These were the external threat of both dispossessed Indians and their French allies, especially given that, to add insult to Puritan injury, many of the Indians to the north in Quebec had converted to Catholicism;<sup>41</sup> the ongoing conflict between the colony and the Crown; and a Calvinist polity in which leading Ministers reminded churchgoers that the Evil One was only kept at bay by constant vigilance. In supporting the conduct of the trials, the leading Puritan minister Cotton Mather argued that 'war against the Devil and war against the popish French and their Indian allies were the same'.<sup>42</sup> Moreover, anyone who purported to make a pact with the Devil challenged the authority of the Puritan Magistracy and Ministry in the Massachusetts Bay Colony. Thus, accusations which might otherwise have been dismissed out of hand provided the match for this tinder; and once the girls involved alleged

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<sup>37</sup> Puritans 'strove to comprehend the relationship between divine sovereignty and human free will as well as to structure a government that balanced hierarchical authority with liberty': William E Nelson, 'Puritan Law in the Bay Colony', in *The Common Law of Colonial America: Volume I: The Chesapeake and New England 1607-1660*, Oxford Scholarship Online: September 2008 DOI:10.1093/acprof:oso/9780195327281.003.0004

<sup>38</sup> William E Nelson, 'The Utopian Legal Order of the Massachusetts Bay Colony, 1630-1686', (Apr 2005) 47(20) *The American Journal of Legal History*, 193.

<sup>39</sup> Peter C Hoffer, *The Salem Witchcraft Trials: A Legal History*, (University Press Kansas, Lawrence, 1997), 68.

<sup>40</sup> Sanford J Fox, *Science and Justice: the Massachusetts Witchcraft Trials*, (Johns Hopkins Press, Baltimore, 1968), 6-7.

<sup>41</sup> Carla Gardina Pestana, *Protestant Empire: Religion and the Making of the British Atlantic World* (University of Pennsylvania Press, Philadelphia, 2009), 161.

<sup>42</sup> Hoffer, n34, 81.



large scale devil-worship by local witches — including Ministers — the authorities brought the full force of the law to bear on those making the claims.<sup>43</sup>

It has been argued that a witchcraft trial was usually ‘the last step of a long social and legal process, displaying the depths of antagonism, malice and factitiousness’ in a small community.<sup>44</sup> The Salem Trials replicated both the underlying village tensions which frequently had led to accusations under the English witchcraft legislation, and the extraordinary external circumstances which had facilitated the witch craze in Essex. The earlier tradition of leniency was replaced with a slew of judicial executions, reliant to a considerable extent on the acceptance of ‘spectral evidence’ of witchcraft, having taken place even within the courtroom itself. However, the persuasiveness of the spectral evidence was based not on instructions from the bench, but on the fact that the community had accepted that the girls were bewitched.<sup>45</sup> Moreover, in stark contrast to previous witch trials, the Salem executions were designed to excise the accused from the threatened community, and to thereby defend it from its internal and external enemies.<sup>46</sup> The role of the trials as a form of social corrective in New England has been highlighted by legal historian David Konig, who stresses that anyone who dared to defy the judges in the course of the Salem Trials was executed, and that several other condemned witches had previously transgressed the bounds of the law. In the Massachusetts Bay Colony, witchcraft, whether real or imagined, betokened contempt for established rules, which in turn threatened the very existence of the godly community.<sup>47</sup>

The other significant component of Britain’s Atlantic Empire was the sugar-producing islands of the West Indies, described as the ‘hub of empire’.<sup>48</sup> In considering Britain’s Caribbean possessions, the discourse on sorcery and witchcraft tends to focus on *Obeah*, a catch-all expression used by colonists to denote a wide range of creole practices in which healing and religion were intertwined, and which the common law again declared illegal.<sup>49</sup> However, there is one example from the colony of Bermuda, first permanently settled by the Virginia Company

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<sup>43</sup> On the conspiracy of witches to subvert the Kingdom of God, see Brian P Levack, ‘The Great Scottish Witch Hunt of 1661-1662’ (Autumn 1980) 20(1) *The Journal of British Studies*, 98.

<sup>44</sup> Stephen Timmons, ‘Witchcraft and rebellion in late seventeenth century Devon’ (2006) 10(4) *Journal of Early Modern History*, 307.

<sup>45</sup> Hoffer, n34, 87.

<sup>46</sup> *Ibid.*, 101.

<sup>47</sup> David D Hall, ‘Witchcraft and the Limits of Interpretation’ (June 1985) 58 *New England Quarterly*, 265.

<sup>48</sup> Eric Williams, *Capitalism and Slavery* (University of North Carolina Press, Chapel Hill NC, 1944), 52. Eric Williams was a historian who became the first Prime Minister of Trinidad and Tobago from 1962 until his death in 1981.

<sup>49</sup> There is a considerable literature on Obeah. See, e.g., Randy M Browne, ‘The “Bad Business” of Obeah: Power, Authority, and the Politics of Slave Culture in the British Caribbean’ (July 2011) 68(3) *The William and Mary Quarterly*, 451; and Diana Paton’s ‘Witchcraft, Poison, Law, and Atlantic Slavery’ (April 2012) 69(2) *The William and Mary Quarterly*, 235.

in 1612, which reflects the patterns we have seen of the Witchfinders in Essex and in Salem. The religious disturbances of the seventeenth century were played out in miniature in Bermuda, as local Puritans briefly embraced the politics and religion of the English Commonwealth. Historian Virginia Bernhard argues that if the aim of the local authorities was to 'restore order to a disorderly society and to remove known transgressors or troublemakers...a witch hunt might serve'. Between 1651 and 1655, five people were hanged for the crime of witchcraft, the only such executions in Bermuda's history. Moreover, Bernhard notes that, as in Salem, all the convicted witches had 'histories of unpleasantness', which marked them as fundamentally anti-social, and came from the lower stratum of colonial society.<sup>50</sup>

### Evidence and the end of belief

Shortly before his death in 1676, the former Lord Chief Justice Sir Matthew Hale had reflected that witchcraft was, after all, a 'secret thing' known only to God.<sup>51</sup> Six years later, Temperance Lloyd of Bideford in Devon became the last witch ever executed in England.<sup>52</sup> After the upheavals of the seventeenth century, the elite embrace of the rational principles of the Enlightenment hardened the attitudes of legal officialdom against the reality of the practice of witchcraft in England, or at least made proving it in court more difficult. The final English *Witchcraft Act* of 1736 evidenced the change in mindset that characterised the early eighteenth century. During the preceding centuries, challenging the belief in witches was widely seen as a step on the slippery slope to atheism, and arguments for and against such belief were still grounded in the defence of Christian doctrine. Although there had been a decline in indictments prior to the 1736 Act, this was due to the fact that, as trials became a 'legal embarrassment', justices increasingly dismissed them outright or dealt with them informally, so that the Jacobean Act of 1604 had been a dead letter long before its repeal. Indeed, American historian Edward Bever suggests that the introduction of the final Witchcraft Bill to Parliament may have been motivated by the desire of the Whigs in power to force their Tory opponents into defending 'an already lost cause', rather than to end witch trials which had effectively not occurred for twenty years.<sup>53</sup>

Thus, the 1736 Act, rather than punishing supposed *maleficium* or pacts with the Devil, aimed at preventing and punishing 'any Pretences' to witchcraft, pursuant to which 'ignorant Persons

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<sup>50</sup> V Bernhard, 'Religion, Politics, and Witchcraft in Bermuda, 1651–55' (October 2010) 67(4) *The William and Mary Quarterly*, 707.

<sup>51</sup> Gaskill, n 1, 62.

<sup>52</sup> Owen Davies, 'Witchcraft: The spell that didn't break', (August 1999) 49(8) *History Today*, 10.

<sup>53</sup> Edward Bever, 'Witchcraft Prosecutions and the Decline of Magic', (Autumn 2009) 40(2) *Journal of Interdisciplinary History*, 281

[were] frequently deluded and defrauded'. The Act made it an offence to *pretend* to 'exercise or use any kind of Witchcraft, Sorcery, Inchantment, or Conjurat[i]on, or undertake to tell Fortunes, or pretend, from his or her Skill or Knowledge in any occult or crafty Science, to discover where or in what manner any Goods or Chattels, supposed to have been stolen or lost, may be found'.<sup>54</sup> The official English witch craze was effectively over, although English Methodists and Scottish Presbyterians still feared Satan and his earthly vassals, and condemned the 1736 Act. However, it was no longer tenable for those learned in the law to profess belief in witchcraft.<sup>55</sup> Indeed, in 1751 the organiser of a 'swimming' in Hertfordshire to prove or disprove witchcraft was himself prosecuted and executed.<sup>56</sup>

However, peasant fears of witches did not disappear at the stroke of a Parliamentary draughtsman's pen. Lynching had often been the extra-judicial response to accusations of witchcraft, and they became more common across Europe as continental courts began either to acquit the accused or simply refuse to initiate formal proceedings.<sup>57</sup> Popular views about witchcraft in England continued into the nineteenth century and beyond, where they were a source of elite contempt, except when 'occasionally collected by antiquarians from the gentle classes as examples of quaint superstition'.<sup>58</sup> Historian Owen Davies has argued that, rather than being a triumph of the Enlightenment, the ultimate decline in popular belief in witchcraft was the end result of the Industrial Revolution and the birth of welfarism, as the State came to provide some degree of financial security to the rural poor and minimised those social tensions which had so often been the basis of allegations of bewitching,<sup>59</sup> not the least of which was that the coming of milk factories meant that the simple act of butter making ceased to be a target for bewitchment.<sup>60</sup>

While belief in witches had remained a touchstone of theism in England, placing witchcraft trials in the hands of the common lawyers contributed to the professionalisation of the

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<sup>54</sup> Emphasis added. Nearly fifty years before, Louis XIV had issued a royal edict regulating the sale of poisons and decriminalizing witchcraft throughout his realm. From then onwards, anyone allegedly performing 'so-called acts of magic', were simply frauds: *Edict du Roy pour la punition de differents crimes*, 8 August 1682, cited in Lynn W Mollenauer, 'The End of Magic: Superstition and 'So-Called Sorcery' In Louis XIV's Paris' in (2005) 37 *Studies in Law, Politics, and Society*, 33.

<sup>55</sup> Gisjswiijt-Hofstra, Levack & Porter, n15, 187

<sup>56</sup> Davies, n47, 8.

<sup>57</sup> Gisjswiijt-Hofstra, Levack & Porter, n15, 84. While suggesting that the retreat of superstition can be charted by reference to the dates on which witchcraft trials ended, Norman Hampson also notes that 'popular prejudice did not keep pace with educated opinion – a witch was put to death near Angers as late as 1780': Norman Hampson, *The Enlightenment* (Pelican Books, London, 1968), 151.

<sup>58</sup> Stephen A Mitchell, 'Witchcraft persecutions in the Post-Craze era: The Case of Ann Izzard of Great Paxton, 1808' (Summer-Autumn 2000) 59(3/4) *Western Folklore*, 309.

<sup>59</sup> Davies, n 47, p 12.

<sup>60</sup> Gisjswiijt-Hofstra, Levack & Porter, n15, 178.

adjudicative and prosecutorial roles, and tended to delineate lawyers as experts in assessing the evidence of witchcraft. Moreover, as early as 1608 the Cambridge divine William Perkins argued that convictions needed to proceed from 'just & sufficient proofes, and not from bare presumptions'.<sup>61</sup> By the mid-seventeenth century it was well established that evidence, originating from witnesses in court or tendered documents, was the means whereby a jury and judge determined matters of fact. Ironically, the success of the Essex Witchfinders' reliance upon supposed 'evidence' of the accused as witches in the 1640's contained within it the seeds of the destruction of the witchcraft trial. In stressing the reality of the discernible signs of witchcraft, Hopkins and Stearne effectively set the evidentiary boundaries for subsequent prosecutions, so that it became necessary to show clear proof of a demonic pact.<sup>62</sup> By the end of the seventeenth century, this 'increasingly taxing exercise in persuasion and proof' had become impossible. Accordingly, all of the thirty-nine witchcraft indictments filed at the Home Circuit between 1660 and 1701 resulted in acquittals.<sup>63</sup>

The witch trial therefore played an important role in the very construction of legal modernity. Between the Acts of 1542 and 1736, common lawyers forced those who alleged the statutory crime of witchcraft to prove the unprovable by way of inductive reasoning based on credible evidence. On this point, legal historian Alyagon Darr argues that, as an outstanding example of the serious but hard-to-prove crime, witchcraft trials provide an excellent case study for the 'social embeddedness of ways of proof'.<sup>64</sup> Darr suggests that the ultimate form of the law of evidence cannot be necessarily contributed to the prescience of the participants in its evolution, but is rather 'an amalgam of interrelating concepts and the outcome of sometimes competing and sometimes complementary interests'.<sup>65</sup> This proposition goes some way to explaining the fact that, in relying on evidence of witch marks or a Satanic compact which was to be admitted in court, the Witchfinders' attempt to prove the irrational by way of rationality ultimately doomed the very notion of a witch trial. Once this process started, its momentum was unstoppable. Ultimately the law of evidence not only confronted witchcraft, but effectively vanquished it: as John Wesley lamented, the non-believers had 'hooted witchcraft out of the world'.<sup>66</sup> It took some centuries, and the trajectory was not always straightforward, as even the most enlightened lawyers were men of their time. This tension is exemplified in Sir William

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<sup>61</sup> Gaskill, n 1, 40.

<sup>62</sup> Gaskill, n 27, 193.

<sup>63</sup> Gaskill, n 1, 61. For similar evidentiary concerns in the Paris Parlement as early as 1643, see Anne Somerset, *The Affair of the Poisons: Murder, Infanticide, and Satanism at the Court of Louis XIV* (Phoenix, London, 2003), 176.

<sup>64</sup> O Alyagon Darr, *Marks of an Absolute Witch: Evidentiary Dilemmas in Early Modern England*, (Ashgate, London, 2011), 16 and 3.

<sup>65</sup> *Ibid.*, p 3.

<sup>66</sup> Trevor-Roper, n13, 96.

Blackstone's assertion that, while denying the existence of witchcraft contradicted scripture, evidence from contemporary cases was 'almost always a complete fabrication on the part of the plaintiffs'.<sup>67</sup> Moreover, it was not until the mid-twentieth century that the Witchcraft Act of 1736 was actually removed from the Statute Book, with the enactment of the *Fraudulent Mediums Act 1951*, largely at the instigation of concerned English Spiritualists.<sup>68</sup>

Thus, by the time Britain set about absent-mindedly acquiring its Empire in the nineteenth century, the view of its lawyers and lawmakers as to the possibility of witches exercising supernatural powers to the detriment of others had come full circle to the early view of the Christian Church and its rejection by St Augustine in the fifth century. The common law had itself tempered the response of both the English Church and State to charges of *maleficium* by its aversion to torture as a means of obtaining evidence from suspected witches. As we have seen, this aversion did not always prevail in times of political and religious upheaval, both within England and in her American Colonies. This was particularly likely when local elites adhered to a Calvinism which stressed the conflictual nature of the godly community and its assailing enemies, whether diabolical or episcopal. In the more stable era of the Hanoverian Settlement, the increasing divergence between elite and popular beliefs in witchcraft led to the situation whereby the struggle was no longer against the evil of witchcraft practices. Rather it was against 'the evil influence which such 'ignorant' and 'superstitious delusions' had on the minds of the uneducated masses,<sup>69</sup> that is, witchcraft beliefs themselves.

### Belief and colonial difference

Nonetheless, in the courts of the British Isles and the First British Empire those judging and being adjudged had spoken a common language and — originally — inhabited a common universe of understanding, informed by a shared history and Christianity in its fundamental premises. In taking on the administration of the subject peoples of the Empire, that commonality of experience ceased to apply. The disdain of the elite at home for beliefs in the efficacy of witchcraft was compounded by assumptions of racial and cultural superiority which precluded cross-cultural appreciation by the colonial rulers of the centrality of witchcraft and sorcery beliefs to the fundamental cognitive orientation of the ruled. And as more and more of the world map was coloured British Imperial pink, the rulers dealt with an array of magical worldviews which challenged the evolved rationality of the administration of justice in parts as

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<sup>67</sup> Timmons, n39, 321.

<sup>68</sup> Speaking to the *Fraudulent Mediums Bill*, spiritualist and former Air Chief Marshall Lord Dowding stated in the House of Lords 'I know for a fact that spiritualists as a whole are exceedingly jealous of their good name in this connection and have readily concurred in the greatly increased penalties for proved fraud contained in the Bill': United Kingdom, *Parliamentary Debates*, House of Lords, 3 May 1951, 721-722.

<sup>69</sup> Owen Davies, *Witchcraft, Magic and Culture, 1736-1951*, Manchester University Press, 1999, p 1.

diverse as Australia<sup>70</sup> and Ceylon.<sup>71</sup> As we have seen, this approach delineated the simplistic legislative response to the mischief of sorcery beliefs in Papua and New Guinea, despite the 'benevolent' administrative aims of Sir William MacGregor and Sir Hubert Murray.

We will now consider how, rather than being an exception, the criminalisation of witchcraft and sorcery, coupled with strict adherence to the forms of common law procedure, and premised on an unbridgeable colonial difference, in fact places Papua and New Guinea squarely in the mainstream of the administration of law in the British Empire. This will be shown by reference to the law as it related to sorcery and witchcraft in British East Africa, with a focus on Kenya.

There are stark differences between the colonial project in Kenya and in Papua and New Guinea. Not the least of these was the prominence of the former – Kenya was the main topic of the annual Colonial Office debate in the House of Commons every year from the end of World War I to 1936 — and the obscurity of the latter.<sup>72</sup> Indeed, in the debate on 'Native Policy in the Empire' in 1937, Lord Moyne noted that he had seen a tremendous diversity of colonial administrations, 'from the highly-organised Crown Colony democracies of the West Indies to the patriarchal governments which you find in Melanesia and Papua'.<sup>73</sup> However, as Kenya was the only directly administered British African colony which contained a significant settler population,<sup>74</sup> the imperial authorities were required to come to a position on the long-term nature of the colony. In February 1923, retired Chief Native Commissioner John Ainsworth — whom we met in the context of Mandated New Guinea — argued bluntly to the Colonial Office that Kenya was a 'Black-man's country and can never become a European country'.<sup>75</sup> This view was among many conveyed to the Secretary of State for the Colonies, the Duke of

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<sup>70</sup> Heather Douglas and Mark Finnane, 'Obstacles to 'a proper exercise of jurisdiction' – sorcery and criminal justice in the settler-indigenous encounter in Australia' in Lisa Ford and Tim Rowse, *Between Indigenous and Settler Governance*, (Routledge, London, 2012), 59.

<sup>71</sup> A J Selvadurai, 'Land, Personhood, and Sorcery in a Sinhalese Village' (1976) 11 (1-2) *Journal of Asian and African Studies*, 82.

<sup>72</sup> C J D Duder, 'Love and the Lions: The Image of White Settlement in Kenya in Popular Fiction, 1919-1939' (Jul 1991) 90(360) *African Affairs*, 427.

<sup>73</sup> Lord Moyne, Debate on 'Native Policy in the Empire', United Kingdom, *Parliamentary Debates*, House of Lords, 9 June 1937, 428. Moyne, an Anglo-Irish amateur anthropologist, was later Secretary of State for the Colonies from 8 February 1941 to 22 February 1942. Deputy Resident Minister of State in Cairo from August 1942 to January 1944 he was Resident Minister from then until his assassination by Zionist paramilitaries on 6 November 1942.

<sup>74</sup> Will Jackson 'White man's country: Kenya Colony and the making of a myth' (2011) 5(2) *Journal of Eastern African Studies*, 344.

<sup>75</sup> C.O. 533/293, Coryndon to Devonshire, 19 March 1923, enclosure, Ainsworth to Bottomley, 19 Feb 1923, quoted in Levi I Izuakor, 'Kenya: the Unparamount African Paramountcy, 1923-1939' (1983) 12 *Transafrican Journal of History*, 38.

Devonshire, who in July 1923 issued a White Paper on Kenya which has become known as the Devonshire Declaration. It included the following key proposition:

Primarily, Kenya is an African territory, and His Majesty's Government think it necessary definitely to record their considered opinion that the interests of the African natives must be paramount, and that if, and when, those interests and the interests of the immigrant races should conflict, the former should prevail.<sup>76</sup>

This resulted in a delicate colonial balancing act familiar from Papua and New Guinea, albeit one which was more complicated due to the scale and nature of Kenya's white settlement. This is that, while the local European population was expected to provide the means whereby Kenya would become economically self-sufficient, it fundamentally conflicted with the liberal imperial aim of ensuring the 'uplift' of indigenous populations.<sup>77</sup> As this played out, the common law was to have a not insignificant role. An examination of the imposition of the common law and the legislative and judicial response to the practice of sorcery or witchcraft, with a focus on the early to mid-twentieth century, shows a consistency of approach in these two very different regions of the Empire, which reflect the legal administrative response of colonial difference.

### The legal establishment of British East Africa

Contemporaneously with the establishment of British New Guinea, on the other side of the Indian Ocean, the British and German Governments were engaged in another *danse imperial*. The Berlin Conference of 1884 on imperial interests in Africa had established the *Principle of Effective Occupation* under which imperial powers could acquire rights over colonial lands only if they possessed them, or had some form of 'effective occupation' such as treaties with local leaders.<sup>78</sup> While the preeminent aim of the Berlin Conference was to alleviate imperial tensions in West and Central Africa, the principle also came to be applied on the Indian Ocean littoral, where rulers and traders had traditionally looked east to Arab Sultanates and to India; from 1698, the island of Zanzibar and its adjacent coast had been part of the overseas holdings of Oman, after the Imam of Oman had expelled the Portuguese from Mombasa. Thus, the first foray into what was to become British East Africa on 25 May 1887 was when the private British East Africa Association obtained from the Sultan of Zanzibar a concession of certain of his mainland possessions. However, in the following year the Sultan's successor made a similar

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<sup>76</sup> See, e.g., the debate in the Lords on the White Paper, United Kingdom, *Parliamentary Debates*, House of Lords, 26 July 1923, <https://api.parliament.uk/historic-hansard/lords/1923/jul/26/kenya-colony>

<sup>77</sup> G M Bennett, 'British Settlers North of the Zambezi, 1920 to 1960' in Lewis H Gann and Peter Duigan (Eds) *Colonialism in Africa*, Vol 2, (Cambridge University Press, Cambridge, 1970), 58.

<sup>78</sup> See, e.g., Matthew Craven, 'Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade' (March 2015) 3(1) *London Review of International Law*, 31.

concession of other parts of his mainland territories to Germany. Then, by way of Royal Charter of 3 September 1888, the British East Africa Association was reconstituted as the Imperial British East Africa Company (IBEAC), with the express objective of bringing all of the Sultan's concessions under British control.<sup>79</sup> As so often characterised the piecemeal and penurious British acquisition of Empire, Whitehall viewed the IBEAC as a cheap and indirect method of expanding British influence in East Africa, whose Royal Charter nonetheless announced to the other European powers that the Company was 'henceforth not merely an agent of the Sultan of Zanzibar, but an arm of British Imperial policy'.<sup>80</sup>

Subsequent violent unrest in the German concession and Chancellor Bismarck's concerns at British expansionism in southern Africa focussed attention on the desirability of the imperial competitors achieving a *modus vivendi* on the Indian Ocean coast.<sup>81</sup> In this atmosphere, in 1889 Salisbury's Conservative Government offered in exchange for a free hand in Zanzibar to return to Germany the small but strategic North Sea island of Heligoland, which had been controlled by Britain since the Napoleonic Wars. In doing so, Salisbury specifically highlighted the connectedness between Britain's interests in Africa and in the south west Pacific:

We have left Prince Bismarck a free hand in Samoa (and a pretty mess he has made of it) but we cannot do so in Zanzibar. The English and Indian interests are both too strong.<sup>82</sup>

Although Bismarck was decidedly lukewarm on the proposal,<sup>83</sup> his dismissal by Kaiser Wilhelm II in March 1890 paved the way for the Heligoland-Zanzibar Treaty of 1 July 1890. Under this Treaty, Germany obtained Heligoland, in exchange for its interests in Zanzibar, retaining the coast of Tanganyika and a strip of land adjacent to Lake Tanganyika. In 1891, Berlin took direct control over all its possessions in Africa, thereby supplanting the German Company for East Africa. This was to be where, in *Heart of Darkness*, Joseph Conrad's Marlow espied on the colonised African map the 'purple patch, to show where the jolly pioneers drink the jolly lagerbeer'.<sup>84</sup> Also in 1891, the IBEAC occupied neighbouring Uganda. On 1 April 1893, its administration was transferred from the IBEAC to the British Crown; the areas of Unyoro, Busoga, Nandi, and Kavirondo were occupied the following year. As with Australia and New Guinea in 1914, during the First World War the British took the neighbouring Tanganyika territory from the German Empire, initially administering it as an occupying power, and

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<sup>79</sup> The IBEAC justified its initial interest in the region on the premise that legitimate commerce or trade was the best cure for slave trade: see Richard Waller, *The Maasai and the British 1895-1905: The Origins of an Alliance*, (1976) 17 *Journal of African History*, 540.

<sup>80</sup> Roland Oliver and Gervase Mathew (Eds), *History of East Africa Vol 1* (Clarendon Press, Oxford 1963), 39.

<sup>81</sup> See D R Gillard, 'Salisbury's African Policy and the Heligoland Offer of 1890', (1960) 75(297) *English Historical Review*, 631

<sup>82</sup> Lady G Cecil, *Life of Robert, Marquis of Salisbury*, Vol IV, 234-5, cited in *ibid.*, NN 5, 641.

<sup>83</sup> Gillard, *ibid.*, 652.

<sup>84</sup> J Conrad, *Heart of Darkness*, (Penguin, London: 1983), 13.



then from 20 July 1922 as a League of Nations Class B Mandate. As such, the British were required to administer Tanganyika 'under conditions which will guarantee freedom of conscience and religion', and were forbidden to construct military or naval bases.<sup>85</sup>

On 1 July 1895, in accordance with the *Foreign Jurisdiction Act 1890*, the Foreign Office took over direct control of the East Africa Protectorate, roughly modern Kenya. The first Commissioner and Consul-General was Arthur Hardinge, whose establishment credentials were such that he had been a Page of Honour to Queen Victoria while at Eton.<sup>86</sup> By way of the *Africa Order in Council 1889*, a comprehensive framework of administration, including in theory the power to hold courts and promulgate regulations, was created for the whole of East Africa. However, in an echo of the experience of Sir Peter Scratchley in British New Guinea, Hardinge soon realised that he had no power to deal with the indigenous inhabitants,<sup>87</sup> resulting in the abortive *East Africa Order in Council 1897* which still failed effectively to apply to natives of the Protectorate. It therefore required clarification by the *East Africa Order in Council 1899* which provided that, unless a contrary intention appeared, the Queen's Regulations were applicable to the natives of the Protectorate. Full jurisdiction in British East Africa was finally conferred on the colonial authorities by the *East Africa Order in Council 1902*, authorizing the Commissioner to make Ordinances for the peace, order and good government of all persons in the Protectorate and establishing a High Court with full criminal and civil jurisdiction.<sup>88</sup>

The tortuous history of the establishment of legal authority over all of the Queen's East African subjects again shows both the painstaking legality of the approach of administrators in London and the imprecise nature of the jurisdiction conferred by the establishment of a Protectorate. Morris and Read contend that it was this very imprecision which commended the repeated use of the Protectorate to the British in the nineteenth century expansion of Empire.<sup>89</sup> In the early twentieth century the Judicial Committee of the Privy Council was called upon to declare the nature of the King-Emperor's dominion within his Protectorates, the first occasion being in

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<sup>85</sup> See generally, Peter A Dumbuya, 'The Tanganyika Mandate, 1919-1933: A Political History' (PhD Thesis, The University of Akron, 1991).

<sup>86</sup> Sir Arthur Hardinge, *A Diplomatist in Europe*, (J Cape, London, 1927), 11.

<sup>87</sup> Sir Arthur Hardinge, *Report of Sir Arthur Hardinge on the Condition and Progress of East Africa Protectorate from its Establishment to the 20th January, 1897*, 35 Presented to both Houses of Parliament by command of Her Majesty. December 1897. See also, Arthur H Hardinge, 'Legislative Methods in the Zanzibar and East Africa Protectorates' (Mar 1899) 1 (1) *Journal of the Society of Comparative Legislation*, 1.

<sup>88</sup> A regular government and legislature were constituted by Order in Council in 1906, consisting of a governor and legislative and executive councils. For a very detailed discussion, see Kenyan historian E S Atieno-Odhiambo's 'The colonial government, the settlers and the "Trust" principle in Kenya 1939', (1972) 2(2) *Transafrican Journal of History*, 94.

<sup>89</sup> H F Morris and James S Read (Eds), *Indirect Rule and the Search for Justice: Essays in East African Legal History* (Indirect Rule and the Search for Justice), (Clarendon Press, Oxford 1972), 42-43.

the 1910 decision of *R v Earl of Crewe ex parte Sekgome*,<sup>90</sup> when considering Bechuanaland (modern Botswana). The Privy Council held that, while the Protectorate was under the King's dominion in 'the sense of power and jurisdiction', that did not extend to actual territorial dominion: in practice a Protectorate was 'a foreign country whose governance [was] an act of state'.<sup>91</sup> This view was upheld in respect of Swaziland in the 1926 Privy Council decision of *Sobhuza II v Miller*,<sup>92</sup> subsequently cited by Evatt J in the High Court case of *Frost v Stevenson*. In *Frost*, Evatt J held that the duties imposed on the Commonwealth of Australia by the Class C Mandate over New Guinea did not endow the Commonwealth with 'full and complete jurisdiction over the territory as though it possessed unlimited sovereignty therein'.<sup>93</sup> However, the early advantages of imprecision were eventually outweighed by the needs for certainty and stability in the British Empire after World War I. By the time East Africa was converted into the Colony of Kenya in 1920, a deliberate policy of opening up Kenya for white settlement<sup>94</sup> had placed strains on a juridical system which was based on British experience of governing India.

Unlike Papua and New Guinea, the British in East Africa encountered an array of traditional legal systems. The Ugandan Attorney-General in 1939 described these as ranging from the highly recognizable legal practices of modern Uganda, with their counterparts in the England of Saxon and Norman times, to the 'ill-defined and primitive dispensation of justice among the Nilotic tribes' of the northern parts of the new possessions.<sup>95</sup> The new possessions originally were regarded as a juridical extension of the Presidency of Bombay, an administrative unit centred on that city in Britain's Indian territories.<sup>96</sup> Thus, it was said that the *Zanzibar Order in Council 1884* made that Territory, as far as the administration of justice was concerned, 'a part of her Majesty's Indian Empire'.<sup>97</sup> Clause 8(a) of the Order in Council directed British courts in Zanzibar to apply the statute law as applied by the courts of the Presidency of Bombay, and in default the statute and common law of England in force at the date the Order came into effect, i.e., 29 November 1884. Thus, in 1937, in *Fatuma Binti Mohammed Bin Salim*

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<sup>90</sup> [1910] 2KB 576.

<sup>91</sup> Note that *R v Earl of Crewe ex parte Sekgome* was cited as recently as 2017 in *Belhaj v Straw* [2017] AC 964, in which the claimant alleged complicity by the former UK Foreign Secretary in his mistreatment by the United States while being held in Libya.

<sup>92</sup> [1926] AC 518.

<sup>93</sup> (1937) 58 CLR 528, 581.

<sup>94</sup> See, e.g., Will Jackson, 'Settler Colonialism in Kenya, 1880 — 1963' in Edward Cavanagh and Lorenzo Veracini, *The Routledge Handbook of the History of Settler Colonialism*, (Routledge, London, 2016), 231.

<sup>95</sup> H R Hone, 'The Native of Uganda and the Criminal Law' (1939) 21(4) *Journal of Comparative Legislation and International Law*, 186 and 180 respectively.

<sup>96</sup> See, e.g., Hardinge, n 87, 35.

<sup>97</sup> C J Tarring 'British Consular Jurisdiction in the East' cited in Thomas R Metcalf, *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (University of California Press, 2007), 46.

*Bakhshuven v Mohammed Bin Bakhshuven*, the Privy Council held that, on a question of Islamic law, the judgments of the Privy Council in appeals from India were equally binding on the East African Court of Appeal [EACA].<sup>98</sup> The EACA had been established in 1902 as the appellate court for British Kenya, the Uganda Protectorate, and Nyasaland (modern Malawi). Its jurisdiction was later expanded across the British littoral of the Indian Ocean to include appeals from the Sultanate of Zanzibar, Tanganyika, British Somaliland, the Aden Protectorate, Colony of Aden (modern Yemen), British Seychelles, as well as Saint Helena in the South Atlantic. Decisions of the court could be appealed with leave to the Judicial Committee of the Privy Council.

In the East Africa Protectorate and in Uganda, the courts applied the Indian Codes introduced by Orders in Council in 1897 and 1902 respectively. The Indian Penal Code originally was developed in 1834 by the First Law Commission, chaired by Thomas Babington Macaulay. The Commissioners had comprehensively considered the legal system then operating in the British administered areas, but the draft Code was not finally adopted in India until 1860. In her 'Codification and the Rule of Colonial Difference', South Asian historian Elizabeth Kolsky notes that the very process of codification was 'an imperial and an international endeavour in which lawmakers in distant geographical locations routinely cited each other's work'.<sup>99</sup> Thus, for example, the drafters of the Indian Penal Code made reference to the equivalent Code of Louisiana — a former Spanish and French possession which was the only civil law jurisdiction of the United States — and were 'acutely aware of the global relevance of their contributions'.<sup>100</sup>

Moreover, Kolsky argues that codification in Britain's Indian possessions had been necessitated by the presence there of a community of 'non-official' Europeans, i.e., resident Britons not employed either by the East India Company prior to the Indian Rebellion in 1857, or by the British Civil Service thereafter.<sup>101</sup> As they were neither Company servants nor Indian subjects, these residents had a tendency to 'slip...through the cracks of the ... dual system of laws and law courts'.<sup>102</sup> A criminal code provided the means to subject to English law this community of 'diverse and often times criminal Europeans who violated the existing law with impunity'.<sup>103</sup> This process presages the experience of the Western Pacific High Commission

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<sup>98</sup> [1952] AC 1.

<sup>99</sup> Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' (Fall 2005) 23(3) *Law and History Review*, 632.

<sup>100</sup> *Ibid.*, 632.

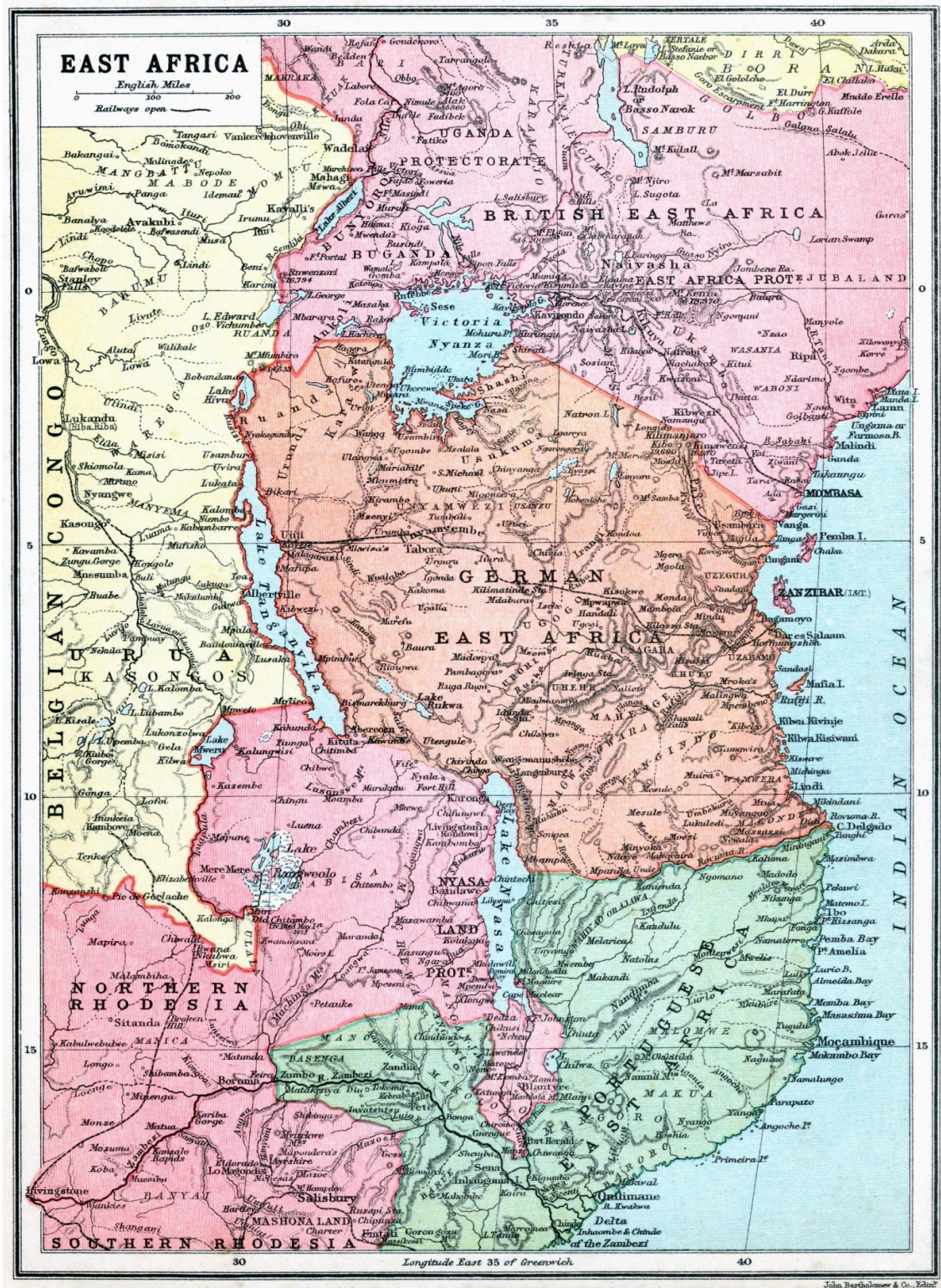
<sup>101</sup> *Ibid.*, 635.

<sup>102</sup> *Ibid.*, 635.

<sup>103</sup> *Ibid.*, 635.



in the later nineteenth century, as the common law attempted to catch up with the physical expansion of Queen Victoria's subjects into parts legally unknown.



Imperial colours — East Africa at the beginning of the First World War.<sup>104</sup>

As the twentieth century progressed, the white population in British East Africa significantly increased. In addition to a substantial Indian immigrant population, historian Brett Shadle characterises the diverse settler community as ‘so shot through with political, economic, cultural and personal conflict to make the term “community” almost ironic’.<sup>105</sup> However, the very fact that codes within the Empire generally were aimed at non-British subjects, and certainly were not considered applicable to Englishmen at home,<sup>106</sup> meant that the continuing use of the Penal Codes were bitterly resented by this community, who feared a criminal code not only as ‘a harsher body of law which would impose heavier penalties’, but as a means whereby the local authorities would acquire ‘greater opportunity for arbitrary action’.<sup>107</sup> In 1905, the Colonists’ Association of British East Africa petitioned the Secretary of State for the Colonies, claiming the right to be governed by the English common law.<sup>108</sup> The settlers were given short shrift by the Legal Officers in London, who noted amongst themselves that many of the petitioners would object to any system of law which ‘restricted their predatory designs’.<sup>109</sup>

These tensions only increased together with the number of white settlers in Kenya in particularly after the First World War. Immigration included a Soldier Settlement Scheme for the colony, which attracted a very high proportion of ex-Officers. Historian C H Duder argues that this was due to the fact that one could be a British ex-officer in Kenya without ‘being impoverished as in Britain, or laughed at, as in Australia’.<sup>110</sup> The distinctive make-up of the expatriate community fed into another settler myth which is of particular interest: as there were no ‘ordinary chaps’ in Kenya, the ‘man from the Clapham omnibus did not exist’.<sup>111</sup>

While we have seen the umbrage directed against Sir Hubert Murray’s ‘native policies’ by the small white community in Papua, the situation in Kenya was not only more complicated, but it was one in which the law played a key role. While Kenya had a formalised court structure of appeals, its handful of English lawyers was subject to repeated criticism from the white

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<sup>105</sup> Brett L Shadle ‘White settlers and the law in early colonial Kenya’ (2010) 4(3) *Journal of Eastern African Studies*, 511.

<sup>106</sup> On the resistance to codification in England itself, see, e.g., Lindsay Farmer, ‘Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45’ (2000) 18 *Law and History Review* 397.

<sup>107</sup> H F Morris, ‘A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935’ (Spring 1974) 18(1) *Journal of African Law*, 6.

<sup>108</sup> H F Morris, ‘English Law in East Africa: a Hardy Plant in an Alien Soil’ in Morris and Read, *Indirect Rule and the Search for Justice*, 118.

<sup>109</sup> Morris, N107, 13.

<sup>110</sup> C J Duder, ‘“Men of the Officer Class”: The Participants in the 1919 Soldier Settlement Scheme in Kenya’ (Jan 1993) 92(266) *African Affairs*, 69.

<sup>111</sup> Will Jackson, ‘Settler Colonialism in Kenya, 1880 — 1963’ in Edward Cavanagh and Lorenzo Veracini, (Eds) *The Routledge Handbook of the History of Settler Colonialism*, (Routledge, London, 2016), 231.



community of an excessive leniency towards the indigenous population. According to the settlers, the common law existed only to buttress an explicitly racial colonial order.<sup>112</sup> While working to ameliorate this, the East African judiciary nonetheless operated within the colonial administrative mindset of using the processes of the law as an educative and civilizing tool, but 'only if it were applied evenly, impartially, and without (undue) regard to race'.<sup>113</sup>

### Witchcraft and the law in Kenya

The system over which the judges presided was one in which the Collector or acting Collector of a District — the equivalent of the Papuan or New Guinean kiap — had full civil and criminal administration over all 'natives' within that District. The Collectors administered justice locally as far as practicable, originally under the Indian Codes. Prisoners were not committed for trial, and the only limit on the Collector's judicial power was that any sentence of more than six months was subject to confirmation by the High Court in Mombasa.<sup>114</sup> It was by this means that allegations of witchcraft as a colonial criminal offence came within the remit of what African historian Katharine Luongo has described as 'the fabled 'men-on-the-spot' in the course of their duties... developing colonial governmental "best practices"'.<sup>115</sup>

At this point it is to be noted that, whereas we subsumed under the heading 'sorcery' the type of supernatural acts with which the colonial law concerned itself in Papua and New Guinea, the distinction between the nature and practice of sorcery and of witchcraft was given greater anthropological emphasis in Africa. This was largely due to the seminal 1937 work *Witchcraft, Oracles and Magic among the Azande* of E E Evans-Pritchard, who had studied with Malinowski at the London School of Economics. Evans-Pritchard maintained that magic was the belief in a mystical power innate in certain individuals and exercised by them to harm others — indeed, the first chapter of the book is entitled 'Witchcraft is an Organic and Hereditary Phenomenon'. This was opposed to sorcery, which was the illegal use of medicines to harm others:

...the power of witchcraft is a mystical and innate power, which can be used by its possessor to harm other people. Often it is thought that the witch need merely wish to harm his victim and his witchcraft then does this, or it may be enough for him merely to feel

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<sup>112</sup> Brett Shadle, 'White settlers and the law in early colonial Kenya, (2010) 4(3) *Journal of Eastern African Studies*, 511.

<sup>113</sup> *ibid.*, 511.

<sup>114</sup> H R T, 'The Opening up of British East Africa', *Journal of the Royal African Society*, (Oct 1904) 4(13), 50.

<sup>115</sup> Katherine A Luongo, 'Motive Rather than Means: Legal Genealogies of Witch-Killing Cases in Kenya' (2008) 48 *Cahiers d'études africaines*, 35.

annoyance or jealousy against someone for the power to set itself in operation without his being aware of the fact that it has done so.<sup>116</sup>

While the assumption was that a sorcerer would as a matter of course practice evil magic to inflict harm others, the relevant acts were such that they could be replicated by any other member of the group, rather than being something which inhered in the sorcerer as an individual.<sup>117</sup> Thus, in her 1951 work on the Nyakyusa of Tanganyika, Monica Hunter Wilson noted their linguistic distinction between *ubulosi*, an innate power used to work evil, and *ubutege*, the illegal use of destructive medicines.<sup>118</sup> Similarly in West Africa, ethnologist Fred Nadel found that, among the Nupe of Nigeria, witchcraft meant 'killing for the reason of some evil will which can be measured by no social or human standards; it [was] an act which is but the inevitable outcome of some initial destructive force'.<sup>119</sup>

Witchcraft did not operate simply to harm the individuals at whom it was directed, but an atmosphere of suspicion and the frequently ensuing violence rendered it fundamentally inimical to the harmony of the group. As British anthropologist Jack Driberg noted, to the indigenous African 'law' consisted of 'all those rules which regulate the behaviour of individuals and communities, and which by maintaining the equilibrium of society are necessary for its continuance as a corporate whole'.<sup>120</sup> An administrator in the Uganda Protectorate from 1912, in 1921 Driberg moved to serve in Anglo-Egyptian Sudan, where he wrote *The Lango: A Nilotic Tribe of Uganda*. In 1925 he returned to London to attend the London School of Economics, afterwards joining the Anthropology Faculty at Cambridge. On the conflict between the African and European concepts of law, Driberg noted that, while he did not 'venture to make any suggestions as how the conflict may best be resolved', he considered that 'a greater understanding of the principles of African law and society may conduce (*sic*) to an administration of justice which will prove more understandable to the African'.<sup>121</sup> Specifically referring to the impact of witchcraft, Driberg noted that '[t]he insidiousness of its operation and the illegitimate use which it makes of magic and the supernatural render the usual processes

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<sup>116</sup> John Middleton and E H Winter (Eds), Introduction, *Witchcraft and Sorcery in East Africa* (F A Praeger, New York, 1964), 3.

<sup>117</sup> Monica Hunter Wilson, 'Witch Beliefs and Social Structure' (Jan 1951) 56(4) *American Journal of Sociology*, 308.

<sup>118</sup> *Ibid.*, 308.

<sup>119</sup> S F Nadel, 'Witchcraft and Anti-Witchcraft in Nupe Society' (Oct 1935) 8(4) *Africa*, 424.

<sup>120</sup> John H Driberg, 'The African Conception of Law' (1934) 16(4) *Journal of Comparative Legislation and International Law*, 231.

<sup>121</sup> *Ibid.*, 243.

of law abortive, and the public law therefore does the only thing possible and eliminates the menace'.<sup>122</sup>

Moreover, as we have seen not only in Papua and New Guinea, but historically in the legal response to witchcraft in England and her American Colonies, both the belief and the supposed practice of witchcraft created a fundamental alternative locus of power to that of the colonial administration. In her *Witchcraft, Witchdoctors and Empire*, American historian Danielle Boaz reports an exchange between colonial officials in Tanganyika in 1932 which could easily have occurred in the Annual Report to Hubert Murray from any of his Resident Magistrates:

...unless the Government took effective steps to deal with witch doctors or those who act under the inspiration of witchcraft, the native draws a very clear inference that the power (or magic) of the Government is less effective than that of the witch doctor.<sup>123</sup>

Thus the colonial administration had introduced specific Ordinances in British East Africa to address the criminal mischief of the 'pretended' practice of witchcraft. Kenya's *Witchcraft Ordinance 1909* created three criminal offences, namely to:

- claim to be a witch or to 'pretend to exercise or use any kind of supernatural power, witchcraft, sorcery or enchantment ... for the purposes of gain' (s 2);
- advise others how to use witchcraft or to supply them with the 'pretended means of witchcraft' (s 3); and
- use such advice or means to 'injure any person or property' (s 4).<sup>124</sup>

The maximum penalties were respectively one year's imprisonment under s 2, and ten years' under s 3 and s 4. While the Kenyan Ordinance seemed to satisfy the colonial imperative for simple and straightforward legislation, that apparent simplicity soon gave grief to the Collectors administering it. Not the least of these problems was that it was not the witches, but those who employed them, who were subject to the greater penalties. British commentators despaired that the very existence of Witchcraft Ordinances was taken to be a tacit acceptance of witchcraft as an established fact, and provisions which evidenced 'a lack of knowledge of native mentality and point of view' made it extremely difficult for Collectors to apply

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<sup>122</sup> *Ibid.*, 236.

<sup>123</sup> 451 *Infliction of Death Penalty in Murder Cases Arising from a Belief in Witchcraft*, Tanganyika, Oct-Dec 1932, PRO, CO 691/126/10 452, cited in Danielle N Boaz, 'Witchcraft, Witchdoctors and Empire: The Proscription and Prosecution of African Spiritual Practices in British Atlantic Colonies, 1760-1960s' (PhD Thesis, University of Miami, 2014), 265.

<sup>124</sup> Unlike Papua and New Guinea, there appears to have been no offence of 'being found in possession of (witchcraft-related) 'implements or "charms"'': cl 80(2)(d) of the *Native Regulation 1939*.



impartially.<sup>125</sup> As early as 1917, the District Collector of Meru in eastern Kenya observed that the Ordinance 'might be made useful; but, as at present drafted, is a failure'.<sup>126</sup>

The limited efficacy of legislation was supported by a 1935 review of colonial witchcraft legislation by G S Orde Browne, adviser on Colonial Labour to the Secretary of State for Colonies, which noted a considerable divergence in legal penalties across the African colonies.<sup>127</sup> Whereas in Uganda someone who posed as a witch-doctor was subject to a sentence of five years, in Kenya or Tanganyika the maximum sentence was one. The Rhodesian regime was the harshest, with potential punishment of seven years' imprisonment, a one hundred pound fine, and 24 lashes.<sup>128</sup> Thus, a practitioner of magic could be subject to a more or less severe response arbitrarily depending on in which British African colony he happened to practise. Orde Browne also noted that the one common element across the legislation was that obviously there had been no native input into its drafting, thereby rendering the application of the common law to the practice of witchcraft 'perhaps the most conspicuous instance of the superimposition of the white man's law and opinion, without any consideration of the African's view'.<sup>129</sup> This variance was by no means confined to the colonial response to witchcraft. When considering how various colonies had fitted Islamic law into the practice of the common law courts, Professor J N D Anderson concluded in 1960 that the fundamental approach throughout the Empire was 'let not thy right hand know what thy left hand doeth'. However, Anderson did acknowledge that this had the benefit of allowing for some accommodation with each community's particularities.<sup>130</sup>

The inapplicability of a legislative response to the practice of witchcraft was also the stance of Evans-Pritchard. Evans-Pritchard maintained from his field work amongst the Azande that magic there was either 'made so openly that there can be no doubt that its action has the

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<sup>125</sup> C Clifton Roberts 'Witchcraft and Colonial Legislation', (Oct 1935) 8(4) *Africa*, 489.

<sup>126</sup> Yearly Notes, 1917, Meru District, Political Record BookKNA, PC/CP 1/9/, cited in Richard D Waller, 'Witchcraft and Colonial Law in Kenya' (Aug 2003) 180 *Past & Present*, 245.

<sup>127</sup> J Orde Browne, 'Witchcraft and British Colonial Law' (Oct 1935), 8(4) *Africa*, 483. Of course, the proscription of sorcery/witchcraft by way of punitive legislation throughout the Empire did not take into account what – if anything – would have been a more effective means for a foreign colonial administration to deal with the threat posed to such an administration by:

- (i) the belief in the power of the sorcerer/witch; and
- (ii) the intra- and inter-communal violence such beliefs engendered,

let alone taking into account indigenous views in East Africa, Papua and New Guinea, or elsewhere.

<sup>128</sup> *Ibid.*, 483.

<sup>129</sup> *Ibid.*, 484.

<sup>130</sup> John N D Anderson, 'Colonial Law in Tropical Africa: The Conflict between English, Islamic and Customary Law' (1960) 35(4) *Indiana Law Journal*, 2. Anderson was Professor of Oriental Laws in the University of London in 1954; head of the Department of Law, School of Oriental and African Studies, London 1953-71; and Professor of Oriental Laws, University of London 1954-75.

moral support of the community or so secretly that it is almost impossible to produce the proofs other than the mystical revelations usually cited by Africans as such'.<sup>131</sup> Nonetheless, when it came to the impact of such magical practices, the colonial courts were faced with the fact that, as Frazer had noted in *The Golden Bough*, 'imagination acts on a man as really as gravitation, and may kill him as certainly as a dose of prussic acid'.<sup>132</sup>

Thus, the colonial criminal courts repeatedly were called upon to deal with violent crime arising from the supposed practice of witchcraft in indigenous communities. This was perhaps most infamously undertaken in the Wakamba witch-killing trials of 1931-32, *R v Kumwaka s/o of Mulumbi and 69 Others*. The facts of *R v Kumwaka* were blandly summarised in the Law Reports of Kenya as follows:

The first accused (Kumwaka) summoned the rest of the accused and brought them to the vicinity of the hut in which was his wife, the woman believed to have been bewitched. Next, the witch, the deceased, was seized and brought to the sick woman's hut and ordered to remove the spell. The accused allege that she removed half the spell during the night. Early in the morning, the witch was detected running away. All accused ran after her and beat her with the thin sticks referred to above. As a result of the beating the witch was killed. On perusing the evidence we entertain no doubt that she died, and died as a result of the beatings administered.<sup>133</sup>

While the Kenyan High Court acknowledged that witchcraft beliefs were 'deeply ingrained in the native character', in February 1932 the court held that the fear of being bewitched could not in and of itself successfully ground a plea of provocation, against what would otherwise be a conviction for murder. Griffin CJ said that to hold otherwise would 'encourage the belief that an aggrieved party may take the law into his own hands, and no belief could well be more mischievous and fraught with greater danger to public peace and tranquillity'.<sup>134</sup> Therefore, he passed death sentences on sixty of the seventy defendants; this was upheld shortly afterwards by the EACA; and in April 1932, the all-but inevitable commutation was granted by the Governor of Kenya Sir Joseph Byrne — himself a lawyer — substituting prison terms with hard labour. According to Katherine Luongo, the Wakamba trials highlighted how the colonial response to witchcraft-related crime was an important factor in 'an empire-wide debate over British justice and local law and custom which brought together anthropological,

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<sup>131</sup> Edward E Evans-Pritchard, 'Witchcraft', (Oct 1935) 8(4) *Africa*, 421.

<sup>132</sup> John G Frazer, *The Golden Bough* (Penguin, London, 1996) 160.

<sup>133</sup> Quoted in K A Luongo, *Conflicting Codes and Contested Justice: Witchcraft and the State in Kenya*, (PhD Thesis, University of Michigan, 2006), 125-6. 'S/o' in African cases stands for 'son of'.

<sup>134</sup> *Rex v Kumwaka wa Mulumbi and 69 Others* (1932), cited in 14 Kenya Law Reports.

administrative, and judicial perspectives and actors'.<sup>135</sup> Metropolitan criticism of the trials and calls for reform led to the papers read to the 1934 International Congress of Anthropological and Ethnological Sciences. This in turn resulted in the dedication to the legal dimension of African witchcraft the entire October 1935 edition of *Africa*, the journal of the London-based International African Institute. Even more practically, the trials were one of the factors which led to the establishment by the Imperial authorities of the Bushe Commission in 1933<sup>136</sup> to investigate the administration of justice in Kenya, Uganda and Tanganyika.

The Commission was chaired by H G Bushe, Legal Adviser to the Secretaries of State for Dominion Affairs and for the Colonies. Its East African colonial members were A D A MacGregor KC, Attorney-General of Kenya; W Maclellan Wilson, nominated by the Government of Kenya; Hon P E Mitchell, Secretary for Native Affairs, Tanganyika Territory; and Mr Justice Law, Puisne Judge.<sup>137</sup> The evidence given to the Bushe Commission provides a snapshot of the view of colonial administrators and lawyers throughout the Empire in the inter-war years on the appropriate response to witchcraft-related crime among Africans. Thus, Kenyan Chief Native Commissioner A de V Wade maintained that killing an alleged witch was an act of self-defence, which to the indigenous Kenya was 'no more blameworthy than a man shooting an armed marauder who is aiming a revolver at him'.<sup>138</sup>

The touchstone of adherence to common law process was stressed in evidence from the Kenyan Chief Justice, Sir Jacob Barth. In what Luongo describes as 'the trope of discipline and denial located in the Witchcraft Ordinance', in evidence to the Bushe Commission, Barth maintained that the Ordinance gave indigenous Africans 'a chance of prosecuting people who practice these alleged supernatural powers'.<sup>139</sup> However, as noted above, the practice of witchcraft was seen as a fundamentally anti-social matter of great enormity by Africans. The chasm between the view of the colonisers and the colonised on the required response to witchcraft and sorcery is shown by the fact that the Bushe Commission also heard evidence

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<sup>135</sup> Luongo, n 120, 116-117.

<sup>136</sup> Another was the 1923 decision of the Supreme Court of Kenya in which a settler Jasper Abraham, who had beaten an employee so badly that the employee later died, was convicted of causing grievous hurt and sentenced only to two years' imprisonment. 'The Colonial Office was scandalised and Bushe was convinced that the Indian Penal Code was to blame': H F Morris, n 97, 14. See also David M Anderson (2011) Punishment, Race and 'The Raw Native': Settler Society and Kenya's Flogging Scandals, 1895-1930', (2011) 37(3) *Journal of Southern African Studies*, 479; and Martin J Wiener, 'Murder & the Modern British Historian' (Spring 2004) 36(1) *Albion*, 1.

<sup>137</sup> *Commission of Inquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters* (Bushe Commission) May 1933.

<sup>138</sup> Evidence to the Commission from Mr A de V Wade, Chief Native Commissioner, Nairobi, 31 March 1933. *Bushe Commission Report*, 13.

<sup>139</sup> Luongo, n 120, 169, citing the Bushe Commission Report, 33-34.

from local chiefs that the punishment for crimes which threatened local order should be execution.<sup>140</sup>

### Witchcraft-related violence and the criminal law

In their report to the Colonial Office, the Commissioners expressed their fundamental dissatisfaction with the existing legal framework in British East Africa, echoing the view of the local lawyers that no system could administer justice unless it 'took justice to the people and administer[ed] it with despatch, with independence, with certainty and with skill'.<sup>141</sup> Looking back on work of the Bushe Commission in 1939, Attorney-General Hone of Uganda noted that it had been welcomed by 'all thinking people in East Africa'. However, as with the attendees of the 1934 International Congress of Anthropological and Ethnological Sciences, Hone KC raised the more profound question of whether 'the imposition, on the native races, of the principles of English criminal law has ever been a success or is likely to be so, in the future, within a reasonably short period'.<sup>142</sup> Regardless of the depth of its findings, the Report was a dead letter before its publication. Even as it was being drafted, the three governors of the East African colonies gained the agreement of the Conservative Secretary of State for the Colonies, Sir Phillip Cunliffe-Lister, that most of its recommendations would not be implemented. Nonetheless, the Commission's work provides us with a direct link between the formation of policy in East Africa and in Papua. Under the heading *Criminal Law and Private Vengeance*, in his report for 1933-34 Hubert Murray quoted the Bushe Report to the effect that 'to the native mind, what the British system regards as a crime against the public peace was essentially a private wrong', noting that '[c]learly a system of substantive law which preceeded (sic) on such principles as these could not be tolerated in any part of the British Empire',<sup>143</sup> such that any possibility of relegating offences under British law to issues which could be resolved privately was rejected out of hand.

Among the Bushe Commission's recommendations was that, in considering the provocation to which 'an ordinary person has been subjected', East African Courts should apply, as far as possible, the standard 'of the ordinary member of the community to which the accused belonged'.<sup>144</sup> This was a considerable time before the Privy Council would arrive at the same point of view in *Kwaku Mensah*. Sir Robert Hamilton was Chief Justice of the East Africa Protectorate from 1906 to 1920, and Parliamentary Under-Secretary of State for the Colonies

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<sup>140</sup> Stacey Hynd "'The extreme penalty of the law": mercy and the death penalty as aspects of state power in colonial Nyasaland, c. 1903-47' (2010) 4(3) *Journal of Eastern African Studies*, 542.

<sup>141</sup> *Report of the Commission of Inquiry*, para 18.

<sup>142</sup> H R Hone, n 87, 179.

<sup>143</sup> Hubert Murray, *Annual Report for Papua 1933-34*, p 57.

<sup>144</sup> Bushe Commission, n137, para 203.

from 1931-32 under Cunliffe-Lister. Hamilton considered that, despite potential difficulty, the suggestion of the acknowledgment of membership of an indigenous African community was 'a valuable one which deserve[d] to be followed up'.<sup>145</sup> Therefore, as with Papua and New Guinea in Chapter Four, this part of the chapter will undertake some consideration of the application of the common law concept of provocation as mitigation of criminal culpability as it was considered by the East African courts.

While the Penal Codes applicable in British East Africa originally defined provocation in detail, they did not include the habitual nexus of reasonableness between a defendant's reaction and the provocation given. This nexus was inferred and applied by the EACA in an appeal from Nyasaland in 1936;<sup>146</sup> but subsequent decisions acknowledged that, as it was not part of the law of the Territories, convictions for murder would be reduced to manslaughter even where the court held that the appellant's response had in fact been disproportionate to the provocation he had suffered.<sup>147</sup> This lacuna was soon addressed by amending the respective provisions to the effect that 'provocation' meant:

...any wrongful act or insult... likely, when done to an ordinary person, to induce him to assault the person by whom the act or insult done or offered...to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.<sup>148</sup>

In *R v Sitakimatata s/o Kimwage*, a 1941 appeal to the EACA from Tanganyika, a defendant had killed a person who had admitted to killing the defendant's wife by witchcraft and threatened to do the same to him pled at trial that he had acted under provocation.<sup>149</sup> In deciding the appeal, the EACA acknowledged that the defendant was 'a simple-minded, primitive peasant of a type not intellectually likely to reject the traditional existence and potency of the witch doctor's craft'.<sup>150</sup> However, on the facts, they held that the defendant's actions were not characterised by that sudden fear and loss of self-control which had traditionally at common law grounded the defence of provocation.<sup>151</sup> As a result, the defendant was found guilty of murder. The process of reasoning of the decision calls to mind that of Frost J in the 1965 decision of *R v Moses Robert*.<sup>152</sup> Frost J concluded that, while Moses was undoubtedly

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<sup>145</sup> Robert Hamilton, 'Criminal Justice in East Africa', (Jan 1935) 34(134) *Journal of the Royal African Society*, 7.

<sup>146</sup> *R v Mwale* (1936) 3 EACA 102 (Nyasaland), cited in James S Read, 'Criminal Law in the Africa of Today and Tomorrow' (Spring 1963)7(1) *Journal of African Law*, NN 7, 9.

<sup>147</sup> See *R v Mohamed* (1942) 9 EACA 52 and *R v Babigamba* (1945) 12 EACA 44.

<sup>148</sup> J9 Uganda Penal Code, cap 22, s 188; Kenya Penal Code, cap. 24, s 209 Tanganyika Penal Code, cap 16, s 202; Zanzibar Penal Decree, cap 13, s. (t): cited in Read, n 132, 9.

<sup>149</sup> [1941] 8 EACA 57, 58.

<sup>150</sup> [1941] 8 EACA 57, 58.

<sup>151</sup> [1941] 8 EACA 57, 59.

<sup>152</sup> [1967-68] PNGLR 482, 487.

angry, he had not stabbed his wife in the heat of passion, but by way of revenge or through a sense of grievance or 'deliberate chastisement', and was therefore guilty of wilful murder.

In the 1945 case of *R v Kajuna s/o MBake*, the defendant had been convicted and sentenced to death for killing his father due to his belief that the father was attempting to kill the defendant's child by witchcraft. In this decision, Sheridan CJ held that the question of whether the defendant's action was a result of a justifiable mistaken belief turned on:

... whether the accused's belief in his father's malevolent invocation of evil spirits in order to injure the child was not only honest, but reasonable, taking into account the fact that he is a primitive African.

Unhelpfully, Sheridan CJ concluded that this was 'a difficult question bordering on metaphysics which I do not propose to discuss here'.<sup>153</sup> Nonetheless, the EACA found that the appellant's belief that the deceased was using witchcraft to kill the appellant's family to be unreasonable, as there was no evidence of any physical act of provocation.<sup>154</sup>

Similarly, in the 1947 Kenyan case of *Akope s/o Karuon*, the accused, two cousins, believed that their father and uncle had been killed by their victim, based on allegations from the sick man days before he died. As they did not despatch the alleged witch until after the sick man's death, the EACA held that provocation was inapplicable, given that sufficient time had elapsed for a reasonable man to gain control of his emotions.<sup>155</sup> In considering the case in a leading 1966 article, 'Mens Rea and the Reasonable African', American legal academic Robert Seidman noted that the idea that time operated to cool the passion was an European conceptual import; the longer the indigenous African brooded on the 'overhanging, omnipresent threat' of witchcraft, the more inflamed the passions would be.<sup>156</sup>

Nonetheless, also in 1947, in hearing an appeal from Uganda, *R v Fabiano Kinene*, the EACA did hold that, on the facts of the case, the defendants' belief in witchcraft constituted legal provocation.<sup>157</sup> On the night in question, the defendants found the deceased crawling naked in their compound. They seized him and killed him by forcibly inserting into his anus twenty

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<sup>153</sup> [1945] 12 EACA 104 (Tanganiyika).

<sup>154</sup> 'A mere belief founded on something metaphysical as opposed to something physical, that a person is causing the death of another by supernatural means however honest that belief may be has not so far as we are aware been regarded by this Court as a mitigating circumstance in law': *R v Kajuna s/o MBake*, cited in Onesimus K Mutungi, 'Witchcraft and the Criminal Law in East Africa' (1971) 5 *Valparaiso University Law Review*, 524.

<sup>155</sup> (1947) 14 EACA 105, cited in Robert Seidman, 'Witch Murder and Mens Rea: A Problem of Society under Radical Social Change' (Jan 1965) 28(1) *The Modern Law Review*, 52.

<sup>156</sup> *Ibid.*, 52.

<sup>157</sup> (1941) 8 EACA 95.

unripe bananas — the particularly unpleasant traditional Ugandan method of despatching a witch. Chief Justice Sir Joseph Sheridan held that:

... the victim was performing in the actual presence of the accused some act which the accused did genuinely believe, and *which an ordinary person of the community to which the accused belongs would genuinely believe*, to be an act of witchcraft against him or another person under his immediate care such that he might be angered to such an extent as to be deprived of the power of self-control and induced to assault the person doing the act of witchcraft.<sup>158</sup>

However, as we saw in the previous chapter, in 1946 in *Kwaku Mensah v The King*, the Privy Council held that, in determining who was a ‘person... of ordinary character’ for the purposes of ascertaining whether or not provocation was applicable to reduce a murder charge to one of manslaughter, the relevant standard was that of ‘the ordinary West African villager’.<sup>159</sup> Despite this ruling, in *Gadam v R* in 1954, the West African Court of Appeal found in an appeal from Nigeria that while the commonality of belief in witchcraft in the appellant’s community made the murder of an alleged witch an honest mistake on his behalf, it would not be sufficient to render it ‘reasonable’.<sup>160</sup> Also, despite *Kwaku Mensah*, in 1957 in *Att-Gen for Nyasaland v Jackson*, in overruling the trial judge, the EACA held that the standard of reasonableness of mistake in the killing of a witch in imagined self-defence was that of the ordinary man in the street in England. This was due to the view that the law of England was ‘still the law of England even when it is extended to Nyasaland’.<sup>161</sup>

The East African courts also held that a threat to a defendant must have been of a physical nature. In 1951, in *Erika Galikuwa v R*, the appellant, unable to pay for services rendered by a witchdoctor, killed him after the witchdoctor told him that his medicines would ‘eat him up’.<sup>162</sup> His plea of provocation failed, largely because rather than constituting a threat of immediate violence, at best the witchdoctor’s threat was to injure him in the future. In confirming the conviction, the EACA held that a mere threat to cause injury to health — or even death — in the near future cannot be considered as a physical provocative act, noting that it was difficult see ‘how an act of witchcraft unaccompanied by some physical attack could be brought within the principles of English Common Law’. The EACA found that, on the appellant’s own evidence, he clearly was motivated not by anger but by fear alone. He attacked, not in the heat of passion, but ‘in despair arising from the recognition of his inability to raise the money

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<sup>158</sup> Emphasis added.

<sup>159</sup> [1946] AC 83.

<sup>160</sup> *R v Gadam* [1954] WACA 442 (Nig), 443.

<sup>161</sup> [1957] Rhodesia and Nyasaland Reports 443.

<sup>162</sup> [1951] 18 EACA 175.

demanding and his hopeless fear of the consequences. The EACA further held that the appellant was not suddenly deprived of his self-control, but acted deliberately and intentionally, because of the impasse he was facing.<sup>163</sup>

Again, as Seidman posits, the very distinction between 'physical' and 'metaphysical' threats is based upon a Western scientific understanding of the nature of physical sickness; 'it is in large part in the understanding of cause and effect that scientific knowledge is distinguished from non-scientific knowledge'.<sup>164</sup> It is interesting to note that Jean Zorn maintained that Seidman's article, 'Witch Murder and Mens Rea: A Problem of Society under Radical Social Change', which considered the increase in witch murders in societies under social duress, received less favourable attention amongst Papua New Guineans than his 'Mens Rea and the Reasonable African', which maintained that colonial courts were mistaken to dismiss customary beliefs on the grounds that they seem irrational to the European judges.<sup>165</sup> 'Witch Murder and Mens Rea' would also be cited by Narokobi AJ in the post-independence Papua New Guinea Supreme Court in the sorcery-related murder case of *State v Gesie*.<sup>166</sup>

For completeness, there was one colonial decision in which the court availed a defendant of the defence of insanity in relation to a witch-murder: In 1957 in *R v Magaza s/o Kachehakana* the accused was charged with the murder of his father, whom he believed had bewitched and killed his two sons, his first wife, his goats and a cow. He also believed that the father had bewitched him and made him impotent, and bewitched his second wife who was always sickly. After they both attended the funeral of a child, the accused suddenly attacked his father and hacked him to death. Bearing in mind the above EACA decisions, the Ugandan High Court ruled out of provocation, but held as follows:

... an African living far away in the bush may become so obsessed with the idea that he is being bewitched that the balance of his mind may be disturbed to such an extent that it may be described as disease of the mind. Here the killing is unexplained, and... inexplicable; except upon the basis that the accused did not know what he was doing.<sup>167</sup>

However, due to the inherent difficulties with Lyon J's interpretation of 'disease of the mind', on *R v Magaza*, the case was generally ignored until the post-independence case of *Okello*

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<sup>163</sup> (1951) 16 EACA 175, 178 (Uganda).

<sup>164</sup> Seidman, n140, 66.

<sup>165</sup> Jean G Zorn, 'Women and Witchcraft: Positivist, Prelapsarian, and Post-Modern Judicial Interpretations in PNG' in A Whiting & C Evans, *Mixed Blessings Laws, Religions, and Women's Rights in the Asia-Pacific Region*, (Martinus Nijhoff Publishers, Boston 2006), 74.

<sup>166</sup> [1980] PNGLR 510 (19 December 1980).

<sup>167</sup> [1956-7] 8 ULR 294.



*s/o Kameleti v Uganda*, when the court likened the fear of witchcraft to ‘an insane delusion’, ‘a disease of the mind’, and found an appellant not guilty of murder on account of insanity.<sup>168</sup>

The other reported witch-murder decision to consider insanity was the 1956 Kenyan appeal of *Philip Muswi s/o Mosola v R*. The EACA, rejected its applicability, as the court held that at time of murdering his wife, whom he believed was bewitching him, the defendant knew what he was doing and could distinguish right from wrong. Thus, even if the defendant believed that he was justified in killing his wife because she was practising witchcraft, there was no evidence that such belief arose from any mental defect on his behalf. Indeed, as the EACA noted, it was a belief ‘sometimes held by entirely sane Africans’.<sup>169</sup>

One final matter characterises the conduct of East African witch-murder trials which is both similar to and divergent from the practice in Papua and New Guinea. As we have seen, from the very first encounters between the common law and indigenous Papuans, the colonisers took into account the fact that traditional mores may compel acts which would be ‘criminal’ in the sight of English law. Notable among these during the period of colonization was of course sorcery-related violence, including murder. The court would strictly adhere to the procedure of the common law, find an accused guilty, but then give a light sentence which reflected the disparity between indigenous and Anglo-Australian understanding of the nature of the acts of the accused.

In African colonies, courts were much more reticent to find mitigating factors in witchcraft-related deaths which would operate to reduce a finding of murder to one of manslaughter. However the verdict and sentence of death, was almost always accompanied by a request to the Governor that the death sentences not be carried out. As Seidman notes, with ‘monotonous regularity, courts... convicted, sentenced the defendant to death, and — in the same breath — recommended executive clemency’.<sup>170</sup> Thus, in dismissing the murder appeals in *R v Kajuna s/o MBake*, Griffin CJ observed that in all such cases the court was aware that ‘the element of witchcraft as a mitigating factor is always taken fully into account by the Governor in Council’,<sup>171</sup> that is to say, he was confident that the capital sentences would be commuted. Similarly, on the other side of the continent, in the 1952 decision of *Kokomba v R*, the appellant had been convicted of murdering a sorcerer whom he believed had killed one of his brothers by witchcraft and was responsible for the illness of another brother. In dismissing

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<sup>168</sup> Crim App No 2 of 1978, considered in Daniel D N Nsereko ‘Witchcraft as a Criminal Defence, From Uganda to Canada and Back’ (1996) 24(1) *Manitoba Law Journal*, 57.

<sup>169</sup> *Philip Muswi s/o Mosola v R* [1956] 23 EACA 622, p 625.

<sup>170</sup> Cited in Seidman, n140, 46.

<sup>171</sup> [1945] 12 EACA 104.

the appeal, the West African Court of Appeal noted that, while the appellant's belief that he had saved his second brother by disposing of a sorcerer was no defence in law, it was 'a matter which the Executive will, no doubt, consider when the case comes before it for consideration'.<sup>172</sup> Accordingly, while in Papua and New Guinea it was the judiciary which took into account the reality of indigenous beliefs in handing down lesser sentences for violent sorcery-related crime including murder, in Britain's African territories it was expected to be the role of the Executive to take into consideration the ubiquity of the fear of witchcraft. Nonetheless, the result for the accused was fundamentally the same.

On this point, Driberg posited in 1934 that it would be preferable to acknowledge within the criminal law itself the impact of traditional beliefs upon motive. This would result in a more widely calibrated range of punishments which would be 'more intelligible to an African accused than a capital sentence which was never expected to be put into effect'.<sup>173</sup> Seidman came to the nub of the matter when he noted that the 'institutionalised reliance upon executive clemency' was in effect the recognition of the basic inadequacy of 'judicial solutions to the problems posed by [witchcraft-murder] cases'.<sup>174</sup> Historian of law, crime and punishment in Africa, Stacey Hynd has described this process as 'the political calculus of commutation', which was 'shaped by shifting landscapes of power and racialized stereotypes of African behaviour, as well as by the necessity of maintaining "white prestige" through the self-ascribed benevolence of British justice'.<sup>175</sup>

However, it was beyond even the harshest critics of the administration of justice in British East Africa to admit the helplessness of the law in the face of violent crime arising from unwavering belief in the efficacy of witchcraft. As Commissioner Bushe argued in the course of hearings in March 1933:

When you say, "but for His Excellency's intervention they would have been executed", are not you rather putting the case like this—"but for the fact that we had some brakes, we might have run down the hill and crashed at the bottom"? You must not except an essential part of the machine and then say that the machine was bad.<sup>176</sup>

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<sup>172</sup> (1952) 14 WACA 236, cited in S K B Asante, 'Over a Hundred Years of a National Legal System in Ghana: A Review and Critique' (Spring 1987) 31(1/2) *Journal of African Law*, 77.

<sup>173</sup> Driberg, n108, 243.

<sup>174</sup> R B Seidman, n140, p 46.

<sup>175</sup> Hynd, n127, 85.

<sup>176</sup> This was in response to evidence from Mr S H La Fontaine, Provincial Commissioner of Ukamba Province, 28 March 1933.

### 'Law and disorder' in Kenya

The Second World War did not have the immediate physical impact on East Africa that it had on Papua and New Guinea. Nonetheless, the pressures of decolonisation were more quickly and thoroughly felt, not the least in the application of the law. As H F Morris later observed in his 'English Law in East Africa: a Hardy Plant in an Alien Soil', paternalistic consideration was no longer given to whether the procedures of the common law should be 'radically modified when Africans were parties to a case'. However, he noted further that even less regard was had to the content of customary law by a largely expanded judiciary and magistracy, who often had even less colonial experience than their untrained pre-War predecessors.<sup>177</sup> More fundamentally, Richard Waller identifies reservations which reflect those of H R Hone KC prior to the War noted above. These were as to the very possibility of the administration of substantial justice in Kenya:

Hard cases notoriously make for bad law, and witchcraft produced more than its fair share. It was clear that the Witchcraft Ordinance was unsatisfactory: might it also be as unjust, inconsistent and even irrational as the beliefs it challenged?<sup>178</sup>

Waller concludes that a culture of legal uncertainty preceded the 'law and disorder' of the Mau Mau anti-colonial insurgency in Kenya from October 1952 to December 1959, and to an extent, 'made that illegality acceptable'.<sup>179</sup> Katherine Luongo notes that in the prelude to the Insurgency, colonial administrators repeatedly made explicit links between Mau Mau and witchcraft as challenges to their authority. These emanated not only from the insurgents, but:

... from the witches and witchdoctors adhering to the Mau Mau cause and from those taking advantage of the period's instability to practice their witchcraft more broadly and fiercely.<sup>180</sup>

Recent historical works have shown the frequently disreputable role the colonial courts played in responding to the State violence in attempts to put down the Insurgency.<sup>181</sup> The official Colonial Office report was pilloried by contemporaries as frequently wrong 'not only in fact but in interpretation'.<sup>182</sup> Nonetheless, the report's author, F D Corfield, retired former Governor of the Upper Nile and Khartoum Provinces, did strike at the heart of the issue of the basic legality

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<sup>177</sup> Morris, n96, 103-104.

<sup>178</sup> Waller, n113, 274-275.

<sup>179</sup> *Ibid.*, p 275.

<sup>180</sup> K Luongo, n120, 282.

<sup>181</sup> Between 1892 and 1958, around 3000 Kenyan Kikuyu were tried for capital charges relating to Mau Mau crimes; of these 1090 were hanged: David Anderson, *The Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire*, (Phoenix, London, 2005), 6-7.

<sup>182</sup> F B Welbourn, 'Review: The Origins and Growth of Mau Mau: An Historical Survey' (1961) 2(1) *The Journal of African History*, 170.

of matters such as witchcraft prosecutions. He queried whether in colonial Kenya there had been:

...a mistaken tendency to equate judicial procedure with the administration of justice? Have not the British, as it were, invested their legal processes with a “divinity” which they do not deserve and thereby impeded a modification of them to suit other circumstances, in the mistaken belief that any change will upset a carefully well-balanced machine?’.<sup>183</sup>

## Conclusion

As noted at the outset, the aim of this Chapter has been to historically and geographically contextualise the response of the colonial Administration to sorcery through criminalisation under legislation, which was then enforced by prosecution in the courts. The Christianity which the colonisers imported to Papua and New Guinea had progressed from St Augustine’s rejection of the very possibility of creatures of evil operating independently of God’s will, to a pre-Reformation orthodoxy which saw witches as the object of the interest of the Inquisition. The Reformation then honed the existing equation of witchcraft with heresy, as Protestant reformers rejected the efficacy of the Sacraments as a means of obtaining grace, and banned the non-biblical sacramental practices which had given comfort to the uneducated faithful in a dangerous world. Both Catholic and Protestant clergy called upon the State for support.

In England, moving the responsibility for witchcraft prosecutions to the common law courts bolstered Henry VIII’s aims of legitimising his break from Rome, and facilitated the identification of witchcraft/heresy as a form of treason in his newly Protestant State. However, unlike civil law jurisdictions — including neighbouring Scotland — witchcraft prosecutions were generally undertaken without recourse to torture.<sup>184</sup> The exceptions to this we have seen occurred in times of extraordinary pressure on civil society such as the English Civil War and the threat of foreign invasion, combined with an ascendant Calvinist polity. This provides the background to the excesses of both the Essex Witchfinders and of the Salem Trials across the Atlantic. By the time the American War of Independence heralded the Second British Empire at the end of the eighteenth century, the spread of Enlightenment beliefs among the English elite meant the end of witchcraft prosecutions. Stricter requirements of proof could not be satisfied in the common law courts, and so the 1736 Act criminalised the ‘pretence’ of witchcraft.

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<sup>183</sup> Colonial Office, *Historical survey of the origins and growth of Mau Mau*, Command Papers, 250, <https://parlipapers-proquest-com.ezproxy.lib.monash.edu.au/parlipapers/docview/t70.d75.1959-048997?accountid=12528>

<sup>184</sup> This is not to say that it did not occur under warrant, but that, as American legal historian John H Langbein notes, the English did not ‘regularize the use of torture in their criminal procedure’: John H Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (University of Chicago Press, Chicago, 2006), 73.

This then was the heritage of the colonisers. The European Christianity they brought with them disavowed its earlier, determined, beliefs in the mischief of witchcraft and in the need for the confessional State to prosecute its practitioners. Rather, it had come to see the role of both Church and State to campaign against the mischief of the *ignorance* in which such beliefs might still flourish, whether that was among the ignorant at home or abroad. Therefore, when we compare the legal response of the common law to the practice of African witchcraft in colonial Kenya we discover a very familiar pattern of criminalisation and prosecution, in which the 'other' of a Christian religious divide is replaced with the 'other' of the colonised native, the prisoner of his or her backward beliefs.

As with the earlier verities of religion, the adepts of the common law believed that theirs was a universal creed. Eastern Africa was therefore divided up with strict legality, with an array of Orders in Council designed to ensure that the colonial authorities had legal authority over all within their newly-drawn borders. They did this first by extending imperial jurisdiction from British India and then modifying it for the benefit of the white settler population. Here too, as a continuing belief in the supernatural power of the witchdoctor posed a threat to the authority of the colonial state, it was necessary to bring it within the purview of the common law by way of Witchcraft Ordinances. These were adjudicated by the 'men on the ground' who were the backbone of imperial administration.

Again, as witch-killing was both a customary imperative and a criminal mischief, it threatened the colonial state's monopoly on violence, and could not be downplayed. Looking to the Privy Council as the Court of Empire, the East African courts devised means of legal mitigation of criminal responsibility such as provocation as a means of bridging the colonial divide; but only so far. Superior Courts therefore combatted witchcraft-related violence with a strict adherence to common law processes which led regularly to sentences of execution. These were then subject to the executive's prerogative of mercy, taking into account the customary beliefs of the accused and their communities.

Ultimately, the processes of decolonisation in Papua New Guinea and in Kenya could not have been more different. While Papua New Guineans had a lot to be dissatisfied about in respect of Australia's 'briefcase' abandonment of them,<sup>185</sup> this was no comparison with the deadly violence perpetrated against the Kikuyu in Kenya by the British Administration. However, despite whatever rancour the peoples of the different societies may have felt towards the colonisers and their imposed laws, one matter in which independent legislatures maintained pre-independence continuity was in the ongoing criminalisation of malevolent magical

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<sup>185</sup> See John Waiko above, Chapter Three, NN 168.

practices. In Kenya this is maintained by the *Witchcraft Act 1925*,<sup>186</sup> and in Papua New Guinea by the *Sorcery Act 1971*, repealed in 2013. Accordingly, we will now consider the genesis of that legislation; its interpretation by the expatriate judges in the light of the *Native Customs Recognition Ordinance 1963*; and the attempts of indigenous law reformers to create a more Melanesian jurisprudence to deal with sorcery-related violent crime.

## Chapter Six: The Sorcery Act 1971 and its Discontents

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The real difficulty with the Sorcery Act is that it was enacted by Australians who are not aware of the real and factual effects of sorcery.<sup>1</sup>

### Introduction

In the previous chapters we have seen how the legal framework in which sorcery and sorcery-related crime were considered in the public sphere in Papua and New Guinea slowly developed during the 1960's. Despite its obvious practical and procedural limitations, the Legislative Assembly began to evolve into a national forum with an indigenous majority amongst whom laws and public policy could be debated on their own terms. Contemporaneously, the expatriate Supreme Court attempted to devise a means of fairly addressing the individual facts of sorcery-related matters before it, within the wider societal imperative of arresting the widespread violence which sorcery beliefs undoubtedly engendered.

In this Chapter we will examine how these law-making and law-enforcing processes intersected in the implementation of the provisions of the *Sorcery Act 1971* [Sorcery Act], which superseded the Sorcery Ordinance of 1893.<sup>2</sup> An important aspect of this is the judicial role in interpreting the Sorcery Act's defence and mitigation provisions of, in which it would

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<sup>186</sup> <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2067>

<sup>1</sup> *The State v Magou* [1981] PNGLR 1 (Nakarobi AJ).

<sup>2</sup> Although the legislation also was originally known as the Sorcery Ordinance, it will be referred to throughout as the Sorcery Act, as this is how it was referenced from the enactment of the Constitution - *Constitution of the Independent State of Papua New Guinea 1975*, Sch 2.6 (2) - up until its repeal by the one-line Sorcery (Repeal) Act 2013, which provided as follows: 'The **Sorcery Act** (Chapter No. 274) is repealed'.

appear that the drafters deliberately steered clear of the particularly difficult issues of the potential defences of self-defence and insanity, to remove them from judicial purview.

The indigenous societies of Papua New Guinea had undergone profound and irreversible transformation as the agents of the colonial Administration ‘pacified’ the country from the 1880’s onwards. Not the least of these changes were exposure to other indigenous traditions than their own. This begs the question of whether the mischief of ‘sorcery’ being dealt with by the 1971 Sorcery Act was of the same fundamental character as that for which the 1893 Sorcery Ordinance was devised. Therefore, we will briefly consider anthropological evidence of the impact of colonisation upon sorcery beliefs and practices in Papua New Guinea.

### The evolution of sorcery beliefs

The impact of colonisation upon indigenous peoples generally is tragically predictable — it is not for nothing that the term is used medically in relation to the presence of unwelcome infection in the human body.<sup>3</sup> Reading Malinowski on the Trobriand Islanders in 1922, one could be forgiven for assuming that the European presence had barely impacted on the nature of traditional beliefs, but later anthropologists stressed the profound effects of colonisation. Writing in 1973, American anthropologist Leonard Glick suggested that more, rather than fewer, sorcery accusations would characterise Papua New Guinea in the late twentieth century, and considered that efforts should not be wasted on trying to eliminate such accusations through education or fiat, e.g., the provisions of the Sorcery Act.<sup>4</sup> Rather, every effort should be made to understand such events in their own social contexts, as:

...manifestations of genuine, perhaps necessary and functional conflicts rooted in the social history of a community. [Sorcery accusations] may turn out to be responses to deprivation, absolute or relative, for which remedies may then be sought.<sup>5</sup>

Twenty years later in an article on the Papua New Guinea Highlands, American husband and wife anthropologists Pamela J Stewart and Andrew Strathern proposed the following essential characteristics which created the atmosphere in which sorcery beliefs were leavened by the colonising experience:

...the movements of people, the mixing of linguistically or socially different groups, the effects of disease, alterations in group composition and the condition of leadership, changes in patterns of inequality arising from patterns of cash cropping and the

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<sup>3</sup> See, e.g., Liisse-Ann Pirofski & Arturo Casadevall, ‘The meaning of microbial exposure, infection, colonisation, and disease in clinical practice’, (October 2002) 2(10) *The Lancet Infectious Diseases*, 628.

<sup>4</sup> Leonard Glick, ‘Sorcery and Magic’ in Ian H Hogbin (Ed), *Anthropology in Papua New Guinea: Readings from the Encyclopaedia of Papua and New Guinea* (Melbourne University Press, Melbourne, 1973), 185.

<sup>5</sup> *Ibid.*, p 186.

consumption of goods purchased with money, and shifts in the balances of power between the genders and between local leaders.<sup>6</sup>

All of these, of course had been the experience of indigenous Papua New Guineans. Stewart and Strathern concluded that, not only did the *Pax Australiana* fail to suppress sorcery and witchcraft, but the beliefs actually 'mutated and spread'. Removing the traditional inter-group physical hostilities created a vacuum into which more intensive and extensive sorcery and witchcraft beliefs rushed.<sup>7</sup> They gave numerous examples of how the bewildering social dislocation which characterised the European colonial project in Papua New Guinea created fertile ground for adaptations of sorcery belief across the Territory. For example, from the nineteenth century onwards, the Karam people of the north of the Jimi Valley in the Highlands developed a belief in a form of witchcraft (*koyb*) which was blamed for sudden deaths. The *koyb* was described as a small snakelike creature that was retained in the abdomen of the witch, enabling its human host to kill others.<sup>8</sup> Not only was this a new adaptation of the beliefs of neighbouring tribes — with whom they had previously had little, if any, contact — but it was the counterpart to the onset of dysentery and malaria among the Karam, lowland diseases which may well have been introduced to their Karam territory by the newcomers.<sup>9</sup> Similarly, the Tangu of Madang Province, whose numbers had been drastically reduced by epidemics, developed a belief in the *ranguma*, who combined the prestige of the sorcerer with the contempt for the witch. As such, the *ranguma* exerted only a tenuous hold over the magic he practiced, and exemplifies Michelle Stephen's argument that, in failing to uproot sorcery beliefs in Papua New Guinea, Christianity simply damaged the legitimacy of sorcery and negated the cultural controls which traditionally had been exercised over its practice.<sup>10</sup>

The 'introduction' of new, more powerful — and, perhaps, less predictable — forms of sorcery is a recorded characteristic of societal responses to colonialism throughout the British Empire. As early as the turn of the twentieth century, a spate of possessions in Zululand were said to have been introduced from 'the North', from areas that today comprise Mozambique and

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<sup>6</sup> Pamela J Stewart and Andrew Strathern, 'Feasting on My Enemy: Images of Violence and Change in the New Guinea Highlands' (Fall 1999) 46(4) *Ethnohistory*, 664.

<sup>7</sup> *Ibid.*, pp 646-647.

<sup>8</sup> *Ibid.*, pp 645-669.

<sup>9</sup> Pamela J Stewart and Andrew Strathern, *Witchcraft, Sorcery, Rumors and Gossip*, (Cambridge University Press, New York, 2004), 122-123. Much work has been done on the spread of *kuru* among the Fore people of the Eastern Highlands Province. See, e.g., Shirley Lindenbaum, 'Kuru, Prions and Human Affairs: Thinking about epidemics', (2001) 30 *Annual Review of Anthropology*, 363.

<sup>10</sup> Michelle Stephen, 'Contrasting Images of Power' in Michelle Stephen (Ed), *Sorcerer and Witch in Melanesia*, (Melbourne University Press, Melbourne, 1987), 279.



Swaziland'.<sup>11</sup> Bruce Kapferer has observed that much modern sorcery in Sri Lanka derives its force from the fact that it 'fuses old practices onto the new, hybridises, and is 'foreign' and borrowed'.<sup>12</sup> Moreover, reflecting on the evolution of witchcraft and sorcery in Africa more generally, Kapferer argues that the legal proscriptions, which we have seen in relation to Kenya in particular in Chapter Five, were 'a factor in reinventing sorcery as a potent force of modernity, a force resistant to colonial authority and alive in the ambiguities of post-coloniality'.<sup>13</sup> Nonetheless, these legal proscriptions remained on the statute books of many independent states after they had obtained independence from Britain, including Papua New Guinea. We therefore turn to the introduction and implementation of the *Sorcery Act 1971*.

### Sorcery in the House

In Chapter Three we considered in some detail the practical procedural issues facing the indigenous members of the First House of Assembly. The relevance of this to the legal response to sorcery in Papua New Guinea is that in the course of the Second House of Assembly, from 1968 to 1972, indigenous members were sufficiently confident and concerned to bring about an ongoing statutory response to the colonial crime of sorcery. In March 1967, Pita Simogun, MHA for Wewak-Aitape in the Sepik, expressed concerns that the death of two Members of the Second House of Assembly could be attributable to sorcery.<sup>14</sup> In response, Ian Downs reassured Members that it was to be expected in a House of Assembly of 64 members that 'one or two should die during its course'.<sup>15</sup>

On 26 August 1968, Beibu Yembanda, MHA for Wewak, asked Secretary for Law Wally Watkins what legal measures had been or would be taken to 'punish the witch doctors and others who practise sorcery'. Watkins took the question on notice. On the following day he replied that, other than provisions in the Native Regulations of Papua and the Native Administration Regulations of New Guinea, 'which would soon be repealed', the main provision was the then-s 432 of the Criminal Code, namely that:

Any person who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult science to discover where or in what manner anything supposed to have been stolen or lost may be found, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for one year.

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<sup>11</sup> Julie Parle, 'Witchcraft or Madness? The Amandiki of Zululand, 1894-1914' (Mar 2003) 29(1) *Journal of Southern African Studies*, 105

<sup>12</sup> Bruce Kapferer, 'Outside All Reason: Magic, Sorcery and Epistemology in Anthropology', *Social Analysis: The International Journal of Social and Cultural Practice*, Vol 46, No 3, (Fall 2002), p 20.

<sup>13</sup> *Ibid.*, 16-17.

<sup>14</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 5 March 1967, 2325.

<sup>15</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 5 March 1967, 2326.

Whether or not it was inspired by the imminent repeal of the Sorcery Ordinance, as part of the general repeal of Native Regulations referred to by Curtis, on 12 June 1970, Paul Lapun, MHA for South Bougainville, introduced a Sorcery Bill. This was based on his belief that '[w]e ourselves, the people of this country, know that sorcery does occur'.<sup>16</sup> Lapun was an important figure on Bougainville and the Parliamentary leader of the Pangu Pati, which had been formed in 1967. Born in 1923, he had entered the Catholic seminary at Chabai in northwest Bougainville in 1936, and evacuated to Rabaul shortly before the Japanese invasion in 1942. Although he left the seminary in 1948, he continued to teach there until the 1960s. Ironically, by that time the colonial Administration believed he had claimed to possess supernatural powers and was fomenting the rise of a cargo cult on Bougainville, requiring him to defend himself against charges in the port town of Kieta.<sup>17</sup>

Lapun's original motion was adjourned and came on for the Second Reading debate on 18 November 1970. He noted that since introducing the Bill he had received replies supporting his proposal from the local councils of Goroka, Bundi, Mekeo, Lumari, Sokes, Korimerri, Mount Hagen, Wantost and Kerowagi, showing that concerns with respect to the practice of sorcery were widely spread across the Territory.

The first part of the Sorcery Bill dealt specifically with poison, which Lapun maintained had 'no connection with the work of evil spirits'. However, Lapun argued that a court, 'at the whisper of the word 'poison'', assumes that sorcery is involved and will not proceed because of a lacuna in the law:

When the courts decide that there is no poison, the people are only too happy to hear this. They say to themselves: "Very well, killing each other with bows and arrows and spears has finished. We can kill others using poison now. The courts of the white man will not believe in this, so no one will be taken to court for this..."<sup>18</sup>

Accordingly, a specific law against sorcery was required so that alleged sorcerers could be tried in court for their practice of the dark arts.<sup>19</sup>

The second Part of the Bill specifically dealt with sanguma — which Lapun thought came from a language in the Sepik — or as he said, 'sorcery in English'. He noted that not everyone shared the widely-held belief in the efficacy of sorcery:

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<sup>16</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 12 June 1970, 2959.

<sup>17</sup> E Ogan, 'Cargoism and Politics in Bougainville 1962-1972' (1974) 9 *The Journal of Pacific History*, 119.

<sup>18</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 18 November 1970, 3677.

<sup>19</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 18 November 1970, 3677.

...some anthropologists could say that... how on earth can we make laws to govern things which do not exist...The anthropologist may say to me that I am...trying to account for some phenomenon which is almost an impossibility. I would not say anything to him because he is an expert in the field...However, I would not agree with him. I would not follow him all the way.<sup>20</sup>

According to Assistant Administrator Les Johnson, the English translation in Hansard does but 'poor justice to Lapun's Pidgin eloquence', in a lengthy speech given without notes.<sup>21</sup> Possibly to the chagrin of the hard-working Hansard reporters, Lapun went on to quote the Nicene-Constantinopolitan Creed in Latin to the effect that God the Father had created all things 'seen and unseen'. He rhetorically asked the House, who could explain what the unseen things were, and challenged 'the anthropologist' to name and count them all out loud.<sup>22</sup> Lapun thus syncretised the deeply-held Christian religious beliefs of most Papua New Guineans with their equally deeply-held fear of sorcery, arguing that '[S]orcery and everything that goes with it is known throughout Papua and New Guinea and it is part of life of the people'.<sup>23</sup> Accordingly, the aim of his Sorcery Bill was that, if someone employed sorcery to kill another with their 'power of belief in spirits and ghosts' then that person must 'answer a court case'.<sup>24</sup>

Finally, Lapun assured the House that the Bill would not impact upon people using the 'good things of sorcery' to assist in their hunting and fishing, thereby continuing the actual practice of the colonial Administration dating back to Hubert Murray's observations in *Papua or British New Guinea* in 1912.<sup>25</sup> Lapun acknowledged that while he might appear to be a catechist giving instruction, he was doing so to convince 'especially the Europeans who may not believe in sorcery'.<sup>26</sup> Les Johnson maintained that, as the Christian beliefs of many of the other indigenous Members were founded on 'simplistic explanations' of their respective faiths which 'positively encouraged a belief in spirits', they were convinced by Lapun's eloquence.<sup>27</sup>

Debate was adjourned and the matter came before the House again on 19 March 1971. By this time discussions between Lapun and L J Curtis, the Territory's Secretary for Law, had resulted in amendments to the Bill to make it a more workable proposition. Among these were

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<sup>20</sup> Hubert Murray, *Papua or British New Guinea*, (T M Unwin, London: 1912), 203-206.

<sup>21</sup> Les W Johnson, *Westminster in Moresby: Papua New Guinea's House of Assembly 1964-1972*, [https://openresearch-repository.anu.edu.au/bitstream/1885/111462/1/b20360046-Johnson\\_L\\_W.pdf](https://openresearch-repository.anu.edu.au/bitstream/1885/111462/1/b20360046-Johnson_L_W.pdf)

<sup>22</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 18 November 1970, 3677.

<sup>23</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 18 November 1970, 3677.

<sup>24</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 18 November 1970, 3677.

<sup>25</sup> Murray, *Papua or British New Guinea*, n20, 204.

<sup>26</sup> Papua New Guinea, *Parliamentary Debates* House of Assembly, 18 November 1970, 3677. The third part of the Bill dealt with love charms 'to win womenfolk', which need not concern us.

<sup>27</sup> Johnson, n 21.

amendments to change the proposed definition of a sorcerer from 'a person who has the power of sorcery' to be a person who:

- (a) claims to have powers of sorcery; or
- (b) directly or indirectly pretends to have, holds himself out to have or professes to have, powers of sorcery: s 4 of the Sorcery Act.

The express purpose of this amendment was to ensure that the courts were not required in doing so to accept a belief in sorcery. Curtis saw this as one of the main limitations of proceedings under the 1893 Ordinance. He acknowledged that the practice or reputed practice of sorcery in the Territory was a matter of great concern to many members of the House.<sup>28</sup> He further acknowledged those difficulties which we have seen had bedevilled the enforcement of the 1893 Ordinance, namely that victims and witnesses would not give evidence due to fear of further sorcery; a sorcery conviction was tantamount to giving the convicted sorcerer 'a ticket to practice sorcery', which was of great concern to the Magistrates; and it was difficult for expatriate Magistrates to 'set aside a deeply ingrained belief in the power of sorcery' in order to convict an alleged sorcerer.<sup>29</sup>

In his speech, Curtis referred specifically to the unhappy precedent of the English witch trials. He stressed that the House had to be sure that the Sorcery Bill would not replicate these by turning out to be 'an instrument of oppression against those whose beliefs are unpopular, or whose actions are not understood by their fellow men'.<sup>30</sup> Rather, regardless of their own personal views on the efficacy of sorcery, Curtis argued that all Members would agree that anyone who claimed to have the power to produce harmful results ought to be dealt with according to the processes of the law. The real task, he argued, was education, which would 'push back the boundaries of ignorance' so as to staunch the mischief at its source.<sup>31</sup>

The only indigenous Member to speak to the Sorcery Bill was Siwi Kurondo, Member for Kerawagi in the Simbu District. While it might seem surprising that there was so little contribution to the consideration of the Bill, it is a reasonable assumption that on the one hand, based on both their traditional beliefs and their understanding of Christianity, the indigenous Members supported it wholeheartedly and felt no need to extend the debate; and on the other,

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<sup>28</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 19 March 1971, 4138.

<sup>29</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 19 March 1971, 4138. Curtis subsequently was Deputy Secretary of the Commonwealth Attorney-General's Department and a leader in the reform of Australian administrative law. See, e.g., Curtis's Obituary in the *AIAL Forum* No 24, March 2001, <http://classic.austlii.edu.au/au/journals/AIALAdminLawF/2000/1.pdf>

<sup>30</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 19 March 1971, 4138.

<sup>31</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 19 March 1971, 4139.

that the Australian members kept a judicious silence. The Bill went into Committee, and was duly passed by the House on 19 March 1971.<sup>32</sup>

### Changes wrought by the *Sorcery Act 1971*

Under the Act, a 'sorcerer' was a person who either claimed to have powers of sorcery; or directly or indirectly pretended to have, held himself out to have or professed to have, powers of sorcery. 'Sorcery' was broadly, but not exclusively, defined to include what was known, in various languages and parts of the country, as witchcraft, magic, enchantment, *puri puri*, *mura mura dikana*, *vada*, *mea mea*, *sanguma* or *malira*, whether or not connected with or related to the supernatural: s 1(1) of the Sorcery Act.

In Chapter Four we noted that the Preamble to the 1893 Sorcery Ordinance stressed that although sorcery was only deceit, as 'the lies of the Sorcerer frighten many people and cause great trouble... the Sorcerer must be punished'. The Preamble to the Sorcery Act went into much more extensive detail, providing a comprehensive justification for the need for the legislation, while keeping the colonial Administration at arm's length from the belief in the existence or efficacy of sorcery:

There is a widespread belief throughout the country that there is such a thing as sorcery and that sorcerers have extraordinary powers that can be used sometimes for good purposes but more often for bad ones, and because of this belief many evil things can be done and many people are frightened or do things that otherwise they might not do.

Some kinds of sorcery are practised not for evil purposes but for innocent ones and it may not be necessary for the law to interfere with them, and so it is necessary for the law to distinguish between evil sorcery and innocent sorcery.

There is no reason why a person who uses or pretends or tries to use sorcery to do, or to try to do, evil things should not be punished just as if sorcery and the powers of sorcerers were real, since it is just as evil to do or to try to do evil things by sorcery as it would be to do them, or to try to do them, in any other way.

Sometimes some people may act, or may believe that they are acting, under the influence of sorcery to such an extent that—

- (a) their conduct may not be morally (and should not be legally) blameworthy; or
- (b) actions that would ordinarily be regarded as customary offences may, in traditional social groups, be regarded as excusable or capable of being compensated for.

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<sup>32</sup> In the 1972 Pangu Pati *Policy Statement*, among the way the Party was said to have fought for Papua Niuginians (sic) was that it had 'made a new law to stop evil sorcery', quoted in Brian Jinks, Peter Biskup and Hank Nelson (Eds), *Readings in New Guinea History*, (Angus & Robertson, Sydney, 1973), 29.

There is a danger that any law that deals fully with sorcery may encourage some evil-intentioned people to make baseless or merely spiteful or malicious accusations that their enemies are sorcerers solely to get them into trouble with other people, and this is a thing that the law should prevent.

Section 3 of the Sorcery Act stipulated that, notwithstanding anything in any other law or rule of statutory construction, in the interpretation and application of the Sorcery Act the provisions of the Preamble were to be taken fully into account in all cases, and each provision of the Sorcery Act was to be read and construed as being intended to give effect to those provisions. Moreover, under the heading *Existence and Effectiveness of Powers of Sorcery*, s 5 of the Sorcery Act provided as follows:

Even though this Act may speak as if powers of sorcery really exist (which is necessary if the law is to deal adequately with all the legal problems of sorcery and the traditional belief in the powers of sorcerers), nevertheless nothing in this Act recognizes the existence or effectiveness of powers of sorcery in any factual sense except only for the purpose of, and of proceedings under or by virtue of, this Act, or denies the existence or effectiveness of such powers.

However, s 12 of the Sorcery Act tended to hedge the Administration's bets. It provided that if an act of sorcery was 'intended to produce or purports to produce any unlawful result' the person doing the act was guilty of an attempt to produce the result and was punishable accordingly. Accordingly, a person who used sorcery to kill a person could be charged with attempted murder. The Sorcery Act therefore had the potential to punish sorcerers, while simultaneously refraining from committing those enforcing its provisions as to whether sorcery existed.

Indeed, as we have seen, the justices of the Supreme Court had throughout the 1960's grappled with the issue of how to balance the socio-cultural reality of widely held beliefs in the powers of alleged sorcerers with the criminality of people charged with their murder. This was particularly the case in respect of the availability of the mitigation of provocation in such murder trials. An important development therefore was the introduction of s 20 of the Sorcery Act, which provided as follows:

**20. Sorcery as provocation,**

(1) For the avoidance of doubt, it is hereby declared that an act of sorcery may amount to a wrongful act or insult within the meaning of Section 268 of the Criminal Code.

(2) It is immaterial that the act of sorcery did not occur in the presence of the person allegedly provoked, or that it was directed at some person other than the person allegedly provoked.

(3) The likely effect of an act of sorcery relied on by virtue of this section shall be judged by reference, amongst other things, to the traditional beliefs of any social group of which the person provoked is a member.

As Rob O'Regan and others noted at the time, this formulation removed several of the impediments to the use of the provocation defence in sorcery killings.<sup>33</sup> The Sorcery Act was not, however, a complete defence for those who killed purported sorcerers, in that it retained the requirement from s 304 of the Criminal Code that the killing must occur sufficiently soon after the killer had learned about the act of sorcery such that his passion has not cooled. The continuing impact of s 304 is considered below. Reflecting on the Sorcery Act in 1983, American legal academic Jean G Zorn doubted that the fact that it made no reference to the availability of pleas of self-defence or insanity was an oversight. She concluded that the drafters 'probably intended exactly this result'. Although there is no reference to this in the Sorcery Bill's Second Reading debate, it seems reasonable to assume that the Law Officers did indeed take the opportunity to address the provocation issue while steering clear of the even thornier issues of self-defence and insanity.

Finally, s 20 explicitly removed from the courts the opportunity to declare that a 'wrongful act', which was sufficient to count as provocation had to be wrongful as that term had previously been understood, i.e., either unlawful or physically harmful. This was produced by the fact that s 20(1) expressly declared that an act of sorcery may be provocation, and that s 20(3) defined 'wrongful' to be determined by reference to the traditional beliefs of the accused's social group, thereby acknowledging the cultural specificity of the indigenous defendant.

As we will see, these changes would be of great importance to those accused of sorcery-related murders. Otherwise, arguably, they were relevant only to the lawyers of the Territory. Therefore, we will now consider to what extent we can gauge the adoption by the Legislative Assembly of a continuing prosecutorial approach to the practice of sorcery exercised the minds of the wider community.

### Sorcery in the contemporary public discourse

In his speech in the Sorcery Bill's Second Reading debate, Siwi Kurondo informed the House that, while touring the Territory, many people had approached him to say that they supported

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<sup>33</sup> Rob O'Regan, 'Sorcery and Homicide in Papua New Guinea' (1974) 48 *Australian Law Journal*, 80.

the Sorcery Bill.<sup>34</sup> There is no reason to doubt Kurondo, especially given the range of responses Paul Lapun had received in the wake of the Bill's introduction. Certainly, the Department of Education prepared a *Discussion Guide for Senior Students*, as part of an ongoing series on current legislation, [see the cover page below]. However, an examination of the *Papua New Guinea Post Courier* — the national daily paper published in Port Moresby — for the period of the Bill's progress from 1970 to 1971 gives an impression that the Sorcery Bill itself was not one of the most important matters of public concern at that time. The only references to the Bill are one sentence in the column *The Drum* for 1 June 1970;<sup>35</sup> a longer article 'House to move on sorcery' on 15 June 1970;<sup>36</sup> a brief article entitled 'Ban sorcery, house urged' on 19 November 1970;<sup>37</sup> and a one-liner in an article on 2 March 1971 on Bills passed by the House of Assembly.<sup>38</sup>

In addition, two letters to the Editor were published during that time, the first on 15 July 1970, entitled 'Sorcery hard to banish'. In this letter, Ani Tobehai of 'Coastal Papua' argued that Lapun should know that the effectiveness of sorcery lay in 'the mind and heart (or conscience) of those against whom it is being practised'. While the writer agreed that sorcery must eventually be 'abolished', they maintained that the answer was not to be found in a legislative response.<sup>39</sup> The other was a letter on 30 November 1970 from one Sebie D Wat, who gave their address as the University of Papua New Guinea, contemporaneously derided as a 'Mau Mau factory'.<sup>40</sup> The *Post-Courier* headed this letter 'On Lapun's Bill: Politicians should leave the sorcerers alone'. The author declared that sorcery and magic would 'swiftly deteriorate traditional cultures, with consequences deleterious to the nation and particularly to the bulk of the population living in villages':

... It would be a waste of time for the police to look for suspected sorcerers or magicians. I suggest that superstitious politicians let the sorcerers and magicians alone and concentrate on more important political and economic issues.<sup>41</sup>

There are only two other roughly contemporary articles on the Sorcery Act in the *Post-Courier*, after it had been passed. On 27 November 1972 in which the *Post-Courier* reported that the Secretary for Law, Bill Kearney, had told the House of Assembly that the definition of sorcery in the Sorcery Act was complex, because it was 'only bad or evil sorcery that

<sup>34</sup> Papua New Guinea, *Parliamentary Debates*, House of Assembly, 19 March 1971, 4139.

<sup>35</sup> *Post-Courier*, 1 June 1970, <https://trove.nla.gov.au/newspaper/article/250228065>

<sup>36</sup> *Post-Courier*, 17 June 1970, <https://trove.nla.gov.au/newspaper/article/250229622>

<sup>37</sup> *Post-Courier*, 19 November 1970, <https://trove.nla.gov.au/newspaper/article/250246734>

<sup>38</sup> *Post-Courier*, 2 March 1971, <https://trove.nla.gov.au/newspaper/article/250350772>

<sup>39</sup> *Post-Courier*, 30 November 1970, : <https://trove.nla.gov.au/newspaper/article/250232800>

<sup>40</sup> Hank Nelson, *Papua New Guinea: Black Unity or Black Chaos?* (Penguin, Middlesex, 1972), 179.

<sup>41</sup> *Post-Courier*, 30 November 1971, <https://trove.nla.gov.au/newspaper/article/250247907>



the [Act] was seeking to stop'. This was in response to Mr Marcus Kawo, MHA for Usino-Bundi in Madang, during Question Time.<sup>42</sup> The other was on 16 July 1973, in response to a call from Kawo for tougher laws, as he maintained that '[f]rightened people were giving all their money to sorcerers instead of using it to pay council tax and school fees'. The spokesman for the Law Department maintained that the Sorcery Act was as effective as it could be without 'putting innocent citizens in danger of being wrongly convicted'.<sup>43</sup>

However, as we have seen from the Patrol Officers' Reports, prosecutions under the 1893 Sorcery Ordinance had continued apace throughout the Territory. Therefore, it should perhaps not be surprising to note that while the *Post Courier* had limited coverage of the passage of the *Sorcery Act 1971*, it had considerable coverage of sorcery allegations and trials for sorcery-related murders for that same period.

Between September 1969 and November 1971 there were fourteen articles on such prosecutions, with headings such as 'Two taunted into murder court told'.<sup>44</sup> There is also evidence that the provisions of the Sorcery Act were being enforced, in that on 15 October 1969 there was a report of a defendant being fined \$2 for being in possession of charms.<sup>45</sup> Perhaps the most unusual sorcery-related crime was that relating to a New Guinean, Damien Damen. Damen was charged with unlawful deprivation of liberty, having organised his own 'court' to hold two accused sorcerers for two weeks. Clarkson J in the Supreme Court at Kieta held that, while sorcery had to be stopped, private citizens should complain to the police rather than make their own 'arrests'. Damen was fined \$50 and placed on a bond.<sup>46</sup>

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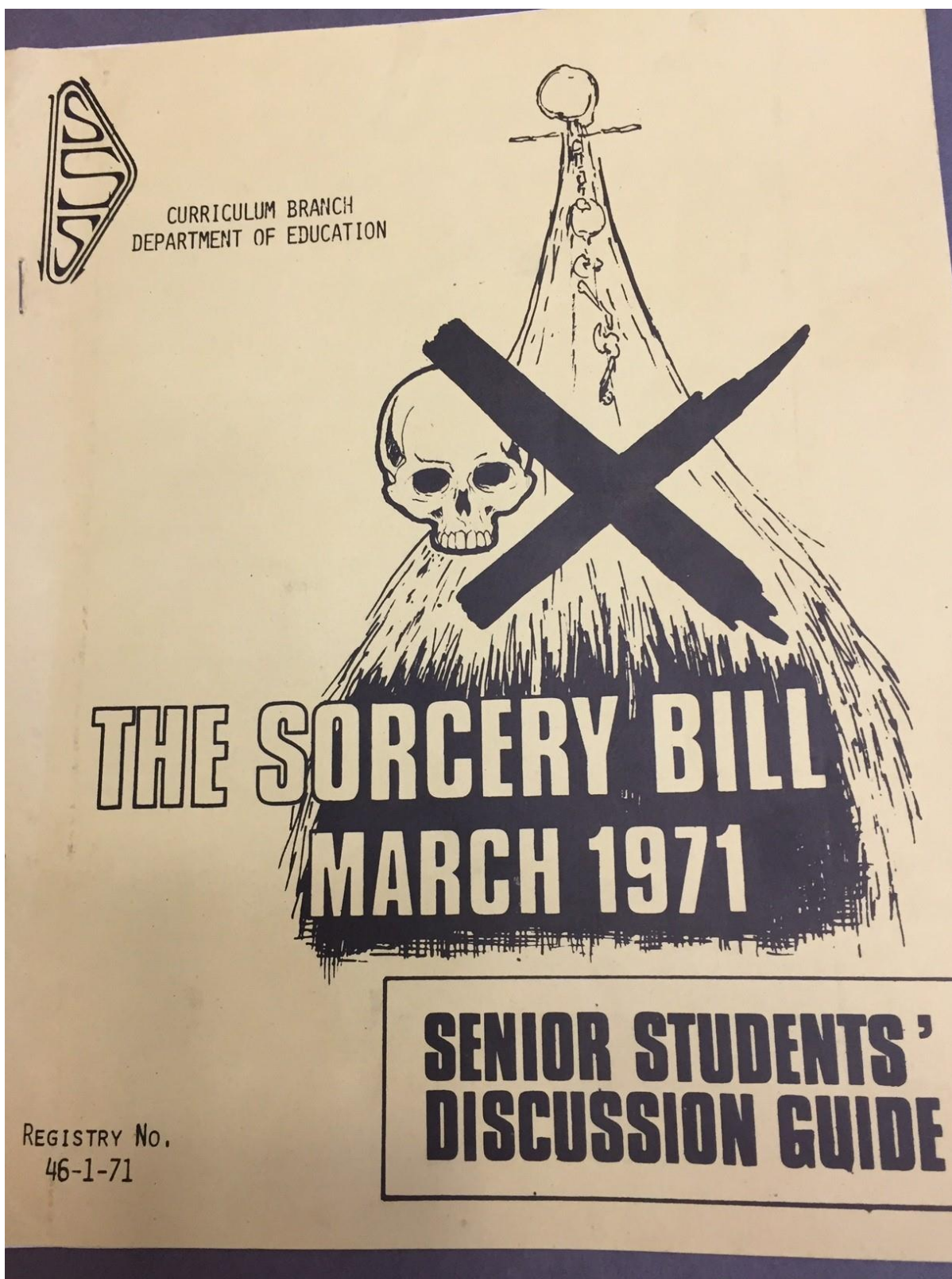
<sup>42</sup> *Post-Courier*, 30 November 1970, <https://trove.nla.gov.au/newspaper/article/250366024>

<sup>43</sup> *Post-Courier*, 16 July 1973, <https://trove.nla.gov.au/newspaper/article/250864078>

<sup>44</sup> These articles are 10 September 1969, 'Sorcery Claim — Man gets 10 years for killing his guest' in Goroka, <https://trove.nla.gov.au/newspaper/article/250154398>; 5 November 1969 — Killing planned for year — 2 gaoled for payback on sorcerer', <https://trove.nla.gov.au/newspaper/article/250359444>; 26 November 1969, 'Kuru sorcery is a way of life for them', <https://trove.nla.gov.au/newspaper/article/250359254>; 26 November 1969, Councillor murdered by hired assassins, <https://trove.nla.gov.au/newspaper/article/250359420>; 28 November 1969 Mt Hagen Stabbing (implements of sorcery found on the accused), <https://trove.nla.gov.au/newspaper/article/250359881>; 18 March 1970, 'I have just killed my mother', <https://trove.nla.gov.au/newspaper/article/250222469>; 28 April 1970, 'Villager says he axed lady over sorcery', <https://trove.nla.gov.au/newspaper/article/250227712>; 27 May 1970 — Gaoled on Charge of Murder, <https://trove.nla.gov.au/newspaper/article/250190715>; 3 March 1971 — 'Two gaoled for killing woman', <https://trove.nla.gov.au/newspaper/article/250350886>; 23 April 1971, 'Superstition and sorcery — it's still a way of life', <https://trove.nla.gov.au/newspaper/article/250253748>; 27 August 1971 — 'Two taunted into murder court told', <https://trove.nla.gov.au/newspaper/article/250202348>; 8 September 1971, 'Sorcerers get three months jail', <https://trove.nla.gov.au/newspaper/article/250201100>; 20 September 1971 — 'Nine on sorcery charges', <https://trove.nla.gov.au/newspaper/article/250202348>

<sup>45</sup> 15 October 1969 — 'Charms cost man \$2', (fine for possession of sorcery implements), <https://trove.nla.gov.au/newspaper/article/250279123>

<sup>46</sup> *Post-Courier*, 25 November 1970, <https://trove.nla.gov.au/newspaper/article/250247371>



Cover — *The Sorcery Bill, March 1971: Senior Student's Discussion Guide*.<sup>47</sup>

<sup>47</sup> Author's photograph, *The Sorcery Bill, March 1971: Senior Student's Discussion Guide*, Department of Education, Port Moresby 1971, held in State Library of New South Wales.

The first article in the *Post-Courier* after the passage of the Sorcery Act was on 20 September 1971, when nine men from the Bainings District of East New Britain were charged following investigations in the Vunalama area.<sup>48</sup> Then, on 1 November 1971, the paper reported that seven men appeared in the Lake Kapiago District Court charged with having killed a woman with arrows and axes because they thought she was a sorceress.<sup>49</sup> An article on 16 May 1972 reported that the Sorcery Act had been invoked for the first time at the Supreme Court sittings at Goroka, in which Raine J told the appellants Iaso and Kapoi that: 'Because you thought this was a sanguma man I do not find you guilty of wilful murder, or murder. You made a mistake and you are guilty of manslaughter'.<sup>50</sup> They were sentenced to two years and nine months' imprisonment. As this article reported on the important decision of *R v Joharumba*,<sup>51</sup> we will now examine the consideration of the Sorcery Act in the Courts.

### The Sorcery Act on trial

The new Act had been first subject to judicial consideration in March 1972 in *Tokoi v Bryant*, an appeal heard by Frost J sitting in Rabaul.<sup>52</sup> Under s 4 of the Sorcery Act, an 'act of sorcery' was defined to mean any act (including a traditional ceremony or ritual) which was intended to bring, or purported to be able or adapted to bring, powers of sorcery into action or to make them possible or carry them into effect. The term 'forbidden sorcery' was defined to mean 'sorcery other than innocent sorcery', and 'innocent sorcery' was defined to mean sorcery of a kind referred to in the First Schedule to the Act. The First Schedule contained an extensive definition of innocent sorcery:

1. For the purposes of this Act, "innocent sorcery" is sorcery that—
  - (a) is protective or curative only, or is not intended to produce, and does not purport to be calculated or able or adapted to produce, any harmful or unlawful result, or to exert any harmful, unlawful or undue influence on any person; and
  - (b) is generally regarded in the social groups of which—
    - (i) the accused person; and
    - (ii) the person at whom the act was directed; and
    - (iii) the person whose conduct was intended to be influenced, are respectively members as being, by custom, legitimate or harmless and not offensive in all the circumstances of the case.

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<sup>48</sup> *Post-Courier*, 20 September 1971, 'Nine on sorcery charges'

<https://trove.nla.gov.au/newspaper/article/250202348>

<sup>49</sup> *Post-Courier*, 1 November 1971, "'Sorcery" killing: seven for trial'

<https://trove.nla.gov.au/newspaper/article/250856122>

<sup>50</sup> *Post Courier*, 16 May 1972, '2 convicted on sorcery charge',

<https://trove.nla.gov.au/newspaper/article/250294308>

<sup>51</sup> [1972] PGSC 9 (11 May 1972).

<sup>52</sup> *Tokoi v Bryant* [1972] PGSC 6 (21 March 1972).

2. Subject to Section Sch. 1.3. the circumstances referred to in Section Sch. 1.1. include any circumstance (including the courtship of an unmarried person by an unmarried person, betrothal, marriage, the fact that the act of sorcery was intended only to counteract or nullify the effect of a previous act of sorcery or any customary compensatory or conciliatory arrangement) that arose before the act of sorcery, or that arose, or that the court dealing with the matter is satisfied will arise, after the act.

3. The circumstances referred to in Section Sch. 1.1. do not include—

- (a) any act, matter or thing that constitutes, or is an ingredient of, an offence committed by or on behalf of the accused person against any other law; or
- (b) any act, matter or thing that is repugnant to the general principles of humanity or is not in the public interest; or
- (c) any other act, matter or thing that, in the opinion of the court dealing with the matter, is improper to be taken into account.

4. For the purposes only of Section Sch. 1.3.(b) and (c), an act of sorcery shall not, simply as such, be deemed to be not in the public interest or improper to be taken into account.

5. For the purpose of allowing any circumstance referred to in Section Sch. 1.1. to arise, if the court dealing with the matter considers it proper and in the interests of justice and the amicable settlement of social or personal disputes or differences to do so the court may by order adjourn the hearing of the matter for such period and on such terms and conditions (including the entering by any person into a recognizance for any purpose connected with the matter) as the court thinks proper.

Frost J noted that while there was no precise definition of an act of forbidden sorcery, it was plain from s 4 of the Sorcery Act that an act of forbidden sorcery meant an act of sorcery *other than* innocent sorcery. Accordingly, he held that for the defendant to admit the truth of an information under s 11 it must be shown that he admitted first, that there was an act of sorcery within the meaning of that definition; and, second that the sorcery was other than innocent sorcery as defined in the First Schedule.<sup>53</sup>

Ascertaining whether this had in fact happened required reference to the applicable procedure for the hearing of simple offences. These was set out s 134 and s 135 of the *District Courts Ordinance 1964*, as follows:

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<sup>53</sup> *Tokoi v Bryant* [1972] PGSC 6 (21 March 1972).

134. Where the defendant is present at the hearing of an information, the substance of the information shall be stated to him, and he shall be asked if he has cause to show why he should not be convicted or why an order should not be made against him, and if he has no such cause to show the court may convict him or make an order against him accordingly.

135(1). If the defendant does not admit the truth of an information, the court shall proceed to hear the complainant and his witnesses and the defendant and his witnesses and also such witnesses as the complainant examines in reply, if the defendant has given evidence other than as to his general character.

135(2). The court, having heard what each party has to say and the evidence adduced, shall consider and determine the whole matter, and shall convict or make an order upon the defendant, or dismiss the information, as justice requires.

However, in another attempt at that softening of the common law process which characterised the sentencing process in Papua, a distinct practice had been adopted in relation to indigenous defendants. This was that, in applying s 134 and 135 of the District Court Ordinance, the Magistrate would put to the defendant the various elements of the charge in order to obtain an answer as to whether each such element was admitted or denied. However, as will be seen, Magistrates had a tendency to overstep the mark, by too broadly interpreting and applying these provisions. Frost J held in *Tokoi v Bryant* that a Magistrate's questions to the appellant resulted in it being unclear as to whether the appellant had in fact admitted to the elements of the offence under the Sorcery Act. The first question put to the appellant by the Magistrate was:

It is said that on the 18th August at Volavolo you with other men made sorcery (poison), is this true?' The defendant replied 'Yes'.<sup>54</sup>

Frost J held that this did not amount to an admission of an act of *forbidden* sorcery within the meaning of the Sorcery Act, thereby resulting in the appellant being denied a trial of the charge. As it could not be said that there had not been a substantial miscarriage of justice, the appeal was allowed and the conviction and sentence overturned.

What is of particular interest in relation to the distinction between 'poison' and 'sorcery' which Paul Lapun had stressed in the Sorcery Bill's Second Reading Speech is that the Magistrate obviously considered that 'poison' and 'sorcery' were interchangeable terms. This terminological fluidity is also shown in decisions of Mann CJ in the early 1960s such as *R v Korongia*, in which he referred to sorcery, but noted that the evidence came through Pidgin to

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<sup>54</sup> *Tokoi v Bryant* [1972] PGSC 6 (21 March 1972).

English and that the Pidgin word 'poison' had been used;<sup>55</sup> and *R v Napa*, where he averted to 'the ambiguity of the word 'poison' as used by different generations'.<sup>56</sup> This blurring was not simply something that occurred in colonial courts — in his article on a 1994 sorcery dispute in an Erima Village Court, Australian anthropologist Michael Goddard noted that the disputants employed the Tok Pisin expression *Posin pasin*, which continued to be used as 'a gloss for the indistinct range of phenomena covered by the official term 'sorcery''.<sup>57</sup> The importance of this fluidity is that there was an indigenous distinction between 'poison' and 'sorcery' which was not necessarily reflected in the statutory distinction between 'sorcery' and 'forbidden sorcery'. It also highlights that the terminology used tended to elide the differences between the nuanced indigenous and blunt colonialist viewpoints.

Further Supreme Court consideration of the lower court process took place in June 1972. In the case of *Mau'u v Pare*,<sup>58</sup> Frost J heard an appeal from the East New Britain Local Court held at Pomio on 16 February 1972. Here the appellant had been convicted of an offence against the provisions of s 10(1) of the Sorcery Act, namely, that on or about 22 December 1971, at Koihau Village, he did pretend to be a sorcerer. He was sentenced to four months imprisonment. The grounds of appeal were that a plea of guilty should not have been entered; there was insufficient evidence to support the conviction; and the sentence was excessive.

The facts were that the appellant had taken some fruit of a Kapiak tree ('highland breadfruit') owned by one Tokae Binga. As Tokae was upset at this he decided to get rid of the tree in question by ring-barking it. When the appellant discovered this he tried to ascertain who had done it, but no one in the village would tell him, including Tokae Binga. The appellant then collected some Bal Bal twigs and told people that he was going to burn them at the base of the Kapiak tree, a magic process which the local Kol people believe is designed to kill the person who was responsible for the ringbarking. Fearing for his life, Tokae Binga reported the matter to the police on patrol. Pursuant to the procedure under the District Courts Ordinance referred to above, the statement of facts on which the charge was based was handed to the Magistrate. When the charge was read and explained to the appellant, he replied: 'Yes this is true, I did it to trick him'. There were similar words to these in his statement to the police, but they did not appear in the statement of facts read out to him in court.

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<sup>55</sup> *Regina v Korongia* [1961] PGSC 3 (24 May 1961).

<sup>56</sup> *Regina v Napa* [1962] PGSC 24 (9 February 1962). Mann CJ's impression of the appellant Napa was that he was 'a cunning old scoundrel, of low mental development but of considerable capacity to turn a situation to his own advantage'.

<sup>57</sup> Michael Goddard, 'The Snake Bone Case: Law, Custom, and Justice in a Papua New Guinea Village Court', (Sep 1996) 67(1) *Oceania*, 56.

<sup>58</sup> [1973] PNGLR 64 (1 June 1972).



Frost J considered whether this amounted to an unequivocal admission of guilt. He noted that it was not alleged against the appellant that he had in fact burned the twigs at the base of the Kapiak tree, rather that he had collected them. This could at most be an ‘action preparatory to doing an act of sorcery’, and evidence that the appellant claimed he had powers of sorcery. Moreover, Frost J considered that the addition of the words ‘I did it to trick him’ rendered it doubtful as to whether the appellant was in fact claiming to have powers of sorcery. Therefore, he held that, as the appellant’s words did not amount to an unequivocal admission of guilt for the purposes of the District Courts Ordinance, it could not be said that there had not been a substantial miscarriage of justice, citing Fullagar J in the High Court in *Mraz v The Queen*.<sup>59</sup> Therefore he remitted the matter to the District Court. Presumably referring to *Tokoi v Bryant*, Frost J also noted that this was not the first occasion that the Court had found it necessary to point out that Magistrates should be ‘very slow to accept any plea containing words of apparent qualification as a plea of guilty’, particularly where, as in this instance, the charge was a serious one.

Soon after the decision in *Tokoi*, Raine J had cause to consider the Sorcery Act in the May 1972 decision of *R v Joharumba*, noted above.<sup>60</sup> In this matter, the accused lived in the village of Ikanofi in the Eastern Highlands. Raine J observed that they belonged to a social group which believed in sorcery ‘as strongly... as the belief of some more sophisticated people in miracles and visions’,<sup>61</sup> a parallel not uncommonly raised by devoutly Christian Papua New Guineans in the public square. On the day in question there was a motor vehicle accident in which a child — although not a child from Ikanofi — was injured. Having fled the scene of the accident the deceased ran through the bush into a coffee garden. One of the accused maintained that in the ensuing tumult he heard someone in the village call out ‘Sanguma man’, after which he attacked the deceased with arrows. As the evidence was clear that the deceased had died from axe wounds inflicted by the (other) accused, the issue was whether they all should have been sentenced for manslaughter rather than murder, due to the availability of the defence of provocation under the Sorcery Act.

At the outset, Raine J noted that if he accepted that there was an honest and reasonable, yet mistaken, belief that there had been an act of sorcery — or was not satisfied that there was not one — the accuseds’ criminal responsibility might be less than would have been possible prior to 8 July 1971, when the Sorcery Act came into effect. As considered in Chapter Four, s 24 of the Papuan Criminal Code provided that a person who did or omitted to do an act

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<sup>59</sup> (1954-56) 93 CLR 493, 514.

<sup>60</sup> [1972] PGSC 9 (11 May 1972).

<sup>61</sup> [1972] PGSC 9 (11 May 1972).

under an honest and reasonable, but mistaken, belief in the existence of any state of things was not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as were believed to exist. Under s 304 of the Code, when a person who unlawfully killed another under circumstances which, but for the provisions of s 304, would constitute wilful murder or murder; did the act which causes death in the heat of passion caused by sudden provocation; and did so before there was time for that passion to cool, they were guilty of manslaughter only. Thus, Raine J considered that, applying the facts in *Joharumba* to s 24 of the Code and combining them with s 20 of the Sorcery Act, might result in the following outcome:

If the accused men do acts of violence under an honest and reasonable, but mistaken belief that an act of sorcery has been committed, then, if the likely effect of that imagined act of sorcery, viewed in the light of the accuseds' groups' traditional beliefs could have serious effects, then the accused men would not be criminally responsible for their violent acts to any greater extent than if an act of sorcery actually had been committed.<sup>62</sup>

Raine J noted that, under s 20(1) of the Sorcery Act, an act of sorcery may amount to a 'wrongful act' within the meaning of s 268 of the Criminal Code. He considered that, in this instance, it would have been a wrongful act if the deceased had indeed been a Sanguma man, as he found that Sanguma men in the Ikanofi region did not merely 'point the bone' at victims, but actually killed them. Moreover, the fact that, under s 20(2) of the Sorcery Act, the acts of sorcery need not occur in an accused's presence and could be directed at someone other than the accused. This meant that a more general fear of sorcery being meant for the accuseds' *community* was sufficient. Therefore, as far as s 268 of the Code was concerned, Raine J considered that:

...the fact that the deceased was a stranger and was running, and that he was near a coffee garden, where Sanguma men often pounce on unsuspecting villagers as they work, makes it clear that the accused believed the sorcerer would have been involved in 'forbidden sorcery' ... and therefore unlawful. This sorcery would be directed, in the village of Ikanofi, towards all and sundry, and probably at persons who stood in a parental, filial or fraternal relationship to the accused.

Although it was unquestionably an intentional killing, Raine J held that the appearance of the deceased was 'sudden' within the meaning of s 304 of the Code, and was satisfied that 'there would have been no time for [the accused's] passions, quite certainly aroused, to cool'. Moreover, he was satisfied beyond reasonable doubt that, were it not for s 4 and s 20 of

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<sup>62</sup> [1972] PGSC 9 (11 May 1972). Emphasis in the original.



the Sorcery Act read with s 24, s 268 and s 304 of the Criminal Code, the accused would have been guilty of wilful murder. However, because of his view of the interaction of the statutes, and the facts he had been able to ascertain, Raine J found the accused guilty of manslaughter.

Presumably Raine J had some doubts about his interpretation of the interaction between the new Act and the Criminal Code, as he referred his decision in *Joharumba* to the Full Court of the Supreme Court for review under s 30 of the *Supreme Court (Full Court) Ordinance 1968*. In November 1973 the Full Court handed down its decision in *K.J. v Regina*.<sup>63</sup>

Minogue CJ and Kelly J noted that the learned trial judge — that is, Raine J — had found that the accused clearly believed the sorcerer had been involved in ‘forbidden sorcery’ under s 4 of the Sorcery Act. As noted by Raine J, ‘act of sorcery’ is defined in s 4(1) as meaning (unless the contrary intention appears) any act (including a traditional ceremony or ritual) which was intended to bring, or which purported to be able or adapted to bring, powers of sorcery into action or to make them possible or carry them into effect. Therefore, Minogue CJ and Kelly J found that, in applying s 24 of the Code, the ‘state of things’ referred to therein would be whether a wrongful act or insult of the nature referred to in s 268 had been done or offered. If there were an honest and reasonable but mistaken belief that this had occurred, provocation could then operate as a defence, or in the case where s 304 applied, to reduce wilful murder or murder to manslaughter.

Minogue CJ and Kelly J summarised the result of reading together these provisions as follows:

- (1) A person who kills another under circumstances which would otherwise constitute wilful murder or murder,
- (2) and who does so under an honest and reasonable but mistaken belief that,
- (3) that other has committed or is in the process of committing an act of sorcery of such a nature, judged by reference to the traditional beliefs of the social group to which the accused belongs as to be likely when directed at the accused or at some person to whom the evidence discloses the accused stood in a protective or obligatory clan relationship to deprive the accused of the power of self-control and to induce him to assault the person who he thus believes has committed or is committing that act of sorcery,
- (4) and who does the act which causes death in the heat of passion caused by that belief on the sudden and before there is time for his passion to cool,
- (5) is guilty of manslaughter only.

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<sup>63</sup> [1973] PNGLR 93 (13 November 1972).

They also held that the definition of ‘act of sorcery’ in s 4(1) of the Sorcery Act appeared to contemplate that an act may constitute an act of sorcery for the purpose of that Act ‘even though it may only be, as it were, a step in the process of carrying powers of sorcery into effect’. They therefore followed Frost J’s finding in *Mau’u v Pare* that collecting twigs could be an ‘action preparatory to doing an act of sorcery’ for the purposes of the Sorcery Act.<sup>64</sup> They upheld Raine J’s applicability of provocation to the facts at hand and noted that, in reading together all of the relevant provisions, the pivotal fact was not the nature of the victim, but the nature of *the acts* which caused the belief to arise in the mind of the accused:

The fact that a man is or is believed to be a sanguma man is not to the point except in so far as it may bear on the nature and quality of his acts; it would be wrong to conclude as a matter of law that because an act of sorcery is done by a sanguma man it is therefore necessarily a wrongful act; this is a question of fact to be determined on the evidence.<sup>65</sup>

Prentice J strongly dissented. He held that the provisions of s 268 and s 304 of the Criminal Code on the one hand, and s 24 of the Sorcery Act on the other, were so inconsistent that they could not stand together, directly opposite to the conclusion of Minogue CJ and Kelly J. As he held that provocation could only be considered in respect of the person who had provoked the violence, Prentice J considered that it was ‘completely anomalous to find excuse in an imagined provocation for an assault upon an innocent (inoffensive) person’. As s 304 of the Criminal Code required ‘the heat of passion’ to be *caused by* sudden provocation, this could not apply where — as on the facts in *K.J.* — no such act of provocation had actually occurred, but was ‘merely imagined’. This appears to directly conflict with Raine J’s findings in *R v Joharumba* that the legislative regime envisaged that the feared sorcery could be directed ‘towards all and sundry’.<sup>66</sup>

However, as with the majority, Prentice J found that the mere existence or presence of a person who is known to be, or has been, a practising sorcerer could not, as a matter of law, constitute an act of sorcery under s 4 of the Sorcery Act. He held that the appropriate question was not whether the act (or imagined act) could have serious effects, but rather whether the act in question would be likely when done to an ordinary person (in the accuseds’ cultural background) to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult was done (or imagined to have been done).

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<sup>64</sup> [1973] PNGLR 64 (1 June 1972).

<sup>65</sup> [1973] PNGLR 93 (13 November 1972).

<sup>66</sup> [1972] PGSC 9 (11 May 1972).

It seems reasonable to assume that Prentice J's wrangling with the issue of the 'imagined' act of provocation in *K.J. v Regina* may have been one of the decisions which gave rise to Bruce Ottley and Jean Zorn's observation that, in Papua New Guinea, the view of the colonial Supreme Court was that:

...although most people believe in sorcery, and most sane people do so, no reasonable person would. This series of cases leads inevitably to the conclusion that the court believed there to be many sane but few reasonable persons in its jurisdiction.<sup>67</sup>

Within six months of the Full Court decision of *K.J. v Regina*, the issue of provocation under the Sorcery Act was again considered, this time by Denton AJ sitting in Tari, in the Highlands. In the matter of *R v Noloda*,<sup>68</sup> the accused were two brothers indicted on a charge of wilful murder of one Kauri Kesese, a purported sorceress. Kauri had allegedly killed the wife of one of the accused by the use of forbidden sorcery. On the sparse facts available to the court, after the death occurred Kauri ran away; the accused both then chased her for about one and a half miles; killed her with knives; and threw her body into the Sewa River.

Only two weeks before, the Crown had put to Denton AJ in the murder case of *R v Obu*<sup>69</sup> that the relevant test of provocation was based only on s 304 of the Code and the common law as it applied in Papua. Due to the hierarchy of courts, he felt bound to follow the High Court's recent decision in *Kapronovski v The Queen*,<sup>70</sup> an appeal from Queensland, rather than the Full Court of the Supreme Court in *K.J. v Regina*. This was to the effect that s 268 of the Criminal Code did not apply to cases arising under s 304 of the Code. Therefore, the Crown argument as to the proper test of provocation succeeded in *Obu*.

He therefore embarked in *Noloda* on a consideration as to whether sorcery could amount to provocation at common law. He noted that, while it was possible that there might in fact be English or American authority on the subject, generally 'trials of witches seem to have been the practice rather than trial of those who dealt with them'.<sup>71</sup> He therefore concluded that sorcery generally could not amount to provocation at common law. However, on the facts, he found that Kauri's act of running away suggested that there may have been an act — and as evil sorcery, a wrongful one — committed by her, which could form the basis of provocation for the purposes of s 20(2) of the Sorcery Act. Applying an objective test of the average Huli

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<sup>67</sup> Bruce Ottley and Jean Zorn, 'Criminal law in Papua New Guinea: Code, Custom and Courts in Conflict' (1983) 31 *American Journal of Comparative Law*, 266.

<sup>68</sup> [1974] PGSC 45 (15 May 1974).

<sup>69</sup> [1974] PGSC 43 (6 May 1974).

<sup>70</sup> (1973) 133 CLR 209.

<sup>71</sup> [1974] PGSC 45 (15 May 1974)

villager, Denton AJ doubted whether there had been time for the accuseds' passion to cool. Having found it impossible on 'the paucity of evidence' to distinguish between the availability of provocation as a defence to the accused whose wife had died and to his brother, Denton AJ acquitted them both of wilful murder and convicted them both of manslaughter.

### Custom and the colonial law across the Empire

In interpreting the Sorcery Act, the expatriate justices of the Supreme Court continued to apply the common law principles in which they had been trained in Australian law schools. They ameliorated what they considered to be universally applicable legal rules with reference to the realities of traditional village life in Papua New Guinea generally, and to the belief in the effective practice of sorcery more specifically. Reflecting on the efforts of the court in 2006, Jean Zorn damned them with faint praise, noting that '[m]any of them [were] good and honest men, who wish[ed] to do good'.<sup>72</sup> However, she felt that, as a result of this training, they were inflexible positivists with 'a tenet of their secular religion' that rules were 'to be read exactly as written, unless so ambiguous as to have essentially no meaning on their face at all.'<sup>73</sup>

In the early 1970's Zorn had been a law lecturer at the University of Papua New Guinea, where she established the course in customary law. After independence, she served on the Law Reform Commission, which had among its aims to make recommendations in relation to the restatement, codification, amendment or reform of customary laws.<sup>74</sup> She later argued that the Sorcery Act was promoted in the late colonial era as 'the answer to the problems raised by a court that refused to accept that a belief in sorcery might be reasonable'. As the Territory neared independence, Papua New Guineans were talking about a 'return to a truer Papua New Guinean legal culture, a legal culture based upon the values, norms and processes of customary law'.<sup>75</sup> Accordingly, as sorcery was perhaps more socially enmeshed than any other custom considered by the Supreme Court, it is very much worth taking a discursion into the application by the courts during this time of the *Native Customs (Recognition) Ordinance 1964* [the Recognition Ordinance].

The Recognition Ordinance employed the standard colonial legal safeguard that custom was not to be recognised and enforced where it was 'repugnant to the general principles of humanity, inconsistent with any law in force in the country or, in the opinion of the court, unjust

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<sup>72</sup>Jean G Zorn, 'Women and Witchcraft: Positivist, Prelapsarian, and Post-Modern Judicial Interpretations in PNG' in A Whiting & C Evans, *Mixed Blessings Laws, Religions, and Women's Rights in the Asia-Pacific Region* (Martinus Nijhoff Publishers, Boston, 2006), 80.

<sup>73</sup> *Ibid.*, p 80.

<sup>74</sup> *Law Reform Commission Act 1975*, s 9(1)(d).

<sup>75</sup> Zorn, n 69, 78.

or against the public interest': s 6 of the Recognition Ordinance. The manner in which the Repugnancy Doctrine was to be applied was set out by Sir Kenneth Roberts-Wray, legal adviser at the Colonial Office in the 1940s and 1950s, in his 1966 book *Commonwealth and Colonial Law*. Roberts-Wray declared that where a customary law was 'repugnant to good conscience', colonial courts could not disregard Western norms in order to accept as a persuasive argument that the 'conscience of the community concerned sees nothing wrong with the rule'.<sup>76</sup> In other words, the litmus test remained the conscience of that vaguely Christian reasonable man on the Clapham Omnibus looking forward to his haddock and chips. Moreover, the judicial ascertainment of 'custom' in the Territory was more easily said than done; it was argued by the colonisers that the ephemerality of native customs were such that 'a rule which was honoured in 1968 has been superseded in 1971 by something very different'.<sup>77</sup>

Fortunately, as with the reasonable Papuan, the Territory's judges were given guidance by their Lordships of the Privy Council:

... almost all the laws and customs of the world, civilised and uncivilised, come up for discussion in that dingy little room where the Judicial Committee of the Privy Council hold their sittings.<sup>78</sup>

Despite Viscount Haldane's sanguine view in 1922 that the Privy Council made its decisions with 'a view to the law and spirit of the country from which the appeal is brought, and in accordance with the traditions of that country',<sup>79</sup> critics argued that it treated the highest colonial courts as second rate. This was due to the fact that in the metropole, as early as 1918 the United Kingdom Court of Appeal had held in that Privy Council decisions were not theoretically binding on English courts, but of great weight and to be commonly followed in like cases.<sup>80</sup> Otherwise, Privy Council decisions in respect of one imperial jurisdiction were

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<sup>76</sup> Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (FA Praeger, New York, 1966), 578. As Shaunnagh Dorsett notes, repugnancy had a similar effect to common law notions of *malum in se*, thereby providing 'malleable... yard-sticks by which the acceptability of customs could be judged' by the colonisers: Shaunnagh Dorsett, 'Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of "Barbarous" Customs in New Zealand in the 1840's', (2009) 30(2) *The Journal of Legal History*, 175.

<sup>77</sup> Bernard Brown, 'Outlook for Law in New Guinea' (Jun 1971) 41(4) *Oceania*, 248.

<sup>78</sup> Sir Courtenay Ilbert, 'The Work and Prospects of the Society', (1908) 9(1) *Journal of the Society of Comparative Legislation*, 23.

<sup>79</sup> Lord Haldane, 'The Work for the Empire of the Judicial Committee of the Privy Council' (1922) 1(2) *The Cambridge Law Journal*, 148.

<sup>80</sup> *London Joint Stock Bank v Macmillan & Arthur* [1918] AC 777. They were, however, not always followed; in *Port Line v Ben Line Steamers Ltd* [1958] 2 QB 146, Diplock J expressly refused to follow the 1926 decision of *Lord Strathcona Steamship Co v Dominion Coal Co* [1926] AC 108, an appeal from the Supreme Court of Nova Scotia.

expected to apply to the courts of other countries from which appeals to it lay, in cases where the law to be applied was the same in both countries.<sup>81</sup>

On this basis, Nigerian legal scholar Bonny Ibhawoh concludes that the Privy Council was a key site where ‘colonial legal modernity was fashioned’,<sup>82</sup> and the historical significance of its decisions lay in ‘the breadth of their influence as venues for adjudicating colonial difference across the Empire’.<sup>83</sup> Thus, in Papua and New Guinea, the traditional starting point for the ascertainment of custom was the 1916 decision in *Angu v Attah*. Hearing an appeal from the Gold Coast (modern Ghana), the Privy Council noted as follows as to the content of a ‘native law’:

...As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them.<sup>84</sup>

Subsequently, in *Commonwealth Shipping Representative v. P. & O. Branch Service*, Sumner LJ distinguished ‘evidence’ in the ordinary sense from information on which such ‘judicial notice’ is based as follows:

Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.<sup>85</sup>

The reverse of what came to be known as the rule in *Angu v Attah* was that, where colonies had structures of ‘native’ courts and judges, it was assumed that they would know their own customary rules and practices. Accordingly, formal evidence of these would not be required. Thus, in the 1957 Northern Rhodesian case of *Chitambala v R*, Somerhough J observed that:

... it seems clear to me that a native court whether of the first instance or of appeal may be presumed to know the native law and custom prevailing in the area of its jurisdiction in the same manner that the judges of the High Court are presumed to know the common law.<sup>86</sup>

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<sup>81</sup> See *Fatuma Binti Mohamed Bin Salim Bakhshuwn v. Mohamed Bin Salim Bakhshuwn* [1952] AC 1 at 14, and H H Marshall, ‘The Binding Effect of Decisions of the Judicial Committee of the Privy Council’ (Jul 1968) 17(3) *The International and Comparative Law Quarterly*, 743.

<sup>82</sup> Bonny Ibhawoh, *Imperial Justice: Africans in Empire’s Court*, 4.  
<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199664849.001.0001/acprof-9780199664849>

<sup>83</sup> *ibid.*, 15.

<sup>84</sup> *Angu v Attah* (1916) Privy Council Appeals 1874-1928, 43 (Gold Coast)

<sup>85</sup> [1923] AC 191, 212.

<sup>86</sup> [1957] NRNL 29 at 39, cited in J Ademola Yakubu ‘Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria’, (2005) 30(4) *Africa Development*, 217. Somerhough J’s other claims to fame were

As there were no native courts in Papua and New Guinea until the introduction of Village Courts in 1974, it was up to individual Australian kiaps and judges to determine what — if any — native custom might bear upon the case before them. This was to be discerned from their own local enquiries. In this endeavour they were given some guidance by another Privy Council decision, again from West Africa This was *Eleko v Officer Administering the Government of Nigeria*, which in 1931 outlined what was generally considered to be the main characteristics of ‘native law and custom’ throughout the British Empire. These were the acceptance of the posited customary norm by the community; its adaptability, flexibility, uncertainty and divergence; its multiplicity; and its unwritten nature.<sup>87</sup> These common features were the very opposite of the approach of those imperial administrators who aimed to codify traditional law, and thereby petrify it at a point in time.<sup>88</sup>

As early as 1908, these characteristics had been noted by the Chief Justice of the Supreme Court of Nigeria, Sir Willoughby Osborne. In the case of *Lewis v Bankole* the court had to consider the ‘vexed question of the tenure of what is known as family property by native customary law’.<sup>89</sup> Osborne CJ noted as follows:

One of the most striking features of West African native custom... is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character’.<sup>90</sup>

Nonetheless, he held that, while the plaintiffs who argued joint family ownership of the property in question may have had native law and custom on their side as it was ‘understood and possibly applied’ in the 1860s, that was not the native law he was bound to apply in 1908.

However, even if it had been the current custom, Osborne CJ felt that it was his duty to decide that the earlier norm of the division of family property was ‘repugnant to the principles of equity’, such that he would have refused to enforce it. However, the repugnancy of common

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being the lawyer in charge of British war crimes investigations into medical experiments on prisoners in the Ravensbrück women’s camp (see P Weindling, ‘The Origins of Informed Consent: The International Scientific Commission on Medical War Crimes, and the Nuremberg Code’, (Spring 2001) 75(1) *Bulletin of the History of Medicine*, 37); and, subsequently, to be the original trial judge in the political criminal trial in Northern Rhodesia of four United National Independence Party members who were alleged to have murdered a white housewife on 8 May 1960, by setting her on fire with petrol. He died thirty-five days into the trial.

<sup>87</sup> [1931] AC 662.

<sup>88</sup> See, e.g., Brett L Shadle, ‘Changing Traditions to meet current altering conditions’: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60’ (1999) 40 *The Journal of African History*, 411.

<sup>89</sup> [1908] 1 NLR 81.

<sup>90</sup> [1908] 1 NLR 81, 100-101.

ownership was not confined to Britain's possessions in Africa, as evidenced by the 1955 New Zealand Court of Appeal decision in *Re Bed of Whanganui River*.<sup>91</sup>

Returning to the courts of Papua and New Guinea in the 1960s, contemporaries argued that Minister Hasluck had discouraged the use of such African precedents.<sup>92</sup> However, as we have seen, the 1947 Privy Council decision of *Kwaku Mensah* played a seminal role in the development of the defence of provocation in the Territory by the Supreme Court justices. This effectively began with Mann CJ's determination in *R v Hamo* that the expression 'ordinary person' in s 268 of the Criminal Code meant 'an ordinary person in the environment and culture of the accused'.<sup>93</sup> Indeed, *Kwaku Mensah* was referenced by Menzies J in one of the few criminal cases from Papua New Guinea ever to reach the Australian High Court, namely the 1964 decision of *Mamote-Kulang v The Queen*.<sup>94</sup> In that case, the High Court unanimously rejected the appeal from a manslaughter verdict of Ollerenshaw J, with Windeyer J noting that, 'as the learned trial judge has a knowledge of the Territory based on long experience', the High Court should not interfere with his ruling.<sup>95</sup> This acknowledgment of the 'colonial difference' of the Territory cannot help but be reminiscent of the view of Isaacs J in *R v Bernasconi* some fifty years before of the need for the High Court to take into account 'the life tints... [of] a region like New Guinea'.<sup>96</sup>

### Custom and land claims

Thus, when considering the content of native custom in the light of the Recognition Ordinance in respect of claims for traditional land ownership, both *Angu v Attah* and *Eleko* were cited by Minogue J in the 1966 case of *Tolain v Administration of the Territory of Papua and New Guinea*.<sup>97</sup> The appellants claimed to be the owners by native custom of land known as Vulcan Island, which had arisen from the sea bed a few years before the colonization of New Britain by Imperial Germany. On 28 May 1937, a further volcanic eruption occurred, such that Vulcan Island became joined to and part of the mainland. Prior to that eruption the appellants had fished and collected coral and shell fish over the shallow reef separating Vulcan Island from the mainland to the exclusion of all others. On 15 November 1937, Administrator McNicoll of

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<sup>91</sup> [1955] NZLR 419. See also, F M Brookfield, 'The Waitangi Tribunal and the Whanganui River-Bed' (2000) 1 *New Zealand Law Review*, 1.

<sup>92</sup> However, Mann CJ had first briefly referred to *Kwaku Mensah* in *R v Koruapu* [1957] PGSC 11 (22 July 1957), in which he found provocation reduced a murder sentence to manslaughter where the Highlands appellant had killed with a handy axe the adulterous partner of his sister-in-law.

<sup>93</sup> *R v Hamo* [1963] PNGLR 9.

<sup>94</sup> (1964) 111 CLR 62 (25 March 1964).

<sup>95</sup> (1964) 111 CLR 62 (25 March 1964).

<sup>96</sup> (1915) 19 CLR 629, 639.

<sup>97</sup> *Tolain, Tapalau, Tomaret, Towarunga, and Other Villagers of Latlat Village v Administration of the Territory of Papua and New Guinea; In re Vulcan Land* [1965-66] PNGLR 232 (5 May 1966)



New Guinea gazetted this newly emerged land as land belonging to the Administration of the Mandated Territory, at which time members of the appellants' clans occupied it so as to plant crops and trees. They continued to do so until February 1942, when the Japanese Imperial Army occupied Vulcan Island. On 1 May 1956, the Administration lodged a claim to Vulcan Island under the provisions of the *New Guinea Land Titles Restoration Ordinance 1951*, land title documents having been destroyed by the Japanese. The Commissioner of Titles declared on 27 October 1959 that part of Vulcan Island was vested in the Administration as absolute owner, and part was vested in the Director of Native Affairs as trustee for the indigenous claimants as set out in the relevant Order. The appellants claimed the whole of Vulcan Island as theirs by customary right, and in the course of the appeal the Administration likewise sought a variation of the order to have the whole of Vulcan Island vested in it as absolute owner.

In his judgment, Minogue J agreed with the appellants' counsel that what gave the relevant native rules as to land use their force was the acceptance by the community in that area of those rules, as held in *Elko v Officer Administering the Government of Nigeria*; he also agreed that *Angu v Attah* required these rules to be proved by calling witnesses acquainted with the native customs, until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.<sup>98</sup> On the nature of native land-holding, he referenced T O Elias's *Nigerian Land Law and Custom*, to the effect that 'the relation between the group and the land they hold is invariably complex, since the rights of the individual and the group to the piece of land often co-exist within the same social context', concluding that the Nigerian conceptions were 'more applicable to the situation in New Guinea - at least as it was when the *Land Ordinance* was made'. Minogue J also held that 'owner' in the *Land Ordinance* 1922 meant the 'person or group of persons or the community, which, according to the area and custom concerned, had the right to use the land and exclude others therefrom'. However, while he found that for all practical purposes the local matrilineal descent groups known as *vunatarais* 'owned' the reefs and the intervening area between them and the high water mark, Minogue J held that under native custom the concept of ownership would not 'go beyond that of the right to use this area for such purposes as the community could then envisage'.<sup>99</sup>

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<sup>98</sup> Thus the colonial judiciary replicated the ascertainment and application by English courts of English customary law as set out by the Australian-born Professor of Jurisprudence at Cambridge, Sir Carleton Kemp Allen: 'The primary function of judicial analysis is to examine the nature and reality of *existing* custom, not... arbitrarily to abolish those which are proved to exist in immemorial practice': C K Allen, *Law in the Making* (Clarendon Press, Oxford, 1927), 86. Emphasis in the original.

<sup>99</sup> *Angu* would again be cited in *Adoption of Children Act 1968 and an Appeal by The Secretary for Justice against an Order made in respect of N, a female child* [1980] PNGLR 64 (5 May 1980); and *Eleko* in a habeas corpus matter of *Aika v Uremany* [1976] PNGLR 46 (9 February 1976).

Again, in the 1972 case of *Nomgui v Administration of the Territory of Papua and New Guinea (re Lae Administration Land)*,<sup>100</sup> the Full Court of the Supreme Court heard an appeal in respect of a claim against the Administration for compensation for the entire 11,933 acres of land on which the town of Lae was built. The relevant land had been acquired by the New Guinea Company (*Deutsche Neuguinea-Kompagnie*) in 1900 as 'ownerless'. Subsequent to expropriation in 1920, resumption in 1927, and the destruction of titles and other land records in World War II, the Administration's title was registered in January 1966. The plaintiffs claimed that, as the land was owned by their ancestors in 1900 pursuant to native custom, the purported 'ownerless' acquisition and subsequent dealings and transfers were invalid. Alternatively, they claimed compensation for their loss of the land. Kelly J found for the plaintiffs at first instance. As he found that the 1927 resumption was in fact valid, and title had passed to the Administration, he ordered compensation to be paid to the plaintiffs in the sum of \$2,400.00 (over \$25,000.00 today<sup>101</sup>) plus interest.

However, on appeal, the Full Court found that, as each plaintiff group claimed exclusive ownership of a number of plots, it was necessary for each group to prove its title to the specific plots which it claimed. The Full Court found that, as the evidence did not identify the plots with particularity; there was no evidence given on the ownership of some of the plots; and conflicting evidence was given as to the ownership of other plots, it was not possible to make findings as to the ownership of each individual plot of land. Thus, the court held that Kelly J had been wrong in awarding compensation based on a general apportionment of land by acreage among the claimants. Moreover, it was held by Clarkson and Prentice JJ — Frost SPJ dissenting — that the documentary evidence established that the land was in fact 'ownerless' in 1900 as that term was used in the contemporary law of German New Guinea, and that its acquisition had been valid. Their Honours concluded that:

Traditional history is liable to corruption as a result of self-interest, pride, misunderstanding or mere forgetfulness of any narrator or listener. The contemporary records, on the other hand, reflect the facts as then seen by the recorder; no subsequent event can change what has been written; the only point at which the accuracy of the record can be challenged is at the time of recording. If special weight were not given to contemporary records, there is the danger that they would, with the passage of time and the disappearance of collateral evidence, be discarded in favour of traditional history as propounded by the last listener

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<sup>100</sup> [1974] PNGLR 349 (4 September 1972).

<sup>101</sup> See <https://www.rba.gov.au/calculator/annualDecimal.html>

with the result that claims based on traditional history which would have failed when all the facts were known would succeed when knowledge of most of the facts had been lost.

In his dissent, Frost SPJ canvassed the relevant case law on native title as at September 1972, noting the recent Northern Territory judgment of a single Supreme Court justice in *Milirrpum v Nabalco*.<sup>102</sup> He highlighted Blackburn J's conclusions in *Milirrpum* that, while the Yolngu claimants had to show a *proprietary* right to the land claimed, it was sufficient that such a right existed under 'a system of law recognised as obligatory upon them by the members of a community'. This proprietary interest in land, Blackburn J had held, implied 'the right to use or enjoy, the right to exclude others, and the right to alienate'.<sup>103</sup> Frost SPJ also noted the 1932 decision of *Custodian of Expropriated Property v Commissioner of Native Affairs (re Jomba Plain)*<sup>104</sup> in which Philips J had held that various indigenous claimant groups had free and unrestricted rights of ownership to land despite purported purchases in 1887 and 1888 by the New Guinea Company.<sup>105</sup> Therefore, it was not a foregone conclusion that there could be no successful native title claims in Papua New Guinea. However, Frost SPJ also referenced the 1919 decision of *In re Southern Rhodesia*, in which their Lordships of the Privy Council infamously had held that some indigenous groups were 'so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society'.<sup>106</sup> He then wondered whether in the instance before the court the 'state of native society in the area was sufficiently settled for it to be found that claims to land were recognised by the respective tribes in such a manner as

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<sup>102</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

<sup>103</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 242.

<sup>104</sup> [1971] PGCC 2; [1971-72] PNGLR 501 (25 May 1932). The case note states that the judgment was published in the 1971-72 Report due to its 'legal and historical importance with the kind permission of Paul J. Quinlivan Esq., Barrister and Solicitor of Port Moresby who previously published them in roneod form'. Accordingly, it seems unlikely that Minogue J had access to it, as it is not referenced in the Vulcan Island claim.

<sup>105</sup> In *Jomba Plain*, Philips J noted that the principles governing the procedure of the New Guinea Company in exercising the exclusive rights granted to it under its charter of taking possession of ownerless land were laid down by the Company's directorate 'with the sanction of the Imperial Chancellor in regulations, or instructions, dated 10th August, 1887, and were very precise'. Whether or not this is to be attributed to an inherent German preference for orderliness, it does seem to contrast with the British approach in the Pacific. The ability to alienate wastelands in places such as the Solomon Islands was specifically controlled by the colonial administration - 'wasteland' being land not owned, cultivated or occupied by any native or non-native person under s 2 of the *Queens Regulation - Solomon (Waste Lands) Regulation 1900*. However, the policy was to alienate it to British/Australian companies, such as the ubiquitous Burns Philp, after a 'perfunctory' consideration of whether it was in fact unoccupied by the local indigenous population: see Judith A Bennett, *Wealth of the Solomons: a history of a Pacific archipelago, 1800-1978*, University of Hawai'i Press, 1987, 129-132.

<sup>106</sup> [1919] AC 211, 233. The decision raised the ire of Bronisław Malinowski. He countered that it was 'absurd to say that the institutions of such societies cannot be reconciled with the "institutions or legal ideas of civilized society"'. To reconcile the two is precisely the task of Colonial Statesmanship': Malinowski, 'The Rationalization of Anthropology and Administration' (Oct 1930) 3(4) *Africa*, 415.

could be reconciled with the institutions or the legal ideas of civilized society'.<sup>107</sup> Ultimately, as the fundamental issues of the nature of native title in Papua New Guinea had not been put to the court by counsel, he did not decide upon them.

Shortly after independence,<sup>108</sup> in the case of *Re Bingagl and Kambu*,<sup>109</sup> Saldanha J heard a claim relating to land near Kerowagi Station in Chimbu District. He held that it was not only expedient but also 'right and proper' that, when it imposed its control, the colonial Administration should have recognised rights of ownership which had been acquired by native custom, even if that custom necessarily entailed the acquisition of property by way of violent conflict between neighbouring tribes. He therefore found that, as the Gena were settled on the land to the east of the Koro River when the Administration made itself known in the area in or about 1938, they were the owners of that land. However, he drew a line thereafter, concluding that it would be 'repugnant to the general principles of humanity' to recognise ownership where that had come about by way of brutal conquest subsequent to the boundaries having being set by the local kiap.<sup>110</sup>

In determining the applicable test for ownership, once again reference was made to a decision of the Privy Council. In this instance Saldanha J cited a 1957 appeal from the West African Court of Appeal in *Twimahene Adjeibi Kojo II v Opanin Kwadwo*:

Where there is a conflict of traditional history one side or the other must be mistaken but both may be honest in their belief. In such a case demeanour is of little guide to the truth, the best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is the more probable.<sup>111</sup>

This narrow approach to assessing the reliability of written and oral records was not limited to the time or place of the decision in *Nomgui*, but is redolent of some later Australian native title law. In the Federal Court in 1998, Olney J determined the matter of *Yorta Yorta Aboriginal*

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<sup>107</sup> Frost SPJ in *Nomgui v Administration of the Territory of Papua and New Guinea (re Lae Administration Land* [1974] PNGLR 349 (4 September 1972).

<sup>108</sup> Note that, since independence, the Supreme Court has held that the courts of Papua New Guinea are not required to follow Australian precedent — usually arising from the Queensland Criminal Code — but, where appropriate, the common law of England as at 16 September 1975. See, e.g., Kearney J on the admissibility of a confession as evidence in a murder trial in *State v Woila* [1978] PNGLR 99 (14 April 1978). Also, while the Constitution provides that the Supreme Court is not bound by its own pre-independence decisions, it should only disregard them for cause: PNG Constitution, Part II, Division 1, § 9.

<sup>109</sup> [1976] PNGLR 34 (13 January 1976).

<sup>110</sup> [1976] PNGLR 34 (13 January 1976).

<sup>111</sup> [1957] 1 WLR 1223. Saldanha J noted that this test previously had been adopted by Frost SPJ in *Re Veakabu Vanapa* [1969-70] PNGLR 234 (24 October 1969) and by Williams J in *Lilumpat Land Owning Group v Clans* [1974] PNGLR 235 (17 February 1972).

*Community v The State of Victoria*. He held, by reference to 'such credible primary evidence as is available and [the application of] the normal processes of analysis and reason',<sup>112</sup> that native title did not exist in relation to the claimed area, as the claimants' traditional laws and customs had been 'washed away by the tide of history'.<sup>113</sup> Writing in 2004, Ben Golder argued that, in doing so, Olney J prioritised 'the specious neutrality of the written word over the tendentious malleability of the oral',<sup>114</sup> unashamedly the approach adopted by Clarkson and Prentice JJ in *Nomgui* thirty years beforehand. Similarly, historian Samuel Furphy argued that Olney J had formed 'concrete conclusions about historical change based on highly selective and narrowly focussed documentary evidence', most notably pastoralist Edward M Curr's 1883 *Recollections of Squatting in Victoria*.<sup>115</sup>

Moreover, the joint judgment of Gleeson CJ, Gummow and Hayne JJ in the *Yorta Yorta* High Court appeal posited the assertion of British sovereignty as the point after which indigenous rights to land gave way to the new normative system, such that they 'would not and will not be given effect by the legal order of the new sovereign'.<sup>116</sup> While this may sound much more grandiose, in practice it means little more than a lone kiap placing boundary markers in the valleys of Papua.

### Family and custom

The other reported cases in which reference was made to the Recognition Ordinance deal predominantly with family relationships, or the *mens rea* of criminal accused, as we have already considered more generally. An early and fairly straightforward example of the first category is a 1965 custody decision of Minogue J in *Kariza-Borei v Navurenagai*, relating to the legitimacy of children of native customary marriage.<sup>117</sup>

More complex was the 1972 decision of *Madaku v Wau*,<sup>118</sup> in which Minogue CJ had to consider the customary 'offence' of the appellant's sexual intercourse with his 'clan sister'. On familiar ground, Minogue CJ noted that the Recognition Ordinance required the court to take native custom into account in concluding as to a state of mind or the reasonableness of conduct. The new approach for the judiciary was the requirement to impose either civil or

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<sup>112</sup> [1998] 1606 FCA para [62].

<sup>113</sup> [1998] 1606 FCA para [129].

<sup>114</sup> Ben J Golder, 'Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law', (2004) 9 *Deakin Law Review*, 51.

<sup>115</sup> Samuel Furphy, *Edward M. Curr and the Tide of History*, <https://press-files.anu.edu.au/downloads/press/p223251/html/ch12.html?referer=&page=17>

<sup>116</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, para 43.

<sup>117</sup> [1965-66] PNGLR 134 (8 June 1965). See also Smithers J in *A.B., Re* [1965-66] PNGLR 53 (20 April 1964) and Kelly J in *R v Kaupa* [1971] PNGLR 195 (3 June 1971), for determinations as to whether or not in the opinion of the court the recognition of a custom would be in the best interests of the child.

<sup>118</sup> [1973] PNGLR 124 (13 December 1972).

criminal sanctions in respect of conduct which breached a customary norm, but no western criminal law. By questioning several village elders the Magistrate had found that sexual relations and marriage between first cousins of the same clan were strictly forbidden, and that death previously had been the resulting penalty. Under the colonial Administration this had evolved to require compensation from the 'offender' in the form of cash and/or kind. Minogue CJ found that, as the breach alleged did not fall within any of the specific subject matters set out in s 8 of the Recognition Ordinance the court could only assume jurisdiction under that section if it considered 'that by not taking the custom into account injustice will or may be done to a person'. He held that in the circumstances there had been a substantial miscarriage of justice in that the appellant did not appear to have had the kind of hearing to which he was entitled; allowed the appeal; and remitted the matter for rehearing by another Magistrate. Minogue CJ also took the opportunity to stress that Magistrates should record the advice on which they base a decision in respect of native custom, not only for the benefit of an appeal court, but also 'for the community in which the custom is in operation'.<sup>119</sup>

With respect to the criminality of certain acts, the case law provides an array of examples of the interaction between the strictures of the common law and those of native custom. In the 1968 decision of *R v Lupalupa*,<sup>120</sup> Frost J found that Yagariyayufa men, from a village south of Goroka in the Eastern Highlands, were an 'unlawful assembly' for the purposes of s 61 of the Criminal Code, and were 'riotously assembled'. However, with reference to their genuine claim to the land in question, the Recognition Ordinance rendered pulling down their Nibiufa opponents' houses not 'an unlawful act' within the provisions of s 65 of the Code.<sup>121</sup> Frost J also found that, as the Crown had not 'excluded the hypothesis' that the Yagariyayufa had to 'stand their ground and return the fire to defend themselves until the opportunity occurred for them to retire', he could not be satisfied that the accused was not acting in self-defence, and so acquitted him.

In 1973 in *R v Aleva*,<sup>122</sup> the 50 year-old appellant murdered his teenage wife who had left him to return to live with her mother. Prentice J considered whether, under s 7(e) of the Recognition Ordinance, a possible loss of the bride price involved might have operated as 'an inflammatory factor', such as to provide extenuating circumstances under s 305(2) of the

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<sup>119</sup> The decision subsequently was referenced in Law Reform Commission Working Paper 22 *Custody Jurisdiction in Papua New Guinea*, [1987] PGLawRComm 1 (1 August 1987). See also Minogue CJ, Prentice and Williams JJ in *Gugi v Stol Commuters Pty Ltd* [1973] PNGLR 341 (5 October 1973) on the issue of the potential impact on the amount of a settlement of a widow's village subsistence rights.

<sup>120</sup> [1967-68] PNGLR 455 (28 October 1968).

<sup>121</sup> See also Wilson AJ in *R v Lida* [1973] PGSC 62 (17 September 1973), on conspiracy in relation to behave in a riotous manner.

<sup>122</sup> [1973] PGSC 73 (29 May 1973).

Criminal Code. Although he did find such circumstances to reduce the charge from one of wilful murder, Prentice J maintained that sentences for violence and killings handed down in the Territory had to increase, in the court's effort to 'make a contribution to evolve a thoroughly peaceful society of peoples'. He therefore sentenced the appellant to 12 years' imprisonment with hard labour, effectively a life sentence. Moreover, Prentice J stressed that, in taking into account native custom as he found it, his judgment should not be seen to support the view that the lives of 'the old, the weak, the young, and women in particular' were of lesser value in the eyes of the common law:

Any imagined concept that the law should be administered to make Papua New Guinea safe for the "big man" will not I hope receive propulsion or encouragement from any judgment or sentence of mine.

While not directly relating to the commission of a crime, a series of Supreme Court decisions show Australian judges grappling with the application to indigenous villagers of a peculiarly Christian aspect of evidence law. The common law had traditionally made an exception from the application of the rule against hearsay for 'dying declarations'. The classic formulation of these was given by Eyre CB in the 1789 decision of *R v Woolcock*:

... when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.<sup>123</sup>

In 1963 in *R v Madobi*,<sup>124</sup> Ollerenshaw J held that, as the admissibility of a dying declaration was based on the Christian belief in a hereafter, it could not be assumed to be applicable to villagers who did not 'anticipate anything like a judgment upon their sins that would create a solemn sanction to speak truthfully upon the eve of such a judgment'.<sup>125</sup> In this case, Rob O'Regan was counsel for the accused Madobi, and directed Ollerenshaw J to an unreported 1958 Northern Territory decision of Kriewaldt J in *R v Wadderwarri*, in which Kriewaldt J had rejected the dying declaration of an aboriginal deceased. O'Regan subsequently defended the decisions of both Ollerenshaw J and Kriewaldt J, based on the fact that in the respective Territories the common law of England had been received only so far as it was applicable to the local circumstances, and this did not import the admissibility of dying declarations to

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<sup>123</sup> (1789) 1 Leach 500.

<sup>124</sup> [1963] PNGLR 252 (8 May 1963).

<sup>125</sup> [1963] PNGLR 252 (8 May 1963).

jurisdictions in which 'the indigenous population had only in the past century been exposed to Christian teaching'.<sup>126</sup>

A different approach subsequently was taken by Clarkson J in the 1967 decision of *R v Kipali*.<sup>127</sup> The accused was charged with the wilful murder of his wife, who had made a dying declaration to that effect. Clarkson J found that there was sufficient evidence of the deceased's Christian beliefs that it could not be shown that she did not believe in a future state after death, and so he accepted her dying declaration. However, he noted further that this perhaps had become irrelevant, as the time had come where courts should no longer inquire into a person's beliefs to test whether a declaration should be admissible (as opposed to determining its evidentiary weight):

If... the personal beliefs of a declarant are not examined in England or Australia, where it can safely be assumed that a sensible part of the community hold no religious beliefs and no belief in divine punishment... it is difficult to see on what basis such an examination should be undertaken in the Territory.<sup>128</sup>

Finally, the matter of *R v Pundali*, heard in Wabag in September 1973, was a payback murder among the feuding Ki and Kara clans of the Enga, in which the deceased Warum Korao had purportedly stated 'I am dying because Nere and Nambi hit me'.<sup>129</sup> 'Nere' was the main accused, the No 1 Big Man of the Kara, Nere Pundali.

Wilson AJ took a different slant on Clarkson J's view in *Kipali*. He held that the court should not assume that there was a sanction against lying in the face of imminent death among members of a predominantly Christian community any more than it should assume that no such sanction existed 'where the deceased is a member of an uncivilized or partly-civilized native community'.<sup>130</sup> He cited s 7 of the Recognition Ordinance to the effect that the court was required to recognise native custom, especially where it was necessary 'to ascertain the existence or otherwise of a state of mind of a person' or 'where the Court considers that by not taking the custom into account injustice will or may be done to a person'. Thus, in the case before him Wilson AJ held that:

Consideration of a person's state of mind as to his life expectancy may involve some consideration of his appreciation of what death really involves for him as well as a

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<sup>126</sup> *Courts and Laws Adopting Ordinance 1889 and the Laws Repeal and Adopting Ordinance 1921*. See also Rob S O'Regan, 'Aborigines, Melanesians and Dying Declarations' (Jan 1972) 21(1) *The International and Comparative Law Quarterly*, 181.

<sup>127</sup> [1967-68] PNGLR 119 (5 October 1967).

<sup>128</sup> [1967-68] PNGLR 119 (5 October 1967).

<sup>129</sup> [1973] PGSC 64 (20 September 1973).

<sup>130</sup> [1973] PGSC 64 (20 September 1973).



consideration of the proximity of his expected death. If the law is that an investigation should be undertaken, for me to have declined to do so and to have ruled that this dying declaration was admissible in circumstances where the native custom of this declarant may have revealed that this dying declaration was inadmissible (e.g. where death means the immediate and entire transportation to a better world), may well have led to an injustice to these two accused.<sup>131</sup>

Thus, in the decade from 1963, the court had evolved from an outright rejection of the possibility of the admissibility of an unChristianised indigenous victim's dying declaration (*R v Madobi*); through one which queried why there should be an inquiry into the victim's beliefs in Papua New Guinea if not in the rest of Australia (*R v Kipali*); to one which required the ascertainment on evidence adduced of the individual declarant's likely state of mind with reference to the prevalent local native custom (*R v Pundali*). Indeed, with respect to the application of the Recognition Ordinance, *R v Pundali* appears to be the first instance in which the court acknowledges the individuation of an indigenous person's belief, balancing this against assumptions of a collective view, either Western or indigenous.

The case had been further complicated by the fact that there was no objective evidence on which the court could decide between the violently conflicting versions put forward by the accused and his witnesses, or the Crown witnesses, all of whom came from the opposing Enga clans in question. More relevantly for our purposes, contemporary anthropological evidence was admitted under s 7 of the Recognition Ordinance, without objection. This was to the effect that among the Enga it was customary on the one hand for the kin of a deceased to blame the Big Men of their enemies for the murder, to elevate its importance; and, on the other, for the kin of an accused to agree amongst themselves to put forward someone less important than their Big Men to take the blame. Accordingly, the court could not be convinced by reference to either side of the dispute that the accused was in fact the culprit. As the Crown entered a *nolle prosequi*, Wilson AJ discharged both the accused.

In examining the Supreme Court's attempts to discern and then apply native custom, as a backdrop to its consideration of sorcery-related violent crime, we can ascertain a nuanced approach. It is hardly one which represents an upwards trajectory in which native custom takes its place beside the rules of the common law, but one which takes faltering steps towards findings that are as fair as the Justices can perceive. The court makes genuine efforts to enforce the Recognition Ordinance, but the process remains one in which an ongoing mindset of colonial difference colours the results, based to a considerable extent, it would appear, on

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<sup>131</sup> [1973] PGSC 64 (20 September 1973).

the subject matter. In family-related matters, the cases considered were such that the customs ascertained could be tolerated without raising the spectre of repugnancy. The *mens rea* cases gave the Justices sufficient latitude to adhere to custom while articulating their displeasure if needed by way of severe sentences imposed. However, when it came to the indigenous concept of land ownership, they could go so far, but no further. This is hardly surprising, given that almost contemporaneously Blackburn J in the Supreme Court of the Northern Territory decided against the claim of the Yolngu people of the Gove Peninsula in Arnhem Land, in *Milirrpum v Nabalco Pty Ltd*.<sup>132</sup> Blackburn J held that, as a matter of *fact*, the Yolngu had a:

...subtle and elaborate system of social rules and customs which was highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of person whim or influence. If ever a system could be called 'a government of law, and not of men', it is that shown in the evidence before me.<sup>133</sup>

However, when it came to discerning the applicable *law* he found himself bound to follow *Cooper v Stuart* — in which, as we have seen in Chapter Four, the Privy Council was taken to have affirmed that New South Wales was to be treated as a settled colony<sup>134</sup> — to the effect that communal native title was not part of the common law of Australia. Echoing Minogue CJ in *Tolain v Administration of the Territory of Papua and New Guinea*, Blackburn J found further that there was so little resemblance between 'property, as [the common law]... understands that term, and the claims of the plaintiffs for their clans' that he was obliged to hold that 'these claims are not in the nature of proprietary interests'.<sup>135</sup> Moreover, this approach continued to colour much later native title decisions in Australian courts, such as *Yorta Yorta*.

Therefore, while we should be more generous than Jean Zorn in her assessment of the approach of the expatriate judiciary, it must be acknowledged that the justices were deciding cases with reference to their own common law mental framework. This was the case in respect of applying the Recognition Ordinance generally, and in deciding on sorcery-related violence specifically. The material on custom and land claims both contextualises the response to customary sorcery-inspired violent crime; and shows that the Justices undertook their decisions in relation to the applicability of the Native Customs Ordinance based on the courts of Papua and New Guinea being an integral part of the Australian court hierarchy. As such,

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<sup>132</sup> (1971) 17 FLR 141 (27 April 1971).

<sup>133</sup> *Milirrpum v Nabalco* (1971) 17 FLR 141, 267.

<sup>134</sup> (1889) 14 App Cas 286, at 291-293. See generally Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review*, 1

<sup>135</sup> *Milirrpum v Nabalco* (1971) 17 FLR 141, 273.

the requirement to take custom into account tended to reflect the views of an expatriate judiciary on the degree to which the common law could accommodate various customs, depending on their 'repugnance' to Anglo-Australian norms. As we have seen, it appears that customary beliefs in sorcery simply could not be accommodated; customary land-holdings only very rarely; but customary family law much more easily.

An exception to these limitations would not be seen in Papua New Guinea until we consider the legal thought and jurisprudence of Bernard Narokobi, indigenous jurist, law reformer and quondam Acting Justice of the Supreme Court. Narokobi's work also provides us with a conceptual and practical bridge from the Australian colony of Papua and New Guinea to the independent State and onto the beginning of the decolonisation of the law.

### The jurisprudence of Bernard Narokobi and sorcery law reform

Bernard Narokobi was born during the Second World War in Wautogik Village, Dagua in the East Sepik Province. This was the same Mountain Arapesh area where Margaret Mead had undertaken anthropological work in 1931 and 1932.<sup>136</sup> Narokobi's career is deeply enmeshed with the public life of the independent state of Papua New Guinea. In 1966 he became one of the first indigenous students to study overseas, when he attended the University of Sydney law faculty. After his graduation and admission as a barrister in New South Wales, he returned to Papua New Guinea in 1972, where he was associate to Prentice J. He then became the Permanent Consultant to the Legislative Assembly's Constitutional Planning Committee, chaired by future Prime Minister Michael Somare. As we will see from his other writings, Narokobi's voice clearly can be heard in the plea of the Committee in its seminal 1974 Final Report to the Legislative Assembly:

The process of colonisation has been like a huge tidal wave. It has covered our land, submerging the natural life of our people. It leaves much dirt and some useful soil, as it subsides. The time of independence is our time of freedom and liberation. We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundations of our ancestral land...

We should use the good that there is in the debris and deposits of colonisation, to improve, uplift and enhance the solid foundations of our own social, political and economic systems. The undesirable aspects of Western ways and institutions should be left aside. We recognise that some of our own institutions impose constraints on our vision of freedom,

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<sup>136</sup> The exact date is unknown: G Bablis, 'A Melanesian Icon – Professor Bernard Mullu Narokobi (ca 1940–2010)' (2010) 40(2) *Catalyst*, 236.  
<<https://search.informit.com.au/documentSummary;dn=390691436765824;res=IELHSS>>ISSN:0253-2921.  
[cited 26 Feb 20].

liberation and fulfilment. These should be left buried if they cannot be reshaped for our betterment.<sup>137</sup>

Narokobi felt deeply that an independent Papua New Guinea had the potential for the common law to continue to be a source of law, but one which ultimately was subordinate to traditional customs. This approach was epitomised by what Narokobi famously termed *The Melanesian Way*, in which justice would 'entail the giving of a full and proper place to the human experience of our race and people.'<sup>138</sup> In his 1982 article 'History and Movement in Law Reform in Papua New Guinea', Narokobi acknowledged that the law had in history played a civilising role. However, he also stressed its use in the arsenal of imperialist expansion, given that it had:

...often been used as a sharp sword by the powerful to conquer untold numbers of powerless peoples... to destroy cultures, civilisations, religions and the entire moral fabric of people. In Melanesia, as elsewhere, the Anglo Australian law was used, and is still being used, to do precisely that. When they (the colonial power) could not find any brick built courts, or armed and uniformed constables, or any paper codes of law, they concluded that there is neither law nor justice in Melanesia.<sup>139</sup>

As Narokobi wrote prolifically on aspects of Melanesian culture, custom, and life, it is not surprising that he specifically addressed his view of the fundamental errors of the western legal response to sorcery in colonial Papua and New Guinea. He maintained that, as sorcery was 'the last frontier of inner consciousness for the Melanesian', no amount of western education would remove from indigenous Papua New Guineans their 'deep sub-conscious fear of sorcery'. Therefore, he lamented the fact that the common law courts had given so little leeway in sentencing for sorcery-related murders, given that the people regarded sorcerers as 'cold-blooded murderers who set upon a course of systematic termination of human life'.<sup>140</sup> Moreover, in a country where sorcery killing was 'an act of honour and self-preservation', he argued that the ability of a court to find under s 20 of the Sorcery Act that provocation would

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<sup>137</sup> Constitutional Planning Committee Report 1974, Ch 2, *National Goals and Directive Principles*, paras 98 and 99, <http://www.paclii.org/pg/CPCReport/Cap2.htm>. As Brunton and Roebuck argued in 1982, 'Where the overwhelming majority of the citizens of a country share traditional attitudes towards customary law... then those traditional attitudes... are the natural infrastructure upon which to build the new legal system': B Brunton and D Roebuck, 'Editorial Customary Law and Statute Law in the Pacific: A Policy Framework' (December 1982) 10(1&2) *Melanesian Law Journal*, 11.

<sup>138</sup> Bernard M Narokobi 'Adaptation of Western law in Papua New Guinea', (1977) 5(1) *Melanesian Law Journal* 52.

<sup>139</sup> Bernard Narokobi, 'History and Movement in Law Reform in Papua New Guinea' in David Weisbrot, A Paliwala and A Sawyer, *Law and social change in Papua New Guinea* (Butterworths, Sydney, 1982), 21.

<sup>140</sup> Bernard M Narokobi, n133, 52.

reduce a wilful murder charge to one of manslaughter was an inadequate recognition of the breadth and depth of indigenous belief in the reality of sorcery.<sup>141</sup>

Narokobi took particular offence at the Supreme Court's development of 'the reasonable Papuan'. In his view, the very concept of reasonableness was based on the assumption that once Papua New Guineans were educated out of their primitive 'cultural enslavement' they would behave 'like Englishmen in a Papua New Guinea setting'.<sup>142</sup> Rather, what was *reasonable* ought to be measured by reference to the broader indigenous understanding of an act's 'conformity to the norms of behaviour appropriate to one's status', as Max Gluckman's work on the Lozi of Barotseland in Northern Rhodesia (now part of Zambia) had similarly concluded.<sup>143</sup>

While Narokobi always wrote with passion, his views on the deleterious impact of the common law were expressed somewhat less vehemently than his contemporary John Kaputin, who was pre-independence Minister for Justice from August 1973-March 1975. In a 1975 article Kaputin railed against the role the common law had played specifically in respect of the economic subjugation and exploitation of Papua New Guineans:

In this country, the law was an instrument of colonialism whereby the economic dominance of the white man was established over us. In other words the law was not a set of universal and abstract principles. It was specific, and it made numerous distinctions between the white and the black. It not only deprived us of our land, but forced us to work for the expatriate plantation owners to whom the law gave our lands. There is a danger that unless we take positive steps to affirm our rights, the colonial law will continue its stranglehold of our economic and social lives.<sup>144</sup>

Kaputin declared that it would be his responsibility as Minister for Justice to ensure that not only did the law not obstruct the Government's Eight Point Improvement Plan of 'radical change', but that it would operate as a 'weapon of social justice'.<sup>145</sup> Key to achieving this was the establishment without delay of a Papua New Guinea Law Reform Commission. Thus, in May 1975 Narokobi became the inaugural Chair of the newly-established Law Reform Commission. Among its functions under the *Law Reform Commission Act 1975* were to make recommendations in relation to the restatement, codification, amendment or reform of customary laws; as well as the development of new approaches to and new concepts of the

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<sup>141</sup> *Ibid.*, 55.

<sup>142</sup> *Ibid.*, 58.

<sup>143</sup> A L Epstein, 'The Reasonable Man Revisited: Some Problems in the Anthropology of Law' (Summer 1973) 7(4) *Law & Society Review*, 652.

<sup>144</sup> John Kaputin, 'The law: A colonial fraud?' (1975) 10 *New Guinea*, 4.

<sup>145</sup> *Ibid.*, 5.

law, in keeping with and responsive to the changing needs of Papua New Guinea society and of individual members of that society.<sup>146</sup>

The Commission's first publication in July 1976 was its Occasional Paper No 1, *The Punishment for Wilful Murder*.<sup>147</sup> Given the ongoing media coverage of sorcery-related violence and Narokobi's own work, it is perhaps unsurprising that in 1977 the Commission published Occasional Paper on sorcery. This was in response to a reference from Ebia Olwale, the first post-independence Minister for Justice. The Law Reform Commission was required to consider the types of sorcery practised in Papua New Guinea in order to:

...determine how widespread the practice of sorcery is, suggest to [the Minister] if the present law against sorcery is effective, and also suggest to what extent the law should further deal with sorcery, if at all.<sup>148</sup>

The Occasional Paper is unashamedly 'Melanesian' in tone. Noting that the Sorcery Act did not admit that sorcery had effect such that those who practice evil sorcery should be punished, it concluded that, regardless of what legislation provided, evil sorcery would only be eliminated when the deeply held beliefs of the people in its effects are forgotten. It did not overstate the ability of the most well-intentioned legislation to effect change. It noted that there were 'limits to the mental dimensions of belief beyond which the law cannot go, and if it does it will create more social harm than it will create social good'.<sup>149</sup>

This nation-wide review was followed by local studies among the Tolai and the East Sepiks in 1978, in which Narokobi was personally involved on the ground. Then in 1979 the Law Reform Commission commenced another study on the effects of sorcery in Kilenge, West New Britain Province, which was undertaken by the American anthropologist Martin Zelenietz. The interviews conducted in both reviews revealed that it was not a question of whether Papua New Guineans continued to believe in the practice of sorcery in the late 1970s, but, rather, whether they considered it was being used more indiscriminately than previously had been the case.<sup>150</sup> A common explanation for this perceived increase in the use of sorcery was that it had 'provided some positive results'.<sup>151</sup> This was in contradistinction to the ineffectiveness of the government, including in enforcing the Sorcery Act itself.

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<sup>146</sup> *Law Reform Commission Act 1975*, s 9(d) and s 9(e) respectively.

<sup>147</sup> *Punishment for Wilful Murder*, Occasional Paper 1 [1976] PGLawRComm 3 (1 July 1976)

<sup>148</sup> Law Reform Commission, *Sorcery*, Preface.

<sup>149</sup> Law Reform Commission, *Sorcery*, 12.

<sup>150</sup> Law Reform Commission, *Sorcery among the East Sepik*, 14.

<sup>151</sup> Law Reform Commission, *Sorcery among the Tolai People*, 14-15.

Although most of those interviewed had had no formal contact with the Sorcery Act, it was found that the local people felt that in its application the burden of proof should be reversed;; strict rules of evidence ought not to be applied; and that traditional methods of proof or sorcery should be allowed, e.g., *komkom*.<sup>152</sup> The report on the Tolai also found sorcery matters should be handled by the Village Courts. Whether or not this was due to lack of exposure, the fact was that Village Courts — which finally had been established shortly before independence under the *Village Courts Act 1973* — did in fact have jurisdiction to hear sorcery offences. These included:

- (i) practising or pretending to practise sorcery; or
- (ii) threatening any person with sorcery practised by another; or
- (iii) procuring or attempting to procure a person to practise or pretend to practise, or to assist in, sorcery; or
- (iv) the possession of implements or charms used in practising sorcery; or
- (v) paying or offering to pay a person to perform acts of sorcery: cl 3(p) *Village Courts Regulation 1974*.

However, in one public meeting at Dagua in East Sepik, the Law Reform Commission was told that the Village Court magistrates hid sorcerers because they were sorcerers themselves. The local magistrate later showed Narokobi a parcel of *salat*, stinging nettles which the Magistrate had held to be too small for sorcery purposes. Despite this, Narokobi concluded to the contrary that the particular wrapping of the *salat* suggested that it was in fact meant to be used for sorcery. On the other hand, a local Member of Parliament had ‘arrested’ several sorcerers and taken them to the Village Court, which had punished them.<sup>153</sup> Thus, there was a diversity of views expressed as to the effectiveness of the Village Courts as a means of combating sorcery.

Ultimately, the Law Reform Commission concluded that it might be necessary for the law to be ‘tough on evil sorcery’ to reduce its practice.<sup>154</sup> Among some of its novel recommendations were that banishment for a period or for life should be available as an alternative to imprisonment, to be determined by secret ballot; divination should be used, but not without corroboration; an amnesty should be offered to those who want to give up sorcery; and severe

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<sup>152</sup> *Komkom* is itself a magical process whereby a sorcerer is used to identify a victim’s murderer: Law Reform Commission, *Sorcery among the Tolai People*, 18-19.

<sup>153</sup> Law Reform Commission, *Sorcery among the East Sepik*, 22.

<sup>154</sup> Law Reform Commission, *Sorcery among the Tolai People*, 16.

penalties should be imposed on those who teach evil sorcery or transmit it in any way or form.<sup>155</sup>

The year after the publication of the Occasional paper on Kilenge, the Supreme Court was forever changed as a result of the Rooney Affair, which is worth a brief discursion due to its position in the legal history of Papua New Guinea. In short, in a number of instances, the Minister for Justice — and former Law Reform Commissioner — Nahau Rooney had questioned the commitment of the expatriate Supreme Court bench to the aspirations of the independent State of Papua New Guinea. The Leader of the Opposition, Iambakey Okuk, brought a private prosecution against her for contempt of court, which was taken over by the Public Prosecutor.

The Minister was found guilty by the Full Court of the Supreme Court of one count of violating the *sub judice* rule and two counts of scandalising the court, and sentenced to eight months' imprisonment. However, she was shortly thereafter released on licence by Prime Minister Somare, who had taken over her Justice portfolio. The release prompted the resignation of Prentice CJ, Raine DCJ and Saldanha and Wilson JJ. In addition to evidencing the commitment of the Justices to the rule of law and the doctrine of the separation of powers, the *Rooney* decision remains memorable due to Saldanha J's blistering justification for the Minister's sentence of imprisonment:

It is the only way I know of bringing home to the Minister, to the Government and to the people of this country the enormity of the Minister's transgression, that what she did was to dare to pit her puny might, not against unimportant foreign judges administering insignificant foreign laws, but against the majesty of law and justice which the people of this country had freely adopted as their own. And for this she must now be visited with condign punishment as retribution for herself and a deterrent for future would-be offenders.<sup>156</sup>

The other result of the Rooney Affair was that the resignation of the Australian judges, heralded the beginning of the indigenization of the Supreme Court bench. Buri Kidu, Secretary of the Prime Minister's Department, was appointed the first indigenous Chief Justice by the Government of Prime Minister Julius Chan, who had taken office after Prime Minister Somare had been defeated in a no-confidence motion in Parliament. Moreover, Narokobi was appointed as an acting Judge of the National and Supreme Court for one year from May 1980 to 1981.

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<sup>155</sup> Law Reform Commission, *Sorcery among the East Sepik*, 22.

<sup>156</sup> *Rooney (No 2), Public Prosecutor v [1979] PNGLR 448* (11 September 1979).



Narokobi now had the opportunity to put his beliefs into practice. In May 1980 in *Sipo v Meli* he heard an appeal from an adultery conviction under Native Regulation No 84(2).<sup>157</sup> Noting that the Constitution clearly stated that Christian principles and ancestral wisdom were the dual pillars of the State,<sup>158</sup> he confirmed Miss Sipo's conviction, quashed the sentence, and ordered that it be substituted with two weeks' imprisonment with light labour and compensation of K10.00 to the aggrieved respondent, Mrs Meli. However, he took the opportunity to note that the continued existence of such Native Regulations was:

...becoming an anachronism and an insult to the national sovereignty and integrity, especially when in its application, the law is restricted to one class of citizens only. It is easy to understand positive discrimination in favour of less privileged. It is difficult to justify criminal law whilst it penalises one class of people only.<sup>159</sup>

Nonetheless, the Law Reform Commission had found in 1977 that 'an overwhelming majority of the people considered that adultery should be subject to the law in one way or another.'<sup>160</sup>

In *State v Wapulae*, five defendants had been charged with the wilful murder in Enga Province of Utomi Polio, a purported sorceress.<sup>161</sup> On the day in question, they had taken her on foot to the Government Station at Porgera, apparently to report her to the kiap for a charge to be laid under the Sorcery Act. On the way, Polio attempted to escape, but was immediately caught and shot to death with arrows by the defendants. Narokobi AJ noted that the defendants came from a very remote part of the country, with minimal contact with outside world, 'let alone the white man'. In considering all the circumstances of the defendants and the alleged number of the deceased's sorcery victims, he noted as follows:

I sit here as a Melanesian judge among Melanesians. I run a grave risk that I might put on Anglo-Australian cognitive lenses to see Melanesian situations and events. Fortunately, the Australian judges in the past have been mindful of this danger and have sought to give careful consideration in sentencing to the cultural setting of the offenders.<sup>162</sup>

He then proceeded to read together the Sorcery Act, the *Recognition Ordinance*, the Criminal Code Act of 1974 and the Constitution, to conclude that the circumstances of the country

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<sup>157</sup> [1980] PGNC 7; N240 (23 May 1980).

<sup>158</sup> However, as Judge John Goldring noted, that Constitution is 'in the highest traditions of English common law legalism... despite its lip-service to Papua New Guinea forms, if it is the expression of the will of the People, that will is not founded in the traditional cultures of Papua New Guinea, but is a product of western influences': John Goldring, 'Legalism rampant: the heritage of imposed law and the constitution of Papua New Guinea' (1979) 12(3) *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America*, 223.

<sup>159</sup> *Sipo v Meli* [1980] PGNC 7; N240 (23 May 1980). The Regulation provided as follows 'Any female who on complaint of her husband is found guilty of committing adultery with any man shall on conviction be liable to a fine not exceeding Thirty shillings or in default of payment to imprisonment for any period not exceeding Three months, or to imprisonment in the first instance for any period not exceeding Three months'.

<sup>160</sup> Law Reform Commission, *Adultery*, Report 5 [1977] PGLawRComm 3 (1 February 1977).

<sup>161</sup> [1980] PGNC 9; N233 (4 June 1980).

<sup>162</sup> Narokobi AJ in *State v Wapulae* [1980] PGNC 9; N233 (4 June 1980).

demand that compensation as a form of liability be recognised and applied, in criminal cases, wherever appropriate. Therefore, he imposed a term of imprisonment of three months with hard labour on each of defendant ordered each of them to pay five mature pigs to the deceased's younger son immediately upon their release.

Given this radical departure from precedent, it is not completely surprising that the Public Prosecutor appealed against the inadequacy of the sentences. In *Acting Public Prosecutor v Aumane, Boku, Wapulae, and Kone* the Full Court — consisting of Kidu CJ, Kearney DCJ<sup>163</sup> and Greville Smith, Andrew and Kapi JJ — unanimously held that the sentences were 'most inadequate' and should be increased in each case to five years and five months (taking into account four months awaiting trial and three months already served); and that the order directing payment of pigs as compensation was made without jurisdiction and should be set aside.<sup>164</sup>

Kidu CJ acknowledged the widespread belief in sorcery and the real fear that that engendered, even among his 'own people'. However, he held that the cultural setting of indigenous accused could not be allowed to override the clear dictates of the Parliament as expressed in the Criminal Code: '[i]f Parliament represents the people of Papua New Guinea and the laws it makes reflect the attitude of the people, then courts must take heed'.<sup>165</sup> He found that Narokobi AJ had gone so far as to state that the deceased had killed about twenty people by sorcery. While he agreed that the respondents *believed* that in the present case some twenty fell at the deceased's hands there was no proof that this in fact happened.

For his part, Andrew J noted that Narokobi AJ appeared to have adopted the recommendations of the Law Reform Commission as being the relevant applicable law, as 'a classic sorcerer killing envisaged... for a new class of homicides to be called diminished responsibility killings'. While it may have been 'a view of the law as one would wish it to be or an idealistic approach' it was not the law, such that this interpretive approach amounted to an error of law. However, ultimately Narokobi had the last word. As Minister for Justice in 1991, he introduced the *Criminal Law (Compensation) Act 1991* which allowed courts to order compensation to be paid by an offender to a victim and his or her group.

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<sup>163</sup> This is the same William Kearney whom we have seen as Secretary of Law from 1972-75, responding to questions in the House on the *Sorcery Act 1971*. He graduated in law from the University of Sydney and University College London, and was knighted in 1982 for services to the law in Papua New Guinea.

<sup>164</sup> [1980] PNGLR 510 (19 December 1980).

<sup>165</sup> [1980] PNGLR 510 (19 December 1980).

### The dream of Yale Gesie

After his decision in *Wapulae*, but before the appeal was heard, Narokobi AJ handed down his decision in *State v Gesie and Guluwe*,<sup>166</sup> one which had its 'sorcerous twists and turns', and was perhaps without parallel in the common law world. The two defendants, from a remote village in the Southern Highlands, were charged with the wilful murder of an elderly local woman by strangling. As Gesie's own statements in the District Court established beyond a reasonable doubt that he intended to kill the deceased and had done so, the issue was whether the charge should be reduced to manslaughter.

Under the heading *Facts and Metaphysical Circumstances Leading to the Killing*, Narokobi AJ outlined the dream of Yale Gesie which led him to believe that the deceased was responsible for the sudden deaths of his two young children by evil sorcery. He noted that he had to decide a case which had arisen 'exclusively within Melanesian legal order' within the strictures of the 'imposed legal system with its roots in the Austinean theory of jurisprudence'. It would be difficult to envisage two more varied approaches; in the former, law itself was 'an aspect of the Melanesian total cosmic view of life' in which 'dreams and secret knowledge [were] vital constituents of the society's fabric'.

Nonetheless, Narokobi AJ applied the imposed law on the facts as he discerned them. He considered that even an unreasonable mistake in a wilful murder case could be a defence.<sup>167</sup> Where intent was an element of a particular crime, a mistake which negated that intent must absolve the accused. If so, there was no need to question whether the belief is reasonable or not; or whether it is honestly held or not:

If a belief is genuinely or honestly held, it is a belief in the personal conscience of the believer. And if a mistake is not genuine, it is not a mistake at all... The concepts of reasonableness and honesty are concepts of credibility of witnesses to be determined on the basis of available evidence.

As we have seen, under s 7(b) and (c) of the Recognition Ordinance, custom could be taken into account in determining the reasonableness or otherwise of an act, or an excuse. Narokobi AJ held that, customarily, it was not unreasonable in the community to which the accused belonged to believe in the power of sorcery, nor to believe in the reality of the content of dreams. While it was also equally reasonable to kill reputed sorcerers, he noted that that was

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<sup>166</sup> [1980] PGNC 20; N254 (12 July 1980).

<sup>167</sup> In doing so, he rejected Kenny's *Outlines of Criminal Law*, and citing with approval what would appear to be Glanville Williams' 1949 article, 'Homicide and the Supernatural', (1949) 65(4) *Law Quarterly Review*, 491.

not to be encouraged, as it was 'clearly repugnant to the general principles of humanity'. Narokobi AJ concluded that the killing was:

...induced by a complex combination of sorrow, fear and anger or rage such as would have put him in a state of diminished or even clouded responsibility. Whether that is provocation is a matter of use of words, in my humble opinion.

On this occasion, reading together the Sorcery Act, the Recognition Ordinance, the Constitution and Law Reform Commission reports, he gave a sentence of imprisonment with hard labour for nine months to Gesie, and required him to pay the widower of the deceased K68.00 upon his release. Narokobi AJ sentenced his accomplice Guluwe to imprisonment with hard labour for three months. In doing so he stressed that the courts in Papua New Guinea had to interpret the Code in light of Custom, referring back to Denning LJ in *Nyali*:

The fragile plant of the Criminal Law cannot be treated as an English Oak that must be pruned, but a coconut that must take root in Melanesian soil, if it is to blossom and flower.<sup>168</sup>

In reflecting on the decision in *Gesie*, Jean Zorn argued that Narokobi AJ wrote to convince the eventual appellate court that there are grounds for his verdict in both custom, and at common law, as 'a model for them of the way in which they should approach their task'.<sup>169</sup> If so, it would appear that his efforts were in vain. No reference to an appeal from the decision in *State v Gesie*, nor any other citation, can be located among the law reports held by the Pacific Islands Legal Information Institute. If this is correct, it would appear that rather than even over-ruling or distinguishing it, Narokobi AJ's fellow judges simply decided to ignore the decision in *Gesie*. This position is supported by the fact that, almost contemporaneously, the Full Court of the Supreme Court did overturn *State v Wapulae* and refute in detail the bases for Narokobi AJ's decision at first instance. Thus, in his haste to rebuild the legal system of Papua New Guinea, not on the scattered good soil deposited by the tidal wave of the common law, but on the solid foundations of custom, Narokobi crafted in *Gesie* a decision which his judicial colleagues were determined to wither untended.

## Conclusion

In this Chapter we have examined the pivotal role played by the Sorcery Act as the final stage in the consideration of the western legal response to sorcery in colonial Papua and New Guinea. This has taken us beyond the colonial era, to the case law and reform proposals of the independent state of Papua New Guinea. This is not surprising, given that both the Act

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<sup>168</sup> [1980] PGNC 20; N254 (12 July 1980).

<sup>169</sup> Zorn, n69, 86.

and its interpreters had a firm Anglo-Australian colonial stamp. Also, despite flag-raising independence ceremonies, there is no clear line between the colonial and the post-colonial.

However, the Sorcery Act had a decisively Melanesian flavour. Paul Lapun's impassioned Second Reading speech shows that indigenous Papua New Guineans grounded the need for the legislation in both their Christian and traditional belief structures. They did so without any apparent sense of conflict between the two belief systems. This is reflected in the preamble to the Constitution, namely that Papua New Guineans pledged themselves as a nation to 'guard and pass on to those who come after us our noble traditions and the Christian principles that are ours now'.<sup>170</sup> While the evidence from the contemporary press suggests that there was little public discussion of the Sorcery Bill, the *Port Moresby Post-Courier* is at the same time replete with articles about sorcery and sorcery prosecutions under the Ordinance.

The Supreme Court continued on the interpretative trajectory established prior to the Sorcery Act, although with the added dimension of how, as a 'native custom', sorcery might be able to fit within the system of its own precedents. We have seen that in a range of other customs — relating to land, family relationships and the application of *mens rea* — the expatriate judges applied the Recognition Ordinance with varying degrees of adeptness. In doing so, they were often constrained by both their training and the enduring incomprehension of the colonisers for the colonised. However, as we also noted, any aspersions cast on these limitations should be tempered by the fact that, as far as the recognition of indigenous claims to land and water were concerned, their views continued to be held by Australian judges and law makers up until the end of the twentieth century.

The important exception to this colonialist jurisprudence was undoubtedly the writings and public roles of Bernard Narokobi. Narokobi had the rare prospect of attempting to craft an indigenised legal response to the sorcery, that 'last frontier of inner consciousness for the Melanesian'.<sup>171</sup> Under his leadership, the Papua New Guinea Law Reform Commission conducted valuable research into the nature and extent of sorcery beliefs in the newly-independent country; and as a Cabinet Minister he effected important legal reforms. However, when his opportunity came to put his Melanesian jurisprudence into effect on the Supreme Court bench in the wake of the Rooney affair, his proposals were too radical for his fellow judges, whether expatriate or indigenous.

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<sup>170</sup> Constitution of the Independent State of Papua New Guinea, [http://www.paclii.org/pg/legis/consol\\_act/cotisopng534/](http://www.paclii.org/pg/legis/consol_act/cotisopng534/)

<sup>171</sup> Narokobi, n 127, 60.

# Chapter Seven – Conclusion

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Law stretches right into faraway places, to claim and to name, to plant authority amid strangeness, to declare with portentous certainty what the reality of a remote spot shall be.<sup>1</sup>

## Introduction

In Chapter Six we noted the equivalence of the historical process of colonisation with the medical sense of the presence of unwelcome infection in the human body.<sup>2</sup> However, the online *Oxford English Dictionary* reveals that its etymology is somewhat more benign. The word ‘colony’ comes ultimately from the Latin *colōnus*, a tiller, farmer, cultivator, planter, or settler in a new country.<sup>3</sup> For our purposes, it is noteworthy that one of the OED’s examples of its modern usage is a familiar one, provided by Sir John Seeley’s 1883 *Expansion of England*, which we encountered in Chapter One:

By a colony we understand a community which is not merely derivative, but which remains politically connected in a relation of dependence with the parent community.<sup>4</sup>

The *Oxford Companion to the High Court* maintains in its article on ‘colonialism’ — apparently without irony — that the term has since the Second World War gained ‘the derogatory sense of an alleged policy of exploitation of backward or weak peoples by a large power’. The *Companion* further notes that this ‘policy’ had a legal impact on indigenous peoples on the mainland of Australia, in the Torres Strait and ‘in the Territories of Papua and New Guinea (while under Australian control)’.<sup>5</sup> In this Chapter, we will review how this thesis has examined the various legal means by which the dependent colonial administrations in Papua and New Guinea addressed the mischief engendered by the endemic indigenous belief in the ability of sorcery to effect physical harm and death.

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<sup>1</sup> Christopher Tomlins, *The Many Legalities of Early America* (University of North Carolina Press, Chapel Hill NC, 2001), 5.

<sup>2</sup> Liisse-Ann Pirofski & Arturo Casadevall, ‘The meaning of microbial exposure, infection, colonisation, and disease in clinical practice’ (October 2002) 2(10) *The Lancet Infectious Diseases*, 628.

<sup>3</sup> *Oxford English Dictionary*, Online at 12 April 2020, ‘colony’ (def 4).

<sup>4</sup> *Ibid.* Seeley also noted that the word ‘Empire’ seemed ‘too military and despotic to suit the relation of a mother-country to colonies’: Seeley, *Expansion of England*, 38.

<sup>5</sup> Francesca Dominello, ‘Colonialism’, in Tony Blackshield, Michael Coper & George Williams (Eds), *The Oxford Companion to the High Court* (Oxford University Press, Sydney, 2001) 110.

## The quest

As noted in Chapter One, the idea for the research came from an interest in two distinct sources. One was the manner in which rational administrators deal practically with irrational community beliefs; and the other was the continuing paternalist approach of Australian decision-makers in respect of the practice and procedure of the legislature of independent Papua New Guinea, our closest neighbour. The then-contemporary debate about the efficacy of the *Sorcery Act 1971* in dealing with the increasing incidence of sorcery-related violent crime in Papua New Guinea unexpectedly brought the two topics together. Moreover, given that Papua New Guinea only gained its independence in 1975, it immediately indicated that the colonial administration had resorted to legislation to deal with the mischief of sorcery. This therefore framed the thesis as a consideration of what was described in the Introduction Chapter as the entire colonial panoply of policymaking, legislative process, law enforcement and judicial decision-making, as it related to sorcery.

My original approach was to view this response through the lens of legal pluralism, within the broader context of the development of legislative regimes in the South Pacific to address sorcery and sorcery-related crime, such as in Vanuatu. However, in Papua and New Guinea, the creation – or evolution – of legal pluralism in the colonial period was arrested by the nature of the myriad, largely acephalous communities which the administration was meant to rule.<sup>6</sup> Thus Chapter 3 in particular notes that the Lugardian ideal of indirect rule by co-opting traditional administrative and juridical structures was inapplicable to the Territory.

Similarly, early research militated against the applicability of the theoretical frameworks of either legal transplant theory or path dependency. The former because ‘transplant’ cannot satisfactorily address the imposition of a legal system from the foundation of British New Guinea onwards as effectively as the approach of a legal historical narrative reliant upon statutes and case law; the latter because path dependency is not as effective a descriptor of a colonial decision-making which was consciously bounded administratively by the dissemination of Empire-wide ‘best practice’, and legally by the jurisprudence of the Privy Council. Accordingly, while I examined the relevant literature, I did not find it applicable to the subject.

Moreover, as I began to research, my interest was piqued by a completely different aspect. This was the historical situation of the reception of the common law in Papua New Guinea,

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<sup>6</sup> Lauren Benton has clearly set out the nexus between indirect rule and legal pluralism:

As with indirect rule, legal pluralism as a colonial project often required the creation of “traditional” authority and the reification of legal practices and sources of law that had existed formerly only as fluid elements of a flexible legal process: Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*, Cambridge University Press, 2002, 128.

and its application to sorcery within the much broader context of the common law's expansion throughout the length and breadth of the British Empire. In part, this was due to the pressing absence of British New Guinea, Papua, or Papua and New Guinea, from the historiographical record. The Territories barely rate a mention in the monumental five-volume *Oxford History of the British Empire* of the 1990's, let alone in the myriad of other recent works on either the Empire *simpliciter*, or law in the Empire.

This absence is possibly attributable to a number of distinct, but interconnected, factors, evidence of which arose as the research continued. These included the fact that the Protectorate of British New Guinea was hardly a prized spoil of Empire. Whitehall had had to be goaded into acquiring the unremarkable south eastern portion of the island of New Guinea by the expansion of the German Empire into the north-eastern portion, after having stared down the attempts of the Colony of Queensland effectively to acquire it as a colony of its own. Other than as a source of millinery adornment, British New Guinea subsequently rarely made an impression on the British ruling class.

Nonetheless, the very establishment of a Protectorate placed this expansion of empire within what I have earlier described as the cautious and parsimonious expansion of legal sovereignty over the Queen's subjects. This characterised British imperial expansion in the mid- to late-nineteenth century more generally than only in the south west Pacific. However, while the final push came from Imperial Germany, the establishment of the Western Pacific High Commission by Order in Council in 1877 provided a framework in which the common law could deal with British subjects there. In the person of its Commissioner, Sir Arthur Gordon, Governor of Fiji, the Western Pacific High Commission also provided a living link with an earlier liberal imperial ideology, closely tied to the ideals of trusteeship and improvement, and owing much to the Abolitionist Movement of the 1820's and 1830's. This approach characterised the application to native policy in British New Guinea of Sir William MacGregor and reached its paternalistic zenith under the long reign of Sir Hubert Murray in Papua. Murray reinforced the approach with an official interest in anthropology, hoping to use its insights to more effectively govern the indigenous population of the Territory.

The results of this early research led to an expectation that further work would disclose that the policy response of the colonial administration was one in which the reality of the efficacy of sorcery to indigenous Papua New Guineans would play an important role. This, in turn, was bolstered by early research into the seminal legal anthropological work of Bronisław Malinowski in New Guinea, in which the centrality of sorcery to Melanesian societies was an integral component. However, further research revealed that this was not the case. Rather than being a late-colonial novelty, the Sorcery Act of 1971 was effectively a slightly more



efficient version of the Sorcery Ordinance of 1893, promulgated in what was then still British New Guinea.

It also soon became obvious from the records that the colonial administration in Papua and New Guinea dealt with the 'mischief' of sorcery on two different, if closely-connected, levels, namely:

- the supposed practice of sorcery; and
- the violence arising from the belief in the practice of sorcery.

The first type of mischief was perceived as a threat to the very legitimacy of the colonial administration. As clearly shown by Malinowski in his 1922 *Argonauts of the Western Pacific*, the sorcerer was a traditional locus of power in the villages of Papua and New Guinea, particularly given the limited concept of chieftainship, whether elective or hereditary. As the legitimacy of the colonial intrusion was based on the protective use of the monopoly of violence, the very belief in the ability of a sorcerer to effect illness and death was anathema to the administration, regardless of the colonisers' own disbelief. Thus, in 1909 a Gulf Division Resident Magistrate unequivocally identifies this fundamental contest of ideologies:

The wily sorcerers know that, as the Government influence increases, their own decreases ... I am afraid that the Gulf Division sorcerer, like the Australian rabbits, will be hard to eradicate.<sup>7</sup>

The colonial authorities dealt with the second type of mischief as an ongoing threat to the maintenance of peace and good order in Papua and New Guinea. This again impacted on the legitimacy of the colonial administration, although not at such an existential level. Rather, the maintenance of the peace was an expected role of 'government'. Thus, the 1893 Sorcery Ordinance criminalised the practice of sorcery, incorporating the relevant offences under the rubric of 'Forbidden Acts'. Such acts were forbidden only to the native population, and added to the long list of 'offences' by which the colonial administration curtailed the daily lives of indigenous Papuans and New Guineans as independent actors. They were enforced by legally untrained kiaps, the fabled 'men on the ground', in such an abridged version of common law procedure as to barely warrant the name of 'court'. It was the reports of these men on the ground — provided annually to the administration in Port Moresby and thence to Melbourne until 1927 and to Canberra thereafter — which supply the source for consideration of the ebb and flow of the fight against the power of the sorcerer in the village.

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<sup>7</sup> *Annual Report for Papua 1908-09*, 57.

The other facet of the mischief of sorcery was dealt with in the courtrooms of the Territory by way of the adjudication of violence against purported sorcerers. This was often murder, freely acknowledged by the accused. These at least came before the handful of judicial officers, such as the sorcery murder trial before Hubert Murray in March 1924 in Samarai, only the second case in which the future Justice Ralph Gore appeared as counsel in Papua. The contemporary records for these are almost non-existent, but it is obvious in the references from the judicial officers that the trials were characterised by a strict adherence to procedure, ameliorated by some acknowledgment of the belief systems of the accused, when sentences were to be imposed. As we have seen, this was first proposed by judge Sir Francis Winter in his 1898 Memorandum on the administration of justice in British New Guinea, in which he maintained that customary motives for killing — such as sorcery — could not influence a murder verdict, but could nonetheless warrant a commutation of the sentence.<sup>8</sup> Thirty years later this practice was codified by Justice Ralph Gore in his 1929 *The Punishment for Crime Among Natives*.<sup>9</sup>

This discovery necessitated a re-orientation of the research project. The basic research question of the thesis remained how did a supposedly rational (colonial) system of administration and law deal with the irrational traditional beliefs in sorcery. However, answering this required seeking out the basis of this blunt colonial response of proscription and prosecution. As noted above, the short answer was to formally criminalise the practice, while refusing to contemplate its reality. In order to illuminate this approach, contextualisation of the legal practice of Papua and New Guinea was sought. This was done first, by way of ‘reaching back’ to consider the historical response of the common law to the belief in the practice of magic; and second, ‘reaching across’, to establish what was the contemporary response across the British Empire, as Anglo administrators dealt with similar indigenous beliefs in such magic.

There is now an enormous literature on European witchcraft generally in the early modern era, including a considerable sub-genre on the phenomenon of witchcraft trials in jurisdictions ranging across the continent from Spain to Russia. The common law in England and its early colonies adopted proscription by legislation to deal with the harm supposedly inflicted in communities by the use of magic. This was specifically the baleful practice of *maleficium*, first subject to the secular courts in Tudor England in 1542. The approach generally was tempered

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<sup>8</sup> Francis Winter, ‘Memorandum by the Chief Judicial Officer on the Administration of Justice, in Connection with the Natives of the Possession, During the Last Decade’ *Annual Report for British New Guinea 1898-99*, 70.

<sup>9</sup> Ralph T Gore, ‘The Punishment for Crime Among the Natives’, *Annual Report for Papua 1928-29*, 20.

by the reticence of the common law to countenance the judicial use of torture, which resulted in a much lower rate of convictions and executions than in civil law jurisdictions on the European continent and in Scotland. From the late sixteenth century, the bitter fragmentation of European Christendom wrought by the Reformation and Counter-Reformation tinged witchcraft with the fear of the infection of the heresy of the outsider. This partially explains the tragic and dramatic exceptions to the common law's relative forbearance which are provided by the Essex Witchfinders during the English Civil War and the particularly infamous Salem Witch Trials of the 1690's.

Nonetheless, prosecutions in the early modern era involved judges, prosecutors and defendants on whose common Christianity was based their belief in the efficacy of witchcraft. Moreover, there is one historical constant clearly linking the practice of the early modern era with that of the period of British colonial expansion in the nineteenth and twentieth centuries. This is the use of anti-witchcraft legislation to single out, and preferably excise from the community, individuals who were perceived as having anti-social traits which tended to threaten authority.<sup>10</sup> The 'threat' of the sorcerer in Papua and New Guinea was by no means limited to the physical suffering and death he was supposed to be able to inflict, but to the cohesion of the village community under the protection of the colonial administration.

Under the influence of Enlightenment principles of rationality, from the sixteenth to the eighteenth century the aim of anti-witchcraft legislation shifted from one of addressing the mischief of the malevolent practice of witchcraft to one of addressing the mischief of the ignorant belief in witchcraft, which we can see reflected in both the 1893 Sorcery Ordinance and the 1971 Sorcery Act. In the metropole, this culminated in the 1736 English Witchcraft Act, which punished 'any Pretences' to witchcraft, pursuant to which 'ignorant Persons [were] frequently deluded and defrauded'.

Thus, by the time the bounds of the British Empire embraced Papua and New Guinea, common lawyers had long been convinced of the internal rationality of their discipline, and, therefore, its universal applicability. In far-flung colonies they then faced the fundamental irreconcilability of their legal training — and their post-Enlightenment Christian belief systems more generally — with the very real and endemic belief among the Empire's indigenous subjects in the efficacy of the practice of evil magic, whether described as witchcraft or sorcery.

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<sup>10</sup> See, for example, Peter C Hoffer, *The Salem Witchcraft Trials* (Lawrence, Kansas: 1997), 87; and V Bernhard, 'Religion, Politics, and Witchcraft in Bermuda, 1651–55' (October 2010) 67(4) *The William and Mary Quarterly*, 707.

As legislators, administrators, and judges in Papua and New Guinea, they attempted to square this dichotomous circle by acknowledging the genuineness of the belief, while refusing to officially accept its reality in the course of rendering criminal both the practice of sorcery, by way of specific legislation, and the violence which that supposed practice engendered, by reference to codified common law principles. This approach was justified by the imperial imperative of bringing peace, order and good government as the blessings of colonisation, the crux of the often-fragile *Pax Australiana* of the late twentieth century. In doing so, the approach of the Anglo-Australian administration was clearly in accordance with legal practice throughout the British Empire, with the blessing of the Judicial Committee of the Privy Council.

As the Court of Empire, the Privy Council was the keystone of the practice of the common law. It thus provides one means of 'reaching across', to compare the legal response to sorcery in Papua and New Guinea with the jurisprudence of other colonial territories, framed by their legislative approach. The familiar combination of proscription of witchcraft and the prosecution of its practitioners characterised the legal regimes of Britain's African territories generally. Despite the exceptional nature of the accession to the empire of Papua and New Guinea as a colony-once-removed, when we examined in particular the situation in the colony of Kenya, an extraordinary commonality of imperial legal approach was revealed. Beginning with an exhaustive attention to legality contained in Orders-in-Council, and the useful fluidity of the concept of 'Protectorate', Kenya then saw the introduction of a codified criminal law, applicable to both the indigenous and settler population. Soon afterwards, the colonial pattern became even more familiar, with the *Witchcraft Ordinance 1909* used by legally-untrained local administrators to deal with claims of witchcraft; and the development of a jurisprudence by the expatriate justices of the East African Court of Appeal to assess the reasonableness of the response of the individual African defendant to the provocation of witchcraft, followed by the inevitable plea to the Executive for commutation of capital sentences, based on adherence to traditional beliefs.

### The findings - unembarrassed legal colonialists?

In his 2016 monograph, *The Embarrassed Colonialist*, journalist Sean Dorney argued that, on the rare occasions on which Australians thought of Papua New Guinea at all, they regarded the country as 'our unfortunate illegitimate child that we are ashamed of'.<sup>11</sup> This is a far cry from the high hopes we saw expressed in Chapter Two for the nascent Territory of Papua in 1909, lauded by Beatrice Grimshaw as a land of promise for British investors, the 'First

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<sup>11</sup> See Sean Dorney, 'Why is Australia so desperate to ignore Papua New Guinea?' *Sydney Morning Herald*, 20 February 2016. A positive review of *The Embarrassed Colonialist* described it as 'a slim but particularly pointed volume': John Connell (2017) *The embarrassed colonialist*, (2017) 48(4) *Australian Geographer*, 542.

Grandchild of Empire'.<sup>12</sup> Dorney maintains that the role of 'coloniser' sits ill with Australians' view of themselves and their nation's place in the world, and is compounded by an overwhelming ignorance of the history of our relationship with our nearest neighbour. It is also a hangover from some contemporary views during the colonial period itself. Despite being resident in Port Moresby from 1951 to 1966 as the wife of the Administrator, Dame Rachel Cleland famously stated that the first time she heard the word 'colony' mentioned was 'about 1965; and it gave me a distinct shock'.<sup>13</sup> As we saw in Chapter Four, Dame Rachel also was also a firm believer in the 'soundness' of the kiap court as a building block of 'order' in the Territory.

Due to the 1960's reforms to the administration of justice, the higher courts became clearly demarcated from the administration and its needs for the rudimentary justice of the kiap courts, especially their role in the enforcement of Forbidden Acts, which so tightly circumscribed the existence of indigenous Papua New Guineans. Australian lawyers and judges asserted their independence. One outcome of this was the adoption of more sophisticated approaches, such as the evolution of the concept of the 'reasonable Papuan' who could be provoked to murderous violence by his belief in the reality of the sorcerer's acts. This was combined with the longstanding practice of handing down lesser sentences, a policy which dated back to 1898. This attempt to bridge the colonial difference between expatriate judge and indigenous defendant resulted in the elaboration by the Supreme Court of a hierarchy of civilization in which the white community in Port Moresby sat at the apex of a pyramid which spread downwards and outwards, from the indigenous people on the urban periphery until it included the most remote villagers of the Territory.

The very concept of the 'reasonable Papuan' was deplored by the leading Melanesian legal scholar Bernard Narokobi. Narokobi argued that it was a western legal construct whose aim was to place the indigenous defendant within the very hierarchy which resulted, although with at least the succour of one day being able to approximate the man on the Clapham omnibus.<sup>14</sup> Undoubtedly, the divide of colonial difference remained unbridgeable. However, I would suggest that one of the contributions of this thesis has been to plot the development of a colonial jurisprudence which definitely attempted to balance the universality of the applicability of the common law against the lived reality of the indigenous villager both as an individual in the courtroom and as integral part of a localised societal matrix outside of it. It was not wholly

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<sup>12</sup> Beatrice Grimshaw, *Papua, the marvellous: the country of chances*, (Melbourne 1909).

<sup>13</sup> Quoted in Hank Nelson, Taim Bilong Masta, (ABC Books, Sydney 1982), 11.

<sup>14</sup> Bernard M Narokobi, 'Adaptation of Western law in Papua New Guinea' (1977) 5(1) *Melanesian Law Journal*, 52.

successful in Papua New Guinea, nor should we expect that here — any more than in the other parts of Empire — expatriate lawyers could undo their own lived experience and training to have made it so. Nonetheless, the evidence as presented clearly shows the effort on the part of the Supreme Court to find some space within its rational universe for the irrationality it encountered.

That evidence also shows that, when applying the provisions of the *Native Custom Recognition Ordinance 1963*, expatriate judges could more readily accommodate matters such as traditional family customs than issues such as the title to tracts of land. This flawed approach was not unique to the colonialist judiciary of Papua and New Guinea. Contemporaneously with the majority of the Full Court in *Nomgui* declaring the land subject to claim as ‘ownerless’ as at the turn of the twentieth century,<sup>15</sup> a single judge in the Northern Territory in *Milirrpum* found that the ‘interest’ of the Yolngu people in their lands was not a proprietary one which was amenable to being recognised by the common law.<sup>16</sup> This commonality of approach is evidence of the fact that, despite any exotic ‘life tint’,<sup>17</sup> those enforcing the law in Papua and New Guinea — based on a Criminal Code imported from Queensland, anticipating appeals to the High Court, and relying on precedents from the Privy Council — considered the legal system of that Territory as an integral part of the wider Australian one.

At the outset of this thesis I suggested that its value would be to open up for historical legal examination what has been a very under-examined component of the British Empire, namely the Anglo-Australian colonial possessions of Papua and New Guinea. One of the most gratifying aspects of this research project has been to see how the evidence of ‘colonial law talk’ — the law-making, law-enforcing and law-adjudication — can be pieced together from the available records to position the experience of the administration of the Territory squarely within the wider legal historiography of the Empire. The evidence from the legal response to the belief in the practice of sorcery and the ensuing sorcery-related violence demonstrates that the experience in the Territory reflected that of other British colonial possessions: the universality of the common law was taken as axiomatic by policy-makers in Port Moresby and Canberra; the differences between the coloniser and the colonised coloured the criminal jurisprudence, despite the best efforts of an expatriate judiciary; and indigenous Papua New Guineans impressed kiaps with their attempts to use the imposed law to their own advantage

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<sup>15</sup> *Nomgui v Administration of the Territory of Papua and New Guinea (re Lae Administration Land* [1974] PNGLR 349 (4 September 1972).

<sup>16</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.

<sup>17</sup> See Isaacs J in *R v Bernasconi* (1915) 19 CLR 629, 639.

in the remotest villages.<sup>18</sup> In doing so, the documentary evidence in the thesis has taken some steps toward recasting the perceived legal exceptionalism of Papua and New Guinea into the mainstream of Australian and Imperial legal history.

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<sup>18</sup> See, e.g., 28.11.43 Patrol Officer to District Officer of Mambere Patrol Reports Northern District, Higaturu 1943-1944, National Archives of Papua New Guinea, Accession 496.

# Appendix 1 – The Punishment for Crime Among Natives 1930

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## THE PUNISHMENT FOR CRIME AMONG NATIVES 1930

**RALPH T. GORE.**

Central Court, 7<sup>th</sup> November, 1930

The assumption of rule in Papua found a rudimental people. So backward were they in communal arrangement that not even did there exist the primitive law-giver to regulate the punishment for crime by so much as the archaic method of insisting upon the claims of the individuals injured. The matter of redress for wrong was left to the inclination of the individuals who had suffered and the punishment or satisfaction varied with the power, the will, or the opportunity of the sufferer or his adherents. No particular regard was paid to the object of punishment, very often an innocent person suffering for the crime of another, the latter thereupon becoming free from molestation. Sometimes satisfaction was gained by swift action, sometimes it was postponed for long periods and sometimes no satisfaction for the crime done was ever had at all. It cannot be said that there existed any generally accepted idea as to the degree of punishment except that death was the prevailing form. There being no semblance of a legal system to serve as a foundation, Government was not faced with the problem of choice, and the only hope for posterity was of the establishment of the legal system of civilisation to the exclusion of all else.

Where criminal jurisprudence has developed with the people and has been formulated by them for the common weal, through moral demands, they are so bound up with it that its application is conventional. This system suddenly imposed upon a people incapable of comprehension and ethically opposite comes as a shock, which without some softening, would be sufficiently violent to overthrow the social structure and to cause the ultimate extinction of the race. As the criminal system adopted is founded on the requirements of civilisation there could be no lowering of principle. It is through the attitude of the Courts in their treatment of the criminal sanctions in relation to native crime that the necessary adjustment is made between the sanctions provided and the social condition existing.



The theories of punishment in civilized communities, where the criminal law has developed with civilisation and is an inseparable part of the social system, cannot be regarded as stable even now. When the same system is applied to Papua in addition to the varying theories of punishment found in the white community there are the numerous problems which arise out of the application of the system of civilisation to a primitive people. Just as in a white community there is the need for uniformity as far as it can be had from the wide powers of the Judges and their varying mental attitude, a congruity of application of the criminal sanctions to the native races is to be sought. In Papua, fortunately, so far approximate co-ordination has been achieved in this regard. The responsibility imposed by the wide powers in relation to punishment is in no way lessened but it assumes a somewhat different character. The problems of punishment in a European community are to a great extent confined to the immediate effect on the community, but in the consideration of punishment as affecting native races, future results are of far greater importance than consequences which may have the effect of instant prevention but which would be deleterious to the race as a whole.

The paramount object of punishment in any community is the prevention of crime. The difficulty here is to carry out the paramount object while at the same time to guard against a result which would be detrimental to the preservation and advancement of the people. The punishment is to be the maximum that can be awarded, having the paramount object in view, after taking into consideration all the matters essential to the preservation and civilisation of the native races of which the Court can properly take note. This is what may be called an economic application of the criminal sanctions. If this theory is respected the punishment may not entirely effect the paramount object, or approach the stage reached in civilized communities, during the evolutionary period, but it is considered that such a contingency is to be borne rather than that the native races should perish through a failure to take into account those matters which appear to be essential to their preservation and development.

Although criminal punishment acts on the individual both mentally and physically the chief aim is to effect the prevention of crime by the action it has on the minds of others. This aim assumes even greater importance when the criminal sanctions are being applied to native races. Execution of course, puts it for all time beyond the power of the criminal to commit further crime and imprisonment also prevents a repetition of the crime during the period of incarceration, but the fear of further crime being committed by the same individual is outweighed by the value the criminal is likely to have as a preceptor among the people.

Execution also has a strong tendency to prevent crime in European communities through the terror it inspires in others. In native society it has far less value in that regard for the sanction for most crime committed against the primitive social order has always been death. It has always been expected and has followed as a natural sequence unless it could have been avoided by the perpetrator in some way, so that unless the difference in the manner of carrying out the death penalty by its novelty can inspire terror, it has little deterring effect on the minds of others. It would happen mostly, however, that the criminal would merely disappear from his tribe and be seen no more. What would remain to the rest of the tribe would be a notion that the criminal had been put out of the way by the Government but the manner of his exit from their midst would be vague and too unsubstantial to make any lasting impression on them. The effect of criminal punishment on the prevention of crime among natives is to be had largely from the influence on the minds of others through the instrumentality of the criminal. As the agent conveying the results of the object – lesson it follows that he cannot be put to death, nor is the knowledge that he has to impart to be unnecessarily withheld from his people by too long imprisonment.

In addition to the various considerations which usually affect the minds of judges in arriving at the particular penalty to be awarded in a given case, the main considerations determining punishment for native crime are as follows:-

- (1) No previous knowledge of the Government or only a vague idea of the Government existing.
- (2) Some knowledge of the existence of the Government but inability to resort thereto for the punishment of crim.
- (3) Crime committed arising out of native custom.
- (4) The degree of advancement made through contact with civilisation.
- (5) The decline of population in a particular tribe.

(1) It is a fundamental principle that everyone is presumed to know the law. It is bound up in our system and cannot be ignored. This presumption is satisfied by arrest and trial for it can be carried no further when it is an evident fact that the delinquent does not know the law and has never had an opportunity of knowing it. The native becomes a criminal only because of

the law which somebody, of whom he has never heard, has imposed upon him. In justice the Court cannot award any punishment at all. The mere conviction without penalty is not without beneficial results for it has a certain civilizing value from the enforced visit of the distant tribesman to a government centre. What he has seen and what he has experienced is carried back with him and remains with him, at least, even if he does not influence others of his tribe by his impressions.

(2) Having adopted the criminal system it naturally follows that the means of applying its sanctions must be provided before it can be hoped that the system will be accepted. It is of course idle to provide the elaborate machinery in motion. The native can scarcely be executed to refrain from resorting to his own primitive method of redressing wrong merely because somewhere to his knowledge there is a Government existing. If this tribal district is hemmed in by other hostile tribes through which he would have to pass in order to lay his complaint or if the innate fear of the world beyond prevents his seeking the aid of the Government at a distance and the visits of a government official to his district can be but rare, his tribe cannot be considered within the ambit of effective government control which postulates a strict adherence to the law. It is impossible to preserve constant contact with many tribes owing to the physical features of the country. More often are the distant tribal districts being penetrated and more and more are they being brought under proper control, but until such time as the inability to seek the aid of the law can be negated the courts cannot award punishment for crime. Crime is never countenanced and arrest and trial follow as necessary sequence but the delinquent cannot receive punishment for following his natural bent when nothing has effectively provided to supplant it.

(3) In order that punishment should deter through the terror it inspires the delinquent must know that he is doing wrong, or, if he knows he is doing wrong it does not suffice unless also he can help doing the wrong. If his mental aptitude is such that he is unable to refrain from committing an offence, the fear of punishment cannot make him avoid doing so. The native custom which supplies the motive is such an ingrained part of his social system that to him it is no wrong to commit crime in obedience to it. The urge, too, is so great that although he may have acquired a sufficient conception of the law's demands, he is mentally incapable of resisting the impulse of his tribal creed. The Courts regard crime committed in obedience to inherent native custom in the light of criminal responsibility. The untutored savage can be likened to the child of tender years who knows not the difference between right and wrong or to the person of natural mental infirmity which deprives him of the capacity to control his actions. But, in truth, they are neither children nor persons of mental infirmity when the law

relieves of total criminal responsibility, but the Courts take it upon themselves to relieve them of a measure of criminal responsibility because of the motive which urged the crime.

This is as it affects the criminal himself and the punishment awarded is sufficient to deter him from further crime, or rather should it be said that it suffices to influence him in not committing further crime through the enlightenment gained during imprisonment. As a deterrent to others through the fear it inspires punishment has little or no value when the crime is committed in obedience to native customs so that a greater punishment having for its object the deterrence of others is not warranted. The enlightenment of the delinquent is to some degree imparted by him to other members of his tribe on his return from prison and by this and other influences of contact there is a gradual process of breaking down of superstition and evil custom.

(4) The fourth consideration requires an intimate knowledge of the history of the various native races since the advent of the European as well as the disposition of the various centres of white population and the spheres of government and missionary influence. There is the presumption that an offender belonging to a tribe existing in geographical proximity to the centre of white population or which has come under the permanent influence of government or mission has made such advancement by contact that he should know better than to commit crime. This presumption, however, is not always safe for it may be dispelled by the knowledge that in spite of the geographical proximity and the efforts of government and mission the people have failed to profit by their nearness to civilisation or to accept the proffered assistance to a higher standard. As far as their appreciation of the existence of Government goes, and their acceptance of what it stands for, they are hardly in a more favourable position than the people of distant tribal districts who have received little opportunity. For crime committed by civilized persons there is a reason, a motive, though not always disclosed, unless the perpetrator is insane when the law provides particular treatment for him. Taking murder as an example, if it is shown that there was an entire absence of motive and the killing was done merely for the sake of killing, there would be a decided inclination to place the prisoner in the hands of a medical man for examination for insanity. In dealing with natives, however, when there is an entire absence of motive it is not a suggestion of insanity but merely that the people have not shaken off the blood lust of ages and have failed to accept the moral feelings of their mentors. There is a peculiar reason very often given for the commission of crime which appears to the sophisticated white man as irrational, but when it is put forward to those who have some knowledge of the native races and their history it is understandable and the treatment it receives has no

regard to mental deficiency. The reason or motive referred to here is that which is given for killing a person quite innocent of any injury to the murderer but merely because the murderer's wife or some relative or friend died and he is sorry. He vents his feeling of sorrow or rage upon the person of another, perhaps one whom he has never seen or even heard of before. Crime committed for no reason at all, or with such a reason as has been described, by a native the bent of whose tribe has been always the desire to kill for the sake of killing, cannot be treated as having been done through the mental derangement of the perpetrator. It is to be considered as the deed of one who belongs to a backward race which has not responded to the civilizing influences within its reach. The delinquent is to receive punishment for his crime and the amount of it depends on the degree of advancement he is considered to have made, arrived at by a review of many and varied circumstances. It is inconceivable that he should be awarded punishment in equal degree to that which would be given to a European for corresponding crime when he is void of that moral sense which binds the actions of the European with the law which the latter himself has helped to create. What he is awarded is something much less, hoping for the day when he will emerge from the slough of ignorance and savagery on to the firm ground of civilisation.

(5) The problem of depopulation or the preservation of the race is one which vitally concerns the Administration and it is a subject which receives constant and careful attention from that source. It may be considered that it properly belongs to administrative government and a recognition of it by the Courts is an incursion into the province of administrative government, but when punishment is likely to affect the economic position of the people it is difficult for the Administration to employ the proper safeguards through ministerial acts. It would not be practicable for the Executive to examine each particular case, and if it were, it could not be considered without an examination into all the other circumstances which influenced the mind of the Judge in arriving at the punishment awarded. This is apart from the impropriety of undue interference with judicial sentences by systematic examination. The Administrative Government, therefore, must rely upon the Courts to assist where necessary in its endeavour to preserve the race for an uplifted posterity. This consideration influences the Court when the delinquent is a member of a tribe which is decreasing or concerning which there is the fear of a decrease and then particularly when a number is charged with committing a crime in company.

In dealing with ordinary native crime little assistance can be had from the accepted consideration determining punishment for crime committed in white communities either as regards the offence or the offender. For example, as regards the offence the greatness or

smallness of the evil likely to result from the acts of the kind, the place, the time or the company, have little or no influence. The frequency or rarity with which crime is committed, however, is a consideration which at times receives due weight. In white communities either may be a matter of extenuation or aggravation according to the mind of the Judge. In dealing with native crime, however, it is submitted that it is as a rule more efficacious to treat the circumstances of rarity as a matter of aggravation rather than of extenuation for when a tribe has advanced so far that crime among its members is rare they are more susceptible to punishment, and in order to preserve the highly satisfactory position an exemplary punishment may be warranted.

For native crime, often the punishment awarded does not approach in severity that which the native himself would give were it left to him, nor, indeed does it equal the punishment for corresponding crime committed by a European. It may appear to some observers that a punishment much less than that which the native has always regarded as a proper retribution for crime would render the crime less serious in the eyes of the native, which will not assist him to appreciate our moral teaching or that it will cause him to look upon our measures of justice as failing short of the standard we claim to set up, creating a lack of faith in our institutions and our tutelage. The sanctions of savagery however, have been wholly displaced by those of civilisation and the native races have to be moulded into the new order. The Courts can only treat crime shorn of all the logic of the savage in his conception of punishment and with a proper correlation of the laws adopted and the backward state of the people.

When the punishment imposed is light in comparison, the people have not reached the stage when they reflect upon the difference to the disadvantage of our methods. What they do see is what we wish them to see, the great difference to our attitude towards offenders and theirs. There is not in fact among the most backward tribes a conviction that our punishment is less in degree than their own as the novelty of ours is enough to dispose of any impression of insufficiency.

There are some tribes which have been in constant contact with civilisation since the advent of government and have assimilated sufficient of our moral convictions to note the relation between them and the law. Crime among them is rare and if committed the punishment is equal in severity to that awarded among whites. There are other tribes however, which are intermediate between the backward tribes where punishment is light and the sophisticated tribes first spoken of. The people are in a transitory stage from adherence to obnoxious

native custom to acceptance of the moral teaching of civilisation. The reflection of the more advanced among them may be adverse to our treatment of the sanctions when applied to delinquencies of their tribe but until the transition has been effected and has become visible as a collective gesture the opinion of a few cannot influence the considerations determining punishment.

There are sound reasons for maintaining that the attitude of the Courts in their treatment of native crime has been productive of beneficial results. Experience has shown that the proportion of criminals who have received punishment by imprisonment and have again committed crime after release is remarkably small. It has also been observed how often the returned criminal becomes a strong restraining influence among his fellow tribesmen through disinclination to join in suggested crime or by active disapproval.

**RALPH T. GORE.**

Central Court, 7<sup>th</sup> November, 1930.

(Extract from *Territory of Papua Annual Report* for the year 1928-1929. Pages 20-22)

## Appendix 2 – Forbidden Acts

Extract from *Territory of Papua Annual Report for 1949-1950*

### Appendix III.—continued.

#### 3. Courts for Native Matters

Offences against Native Regulations.	Reg No.	Tried.	Convicted.
Contempt of Court	69 (a)	8	3
Obstruct Magistrate	69 (o)	6	6
False evidence before Court	69 (e)	3	3
Escaping from custody	70 (a)	16	16
Escaping from gaol	70 (c)	7	7
Supplying prisoner without permission	70 (e)	1	1
Assault	71 (a)	316	308
Spreading false reports	71(b)	35	34
Threatening behaviour	71 (c)	96	91
Obscene language	71 (d)	20	20
Riotous behaviour	71 (e)	275	260
Possession of a weapon capable of wounding	72 (6)	1	1
Absent from quarters between 9 p.m. and dawn	73 (1)	16	16
Unlawfully on premises	74 (1)	85	79
No means of support	75 (3)	1	1
Desertion of wife and/or children	77 (1)	8	7
Disobey order of maintenance	77 (2)	3	3
Vary order of maintenance for wife and/or children	77 (5)	1	1
Stealing	78 (1)	137	127



Pretending to be in service of Government	79 (1)	1	1
Wrongful use of authority	79 (2)	6	6
Practising sorcery	80 (2) (a)	15	14
Threatening with sorcery	80 (2) (b)	4	3
In possession of implements of sorcery	80 (2) (d)	3	3
Possession of implements used in connexion with illegal cult	81 (2)(c)	2	2
Bribery of official	82	2	2
Gambling	83	720	699
Adultery	84	279	279
Inducing woman to have sexual intercourse with native not her husband	84 (5)	6	6
Receiving gift for allowing native man to have sexual intercourse with woman	84(6)	2	2
Indecent assault	87	35	33
Drinking intoxicating liquor	88	2	2
Careless use of fire	91(a)	5	5
Threatening or abusive language to a European	93(a)	1	1
Wearing no clothes	96	1	1
Unlawful burying.	100 (1)	2	2
Forbidden settlement on land	101 (a)	42	41
Forbidden settlement away from village	101 (b)	6	6
Disobeying order to remove from forbidden settlement	101(c)	5	5
Failure to keep area around house clean	101(4)	102	101

Failure to repair house after order	101(6)	39	39
Failure to remove unsanitary house	101(9)	57	57
Failure to improve or fill in unsanitary wells	101(13)	19	18
Failure to submit to examination for venereal disease	105	3	3
Failure to obtain treatment after examination for venereal disease	106	90	90
Defecating so as to encourage flies	108	6	5
Failure to remove sick native on being ordered	110 (1)	4	4
Failure to observe quarantine between houses	110 (3)	1	1
Failure to observe quarantine between villages	110 (5)	35	35
Failure to take child for medical treatment after being ordered	115	19	19
Unlawful killing of animals	116(2)	1	1
Failure to report to owner after killing animal	116(3)	1	1
Killing animal on own property and consuming carcass	116(4)	1	1
Child not attending school	117(2)(a)	3	3
Child neglecting to attend school	117(3)	4	4
Failure to maintain roads	118	198	194
Wilfully destroying a cultivated tree	121(7)	2	2
Refusal to carry for the Government	127(9)(b)	105	84
Disobeying a lawful order	130	3	3

Ownership of property	132 (a)	1	1
Recovery of money.	132 (d)	2	2
Compensation for damage to property	132 (e)	28	28
Failure to aid official in arresting another person	155 (9)	1	1
Village officials wilfully neglecting to carry out instructions	155 (11)	18	18
<b>Total</b>		<b>2,917</b>	<b>2,814</b>

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