Chapter Two

'Nau Taim Bilong Yumi Yet'

In this chapter, two institutions of social control established after Independence will be examined: the Village Court system and the probation system. These institutions are representative of the agents of change in the post-Independence period and they are illustrative of the interplay between the customary and the introduced law in Papua New Guinea.

The Village Court system resolves disputes by reference to custom and is an attempt by post-Independence governments to settle an issue not fully faced by the colonial administration—the integration of custom into the formal legal system and the acceptance of plural systems of law. The probation system, which did not exist under the colonial administration, is an attempt to provide a flexible sanction for offenders against social order by involving the local community and, in an innovative way, the values of that community, in the treatment of the offender.

It will be seen that the Village Court system, through the application of custom to dispute settlement, has the effect of denying improvements to the status of women. Probation, on the other hand, can help serve the needs of women in that it can provide supervision, community support and counselling which together can bring a meaningful resolution to the common problems which bring women into conflict with the law in Papua New Guinea.

Village Courts

The Village Courts Act of 1973 came into operation on 5 December 1974 (PNG Justice Department Files—Village Courts Act 1973). The Act was revised in 1989 but the basic structure remains the same as in the 1973 Act (Baker, J. 1990, pers. comm., 22 January). The idea of a system of village courts had been discussed at various times by the Australian Administration but it had always been rejected in favour of the kiap system and the Local/District/Supreme Court system introduced in the 1960s. The Local Court system was to have jurisdiction over the less

serious offences and to focus on integrating trained indigenous Magistrates into the western based court system. However, the kiap was still exercising judicial authority in the early 1970s (Bayne 1985, p. 76). Since the luluai system had been replaced by a system of Local Government Councils who, in theory, did not have legal authority to deal with village disputes as the luluais had, a gap had been created in rural justice and the link between the central government and the village people had been broken (Downs 1980, p. 152). By 1971 the Administration could see that there was a need for some form of dispute settlement to be legitimised in the judicial system at the village level in response to the growing concern over law and order problems in the rural areas (Bayne 1985, p. 76). Discussion of the rejected Village Court system resurfaced once again yet the system did not receive government backing until the period of self-government. During this period the Government appointed a Papua New Guinean and an Australian Magistrate to make recommendations for the establishment of a Village Court system (Bayne 1985, p. 76).

The system created as a result of the recommendations made by these Magistrates was simple in structure. Each Court was formally created by proclamation by the Minister of Justice and was given jurisdiction over a designated area. Bayne (1985, p. 77) notes that: 'In practice, the courts were created as a result of local initiative from the villagers and the local government council. Given the complexity of Papua New Guinean society, the spread of the courts across the whole country has been remarkable. By 1980, there were some 754 courts covering some, 1,750,000 people'. In 1988 there were 957 Village Courts and 9486 Village Court officials (Village Courts Secretariat, *Annual Report* 1988, p. 6).

The courts were not established according to geography, but to political alliance patterns based on traditional alliances usually set up for warfare, defence and exchange reasons. Therefore, as Bayne notes (1985, p. 77), there was a traditional basis for cooperation between groups for court purposes.

The Act specifies that the aim and purpose of a Village Court is: 'to ensure peace and harmony in the area for which it is established, by mediating in and endeavouring to obtain just and amicable settlement of disputes' by applying the appropriate custom. Each Village Court was to be comprised of a minimum of three Magistrates and no more than a maximum of ten. Appointment was made by the Minister for Justice based on the recommendations of the Provincial Supervising Magistrate (PSM) after he had consulted with the appropriate Local Government Council. Those suggested for appointment were elected by the villagers in the initial phases of the Village Court system. There were no training or literacy qualification requirements. Appointment was for a period of three years. A Magistrate could hold court at any place whether it be under a tree or in a specified building.

In line with Melanesian notions of justice no formal distinction was made procedurally between civil and criminal cases. However, a distinction was made between civil and criminal for jurisdictional purposes. Bayne (1985, p. 78) states that a 'court can determine whether a person has committed an offence as prescribed in the Regulations'. The criminal offences for which the Village Court has jurisdiction include matters which are 'likely to cause disturbances of the peace in the villages' (Bayne 1985, p. 78). These matters include for example, sorcery, breach of custom, adultery, spreading false rumours, maintenance matters, disputes over brideprice, desertion, and stealing. Village Court also has jurisdiction to issue a summons to appear before it, to issue a warrant of arrest for those who fail to appear or for those who fail to follow the instructions given by the particular Village Court and to sanction those individuals who fail to abide by Local Government Council rules. Peace officers are also appointed to enforce the jurisdictional and arresting powers of the Village Court.

Village Court cannot directly impose a prison term for offences. It has the authority to make 'imprisonment orders which can then be enforced by the 'official' Magistrates' (Bayne 1985, p. 78). Sanctions which can be imposed by the Village Court include court fines, ordering of compensation to be paid to the complainant(s), and ordering the performance of community work. For each K10 (approximately A$14 at August 1992) or part thereof of any fine, damages, or compensation which is not paid, the defendant faces imprisonment for one week.

Village Court jurisdiction over a matter is determined by 'factors such as the place where the dispute arose, or the residence of the parties' (Bayne 1985, p. 78). Village Courts do not have jurisdiction in matters dealing with land or the driving of motor vehicles.

Villagers who have appeared before Village Court have the right to appeal the Village Court Magistrate's decision to a Local or District Court Magistrate either orally or in writing. The Local or District Court Magistrate has the authority only to confirm or dismiss the appeal.

The Village Court system is monitored by provisions in the Act which require the Provincial Supervising Magistrate (PSM) to inspect each Court and its records within his Province regularly and to check on its functioning. This supervisory mechanism is considered to be a 'critical element of the system' proving to be a more significant check on its potential failings than the review and appeal provisions of the Act itself since the PSM could provide Village Court Magistrates, peace officers and clerks with current feedback on the limitations of their work.

Village Courts and dispute settlement

The Village Court was given the mandate firstly to 'attempt to reach a settlement by mediation before exercising its compulsive jurisdiction' and it 'may adjourn any proceedings relating to a dispute in which it is exercising that jurisdiction if it thinks that by doing so a just and amicable settlement of the dispute may be reached'. The mediation role was emphasised so that, if possible, the dispute could be amicably settled by custom. The Act states that 'in all matters before it a Village Court shall apply any relevant custom as determined in accordance with Sections 2, 3 and 7 of the Customs (Recognition) Act'. Custom was to be given priority and applied despite any inconsistencies with any Act in Papua New Guinea.

The authors of Papua New Guinea's Constitution clearly envisaged the Village Court as being something different than the imported system since the Constitution states that the normal protections provided by the western court system to persons arrested, detained or charged with offences do not apply in Village Court. The Constitution requires only that the rules of natural justice be followed. Clearly, it was accepted that there would be differing standards of justice; that provided by custom and that provided by the Constitution and laws made by Parliament.

The Village Courts system has been criticised by some for failing to achieve the intended bridging of the gap between the western court system and traditional custom. It has tended in practice to imitate the procedural formality of the Local and District Court system, thereby removing the important procedural informality of traditional dispute settlement in which all parties were permitted to tell their version of the story. However, it should be noted that traditional forms of dispute settlement likely to be used by the Village Court would have undergone changes. Papua New Guinea societies themselves have changed in response to contact with the colonial administration's introduced system of justice (Strathern 1972a). As Weisbrot notes (1977, p. 153):

> . . . the Village Courts have become somewhat more rigid and formal than was anticipated, and are tending to emulate the official courts rather than replace the unofficial courts as the settler of the common disputes that disrupt the village.

Some Village Courts have emulated the official courts by holding court in rooms built specifically for the purpose of holding Village Court. These courtrooms are modelled after the courtrooms in the Local and District Courts where the complainant and the defendant sit at different tables facing the Village Court Magistrate (Westermark 1978, p. 83; Paliwala 1977, pp. 167-8).

'In any proceedings before it, a Village Court shall not apply technical rules of evidence, but shall admit and consider such information as is

available'. A study conducted by Westermark in the Eastern Highlands, however, shows that despite the intention of s28, Magistrates 'limit evidence to the specific issue before them. They will not consider a dispute that preceded the case under consideration, even though it may be one of its causes' (Westermark in Toft 1985, p. 108).

Strathern (in Epstein 1974, pp. 270-316) refers to another feature of customary dispute settlement; that of 'talking out' the dispute. She argues (in Epstein 1974, pp. 271-2) that one of the main goals in achieving a peaceful dispute settlement is that all parties are allowed to express their grievances and air their views to such an extent that a state of catharsis is attained:

> . . . an issue should be so thoroughly aired that not even the most minor factors relating to it remain to foster further grievances in the hearts of the disputants. A truly successful settlement brings about a change in the disputants' feelings towards one another, so it is hoped.

Strathern (in Epstein 1974, p. 272) also notes that this public airing of all the contributing factors in a dispute can cause further problems since publicising all the information can lead to this information being used by one group against the other in later political ploys between competing groups. Revealing information in a public forum can also lead to embarrassment and shame (Epstein 1974, p. 23; Strathern in Epstein 1974, p. 272).

By comparison, the procedures of the western courts do not allow the disputants the same opportunity of attaining this state. During two years of association with the Local and District Courts in various centres in Papua New Guinea (1985-6), the author observed numerous cases where defendants were frustrated by the fact that they were not permitted to fully air their side of the story. For example, on numerous occasions after the Court had read the charge to the defendant and requested the plea by asking in pidgin language, 'Em i tru o em i no tru?' (Is it true or is it not true?), the defendant would respond 'Em i tru, tasol . . . ' (It is true but . . .). The Magistrate would then interrupt the defendant to pronounce him/her guilty. The defendants were left feeling bewildered since they were attempting to explain the context within which the act took place. The western court system uses the accusatorial system and not the inquisitorial system. The defendant, not understanding the system, quickly provided the court with a guilty plea by the statement 'Em i tru'. Magistrates frequently stopped the defendant at that stage, registered a guilty plea and then proceeded to sentencing.

The western court system is not designed to take account of the Melanesian custom of circumlocution because it emphasises relevance. In the imported system in Papua New Guinea facts are only admissible in evidence if they are relevant to the charge. However, in Papua New Guinea custom (Epstein 1974, p. 22):

> In conciliation proceedings (where the disputants are linked by close bonds and the complainant wishes a change in the behaviour of the defendant as is often the case in the village) . . . the complainant may be less specific, and as grievance is followed by counter-grievance a considerable time may elapse before what is in issue emerges. What facts are relevant in this kind of situation is therefore most difficult to assess.

Village Courts and women

A woman in a dispute with another person can first attempt to use the informal remedies of mediation or moots. A study conducted by Westermark in the Eastern Highlands Province between 1977 and 1978 suggests that most women and men were using the more formal methods of dispute settlement rather than informal procedures (Westermark in Toft 1985, p. 110). The Agarabi Village Courts have divided all disputes into 'little trouble' and 'big trouble'. 'Little trouble' cases are those that involve closely related disputants and are assigned to the more informal 'outside courts' which use the mediation process. 'Big trouble' cases are those which involve violence or divorce. These come before the formal court hearings of the Village Court. Westermark's study showed that most family issues which came before the formal Village Court involved marital problems and assaults and that women were frequently the plaintiffs (in Toft 1985, p. 112). An interesting finding of the study was that out of 94 cases of trial or reports involving both sexes, 88 per cent were initiated by women. Strathern (in Toft 1985, p. 8) argues that this may mean that women (who normally have difficulty in asserting themselves) are using the Village Courts as a way of getting their marital problems (which often involve violence) into a public forum. She also notes (in Toft 1985, p. 8) that 'women's ability to bring complaints to full trial (rather than report) continues to rest on how seriously men, in this case Magistrates, take the issue. Thus, whereas almost all rape and assault cases lead to trial, only half of the "marriage" cases do'.

Once mediation attempts by the Village Court Magistrates have failed they will exercise their civil or criminal powers. Most cases involving women that come before the Village Court are concerned with domestic disputes (pers. comm.: Noah Tade former Village Court Inspector; Gill Christ Kanadari VC Magistrate, Popondetta; Melky Tokinala—Village Court Officer, Rabaul; Stephen Alpichin—VC Magistrate, Maprik). A nation-wide study which overviewed cases of village conflict involving 'inter-sexual and domestic issues' in order to 'assess the ability of village women to pursue their grievances', noted (Scaglion & Whittingham, in Toft, 1985, p. 122-3) that 'nearly' one third of the sample of 481 cases involved 'sexual jealousies', 'petty domestic' or marital relations-type cases. Scaglion and Whittingham note that women are using the public forum because they have failed to get satisfaction in the informal public forums

(in Toft 1985, p. 129). They also note that sex-related cases are more likely to involve assault than other types of cases and this factor contributes to the use of Village Court in these kinds of cases since violence is a matter considered serious enough to deal with in the more formal Village Court (in Toft 1985, p. 127).

According to Scaglion and Whittingham's study (in Toft 1985, pp. 127, 129) women are the sole complainants in only one-fourth of all village cases. They note regional differences in this statistic which show that Papua and Highlands women act as sole plaintiffs in 30 per cent of cases while women in the New Guinea Islands were the sole plaintiffs in 30 per cent of cases but joined with men as plaintiffs in a further 14 per cent of cases. In Momase region (northern New Guinea mainland area) women acted as sole plaintiff in only 20 per cent of cases.

Types of cases involving women

Mitchell (1985) outlines three categories of family disputes which involve women in Village Court in her study of Village Courts in the two provinces of North Solomons and Southern Highlands. They are entry into marriage, disputes arising during marriage and dissolution of customary marriages.

Entry Into Marriage Most cases that come before the Village Courts involving entry into marriage are concerned with the payment of bridewealth (or brideprice) and with the issue of consent to a marriage. The issue of bridewealth involves two groups of people since traditionally the marriage binds two groups together through a contract of obligations and responsibilities. Mitchell (1985, p. 84) found in her study that most Village Courts in the Southern Highlands would attempt to mediate between the two groups. On the issue of consent in marriage, Mitchell found that few cases were heard on the subject. Despite this, she argues that consent is an issue (1985, p. 84) since young people were often pressured to marry a person chosen by their parents. Boys were much better equipped to resist such pressure than girls. Mitchell (1985, p. 84) points out that if '[a]rranged marriages are the custom, a girl would not be likely to think she could complain about it to a Village Court; and even if she thought she could, there would be enormous pressure on her not to do so'.

Disputes Arising During Marriage Disputes that come up during marriage involve polygyny, domestic violence, adultery and desertion (Mitchell 1985, pp. 85-8). Polygyny disputes take two forms: the wife or wives seek to block the husband's attempts to take on yet another wife; the wives themselves may be fighting with each other over the disproportionate sharing out of attention, cash, or food by the husband.

Domestic violence is endemic in Papua New Guinea and many women have been disciplined in this manner by their husbands (*see* Law Reform Commission Reports on Domestic Violence in both Rural and Urban Papua New Guinea, Occasional Papers Nos. 18 & 19). Mitchell (1985, p. 86) found that it was a prevalent practice in both provinces in which the study took place and that often domestic violence was associated with alcohol consumption. She also found that the amount of compensation ordered by the Village Court in such cases was small because Magistrates treated the matter as a private one between the husband and wife.

Adultery is considered a very serious matter by the people of Papua New Guinea. Up until very recently, women bore the brunt of any punishment meted out by the Courts since the law required only the third party to face a criminal charge. This has been recently changed (September 1989), so that both parties involved in the adulterous act can be taken to Court. Traditionally, women were severely punished for adultery. Village Court hears cases of adultery even though many go before the Local or District Courts. An order of compensation is usually made in adultery cases.

Desertion is an offence committed by both sexes in Papua New Guinea. Even though Mitchell found no record of cases where a man was directed to return to his deserted wife she found that (1985, p. 87):

> . . . in some Southern Highlands village courts, it is a fairly common practice for Magistrates to force a woman to live with her husband if he has paid full brideprice for her. There were several cases recorded where a wife left her husband (in some instances to live with another man), and when the husband subsequently brought her before the village court, she was ordered to return to him. In one case a woman was jailed for four weeks for failure to obey an order to stop sleeping with another man and return to her husband. Not only is there no authority under the Village Courts Act for Magistrates to make this sort of order, but it also violates a woman's right to freedom of movement guaranteed by s.52 of the Constitution and arguably to her right to privacy guaranteed by s.49.

The Village Court has no authority to order the regular payment of maintenance to deserted women and children by their husbands. It is empowered only to order a compensation payment of up to K500 (approximately A$700 at August 1992) and this is usually dispensed amongst the wife's relatives (Bradley & Tovey 1988, p. 7). Matters relating to brideprice, custody of children or compensation for death are not included in the K500 compensation limit.

Dissolution of Customary Marriages Divorce is considered a very serious issue in the Village Courts and Magistrates often attempt to facilitate a reconciliation (Mitchell 1985, p. 88). When there is a breakdown in a marriage the return of brideprice is the most common dispute dealt with by the Village Court. Custody of children is regulated

by the descent system of the groups involved. If it is a matrilineal group the child belongs to the female line. In patrilineal societies, the children are rightfully claimed by the father's line if he has paid the full amount of brideprice.

Women sometimes become involved in money disputes. This has occurred more frequently in the Highlands as women have come to earn cash from coffee production. Some have become involved in business or have provided loans to people to start a business. They have sometimes ended up in Court because the person they loaned the money to has absconded with it (Giddings, R. 1989, pers. comm., 8 October).

Difficulties experienced by women before the Village Court

Women are at a disadvantage when disputes involving them are brought before the Village Court. Mitchell (1985, p. 81) makes the point that customary family law does not give women equality with men. She uses the examples of brideprice and polygyny; customs which create inequality and imbalance in marriages (*see* Mitchell 1985, p. 88).

Another problem faced by women when they come before the Village Court is that almost all Village Court Magistrates are men. Women are inexperienced and lack skills in public speaking (Paliwala 1977, p. 169; Mitchell 1985, p. 89). This suggests that they will get a less than sympathetic hearing for their dispute and will be disadvantaged in their attempt to explain their side of the dispute to the Magistrate.

Other examples can be found elsewhere. At Mendi in the Southern Highlands Province, women have been ordered to pay fines for smoking but this is not considered an offence for men (Paliwala 1977, p. 169). Paliwala (1977, p. 169) noted that: 'The courts justify these fines on the ground that smoking is a symptom of the kind of behaviour which leads to enticement by young 'modern' girls and men away from their wives'.

In Mount Hagen, Western Highlands Province on 3 and 10 May 1989, Mr. Justice Woods heard applications under the Constitution by a woman who claimed an unlawful detention order was made against her by the Village Court. She had been imprisoned for failing to obey orders for payment of compensation made by the Village Court. She left her husband in 1984, returned to her own village, and later re-married. Her husband took her to Village Court and she was ordered to pay K840 (approximately A$1200 at August 1992) compensation in 1985. The Order for her imprisonment for failure to pay the compensation was made in 1988. She was given 84 weeks imprisonment. Mr. Justice Woods found that her imprisonment was contrary to s.42 of the Constitution which states that 'no person shall be deprived of his personal liberty except—(c) by reason of his failure to comply with the order of a court made to secure the fulfilment of an obligation (other than a contractual obligation) imposed upon him by law'. Justice Woods held that the order requiring her to repay the brideprice was a civil contractual obligation in custom

and was not related to an offence. Justice Woods ordered the woman to be released from prison. This case was appealed to the Supreme Court of Papua New Guinea which found that an order for imprisonment under s.33 of the Village Courts Act, following commission of an offence under Section 31 of the Act, does not unlawfully deprive a person of the right to personal liberty given under s.42(1) of the Constitution (PNG Justice Department files—SCR No. 2 of 1989 Re: Special Reference Pursuant to Constitution).

Teine and Paliwala's study on 'Village Courts in Simbu' (1978, pp. 37-8) provides an example of the difficulties that Simbu women face before a Village Court. One case involved a woman who left her husband after six months of marriage when her husband's brother tried to have intercourse with her. She left her husband and went to another man. The Village Court Magistrate found that she was making excuses and ordered her to return to her husband as he had paid brideprice for her. She was only permitted to stay with this new man when her husband said he would accept her decision if the brideprice was returned to him. The woman's preference was not considered to be relevant by the Village Court. The Magistrate ordered a substantial amount in brideprice to be returned. Teine and Paliwala argue that Simbu Village Courts are unsympathetic to women and that the above case typifies their treatment in Village Court (1978, p. 49).

The following case described by Paliwala (1982, p. 222) further illustrates the attitude of Village Court Magistrates toward women who wish to divorce their husbands:

> In one case in Mendi in the Southern Highlands, a woman had run away from her husband a second time, in spite of a preventive order from the village courts which enjoined both parties to stay together in peace. The husband had beaten the wife very badly and the wife refused, before the court, to go back to the husband. She said that if the court insisted on her going back, she would commit suicide. The court insisted that she should give the marriage another try and ordered the husband to give one cassowary as compensation for the injury. The wife rushed to the river. She did not commit suicide but smashed the fingers of her hand with a stone, saying to the court, 'You may force me to go back, but I will be no use to him as I can't dig his garden and can't cook his food'.

Paliwala (1982, p. 222) states that although the Village Courts appear to be more than willing to acknowledge and support western practices in other economic transactions, ' . . . in dealing with women (the Village Court) can insist on extreme "traditionalism" '. He provides us with the following example:

> The wife claimed that the husband had not given her any money to buy clothes etc. when she had her baby. The husband worked on the council road programme. The Court said: 'This thing of money is a new thing. We never had

> money before and a man was never supposed to give money to a woman. We have our gardens. You should not bring to us questions of money'.

Paliwala found in his study of Village Courts between 1975 and 1978 that 'an excess of traditionalism' was not found except in matters dealing with women (1982, p. 222).

Probation Service

In 1976 the Government of Papua New Guinea endorsed a policy recommendation by the Minister for Justice to introduce a probation system to the country and by 1979 the Probation Act had been enacted. It took several years for the system to get off the ground but by 1991 there were twenty-two offices spread across seventeen provinces and the National Capital District with fifty-three staff providing Probation services to the Courts.

The Probation Act 1979 authorised the Probation Service to be set up in areas which are specified by the Minister for Justice acting on the advice of the Chief Probation Officer. The Probation Service set up offices across the country according to need (based on an assessment of the severity of the law and order situation in an area) and according to community response (which was determined by the willingness of the community to form a Probation Support Committee which would assist in conducting public awareness campaigns about Probation and to assist in the recruitment of Voluntary Probation Officers). An attempt was also made to involve the Provincial and local Governments by soliciting their financial contributions to the Probation Support Committee and to the local Probation office in the form of stationery, drivers, vehicles, or secretarial staff. Once the Probation Support Committees fulfilled their obligation to assist in the process of setting up a Probation Service in their area it was hoped that they would then attempt to develop rehabilitation programs which could assist probationers and youth in general in their respective communities. This approach was modelled on the work of the Eastern Highlands Provincial Rehabilitation Committee which had developed a potato cooperative and other economic projects which gave local youth some access to the cash economy. These projects were to be determined by the special needs and the ecological and economic potential of the local communities.

The legislation provided for four classes of officer within the system: the Chief Probation Officer, Senior Probation Officers, Probation Officers and Voluntary Probation Officers (s.5 & 6). The Chief Probation Officer, the Senior Probation Officers and the Probation Officers are all members of the National Public Service. The fourth class of officer, Voluntary Probation Officer, was to be recruited from the community, appointed by

the Chief Probation Officer or his delegate and was to receive no remuneration for his/her services.

Probation, as a sentence, can be given by all Courts except Village Court, for all offences except when 'a mandatory minimum sentence is provided for by any law'. The Court may 'impose a sentence but suspend it' or it may 'defer sentencing him to imprisonment' and order probation for up to a maximum of five years. Offenders given the probation sentence in Court are required to 'keep the peace and be of good behaviour', report to a Probation Officer, remain at a specified address until contacted by a Probation Officer, reside at a specified residential address and not change employment unless the Probation Officer is given reasonable notice. The Court may order special conditions which would ensure the offender's 'good conduct'.

A person who fails to comply with the conditions of a Probation Order commits a breach of that order and after conviction, faces an extension of the Probation Order, the imposition of additional conditions, imposition of the original suspended period of imprisonment or any part of it, or a prison sentence (if sentencing had been originally deferred).

The country has been divided into four regions for probation purposes: Papua, Highlands, Momase (northern New Guinea mainland) and Islands. Each region is supervised by a Senior Probation Officer who is answerable to the Chief Probation Officer.

Immediately subordinate to the Senior Probation Officers are the various Officers-In-Charge (OIC) of the Provincial offices located in each region. The OICs supervise the staff within the provincial offices and the field offices located within their province.

The probation system is designed so that there is a small core group of professional Probation Officers providing services to the courts (such as the preparation of Pre-Sentence Reports which make assessments as to the offender's suitability for probation supervision) and providing the supervision of probationers in the community with the Voluntary Probation Officer's assistance.

One notable feature of the Papua New Guinea probation system is the participation by members of the community in the supervision of offenders through their appointment as Voluntary Probation Officers. This component was included in the system so as to involve the community and to encourage its participation in the resolution of its own law and order problems.

The Probation Officers supervise the Voluntary Probation Officers and the probationers through a system of patrol similar to the kiap system. Each month they supervise the areas for which they are responsible. During these vehicular patrols Probation Officers meet with VPOs and probationers to discuss issues relating to their Probation Order. This helps to ensure that the court orders are followed and, if possible, that

appropriate assistance is offered to the probationer so that he/she can deal with the problems which led the offender to break the law.

The response by the community has been very positive. There has been an abundant supply of people willing to volunteer their services in the supervision of offenders. There were 588 Voluntary Probation Officers registered with the Probation Service throughout the country in 1988. The Service was able to use only 275 of those registered to actually supervise probationers. These 275 VPOs supervised a total of 347 probationers during the year (PNG Probation Service *Annual Report* 1988). Major problems experienced have been insufficient training of volunteers, the reluctance by the courts to utilise probation as a criminal sanction and the difficulties in obtaining adequate vehicle transport with which to carry out the patrols (PNG Probation Service *Annual Report* 1988).

Probation and dispute settlement

The probation system in Papua New Guinea assists offenders by attempting to integrate aspects of the traditional system of social control and the imported court system (Tohichem, L. 1990, pers. comm., 20 February, PNG Chief Probation Officer). Traditionally, social control mechanisms varied but most involved elements of 'talking out the dispute', mediation, compensation, or in extreme cases, punishment by death through banishment or sorcery. Mr. Leo Tohichem (1990, pers. comm., 20 February) states that:

> Instead of bridging the gap between the imported justice system and the customary system of social control, probation, (when used properly), attempts to bring out the value of tradition by acknowledging custom and giving the community a voice in the sentencing process. It helps make the western system more responsive to custom. Once the court, acting upon the recommendations of the Probation Officer, has taken custom into account during sentencing, the community can then see for itself that justice has been done according to custom. This is important, for if traditional expectations are not satisfied, then despite the court sentence, the people will find some excuse to re-create trouble with the offending group and will therefore re-open the conflict until they feel that balance has been restored.

The balance is usually restored through some form of reciprocity between the victim's group and the offender's group. The Act requires Probation Officers to provide the court with background and character information (Pre-Sentence Report) which would assist it in determining the most appropriate sentence for the offender. The Report may also make an assessment regarding the offender's suitability for probation supervision and recommend any special conditions which are considered appropriate. Probation Officers have been taught to attempt to make recommendations in their Reports which will satisfy the reciprocity

demand. Senior Magistrate Rick Giddings (1989, pers. comm., 8 October) notes that:

> Probation serves a mediation role between the interests of customary law and of the imported court system since a good Pre-Sentence Report should be able to draw attention to the Court to the customary issues involved in the commission of the offence and draw its attention to the way the community feels about the way the offence can be compensated for or the problem resolved.

They can do this through recommending that the court order special conditions to be fulfilled by the probationer during the period of the Probation Order. Examples of conditions which can be and are in fact ordered by the court and are tailored to custom include restitution, compensation, repatriation and the performance of community work.

If an offence is committed by a villager outside his group (for example when the offence takes place in a nearby town where he has no means of support) he may be placed on probation and ordered to be repatriated back to his village. In Papua New Guinea a condition of repatriation requires the probationer to be transported back to his home village by the Probation Service. The Probation Officer appoints a Voluntary Probation Officer to supervise the probationer within the probationer's home community (Probation Service Operations Manual). This type of community supervision gives the community some control over the behaviour of its members through its representative, the Voluntary Probation Officer. Since everyone in the community knows everyone else and is aware of each other's activities, the probationer's conduct is easily monitored. If the probationer does not behave according to the conditions under which he has been placed, someone within the community will usually report it to the VPO or even to the Probation Officer. In full public view, the probationer is expected to abide by the terms of his Probation Order and to stay out of conflict with the law.

Giving the villagers a formal role in the process of assessing a probationer's performance in the village community is viewed by them as important since, by this means, their traditional role of ensuring that their own members are upholding the values of the group is recognised (Tohichem, L. 1990, pers. comm., 20 February).

The situation is somewhat different in the urban settlements. Here, villagers have migrated to areas around the towns and have built squatter settlements. These settlements are not generally provided with basic services such as electricity, water, sewage, and garbage collection (Agyei 1980, p. 12). If an offence is committed by a person who has established himself in such a settlement it may not be appropriate to order him to be repatriated to his home village. This is especially true when the person involved is a second generation urban settler and has few ties with his rural relatives. In this situation the offender would not be regarded as part

of the rural group and consequently there would be no commitment on their part to look after him. Community supervision would have to be provided by people residing in the urban settlement in which he has grown up.

According to the Chief Probation Officer, supervision in the settlements does not have the same customary force as it does in the rural villages (pers. comm., 20 February 1990). He attributes this to the fact that the settlements, although divided into groups of Sepiks or of Chimbus for example, are not tied together through kinship or other traditional alliances or cohesive relationships. They are made up instead, of a collection of personalities from a particular province or area. Therefore, the system of obligations is much weaker and the commitment toward monitoring the behaviour of a particular member of that community is less. However, Clifford (in Biles 1976, p. 25) disagrees with Mr. Tohichem's analysis of the level of group loyalty and commitment within the settlement areas when he states:

> Observation shows that there is usually a strong community sentiment in these areas and, without doubt, there are informal leaders already exercising considerable influence. The very fact that most of the urban crime causing concern may be committed by settlement dwellers but is not usually committed within the settlements where they live is substantial testimony to an internal cohesion and a rejection of lawlessness (by their standards) which probably matches that of any part of the city.

Clifford (in Biles 1976, p. 14) agrees that there has been: '. . . a gradual erosion of community traditions and the informal social controls. Just as these can no longer carry the full burden of indigence and unemployment in the town, neither are they being fully effective any longer in controlling crime'.

Monitoring a probationer's behaviour is also more difficult in the larger urban setting. A factor which influences the ability or the interest of the settlement community to supervise effectively a probationer within their sphere of influence (settlement) is the custom of redistributing items stolen during offences. As Mackeller notes (in Biles 1976, p. 122):

> As Melanesian custom is not to hoard wealth but to redistribute it, there are many beneficiaries of a single housebreaking act, and in their efforts to track down housebreakers, the police cannot expect to receive help from that section of the city's community which is receiving this clandestine form of welfare.

This factor also influences the Probation Officer's ability to effectively supervise probationers within the urban settlements. However, supervision in the settlements can be made more effective if the group has developed strong relationship ties and if the Probation Officer makes an attempt to utilise them.

The payment of compensation is an important element in traditional dispute settlement since most disputes between Papua New Guineans can be settled by such payment.

Only the Village Courts and the District Court (in specified summary offences such as assault, damaging property, negligent use of fire, as well as adultery and enticement cases) can order the payment of compensation (Summary Offences Act 1977). The Local Court does have provision that in any civil matter the Magistrate can switch from a trial situation to one of mediation. When mediation is used compensation can become one of the penalties imposed.

Ordinarily, therefore, where a monetary sanction is imposed as a punishment, it is by way of a fine. Since a fine goes to the state and not to the victim or to his lineage it is often considered necessary for the offender's group to pay compensation to the victim's group regardless of the criminal conviction and fine. Probation permits the Court to order a payment of compensation and restore balance. A condition of restitution or compensation is often part of a Probation Order. If the offender or his group does not have the goods or cash with which to pay the compensation claim, the community will sometimes agree to the offender performing community work for the victim instead.

The total number of Probationers placed under the supervision of the Probation Service either on Probation or on Good Behaviour Bond in 1988 was 2,062. In 1988, 262 probationers were ordered to pay compensation as part of their Probation Order. A further 177 probationers were ordered to perform community work for a total of 2082 days (Papua New Guinea. Probation Service *Annual Report* 1988, p. 3). Together they comprise 21.3 per cent of the cases placed under Probation supervision during the year. However, not all community work service is ordered to be performed for the victim.

The Probation Officer can also ensure, through the process of preparing a Pre-Sentence Report, that both sides of the dispute have their say in Court in the determination of the appropriate sentence. Custom is recognised in the formal court system as a mitigating factor in sentencing. It is not a defence in law (Customs Recognition Ordinance 1963 s.7). The Court will give weight to the fact that the two parties have already negotiated a compensation payment or that custom has been used to justify the commission of an offence. Probation Officers attempt to ensure, not just that custom is recognised, but that it is taken one stage further by giving effect to it through the use of special conditions.

Constraints on the probation system

The potential of the probation system has been outlined in the previous section. In practice its ability to address the law and order problems of Papua New Guinea is affected by external factors beyond its control. Crime has been increasing in all the major urban centres around the

country. This can be attributed to economic development and urban migration as well as to the inability of the economic system to meet the employment demands of the growing population of the country's youth (under 30) (Agyei 1980, p. 12-13).

There has been an increase in the amount of gang activity in all the urban centres (Clifford 1976, p. 16; Harris 1989; Reay 1982). This is seen as a natural result of the inequities in the economic system. The formation of gangs, originally in Port Moresby, has also been attributed to the sociological need for those (Clifford in Biles 1976, p. 16):

> . . . unemployed, aimless, frustrated and bored young people, unable and perhaps unwilling to find work, [who] slowly drew together for mutual protection—probably against critics at home, older people who despise their idleness or other working youths who had no time for those less fortunate than themselves. Formed into powerful groups, the unfortunate could compensate for their powerlessness and sense of failure. In a strong mutually protective group, they were able to stand against others, to make others respect their trouble-making capacity and to present a bold front to an alien world: this was a way to obtain a form of status and dignity.

The gap between the rich and the poor in Papua New Guinea has widened. Increased criminal activity has also been attributed to the educational system which has had the effect of changing the attitudes and expectations of the younger people in Papua New Guinea. Education has been viewed by the people as a vehicle to increased status and prestige since it creates the potential of earning cash through employment (Guthrie 1980, p. 37-8). The rural people believe that their educated children will find such employment in the urban centres. The consequent migration to the urban centres has already been discussed. When jobs fail to materialise for the migrants who have obtained some education they sometimes turn to crime for material support. They face parental pressure as well since their parents and relatives expect a return on their investment in the child's education. The desired return is in the form of cash earned from 'fortnight pay'.

Since the Probation Service relies heavily on community supervision in its attempt to place the onus on the offender's community for his rehabilitation it requires a strong traditionally based community. Tradition will continue to exist as long as the community remains strong and maintains traditional ties and relationships based on obligation and reciprocity. Yet as noted above, tradition is under strain. Since the PNG probation system depends upon a strong community base how will it deal with the loss of community if the current trend continues?

The PNG Probation Service is a young service in a developing country. It continues to experience internal organisational and administrative problems. These include budgetary constraints, housing problems, and the skill deficiencies of its staff in all aspects of Probation

work. These internal problems affect the ability of the Service to deliver effective services to the Courts and to provide adequate community supervision.

Probation and women

Both Probation Service staff and the District Court Magistrates interviewed agree that most disputes faced by women are domestic in nature. Mr. Tohichem noted that (pers. comm., 20 February 1990):

> Generally Papua New Guinea women are not aggressive in character. If they are convicted of an offence it is usually because someone else has placed them in a situation where they have to retaliate by stealing or fighting to protect their traditional position and rights. Women are rarely the initiators of the disputes which lead them into conflict with the law.

Probation attempts to keep women who come before the courts out of gaol. Incarceration separates women from their families for the period of their imprisonment. They are also separated from their community. In the community there is usually someone who can provide support or at least listen to a woman's problems. Papua New Guinea gaols offer little in the way of employment, rehabilitation programs, or counselling services ('The Report of the Committee of Review into Corrective Services in Papua New Guinea April 1979' in Johnson 1979, p. 68-71). In gaol there is no support provided for the female offender or for her problems.

The probation system allows women to be given a non-custodial sentence. As a result there is less chance of marriage breakdown due to enforced separation. Probation, with a special condition of community work, may be used as an alternative to a fine which women may not be able to afford. However, community work can also present problems for women since their financial and subsistence needs may require them to work long hours to meet their children's and family needs. With the added responsibility of the children's care, a condition of community work may create impossible demands on their time (Clifton, D. 1990, pers. comm., 22 February). It is possible for the Court to order women who are in such difficult circumstances to make a compensation payment to the complainant in food or goods instead of cash, although this does not occur frequently.

One of the aims of the Probation Service is to stabilise and maintain the family relationship when it comes under pressure from either internal or external sources (Yupae, N. 1989, pers. comm., 10 October). Probation Officers can provide some of the necessary support to women probationers in their own communities by assisting them with individual or family counselling services. The Service has included the Papua New Guinea Law Reform Commission's Domestic Violence Awareness sessions in its training program for new officers. It has also included training courses in counselling skills as part of its' overall staff training

program (Probation Service Training Plan 1990). Officers have spent a great proportion of their time providing counselling to female probationers (Clifton, D. 1990, pers. comm., 22 February). As will be shown later, women are being taken to court for matters which are defined by the western system as offences but which are considered obligatory under custom. In their attempts to discuss the problems which have led women into their legal predicament, Officers are sometimes able to mitigate the injustices experienced by women. They also attempt to talk to both the wife and the husband together in an effort to address the marital problems at issue and to provide alternative solutions to these problems which do not involve breaking the law. Clifton noted that despite the attention given to the problems of female probationers, Probation Officers had not yet developed the skills required to identify and utilise appropriate and available community resources which might assist women.

Counselling assistance offered to women by the Probation Service is especially important in urban areas where the support from the community is not as great as in the rural areas. In this way the Probation Service can provide a service to urban women (for example, listening to their problems and attempting to provide them with assistance and support) in areas where traditional ties are much weaker and the traditional community has broken down.

It is the Chief Probation Officer's view that the Probation Service has had the effect of making the imported court system of Papua New Guinea more sensitive to the special needs of women and that there has been a significant improvement in the treatment of women within the system since the introduction of Probation (pers. comm., 20 February 1990). Prior to the implementation of Probation Services in the country Mr. Tohichem observed that the Courts were treating women who came into conflict with the law in the same way as they would treat any man who faced a similar charge; by handing down sentences strictly according to those stipulated by the Criminal Code and the Summary Offences Act. They did not ordinarily take into consideration the woman's family or economic responsibilities. Magistrates appeared reluctant to consider the effect on the woman or her family of a fine or incarceration.

Women have difficulty in Court asserting themselves and explaining their situation to the Magistrates. The Magistrates (mostly male) sometimes have their own prejudices regarding women and their position in society (Chief Probation Officer 1990, pers. comm., 20 February; Bradley 1988, p. 8). Probation Officers are able to speak for these women so that their legal rights and social problems are recognised. The Pre-Sentence Report prepared by the Probation Officer formalises the process of ensuring the woman's legal and social rights are raised for the Courts' consideration. Incidentally, Probation Officers are not always assertive enough in their efforts to identify female cases which might be considered for Probation

supervision or which might be suggested to the Magistrate as an appropriate case for a Pre-Sentence Report. This problem is also experienced in relation to men and is an area of need for future training.

Probation Officers (mostly male) also have their own prejudices regarding women which can affect their recommendations to the Court in Pre-Sentence Reports or their decision about whether or not to lay a charge of breach against a woman. This is especially true when they are dealing with educated women who do not always behave according to the traditional and subservient standards expected of most women in Papua New Guinea (personal knowledge based on work with the Probation Service between 1985 and 1986; Clifton, D. 1990, pers. comm., 2 March).

Cases involving women

The offences which most often bring women before the Local and District Courts are assault, use of insulting behaviour or language, domestic violence, desertion, stealing, shoplifting and adultery. In the District Court most assault charges or charges of using insulting language against women relate to jealousy over actual or suspected infidelity on the part of husbands or boyfriends (pers. comm.: Giddings, R. 1989, 8 October, Senior Magistrate; Yupae, N. 1989, 10 October; Aina, D. 1989, 28 November, District Court Magistrate Maprik; Kerari, J. 1990, 18 January, Probation Officer Popondetta).

Traditionally there was much fighting between women (especially co-wives) usually as a result of rivalry and feelings of jealousy over the attentions of a man (Strathern 1972b). Under custom, it was considered the obligation of the first wife to assert her position as first wife to shame any other women whose attentions were being sought after by her husband (Giddings & Giddings 1985, p. 6). This was done by attacking the second woman in public (often in the market) either verbally or even physically.

This custom is still practised today. The complicating factor is that the western system of law introduced the offence of assault. Women who are attacked by other women in these circumstances often take the matter to the police and lay a charge of assault or another related offence such as using insulting behaviour or language.

Traditionally, it was usually the leaders or bigmen of a community who were able to financially afford more than one wife. Today, it is common for Papua New Guinea men to initiate friendships or relationships with women (often younger women) in addition to their wives. The practise of polygyny has decreased since contact through the influence of the church (Johnson 1979, p. 39). Currently however, more and more men seem to pursue the attentions of other women outside of their marriage and often claim that they are interested in taking a second wife and therefore use the term polygyny to describe their activities (Worovi, P. 1989, pers. comm., 10 October). Another change has been

that men who do not wish to purchase additional wives but would like to take a new wife, attempt to make it difficult for their first wife to remain with them hoping that they will leave of their own accord. In such a situation it is more difficult for the estranged wife to receive a maintenance order from the Court (Johnson 1979, p. 53-4).

Women are also involved in offences relating to money such as shoplifting or stealing and occasionally for living off the proceeds of prostitution. Some women are motivated to steal, shoplift or engage in prostitution because their husbands are not providing them with enough attention or money to look after their own survival needs or those of their family (Vuvut, S. 1990, 22 February, Probation Officer National Capital District). The Law Reform Commission has reported that the two main causes of marriage disputes in the rural areas are 'sexual jealousy and a wife's failure to meet marital obligations' (Ranck & Toft in Toft 1986, p. 12). However, in the low income urban group, alcohol and money appear to be the major factors causing marital disputes. Ranck and Toft note (in Toft 1986, p. 14) that:

> The urban male is apparently under greater domestic pressure than is the rural male. Urban male roles tend to follow those of the Western world, where the man is openly seen as the principal provider for the family. The rural male has had many of his traditional functions a protector and hunter for the family severely eroded, leaving him under much less pressure to perform on a day to day basis regarding subsistence and survival . . . Amongst the urban low income group, both men and women feel that husbands are not meeting obligations, which points to an increasing sensitivity amongst men about the changing urban male domestic role.

In the Courts, problems of lack of confidence and experience in the public arena arise for women, especially uneducated rural women. Other difficulties experienced are their lack of knowledge and understanding of their legal rights and of Court procedures (Bradley 1988, p. 6). For example women (and men) often do not understand the procedures involved in laying a complaint, issuing a summons or ensuring their witnesses attend Court on the correct day.