Women, Justice, and Custom: the Discourse of “Good Custom” and “Bad Custom” in Papua New Guinea and Canada*

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ABSTRACT

Court decisions involving custom, the rights of women, and positivist law in Papua New Guinea and Canada are explored and contrasted. In Papua New Guinea the courts have struck down aspects of custom or customary law as being repugnant to the general principles of humanity and in violation of positivist law. In Canada men have argued for the application of custom as a mitigating factor in sentencing, asserting that it offers justification for conduct against women judged criminal under positivist law. Examining judicial discourse on custom or customary law in the two countries illuminates the tensions between custom and positivist law, revealing how custom comes to be judged “good” or “bad” and is reframed as non-normative in one country but as an appropriate cultural component in sentencing in the other.

Papua New Guinea

On 3 MAY 1996, the Post-Courier, one of the two daily newspapers circulating in Papua New Guinea, carried the following headline on its front page:

“Girl Sold in Death Compo”

The story revealed that a “young girl” (later identified as Miriam Willingal) had “been included as part of a compensation payment to be made to the relatives of a man recently shot dead by the police” (Post-Courier 1996). The maternal uncles of Koi Dam, the deceased man, had demanded either a “young girl” or K20,000 together with pigs, and the villagers (Miriam’s relatives) had agreed to give Miriam

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as part of the compensation payment to Koi Dam’s relatives. At the time of the incident, University of Papua New Guinea anthropologist Dr. John Muke, whose village lies in the area, was in the location and is reported as saying that although he did not agree with the woman being given as compensation, “pressure” was applied and the villagers were left with no option. The villagers gave 24 pigs as part of the compensation settlement.

Canada

In 1984, in the Northwest Territories of Canada, in the case of R. v. Curley, Nagamalik and Issigaitok, three Inuit men pleaded guilty to the charge of having intercourse with a female under the age of 14. When considering sentence, the trial Judge, Judge Bourassa, stated: “law and the morality it reflects (must) walk hand in hand with the people” (Nightingale 1991:93). The Judge noted that in his view, as established from a pre-sentence report and “this court’s experience in the eastern Arctic” (Nightingale 1991:93), there was a conflict between alleged Inuit values that a woman was ready to engage in sex once menstruation commenced and the provisions of the Canadian law which make intercourse with a girl under 14 an offence. He imposed a sentence of one week in prison followed by eight months of probation. The case was appealed on the grounds of inadequacy of sentence and incorrect assertions of Inuit values. Although the appeal court did not consider the latter issue, it did recognize, as did Judge Bourassa, “that knowledge of the law is an evolving factor” (Nightingale 1991:94). The sentence was increased to four months imprisonment. One commentator argues that this case, amongst others, shows some Canadian courts equating cultural difference as inferiority in that espousal of values different to those pronounced in Canadian law is defined as ignorance of the law (Nightingale 1991:94).

In this paper I contrast court cases involving custom, women, and justice in Papua New Guinea with such cases in northern Canada and explore the judicial discourse concerning custom/culture and its interaction with positivist law to illuminate tensions, to reveal how custom comes to be judged as “good” or “bad,” and to show how custom is reframed as non-normative in one country but as an appropriate cultural component in sentencing in the other.

The “Selling” of Miriam

To return to the Papua New Guinea narrative, on May 9 the Post Courier, again in a front-page story headed “Judge Looks into Girl Compensation Case,” reported that human rights groups and the National Court were looking into the issue on the ground that Miriam’s constitutional rights might have been violated by the exchange (Palme 1996). The report detailed that 18-year-old Miriam had been