COMMENT

JUST LAW FOR PRIMITIVE SOCIETY?

> (Imperialism) uprooted ancient laws and gave in exchange Western justice whose ideals disrupted the local culture by striking at the roots of time-honoured traditions and customs. . . . Immense strides were made in orderly government, but it was government over and not of the people. . . . Colonialism even in its most missionary moments, never succeeded in seeing the "natives" as equals and it usually took for granted their irremediable inferiority.
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> —Robert Heilbroner,
> *The Future as History* (1959)

The purpose of this Comment is to present some questions which will arise from the inevitable application of Western law to primitive societies. It will give special attention to the problems arising in the Territory of Papua and New Guinea (hereafter called, where the context permits, "New Guinea"). In New Guinea there are some hundreds of tribal groups, few of which share a common language and many of which have quite different tribal customs, including methods of dispute settlement and treatment of socially condemned activities. The questions to be raised include that of whether the tribal people of a primitive society have a concept of "justice"; and if so, whether and in what respects it differs from commonly held Western notions of justice. In order to discuss this it will be necessary to examine the sort of dispute settlement mechanisms which exist in such a society, and also the attitudes held in such a society to those who act in a way offensive to it, or at least to its leaders. It will also necessarily involve the question of whether certain activities found in such a society constitute a legal system.

If they do not, and perhaps even if they do, the imposition of Western law may be regarded as a means of forcing the local people to conform to the standards of the white man. There may exist some justification for the imposition of a totally foreign legal system; but the question of the degree of consideration of existing popular customs and standards is nevertheless important. A comparison will be made of the treatment of certain activities under the customary tribal system and under the white man's law, particularly in the field of criminal law—where, it seems, the effects of the imposition of Western law would be most significant, as this is the area in which most people come into contact with the law. From this an attempt will be made to show the effects, or some of them, of imposing Western law upon primitive communities. Some of the resulting problems will be discussed, and some of the alternatives examined.

I

The island of New Guinea lies to the north of Australia, and south-east of the larger part of the Indonesian archipelago. The western half of the island (West Irian) is part of the Republic of Indonesia. The eastern part of the island is divided into two: the south-east quarter (Papua) has been part

of Australia since the 1880s, when it was seized by the Queensland colonial government to prevent it falling to the German Empire. The north-east quarter, now (with a large number of offshore islands) the Trust Territory of New Guinea, was formerly Imperial German territory. From 1919 until 1946, except for a period of Japanese occupation during the Second World War, this part of the Territory was administered by Australia under a League of Nations mandate. Since 1946, it has been the subject of a United Nations Trusteeship Agreement, under which Australia is the administering nation.[1] Since June 1, 1949, Papua and New Guinea have been administered as a single unit.[2] In 1964, an elected House of Assembly was set up with power to make Ordinances "for the peace, order and good government" of the Territory, and in 1967 the proportion of elected representatives was increased.[3] Virtually all the elected representatives are now non-European.[4] However, the legislative powers of the House of Assembly are limited. It may not legislate on defence or foreign policy; certain Ordinances, including those relating to divorce, land, employment, immigration and the Public Service, require the approval of the Australian Government before becoming law; and all Ordinances passed by the House may be disallowed by the Australian Government or its representative in the Territory.[5] This structure has been criticised by many people, both in the Territory and outside, as not going far enough towards self-government, but it has been supported by many local leaders in the New Guinea Highlands, who wish to remain subject to Australian guidance and control until their people have been sufficiently educated.[6]

New Guinea is largely an area of high volcanic mountain ranges, separated by narrow fertile valleys. A large proportion of the people live in these valleys, which in many cases are inaccessible from the coast except by air. This may account for the fact that the four and a half million people of the Territory are divided into about 600 tribal groups. While these people are ethnically related, their languages are widely different, as are their social customs. Until the coming of the white man, and indeed after it, there was little intercourse, even contact, between the inhabitants of different valleys. The coastal people of New Guinea have been in regular contact with Europeans, especially traders and missionaries, since the 1860s, and their habits were substantially affected by this contact. Most of the highland people had no contact with Europeans until World War II, and then any contact was with missionaries or occasional Administration patrols. Because of lack of incentives and facilities, very few New Guineans received any Western education until the 1950s.

Few anthropological studies were made of the highland people of New Guinea, although the pioneering studies made by Bronislaw Malinowski,[7] Margaret Mead,[8] Ian Hogbin[9] and others on the Trobriand and other offshore islanders are quite famous. Indeed, the only study of highland people until

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[1] Agreement of 13th December, 1946, reprinted as a Schedule to the Papua New Guinea Act, 1949-68 (Cwlth.).

[2] Papua New Guinea Act, 1949-68 (Cwlth.) (hereinafter cited as "P.N.G. Act").

[3] Papua New Guinea (Amendment) Act, 1968 (Cwlth.), following a report by a Committee of the House of Assembly. The Australian government rejected proposals to grant ministerial responsibility on the British pattern to members of the House.

[4] United Nations Trusteeship Council, Report of the Visiting Delegation to the Trust Territory of New Guinea, 1968 (U.N. Doc. No. T1678, hereinafter cited as "U.N.T.C. Report").

[5] P.N.G. Act, ss. 53-57A.

[6] *Cf.* the U.N.T.C. Report—esp. the first part, dealing with submissions made to the delegation during its visit to the Territory. The Report also provides an excellent background on the culture and economy of New Guinea.

[7] *Crime and Custom in Savage Society* (1926).

[8] *Growing Up in New Guinea* (1928).

[9] *Law and Order in Polynesia* (1934).

very recently was that made by Leopold Pospisil of the Kapauku, who live in the extreme eastern part of West Irian.[10] Ethnically the Kapauku and the other highland Irianese are closely related to the Western highlanders. Studies of land tenure in the Western Highlands by Peter Lawrence[11] and the New Guinea Research Unit of the Australian National University[12] show significant similarities to the customs of the Kapauku, although there are differences, which may be ascribed to the isolation of the various groups studied from other groups. For these reasons it is submitted that the study of Pospisil has relevance to a general study of "law" and customs of highland people. Pospisil's work has the added advantage that it is the only available "case" study of the customs of highland groups in New Guinea. The question of land tenure is extremely important, but very complex, and for this reason, except where it is relevant to other "legal" questions, it will be disregarded in this Comment.

II

It seems that the principal object of the "law" of the Kapauku, as found by Pospisil, is the maintenance of friendly relations among the members of the community. He describes the community as a "confederacy" of persons sharing common lineage, and others living in the same villages. Because of the apparent purpose of the rules, in many of the observed cases the sanction provided by the rules was not imposed, or the prescribed restitution or compensation was not made, as to have done so might have been to endanger relationships between, say, members of a family group, or inhabitants of the same village.[13] Similar considerations (of maintenance of friendly relations between villages or between confederacies) apply even though the parties to a dispute may come from different villages.[14] Of the cases which Pospisil discusses, he classifies 114 as "legal". Of these, in 45 cases, the decision of the authority did not comply with what Pospisil had established to be the customary rule applied in such cases.[15]

Hogbin has found that the authorities in a primitive society in the British Solomon Islands also depart from established custom in similar cases.[16] John Beattie[17] reports that the Bunyoro of Central Africa make a practice, in the case of a minor delict, of ordering the losing or guilty party to bring beer and meat to the hut of his victim or opponent. All parties share the feast; friendly relations, and thus the *status quo ante*, are restored. This, in the view of all parties, is the just result. Max Gluckman,[18] in his detailed study of the judicial process of the Lozi people of Zambia, found, in a highly formal system of courts, a similar object. He gives examples of the highest judges in the system admonishing wrongdoers and exhorting them to behave in such a way as not to disturb society. Western legal systems also occasionally provide that the judiciary should provide advice and moral instruction to parties—it is common that parties seeking divorce must submit to certain attempts by the courts to facilitate reconciliation, and probation for young criminal offenders seems to have been accepted throughout the common law world.

Pospisil's study shows that amongst the Kapauku, "legal" disputes most

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[10] *Kapauku Papuans and their Law* (1958).
[11] In Ian Hogbin and Peter Lawrence, *Studies in New Guinea Land Tenure* (1967).
[12] *New Guinea Research Bulletin*, No. 11 (Australian National University, 1967).
[13] Pospisil, *op. cit. supra* n. 10 at 169 (Case 35).
[14] *Ibid.*
[15] *Id.* 280.
[16] Hogbin, *op. cit. supra* n. 9.
[17] *Bunyoro* (1960) 66-70.
[18] *The Judicial Process among the Barotse of Northern Rhodesia* (1955) 37 (Case 1). See also *id.* 55.

often arise out of interference with chattels (usually pigs or vegetables), contracts for the sale of chattels or for the raising of pigs, and matrimonial disputes. Hogbin,[19] who also deals with a primitive society, and Gluckman,[20] whose concern is with a more advanced society, report that by far the most numerous disputes were matrimonial. (The same is true of New York City, so it is questionable whether the preponderance of matrimonial litigation marks any particular stage of development of society.) The preponderance of non-matrimonial disputes among the Kapauku may result from the system of contracts (for the sale and raising of pigs, the principal form of wealth) which the Kapauku possessed long before their contact with the white man. It may be of the nature of commerce that it gives rise to disputes. A further factor may be that the system of marriage is essential to the Kapauku economy, a wife being regarded as an asset of great value, as it is the women who tend the gardens and supply food for the pigs (and, perhaps incidentally, the men).[21] By way of illustration, I shall discuss some of the cases reported by Pospisil, and later shall point out some of the problems which would arise, should the appropriate Western law be applied to the same situations.

1. *Pig-stealing*

(*a*) A's pig disappeared. After two days, a man from a distant village reported to the owner that a man from his village had stolen the pig. The people of A's village took their weapons and went to the distant village. The inhabitants of the village, contrary to the local custom, which requires that a pig-thief or his people should pay an adequate indemnity, refused to pay. A's people thereupon seized a larger pig and took it back to their village where A gave a feast, and sold the remainder of the pig.[22]

(*b*) P, a member of a village not belonging to the confederacy stole a pig belonging to J. A relative who was angry with the thief came to J and denounced the culprit. J, with some other people from his village, surreptitiously took a pig belonging to the brother of the thief as indemnity.[23]

(*c*) X stole a pig in a distant village. He brought it to his own village where he secretly cut it up and sold it. The next day, the people of the owner's village appeared at X's village and demanded justice. The headman of the confederacy assured them that if they would wait a short time they would receive an indemnity. The headman ascertained exactly who the culprit was, and forced him to pay an indemnity in valuable cowrie shells. X was also subjected to humiliation and reprimand by the headman.[24]

These cases illustrate the rule that when a thing of value is stolen, the thief is liable to indemnify the owner. Even though in the first two of the cases there is no authority involved, it is considered just that if the indemnity is not paid voluntarily, it may be taken by any means available.

2. *Stealing of Vegetables*

Pospisil states that the accepted rule is that when vegetables or food are stolen, unless the goods are voluntarily returned, the thief should be beaten with a stick.[25] Thus where the wife of a headman stole some sweet potatoes from the garden of a neighbour, it was considered extremely just that, in addition to beating his wife, the headman should offer an indemnity for the stolen vegetables.[26]

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[19] *Op. cit. supra* n. 9.
[20] *Op. cit. supra* n. 18.
[21] Pospisil, *op. cit. supra* n. 10 at 57.
[22] *Id.* 192 (Case 76).
[23] *Id.* 193 (Case 77).
[24] *Id.* 192 (Case 75).
[25] *Id.* 184 (Rule 49).
[26] *Ibid.* (Case 61).

3. *Sexual Offences*

Rape and "indecent" assault with intent to rape do not seem to be considered very seriously by the Kapauku.

(*a*) A young boy met a girl on a path in the bush, grabbed her by the breasts and attempted to seduce her. The girl complained to her father, who asked the headman of the boy's village for an indemnity. The headman treated the affair as a joke, paid the indemnity (the amount of which was fixed by custom) himself, and gave the boy advice on the art of seduction.[27]

(*b*) The former lover of a woman accosted her in the bush. He unsuccessfully attempted rape. The woman's husband did not demand indemnity, and indeed could not, as the attempt had failed.[28] Pospisil states that the rule is that where a married woman is raped she must immediately tell her husband; the offender may then be put to death, but if he offers an indemnity, the husband may accept this in lieu of punishment of the offender.[29] If the woman is unmarried, the only penalty that may be imposed on the offender is the payment of the indemnity.[30] Pospisil reports one case in which a rapist paid to the father of the unmarried victim not only the amount fixed by custom as the indemnity for the offence, but a higher sum which had been demanded by the father; he did this expressly to preserve good relations with the girl's family.[31]

Normally, where a woman commits adultery, both she and her lover should be put to death.[32]

(*c*) A couple were discovered in the act of adultery. They escaped to the bush. The cuckolded husband shot and killed a pig belonging to the offender and burnt his house. He then started a war between his village and that of the offender. In order to stop this war, the headman, who was the relevant authority, declared that the loss of the house and pig were sufficient punishment for the offence, and when, after some months, the offender returned from hiding, no further action was taken.[33]

III

It should be noted that the members of the community who reported these cases to Pospisil often described a departure from an accepted rule by the authority as "good" or "just".[34] Yet when asked, in the abstract, to describe what is good, or even to specify a man who is described by the community as good, and to identify the characteristics which make him so, the Kapauku speak of such things as generosity to the sons of the sister of the man in question.[35] Pospisil states that "evil" and "good" are not substantives in the Kapauku language; they are criteria which are always relative.[36] This suggests that the only way to ascertain what is good or bad (and, by analogy, what is just) is to ascertain the objects in relation to which the words are used, and to derive from these the criteria for application of the value-terms.[37]

Since two thousand years of Western philosophical tradition have failed to produce a satisfactory definition of justice which does not concede that justice is a relative and relational concept, the failure of a primitive and

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[27] *Id.* 161 (Case 25).
[28] *Id.* 171 (Case 39).
[29] *Id.* 167; see also 168 (Rule 34).
[30] *Id.* 172 (Rule 36).
[31] *Ibid.* (Case 41).
[32] See *loci cit. supra* n. 29.
[33] *Id.* 168 (Case 34).
[34] *Id.* 288.
[35] *Id.* 79-80.
[36] *Id.* 17.
[37] This would support the later theory of justice of Hans Kelsen, as propounded in Part X of his essay, "What is Justice?" See Kelsen, *What is Justice?* (1957) 22-23.

isolated community to evolve more than relative criteria for application of its moral value-terms should not be criticised. In any case, it is not the purpose of this Comment to discuss the attempts of theorists to arrive at understanding or elucidation of the various moral terms, particularly "justice". What it attempts to do is merely to make the point that in practice ideas of "right", "good" and "justice" vary from society to society. The cases discussed above, and the Kapauku methods of dealing with them, would probably not commend themselves as examples of justice to a Western-trained lawyer. This is particularly so in the cases of "self-help". However, there does exist a problem when informal mechanisms of dispute settlement are permitted in a more complex society. The complexity, of itself, might require substantial changes in procedure.

IV

Pospisil calls the Kapauku system of rules and dispute-settlement mechanisms "law". Is this a proper description? Questions of this type have for many years been a point of controversy for both anthropologists and legal theorists.[38] In his introduction to Hogbin's *Law and Order in Polynesia,* Malinowski enlarges on a point which he had suggested in his *Crime and Custom in Savage Society.* Roscoe Pound had defined "law" as "social control through the systematic application of the force of politically organized society". Malinowski questions whether such a definition is appropriate to a primitive society.[39] He finds in Hogbin's description of an island society in the British Solomon Islands (which in several significant ways, particularly in respect to treatment of some minor and matrimonial offences, has similarities to the Kapauku society) substantial support for his views. He says:

> These rules of ordinary or neutral custom are never sanctioned in the sense that their breach provokes dissatisfaction in anyone, hence reaction, communal or individual, hence organized punishment. Such rules are not broken, since no one wants to break them, hence their breach does not exist and cannot be punished.
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> Look on the other hand at the rules which curb sexual passion and the injunction of continence, at the rules which forbid a man to court another man's wife or maidservant. The very apparatus of circumstantial and additional safeguards indicates how many temptations are involved in such rules. Chaperones, *ceintures de chasteté,* harems and eunuchs, the vigilance associated with the convent school, the customs of courtship in Spain, all indicate that we have a type of rule which must not only be made safe by subsequent punishment of breach, but, so to speak, temptation-proof at every juncture. The very possibility of a breach is prevented by elaborate arrangements and constant vigilance.[40]

In other words, primitive societies (as well as "advanced" societies) may have rules which are punctiliously observed but need not be institutionalised. Neither need such rules have sanctions of the type found in Western systems of criminal law. For Malinowski, the "laws" of such primitive societies are intrinsically valid customs, albeit of a special type—and some of the customs which become institutionalised as society advances do not represent any gain in terms of moral or social worth. Malinowski also quotes an opinion of Lord Sumner, speaking on behalf of the Judicial Committee of the Privy Council in England:

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[38] For an excellent account which takes note of the contributions of both legal theorists and anthropologists, see J. Stone, *Social Dimensions of Law and Justice* (1966), esp. Ch. 3.

[39] Introduction to Hogbin, *op. cit. supra* n. 9, at xxvii.

[40] *Id.* xxvi.

> The estimation of the rights of aboriginal tribes is always extremely difficult. Some tribes are 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 and legal ideas of a civilized society. Such a gulf cannot be bridged.[41]

While Malinowski does not accept the last sentence of this passage, he expresses support for the sentiment expressed in the first part.[42] Indeed, Lord Sumner does give a fair statement of one view of this problem.

The question may be expressed in a slightly different way. Can a system of rules which is not institutionalized have the force of law? From this it follows that one should ask what would be the impact of the institutionalization of a system of rules which previously existed in a non-institutionalized form. This question is relevant to the present Comment. At this stage it is suggested that the mere fact of the institutionalization would have no significant effect; indeed, such a phenomenon does not exist *in vacuo*. The studies of Hogbin[43] suggest that the institutionalization of these rules is part of an evolutionary process. Gluckman, drawing on a wide range of studies, reaches the same conclusion.[44]

Another related question, central to the present Comment, concerns the impact of a formal, institutionalized system of law upon a society which previously lacked any such institutions. Mr. Justice D. M. Selby, of the Supreme Court of New South Wales, formerly a Judge of the Supreme Court of Papua and New Guinea, has described some of the contradictions with which the New Guinean is confronted in just such a situation.[45] His descriptions of the cases which came before his court while it was on circuit in the highland regions illustrate this particularly well. Mountain people found themselves before the Court, a completely strange institution, charged with crimes consisting in actions which were completely justified by the only rules previously known to them. The accused, undoubtedly guilty by the white man's law, would find himself deprived of his liberty for the performance of an act justified, even required by his own customs. The white man's law applicable to crimes committed in New Guinea is the Queensland Criminal Code.[46] This code was drafted in the 1880s by Sir James FitzJames Stephen, the noted English jurist. While it may have been appropriate to Victorian England, it is probably inappropriate even in a developed society today, let alone a primitive society. Under s. 398 of the Code, both the pig stealers, and the owners of the stolen animal who retaliated, would be liable to three years' imprisonment with hard labour. The youth who rudely accosted the young lady would face, under s. 350 of the code, two years imprisonment with hard labour—and it would be unlikely that the Judge would be sufficiently skilled or experienced in the social mores of the community to give the advice which the youth received. The rejected lover in case 2(*b*) would be punished as a rapist and would face life imprisonment. Had the cuckolded husband succeeded in killing his wife's seducer, he also would be liable as a murderer to imprisonment for life. (Under Australian law, adultery is not sufficient provocation to reduce a charge of murder to one of manslaughter unless the killing takes place immediately upon the husband finding his wife in the act of adultery.[47]) The husband would also be liable to ten years' imprisonment for malicious

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[41] *In re Southern Rhodesia* (1919) A.C. 211, at 233-34 (*per* Lord Sumner).
[42] Introduction cited *supra* n. 39 at xxviii.
[43] *Op. cit. supra* n. 9.
[44] *Op. cit. supra* n. 18.
[45] D. M. Selby, *Itambu* (1963).
[46] Adopted in Papua by Ordinance of 1902, and in New Guinea by Ordinance of 1922.
[47] *Parker* v. *R.* (1964) A.C. 1369 (Privy Council).

destruction of property. Other prohibitions which would appear strange to a tribe such as the Kapauku would be the prohibition on bigamy.[48]

For the Kapauku, deprivation of liberty was entirely unknown before the advent of the white man, and has since been considered the most horrible type of punishment available—the only thing which Pospisil's Kapauku informants considered absolutely evil.[49] In such a context, the imposition of this form of punishment as a matter of course, for actions which the New Guinean considers petty, may lead to rejection by the tribesman of the new social order, or at least to total lack of respect for its laws. Such a result might come about because the imposed laws do not take into account the values of the society on which they are imposed. Even by the standards of most Western theorists, laws which do not reflect the values of the society to which they apply are considered unjust, and, at least in extreme cases, appropriate to be overthrown by force.[50]

It was suggested above that the institutionalization of a system of law is a gradual process. It is also one which reflects significant changes in the behaviour and attitudes of the society.[51] Conversely, when a foreign system of legal institutions is imposed on a society to which the concepts involved in the new system are completely alien, a change in social behaviour will result. The changes are likely to be more significant if the customs and dispute-settling mechanisms of the society are relatively primitive when compared with those of the system newly imposed. Pospisil suggests that the Kapauku did have an institutionalized legal system;[52] but in view of the remarks above, this is open to doubt. The Lozi people studied by Gluckman did have an extensive judicial system, but, as in the Kapauku customs, the system did not have any notion of legislation imposed by a ruler.[53] Innovations were made by the authorities by actions which disregarded existing customs.[54] In both systems the authorities did not regard the system as rigid, but merely as a framework within which they could take certain action, usually prescribed by custom, to restore the *status quo ante*. Nevertheless, the Lozi people were accustomed to taking their disputes and complaints to a judicial forum, and when British rule was established they found it easy to accept the phenomenon of a court; the Kapauku, and similar New Guinea tribes, are obliged to familiarize themselves with and accept an entirely novel concept. In order to make this change easier, introduction of the western concept of courts as agencies of dispute settlement, and as administering sanctions resulting from prohibited acts, must be part of a process of education.

V

It is assumed that, regardless of the wishes of the highland people, a modern state is to be established in New Guinea. This development is made inevitable with the increase in communications between formerly isolated communities, with the advent of Western education, and with the resulting economic changes, particularly increasing economic specialization and the introduction of cash crops.

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[48] Pospisil, *op. cit. supra* n. 10 at 58.

[49] *Id.* 77.

[50] See e.g. John Locke, *Second Treatise of Civil Government* (1690) Ch. XVIII ("Of Tyranny").

[51] See Max Gluckman, *Politics, Law and Ritual in Tribal Society* (1965), esp. the Introduction.

[52] Pospisil, *op. cit. supra* n. 10, Part IV, esp. at 250-260.

[53] Gluckman, *op. cit. supra* n. 18, Ch. 1.

[54] Possibly the best example of this type of change is given by Pospisil, *op. cit. supra* n. 10 at 165 (Case 33). A village headman offended a minor taboo on "incest" between distantly related lineage groups. Others followed his example to the point where the taboo could no longer be said to exist. Pospisil reads more than this into the occurrence, and refers to it as a change in the law.

Case 1(*c*) above shows that even when the people are still in a primitive condition, some form of super-communal dispute-settlement mechanism is desirable. It is likely that this development will be necessary within a relatively short time, as one of the most frequent demands of the highland people to any whom they believe to be able to help is for roads, particularly so that they may have access to markets for cash crops. For them, cash crops seem the obvious means of obtaining a foothold in the modern economy.[55] These economic changes will entail the establishment not only of a super-communal dispute-settling mechanism, but also of a set of rules which the tribunals may apply. It is obvious that what may be acceptable to one community, and in accordance with the custom of that community, may be strange and unacceptable to a neighbouring community. A "law" accepted by the people of one area only would be as strange to the people of other areas as would Western law.

One law which may be imposed upon the highland people of New Guinea is the uniform Sale of Goods Act adopted by the Australian States. This Act would conflict in important ways with local custom (in cases where, as with the Kapauku, there is a developed law of contract).[56] What difference would it make if, in the interest of providing uniform law, the rule applied, say, in the Sepik Valley was the rule developed by the Tolai people of New Britain or the Australian Sale of Goods Acts? The choice seems to lie between the imposition of a law which is well settled, which has been used for a long time in developed communities, and the effect and operation of which people can be educated to appreciate, and the formulation of a system of laws based upon the customary rules of one or more of the communities to which the new law is to be applied.

The first alternative would require an educational process lasting a considerable time; if such education were not possible, confusions and injustices (even by Western standards) such as those pointed out by Selby, J.[57] would necessarily occur.

The second alternative involves difficulties of a different kind. It would be necessary to ascertain the precise nature and functions of the existing customary rules, preferably among all the communities to be affected, then to decide upon an effective compromise from among the multitude of rules which would be discovered in the survey of customs. Once the content had been established, it would still be necessary to formulate the rules in such a way as to enable their application by a sophisticated judicial system, while keeping them in a form that could be understood by illiterate people. The process of educating the people from communities whose customs had not been embodied in the law would be of the same type and magnitude as if the new law had been taken entirely from foreign sources; and such communities would be in the vast majority, because of the isolation from each other of the numerous communities in New Guinea. While ideally it would be desirable to formulate a law which had its base in the customs of the country, it is impossible that the necessary anthropological or legal skill would ever be available for the task, even if local rivalries would ever permit a compromise of the type suggested. For this reason the first alternative seems to be preferable.

Whichever choice were made there might still be a problem in that the people might know what the new law was to be, and that it would be

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[55] *Cf.* the U.N.T.C. Report, Section on "Economics".

[56] Compare Rules 81-83 as stated by Pospisil, *op. cit. supra* n. 10 at 211-12, with the rules for determining the time of passing of property in the goods under the Sale of Goods Act, 1923-53, s. 23 (N.S.W.).

[57] *Op. cit. supra* n. 45.

applied, but would not consider it just by the standards of their community. They might act as if their leaders had changed the law by traditional means,[58] or they might ignore it.[59] They might even take active steps to reject the law in its application to their community. If such a move were successful, it would mean a reversion to the earlier fragmentation.

Essentially the question is one of conflicting concepts of "justice". The problem, in this context, does not appear to have received the attention of legal philosophers,[60] although anthropologists have given it a great deal of thought. Western law has for so long been accepted in so many colonies and former colonies that it is no longer questioned, except in relatively minor matters of personal law where traditional law remains in force.[61] Certainly the colonial powers did not question the justice of applying their domestic law to other societies which they purchased or subjugated—as witness the opinion of Lord Sumner quoted above.[62] Yet the consistency of such action with basic notions of human rights is open to question. The desirability of local or even national standards of justice is itself open to question in a world where there is great ease of travel, communication and commerce, and therefore vastly increased international intercourse; there may be a need for rules which all may understand and apply, and which all consider to be just. Is this question simply one of education and social conditioning, so that all will come in time to accept common standards of justice which differ from those handed down by local tradition? The politicians and diplomats who drafted the Trusteeship Agreement for New Guinea did consider this problem. Article 8, Clause 2(a) of the Agreement[63] requires the Administering Nation to

> take into consideration the customs and usages of the inhabitants of New Guinea and respect the rights and safeguard the interests both present and future of the indigenous inhabitants of the Territory and in particular ensure that no rights over native land in favour of any person not an indigenous inhabitant of New Guinea may be created or transferred without the consent of the competent public authority. . . .

The material above shows that there are difficulties even in performing this obligation.

Another problem which arises is that of the *non liquet*. This is the case which is not provided for by the customary rules, but which can be expected to occur frequently with the advance of "civilization". One obvious example is the need for a law governing negligence in the use of motor vehicles, which will be required as soon as roads are built through the remaining sections of the New Guinea Highlands. But the introduction of bills of exchange and other commercial instruments must give rise to similar problems. Is it really preferable to allow a law based on community "custom" (in which the prejudice and interests of the traditional lawmaker could not be overlooked) or should the society rely on the experience of other communities, even if

[58] See *supra* n. 54.

[59] See the U.N.T.C. Report, Section on "New Britain". This describes the refusal of the relatively advanced and educated community on the wealthy Gazelle Peninsula of New Britain to pay local government taxes and to participate in local government councils. Their action may have the character of a political boycott rather than a protest against unjust law, but it does demonstrate that direct political action is possible in a relatively primitive area.

[60] For an exception see Stone, *op. cit. supra* n. 38 at 111-14; and *cf. id.*, *Human Law and Human Justice* (1965) 278-79, 284-85.

[61] During the period of British rule in India and Pakistan, commercial law, the law of contract and tort, and the law of corporations were essentially British law. The law of marriage and divorce, and of succession, was governed by the "personal law" of the individual concerned, e.g. Hindu, Muslim or English law. A similar solution might be appropriate in New Guinea.

[62] *Supra* at n. 41.

[63] *Supra* n. 1.

this involves an abandonment of "traditional" standards of justice? (By the time the technical developments necessitating changes in law reach the "primitive" parts of New Guinea, it may be expected that traditional attitudes will already have been modified, if not radically altered, by contact with Western ideas.)

VI

Clearly a uniform system of law must be applied to New Guinea, to "advanced" as well as to "primitive" areas. It is problematic whether such a system can take into account the traditional values of the many "primitive" communities, embodying a multitude of varying concepts of justice. It is improbable that all communities could be satisfied: whatever laws are imposed will be considered unjust by *some* communities. The people who do not accept the imposed laws as just must be educated—at least to the need for having the system, and to the reasons why such laws are considered just by others. For the sake of expediency a division may be made during the period of introduction of the new law between areas subject to the new, imposed law, and those for the time being remaining subject to traditional law. The immediate need for a national system of law is only in certain fields, although it is to be expected that all areas of activity will progressively be subjected to a unified law. If this unified, imposed law can reflect as much as possible the concepts of justice held by the people, so much the better.

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