BOOK REVIEWS

THE FUTURE OF TRADITIONAL LAW

Michelle Potter, *Traditional Law in Papua New Guinea: An Annotated and Selected Bibliography* (Canberra, 1973).

A bibliography can be properly evaluated only by putting it to use, and I have therefore read 10 of the 283 books and articles listed in the bibliography.[1] Just under 3% is a very small sample, but it does provide a reviewer some basis on which to make a judgment of its value.

The method and scope of the bibliography are explained in an introduction written by Peter Sack and will not be repeated at length here. It is sufficient to say that the bibliography does not purport to be exhaustive, and that the selection of periodicals researched was "somewhat arbitrary". However, it appears as if the major anthropological periodicals dealing with Papua New Guinea have been included.

The bibliography will of course be of immense value to the anthropologist, but it is clear from the introduction that it is intended to stimulate interest by non-anthropologists, particularly lawyers, in the traditional law, and its usefulness from this perspective must be evaluated. Sack argues that legal development in both Western societies and in Papua New Guinea will in the future follow a "sociological approach which - like traditional Papua New Guinea law - applies broad and flexible principles to individual cases instead of trying to typify cases in order to bring them under precise and firm

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1 The references I consulted are: Hogbin, "The Father Chooses His Heir" (1940) 11 *Oceania* 1; Hogbin, "Local Government for New Guinea" (1946) 17 *Oceania* 38; Groves, "Report on Field Work in New Ireland" (1932-33) *Oceania* 325; Read, "Social Organisation in the Markham Valley, New Guinea" (1946) 17 *Oceania* 93; Nilles, "The Kuman People: A Study of Cultural Change in a Primitive Society in the Central Highlands of New Guinea" (1953) 24 *Oceania*; Read, "The Political System of the Ngarawapum" (1950) 20 *Oceania* 185; Whiting and Reed, "Kwoma Culture" (1938) 9 *Oceania* 170; Williams, "Seclusion and Age Grouping in Papua" (1939) 9 *Oceania* 359; Todd, "Native Offences and European Law in South-West New Britain" (1935) 5 *Oceania* 437; and Thurnwald "Women's Status in Buin Society" (1934) 5 *Oceania* 142.

rules."[2] So far as Papua New Guinea is concerned, he argues that if traditional Melanesian values are to be incorporated into the legal system, "the traditional laws in the various parts of Papua New Guinea have to be thoroughly investigated and analysed." How far the study of traditional law is of great practical importance in achieving this aim is discussed below, but it should be noted firstly that the bibliography is of value for other reasons too.

The references contain a good deal of source material for the study of Papua New Guinea history. Groves provides evidence of early land acquisitions on the east coast of New Ireland (where land was purchased for "a few articles of tawdry trade") and of the use of forced labour to build roads. Nilles has evidence that the nature of Australian settlement in the Waghi area followed a similar pattern. And Nilles also offers a good analysis of the stages of pacification in his area of study. There is a wealth of material on the colonial administrative system, and such topics as the Courts for Native Affairs (Nilles), the effect of head tax as an incentive to men to engage in plantation labour (Williams, Read and Nilles), the luluai system (Groves, Todd, Hogbin and Nilles), the native police force (Todd, Hogbin and Nilles), and the effect of Native Regulations (Thurnwald, Todd and Nilles). All these topics will be of particular interest to lawyers. But, aside from their historical interest, the more important question is how the references provided can assist considerations of the future course of legal development in Papua New Guinea.

While it is hardly possible to dispute Sack's argument for a sociological approach to legal development based on Melanesian values, it is possible to dispute the argument that a study of traditional law is of "great practical importance" to such an approach, particularly if the study were to lead to relative neglect of other possibilities. There are a number of reasons why we should be sceptical about the value of intense study of traditional law.

First, all Papua New Guinea traditional societies have undergone and are undergoing rapid social change, which leads to changes in the relationships of people in the traditional sector and changes in their ways of doing things, including the manner in which they settle disputes. The validity of

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2 Cases such as *Holder* v *Holder* [1968] Ch 353, 401, provide evidence that the English courts are tending to favour the application of discretionary rules to avoid injustice.

these propositions is confirmed by almost all the references, and such recent studies as Marilyn Strathern's *Official and Unofficial Courts* indicate how traditional society not only changes but adapts itself to the imposed system of administration.[3] A dichotomy between the traditional system and the imposed system is therefore too simple. Most of the references in the bibliography are moreover to the pre-World War II period, and those dealing with the Highlands seem to have been written soon after contact. It may be questioned therefore whether the pictures of social relations given are valid in 1974. It is quite clear for example that traditional practices regarding forced marriage have changed since Thurnwald, Hogbin and Nilles wrote.

Second, there are inherent difficulties in using evidence of traditional law to plan for the future substantive law of a national legal system. Most of the references provide little evidence that firm rules for particular situations were accepted, although they demonstrate that certain general principles were immutable. What may be loosely called political factors often shaped a particular decision. Thus, Hogbin concludes his case-history of a dispute between a headman and his eldest son in Wogeo with this remark about the attitudes of the people to the proper solution of the conflict: "Whether stress will be laid on principles or on sympathies is largely determined by external factors, such as private friendships and the amount of disturbance the rebel is causing."[4] Apart from this lack of clarity about what the rules were, there is also great variation among the communities of Papua New Guinea in the general principles of their legal systems. These difficulties should cause doubts about the prospects and the utility of attempting to codify the traditional law of communities in Papua New Guinea.[5] It might be better to encourage Local Government Councils to formulate rules for their areas.

However, although substantive law defies easy codifi-

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3 (1972) New Guinea Research Bulletin No. 47.

4 Hogbin, "The Father Chooses his Heir," *op. cit.*, 39. For further evidence on the general point see Nilles, Read, and Lawrence, "Law and Anthropology: The Need for Collaboration" (1970) 1 *Mel L J* 40.

5 The difficulties of codification are emphasised by Epstein, "Procedure in the Study of Customary Law"(1970) 1 *Mel L J* 51.

cation, there is a great deal to be learnt from the procedures followed in resolving disputes. Traditional law can be more properly characterised as a process for settling disputes than as a body of rules. In some areas, such as Buin, hereditary chiefs had considerable powers, but generally disputes were settled by mediation and decisions were sanctioned by consensus of the village. The references contain a wealth of evidence on the existence and nature of traditional dispute settling techniques.[6] (It is intriguing to note that several authors mention that a vigorous game of football was often substituted for more lethal displays of anger.)

Hogbin's study of dispute settlement in the Busama area concluded with the recommendation that the system be given official recognition, just as customary courts in the British Solomons had been officially supported. His study was supported by a grant from the Australian government, indicating perhaps that the administration of the time was sympathetic to such a proposal. Section 63 of the *Papua and New Guinea Act 1949* provides further evidence of official sympathy, as it allowed for the creation of "native village courts." However, any inclination to recognise customary institutions was reversed by the policy decision in 1955 to extend the imposed court system down to the village level.[7] This decision, and its affirmation in the Derham Report, which also recommended reform of the lower courts and the training of magistrates to staff them, led to the *Local Courts Act 1963*.[8] Today's Papua New Guinea government, however, is sympathetic to the recognition of village institutions. The *Village Courts Act 1973* effectively reverses the 1955 decision, and the Commission of Enquiry into Land Matters has recommended the use of conciliation and arbitration techniques in the settlement of land disputes.[9] With the growing use of traditional legal processes comes a growing need to understand those processes, and the anthropological studies of traditional dispute settlement will once more be important.

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6 See Groves, Todd, Whiting, Hogbin, Read and Nilles.

7 Wootten, "Research into Customary Law: A Lawyer's View" (1968) unpublished typescript.

8 D.P. Derham, *Report on the System for the Administration of Justice in the Territory of Papua and New Guinea* (1960) Chapters II and V.

9 Commission of Enquiry into Land Matters, *Final Report* (1973) Chapter 8.

There are, however, two further reservations to be made concerning the study of traditional law. Some of the principles of traditional law are at variance with the social policies of the government, which may prefer to suppress than to recognize them. Such traditional practices as infanticide, widow-immolation and cannibalism disappeared soon after contact with the colonial administration, but payback is still strong in some areas, and there may not be any practical alternative to treating payback killings as homicides. Another example is the traditional laws' attitude to women. Thurnwald's study of women in Buin provides ample evidence for her conclusion that "they held a subordinate position to men." For example, they were required to abide by their father's choice of a bridegroom; the wife was regarded as the husband's property, could not own property herself and was beaten for trivial reasons; children belonged to the husband and his family; and, prostitution was institutionalised. Hogbin and Nilles also cite the practice of forced marriages. Rapid social change has affected this area of traditional law and practice, but insofar as these attitudes towards women persist, they appear to be contrary to point seven of the *Eight-Point Improvement Programme*, which requires that women participate equally with men in economic and social activities. Some countries have found it necessary to pass legislation in order to overturn traditional legal practices, and Papua New Guinea may wish to do the same.[10]

A final reservation about the study of customary law arises from the whole host of legal problems thrown up by modernisation and development, and by Papua New Guinea's growing relations with the external world of foreign governments and foreign finance. Traditional law cannot provide solutions to most of these problems. The spread of the cash economy to the village necessitates the creation of an appropriate commercial law, and while it would be folly to imagine that the imposed Anglo-Australian law can provide satisfactory principles, it would be equally foolish to suppose that traditional law can do more than provide some basic principles and values upon which to build a law suitable to Papua New Guinea today. Papua New Guinea's emergence as a nation introduces it to the wide field of international law, many aspects of which will be of decisive importance to the country's economic future. International contracts and concession agreements with multi-national corporations are but one facet of this problem. The staggering profits of the Australian company

10 See, for example, Tanzania's *Marriage Act 1971*.

Bougainville Copper Pty. Ltd. and of its English parent Rio Tinto Zinc Pty. Ltd. underline the immediate need for research in this area of the law.

For the above reasons, I would suggest that those concerned with the future legal development of Papua New Guinea need to go much further than a study of traditional law in the planning of a national legal system. How then might the sociological approach urged by Sack proceed? This question has been considered, in relation to Papua New Guinea, by two anthropologists, one lawyer, and a scholar with interests in both fields.[11] Epstein, more concerned with the techniques of customary law research, did not deal with the broader issues of the place of such research in future legal development. Lawrence favoured a "middle course" between Australian law and customary law, and Brown advocated a synthesis between the two. Wootten was sympathetic to cooperation between lawyers and anthropologists and stressed the need for reforms to proceed upon an understanding of customary law, but he seemed more aware of the inherent limitations of customary law. Both Lawrence and Wootten favoured research that would concentrate on particular practical issues, whilst Brown was more optimistic that a general statement of customary law could be achieved. All favoured inter-disciplinary education.

Given the shortage of research staff and the urgency of some of the practical problems facing the government, it is difficult to see that anything but *ad hoc* investigations can be attempted at the present time. The government has attempted to deal with practical issues through commissions and the like and some legislation has resulted.[12] It is the responsibility of both lawyers and anthropologists to cooperate

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11 Epstein, *op. cit.*; Lawrence, *op. cit.*; Brown, "Legal Research in New Guinea" (1971) 1 *Mel L J* 60; Wootten, *op. cit.*

12 Notably the *Village Courts Act 1973* and the *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act 1974*. *The Land Acquisitions Bill 1974* is the first of a series of land bills resulting from the report of the Commission of Enquiry into Land Matters.

in these ventures.[13] Thus, though the bibliography will be an invaluable starting place for researchers, research should be much more broadly based and researchers should be acutely aware of the need to adjust the legal system to present social facts and to anticipate the direction of future social change.

- Peter Bayne

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13 Groves felt it necessary to approve the view that "anthropology as a science can find justification only in the direction of its researches towards the solution of problems of native administration" in societies subjected to the contact of European culture in contrast to the view of "a certain school of anthropology [which] appears to have looked upon primitive man as the subject matter of the science they represent." It is to be hoped that this debate has been concluded in favour of Groves' view.