

# SEX, GENDER AND THE LAW IN PAPUA NEW GUINEA

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My research is conducted as part of the Oceanic Encounters project, which examines the interaction of indigenous and introduced perceptions of and attitudes to gender and sexuality in the Pacific. I propose to investigate examples of this in the process of the introduction of Western law into Papua New Guinea, specifically the criminal law.

I come to the project from a BA from Sydney University in the 1960s, which included a major in Anthropology, although my Honours field was Indonesian and Malayan Studies. This was followed by some 8 years of living and working in Papua New Guinea before and during Independence in 1975. During this time, I obtained a law degree from the recently established University of Papua New Guinea. This era, early to mid-seventies, was one of major experimentation and enquiry in the field of law reform, and was a time of apparent good communication and accord between lawyers and anthropologists.<sup>1</sup> A Law Reform Commission was established at Independence and operated for many years in close coordination with anthropological work being done at the time. I spent most of the nineties working first in the Law Reform Commission and then in the Attorney-General's Department, before working for more than 3 years in Nauru. In all, I have spent over 20 years living in the Pacific and working mainly in the field of law reform. One of my most significant efforts in recent years was the preparation of Papua New Guinea's HIV/AIDS legislation to address issues of stigma, discrimination and confidentiality.

This experience has positioned me well for a type of interdisciplinary study not undertaken as frequently as it could or should be. I return to the academy and find its

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<sup>1</sup> Lawrence (1970); M. Strathern (1975). However, this is disputed by some commentators; see Narakobi (1989).

form and field transformed. Anthropological study in the 21<sup>st</sup> century has shifted in various ways: from note-taking in the tent in the village to the study of “different forms of knowledge available from different social and political locations” which are not necessarily remote and exotic; and from participant observation out through the tent-flap to the mobilisation of different sources for the forming and informing of knowledge.<sup>2</sup> My thesis can be viewed as one such anthropological study, that is, a study informed predominantly by texts, particularly historical and legal texts, and not confined to a particular locality. Or maybe it is a legal pluralist analysis, informed by ethnography and history. Or perhaps it is an historical study of certain aspects of the anthropology of law. And, to borrow the language of our Academic Skills and Learning Centre, it is, hopefully, an in-depth critical study intended to lead to a new perspective.<sup>3</sup>

I am taking as my starting point Merry and Brenneis’ edited collection *Law and Empire in the Pacific: Fiji and Hawai’i*.<sup>4</sup> Anthropologists and historians in an American Research Advanced Seminar in 2001 were attempting to understand why two Pacific island clusters with similar societies before and during colonial times developed into such startlingly different postcolonial states. In the process, they discovered that the Anglo-American law introduced by the colonial regimes in each place was not just a part of this historical transformative process but actually central to it. The specific aspects of the colonial law the scholars studied and contrasted were its roles in the distribution of land and its determination of national identity. It is law, they found, which generates rights: rights to vote, to hold land, to claim an identity. It is law, which creates the documents and records on which these rights are based, and it is law’s fixity, which maintains and supports them through all but the most violent, lawless upheavals. Law proves to be “a fundamental terrain for the creation of social life”.<sup>5</sup>

This led me to ask: can the same be said for colonial transformations of gender and sexuality? How significant was the introduced law? To what extent did its constructs of gender and sexuality, both those adopted from England and those re-devised on the ground in the colonies, penetrate and affect the lives of the 800-plus language and cultural groups which made up the imperial construct of the two territories of Papua and New Guinea? What was the purpose of the imperial power in importing those constructs? What has been the role of this introduced law in instigating transformations, shaping present-day attitudes, informing the post-contact invention of custom, before, during and after Independence in 1975? Has the law been central and, if so, how? Even if not, what has its effect been? And to what extent has the introduced law itself been changed and modified?

To answer these questions, I propose to study

- the form and processes of the colonial law introduced into Papua New Guinea, and particularly the ways in which sex and gender were treated in the criminal law
- sexual offences, or licit and illicit sex, in selected indigenous societies in PNG

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<sup>2</sup> Gupta and Ferguson (1997)

<sup>3</sup> From a Workshop “How to Manage Your Research Degree”, 7 September 2004, ANU, Canberra.

<sup>4</sup> Merry and Brenneis (2004)

<sup>5</sup> Merry and Brenneis (2004:24)

- the treatment of sex and gender in PNG's present criminal law.

Then I must try and determine the effects of the criminalisation of that which was not previously offensive, and conversely the effect of the law's permitting or enabling that which was previously proscribed. I must also attempt to discover any reverse effects, of customary perceptions of sexuality and gender on the shape, form and content of the formal legal system.

In doing this, I must be mindful of the dangers inherent in pronouncing something to be "customary" or "traditional", for three reasons. Firstly, it is very difficult, if not impossible, to determine in retrospect the norms of any PNG society before or at the time of contact. "Custom" did not exist frozen in time waiting for European contact to affect and possibly alter it. It was doubtless changing before contact in response to various factors, and the impact of contact itself must have brought even swifter and more radical changes to many facets of life. Secondly, given the vast linguistic and cultural diversity of the peoples of Papua New Guinea, there is no single group of norms accepted throughout the country as forming a cohesive body of so-called "customary law". And lastly, I am well aware of the modern propensity for non-European nations to invent and repudiate customs for various socio-political purposes, and of the significant body of literature on the subject—a literature I shall be exploring further.

## **Three-Mile Guesthouse Raid**

The next influence on the direction of my thesis was an incident, which took place in Port Moresby one Friday afternoon last March, shortly after I commenced study. I have called it the Three-Mile Guesthouse Raid. The police raided a guesthouse, which operated a bar and gaming machines. That afternoon, a live band was playing. The raid was conducted in the style often used for raids on illegal squatter settlements,<sup>6</sup> which involves a dramatic "code-name", advance notification to the press, and other high-profile display tactics, all designed to bring to the attention of the public the wonderful job the police are doing in maintaining law and order. In this case, that public display involved not just a lot of looting, assault and rape at the guesthouse itself, but mass arrests of almost everyone on the premises, who were then paraded through the streets of Boroko to the police station. The women were forced to chew and swallow condoms, blow them up, and wave them above their heads while a crowd of onlookers heckled them.

The Metropolitan Police Commander claimed that the raid was intended to prevent sex workers from contracting and spreading HIV. The men caught up in the raid were freed, but the women and girls arrested were charged with "living on the earnings of prostitution", a charge which is the basis of the current criminalisation of sex work. The evidence produced in support of this charge was that condoms had been found on the premises and in the women's possession, which supposedly proved that the premises were a brothel, and the women were prostitutes. The incident attracted an enormous

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<sup>6</sup> Goddard (2001)

amount of attention, both in PNG and internationally. A top-class criminal lawyer was hired to conduct the defence of the women, and to everyone's ultimate relief, the charges were eventually dropped on a technicality—the police had not obtained the necessary search warrant. But the damage had already been done.

### ***Prostitution in the law***

Nowhere in PNG law is it currently stated that prostitution is an offence. In fact, the criminalisation of sex work in PNG at present rests on shaky law. The *Summary Offences Act 1977* provides at Section 55(1), that “a person who knowingly lives wholly or in part on the earnings of prostitution is guilty of an offence.” This Act was a remake of the pre-Independence *Police Offences Act 1925-1974*, which itself was an amalgamation of the parallel Police Offences Ordinances of the pre-Independence territories of Papua and New Guinea. Soliciting was an offence only under the *Police Offences Ordinance* of New Guinea: it never had been in Papua.

In 1978, shortly after Independence, police in Rabaul prosecuted four women who admitted to “being prostitutes” and having sex for money. In the case, known as the *Anna Wemay Case*,<sup>7</sup> the (expatriate) judge had to decide whether—

The prostitute herself, as distinct from the madam, the tout, the bully, the protector, or the pimp, may be convicted of a breach of s. 55 (1).

Common sense would seem to say: no. But this is not how the judge saw it. He applied a standard common law process, and looked no further than the ordinary meaning of the words in the Act. He was asked to consider what the Parliament may have intended when passing the Act. He was asked to consider the report of the Law Reform Commission,<sup>8</sup> which had led to the drafting, and presentation of the new law. He was asked to take into account the fact that the predecessor to the 1977 Act, the *Police Offences Act 1925-1974*, contemplated three classes of offender: the prostitute who solicits, the male persons living off the earnings of prostitution, and the keeper of a brothel or a “house of ill repute”; and that the first of these had been omitted from the 1977 Act. But he decided that the omission of the word “male” in relation to the offence of living on the earnings of prostitution was intended to catch the women who were living on the earnings of their own prostitution. He did not consider that the omission of the word “male” from the new Act may have been prompted by the constitutional guarantee of freedom from discrimination on the grounds of sex. He did not consider the possibilities of male prostitution and the effect of the wording of both the old and the new law. He simply adopted a process, which led him to a strict, literal interpretation of the law. I ask: why?

After the *Anna Wemay Case*, it was assumed that sex work is illegal throughout PNG and sex workers are therefore criminals. Although few arrests and prosecutions took place, the threat was used as blackmail for other purposes. Women who sold sex

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<sup>7</sup> *Anna Wemay & others v Kepas Tumdual* [1978] PNGLR 173

<sup>8</sup> Law Reform Commission of PNG (1975a)

were fair game. The Transex Project of the mid-1990s revealed that the most serious problem facing sex workers was that police harass them and blackmail them, through the threat of arrest, into sex without payment. They are frequently picked up on the streets by police and taken for group rape sessions at the police barracks or other locales.<sup>9</sup> And while it is clear that the law did not authorise the police to treat the women as they did during the Three-Mile Guesthouse Raid, the incident illustrates the result of creating a crime of something, which was not a crime before. Criminalisation can produce a simple equation in the minds of many people, including the PNG police. These people are criminals. Police protect society by apprehending criminals. “Do what it takes to achieve this”, so runs the thinking, “we have the authority of the State on our side, as manifest in the law”.

The *Anna Wemay Case* demonstrates how not just the substance, but also the procedures, of the imported law can, through one single enactment of its power, create an entire pattern in the weave of the social fabric. The Three-Mile Guesthouse Raid was an extreme outcome of this process. Consensual sex between adults has indirectly been made a crime, with horrendous consequences.

I then thought of the other form of consensual adult sexual activity which is subject to the might of the criminal law, that of sodomy, or as the *Criminal Code* so carefully and quaintly puts it: “carnal knowledge of any person against the order of nature”.<sup>10</sup> The recipient is also penalised and may be a woman as well as a man.<sup>11</sup> But the provision is taken to criminalise homosexuality per se. It seemed appropriate, therefore, to examine both these categories of sexual offence at once. I could enquire as to traditional views and practices of both exchange of sex for goods or services, and of sex between males. I could investigate the processes which inform modern-day PNG’s views on the legal status of these sexual activities. And most importantly, I could study how the imported law’s perceptions have formed today’s attitudes.

## **Illicit Sex – The Huli Example**

I had intended to stop there, but then I turned to the ethnographies. While recognising that it is virtually impossible to form an accurate picture of a pre-contact PNG society, I nevertheless wanted to learn what ethnographers may have to say about perceptions of gender and sexuality in areas which are comparatively uninfluenced by all the trappings of modernity found in urban centres. And I immediately discovered a most interesting thing. My starting point here was one of the many writings of Holly Wardlow on the Huli of the Southern Highlands. I read Wardlow initially to learn more about the Huli

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<sup>9</sup> Jenkins (2000: 22, 26)

<sup>10</sup> Section 210. **Unnatural offences.**

(1) A person who—

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a crime.

<sup>11</sup> Of the nine cases under Section 210 brought to the higher courts, two involved sodomy of females: a woman and a 7-year-old girl.

*pasindia meri* and how their entry into a lifestyle akin to sex work was not primarily caused by straitened economic circumstances. But, on reading further, I learned that, for the Huli, the categories of licit and illicit sex differ from those of the introduced law. Illicit sex, for the Huli, is any sex outside a proper marriage created through the giving of bridewealth—so, premarital sex between a courting couple, rape, and adultery are all grouped together. As Wardlow puts it—

Illicit sexual activity—whether “consensual” or “non-consensual”—is understood as the theft of a woman’s productivity from her natal kin, or from her husband if she is married.... the dominant concern in cases of illicit sexual activity is not whether a woman consented, but that her family did not.<sup>12</sup>

Wardlow goes on to note that in cases of pre-marital sex, people frequently could not even remember whether or not the sex had been consensual. She notes that other ethnographers have discussed the same thing. I am reminded also of Carol Jenkins telling me how she was often told: “He raped me... and then I married him.” Clearly, the issue of consent in rape, so crucial to the introduced law’s definition of the offence, is not necessarily central in customary ways of thinking.

This is not to say that all PNG societies have the same attitude to extra-marital sex. Far from it. In some places, pre-marital sex is the norm, and is viewed as a way of experimenting, of determining who will be one’s future life-partner. In others, marriage is a gradual process, not fully confirmed until at least one child is born of the union. But what a study of the ethnographies reveals is that there are many different ways of viewing sex, and illicit sex, and the view taken by the colonial law is but one. While the Huli (and other) views may conflate adultery, rape and consensual premarital sex, for example, the colonial law not only viewed them as separate issues but also treated them in different ways.

### ***Rape***

The offence of rape is found in Section 347 of the *Criminal Code*. The crucial issue of the offence is that of the consent, or lack of it, in the victim. No other person is involved, intention is largely irrelevant, it is the act that matters. But as I have now learned, consent of the victim can be irrelevant in some customary contexts. I wonder, have any of these discordances led to injustice in rape trials in the courts? Alternatively, or perhaps additionally, I can ask whether the law’s view of rape has been modified in the light of the facts surrounding the rape cases that are brought to trial.

### ***Adultery***

Adultery between “natives” had been a criminal offence under the Native Regulations of both Territories, which were largely similar. They set out matters with legal consequences affecting Papua New Guineans only, and established Courts of Native Affairs (abolished in 1963) to deal with certain offences, including adultery.<sup>13</sup> Upon

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<sup>12</sup> Wardlow (n.d.: 153); see also A. Strathern (1985); Toft (1985)

<sup>13</sup> Law Reform Commission of Papua New Guinea (1975b)

Independence in 1975, all the Regulations were repealed except those dealing with inheritance and adultery, and the latter became the subject of a second Law Reform Commission Report in 1977.<sup>14</sup>

This Report acknowledged that adultery is regarded seriously in PNG society, to the extent that in the past at least, death could be the punishment. Confirming the Commission's findings, in the mid 1980s three members of the UPNG Psychology department conducted surveys amongst various groups, rural and urban, on their views of the seriousness of various crimes, as compared to the degree of seriousness allotted them by the formal legal system. One of the more striking results of these surveys was that adultery was viewed much more seriously by Papua New Guineans than the formal law acknowledged.<sup>15</sup>

The Law Reform Commission, mindful of the discriminatory and unconstitutional nature of an offence, which applied to "natives" only, and dedicated to furthering the development of an indigenous legal system based on customary principles, recommended not the abolition of all concern of the law for adultery, but its removal from the ambit of the criminal law.<sup>16</sup> The Commission refuted the principle of using the law as an instrument to enforce morality in cases of sex between consenting adults.<sup>17</sup> A new law applicable to everybody was proposed, which would permit the aggrieved spouse to claim compensation from both offending parties by a private court action. It was another 11 years however, before the *Adultery and Enticement Act* 1988 finally became law. I recall that, once the criminal aspect was removed, the new law gave rise to a flood of cases before the District Courts in Port Moresby, mainly by women determined to expose, and hopefully earn some money from, the philandering of their husbands.

## **The Colonial Law**

Papua New Guinea's formal legal system is based on that of the administering colonial power, Australia, which in turn was based on that of its colonial power, Britain. Australia came to administer the two territories of Papua and New Guinea in slightly different ways: Papua was a British crown possession handed over to a newly formed Australian Commonwealth in 1905; New Guinea was acquired from Germany as a Mandated Territory of the League of Nations after World War I. Australia introduced versions of its Anglo-Australian legal system into both territories, albeit with slight variations between the two, which were not resolved until around the time of Independence in 1975—and some not even then.

This Anglo-Australian legal system is known as the common law system, and is one of the two great legal systems of the West, the other being Continental, or civil, law. Civil law systems are aimed at formulating prospective rules of conduct, which provide a moral basis for society, usually completely written out in a "code". Each

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<sup>14</sup> Law Reform Commission of Papua New Guinea (1977)

<sup>15</sup> Moore et al. (1985); Wuillemine et al. (1986); Richardson et al. (1987)

<sup>16</sup> Law Reform Commission of Papua New Guinea (1977)

<sup>17</sup> McCrae (1977)

individual case which comes to court is decided by going back to these basic principles, and previous cases are a guide only. By contrast, the common law is formed primarily by judges, to resolve conflicts and maintain civil order. The general principles of the common law are believed to have always existed. Each individual case examines closely the particular fact situation with which it is concerned, and by minute inspection, “discovers” the law in its ever-increasing clarity, thereby elucidating and illustrating these general principles. Each case builds upon the one before it, relying on what has gone before. Written laws, known as Acts in sovereign jurisdictions and Ordinances in subordinate territories, are usually drawn up to vary old rules which are no longer satisfactory or appropriate, or to fill gaps in the scope of the common law.

British colonial policy, followed by Australia, was officially one of “indirect rule”.<sup>18</sup> The law was introduced and applied in the colonies only insofar as it was applicable to local circumstances, and was aimed at bringing “order, and the benefits of European administration, to a primitive and dispersed people without greatly disturbing their existing way of life”.<sup>19</sup> Hence in the first instance the introduced law was applied predominantly to the colonisers while the local customary law, whatever that might have been, was to a large extent left alone. It was generally believed that this customary law could eventually be discovered and compiled into a set of rules, which could gradually be merged, with those of the formal law to provide a basis for the legal system of an independent nation some time in the distant future. Disputes which came to the attention of the administration were usually adjudicated by patrol officers with magisterial powers and some anthropological training, through a system of Courts of Native Affairs.

However, despite the policy that customary law was to be left undisturbed as far as possible, when it came to the commission of crimes, the king’s peace must prevail, law and order must be maintained. Subject-people should pay their head-tax and refrain from killing each other, or doing anything else that might cause a breach of the peace or be repugnant to the basic principles of humanity (as interpreted by the law). Gradually, the “natives” would be brought to full realisation of the benefits of modernity, but only if they obeyed the rules. And so the greatest point of contact between the law and the people was that of the criminal law. Serious cases were adjudicated by the formal law courts. And a surprisingly large number of matters which concerned these courts were sexual in nature. Alongside murder and sorcery were rape, incest and sodomy. Adultery was punished too, because it seemed so often to lead to breaches of the peace.<sup>20</sup>

The early paternalistic view that the “primitive” way of life should be left undisturbed gradually gave way to a goal of advancement towards self-government at some time in the foreseeable future, and the 1960s saw significant legal as well as political development. The Courts of Native Affairs were abolished and a single system of law, the introduced law, was to be applied to all.<sup>21</sup> The time of Independence in the

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<sup>18</sup> Easterly (1977); Weisbrot (1982)

<sup>19</sup> Derham (1960)

<sup>20</sup> Derham (1960, Appendix H)

<sup>21</sup> For a fascinating view on this, see Cleland (1984).

following decade ushered in a Constitution with a detailed set of human rights<sup>22</sup> and the means to uphold and enforce them. It also saw a flurry of activity directed towards reform of the law, especially the criminal law, to produce a more autochthonous Melanesian jurisprudence, often dubbed the “Melanesian Way”,<sup>23</sup> which was actually a mixture of custom, principles of Christianity and human rights, and tradition as reinvented for various socio-political purposes. Custom was to be researched, constructed and where necessary re-invented to provide a basis for this new system. Village Courts were established to apply custom, not law, to a range of matters at village level.<sup>24</sup> Anthropologists were appealed to, and one of the most intensive studies of the time was Marilyn Strathern’s *Report on Questionnaire Relating to Sexual Offences as Defined in the Criminal Code*, prepared on request from the Department of Law, wherein she polled nearly 200 social anthropologists, physical anthropologists and some linguists regarding what they knew of sexual “offences” in the societies they studied.<sup>25</sup> The Law Reform Commission embarked on the ambitious project of reforming the entire criminal law and the criminal justice system. But while the Police Offences Ordinances of the two former Territories were swiftly replaced by a new *Summary Offences Act*, and the bulk of the Native Regulations were repealed, the *Criminal Code* itself was not amended in relation to sexual matters until 2002, when significant changes were made, including laws against child sex trafficking and the criminalisation of marital rape. It is notable however that while the changes were recommended by a semi-governmental committee, the amendments were brought to Parliament as a private Member’s Bill. I would like to study the history and background to the making of this new legislation, and whether it has had any impact so far, particularly in the courts.

It seems, then, that despite the early colonial policy of leaving tradition alone except for major infringements of the law, and despite post-Independence efforts to devise and implement a Melanesian jurisprudence, the introduced criminal law of England has, from the outset of colonial rule, had a major impact on PNG society. It was often the first aspect of the law which touched newly-contacted groups; and it has major impact in modern PNG. Every day, the media carry stories of the latest shocking crimes, from daylight robbery to gang rape to the latest statistics on incest cases. Preoccupation with the maintenance of “law and order” by increasingly stringent criminalisation has kept politicians, consultants and report-writers busy for over a quarter of a century.

I ask, why is this? Why is it that the introduced law has tried but failed to combine its own processes with what it conceived as custom? What are the significant ways in which it differed from indigenous concepts and processes of peace-keeping and

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<sup>22</sup> These were mainly the political and civil rights popular at the time. Emphasis was placed on the broader range of social, economic and cultural rights only much later, although references may be found to them, particularly in the Preamble.

<sup>23</sup> For the most complete exposition of this move, see Narakobi (1989).

<sup>24</sup> These courts, however, appear to have developed in many places into a system based on principles of justice developed in an ad hoc manner, with little regard to accepted customary norms. See Demian (2003).

<sup>25</sup> M. Strathern (1975)

dispute settlement? Why has it apparently slid ever more deeply into a state of confusion as to its role in the regulation of sexuality? And most importantly, I ask what is the basis of this thing called criminal law, why and how has it become so significant in PNG, and what has been its effect on traditional views of gender and sexuality?

The division of law into criminal and civil law (not to be confused with the term “civil law” when used to refer to the Continental law systems) was quite alien to traditional PNG society, but it has a long history in the law of England. While disputes between private citizens were resolved in courts established by the king for the purpose, serious interpersonal wrongs such as murder offended all of society, and required punishment either by the king, as sovereign of all his subjects, or the church, which had powers over all matter ecclesiastical and others such as defamation, witchcraft and drunkenness, and the range of matters arising from the relations between the sexes: incest, bigamy, abortion, assault with intent to ravish, fornication and unnatural sex, adultery and everything connected with marriage.

The Enlightenment fed concepts of individual rights into English law, including the concept that justice should be done to individuals and the law should be clearly stated and known in advance. And so began the move towards codification, or the total restatement by statute of the English criminal law. In the end, although England itself never did adopt a criminal code, it exported a code model to most of its colonies and territories, starting with India in 1860.<sup>26</sup> In Australia, the states of Queensland, Tasmania and Western Australia adopted a form of this Code. And it was the Queensland *Criminal Code* which was then on-shipped to the territories of Papua and New Guinea. Along with other statutory sources of criminal law, such as the former Police Offences Ordinances now replaced by the *Summary Offences Act*, and the various Native Regulations which applied only to the indigenous population, the Code formed the bulk of the criminal law system by which the colonised “natives” were kept in order.

There is a great volume of literature on the shifting views of the relationship between common law and custom, on the role of the colonial law in the implementation of the colonial enterprise,<sup>27</sup> and on the rocky and sometimes hostile relationship between lawyers and anthropologists<sup>28</sup> as colonialism spread and then ended, and PNG society changed throughout and beyond the colonial era. Depending on whether administrators, lawyers or anthropologists are speaking, the viewpoint can differ widely. I want to attempt a meta-narrative of these various viewpoints, and thereby arrive at a clearer understanding of the many facets of policy which underpinned the introduction and development of the common law in PNG.

## **Law and Sexuality**

And I want to understand the premises and assumptions concerning the role of the introduced law in ordering and managing matters of sexuality in a place and a social

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<sup>26</sup> Stephen (1883)

<sup>27</sup> Fitzpatrick (1980); Sawyerr (1981)

<sup>28</sup> Zorn (1990); Moore (2001)

milieu far removed from that of Victorian England, where the modern criminal law took its present-day form. In this, I am greatly attracted to Ann Laura Stoler's extension of Foucault's approach to sexuality and power into imperial settings. Foucault argued that the repression of sexuality in Europe in the 18<sup>th</sup> and 19<sup>th</sup> centuries was not necessarily an historical fact. On the contrary, this era produced an entire science of sex through a multiplicity of discourses which were designed to formulate and protect the bourgeois social body, discourses which produced and channelled desire. Of his four objects of knowledge—the masturbating child, the hysterical woman, the perverted adult and the Malthusian couple, the only valid sex was conjugal sex, and desire must remain contained by the marriage bond. All other forms were manifestations of depravity, the actions of the other, the enemy within. The state increasingly intruded on matters of sexuality and reproduction, exerting “biopower” through the regulatory processes of the law.

But Stoler<sup>29</sup> has shown how Foucault has ignored the other great social enterprise of the time, that of imperialism and the discourse of racism. The bourgeoisie of Europe, she claims, was partially defined by contrasts created in the language of race. The colonial other was defined by and defined the unified collectivities of Europe. It race-coded bourgeois identities in both the metropole and the colonies. To Foucault's four objects of knowledge must be added a fifth, that of the eroticised savage. Deviance from the ideal of middle-class purity and conjugal, productive sex could be uncovered not just in the disadvantaged classes of Europe but in the colonies, in both the white under-classes and the native too. State intervention in private life, both in metropolis and colony, was legitimised, and became increasingly vigilant and violent. And so, she suggests, it becomes possible that, through the imposition and manipulation of the introduced legal system, a hidden agenda was being unconsciously played out in the colonial enterprise. In this agenda, the imperial plan of civilisation included the objectification of the colonised peoples to provide a definition of the eroticised other, against which the cultural identity of the colonisers could be developed, asserted and reinforced. White men were hyper-masculinised and colonized men demasculinised in order to buttress assertions of white supremacy. Native women were both eroticised and abjected. White women, when they arrived, were to be dutiful wives, custodians of morality, of their vulnerable men, and of national character, and repeated reminders of this role were necessary. Non-reproductive white women, on the other hand—single women, widows and prostitutes—were threats to colonial prestige.

Stoler's reframing of Foucault raises some significant questions. Firstly, she focussed exclusively on the bourgeois casting of colonials. She specifically chose not to investigate how the colonised were shaped by the sexual policies of colonial states.<sup>30</sup> But I feel it should be possible to situate my investigations in the context of her approach. Was the sexuality of colonised peoples being reconstructed to support the colonial enterprise through the forms and processes of the colonial legal system? Has the emerging middle class of PNG's post-colonial society unconsciously used these

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<sup>29</sup> Stoler (1995)

<sup>30</sup> Stoler (1995: 9)

same techniques to readjust social relations in a globalising world? As it is the law, which provides the foundation upon which these constructs are built, then a study of the legal system may provide some answers.

A more fundamental problem arises. If, as Foucault tells us, the great sexual discourses of the 19<sup>th</sup> century were developed for a specific socio-political purpose in a specific world-region at a specific era in that region's history, then why should we assume that this development was universal? How far did PNG societies develop a concept of sexuality and sexual desire? Elliston warns us of the dangers of treating erotics and sexuality in ethnographic studies as pancultural or precultural universals.<sup>31</sup> It could be, as Jackson points out, that in certain societies, gender has greater cultural valence than sexuality.<sup>32</sup> Muke, in attempting to devise successful HIV/AIDS interventions for his Wahgi society of the Western Highlands, points out that there is no direct word for sex in his language, no discourse of sex per se.<sup>33</sup> This leads me to wonder whether the entire *scientia sexualis* is externally imposed, by policy and through law. If so, what are the consequences of this external imposition? What of the colonised, eroticised or otherwise? While the sexual health of the colonial masters was being scrutinised and managed, did the ruled remain oblivious in their grass huts, living out their lives to the extent that the law grudgingly allowed them? I don't think so, and nor do they. Much has been made of the mission influence, which clothed near-naked bodies and insisted on monogamous conjugal cohabitation. But I think it goes further than that. The law defined what was legitimate for the whites, but I suspect that it impinged on the lives of the colonised more than official colonial policy would have it, and the colonised absorbed these definitions. So I want to study the extent to which PNG's middle class of today has transformed that eroticised savage into their own threatening and perverted other. And I note that that "Melanesian Way" never did penetrate the legal system. Very little has actually been achieved in the law reform that was planned at the time of Independence. Even the village courts, established to adjudicate disputes according to custom, see themselves as applying what they refer to as "government law".<sup>34</sup> Why is this? I think it is not enough to blame the multiple and varied nature of PNG communities and say: it was just too hard. I want better answers than that.

## **Proposed Research**

I am aware that my thesis could take many different tracks. Its ultimate direction will be largely governed by my fieldwork, which will consist of a mixture of library research, archival investigation, study of reported cases, and qualitative interviews. Interview subjects can be classified into two types, "subject informants" and "background informants".

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<sup>31</sup> Elliston (1995)

<sup>32</sup> Jackson (2001)

<sup>33</sup> Presentation at SSGM Workshop "HIV/AIDS in PNG: Priorities for Policy and Social Research", Australian National University, 31 Aug-1 Sep 2004

<sup>34</sup> Demian (2003)

### ***Subject informants***

As subject informants, I want to interview men who have experienced victimisation as a result of their homosexual behaviour, as this has hardly been studied in PNG. Sex workers, on the other hand, have been so studied, interviewed and intervened-upon that almost any outside attention is guaranteed to bring on another police raid. However, I have access to a quantity of previously unpublished archival material relating to sex work in PNG today which should be of great benefit.

### ***Background informants***

These are many and varied. I want to talk to members of NGOs and government bodies concerned with providing assistance to those victimised or criminalized under the current legal regime, for example those involved in providing assistance to the victims of the Three-Mile Guesthouse Raid. I also want to talk to judges, magistrates and criminal lawyers, past and present, regarding their experiences of the application and effect of the law in matters connected with sexuality and gender. I want to talk to the members of the committee which drew up the recent amendments to the *Criminal Code*, and if possible to the proponent of the amending Bill, and to those involved in similar reform work.

### ***Other investigation***

Analysis of case reports will form an important part of my research, but while reports from the higher courts since 1963 are readily accessible, others are not, and some extensive archival research may be required. Another useful source will be newspaper reports, editorials and letters. For example, I want to study the newspapers at the time of the *Anna Wemay Case* to gauge public opinion. I will also be studying relevant ethnographies from various parts of PNG, although at this stage I am not sure precisely which ones.

### **Conclusion**

I feel that my research is timely in view of the spread of HIV/AIDS in PNG. AIDS has transformed the eroticised, deviant savage into a life-threatening demon. And while it lurks around every corner, attention is drawn away from the real issues confronting PNG society in its attempts to recast law and empower society to deal with the epidemic. Perhaps, by moving towards a greater understanding of the processes which have led to today's perceptions of gender and sexuality in PNG, we can move towards more enlightened and effective means of bringing about regulatory and social change.

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