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LAW AND SORCERY IN PAPUA NEW GUINEA

A Reconsideration of the Relationship
Between Law and Custom

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A thesis submitted for the degree of Doctor of Philosophy of the
Australian National University

August 1996
Acknowledgements

Over the several years I have dedicated, directly and indirectly, to the research and reflection that have gone into the production of this thesis, a great many people have provided me with assistance, advice, criticism, inspiration and an essential combination of logistical, intellectual and moral support. To all of them, named and unnamed, I will remain more grateful than I am able to express meaningfully here.

In particular, I would like to thank Peter Sack, whose own work was an early inspiration to me (and continues to be so), and from whose patience and encouragement, as much as his ideas, I have been fortunate to be able to enjoy continuing benefits. For much the same reason, I owe an especial debt of gratitude to Paul Finn, John Braithwaite.

My gratitude is also extended to Hank Nelson, Marie Reay, Peter Bayne, Ngaire Naffine, Martin Krygier, Jean Zorn, Richard Scaglion, George Westerman, Paula Brown Glick, Margaret Jolly, Stephanie Lawson, Werner Levi, Norman Meller, David and Dorothy Counts, Jim Flanagan, Deborah Gewertz, Stanley Laughlin, Edward King, Jocelyn Linnekin, Christine Bourke, Ton Otto, Bill and Margaret Rodman, Ron May, Nicholas Thomas, Walter Tiffany, Jim Boutilier and Jacqui Elliott.

During my time in Papua New Guinea, both in specific connection with my research and whilst teaching in the Faculty of Law at the University of Papua New Guinea, I received kind and thoughtful assistance from Josepha Kanawi, Christine Stewart, Mark Busse, Susan Turner, Koave Seri, Lawrence Newell, Pius Kingal, Lohira Raka, Graham Powell, Norbert Kubak, Oakaiva Oiveka, Rakatani Mataio, Peni Keris, Jake Watura, Gideon Turpot, Kibuta Ongwahumana, Ephraim Matthew, Apisai Uradok, Petero To-Bok, Robin Minding, Jim Robbins, Bruce Harris, Jennifer Popat, Ian Fraser, Paul Digine, Stephen Madana, Gabriel Genda, David Kendrew, Rodney Taylor, Melki To-Kilaia, Isana Sumsuma, and Martin Powis. Special acknowledgement is due to Jacob Simet, Wari Iamo, Rudy James, John Nonggorr, Tony Regan, Eve and Jack Rannells and Alex Amankwah. I would most particularly like to thank his Honour, the Chief Justice of the Supreme Court of Papua New Guinea (then Justice), Arnold Amet and his Honour, the Deputy Chief Justice, Sir Mari Kapi, for their time and candour.
Sadly, four individuals who were good enough to share with me their views and ideas about law, custom and sorcery (amongst other things), and interested enough to consider and discuss my own, have since passed away. Posthumous acknowledgment is thus given here, in gratitude to, and in memory of, his Honour the late Sir Buri Kidu, and the late Professors Peter Lawrence, Daniel Hughes and Roger Keesing.

At various times and in various ways I have been assisted by the National Research Institute of Papua New Guinea, the Association for Social Anthropology in Oceania, the Village Courts Secretariat of the Department of Justice, Papua New Guinea, and the International Development Program of what was then the Australian International Development Assistance Bureau. Especial thanks are due to the Australian National University and the Research School of Social Sciences, without whose generous assistance and material support it is fair to say that none of this would have been possible.

On a more personal level, I must acknowledge and thank my colleagues and friends, Rick Bigwood, Toni Makkai, Sinclair Dinnen and Bernard Sakora, not only for their intellectual support and assistance, but for their companionship, camaraderie, patience, honesty, good humour, high spirits and constancy. And because her guidance, commitment, faith and support have been of singular and enduring significance, my deep and sincere expression of thanks go to Aletta Biersack, who understands what it means to wander in the garden.

Finally, for her practical assistance at a point when so much was at stake—and for a measure of love, support and understanding beyond that which I thought I might ever know—I extend my deepest expression of gratitude to Erica Boulter.
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Abstract

Belief in the power of sorcery, and in the real existence of sorcerers who are capable of causing illness, injury, death or other personal misfortune, are common amongst people from all walks of life in Papua New Guinea today. In response to such harm as is honestly believed to have been brought about by the malevolent actions of sorcerers, or apprehending that such harm is likely to occur, it is not unusual for those who regard themselves or their kindred as actual or intended victims of sorcery to respond, or to react pre-emptively, in the traditional manner, that is to say by killing the suspected sorcerer. Although the practice of harmful sorcery is a statutory offence in Papua New Guinea, accused sorcerers are rarely prosecuted, and no such prosecutions would appear to have been heard or decided by a superior court. At the same time, however, many persons who have dispatched a suspected sorcerer have been charged with, tried for, and convicted of conventional homicide offences.

The legal system in Papua New Guinea is based on English common law, and the processes of judicial ratiocination in the superior courts tend to rely on the precedents and the reasoning articulated in the judgements of English and Australian courts. Thus, when confronted with a matter in which sorcery-related beliefs are determinatively involved, the courts in Papua New Guinea must address, in a very real and practical context, a range of issues centrally implicated in two ongoing and otherwise unrelated debates: viz., the socio-philosophical debate about the contours and content of 'rational', as opposed to 'irrational' beliefs, and the nature of the relationship between custom and law in societies, like Papua New Guinea, in which indigenous values, attitudes and beliefs, and the behaviours they engender, are assumed to be inconsistent with many of the fundamental premises upon which the rules and principles of the adopted common law are based.

Using the idioms of sorcery and law—the existence of both of which constitute undeniable social facts of life in Papua New Guinea today—this thesis critically examines the intellectual and ideological foundations of the dichotomisation of law and custom and the contraposition of rational and irrational beliefs. The analysis of these issues leads to some tentative conclusions suggesting that (a) for the purposes of both a practical and theoretical jurisprudence, the legal traditions instantiated in Melanesian custom and the
common law are not nearly so inconsistent as most anthropologists and socio-legal scholars would have us assume; (b) in reality, the effective operations of the common law system are not nearly so dependent upon conventional Western understandings of 'rational' thought and action as many social theorists and legal philosophers would have us believe; (c) in iterations natural to the cultures and societies in which they occur, a range of beliefs arguably no less 'irrational' than Melanesian sorcery beliefs can, and quite properly do, enter into the sound and sensible decision-making of Western common law courts; and (d) to the extent that the law is properly concerned with the behavioural and ideational parameters of a real world of social experience, there is no good reason, in law or in logic, why the social reality of sorcery-related beliefs should not be regarded by the courts of Papua New Guinea in much the same way they readily regard any other socially real and relevant facts.

No ultimate recommendation is proffered as to the particular determinations to which such a modified conception of law and sorcery should necessarily lead, as these are matters more properly decided by the courts—and the people—of Papua New Guinea.
Chapter One

LAW AND SORCERY IN PAPUA NEW GUINEA
A Conceptual and Phenomenological Anamnesis

Given Western society's emancipation from it, Western travellers, missionaries, administrators and even anthropologists have often selected this, the most bizarre and exotic aspect of native life, for a disproportionate share of attention. People's witch-beliefs are as often recorded for their sheer entertainment value as for their scientific interest. They seem to reward the romantic search by both writers and readers for fantasies that come true.¹

The National Court at Waigani yesterday sentenced eight men to 10 years jail each for the murder of a supposed sorcerer. . . . The men pleaded guilty to killing Sauri Ini on June 21, last year. . . . The defendants . . . said they killed Ini because he was believed to have killed many people by sorcery in various villages including their own. Their claim was supported by two witnesses called by the defence. Judge Los found that both witnesses believed in sorcery and many people, like them, feared Ini.²

1. PROLOGUE

Reporting on the 'administration of justice in connection with the natives' of British New Guinea in 1898, the first Chief Judicial Officer in the colony, the Honourable (later Sir) Francis Pratt Winter, was remarkably sanguine in his reflections on the development of inter-communal relations during the preceding decade.³ In that time, Winter observed, there had been surprisingly few hostile confrontations involving indigenous Melanesians, on the one hand, and members

² 'Killers of "Sorcerer" Jailed for 10 Years,' Post-Courier (3 April 1991), p. 16.
of the small community of colonial officials and other expatriates resident in the Possession, on the other. Many more instances of what he described as 'quarrels due to racial antagonist qualities' might well have been expected. The natives, after all, 'possess[ed] ideas of their own on the subject of justice, which . . . differ[ed] widely' from those of the Europeans with whom they had come into contact. And in so far as these conceptual disparities were generally regarded as reflecting the kind of inter-cultural cleavages which, from a European perspective, were directly attributable to the plain and inherent differences separating savage and civilised society *simpliciter*, they were naturally assumed to preordain a continuing course of inter-racial conflict. In the event, the fact that they did not do so was, perhaps, quite remarkable indeed.

Far more troublesome for those engaged in the processes of introducing and extending colonial rule in British New Guinea were conflicts involving the native inhabitants of the Possession *inter se*, in which conflicts the Administration considered itself bound, by right and by duty, to intervene. Here too, 'native notions of justice' were at sharp variance with those embraced by administrative authorities. But whereas natives 'might acknowledge that the Government was

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5 Winter attributed the low level of inter-racial conflict to 'the slight influx of Europeans into the Possession for several years after its founding . . . .' This circumstance, he suggested, 'enabled the Government to . . . instil into the minds of the natives the belief that the white man had not come to their country for the purpose of ill-treating them.' *Ibid.* But as the number of Europeans residing more-or-less permanently in British New Guinea in 1898 was so small (certainly less than 1,000), it is arguable that there simply were not very many opportunities for such conflicts to arise more frequently than they did. See E. Utrecht, *Papua New Guinea: An Australian Neo-Colony*. Research Monograph No 6. (Sydney: Transnational Research Project, 1977), p. 4.


entitled to punish a native for harming a European or other stranger,' they were not so readily inclined to accept its authority 'to punish one native for harming another native.' In consequence, whenever hostilities amongst the natives themselves were seen to threaten the preservation or advancement of colonial interests to such an extent as to warrant the interposition of administrative force, the ramifications of that kind of intervention were likely to be more problematic, and potentially more violent, for all concerned.8

It was, therefore, to disputes involving the natives exclusively, and to which colonial authorities assumed some sort of militant response was incumbent upon them, that Winter drew especial attention in his decennial report. As it happened, conflicts deriving from native beliefs in sorcery were singularly outstanding amongst these distinctively intra-communal disputes; and in this particular respect, the Chief Judicial Officer's comments were tempered with a marked sobriety:

Sorcery, or to speak more accurately, the belief in sorcery, is a prolific source of murder. At times it leads to the sorcerer, or reputed sorcerer, being killed, as an enemy to his own people. Or a person of one tribe will die of sickness. His tribe, not being able to place his death to the account of any of its own members, comes to the conclusion that the malevolence of some neighbouring tribe led the latter to kill the deceased by sorcery.9

Even for those who had 'been for a long while in the Possession,' Winter opined, it would be difficult 'to thoroughly realise how widely spread and how

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7 Ibid.

8 See, Annual Report on British New Guinea, 1892-1893, p. 46; and see also Wolfers, Race Relations and Colonial Rule in Papua New Guinea, p. 16.

deeply seated this belief in sorcery is, and the mischief and unhappiness that it causes. But whilst these observations might be supposed only to have confirmed what was, in fact, already well known to the handful of Europeans who, by that time, were certain to have become acquainted with some of the harsher realities of Melanesian life, there can be little doubt that they could have been substantiated by what countless New Guineans knew and understood only too well: to the natives of New Guinea, sorcery posed an ever-present and particularly insidious threat, as much to the welfare and stability of the larger community as to

10 Ibid.

11 This is not to say that the nuances of those realities were necessarily well understood in every case. Thus, for example, Joyce has suggested that, although he was most certainly familiar with the problems of violence to which native sorcery beliefs and practices so regularly gave rise, Sir William MacGregor (the Administrator of British New Guinea under whom Winter was serving at the time the Memorandum quoted from above was submitted), failed to develop an adequate appreciation of 'the important functions of sorcery in [the] native culture' of the people he was responsible for governing. R.E. Joyce, Sir William MacGregor (Melbourne: Oxford University Press, 1971), pp. 186-187. But cf. idem, 'William MacGregor: The Role of the Individual,' in The History of Melanesian, Second Waigani Seminar (Canberra and Port Moresby: Research School of Pacific Studies, Australian National University and University of Papua and New Guinea, 1971), p. 44 n. 22; and see also Wolfers, Race Relations and Colonial Rule, pp. 21-22.

individual existence itself. All manner of personal misfortune or natural catastrophe might be attributed to its practice, and its practitioners were widely regarded as a scourge whose isolation or riddance was actively sought. Pernicious cycles of suspicion, accusation, recrimination and violent retaliation were thus played out inexorably, only to begin again when next a fatal illness befell a clansman in his prime, a child was stillborn, a garden crop failed for want of rain, or unseasonable storms brought about destructive flooding.

In the view of those colonial officials who, like Winter, had opportunity to witness its repercussions at firsthand, sorcery could quite reasonably be regarded as a pervasive and perennial 'curse of native life.' But if the existence of sorcery in the context of traditional Melanesian society was 'universally deplored,' its practice, and the responsive violence that practice commonly engendered, could nonetheless be said to entertain a considerable measure of traditional legitimacy.

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13 Indeed, the dispatch of a sorcerer would as likely be met with praise as condonation, regardless of whether the method whereby this was achieved were itself to involve resort to acts of lethal counter-sorcery or some more conventional form of equally potent retribution. See A. Marat, 'The Official Recognition of Customary Responses to Homicide in Papua New Guinea' (PhD Thesis, University of Oxford, 1987), p. 127; L. Steadman, 'Cannibal Witches in the Hewa' (1975) 46(2) Oceania 114.


15 Ibid. The words are actually those of A.M. Campbell, who had been appointed Resident Magistrate for the South-Eastern Division of British New Guinea in 1896 after having spent several years in the colonial service in Fiji and Tonga. See Joyce, Sir William MacGregor, pp. 150, 410-411 n. 19. For similar expressions see also J.H.P. Murray, Papua or British New Guinea (London: P.S. King & Son, 1912), pp. 202-203; C.A.W. Monckton, Some Experiences of a New Guinea Magistrate (London: John Lane, 1921), pp. 92, 113, 120-128.


17 See e.g. A. Chowning, 'Sorcery and the Social Order in Kove'; R. Bawden, 'Sorcery, Illness and Social Control in Kwoma Society' in Sorcerer and Witch in Melanesia, ed. M. Stephen (Carlton: Melbourne University Press, 1987), pp. 149-182, 183-208. Robert Tonkinson has made similar observations regarding the 'legitimacy' of sorcery as an institution of social control in
Amongst the natives of New Guinea, the specific characterisation of sorcery-related conduct as good or evil, as an egregious 'crime' of aggression or an invited and wholly justifiable 'punishment' for some prior wrongdoing, 18 was effectively dependent upon the peculiar circumstances of the individuals and groups immediately involved.19 As a practical matter the general recognition that sorcery was 'bad' was 'irrelevant to political life.20

At the same time, and largely on account of its status as a legitimate modality traditional Ni-Vanuatu society,' Sorcery and Social Change in Southeast Ambrym, Vanuatu' (1981) 8 Social Analysis 77 at 79.

As it is used here, the term 'legitimacy' refers to the existence of a popular foundation of validity or consensual propriety, in respect of institutionalised social action, 'external to and independent of the mere assertion or opinion of the claimant . . .'. Thus, 'if a people holds the belief that existing institutions are "appropriate" or "morally proper" then those institutions are legitimate.' J.H. Schaar, 'Legitimacy in the Modern State' in Legitimacy and the State, ed. W. Connolly (Oxford: Oxford University Press, 1984), p. 108. This usage is consistent, though not necessarily synonymous, with Weber's concept of legitimacy. See M. Weber, The Theory of Social and Economic Organisation, trans. A.M. Henderson and T. Parsons (New York: The Free Press, 1947), pp. 124-132. In a Melanesian context, for reasons that will be explored in subsequent chapters, the concepts of 'legitimacy' and 'legality' should not be assumed to be coterminous. See M. Strathern, 'Legality or Legitimacy: Hageners' Perception of the Judicial System' (1971) 1(2) Melanesian Law Journal 5-27.


20 Forge, 'Prestige, Influence and Sorcery,' p. 258. In his now classic legal ethnography of Trobriand society, Crime and Custom in Savage Society (London: Routledge and Kegan Paul Ltd, 1926), Bronislaw Malinowski placed especial emphasis on this notion of an implicit legitimacy in the practice of sorcery, observing (at p. 93):

Sorcery, in fine, is neither exclusively a method of administering justice, nor a form of criminal practice. It can be used both ways, though it is never employed in direct opposition to law. . . .

Formulatory constructs of Melanesian perspectives on sorcery beliefs and practices are examined in Chapter Four.
in traditional Melanesian socio-political relations, sorcery represented a pointed challenge to the inchoate hegemony of the colonial state and a palpable threat to the incipient colonial legal order. The salient dimensions of that challenge, and the fundamental nature of that threat, may be described essentially in terms of power—in the exercise of which Melanesian sorcery is said to be 'inescapably enmeshed,'\(^21\) and in the consolidation of which the colonial state recognised one of its most immediate and enduring priorities.\(^22\)

More so, perhaps, than elsewhere in the imperial domains of the insular Pacific, the pursuit of administrative colonialism in New Guinea relied upon the effective monopolisation of those forms of power required to exercise a sufficient measure of control over the indigenous inhabitants of the areas into which the government gradually moved to establish its authority.\(^23\) Any advancement of the

\(^21\) Thus, as Zelenietz argues:

> If we see power as a broad phenomenon, as the ability to control or influence the actions of one's self and others, then the use of sorcery and witchcraft become expressions of this ability to control, or attempt to control, both one's own fate and the destiny of other individuals and groups.


\(^23\) The expression 'administrative colonialism' is used here synonymously with 'colonial rule', and narrowly refers to 'the officially-sanctioned policies and practices of... colonial governments and administrations,' exclusive of 'the broader complex of economic, political, religious and [other] social forces... by which Europeans also endeavoured, with variable results, to direct and control the lives of Melanesians. See E. Wolfers, 'For the First 'Generation...with No Personal Recollection of Australian Rule': Reflections on the Impact of Colonial Rule in Papua New Guinea' in *Papua New Guinea: A Century of Colonial Impact, 1884-1984*, ed. Sione Latukefu (Port Moresby: National Research Institute and the University of Papua New Guinea, 1989), p. 417. See also J.D. Legge, *Australian Colonial Policy: A Survey of Native Administration and European Development in Papua* (Sydney: Angus Robertson, 1956); Wolfers, *Race Relations and...*
colonial enterprise was implicitly dependent upon 'a reasonable degree of peace and good order,' the ultimate achievement of which was assumed to follow on only from the application or threat of superior force. Hence, whatever importance might be attached to other items on the colonial agenda (and however one may be inclined to construe the underlying motives to which that larger agenda was meant to give expression), a pressing preliminary objective for New Guinea's colonial administrators was the 'pacification' of the native population.

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25 Colonialism in New Guinea, as elsewhere, was essentially a coercive process, initiated and advanced largely through the application or threat of force. See Fitzpatrick, Law and State in Papua New Guinea, pp. 66-67; P.J. Hempenstall, Pacific Islanders under German Rule: A Study in the Meaning of Colonial Resistance (Canberra: Australian National University Press, 1978), p. 201; Merry, 'Law and Colonialism,' p. 895. Thus, as MacGregor candidly explained in 1888:

There is only one thing they [the natives of New Guinea] respect, that is force. They have the most profound respect for that. . . . We had first to found our Government stations, and we have been using each station as a centre from which our authority is gradually radiating. . . . [W]hen we go into a new district we almost invariably have to fight the principal fighting tribe of the district. We never fight with them at all if we can possibly avoid it until we are in apposition to make it a final and decisive move.

Quoted in I. Downs, The Australian Trusteeship, Papua New Guinea, 1945-75 (Canberra: AGPS, 1980), p. 90. See also Campbell, A History of the Pacific Islands, p. 162. But cf. Wolfers, Race Relations and Colonial Rule in Papua New Guinea, p. 16, who maintains that, in practice, MacGregor may have been rather more reluctant to employ force than these remarks seem to suggest.

26 As the term is used here, 'pacification' refers to:

a critical period in the encapsulation of a native people in which a [native] group's use of armed force is constrained to comply with the actual or presumed demands of an encapsulating power.
Then, and only then, might traditional mechanisms of social control begin gradually to be supplanted by a new set of introduced institutions and processes in which the authority of the colonial regime could be vested on legitimately consensual (rather than nakedly coercive) bases, and the long-term viability of the colonial venture thereby made more secure.

From the outset, however, many of the prevalent socio-cultural predilections of indigenous Melanesians—polygyny, warfare, cannibalism, infanticide, adultery and head-hunting, as well as witchcraft, sorcery and magic—confronted New Guinea's administrative officials with a range of behaviours and underlying systems of belief that were, at once, 'incomprehensible, dangerous or repugnant to the European mind' and fundamentally inimical to the political, economic and ideological designs of the colonial project. In response, New Guinea's British administrators (like their Australian successors and German counterparts) intensified an already firm commitment to changing a number of aspects of


29 Boutilier, 'Papua New Guinea's Colonial Century,' p. 15.
[native] life,' with a view to the reconstruction of traditional Melanesian values, attitudes, beliefs and conduct in accordance with Western—that is to say, Anglo-Australian—models.\textsuperscript{30}

The realisation of this grand transformational plan was ultimately to prove elusive on many fronts, however; and in two significant respects, sorcery-related beliefs and practices in particular operated to frustrate this substitutive effort, effectively militating against the successful exercise of raw colonial power, and undermining the ideological basis upon which claims to the legitimacy of introduced colonial authority might be developed. Firstly, as said, sorcery was early identified as the direct or indirect cause of a good deal of trouble amongst and between natives and, therefore, as a particularly problematic impediment to the processes of pacification.\textsuperscript{31} As a \textit{practical} matter, one obvious solution to the administrative problems sorcery engendered was simply to root out those persons whom government officials had reason to believe were most immediately responsible and bring them to book. Thus, under the authority of the \textit{Native Board Ordinance of 1889},\textsuperscript{32} an administrative regulation was promulgated in 1893 whereby, amongst other things, both the practice and the pretence to practice of sorcery were made 'forbidden acts' for which a native might be imprisoned for up to three months upon a finding of guilt by a European Magistrate.\textsuperscript{33} But the

\textsuperscript{30} Ibid.


\textsuperscript{32} No. IX of 1889.

\textsuperscript{33} \textit{Native Regulation Board}, Regulation No. II of 1893, \textit{Supplement to the British New Guinea Government Gazette}, vol. VI, no. 11 (9 November 1893). According to the original \textit{Minutes of the Native Regulation Board}, British New Guinea, the regulation was actually approved and passed on 16 December 1893. (PNG National Archives/Box No. G-38). Native magistrates, for the appointment of whom provision was made in the principal Ordinance, were authorised to imprison
depth and pervasiveness of native beliefs in the power of sorcery, along with the
sheer prevalence of its practice, consistently stymied administrative attempts to
rein in suspected or even self-confessed sorcerers. In the face of these inherent
and seemingly insurmountable difficulties, direct efforts to suppress the practice
of sorcery by forcibly subduing its practitioners invariably miscarried.

Secondly, beyond the practical difficulties associated with gathering 'reliable
evidence or proof against individual sorcerers and the daunting logistical
problems presented by their profusion, the prevalence of sorcery-related beliefs
and practices also operated to impugn the fundamental ideological bases of
colonial supremacy (and hence, the prepotency of colonial law) by challenging the
epistemological, ontological and cosmological underpinnings of Western culture
and society. For except in so far as it was seen to exercise a powerful and

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a convicted person for a period of up to three days. Under the British, however, no indigenous
magistrates were so appointed; and as Wolfers notes:

after 1909, when the Australian administration promulgated a
completely new Native Regulation Ordinance, this specific
proviso and official faith in its short term applicability, both
18]

34 Annual Report on British New Guinea, 1892 to 1893, p. 46.

35 Ten years after the anti-sorcery regulation had been promulgated, one Resident Magistrate
lamented:

[T]here is nearly always a difficulty in sheeting home a charge
... owing to the extreme reluctance of many natives to give
evidence of information against the most powerful of his class.
... The native way of looking at this matter ... is that if he
denounces a sorcerer and the sorcerer is sent to gaol when he
returns home he will, in revenge, bewitch the informant and
cause him his due.


dynamic 'effect by suggestion' upon the lives of the natives,\textsuperscript{37} to the minds of New Guinea's Anglo-Australian administrators, sorcery was phenomenologically irreal and conceptually irrational. From the administrator's perspective, native beliefs in sorcery were the very stuff of primitive superstition—fantastical, albeit widely and sincerely entertained. And however much they 'might have been expected in a people . . . in the early barbaric stage [of development],\textsuperscript{38} such beliefs were invariably regarded as aberrant and absurd. The disruptive practices of native sorcerers were generally characterised in similar terms, although the active practice of sorcery (as opposed to mere ideation) tended to be portrayed by colonial officials as a patently manipulative and particularly insidious form of humbugery.\textsuperscript{39}

Sorcery thus confronted New Guinea's colonial administrators with an operational dilemma and an epistemological paradox, both of which were pregnant with serious implications for the theory, practice and the ideology of colonial law:

On the one hand, [administrators] recognized the importance of sorcery and witchcraft as systems of beliefs and actions in indigenous cultures. On the other hand, their own upbringing in cultures which stressed scientific empiricism did not allow the administrators to accept the validity of native beliefs. Thus they faced the challenge of saying that sorcery and witchcraft


\textsuperscript{38} \textit{Annual Report on British New Guinea, 1897 to 1898}, p. 69.

did not exist, and yet writing laws that would make these nonexistent phenomena illegal.\textsuperscript{40}

It was obvious enough to the colonial authorities that the regnant powers of sorcery and sorcerers amongst the natives of New Guinea would eventually have to be suppressed, and ultimately supplanted, by the introduced forces of Western rationality and Anglo-Australian law.\textsuperscript{41} Far less certain were answers to the questions of precisely how that might be accomplished, how long it would take and what, in the interim, the most prudent and effective measures for dealing with the disruptive and often disastrous consequences of sorcery beliefs and practices would prove to be.\textsuperscript{42}

At all events, throughout the late-nineteenth century and well into the twentieth, those responsible for the 'administration of justice in connection with the natives'\textsuperscript{43} of New Guinea were constantly, and often dramatically, reminded that sorcery—'the belief, and those practices associated with the belief, that one human being is capable of harming another by magical or supernatural means'\textsuperscript{44}—played a determinative role in many, perhaps most, instances of

\begin{quote}
\textsuperscript{40} M. Zelenietz, 'Sorcery and Social Change: An Introduction' (1981) \textit{Social Analysis} 3 at 12.
\textsuperscript{41} See Murray, \textit{Papua of Today}, p. 225.
\textsuperscript{43} \textit{Annual Report on British New Guinea, 1897 to 1898}, p. 69.
\textsuperscript{44} M. Patterson, 'Sorcery and Witchcraft in Melanesia' (1974) 45 \textit{Oceania} 132 (emphasis supplied). See also, L.B. Glick, 'Sorcery and Witchcraft', in \textit{Anthropology in Papua New Guinea: Readings from the Encyclopaedia of Papua and New Guinea} (Carlton: Melbourne University Press, 1973), p. 182. As we shall see, not all forms and practices of sorcery or witchcraft in Papua New Guinea were (or are) necessarily considered by Papua New Guineans to be evil and destructive.
\end{quote}
violence within, and between the members of indigenous Melanesian communities. As such, sorcery was consistently seen to be a serious hindrance to the exercise of administrative authority, a major impediment to the extension of colonial law and a considerable obstacle to the overall success of the colonial enterprise. In terms of policy and practice alike, it proved to be 'a continual source of worry and anxiety to Government Officers,' singularly constituting 'one of the most difficult problems of the culture contact situation.'

What is more, and more to the point of the instant inquiry, the depth and dimensions of the 'problems' associated with sorcery in Papua New Guinea today are much the same as they were a century ago.

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48 Personal communications, The Honourable Sir Buri Kidu, then Chief Justice of the Supreme Court of Papua New Guinea (6 November 1990); Mr Gabriel Genda, Office of the Public Solicitor, Rabaul, East New Britain Province (20 November 1990); Mr Stephen Madana, Office of the Public Prosecutor, Rabaul, East New Britain Province (16 November 1990); Ms Christine Bourke, formerly with the Office of the Public Prosecutor, Papua New Guinea (31 January 1991); Detective Chief Inspector Martin Powis, Criminal Investigations Division, Royal Papua New Guinea Constabulary, Rabaul, East New Britain Province (16 November 1990).
2. SORCERY AS A PROBLEM OF LAW AND SOCIETY
IN CONTEMPORARY PAPUA NEW GUINEA

From the most remote village enclaves in the Highlands to the isolated settlements scattered amongst the outer islands, from the secluded hamlets that dot the river banks in the jungled lowlands of the interior to the burgeoning towns and cosmopolitan urban centres of the coastal mainland, sorcery beliefs are rife today amongst the indigenous inhabitants of Papua New Guinea.49 The mischief and unhappiness to which these beliefs continue to give rise are commensurately pervasive, and the occasions of conflict and violence which follow on from them still take a prolific toll in human life.50

Despite what, in many areas of the country, has involved a prolonged and seemingly thoroughgoing exposure to the supposedly countervailing influences of Christian missionisation, secular Western rationalism and a 'modern', scientifically constructed, materialist view of phenomenological reality, popular belief in the existence of sorcerers and witches, and in the potent efficacy of their malign practices, is at least as prevalent and deeply entrenched in modern Melanesian


culture and society as it was in the latter decades of the nineteenth century. In a remarkable variety of forms, the endemic practice of sorcery is equally widespread, and it remains a major cause of 'fear, fighting, quarrels and killing' amongst a substantial portion of the population. Manifestly, sorcery beliefs are generative of a whole host of very real and serious problems of law and society in Papua New Guinea today. Findings to this effect are routinely supported by the scholarly products of focused ethnographic fieldwork and a veritable superabundance anecdotal evidence alike. Individual case-studies readily corroborate the more generalised conclusions suggested by broad-based surveys assessing the prevalence and prepotency of sorcery beliefs throughout the country, and both operate to lend a


53 For the moment, the reality of sorcery beliefs and the actual existence of sorcerers is not centrally at issue here, since it is with the implications and ramifications of those beliefs—the reality of which is indisputable on any measure—with which we are primarily concerned. As Taussig suggests in a related context, the principal issue here, is not 'the truth of being but the social being of truth, not whether facts are real but what the politics of their [in this case, specifically legal] interpretation and representation are.' M. Taussig, Shamanism, Colonialism and the Wild Man: A Study in Terror and Healing (Chicago: University of Chicago Press, 1987), p. xiii.


55 Author's field notes and records of interview, October-December 1990; February-June 1992.

disturbing credibility to the graphic newspaper reports that seem to appear with an almost quotidian regularity.\textsuperscript{57} Ever more frequently nowadays, too, the implications and consequences of those beliefs are being canvassed in the pronouncements of the superior courts,\textsuperscript{58} revealing what a judge of the Supreme Court described as 'a pattern of socially approved customary terror.'\textsuperscript{59}

Current research tends to indicate that measures of inter-personal violence and general social dislocation that can be attributed either directly to the active practice of sorcery, or indirectly to reactive (i.e. accusatory and retaliatory) forms of sorcery-related conduct, meet—and possibly exceed—the levels of such disturbances observed or otherwise noted during earlier colonial times.\textsuperscript{60} Indeed, with respect both to the frequency of its occurrence and the severity of its consequences, this kind of conduct now appears to be on the rise,\textsuperscript{61} leading at least one anthropologist, who has devoted a substantial proportion of her career specifically to the study of sorcery in Papua New Guinea, ominously to conclude that


\textsuperscript{58} See, e.g. \textit{The State v Korohi Vagi & Ors} Crim Nos 1046-53/90 (2 April 1990).

\textsuperscript{59} \textit{The State v Daniel Aigal and Gui Robert Kauna} N 891 (12 July 1990) at 11 (per Brunton J, as he then was).


\textsuperscript{61} See, e.g., Westermark, 'Sorcery and Economic Change in Agarabi,' p. 94.
the phenomenon is so widespread and of such a magnitude, it may be compared with the reported efflorescence of witchcraft throughout Europe in the 16th and 17th centuries, and Africa in the 19th.

On the strength of these considerations alone, an examination of sorcery as a problem of law and society in Papua New Guinea today could easily be justified, both in terms of the instructive light it might shed on an important, idiosyncratic component of the country’s larger, if sometimes exaggerated, problems of ‘law and order’, and its potential elucidation of issues and problems of law, culture and society in other countries where patterns of ‘supernatural’ belief and associated behaviour can be seen to pose socio-legal difficulties of a similar character. But

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63 Papua New Guinea’s seemingly perennial crisis in ‘law and order’ is amongst the most prominently featured aspects of contemporary domestic socio-legal affairs. See S. Dorney, Papua New Guinea (Milsons Point, NSW: Random House Australia, 1990), p. 287. Yet the authors of what is generally considered to be the most comprehensive study of crime in Papua New Guinea to date, W. Clifford, L. Morauta and B. Stuart, Law and Order in Papua New Guinea [the Clifford Report] (Port Moresby: Institute of National Affairs, 1984), open their analysis with the following caveat (vol. I, p. 1):

Available statistics on crime in Papua New Guinea are so inadequate that it is impossible to make informed statements about levels of and trends in crime. What figures are available do not support either the idea that crime is increasing or that crime is a more serious problem in Papua New Guinea than in other countries.


64 Socio-legal problems deriving from ‘supernatural’ beliefs involving sorcery and witchcraft commonly arise only in those societies in which a substantial proportion of the population actively entertain such beliefs, and the implications of these problems may therefore be regarded as
beyond the circumscribed utility of exploring the ethnographic contours and content of sorcery as a distinctive feature of contemporary criminology in Papua New Guinea, and beyond the possibility of such an exploration providing serviceable empirical data and theoretical insights for valid, cross-cultural applications in connection with other societies in which analogous systems of 'supernatural' belief hold sway, the instant analysis is principally concerned to investigate the nature and dynamics of sorcery in Papua New Guinea as importing a larger and more general problem for the law, for modern legal ratiocination and for the kind of jurisprudence which the common law tradition in Papua New Guinea—and in every socio-cultural environment in which that tradition operates—must be capable of bringing to bear upon a whole range of issues with which, as we shall see, the peculiar problems of sorcery are surprisingly isomorphic.

3. CHANGE AND CONTINUITY IN SORCERY BELIEFS AND PRACTICES

The persistence of traditional sorcery beliefs and their associated modes of active and reactive expression are, in themselves, tellingly significant features of the modern Melanesian socio-cultural landscape. In characterising sorcery as a particularly intractable problem of law and society in Papua New Guinea, this demonstrable continuity in the expressive patterns of sorcery-related beliefs and behaviour is invariably identified as a determinatively significant factor. This, however, is not to say that Melanesian sorcery beliefs and practices are intrinsically immutable, or that they have somehow remained unaffected by the wide range of influences—calculated and fortuitous—to which they have been exposed from the inception of sustained inter-cultural contact. On the contrary, as empirically accessible social phenomena, the specific dynamics of Melanesian sorcery can be seen to have changed markedly in recent years, in both form and content. In many instances, the nature and implications of these changes have been profound and far-reaching; and in most, though certainly not all, cases, those changes can be attributed, more or less directly, to a variety of inter-cultural

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65 See Glick, 'Sorcery and Witchcraft', p. 182.

66 Writing in 1925, Sir Hubert Murray, Lieutenant-Governor and Chief Judicial Officer of Papua (formerly British New Guinea), made the general observation that: 'the belief in sorcery may be just as strong as ever—it will not die out for many generations, if it ever dies out at all...'. *Papua of To-Day*, p. 66. Sixty years later, referring specifically to sorcery practices amongst the Garia in southern Madang, Peter Lawrence similarly observed:

[T]he Garia retain their belief in the effectiveness of these arts virtually unimpaired even though, since the mid-1920s, they have been incorporated in a modern administrative system and have come under strong Lutheran Mission influence... In a word, sorcery still makes sense to Garia villagers.
The salient effects of such inter-cultural articulations on the nature and direction of change in the expressive patterns of traditional Melanesian sorcery beliefs and practices, and the implications of those changing beliefs and practices for law and legal development in Papua New Guinea, will be considered in the sequel.\textsuperscript{68} Initially, however, two general observations concerning the qualities of change and continuity in sorcery-related conduct and beliefs are in order.

A. **Exogenous Influences on the Practice of Sorcery**

At an empirical level, many changes in traditional sorcery practices and related patterns of conduct in Papua New Guinea can be seen to have been brought about by the introduction of new technologies and elements of material culture from the

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\textsuperscript{67} Lindenbaum cautions that the ideologies of sorcery in many areas of Papua New Guinea are part of a 'repertoire of responses' to a variety of 'social tensions,' which have resulted from the intrusion of all manner of 'objects, illnesses, new cultigens and ideas that entered communities' \textit{long before the physical appearance of whites} . . . 'Images of the Sorcerer in Papua New Guinea,' p. 126 (emphasis supplied). In this connection, Maria Lepowsky makes the following important observation:

\begin{quote}
One of the most influential directions in current anthropology is the accumulation of historical and ethnographic evidence substantiating the argument that small-scale societies were constantly changing and evolving long before contact with Europeans, not merely reacting afterwards to externally induced changes.
\end{quote}

\textsuperscript{68} See Chapters Four and Five.
West. Over the past century, these novel introductions have resulted, amongst other things, in a considerable expansion of the sorcerer’s traditional arsenal and a concomitant sophistication in the techniques and methods of his or her practice.\(^6^9\)

Even the most common-place instruments of Western transportation, communication, construction, medicine, science and warfare (along with their evident capacity to be turned to such seemingly remarkable use) have come to represent an extraordinarily powerful kind of magic, access to which has become increasingly available to the accomplished and aspiring sorcerer alike.\(^7^0\) At the same time, the development of roads and aerodromes, the increased availability of modern means of transport and greater opportunities for Papua New Guineans to travel more widely within their own country have also served to create new opportunities in which these enhanced techniques and improved implements of sorcery can now be brought to bear.\(^7^1\)

Taken together, these essentially technological developments in the mechanics, logistics and paraphernalia of sorcery have substantially broadened the effective range within which it might be employed; and in so doing, they have


\(^7^0\) Thus, as Lindenbaum suggests:

It is not by chance . . . that many of the new instruments of [sorcery] attack—battery acid and bicycle spokes, or sometimes umbrella spokes—come from the 'high technology' of Western transport and life on the road. ['Images of the Sorcerer in Papua New Guinea,' p. 122]

\(^7^1\) Deaths resulting from automobile and aeroplane accidents are now commonly attributed to sorcery. Westermark, 'Sorcery and Economic Change in Agarabi,' p. 94.
effectively operated to multiply the number of persons against whom sorcerous attacks can now be directed.\textsuperscript{72} One notable consequence of this situation has been an accelerated commoditisation of sorcery and the promotion of a growing commerce in sorcery-for-hire. With a new ease of mobility and enhanced methods at their disposal, sorcerers renowned in their local areas for their skills are now able to extend their lethal services on a contractual basis into larger, distant and increasingly more lucrative markets.\textsuperscript{73}

\textbf{B. Endogenous Influences on Sorcery-Related Beliefs}

At a deeper level—although integrally related to the same processes of inter-cultural articulation by which many of the superficial changes mentioned above have been introduced into Melanesian culture and society—the exposure of Papua New Guineans to the disparate values, attitudes, beliefs and behaviour of Western missionaries, traders, planters, entrepreneurs, soldiers and administrative officers has also influenced the nature of change in traditional patterns of indigenous social, political and economic relations. More profoundly still, they have had a substantial influence on the underlying philosophical and ideological bases upon which traditional systems of inter-personal relations are experienced, understood and organised. Over time, this exposure, too, has affected the manner in which

\textsuperscript{72} See e.g. Lawrence, 'The Garia View of Sorcery,' p. 30.

\textsuperscript{73} In November of 1990, officers of the Royal Papua New Guinea Constabulary stationed at Rabaul (East New Britain Province) were investigating a homicide, in relation to which information had been gathered which suggested that the person killed had been the victim of a contract-sorcerer who had been 'brought in' from East Sepik Province. Personal communication, Detective Chief Inspector Martin Powis, Criminal Investigation Division, RPNGC (16 November 1990). Several of the author's informants in Vunamami and Kokopo corroboratively indicated that sorcery 'imported' from the Sepik region was generally regarded as especially potent in the Gazelle, and that substantial prices attached to the purchase thereof. See also S. Lindenbaum, \textit{Kuru Sorcery: Disease and Danger in the New Guinea Highlands} (Palo Alto, CA: Mayfield Publishing Company, 1979), pp. 28, 29, 140; Westermark, 'Sorcery and Social Change in Agarabi,' p. 89.
sorcery-related ideas and beliefs are themselves constructed and expressed in many respects.\textsuperscript{74}

At this level of ideational analysis, more subtle indicia of change in the various modes of indigenous Melanesian sorcery beliefs (and closely associated changes in attendant sorcery practices) are often identified and distinguished on diachronistic bases.\textsuperscript{75} Comparisons along these, amongst other relevant dimensions, will be explored and developed more fully in due course.\textsuperscript{76} At this point, however, it is important to understand that many of the distinctive changes by which significant differences between nominally 'traditional' and 'modern' expressions of sorcery in Papua New Guinea tend to be characterised essentially reflect contiguously adaptive modifications to pre-existing cognitive structures and complementary variations in the scope, magnitude and sophistication of associated patterns of behaviour, rather than entirely novel innovations. Thus, as Ardener has observed in respect of witchcraft beliefs in an African context,\textsuperscript{77} in Melanesia, too, whereas particular manifestations of sorcery beliefs may be 'subject to fashions,\textsuperscript{78} there is an appreciable 'persistence of certain themes in belief from which "replication" occurs . . . when other elements in the social and physical environment permit this.'\textsuperscript{79} In Papua New Guinea, it is rather these


\textsuperscript{75} See Zelenietz, 'Sorcery and Social Change: An Introduction,' pp. 11-14.

\textsuperscript{76} See Chapters Four and Five.


\textsuperscript{78} Ibid., p. 141.

\textsuperscript{79} Ibid., p. 156.
'circumstantial details of "content" through which the replicated element is expressed' that may be seen to differ so greatly from time to time.\textsuperscript{80}

Notwithstanding the metamorphic variability of the 'circumstantial details' of their expression, the 'sorcery syndromes' of Papua New Guinea today are, in fact, 'neither completely old nor entirely new.'\textsuperscript{81} In a thematic sense, therefore, it quite proper to say that there is really 'no such thing' as either purely traditional or uniquely modern Melanesian sorcery.\textsuperscript{82} Indeed, the fundamental epistemological bases of Melanesian sorcery beliefs, the nature of the social phenomena distinctively associated with the expressions of those beliefs and, as we shall see, the jurally relevant implications of sorcery-related conduct, have all remained remarkably constant over time.

4. CHANGE AND CONTINUITY IN LAW

In a great many respects, of course, the conditions and experiences of life for a large and growing number of Papua New Guineans today are radically different to what they were only a century ago. Certainly in respect of the pace at which it has occurred, if not always in terms of the depth or extent of its impact, the qualitative transformation of pre-existing socio-cultural, economic, political and, perforce, legal relations over this comparatively short period of time has been nothing short of phenomenal.\textsuperscript{83} Too often, the ramifications of such transitions may be depicted

\textsuperscript{80} Ibid.

\textsuperscript{81} Lindenbaum, 'Images of the Sorcerer in Papua New Guinea,' p. 127.

\textsuperscript{82} Ibid.

in banal stereotypes which belie the complexity of 'traditional' Melanesian cultures and trivialise the sophistication of indigenous patterns of thought and action.\textsuperscript{84} The fact remains, however, that for a great many Papua New Guineans the processes of social change over the past century have involved a virtual compression of the experience of ten thousand years into a single life time.\textsuperscript{85}

No intellectually responsible attempt to address even the narrowly delimited range of issues having to do, more or less exclusively, with the nature and direction of distinctively legal transformations in Papua New Guinea over the course of the last century can fail to take some critical account of the broader context within which those changes occurred. Nor can such an analysis safely discount the significance or complexity of the relationship between the

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\textsuperscript{84} Sean Dorney, the ABC's long-serving correspondent in Port Moresby, provides some typical examples of these popular caricatures in \textit{Papua New Guinea: People, Politics and History since 1975} (Milsons Point, NSW: Random House Australia, 1990), p. 24. Noting that 'a most effective taunt' amongst members of Papua New Guinea's National Parliament 'is to describe one's opponent as a "primitive",' Dorney sensitively acknowledges that:

)a quick way to cause grievous offence in Papua New Guinea
is to compliment someone on how quickly their people are
making the transition from the cannibalistic stone age. [\textit{Ibid.}]


demonstrably exogenous features of those transformative experiences, on the one hand, and the substantive changes they may be seen to have wrought in contemporary society, on the other. Variable, imperfect and fragmented though the exogenously introduced elements in the processes of change may have been, it is eminently clear that their causal and catalytic contributions to the vicissitudes of Melanesian life in general—and of socio-legal life more specifically—have been extraordinary by any measure. 86 Equally clear, and equally important to recognise, however, is the fact that, amongst the principal driving forces behind the inauguration (and to a considerable extent the perpetuation) of these exogenously introduced transformational processes have been those which have come to be associated axiomatically with the advent of nineteenth-century European colonialism—of which 'the law' is often regarded and aptly described as 'the cutting edge.' 87

To say this much, however, is to say, at once, a great deal and very little; for in the whole modern discourse on the interrelations of law, culture and social change in Papua New Guinea (and elsewhere, to be sure), few concepts bear a greater ideological loading than that of colonialism. Few phenomena seem to have undergone so many permutations of politicised signification, and few experiences continue to evoke such a wide range and intensity of characterisation. 88 Thus, to...

86 Fifty years ago, S.W. Reed spoke eloquently to this point in The Making of Modern New Guinea, pp. 116-125, 258-260.


engage even the most basic questions having to do with colonialism—as an idea, a phenomenon or an experience—is to enter immediately upon an expanse of fervently contested terrain,\textsuperscript{89} and any attempt to canvass the full range of issues germane to nature and ramifications of colonialism and legal change in Papua New Guinea alone would quickly lead far beyond the scope of the instant project. By the same token, aspects of the complex and polemical issues of colonialism are implicit in many of the crucial questions necessarily raised, even within the narrow confines of the present inquiry. Although the aim here is merely to sink a single conceptual shaft rather than to map out the whole relevant topography, such questions cannot be begged entirely.\textsuperscript{90}

A. Law and Colonialism

In broad compass, the term 'colonialism' is meant here to refer to the sequence of more or less concerted attempts by official and unofficial representatives of European society in Papua New Guinea, beginning in the latter decades of the nineteenth century and continuing well into the twentieth, to bring about what


\textsuperscript{90} See M. Ellinghaus, A. Bradbrook and A Duggan, eds., \textit{The Emergence of Australian Law} (Sydney: Butterworths, 1989), p. ix, from whom I have borrowed this apt metaphor.
Professor Brookfield has described as:

a thoroughgoing, comprehensive and deliberate penetration of . . . local or 'residiary' system[s] by agents of . . . external system[s], who aim to restructure the patterns of organization, resource use, circulation and outlook so as to bring these into a linked relationship with their own system[s].

The objective is an externally wrought or guided transformation of the residentiary system[s], revolutionary in the sense that it involves a termination or diversion of former evolutionary trends.\(^91\)

At no time, perhaps, was such a 'revolutionary transformation' ever fully effected in Melanesia.\(^92\) Certainly the levels of comprehensive colonial penetration experienced by many African, Asian and other Pacific Island peoples were never achieved in Papua New Guinea to anywhere near the same extent.\(^93\) Yet many of the same events and circumstances that served to divert former evolutionary trends in socio-cultural, political and economic development

\(^91\) H.C. Brookfield, \textit{Colonialism, Development and Independence: The Case of the Melanesian Islands in the South Pacific} (Cambridge: Cambridge University Press, 1972), pp. 1-2. This broad usage is to be distinguished from the narrower concept of 'colonial rule' or 'administrative colonialism', as discussed above at note 23.


throughout the insular Pacific did most definitely operate directly and profoundly, if not in every case absolutely, to shape the nature and direction of inter-cultural relations in Papua New Guinea as well. Moreover, where these events and circumstances did operate to such effect, they often did so with significant and enduring implications for all manner of traditional indigenous patterns of thought, action and institutional arrangements.\textsuperscript{94}

Amongst other things, the processes of colonialism in Papua New Guinea involved a 'large-scale transfer of laws and legal institutions from one society to another, each of which had its own distinct sociocultural organization and legal culture.'\textsuperscript{95} Here, too, these transferential processes were part and parcel of a multiplex imperial enterprise, the penultimate objective of which was 'to rule and to transform' indigenous society. That is to say, the institutions of the colonial legal order were intended both to 'enforce [...] compliance to a new political order and at the same time . . . to impose a new culture.' Here, too, a salient result of these processes was the erection of a dual legal system: one for the colonised and one for the colonisers. And here, too, as a consequence, Papua New Guineans today struggle with the contradictions inherent in the living legacy of colonialism, as they attempt 'to fashion a unified legal system out of this duality' in a sometimes seemingly ambivalent attempt 'to resurrect and implement the remnants of indigenous, precolonial law.'\textsuperscript{96}


\textsuperscript{95} Merry, 'Law and Colonialism,' p. 890.

Obviously, the conjunction of distinctively legal means and particular colonial ends in Papua New Guinea was more than merely coincidental; and doubtless the interrelationship of the heuristically discrete legal components of colonialism—transference, duality, transformation and hegemony—is best understood as a multifaceted, dynamic and organically integrated whole.\textsuperscript{97} For present purposes, however, it will be sufficient to focus our analytical attention rather more narrowly, emphasising the transferential and transformational aspects of the colonial process in Papua New Guinea (and, more specifically, the role and application of law in that process), as 'an instance of its capacity to reshape culture and consciousness.'\textsuperscript{98}

B. The Dialectical Nature of Socio-Legal Change in The Colonial Context

Over the past century, the political administration of Papua New Guinea has involved nearly a dozen different forms of colonial rule under the direction of four foreign powers and at least the nominal jurisdiction of two international

\textsuperscript{97} As Merry cogently argues, the adoption of deliberately circumscribed analytical perspectives \textit{can} operate to marginalise considerations of the more overtly hegemonic and exploitative implications of colonialism and the attendant institutionalisation of legal dualism. This, in turn, \textit{may} serve to discount the significance of the ideological considerations which lay behind the mechanics of the colonial project (and with which the conduct and consequences of colonial policies were often deeply imbued). These results, however, do not automatically follow on as a necessary and inevitable consequence of such an approach. Indeed, predicated on a clear recognition of the relational integrity by which the multiplexity of colonialism is properly characterised, a circumspect examination of the correlates of any particular component should logically inform and enhance an understanding of the others, and of the colonial process as a whole. 'Law and Colonialism,' p. 890. See also J. Starr and J. Collier, 'Introduction: Dialogues in Legal Anthropology' in \textit{History and Power in the Study of Law: New Directions in Legal Anthropology} (Ithaca and London: Cornell University Press, 1989); \textit{idem}, 'Historical Studies of Legal Change' (1987) 28(3) \textit{Current Anthropology} 367-372.

\textsuperscript{98} Merry, 'Law and Colonialism,' p. 891.
organisations. At various times during this period, Papua New Guineans found themselves governed—or, as often as not, ignored—by English, Australian, German and Japanese authorities, by soldiers, sailors and civilians, and by men who were 'rough and ready or by those with an element of administrative and anthropological sophistication.' Different to one another though each of these regimes may have been in terms of their respective colonial styles and methods of administration, to the indigenous Melanesians whose affairs they sought to govern, they were as one in their alien character, in their relentless demands for compliance with the imposed conditions of a transformational ethos and in their invariable presentation of the same responsive options. In the final analysis, colonialism offered only three alternatives to the native peoples of Papua New Guinea: acquiescence, submission or resistance.

In this sense, as Boutilier, cogently argues, the inter-cultural dynamics of the colonial period can be seen to instantiate the single experience—or rather, an 'assortment of experiences'—which, more than anything else, has served to unify all Papua New Guineans. Extending this notion of the experiential singularity

99 Portions of Papua New Guinea were previously administered as a protectorate and then a colony by England and Germany. In 1905-6, the administration of British New Guinea (Papua) was passed to the Commonwealth of Australia. German New Guinea was occupied by Australian military forces in 1914 and, in 1921, the former German colony became a Class C Mandated Territory of the League of Nations, administered by Australia. During the Second World War, the Japanese briefly occupied New Guinea. Following the war, both Papua and New Guinea were under Australian military administration for a short time. With the return of civilian government, Papua was administered as an Australian external territory. New Guinea was also administered by the Australian government as a Trust Territory of the United Nations.


101 Ibid. As a broad historical truism, Boutilier's characterisation must be understood in light of the fact that the largest concentrations of indigenous Papua New Guineans had virtually no significant contact with Europeans (or any other non-Melanesian interlopers) until the 1930s. See note 92 above.
of European colonialism as a socio-cultural phenomenon, Wolfers underscores its functional implications for the development of an indigenous political response by suggesting that '[c]olonial rule united and divided Papua New Guineans in diverse ways.'

According to circumstances, it sharpened or blunted pre-existing rivalries and conflicts. It generated and suppressed resistance. In short the ways in which both the integrative and oppositional elements in anti-colonial nationalism developed among Papua New Guineans owed much to colonial rule itself.

For all that, to the extent that the unifying (if hardly uniform) and divisive experiences of colonialism may be said to have brought about meaningful and enduring change in the form and content of Melanesian attitudes, values, beliefs and behaviour, far and away the most catalytically influential sources of such exogenously induced change have been the products of a colonial culture that was distinctively Anglo-Australian. And in so far as the discernible effects of those transformative experiences can be linked, analytically and historically, to conceptual and phenomenological considerations of specifically jurisprudential significance, it is to the peculiarly colonial articulations of Anglo-Australian legal culture with its Melanesian counterparts that one must look to locate the origins of those particular exogenous determinants.

Both of these assertions deserve

102 'For the First Generation...', p. 430 (emphasis supplied).
103 Ibid.
104 The examination of the distinctively cultural determinants of inter-systemic legal relations (and corollary efforts to construct theoretical explanations for the nature and dynamics of those relations) have traditionally been matters of especial interest to social anthropologists, providing a particular focus for research and analysis in the sub-field of legal anthropology. Amongst social anthropologists today, however, there is said to be a 'fairly general consensus' that the isolation of 'the "legal" as a separate field of study' should be abandoned in favour of studying law in a more (?) meaningful 'total social context.' P. Just, 'History, Power, Ideology and Culture: Current Directions in the Anthropology of Law' (1992) 26(2) Law & Society Review 373 at 375. For an
further elaboration, and support for each of them will be developed more fully in
the sequel.\textsuperscript{105}

C. Dialectics of Socio-Legal Change
in the Post-Colonial Context

If the advent of nineteenth-century Anglo-Australian colonialism in Papua
New Guinea is fairly accorded its share of determinatively causal responsibility
for the initiation of a series of transformative processes which have touched and
altered so many aspects of 'traditional' Melanesian culture and indigenous patterns
of social relations,\textsuperscript{106} and if the introduction of the colonial state, and the
concomitant 'imposition' of colonial law are properly regarded as seminal in the
formal institutionalisation of the products of those transformative processes,\textsuperscript{107}
then the erection of the post-colonial state—signal in its character as both a

earlier version of much the same argument, see S. Roberts, 'Do We Need and Anthropology of

Although this is not a matter with which we need be distracted here, the question of precisely
where particular heuristic boundaries ought to be drawn within the broad scope of social
anthropological research (or, indeed, whether such intra-disciplinary boundaries should be drawn
at all) is a matter of considerable debate amongst social anthropologists today. But whilst the
analytical isolation of 'the legal' might usefully be eliminated from anthropological analyses
concerned with 'total' socio-cultural contexts, an identification and operational isolation of 'the
cultural' is absolutely integral to practical jurisprudential analyses of real socio-legal affairs. For
theoretical jurisprudence, of course, clarification of conceptions of 'the legal' is at the heart of the
task.

\textsuperscript{105} See Chapter Five.

\textsuperscript{106} Brookfield, Colonialism, Development and Independence: The Case of the Melanesian
Islands in the South Pacific; M. Cooper, 'On the Beginnings of Colonialism in Melanesia' in The
Pacification of Melanesia, ASAO Monograph No 7, ed. M. Rodman and M. Cooper (Lanham,
MD: University Press of America, 1983), pp. 25-41; Reed, The Making of Modern New Guinea,
pp. 89ff.

pp. 65, 67; A. Paliwala, J. Zorn and P. Bayne, 'Economic Development and the Changing Legal
catalyst and a precipitate of the changes its very existence represents—must be seen as equally salient, if not paramount, amongst the more recent turn of events by which the transmutation of Melanesian cultural and social life may be marked.\textsuperscript{108}

In the contemporary context of post-Colonial of Papua New Guinea, it is readily, and often disturbingly, apparent that notions of violence and consent, domination and accommodation still retain their utility as apposite (if not necessarily exclusive) terms of reference by which the articulatory processes of social, cultural and legal change can be described and assessed.\textsuperscript{109} But howsoever the historical circumstances which brought it about may be evaluated, and regardless of the ideological significance one may be inclined to attach to the contemporary fact, Papua New Guinea is today a post-colonial state, independent


and politically sovereign in its own right.\textsuperscript{110} It is certainly regarded as such by every other government in the world; and more importantly, it is so recognised by a growing number of Papua New Guineans who, as citizens, \textit{nolens volens}, of an independent state, must now manage their affairs within its formal ambit, and to none of whom can the decidedly legal (as much as the economic or political) implications of that particular status safely remain a matter of complete indifference.

\textsuperscript{110} With respect to the legal concept of 'statehood', Professor Crawford writes: 'Despite its importance, or perhaps because of it, statehood has never been authoritatively defined in an international decision or instrument. . . .' J. Crawford, 'Islands as Sovereign Nations' (1989) 38 \textit{International and Comparative Law Quarterly} 277 at 280. Essentially, however, the idea of statehood is that a particular territorial community is accepted as a separate entity with a sufficient degree of independence in international relations, and is not subject to the government or authority of another State.


The distinction between states and nations is fundamental. . . . States can exist without a nation, or with several nations, among their subjects; and a nation can be coextensive with the population of one state, or be included together with other nations within one state, or be divided between several states. . . . The belief that every state is a nation, or that all sovereign states are national states, has done much to obfuscate human understanding of political realities. A state is a legal and political organisation, with the power to require obedience and loyalty from its citizens. A nation is a community of people, whose members are bound together by a sense of solidarity, a common culture, a national consciousness. Yet in the common usage of English and of other modern languages these two distinct relationships are frequently confused.
(i) The Constitutional Parameters of Law and State

In 1972, a committee comprised entirely of indigenous Papua New Guineans (although advised by a cadre of mostly expatriate consultants) was established to, inter alia, 'make recommendations for a constitution for full internal self-government in a united Papua New Guinea with a view to eventual independence.' Two years later, in its Final Report, this Constitutional Planning Committee (CPC) prefaced its proposals and recommendations concerning the formulation of a socio-culturally appropriate set of 'National Goals and Directive Principles' with a poignant reflection on the nature of the colonial experience:

The process of colonisation has been like a huge tidal wave. It has covered our land, submerging the natural life of our people. It leaves much dirt and some useful soil, as it subsides. The time of independence is our time of freedom and liberation. We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundations of our ancestral land. We must take the opportunity of digging up that which has been buried. We must not be afraid to rediscover our art, our culture and our political and social organizations. Wherever possible, we must make full use of our ways to achieve our national goals. We insist on this, despite the popular belief that the only viable means of dealing with the challenge of lack of economic development is through the efficiency of

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Western techniques and institutions. 113

With a keen appreciation for the practical implications of nearly a century of inter-cultural relations, the CPC qualified the mandate it had so eloquently set for itself, and for the people of Papua New Guinea, in the following terms:

We should use the good that there is in the debris and deposits of colonisation, to improve, uplift and enhance the solid foundations of our own social, political and economic systems. The undesirable aspects of Western ways and institutions should be left aside. We recognise that some of our own institutions impose constraints on our vision of freedom, liberation and fulfiment. These should be left buried if they cannot be reshaped for our betterment. . . .

Papua New Guinean ways . . . are not stagnant and closed. Our ways have always been open to external influences. It is this inherent openness which has enabled us to achieve so much in such short time and adapt to the new structure which has existed since Europeans first arrived here. Our ability to cope with new demands, our ability to readjust our ancient ways to new needs, have enabled us to develop. . . .

It is inevitable that we should make intelligent use of foreign ways. . . . to supplement our own resources. This is self-reliance. This is self-respect. It is our way, a Papua New Guinean way. 114

At about the same time, referring specifically to the development of the law and legal institutions in an independent Papua New Guinea, the then Chief Minister (later Prime Minister), the Honourable (now Sir) Michael Somare remarked:

[We] are facing, at this very moment, the need to devise a system of laws appropriate to a self-governing, independent nation. The legal system that we are in the process of creating must ensure the orderly and progressive development of our nation. But, in addition, it must respond to our own needs and values. We do not want to create an imitation of the


114 Ibid.
Australian, English or American legal systems. We want to build a framework of laws and procedures that the people of Papua New Guinea can recognize as their own—not something imposed on them by outsiders.\footnote{Law and the Needs of Papua New Guinea's People' in Lo Bilong Ol Manmeri: Crime, Compensation and Village Courts, ed. J. Zorn and P. Bayne (Port Moresby: University of Papua New Guinea, 1975), p. 14.}

With the achievement of independence and the attendant departure of Papua New Guinea's erstwhile colonial administrators, the reglementary emanations of the colonial order were formally supplanted by the terms of an autochthonous national constitution.\footnote{See C.J. Lynch, 'Achievement of Independence in Papua New Guinea: The Legal Aspect' (1980) 15 Journal of Pacific History 175; Y. Ghai, 'Constitution Making and Decolonisation' in Law, Government and Politics in the Pacific Island States (Suva: Institute of Pacific Studies, University of the South Pacific, 1988).} Nobly enshrining the 'worthy customs and traditional wisdoms' of the people as a touchstone for social, political and \textit{a fortiori} legal policy-making,\footnote{Constitution of the Independent State of Papua New Guinea [hereinafter PNG Constitution], Preamble.} and offering a veritable \textit{pae}n to the expression and further development of a distinctively Melanesian approach to the creation, interpretation and application of law,\footnote{Ibid., secs. 29, 21, 25, 60, 158; schs. 1, 2.1 to 2.8, 2.14} the \textit{Constitution of the Independent State of Papua New Guinea} expounds an inspired vision for the development of a system of autonomous national law and legal institutions that faithfully reflect and respond to the attitudes, beliefs, values and needs of Melanesian cultures and societies. In clear and unequivocal terms, it lays the necessary and sufficient foundation for a self-conscious elaboration of an authentic Melanesian Jurisprudence.\footnote{See B. Narokobi, \textit{Lo Bilong Yumi Yet: Law and Custom in Melanesia} (Suva and Goroka: Institute of Pacific Studies of the University of the South Pacific and The Melanesian Institute for Pastoral and Socio-Economic Service, 1989), pp. 3-11, 15-16. Cf. P. Sack, 'Melanesian Jurisprudence: A "Southern" Alternative?' in Philosophy of Law in the History of Human Thought, ed. S. Panou, G. Bozonis, D. Georgas and P. Trappe (Stuttgart: Franz Steiner, 1988), p. 92.} Within
such a framework, the law itself should naturally be expected to conform to 'the perceptions and world-views of the people,' corresponding as closely as possible with their ideas of legal propriety and impropriety, and their preferences for the manner in which instances of both are identified and addressed.\textsuperscript{120} This, at any rate, was the fond hope of the framers.

(ii) The Paradox of Law and State

The period leading up to and immediately following the achievement of independence in Papua New Guinea was an understandably heady time for the founders of the new state.\textsuperscript{121} More so perhaps than in any of the other emerging Pacific Island countries, the making of Papua New Guinea's Constitution took on the veritable qualities of a millenarian enterprise, and one in which genuinely autochthonous ideas and institutions of law would play a particularly redemptive part.\textsuperscript{122} Heralding the advent of a true 'Melanesian renaissance,'\textsuperscript{123} even if their florid rhetoric bespoke the undisguised influence of a discernibly Western (and

\textsuperscript{120} LRC, \textit{The Role of Customary Law in the Legal System}, Report No 7 (1977), p. 47.


distinctively Anglo-Australian) liberal-democratic tradition, '... men spoke of the need to build a new nation from our ruins and from our ancestral heritage.'\textsuperscript{124}

Law was no longer to be an instrument of oppression, but a tool for liberation. Law was no longer to be the exclusive privilege of the rich, but a basic right of all. Law was no longer to be a colonial fraud, but a genuine expression of the felt needs and aspirations of our Melanesian people. Newspapers, learned journals and white papers were filled with lofty calls for adaptation, reformation, simplification or outright revolution in the law to achieve the desired goals.\textsuperscript{125}

Today, more than twenty years on, the Constitution's bold expressions of political aspiration and zealous advocacy of a socio-legal renascence seem poignantly naive, if not extravagant, in their idealism. To be sure, quite different and far less charitable, characterisations of the post-colonial experience in Papua New Guinea have been proffered from time to time.\textsuperscript{126} On balance, however, more measured prospects for the achievement of a socio-culturally appropriate mix of 'traditional' indigenous and 'modern' introduced values have increasingly tended to be viewed with a deepening if not abject pessimism.\textsuperscript{127}

With particular respect to the development, application and refinement of decidedly autochthonous legal values in Papua New Guinea, it is now generally


\textsuperscript{125} Ibid.

\textsuperscript{126} See e.g. Fitzpatrick, Law and State in Papua New Guinea; Ntumy's paper at CL conference, Amarchi, Good and Mortimer and others of this ilk.

conceded that the anticipated re-transformation has fallen far short of what the
Constitution had envisaged.\textsuperscript{128} Scarcely three years after independence, one
commentator observed:

The legal system in Papua New Guinea is a permanent carrier
of foreign ideas and culture, since it is tied to the English and
Australian legal systems, the latest decisions of which are in
practice binding on Papua New Guinean courts. The basic
rules of interpretation and the presumptions of law find their
sources in an alien system, whose hold continues even after
independence. The crises of legal doctrine in England are all
too readily assumed to be the crises of law in Papua New
Guinea, and the latest law reforms in England and Australia
are seen by many as setting the pace for Papua New Guinea.
The development of law based on indigenous concepts and
contemporary problems is stultified because of the force of
foreign imitation. Foreign decisions are cited and applied as if
they had some intrinsic merit and foreign textbooks are
consulted as if they represented the authoritative law of the
land.\textsuperscript{129}

Although contemporary assessments may be somewhat less strident in their
cynicism, and rather more sophisticated in their causal analyses, the 'failure'—if
that, indeed, is how the situation ought properly to be characterised—to bring
about promised institutional change still tends to be explained largely 'in terms of
the social forces continuing on from the colonial situation.'\textsuperscript{130}

It may well be that even the most pessimistic reflections on once-popular

\textsuperscript{128} See Weisbrot, 'Papua New Guinea's Indigenous Jurisprudence and the Legacy of
Lawnmaking' in Essays on the Constitution of Papua New Guinea, ed. R. De Vere, D. Colquhoun-
Kerr and J. Kaburise (Port Moresby: Tenth Independence Anniversary Advisory Committee,
Developing Society, ed. R. James and I. Fraser (Port Moresby: Faculty of Law, University of


\textsuperscript{130} Fitzpatrick, Law and State in Papua New Guinea, p. 238. See, for example, Weisbrot,
preconceptions about how law and legal institutions were meant to operate in an independent Papua New Guinea, and why those expectations have not been realised, contain palpable elements of perspicacity and insight. These considerations, amongst others, are matters to which we shall return in due course.\(^{131}\) For the moment, however, without intending to discount entirely the utility of inquiring critically into 'the relative influence of endogenous and exogenous factors in shaping the beliefs, values and patterned behaviour of Melanesian political leaders and their publics since establishment of those institutions,'\(^{132}\) I submit, as a premise, that the extent to which the nature, quality and direction of such legal changes as have occurred in post-colonial Papua New Guinea—and more importantly, those which may yet occur in the future—might meaningfully be regarded as the products of endogenous or exogenous influences, is really rather something of a 'moot point.'\(^{133}\)

As with sorcery beliefs and practices, few if any aspects of contemporary Melanesian jurisprudential orientations, experiences or understandings may be apprehended or characterised usefully in purely traditional (if 'traditional' is taken to mean wholly indigenous) or entirely modern (if 'modern' is taken to mean exogenously introduced or imposed) terms.\(^{134}\) At all events, the full measure of state legal authority in Papua New Guinea today is formally vested in the legislative and executive organs of a government made up almost entirely of

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\(^{131}\) See Chapter Seven.

\(^{132}\) Wolfers, 'Aspects of Political Culture and Institution-Building in Melanesia,' p. 85.

\(^{133}\) Ibid., p. 101.

indigenous Melanesians. The national judiciary, the local magistracy and the bar are, for the most part, similarly comprised, as is the public service, the police force and correctional authority. By every outward sign, it would certainly seem that the technical accoutrements of political independence have set the institutional bases for an unfettered exercise of legal self-determination firmly in place.

And yet, as a pre-eminent problem of law and society in Papua New Guinea today, sorcery continues to pose particular difficulties for the law, for the courts and for the administration of justice, which are still said to derive fundamentally from enduring and seemingly intractable problems of inter-cultural relations.

135 Of the 100+ members of the National Parliament only a handful not indigenous Melanesian or Papuan citizens. See M. Turner and D. Hegarty, The 1987 National Elections in Papua New Guinea, Australian Institute of International Affairs (Canberra, 1987).


5. OBJECTS AND PURPOSES

The principal aim of this thesis is to inquire critically into the nature and implications of this seeming paradox, and to develop, in a preliminary way, the conceptual foundation upon which a more constructive approach to an understanding of the problem of sorcery, as a problem of law, might be fashioned. In so doing, the distinctively jural dimensions of Melanesian sorcery beliefs and practices are examined here not as instances of a 'most bizarre and exotic aspect of native life,' \(^{138}\) which would be to trivialise a whole host of real and serious social issues of considerable depth and complexity; nor merely as unique, culturally marked tropes emblematically reflecting aspects of peculiarly Melanesian experiences and understandings of reality, (although, in a sense, that is precisely what they are). Rather, the mingled corpus of Melanesian sorcery beliefs and their associated behaviours is treated here as a protean, multi-faceted social phenomenon which is, at once, generative of a demonstrably real and practical problem of law, and tellingly indicative of a persistent misapprehension of the nature and dynamics of that problem, in terms of its socio-legal and jurisprudential implications.

In broad scope, then, Melanesian sorcery beliefs and practices are employed here as a kind of vehicle by which means the contours and content of the larger, embracing conceptual dichotomy between law and custom can be explored and critically evaluated. For it is within this theoretical matrix that virtually all scholarly formulations of the nature of the relationship between nominally Western and Melanesian ideas of law are constructed; and it is within the context

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\(^{138}\) Marwick, *Witchcraft and Sorcery*, p. 15.
of the continuing, if occasionally becalmed, debate about law and custom in Papua New Guinea that the persistence of sorcery beliefs and practices presents itself as a distinctively legal problem.139

It is, in fact, a remarkably consistent vision—or rather, a remarkably persistent illusion140—of 'simpler societies dominated by integrated traditions of ancient origin' that is said to have given Western scholars license to differentiate with exaggerated sharpness between the customs of such "early" societies and the


In modern politics, they asserted, statutory and judicially declared rules of law were arrived at deliberately, reflectively and rationally by professional specialists. Not so in less advanced cultures. The idea seems to have been that, by contrast, in traditional society customs somehow arose from the opinions and practices of 'the people' like mists from a marsh.\footnote{Ibid.}

As a powerful, enduring and effectively unchallenged paradigm of Western thought, it is this dichotomous representation of law and custom that is replicated, time and again, in a set of immanent and closely inter-related conceptual assumptions about the inherently contradictory features of 'traditional' Melanesian custom and 'modern' Western law. It is this set of assumptions which invariably underlies conventional considerations of sorcery in Papua New Guinea today, whether sorcery beliefs themselves (and the conduct attendant upon such beliefs) are regarded from a psycho-social, socio-political, anthropological or purely legal perspective; and it is this set of assumptions, along with the conceptual premises upon which it rests, that is called into question here, both in terms of its descriptive validity and its fundamental analytical utility.

Because it is anchored in a foundation of epistemological presuppositions which, in certain crucial respects, are largely, if not wholly, illusory, it is my contention that the dichotomy between law and custom—like so many of the antinomic constructs which govern comparative representations of Melanesian and Western cultures and societies—is a deceptively simplistic construct.\footnote{See P. Sack, "Law" and "Custom" in Papua New Guinea' (1990) 51 Transactions of the Jean Bodin Society 249, 251.}

Further to this proposition, I shall argue not only that the persistent, uncritical adherence to the heuristic dichotomy between law and custom has served to perpetuate (and even, perhaps, to exacerbate) many of the supposedly inter-cultural conflicts which that model is intended to portray and explain, but that the misrepresentation of both the nature and the magnitude of the purportedly fundamental inter-cultural discrepancies that are said to separate and contrapose the ideas and realities of law and custom, may operate, in effect, to foreordain many of the conceptual dilemmas with which sorcery beliefs and practices vex the law in Papua New Guinea today.

Providing, as it does, one of the most compelling examples of the continuing cogency of the dichotomy between law and custom, the distinctive problematique of law and sorcery in Papua New Guinea offers an especially appropriate means by which to develop support for an equally compelling argument against the otherwise uncontested validity of that dichotomous model. In elaborating such a counter-argument, I shall attempt to demonstrate how the misconceived dichotomisation of law and custom presupposes and reifies the contraposition of certain essentialist notions of modernity and tradition, rationality and irrationality, and empirical (or 'scientific'), as opposed to metaphysical (or 'supernatural'), explanations for a distinct category of irrefutably real phenomena; how these integrally related contradistinctions operate to stigmatise, and thereby to preclude, a circumspect jurisprudential contemplation of sorcery-related beliefs as determinatively relevant features of social (and hence,

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145 See especially Chapter Six.
legal) reality in Papua New Guinea today;¹⁴⁶ and how, as a consequence of this conceptual exclusionary process, the development of a genuinely autochthonous expression of a culturally responsive common law in Papua New Guinea is needlessly handicapped.¹⁴⁷

For all that, let me be clear at the outset that, in advancing an argument against the merits of a dichotomous concept of law and custom, I do not for a moment deny that there were, and still are, real and significant differences between Western and Melanesian experiences and understandings of reality, or that these differences can, and do, set Anglo-Australian and Papua New Guinean Weltanschauungen apart from one another on antithetical, and sometimes irreconcilable, bases. Nor do I reject or discount the determinative implications of some of those differences for a wide range of inter-cultural and decidedly ethnojurisprudential considerations. Rather, I am concerned here to show how the misrendered polarisation of particular concepts and events all too readily conduces to a distorted, and arguably inverted, conception of the relationship between Western and Melanesian legal traditions, whereby real (and imagined) differences are unquestioningly assumed to supersede, subsume and preclude the recognition

¹⁴⁶ See Chapters Five and Six.


The Western legal tradition and its practitioners have always depended on what Clifford Geertz has called 'local knowledge'—and what eighteenth-century German scholars called *Lokalvernunft*—even as they reach out for more universal expressions of that knowledge. In order to reach particular judgments, jurists have always been constrained to understand humanity in particular geographical, historical, and cultural terms; and Western social thought has inherited both the limiting conditions and the universalist aspirations of jurisprudence.
of demonstrable and equally significant similarities, resemblances and continuities.\textsuperscript{148}

Indeed, with respect to certain characteristic features of Western and Melanesian legal traditions, I believe there are clear indicia of an identifiable inter-cultural isomorphism, the dimensions of which remain largely unacknowledged and almost entirely unexplored, because the very possibility of its existence is implicitly foreclosed by the assumptions of the paradigmatic dichotomisation of law and custom. Here, contrary to the quotidian expositions of conventional socio-legal and anthropologically informed wisdom, "we may well be in the presence of a forensic logic that is near constant across cultures";\textsuperscript{149} and here, too, the evidence to be had from Melanesian ethnographies, in complementary conjunction with that to be had from a refined and similarly methodical inquiry into the socio-cultural dynamics of the common law, is highly suggestive and pertinent in this regard. Thus, by re-examining the conceptual basis upon which the dichotomy between law and custom rests, and by proffering in its stead a more accommodating theoretical construct—that is to say, an alternative jurisprudential perspective from which it is possible to recognise and identify indicia of inter-cultural similarities as well as differences—not only might some of the ostensibly 'bizarre and exotic' qualities of Melanesian sorcery beliefs and practices be apprehended with enhanced analytical clarity, but the groundwork might thereby be laid, upon which some of the seemingly intractable problems those beliefs and practices pose for the law in Papua New Guinea today


might begin to be addressed with a greater measure of socio-cultural propriety and practical remedial efficacy. 150

Serious issues, as timely and topical as today's newspaper headlines151 and as portentous as the most recent judgements of the High Court,152 are here thrown into sharp, critical relief. The demonstrable relevance of the distinctively Melanesian issues canvassed in the following chapters to the crucial interplay of 'traditional beliefs' and 'customary values' in relation to both the legal rights of indigenous peoples153 and the pressing problems of law in a modern Australian

150 See R. Horton, 'African Traditional Thought and Western Science' (1967) 37 Africa 50, whose approach to comparative inter-cultural analysis in an African context was 'guided by the conviction that an exhaustive exploration of features common to modern Western and traditional African thought should come before the enumeration of differences.' Like Horton, I too am convinced that—

[b]y taking things in this order, we shall be less likely to mistake differences of idiom for differences of substance, and more likely to end up identifying those features which really do distinguish one kind of thought from the other.


society of increasing cultural diversity,154 will be readily apparent. It is, however, the hitherto unexamined, and yet determinative, significance of those issues, as they must now be seen to affect the fundamental principles and most basic understandings of the very nature and scope of the common law tradition itself, that I regard as a matter of deeper, further-reaching importance.155

6. APPROACH AND METHOD

The active and reactive dimensions of sorcery-related conduct are to be considered here from an explicitly jurisprudential perspective. This, however, is by no means to reduce the broader implications and deeper significance of the diverse and changing manifestations of those phenomena in 'traditional' Melanesian cultures and societies to a discrete administrative problem of law-and-order in the institutional context of the 'modern' state. Nor should the adoption of such a jurisprudential perspective be taken to suggest or imply that the subtle, convoluted nuances of Melanesian sorcery beliefs and practices might somehow be rendered fully comprehensible by regarding them exclusively in terms of their expression as cognisable delicts, in either a 'traditional' or 'modern' idiom. There is, as we shall see, a great deal more than that involved, and to so narrow the scope of analysis would be to cast the matters to hand in a spuriously, indeed


Notwithstanding their distinctive and patently jural manifestations, Melanesian sorcery beliefs are intimately and inextricably bound up with a whole host of psychological, epistemological, ontological and cosmological considerations.\footnote{See M. Stephen, 'Contrasting Images of Power,' in \textit{Sorcerer and Witch in Melanesia} (Carlton: Melbourne University Press, 1987), pp. 249-304.} Moreover, most occurrences of sorcery-related conduct in Papua New Guinea are likewise certain to be enmeshed in an equally complex network of dynamic, cross-cutting social relations.\footnote{See Glick, 'Sorcery and Witchcraft', p. 184; A.L. Epstein, 'Introduction,' in \textit{Contention and Dispute: Aspects of Law and Social Control in Melanesia} (Canberra: Australian National University Press, 1974), pp. 17-18. See generally S. Roberts, \textit{Order and Dispute: an Introduction to Legal Anthropology} (New York: St.Martin's Press, 1979), pp. 55-56.} The meaning and significance properly attributable to any given event or circumstance in which sorcery-related beliefs and practices are involved must, therefore, be understood as contextually dependent and socially contingent (whether or not that particular situation is regarded as bearing peculiarly 'jural' implications). In this respect, 'no matter how sympathetically understood from a relativist perspective,' the specific manifestations of Melanesian sorcery beliefs and their associated practices 'are only the tip of the iceberg. . . .'\footnote{Knauf!, \textit{Good Company and Violence}, p. 334.}

The significance of the particular contextual contingencies germane to Melanesian sorcery beliefs and practices cannot be underestimated; and here, even within the confines of this explicitly jurisprudential analysis, these contingencies
are duly acknowledged as salient, often determinative considerations. As a
precept of analytical circumspection, however, this injunction demands no more,
if nothing less, than the level of methodological rigour properly obtaining in the
analysis of the specific, overt manifestations of a whole host of 'traditional'
Melanesian beliefs and behaviours—including, not least of all, those which bear
especial implications for matters of peculiarly jural import. Hence, in what one
Papua New Guinean legal commentator has described as the 'classical' Melanesian
context:

law is not an independent science or discipline, nor a highly
specialised discipline restricted to an initiated few. It is an
aspect of the total and cosmic way of life, an integral part of
the whole way in which people go about undertaking various
tasks in the community. . . . It is more accurate to refer to
the phenomenon of law as the way of life or the fashion of the
people. In widely spoken Tok Pisin, this is the 'Pasin bilong ol'
or 'Kastom'—their way/s of doing things.

It is equally important, however, to recognise that the very same observations
can be made with respect to the beliefs and behaviours with which Western law is,
and has always been, concerned. Indeed, precisely the same observations can be
made in regard to any fully operative concept of 'law' itself—into the fabric of
which threads of morality, politics, economics, ideology, history, philosophy and
religion are intricately woven, and the replete autonomy of which, in the

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160 See A.L. Epstein, 'Law,' in Anthropology in Papua New Guinea: Readings from the
Encyclopaedia of Papua and New Guinea, ed. I. Hogbin (Carlton: Melbourne University


162 Narokobi, Lo Bilong Yumi Yet, p. 4.

163 M. Wood, 'EC 1992: Free Market Framework or Grand Design,' in Law, Society and
Change, ed. S. Livingstone and J. Morison (Aldershot: Dartmouth, 1990), p. 185. Cf. Lawrence,
'The State versus Stateless Societies', p. 20.
Western and Melanesian social fields alike, cannot safely be regarded as other than a heuristic fiction.\(^{164}\)

Thus, whilst my inquiry is decidedly jurisprudential in its orientation and focus, it is conducted within the broader parameters dictated, firstly, by a recognition of the polymorphic qualities of the contemporary Melanesian social field; secondly, by an appreciation for the integral plurality of law (as one of the many social forms which simultaneously occupy that field); and thirdly, by the realisation that law, sorcery and other social forms are bound together by a


As Roberto Unger instructively points out: 'In societies with a heavy commitment to the rule of law, people often act on the belief that the legal system does possess a relative generality and autonomy.' *Law in Modern Society: Toward a Criticism of Social Theory* (New York: The Free Press, 1976), p. 56. In challenging the validity of this belief, however, Unger raises several probing questions:

\[\text{[I]s not the alleged autonomy of the legal order itself illusory? Has it not often been remarked that, notwithstanding all claims to the contrary, the institutions of the legal system in fact operate as other political agencies of the state and that the methods of legal reasoning do not in the end differ from the ones used in political, economic, and moral choice? The very idea of the rule of law might seem to be based on a misunderstanding, which is also a mystification; it confuses a dominant theory and the mentality which that theory represents with an accurate description of the actual place of law in society. To arrive at a proper appreciation of what the concept of a legal order is meant to describe, one must tread a narrow path between opposite errors.}

One misconception is to identify the workings of the legal order in social life with the way that order is pictured by the doctrines of which it makes use or which serve as its defense. When such an identification takes place, all the symbols and traditions that make the law appear radically autonomous are taken at face value. As a result, the true character of its relations to other aspects of society is obscured. [*Ibid.,* pp. 55-56]
multiplicity of variable and shifting inter-connections, all of which comprise the organic integument of contemporary Melanesian thought and action.

Of necessity, my approach is cross-disciplinary, situated at the often turbulent confluence of emergent streams of thought in socio-legal theory, comparative law and legal anthropology.\(^\text{165}\) It is, moreover, an approach which bespeaks a method that has been deliberately fashioned with a view to the reconceptualisation of certain conventional propositions concerning the theoretical foundations of law in Papua New Guinea, and a corollary reformulation of extant patterns of legal reasoning and practical judicial decision-making. In advancing a frank critique of the dominant (dichotomous) socio-legal paradigm, however, the fundamental intendment of the approach adopted herein is demonstrably reconstructive rather than deconstructive, in terms of theory and practice alike. All good scholarship is bound to be polemic, but not all polemic is necessarily good scholarship.\(^\text{166}\)

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\(^\text{165}\) This, admittedly, is sometimes a rather difficult position to maintain. However, I believe it is the only position from which the jural implications of sorcery beliefs and practices in Papua New Guinea can be assessed with both empirical accuracy and theoretical adequacy; and it is far and away the best position from which to mount a serious effort to address constructively many of the practical problems of law to which sorcery beliefs and practices in Papua New Guinea give rise today.

\(^\text{166}\) I. Wallerstein, 'Some Reflections on History, the Social Sciences and Politics,' in *The Capitalist World Economy* (Cambridge: Cambridge University Press, 1979), x.
Chapter Two

PROLEGOMENA TO
THE DESCRIPTION AND ANALYSIS
OF MELANESIAN SORCERY (I)

To the modern consciousness, the very idea of witchcraft is preposterous. To believe in the capacity of persons to exploit occult powers or spirits, whether for good or bad purposes, is absurd. Indeed, the very 'absurdity' of witchcraft beliefs has constituted a serious problem for modern social theories: witchcraft is a major stumbling block for Western rationalist accounts of human mentality.¹

Vanimo District Court has jailed two men for a year for practising sorcery, in a case which involved a man's death... Wagari Bokoe, 55, of Ossol village and Bus Man, 28, of In village, Bevani District, pleaded guilty to being responsible for the death of Augustine Pohou, of Yako village... [A] third person gave Bokoe and Man K20 with instructions to murder Pohou through sorcery... A week later, Pohou became ill and vomited blood. He was taken to Vanimo Hospital where he died. Pohou's relatives conducted traditional investigations, and confronted Bokoe and Man, who admitted they had killed Pohou.²

1. CULTURAL AND CONCEPTUAL DETERMINANTS
OF SOCIO-LEGAL SIGNIFICANCE

Serviceable conceptions of reality tend to consist in the inter-dependent dynamics of knowledge, belief and action. Implicit in all meaningful human behaviour there is inevitably some elaborate interplay of cognition and affect, even if the patterned intricacies of that process are not always or immediately discernible as such; and it is human behaviour, thus infused with meaning and


significance, that serves in turn to shape the fundamental understandings which inform the ordinary and extraordinary experiences of life.

Social reality, by which expression I refer to the general understanding of what is known to exist and what is believed to be true about the nature of the world that is shared in common amongst the members of an identifiable group or community, and the resultant attribution of meaning and significance to the behaviour of those who populate that community and the larger world alike, may thus be said to involve the perpetually interactive processes and products of a kind of dialectical self-composition generated at the level of both individual and collective consciousness. That reality \textit{simpliciter} is neither more nor less than just such a social construction is a proposition for which there is an abundance of cogently supportive argument. The proposition itself may remain a matter of


continuing philosophical and sociological debate, but in contemplation of the issues with which this chapter and much of the sequel are concerned, its demonstrable utility conduces persuasively to the propriety of its adoption as a viable analytical premise.

Many of the issues raised in consideration of the larger questions that bear on the depth and dimensions of reality, as a transcendent concept, are necessarily implicated in the consideration of sorcery beliefs and practices, as significant features in the landscape of Melanesian social reality. In the interest of thematic fidelity, these issues cannot be canvassed exhaustively here. There need be no compromise of thematic integrity on that account, however, since it is the peculiarly jural parameters of a distinctive, culturally bounded social reality that command a focused attention here, and what is to be examined more closely is the narrower, subsidiary proposition that these demonstrably socio-legal parameters are likewise defined by what is known and what is regarded as knowable, by what is believed and what is credible, by the behaviour certain kinds of knowledge and belief appear to engender, and by the determinative characterisation of the concurrence of particular ideas, beliefs and behaviours in the prevailing terms of law and society.


6 Anthony Kenny makes a similar point in *Freewill and Responsibility* (London: Routledge & Kegan Paul, 1978). Developing the argument that "[t]he mentalistic concepts which are used in the law cannot be understood apart from their function in explaining and rendering intelligible the behaviour of human agents" (p. 12), Kenny offers this admonition:

When we explain action in terms of desires and beliefs we are not putting forward any explanatory theory to account for action. It is true that desires and beliefs explain action; but the explanation is not of any causal hypothetical form. It is not as if the actions of human beings constitute a set of raw data—actions identifiable on their faces as the kinds of actions they
To the extent that the processes and outcomes of such determinative legal characterisations are themselves determinatively shaped and directed by certain values, attitudes, knowledge and beliefs about the nature and significance of cause are—for which we then seek an explanatory hypothesis. On the contrary, many human actions are not identifiable as actions of a particular kind unless they are already seen and interpreted as proceeding from a particular set of desires and beliefs. [Ibid.]

To illustrate this principle—which, for Kenny, involves a critical issue in a decidedly Western philosophical context—he turns immediately to an African sorcery case, Nyuzi and Kudemera v. Republic (1966-68) African Law Reports 249, heard on appeal in the High Court of Malawi. Freewill and Responsibility, pp. 12-21.

For similarly illustrative purposes, and in order to demonstrate the cross-cultural reach of my own arguments, I am inclined to refer to the decision of an English court, Rex v. Duncan and Others [1944] 1 KB 713, which involved an appeal against a conviction in what appears to be the last prosecution in England under the Witchcraft Act, 1735 (9 Geo. 2, c. 5) before that Act was finally repealed in 1951. In Duncan, the court found that it was not an abuse of discretion for the trial judge to reject the submission of evidence, by way of demonstration, of one of the appellants, the purport of which would have been to show that 'at all material times she was a materialization medium and to disprove the allegations made against her', because of the 'difficulty of arranging such a demonstration satisfactory in all its detail to both sides ...'; and because the evidence 'might well confuse the jury or operate to the great disadvantage of the appellants' themselves: [1944] 1 KB at 715.

In pertinent part, the provisions of the Act under which Mrs Duncan had been charged made the pretence of the practice of witchcraft (involving, amongst other things, the 'conjuration' of spirits) an offence. Prior legislation [2 James I, c. 12 (1604)] made the actual practice itself a felony, and referred expressly to the conjuration of 'evil or wicked spirits'. At trial, the accused had sought to demonstrate that she could, in fact, conjure spirits, and to introduce further evidence in support of her contention that the spirits she conjured were neither evil nor wicked. In upholding the decision to exclude that evidence Viscount Caldecote LCJ observed:

[T]he only matter for the jury was whether there was a pretence or not. The prosecution did not seek to prove that spirits of deceased persons could not be called forth or materialized or embodied in any particular form. Their task was much more limited and prosaic. [1944] 1 KB at 718

The distinction the accused had sought to make between evil or wicked spirits, on the one hand, and benign spirits, on the other, would, in Viscount Caldecote's view, 'raise an issue of fact incapable of determination.' More to the point, the court concluded that, even in 1735, '[t]hese things were no longer believed in. . . . ' [Ibid.]

In England, parts of the Witchcraft Act, 1735 were repealed by the Statute Law Revision Act of 1867 (30 & 31 Vic., c. 59), 1887 (50 & 51 Vic., c. 59) and 1948 (11 & 12 Geo. 6, c. 62), respectively. Those provisions which remained in force were finally repealed and supplanted by the Fraudulent Mediums Act, 1951 (14 & 15 Geo. 6, c. 33). It is interesting to note, en passant, that the English legislation of 1735 was not formally repealed in the Australian Capital Territory until 1988, by the Imperial Acts (Repeal) Ordinance 1988 (No. 94).
and effect in human relations, they will invariably bear the indelible imprints of the wider social context in which those characterisations are made. As with any other aspect of institutionalised human affairs, the operative nature of law cannot properly be known or understood simply on its own terms without taking some account of the social conditions of its creation and operation.7 Law itself, as Lon Fuller observed, is an integral constituent of society and its basic processes are pre-eminently social processes.8

Moreover, to the extent that culture may be seen to consist in particular 'socially established structures of meaning,'9 it is the distinctively cultural context within which such social processes occur that must be recognised as being of a fundamentally determinative significance.10 This is especially so in relation to the processes of jural ratiocination and judicial decision-making.

As the venerable jurist, Oliver Wendell Holmes, observed nearly a century ago: 'It is perfectly proper to regard and study the law as a great anthropological document.'11 In a more recent elaboration on that point from the complementary perspective of interpretative social anthropology, Clifford Geertz has argued that

'the cultural contextualization of incident' is perhaps the singularly critical aspect of legal analysis. Any features general to that process, Geertz maintains, will surely be located 'in the ways in which such contextualization is accomplished when the aim is adjudication...'.

The fact that we can—that is, that we think we can—take so much of this context for granted in our own society obscures from us a large part of what legal process really is: seeing to it that our visions and our verdicts ratify one another, indeed that they are, to borrow an idiom less offhand, the pure and the practical faces of the same constitutive reason.

Much of the discussion to which this chapter is devoted revolves around the central significance of culture as a determinative factor in the social processes and outcomes of jural characterisation and judicial decision-making. The implications of that proposition will be explored more fully in the sequel. As a preliminary proposition, however, it is submitted that, in so far as the object of analysis


13 Ibid (emphasis supplied). Essaying in a rather different intellectual tradition to that which informs Geertz's analysis, Roberto Unger offers a complementary argument in Law in Modern Society: Towards a Criticism of Social Theory (New York: The Free Press, 1976), p. 46: 'Each society reveals through its law the inner-most secrets of the manner in which it holds men together.'

involves an attempt to elucidate the determinatively jural and judicially determinative characterisations of the concurrence of particular ideas, beliefs and behaviour, the critical questions to be asked and answered with some certainty at the outset must be: what law? which society? and more critically still, whose culture?

For present purposes, the answers to all three questions might appear to be obvious and the same in each case. The relevant socio-legal context is after all that of Papua New Guinea, and the cultural parameters in accordance with which a meaningful perspective on jurally determinative characterisations of sorcery-related beliefs and behaviour in Papua New Guinea ought properly to be constructed are, ipso facto, Melanesian. It is here, however, that the presumptively antinomic constructs of law and custom, rationality and irrationality, science and superstition, instantiated as they are in the paradoxical union of the 'modern' Western state and 'traditional' Melanesian society, first present themselves as daunting (though not, I think, necessarily insurmountable) conceptual obstacles to analysis. And it is here, too, that these conceptual obstacles, characterised on the basis of the degree to which they may operate to impede useful analyses of the socio-legal implications of sorcery in contemporary Papua New Guinea, are themselves revealed to be fundamentally cultural in their origins and nature.
The obstacles to analysis referred to immediately above are first and foremost cultural, in that they are demonstrably grounded in peculiarly Western constructions of social reality. Organised around distinctively Western assumptions of validity, meaning and significance in respect of particular beliefs about the nature of the world, such constructs necessarily give rise to certain decidedly Western situational predilections for particular forms of human behaviour consistent and coterminous with those assumptions. The conceptual dimensions of these obstacles are really only epiphenomenal, acquiring epistemological import (and hence, socio-legal significance) largely, if not entirely, as a function of the influence of their cultural foundations.

In so far as it takes as an analytical point d'appui the empirically demonstrable social fact that amongst the members of any group, community or society, there does tend to be some identifiable corpus of shared beliefs, ideas and values about the nature of the world and the conduct of human relations therein, this view is

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15 Amongst anthropologists, the debate about the meaning and definition of 'culture' is enduring and seemingly irresolvable. My use of the adjectival form here is consistent with the narrower application of the noun suggested by Roger Keesing, and refers to the ideational systems of shared beliefs, concepts, rules and meanings underlying and expressed in the ways in which identifiable communities of human beings live. Cultural Anthropology: A Contemporary Perspective, 2nd ed. (New York: Holt, Rinehart and Winston, 1981), p. 68.

Culture, so defined, refers to what humans learn, not what they do and make. . . . [T]his knowledge provides 'standards for deciding what is, . . . for deciding what can be, . . . for deciding how one feels about it, . . . for deciding what to do about it, and . . . for deciding how to go about doing it'. [Ibid., pp. 68-69] [Footnotes omitted]


17 In adopting such an analytical premise, I take no position one way or the other in respect of some 'supra-historical human nature', nor do I think it necessary to do so. Cf. Unger, Law in
consistent with elements of consensual or legitimacy-based theories of social order and organisation.\textsuperscript{18} Of course, such beliefs, ideas and values 'may vary as to the extension of agreement with them, as to their relative degree of abstraction or concreteness, as to the intensity of adherence to them, and as to their coherence.' But despite those inevitable 'variations in extension, concreteness, intensity, and coherence,' it is the presence of just such 'commonly held moral and cognitive orientations' that makes organized social life possible.\textsuperscript{19}

Shared beliefs allow people to understand one another and to know what they ought to expect from each other. The basic scheme of human conduct is therefore the internalization of shared understandings and values...\textsuperscript{20}

\textit{Modern Society}, p. 23. The instant analysis does not purport to extend to the larger field of society as an abstract whole, and my aim here is not to advance the enterprise of grand social theory. Being a far more modest undertaking, mine is not an 'attempt to arrive at an understanding of conduct that might be prior to, and independent of, an account of social relations.'\textsuperscript{Ibid.}

\textsuperscript{18} To recognize the explanatory utility of aspects of such theories, of course, is not necessarily to imply or require the uncritical, wholesale adoption of their doctrinal premises or conclusions. Durkheim, and those who have followed him in the functionalist tradition of sociology and anthropology, have been criticized for, amongst other things, appearing to argue that 'law is more than an index of social reality, [but] that it is the true reality in itself.' C. Grace and P. Wilkinson, \textit{Sociological Inquiry and Legal Phenomena} (New York: St Martin's Press, 1978), p. 48.

Whereas the 'visible symbol (of moral phenomena) is law' and we find 'reflected in law all the essential varieties of social solidarity'; it is also the case that 'social life, especially where it exists durably, tends inevitably to assume a definite form and to organize itself, and law is nothing else than this very organization in so far as it has greater stability and precision'. \textit{[Ibid., footnotes omitted]}


\textsuperscript{19} Unger, \textit{Law in Modern Society}, p. 30.

\textsuperscript{20} \textit{Ibid.} I see nothing in such a description that operates to preclude the existence of conflict \textit{Cf. Unger, Law in Modern Society}, pp. 31-32. Indeed, the 'variations' explicitly acknowledged to exist should tend to invite rather than minimise its occurrence. It may also be, as Unger suggests in his critique of the consensual paradigm, that '[t]he tighter the agreement that binds individuals together and the greater the power to determine their conduct, the less of a role remains for rules'
Grounding these theoretical issues in foundations of a more practical jurisprudence, Sir Anthony Mason describes the process of judicial decision-making as necessarily involving a reconciliation of two considerations: the intrinsic 'justice of a rule' and 'the fairness and practical efficacy of its operation in the circumstances of contemporary society.'

It seems to me, however, that to divorce considerations of 'justice', 'fairness' and 'practical efficacy' from the socio-cultural integument in which those ideas are given concrete expression in experience is to reify a purely heuristic distinction, since all of these features may be seen to derive their meaning and significance from established and evolving social norms which are themselves but expressions of demonstrably cultural values.

If the tenability of a judicial decision must ultimately depend upon its essential consistency with the fundamental values of the community in which context the decision is made and is intended to operate, then so too must the legal rules and principles upon which that decision is seen and said to be based. Ultimately, the legitimacy of law in society is culturally grounded; and although...
Sir Anthony may avoid using the term, the ideas around which his arguments revolve implicitly bespeak a dynamic concept of culture.

The cultural experience of Anglo-Australian judges in Papua New Guinea, and the inculcation of Melanesian judges in decidedly Western presumptions about and predilections for certain ideas, beliefs and behaviour (necessarily, perhaps, in the first instance, if somewhat more surprisingly in the second25) have consistently

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political power is legitimate only when the claimant can invoke some source of authority beyond or above himself.


In the introductory essay of their edited volume marking the centenary of Dicey's *Law of the Constitution*, Patrick McAuslan and John McEldowney suggest that more recent approaches to an adequate definition of 'legitimacy' (for the purposes of political analysis) tend to dissolve the concept into a notion of popular belief or opinion. 'Legitimacy and the Constitution: The Dissonance between Theory and Practice' in *Law, Legitimacy and the Constitution*, ed. P. McAuslan and J.F. McEldowney (London: Sweet & Maxwell, 1985), p. 2.

If a people holds the belief that existing institutions are 'appropriate' or 'morally proper' then those institutions are legitimate. Popular opinion determines legitimacy and that legitimacy is 'a function of the system's ability to persuade members [of a society] of its own appropriateness. [Ibid., footnotes omitted]

McAuslan and McEldowney reject such a definition of 'legitimacy' as unsatisfactory for the particular purposes of the political analysis which they are concerned to pursue. For the narrower, more modest purposes of the instant analysis, however, I believe a concept of 'legitimacy' apposite to the description above is both adequate and appropriate. Ronald Dworkin advances a consistent argument in his discussion of integrity in *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 190-215.

25 In advancing his arguments in rejection of the cognitive-relativists' claim that 'all science is ethnoscience', Melford Spiro, 'Cultural Relativism and the Future of Anthropology' (1986) 1(3) *Cultural Anthropology* 259 at 260, muses on the similar and seemingly illogical pattern of adoption and rejection of supposedly culturally determined theories of Western social science (as opposed to law) by Western and non-Western social scientists (as opposed to judges):

The sweeping claim that social science theories merely reflect Western ethnoscience would have to be qualified in respect, at least, to some of the most influential ones. The Darwinian, Marxian, and Freudian theories, for example, were, and are, rejected by scientists and laymen alike on the grounds that they violate common sense or are counter-intuitive . . . ; in short, because they contradict the prevailing ethnoscientific theories. Conversely, those who have accepted them have
predisposed those judicial arbiters of the law to reject as *irreal* the substantive bases of ideas and beliefs that are inconsistent with such culturally derived presumptions and predilections, and to discount as *irrational* the processes by which such beliefs and ideas have come to be held by indigenous Papua New Guineans. Accordingly, and almost invariably, jurally determinative characterisations of the behaviour associated with those *irreal* and *irrational* beliefs have tended to reflect a reluctance (and hence, a failure) to place the events which come before the courts, and which consist in the concurrence of such ideas, beliefs and behaviour, in their proper—that is to say, their Melanesian—cultural context, *for the supremely determinative purposes of dispositively characterising those events in the processes of judicial decision-making.*

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done so in spite of the fact that they were, or are, in conflict with prevailing ethnoscientific theories. Moreover, if that sweeping claim is correct, *why is it that those three theories—among others—have found acceptance by non-Western social scientists when they clearly contradict their own ethnoscientific theories?* [Ibid., pp. 281-282, n. 5 (italicised emphasis supplied)]

With particular reference to anthropological and historical renderings of Pacific Island societies, Roger Keesing has shed some instructive light on this apparent paradox, whereby Western conceptualisations of 'culture' may be seen to have passed through our scholarly discourses and into the 'cultural nationalist rhetoric' of Third world elites. 'Theories of Culture Revisited' (1990) *Canberra Anthropology* 46 at 53. In explaining that process, Keesing described how distinctively Western interpretations of aspects of 'traditional' Polynesian and Melanesian cultures, 'to which Islanders have been exposed through books and other media . . . have fed back into contemporary (mis)representations of the Pacific past.' 'Creating the Past: Custom and Identity in the Contemporary Pacific' (1989) 1(1 & 2) *The Contemporary Pacific* 19 at 24. Given the hermeneutically bounded nature of the Anglo-Australian common law tradition, and the cross-national judicial sub-culture to which it has given rise, it is perhaps not quite so surprising after all that the juridical reasonings of Papua New Guinean judges should reflect such decidedly Anglicised attitudes, values and beliefs.

As we shall see in Chapter Five, similar inclinations have governed legislative determinations.

In sentencing indigenous Papua New Guineans convicted of sorcery-related offences, the degree of 'sophistication', 'civilisation' or 'primitiveness' of the offender have been, and continue to be, taken into account, and the severity of the punishment imposed adjusted accordingly. But this accommodation of 'irrational' beliefs in *irreal* phenomena should not be mistaken for acknowledgement and acceptance by the courts of the validity of the beliefs in question or the
Variably articulated in the orthodox litany of classical legal positivism or the radical idiom of contemporary feminist jurisprudence, the conceptual bases of such fundamentally determinative characterisations are governed by epistemological principles firmly anchored in a decidedly Western cultural orientation. Sympathetically admitting of the fact that some or even many people—and in Papua New Guinea, surely most people—may hold 'irrational' beliefs in the existence of 'irreal' phenomena, this is a perspective from which the formal acknowledgement of the existence of those phenomena in reality is resolutely excluded. Thus, for judicial as much as for legislative purposes, the persistent rationale behind the characterisation and disposition of matters involving sorcery-related beliefs and practices in Papua New Guinea today.

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28 See, e.g. Kapi J's discussion of the 'guiding' theories of criminal law, in accordance with which the sentencing of the accused in Uname Aumane (who had been convicted of killing a person believed to have been a sorcerer) was properly to be informed. [1980] 510 at 537-538.

29 See, e.g. The State v Daniel Aigal & Anor. N 891 (12 July 1990) at 12, in which Brunton J's assessment of the 'political role of the witch-hunt ... [as] a form of terror that holds women in their place' was frankly based on 'a more recent understanding of the social role of witch-hunts emphasising their context in sexual-politics.'


32 To be sure, not all judges in Papua New Guinea have been entirely influenced by their own or their adopted, Western cultural predilections. See e.g. the comments of Smithers J in R. v Mon and Debong [1965-66] P&NGLR 42 at 51 and Narokobi AJ in The State v Noah Magou [1981] PNGLR 1 at 4. But these examples tend rather to provide the exceptions that prove the rule.
effectively remains as it was candidly described nearly a century ago by the then Lieutenant-Governor of Papua, J.H.P. Murray:

The . . . Papuan looks upon sorcery as reality, whereas the European (as a rule) does not; to the former no punishment would be sufficient short of death, or at any rate a long term of imprisonment, either of which seems to us to be out of the question in the case of what is after all, according to our view, only an imaginary offence.33

The prevailing epistemological premises of modern Western culture and society categorically and universally preclude the existence, in fact, of sorcery and witchcraft.34 Genuine beliefs in such phenomena, honestly held amongst members of our own society and others alike, are invariably regarded irrational or delusionary, irrespective of the depth or prevalence of those beliefs within a particular society or community.35 Jurally characterised on the basis of these cultural cum epistemological criteria, behaviour predicated upon the belief in sorcery, witchcraft, magic and related supernatural phenomena, is regarded as essentially, if not always statistically, aberrant.36 Dispositive judicial determinations consistent with that characterisation inevitably follow on.

Poignantly indicative of the culturally-bounded justificatory process by which the rational bases of Western law are explained and validated, it is just such


36 The philosophical foundations of this characterisation and its psychological and medical implications are explored in J. Radden, Madness and Reason (London: George Allen & Unwin, 1985).
beliefs and practices which provide ready examples of what the law must reject, because their admission is precluded by reason itself.\textsuperscript{37} Thus, with explicit reference to 'witchcraft, demonology, exorcism and healing rites', Coval and Smith observe:\textsuperscript{38}

> There have existed and still exist practices which have no [rationally] sufficient causal basis. Inevitably, such practices will fail. Some will persist because of the belief that there is a causal basis, some hypothetical entity which gets the job done, when actually there is no such entity in existence.\textsuperscript{39}

Indeed, virtually everything modern Western scholarship places on offer in respect of sorcery-related beliefs and practices tends to be formulated in implicit accordance with the conceptual premise that, since the existence of sorcery has no tenable basis in reality, belief in the existence of sorcery is perforce irrational.\textsuperscript{40} The politesse of contemporary intellectual and scientific discourse may have supplanted the derision and arrogance with which such beliefs were dismissed in years past,\textsuperscript{41} but the dismissive import of the premise remains the same. To


\textsuperscript{40} See, for example, the remarks of Philip Mayer in a lecture on African witchcraft delivered at Rhodes University in 1954, reproduced under the title 'Witches' in \textit{Witchcraft and Sorcery: Selected Readings}, 2nd ed., ed. M. Marwick (Harmondsworth: Penguin Books, 1982), pp. 54-70.

\textsuperscript{41} John Barry's closing remarks in an address to the Medico-Legal Society of Victoria in 1936 are illustrative. Having spoken on 'Some Aspects of Magic, Witchcraft and Sorcery', Barry concluded:
borrow a characterising aphorism from the popular press, they are all either 'myth or madness'.

At all events, the premise itself reflects neither more nor less than the universal projection of a particular set of culturally determined assumptions about the nature and dimensions of reality, and an associated set of predilections for behaviour that is consistent with those assumptions. And it is this culturally derived premise which forms the epistemological justification for the determinative characterisation of the beliefs and behaviour of millions of people with whose own cultural orientations—which is to say, with whose own cosmological, ontological, epistemological, conceptual and experiential orientations—that premise is readily conceded to be fundamentally at variance. It may well be, as Roberto Unger insists, that '[o]ur theories of culture and social organization depend on the view we have of human conduct and of interpersonal relations.' There can be no doubt, however, that those underlying views of human conduct and interpersonal relations are themselves culturally derived and determined.

It is our duty as members of professions which claim to apply man's most recently acquired faculty, that of reason, to see that we do not, in the discharge of our functions, act upon any assumption unless it can clearly be demonstrated to have a factual existence. As yet, reason has cleared but a little space in the dark jungle of superstition, opposed alike to true religion and to science, that chokes our minds. It is for us to see that space is kept cleared, and so far as it lies within each one of us to do so, to extend its boundaries. [(1936) 2 Proceedings of the Medico-Legal Society of Victoria, pp. 114 at 133]


43 Unger, *Law in Modern Society*, p. 23 (emphasis supplied).
For all that, Western social, scientific and legal thought is perfectly prepared to accommodate the existence of irrational beliefs, even if their substantive basis in reality is denied outright. Thus characterised, irrational beliefs are theoretically explicable in the eminently rational terms of social science as objective indicia of deviance, amongst medical authorities, as symptoms of delusionary psychopathology and by judges and lawyers as manifestations of insanity. And yet, well within the realm of the 'acceptable' in contemporary Western science, society and culture, there are places and names for a whole host of irrational beliefs—and believers—not all of which necessarily bear the stigma of disapprobation. Indeed, a good deal of the richness and depth of Western aesthetics, passion and spirituality derives from the explicitly recognised virtue of the irrational, as an expression of creativity or inspiration, in art, music, poetry, literature and religious faith.

As a cultural predilection, however, the entertainment of rational beliefs is decidedly preferable to most members of Western societies and to an increasing number of the members of Westernised societies alike. As a practical matter, it is certainly more advantageous for those who wish to function effectively in any 'modern' society to hold, and to conduct themselves in accordance with, such beliefs.

44 As Mayer noted: 'Rationalism teaches that everything may be interpreted as the outcome of natural causes. . . . [and w]itches can only have a place in a cosmology that admits to the possibility of things . . . departing from the natural order.' In spite of our rationalism, however, we ourselves 'appear to admit this possibility up to a point, as when we speak of "uncanny" luck, meaning contrary to natural order . . . .' 'Witches', p. 60.

45 The concept and experience of love, which must certainly be acknowledged as one of the principal and perennially enigmatic features of Western civilisation, is a social force pre-eminently 'irrational' in its characteristic expression, and yet one that is seemingly valued all the more highly on that account. Michael Detmold provocatively juxtaposed the irrationality of love to the rational elements of law in an intriguing paper entitled, 'Love and Hate: Aspects of Law and Feminism', presented at a seminar in the Research School of Social Sciences, Australian National University, 16 August 1990. See also E. Gellner, 'Concepts and Society' in Rationality, ed. B. Wilson (Oxford: Basil Blackwell, 1970), pp. 18-49.
beliefs. A modern society is, perforce, a rational society, and it is on a decidedly Western model of rational thought and action that the greatest premium is placed. In the main, therefore, Western law, and the common law in particular perhaps, is—or at any rate, appears to be—rather less tolerant in its accommodation of irrational beliefs. Thus, when particular irrational beliefs are causally associated with certain forms of behaviour, the courts have been especially constrained to draw clear and sharp distinctions between what is, and what is not, acceptable, determinatively characterising (and, as appropriate, negatively sanctioning) conduct of the latter variety, whilst mitigating culpability and its attendant penalties only to the extent that the perpetrator might rationally be regarded as ignorant, deluded, insane—or, as the case may be, merely 'primitive'.

It is no accident that the law's requirements for rationality, both in the nature of the conduct subject to judicial scrutiny and in the process of determinatively characterising that conduct for the purposes of judicial decision-making, rest squarely on the foundation of necessarily shared beliefs about the content and contours of a decidedly Western social reality. Within that reality, what is true must be real and what is real must either be rational, or else it must be explicable in rational terms.

See, for example, the judgement of Andrew J in Acting Public Prosecutor v Uname Aumane & Ors [1980] PNGLR 510 at 529. Although his Honour did not use the term 'primitive', in referring to the judgement of the Supreme Court in Public Prosecutor v. Tom Ake [1978] PNGLR 469, he clearly considered it appropriate to balance the "degree of sophistication of the accused and the retributive and public deterrent elements of the punishment required" in determining that, where the accused had been convicted of killing a woman he believed to have been a sorceress, the imposition of a greater sentence was warranted for 'educative' purposes.

See F.S. Cohen, Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism (Ithaca: Cornell University Press, 1933), pp. 16-17: [T]here is no way of escaping the final responsibility of law to ethics, and, since the field of law lies within the field of human conduct, to morality. . . . To delimit the realm of ethics which is relevant to law is merely to outline the realm of ethically
The practice of truth-speaking implies that agents must be able to reckon, must be rational, since the appraisal of the truth-value of beliefs will depend upon our ability to reckon according to certain rules. The first practice will then call forth a second, that of what we may call formal rationality. If, for example, prediction is a requirement of rationality in that we must have class terms in order to reason, it will also be the case that these terms must be used consistently. Prediction and truth will both depend upon such considerations, among others, from formal rationality. 48

Nor is it merely a matter of coincidence that the rational parameters of the particular social reality articulated in that process will reflect the cultural predilections implicit in the institutions, traditions and experience of those to whom that determinative articulatory task has been entrusted (and who presumably share the cultural predilections of the larger community, or are at least conversant with them). This much is frankly acknowledged in Sir Anthony Mason's identification of the proper role of 'community values' in the process of judicial decision-making:49

[(I)]t is impossible to interpret any instrument, let alone a constitution, divorced from values. To the extent that they are taken into account, they should be acknowledged and should be accepted community values rather than mere personal values. . . . When judges fail to discuss the underlying values influencing a judgment, it is difficult to debate the appropriateness of those values. As judges who are unaware of the original underlying values apply that precedent in accordance with the doctrine of stare decisis, those hidden values are reproduced in the new judgment—even though the community values may have changed.50

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justiciable facts which law can comprehend or affect. And that is a task involving positive [rational] science.


It is implicit, too, however, even in the ordinary exercise of the most conventional judicial discretion.\textsuperscript{51}

Although it is a matter upon the nuances of which philosophical debate continues, the fundamental intendment of modern Western law is generally regarded as securely anchored in precepts of rationality and rationalism.\textsuperscript{52} This, of course, is not to say that it is only or always the law that requires people's conduct to conform to particular, culturally specific criteria of formal rationality. Indeed, so long as their consequences remain innocuous, the irrational qualities of people's beliefs and behaviour in contemporary Anglo-Australian society are generally of far less concern to the law than they are to other normative systems of social control.\textsuperscript{53} And, as mentioned above, in certain areas of human affairs and social endeavour, the expression of irrationality (or at any rate, the discernible influence


of the irrational on such expression) may be regarded as an aesthetic or a spiritual virtue.\textsuperscript{54}

Our concern here, however, is with law; and as a rule, when people act in a manner affecting others in certain significant ways, the law will 'find them obliged to act within th[e] norms of formal rationality'. Otherwise, no one is in a position rationally to predict the consequences of those actions—such consequences themselves 'being known (best) through prediction'.\textsuperscript{55}

Since prediction presupposes predication, universalizability (consistency), impartiality and other canons of formal rationality, we can see that formal rationality is a necessary condition of the function of any social practice or institution.\textsuperscript{56}

3. SURMOUNTING THE CULTURAL-CONCEPTUAL OBSTACLES

Overcoming the conceptual barriers which tend to impede the development of a clearer theoretical understanding of the nature and function of law and sorcery in Papua New Guinea today—and thus to inhibit a more constructive approach to the practical problems which sorcery is seen to pose for the law—requires the adoption of an analytical perspective from which a proper account of the prevailing constructs of Melanesian social reality may be taken. The adoption of such a perspective involves considerably more than simply recognising the difference between what has been described as the 'internal' and 'external' approaches to the study of legal phenomena in different, supposedly 'simple' societies, although a refined understanding of that difference is certainly

\textsuperscript{54} See note 45 above.

\textsuperscript{55} Coval and Smith, \textit{Law and its Presuppositions}, p. 32.

\textsuperscript{56} \textit{Ibid.}
More, too, is involved than merely acknowledging the existence of a multiplicity of legal ideas, institutions and 'systems', as these may be identified and their operations described in relation to the multitude of cultures and societies in which they are found; and more still is required than the development of a sensitive appreciation for the multiplexity of law's functions and concerns even within a single society.58

Beyond a necessary theoretical (and hence, methodological) acceptance of the plurality of law, there must also be an underlying acceptance of, and an abiding commitment to, a dynamic concept of legal pluralism, if analysis in relation to the problems of law and sorcery in Papua New Guinea today is to be meaningful and if proposals for responsive action are to be constructive.59 The nature and

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The external approach may be manifested in a number of ways. At its most extreme it takes the form of the application to the society under investigation of a theory of law formulated in the context of a different society or culture. But it may take less overt forms; an investigator after describing the social life of a people may use a criterion not recognised by the people themselves to [amongst other things] divide the legal from the non-legal. The internal approach is adopted where an investigator, working without preconceptions, attempts to discover the classifications which members of the society use in applying normative notions to behaviour.


['T']he phrase reminds us that there are many and different legal systems, legal arrangements, legal customs and legal 'cultures' in the world, and that they may and do conflict with each
dimensions of the particular pluralist perspective advocated here are developed in
detail and explored at some length in Chapter Seven. At this point, however, it is
important to recognise that its adoption involves something in the nature of an
'ideological commitment', as a precondition to which one must be prepared to
accept and predicate upon—not merely to acknowledge and accommodate where
it is convenient to do so—three general propositions.

First, it must be understood that every operative conception of reality is a
social construction, the contours and content of which may shift and change in
accordance with the prevailing terms of an amorphous popular consensus.
Secondly, the specific content of such a construction must be recognised as
consisting essentially in the products of culturally derived assumptions about the
other. [‘China and Legal Pluralism’ in Sack and Minchin,
Legal Pluralism, p. 29.]

June Starr and Jane Collier endorse what they see as a rejection of the term, because they
believe it implies a sense of ‘equality’ in the arrangement of relations amongst different legal
orders which belies the actual (and, in their view, invariably) hierarchical status of those relations.
Legal pluralism, they argue—

misrepresents the asymmetrical power relations that inhere in
the coexistence of multiple legal orders. Various legal
systems may coexist, as occurs in many colonial and post
colonial states, but the legal orders are hardly equal.
[‘Introduction: Dialogues in Legal Anthropology’ in History
and Power in the Study of Law: New Directions in Legal
Anthropology (Ithaca and London: Cornell University

Legal pluralism is more than the acceptance of the plurality of
law; it sees this plurality as a positive force to be utilised—and
controlled—rather than eliminated. Legal pluralism thus
involves an ideological commitment.

Whilst the broad and relatively uncontroversial definition Professor Tay offers adequately
captures the more generally accepted meaning of the term 'legal pluralism', because it is narrower
and, in that sense, more precise, Sack's definition provides what I regard as a more appropriate
point of analytical departure. More importantly, Sack's definition frankly embraces a distinct set
of political sentiments that are quite different to those which Starr and Collier suggest the term
necessarily imports, and which, mutatis mutandis, are demonstrably more pertinent to the political
and legal circumstances of contemporary Papua New Guinea.
nature of the real world and culturally mediated predilections for particular forms of human action that are consistent with those assumptions. And thirdly, the parameters in accordance with which particular beliefs and behaviour are determinatively characterised for jural purposes must—or, at any rate, ought to—be regarded as reflections of the prevailing presumptions and predilections of the culture and society in which those characterisations are determinatively operative.

The ideological implications of the last-mentioned proposition notwithstanding, it does not seem to me that there is anything inherent in the adoption of such a perspective that is fundamentally inimical to a modern Western Weltanschauung or at radical odds with the actual processes of modern Western law. It can hardly be called novel—prefigured, as it was, in the proto-anthropological political philosophy of Montesquieu, and instantiated in his now classic observation cum exhortation that 'the political and civil laws of each nation should be . . . so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.' Indeed, perhaps the greatest, if greatly under-valued, virtue of the common law tradition lies in the

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In Australia certainly, the point has not been lost on the High Court, which in recent years has played an increasingly active role in the articulation of a distinctively Australian jurisprudence. See M. Ellinghaus, A. Bradbrook and A. Duggan, eds., *The Emergence of Australian Law* (Sydney: Butterworths, 1989), x. The High Court's decision in *Mabo v Queensland* (1992) 107 ALR 1 is only the most recent, if an exceptionally controversial, example. For an extensive discussion and analysis of other indicative examples the several essays collected in Ellinghaus, Bradbrook and Duggan, *The Emergence of Australian Law*. As we have seen, the Chief Justice himself has played an especially active role in the acknowledgement of the demonstrably cultural bases of an emerging, distinctively Australian jurisprudence. See Sir Anthony Mason, 'Changing the Law in a Changing Society' (1993) 67 *Australian Law Journal* 568-574. See also D. Wood, 'Adjudication and Community Values: Sir Anthony Mason's Recommendations' in Ellinghaus, Bradbrook and Duggan, *The Emergence of Australian*, pp. 89-103.
remarkable capacity of that tradition to adjust and adapt to the disparate and changing cultural values of the disparate societies and cultures in which it operates. 63

At a conceptual level, the transcending ideas of 'legal pluralism' and, to a lesser extent, the transcendent ideals of 'cultural relativism', have in fact achieved widespread acceptance amongst a considerable and increasing number of contemporary Western legal scholars and jurists—including those who, on patently moral or ideological grounds, feel obliged to reject some of the practical implications of the application of those ideas in particular circumstances. 64 It is at the underlying cultural level, however, that the real difficulties associated with determinative jural characterisations of sorcery-related beliefs and behaviour arise. Unless those difficulties are understood and addressed at that level, the essential nature of the problem of law and sorcery will remain obscure, and viable approaches to its practical resolution will remain elusive.


64 See e.g. K. Brennan, ‘The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study’ (1989) 7(3) Law & Inequality 367-398. In Australia, unsettled debate about the nature and direction of determinative socio-legal characterisations (judicial and otherwise) of all manner of beliefs and behaviour appears to have less to do with either the recognition or acceptance of the fact that those determinations and determinative processes involve the expression and manifestation of essentially cultural values, than with the precise dimensions of those values and the extent to they ‘ought to be modified’—if, indeed, they ought to be modified at all—in response to the increasing cultural diversity of contemporary Australian society. See G. Bird, The Process of Law in Australia: Intercultural Perspectives, 2nd ed. (Sydney: Butterworths, 1993), p. 460. See also Australian Law Reform Commission, Multiculturalism and the Law, Report No. 57 (Canberra: AGPS, 1992), p. 9.
4. THE PERSISTENCE OF CULTURAL PREDILECTION IN THE DESCRIPTION AND ANALYSIS OF SORCERY-RELATED BELIEFS AND PRACTICES

To the extent that salient aspects of social reality are constructed along dimensions of culturally derived significance, social phenomena of all kinds will necessarily assume such significance—or may be denied significance altogether—as a consequence of the meaning ascribed to them on culturally determined bases. Judicial reasoning is, to say the least, "heavily conditioned by culture, and consequently is itself a culturally relative phenomenon." Thus, to the extent that the operative concepts and conceptions of Melanesian sorcery which inform the processes whereby jurally determinative characterisations of sorcery-related beliefs and behaviour are carried out are themselves recognised as the products of decidedly Western constructions of social reality, those determinative processes, and the dispositions to which they give rise, will necessarily reflect decidedly Western cultural predilections.

For the purposes of theoretical jurisprudence and practical judicial decision-making alike, the informing ideas and experiences that are brought to bear upon the processes by which the sorcery-related beliefs and practices of indigenous Melanesians are given determinative legal significance are, like the law itself, the products of distinctively Western cultural assumptions about the nature of reality as a transcendent concept, and the qualitative dynamics of human affairs as they are conducted within parameters of particular conceptions of social reality. With syllogistic simplicity, this proposition encapsulates the *problematique* of law and sorcery in Papua New Guinea today. For whereas the vast majority of indigenous Papua New Guineans recognise the existence of, and attribute a particular order of

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culturally derived significance to, the ideas and beliefs associated with sorcery and witchcraft, and whilst that recognition and attribution of significance is duly reflected in the *jurally* determinative characterisations of behaviour associated with those ideas and beliefs *in terms demonstrably appropriate to contemporary Melanesian culture and society*, the law of the State of Papua New Guinea is seen to operate to deny the existence of the phenomena on which sorcery-related ideas and beliefs are based, and to characterise those ideas, beliefs and the behaviour associated with them on equally determinative *judicial* bases that are *consistent with the parameters of Western, rather than Melanesian, constructions of social reality*.

As a consequence, where ignorance, prejudice or abject bigotry may have informed the jurally determinative processes of legal characterisation in the colonial past, those processes and their outcomes tended, almost inevitably, to reflect distinctively Western (and peculiarly Anglo-Australian) varieties of ignorance, prejudice and bigotry. Just as inevitably, however, where ignorance, prejudice and bigotry have since been supplanted by new knowledge, wider experience, greater understanding and what might be described as an attendant wisdom, it remains nonetheless a distinctively Western kind of knowledge, experience, understanding and wisdom—burdened and buoyed by the ideas and ideals of peculiarly Western (and decidedly Anglo-Australian) ethics, morality and social philosophy that underlie the purportedly universalist teachings of modern anthropology, sociology, psychology, economics, history and political science—which are now brought to bear upon the determinative processes of legal
and judicial decision-making. In so many respects so much has changed; and yet, in this fundamental sense, so much remains the same.

5. CRITICAL CIRCUMSPECTION IN THE EVALUATION OF THE LITERATURE OF SORCERY AND WITCHCRAFT

The literature of witchcraft and sorcery is said to be 'understandably rich' largely on account of Western society's emancipation from those systems of beliefs and their associated practices. As 'primitive' ideas and phenomena, singularly bespeaking 'the most bizarre and exotic aspect of native life,' sorcery and witchcraft have consistently attracted a disproportionate share of scholarly and popular attention alike. And in both instances, this focused attention appears to be based on the assumption that such beliefs and practices are demonstrably indicative of the profound differences between contemporary native cultures and societies and our own, on the one hand, and comparable measures of difference between the regnant beliefs and practices of modern Western society and those which prevailed amongst our forbears at the close of the medieval period, on the other.

66 This is not to adopt or advance a thesis built upon the kind of epistemological relativism Melford Spiro so effectively criticises in his article, 'Cultural Relativism and the Future of Anthropology (1986) 1(3) Cultural Anthropology 259-286. Mine is not an argument intended to appeal to the unreconstructed cultural determinist, and there is nothing in my suggestion that 'distinctively' Western—or 'peculiarly' Anglo-Australian—norms and values (jural or otherwise) might not share something, and perhaps a great deal, in common with the norms and values attaching to similar beliefs, attitudes and behaviour as these occur in other cultures and societies (including, in this case, Melanesian cultures and societies).


68 Ibid.

69 It was only until the close of the medieval period that 'European beliefs in witchcraft and sorcery seem to have had much in common with those prevailing among present-day non-literate peoples.' Ibid., p. 14. As we shall see, the witchcraft and sorcery beliefs which preoccupied British and continental European societies between the fifteenth and early eighteenth century are
From a contemporary Western perspective then, the sorcery beliefs and practices of native peoples are said to be intrinsically interesting because 'they represent the standardized delusions of the societies concerned,' and thus effectively serve to sharpen the reassuring assumptions of difference that separate our own modern, scientifically enlightened and eminently rational society from those primitive, pre-scientific, irrational others. From the same implicitly comparative perspective, sorcery beliefs and practices become important objects of scholarly study 'because of the light they throw on human behaviour in general, including that of ourselves among whom they no longer command credence.'

Emblematising significant indicia of the structure and values of the societies involved, the comparative study of sorcery and witchcraft beliefs 'is not merely an antiquarian exercise but one of the keys to the understanding of society simpliciter.'

Before unpacking some of the fundamental propositions upon which modern scholarly descriptions and analyses of sorcery and witchcraft generally predicate, and before examining more closely the theories and paradigmatic explanations that have been built upon those propositions and applied, mutatis mutandis, in particular Melanesian contexts, it will be instructive to reflect for a moment on the way in which conventional scholarly treatments of the subject presumptively (and, I would suggest, presumptuously) dismiss sorcery and witchcraft beliefs as irrational, unscientific or, more presumptuously still, pre-scientific. Such said to have been of a different order to that of the earlier periods, when their features shared much in common with the beliefs and practices of contemporary Melanesian and African societies.

70 Marwick, *Witchcraft and Sorcery*, p. 16.

71 Monica Hunter Wilson, 'Witch Beliefs and Social Structure' (1951) 56(4) *American Journal of Sociology* 307, 313.

72 Political rectitude in scholarly discourse has done away with the once-common adjectival appellations of 'native' and 'primitive' society, only to replace them with euphemisms of what
dismissals may be patent and overt: as, for example, in Goldthorpe's introductory sociology text where, 'from the standpoint of science,' the injurious acts of sorcerers are regarded as 'quite ineffectual', the powers attributed to witches are described as 'imaginary' and witchcraft accusations are likewise characterised as 'of course . . . empty accusation[s].' More usually, however, preliminary assumptions of irrationality are implicit in the very method of descriptive representation itself, whereby purportedly objective depictions of the sorcery-related beliefs and behaviour of other societies and cultures, as well as those of Western society at an earlier time (and including sub-groups within Western societies today), are cast in the unprepossessingly neutral terms of difference.

Subtly, and without necessarily conscious intention, the latter, more commonplace expressions of experiential difference operate to distance the rational observer from the irrational objects and subjects of his or her scrutiny. In the spirit of what Roland Barthes described as the 'zero-degree writing' to which all scientific discourse aspires, rational, objective ethnographic scholarship necessarily eschews both the endorsement and the rejection of the irrational beliefs it seeks to describe; although no credible ethnographer would frankly acknowledge the real existence of phenomena which, on rational grounds, cannot be real. To adumbrate illustrative occurrences in the ethnographic literature would be otiose since, as a genre, that literature consists, in the main, of

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descriptions of what they believe and representations of their beliefs from the detached, implicitly privileged perspective of a rational ethnographic analysis. It is a literature in which the anthropologist's scholarly authority, deployed 'heuristically, as a tactic' and often disguising, rather than rising above, the crudities of an earlier, abject ethnocentrism, continues to belie the equally persuasive and equally fictive (if, perhaps, rather less invidious) crypto-ethnocentrism of modern anthropological scholarship.

In a probing exegesis of the ethnographic method and genre, Paul Atkinson casts a critically discerning eye on the tension which lies at the very heart of the

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76 R. Paine, 'Our Authorial Authority' (1990) 9(2) Culture 35 at 39. The evolutionist Frazerian anthropology of the late-nineteenth century, Paine writes, was (p. 36):

devoted to the detection of savagery that once underlay our now civilized society. . . . There is simple ethnocentrism of the white supremacist variety. For the post-Darwinian, Victorian reading public Frazer's message was comforting: not only was it more of men than of apes, but it justified 'the white man's burden.' It was widely read. [Citation omitted]

ethnographic enterprise, namely, 'the contrast between the "self" of the observer and the "other" of the observed.'

Whether or not 'strangeness' is thrust on the observer through an encounter with the exotic, or is achieved through imaginative bracketing of the familiar and the mundane, the confrontation of the self with the other is fundamental. The object of ethnography, Atkinson argues, is 'to persuade the reader of the existence of the world so represented and of the reasonableness of the account itself.' In the end, our rational accounts of others' irrational beliefs and behaviour implicitly, albeit unequivocally, invite a sympathetic endorsement of the descriptive and analytical verisimilitude of those accounts.

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78 The Ethnographic Imagination: Textual Constructions of Reality (London: Routledge, 1990), p. 157. Although Atkinson's critique deals explicitly with ethnographic work in sociology, its relevance and application to all ethnographic work (and indeed, to all forms of modern scholarly writing) is readily apparent and duly acknowledged by the author himself. Idem, pp. 1-9, 25-28 passim.

79 Ibid. See also M. Herzfield, 'Looking Both Ways: The Ethnographer in the Text' (1983) 46(2-4) Semiotica 151-166, who describes this tension in the following terms (p. 151):

The ethnographer's marginality is not simply a passive structural anomaly or a safe perch on the cultural fence; most of the time, the ethnographer is either an insider or an outsider. But—and this is the real crux of the matter—no ethnographer can ever claim to have been one or the other in an absolute sense. The very fact of negotiating one's status in the community precludes any such possibility. Anthropologists have to learn to adapt to events in which they themselves are significant actors. This creates a sense of imperfect closure every bit as disconcerting for us as taxonomic anomalies in a symbolic system.

80 Atkinson, The Ethnographic Imagination, p. 62 (emphasis supplied).

81 Ibid., p. 56. 'The plausibility of a text—of whatever genre—is referred to as its vraisemblance.' Drawing largely on Todorov's explication of the complexity of vraisemblance, Atkinson describes the various layers in which it may appear in ethnographic, amongst other persuasive texts, thus (p. 39):

First, there is the relation between the given text and 'public opinion'; second, there is the text's degree of correspondence to the expectations or conventions of a given genre; third, there is the extent to which the text masks its own textual
In effect, ethnographers actively, if unconsciously, 'construct "descriptions" which warrant the plausible, factual nature of their accounts. Thus, the ostensibly neutral ethnographic account may be seen to reflect something quite different to, and considerably more than, 'mere descriptive writing (whatever "mere" description might connote). Contained, if not deliberately secreted, within the descriptive ethnography is the implicitly evaluative analytic message of anthropology.

In other words, when we talk of the role of 'understanding' or 'interpretation' in interpretative, qualitative studies, we are often dealing with something other than or additional to explicitly stated propositions. Often, the argument is conveyed at a more implicit level, through the very textual organization of accounts: in the way we select and write descriptions, narratives and so on; how we organize texts in thematic elements; how we draw upon metaphorical and metonymic uses of language; how, if at all, we shift point of view, and so on.

Where ethnographers purport to represent societies 'objectively' as comprised of people who, amongst other things, hold irrational beliefs in irreal phenomena, their descriptions of those beliefs and phenomena implicitly project a potently evaluative—and an implicitly devaluing—characterisation of the beliefs described which goes beyond any explicitly evaluative explanation of them. This tacit,

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82 Ibid.
83 Ibid.
84 Ibid.
epistemologically 'devaluing' characterisation of ideas and beliefs as 'irrational' does not necessarily involve authorial assertions of ethnocentric superiority.\textsuperscript{85} The point is, however, that even those scholarly accounts of sorcery and witchcraft which may be regarded as 'primarily descriptive' of irrational ideas and phenomena must necessarily be grounded in rationally based theoretical assumptions in order to render them 'intelligible when viewed from some other society such as our own.'\textsuperscript{86}

Atkinson insists that a critical assessment of the textual devices employed by ethnographers, amongst other scholars, who sincerely endeavour to describe 'exotic' social phenomena and the parameters of the social reality in which those phenomena occur on genuinely objective bases, does not necessarily compromise the credibility and status of ethnographic scholarship: 'It would be all too easy ... to assume that "literary" or "rhetorical" forms and values were incompatible with "science".'\textsuperscript{87} Rather, he argues:

A recognition of the rhetorical forms that run through all scholarly and scientific discourse can only strengthen the awareness and discipline of our academic endeavours.\textsuperscript{88}

That such a critical awareness need not necessarily undermine the value of empirical research I do not doubt; although I am somewhat less certain than Atkinson seems to be that the development of greater vigour and productivity

\textsuperscript{85} Indeed, as Brown suggests, differing modes of descriptive ethnographic authority may be adopted, depending upon a whole host of motivational considerations and ranging along a continuum from 'superiority' through 'equality' to 'inferiority', without compromising the ethnographer's underlying fidelity to rational analysis. See R.H. Brown, \textit{A Poetic for Sociology} (Cambridge: Cambridge University Press, 1977), pp. 52-60.

\textsuperscript{86} Marwick, \textit{Witchcraft and Sorcery}, p. 16 (emphasis supplied).

\textsuperscript{87} \textit{The Ethnographic Imagination}, p. 1.

\textsuperscript{88} \textit{Ibid.}
within the field is incumbent upon an expansion of ethnography's 'systematic self-understanding of contemporary society' to encompass the 'processes and products' of the genre itself. The quest for a redemptively reflexive self-consciousness amongst anthropologists that has been engendered by well more than a decade of probing, introspective analyses certainly cannot, or at least cannot yet, be said to have redounded to the manifest advantage of the ethnographic genre. Indeed, for a great many anthropologists the consequences of that exercise seem rather to have involved a descent into obsessive narcissism, naked cynicism, intellectual paralysis and an ineluctable ennui.

Real, important and dauntingly problematic though the vicissitudes of contemporary anthropology's intellectual and ideological struggle to come to terms with itself (and with the ethnographic projects it continues to countenance) may be, and however disconcerting that experiential reality may be for the modern anthropologist abroad in a post-modern world, my principal concerns here are with the equally real, equally important and no less problematic implications of sorcery-related beliefs and practices in Papua New Guinea for the progressive

89 Ibid., p. 181.

90 I see little in Atkinson's buoyant optimism to insulate the self-consciously reflexive ethnographer from what Laura Nader has described as a kind of 'process fetishism'. 'Post-Interpretive Anthropology' (1988) 61(4) Anthropological Quarterly 149 at 153.

refinement of modern law, the enhancement of judicial ratiocination, the
development of a more circumspect jurisprudence—and the constructive
contribution empirical ethnographic research and anthropological analysis can
make towards the achievement of those objectives. Thus, in so far as the kinds of
ideas and explanations explored in the following chapters\textsuperscript{92} can usefully serve to
elucidate the mechanisms by which sorcery-related beliefs and practices are
jurisprudentially and judicially characterised, it is in relation to that rather more
narrowly focused interest that a critical awareness of the latent, if nonetheless
persuasive, fictions implicit in all of the relevant scholarly discourses becomes
particularly important.

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In the end, all that Western anthropologists and socio-legal scholars may know
and understand about Melanesian sorcery beliefs and practices must necessarily be
viewed through the lens of Western culture. The inherent capacity of that cultural
lens to resolve those ideas and phenomena with a measure of descriptive clarity,
accuracy, precision and objectivity is not called into question here.\textsuperscript{93} It is
crucially important to realise, however, that the processes of judicial decision-
making do not even pretend to attain to that level socio-cultural knowledge and
understanding. The undisguised purpose of judicial decision-making is to pass
judgement according to law. By design, the process is morally evaluative, its
products deliberately and decidedly normative. In both respects, however, the

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\textsuperscript{92} Chapters Three and Four.

\textsuperscript{93} Which is not to say that capacity is, in any sense, beyond question. See Chapter Seven.
criteria are essentially and fundamentally Western. More to the point, even the objective empirical data, which purport merely to describe a whole host of "irrational" beliefs and behaviour on objective bases (and this with a view to informing rational judgements of all kinds), have themselves been marshalled and arrayed in the interstices of an epistemological framework that is culturally constructed.

In the context of academic discourse, a relatively wide berth may properly be given to discussion and debate about the nature and implications of the cultural predilections inherent in such descriptive enterprises, and the extent to which the effects of this implicit tendentiousness might (or might not) be amenable to internal correction. It is in the nature of intellectual discourse—and this is particularly so in respect of the social sciences—to propound tenable theories as opposed to determinative judgements, and tentative theoretical propositions, based upon qualified assertions and cautiously guarded conclusions, are generally considered to be the more responsible. Indicatively, Michele Stephen characterises the anthropological essays collected in her edited volume on Melanesian sorcery and witchcraft as offering neither more nor less than 'a contribution to an existing debate' which 'cannot pretend to be the final word, nor

94 I have no intention of entering here into a general discussion of the moral and ethical foundations of law or the eminently normative functions of judicial decision-making. Acknowledging the philosophical contentiousness of the proposition, however, I hold firmly with the view that the determinative connections between morality, ethics and law are palpable and profound. See F.S. Cohen, Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism (1933; rpt Ithaca: Cornell University Press, 1959).

claim to have tackled all the relevant issues', because no 'single volume can do justice to the diversity of Melanesia'.

The task of rethinking our way through the conceptual categories and explanatory models that have been applied to Melanesian sorcery and witchcraft has only begun. We hope, however, by placing the problem in clearer perspective, and in providing new data and interpretations, that this book will serve to stimulate further debate, and point to some new directions for future research.

As said, however, the distinguishing feature of judicial decision-making is the determinative act of rendering a decision. In the process, assertions as to the veracity of facts are necessarily advanced with conviction and, at least in theory, with some semblance of ingenuousness. Conclusions are necessarily drawn with certainty; and judgements, by their nature, must ultimately be final. Faced with the same inadequacies in the quantity and quality of the information available to them, and confronted with the same human fallibilities in their capacity to evaluate and interpret the 'data' upon which they are obliged to rely, neither judges nor lawyers enjoy the scholar's luxury of putting off for another day—or avoiding altogether—the determinative characterisation of certain beliefs, ideas and behaviour.

Judges are obliged to act decisively. What is more, they must do so in circumstances calculated to affect the course of people's lives in serious, significant and often irreversible ways. Therefore, if judicial decision-making in respect of issues involving sorcery-related beliefs and behaviour in Papua New Guinea is to be based on a circumspect understanding of those beliefs and behaviour informed by the best available data and analyses, it is imperative that a

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97 Ibid.
jurisprudential assessment of that information look beyond the trepidations and 
the polemics which serve, at once, to constrain and to fuel the academic debates in 
the context of which modern scholarly descriptions and explanations of sorcery 
beliefs and practices have been, and continue to be, formulated.

In this, I own, the responsibility falls to bench and bar alike. In the first 
instance, perhaps even more so to the latter than the former, since lawyers 
constitute the 'social institution, intermediate between the courts and the larger 
society, to which the courts are structured to be directly responsive.' 

The courts are not obliged to follow the profession, but they 
are obliged to be responsive to what the profession has to say. 
This obligation entails that the courts attend to the professional 
discourse and stand ready either to modify their views when 
that discourse is convincing or to give good reason showing 
why it is not convincing.

With respect to the development of both a theoretical and a practical 
jurisprudence that takes due account of the force and effect of culture in relation to 
the nature and function of law, informed scholarly descriptions and explanations 
of sorcery, amongst other 'traditional' social beliefs and practices, have long 
provided the raw materials out of which the relevant legal discourses are 
fabricated. In advocating a critical contemplation of those materials generally,

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99 Ibid. This, Eisenberg explains, 'serves as the basis of a critical feedback mechanism and 
enhances the courts' legitimacy by providing a mechanism of judicial accountability.'

100 Anthropological contributions in this respect touch upon virtually every substantive 
concept with which conventional Western legal thought has been, and continues to be, concerned. 
See generally Lloyd and Freeman, Lloyd's Introduction to Jurisprudence, pp. 873-880. And see 
also H. Cairns, 'Law and Anthropology' (1931) 31(1) Columbia Law Review 32-55; E.A. Hoebel, 
and Legal Anthropology: The Roles of Theory and Method Revisited' (1979) 12 Comparative 
& International Law Journal of South Africa 188-198; Koch, K-F., 'Law and Anthropology: Notes 
on Interdisciplinary Research' (1969) 4(1) Law & Society Review 11-27; P. Lawrence, 'Law and 
Riesman, 'Toward an Anthropological Science of Law and the Legal Profession' (1951) 57(2)
and with reference to Melanesia more particularly, my intention here is not so much to cast doubt on the substantive accuracy of the data upon which relevant descriptions are based, as to draw critical attention to the intrinsically evaluative quality of those descriptions and the explanatory analyses built upon and around them.

To make this distinction and to embrace such an unreservedly self-conscious perspective, even in relation to the ostensibly objective reportage of the field ethnographer or cultural historian, is crucial—if for no other reason then because, for the purposes of jurally determinative characterisations of sorcery-related beliefs and practices in Papua New Guinea today, that determinatively evaluative function is ultimately and pre-eminently a judicial task. It is, moreover, a task that is no more properly or safely abrogated in deference to 'true' science and scholarship than it might be made captive to the once self-satisfied assumptions about Western society's monopoly on 'true' religion.101

Chapter Three

PROLEGOMENA TO
THE DESCRIPTION AND ANALYSIS
OF MELANESIAN SORCERY (II)

The anthropologist seeks his subjects in a harsh light. Traditionally, he has studied them in raw environments, undiluted by the domestication of civilization. And wherever he studies, he participates in the nitty-gritty—daily habits, from excretion to copulation, birth to death, as these are revealed in close contact rather than veiled through the myths and refinements of high culture.

Anthropology also favors a soft focus, in a certain sense. Lest they perceive too sharply any object while missing its place in context, anthropologists peer broadly, trying to glimpse foreground and background all at once. Aware that any object, any act is a convergence of myriad forces, they endeavor to capture the whole field, necessarily sacrificing precision of focus for breadth of vision.

1. WESTERN REPRESENTATIONS
OF SORCERY AND WITCHCRAFT BELIEFS

Since the beginning of this century, the task of describing and analysing the nature and dynamics of cultural and social life amongst native, tribal and other indigenous, generally non-western, peoples has come to fall increasingly within the province of cultural or, more narrowly, social anthropology. ¹ As a


² See generally A. Kuper, Anthropology and Anthropologists: The Modern British School, rev. ed. (London: Routledge & Kegan Paul, 1983); J.J. Honigmann, The Development of Anthropological Ideas (Homewood, IL: Dorsey Press, 1976); M. Fried, The Study of Anthropology (New York: Thomas Y. Crowell Company, 1972); S. Tax, ed., Horizons of Anthropology (Chicago: Aldine Publishing Company, 1964). The terms cultural anthropology and social anthropology are often used interchangeably (see, e.g., L. Mair, An Introduction to Social Anthropology, 2nd ed. (Oxford: Oxford University Press, 1972), p. 1), and sometimes merely to differentiate between American and British academic institutional traditions, respectively. However, a substantive distinction may be drawn between 'cultural anthropology', as concerned more broadly with human customs: 'that is, the comparative study of cultures and societies', and 'social anthropology', the latter of which 'has increasingly taken as its central problem the search
consequence of this intellectual division of labour, and the academic cleavages to which it has given rise, empirical, theoretical and interpretative research focusing on the beliefs and behaviours associated with sorcery, witchcraft and magic in the context of such cultures and societies is today almost exclusively the prerogative of social anthropologists and ethnographers. In the main, therefore, the scholarly literature dealing with the sorcery-related beliefs and practices of the indigenous peoples of Melanesia consists in the products of social anthropological and ethnographic research, and it is to that circumscribed body of literature in particular that we must turn in order to acquire a meaningful and relevant appreciation for the origins, nature and dynamics of those beliefs and practices.

In light of the issues raised in the preceding chapter, however, a circumspect application of the ideas and explanations represented in the relevant anthropological and ethnographic literature requires that we regard that body of literature critically. As suggested above, the adoption of such a critical perspective means recognising that, whilst it is the anthropological literature for generalizations and theories about human social behavior and cultures. R. Keesing, *Cultural Anthropology: A Contemporary Perspective*, 2nd ed (New York: Holt, Rinehart and Winston, 1981), pp. 2-3. As it is with this narrower range of social anthropology, and the work product of ethnographers working with that intellectual tradition, that I am principally concerned here, unless the context otherwise requires, that is the expression I will use throughout the text.


which best serves to inform the basis on which Melanesian sorcery-related beliefs and practices (and such conduct as can be seen to be contingent upon those beliefs and practices) may be described and understood, the anthropological formulations are themselves reflections of a set of understandings and experiences that are decidedly non-Melanesian. What must also be borne in mind are the very different purposes and objects served by anthropological characterisations of those beliefs, practices and contingent behaviours, on the one hand, and their determinatively jural characterisations, on the other.\(^5\)

At the outset, however, it seems to me that the purposes of such a critical scrutiny in respect of the kinds of issues with which we are particularly concerned here may be further served by locating the anthropological literature and the ideas and phenomena of which that literature treats, in a larger historical and intellectual context. Nothing so grand as a comprehensive analytical historiography of the ideas that have been brought to bear on the formulation of Western conceptions and constructs of sorcery and witchcraft can be attempted here. Nevertheless, the literature in which these ideas have been expressed can be organised in such a fashion as to provide a useful backdrop against which our understanding of the ideas that have shaped those concepts and constructs can be sharpened, and in so

\(^5\) John Ellard makes a similar point with respect to psychiatric and jural characterisations human behaviour in 'Some Notes on Non-insane Automatism and the Will' (1995) 69 Australian Law Journal 833-840:

To fulfil its functions the law must develop a vocabulary with which to describe human behaviour and categories within which to locate those descriptions. Psychiatrists pursue the same goals but are not driven by the same imperatives. They can be more comfortable with the uncertainties of dimensions rather than the apparent reality of categories. \[Ibid., p. 833\]

In this connection, Ellard observes, judges, who must decide cases in which psychiatric evidence is introduced to inform the process whereby certain conduct is to be jurally characterised, have a rather more difficult task than the psychiatrists providing that evidence, since judges are 'responsible for applying the rules which govern society . . . [and] must come to a final determination in each case, no matter how subtle and complex the issues may be.' \[Ibid.\]
doing, to shed an instructive light on the continuing utility and propriety of their application in the context of a distinctively jural analysis.

2. CREDULOUS AND CRITICAL REPRESENTATIONS OF SORCERY AND WITCHCRAFT BELIEFS

The entire body of Western literature concerned with sorcery, witchcraft and magic may be classified broadly into two mutually exclusive categories on the basis of the fundamental assumptions underlying the epistemological perspective and approach adopted in the consideration of such beliefs and practices. The first of these categories embraces what may be described as credulous representations, on account of the unifying feature of credulity shared amongst its exemplars. The second category comprises what may be described as critical representations, which are characterised by an approach to witchcraft and sorcery from a position of incredulity, invariably coupled with a critical component ranging from guarded scepticism to outright rejection.

Virtually all of the modern scholarly literature falls within the second category. This is predictable enough, given the rationalist dictates of modern scholarly discourse, and the preclusive irrationality that discourse necessarily ascribes to the purported legitimisation of belief in the real existence of patently 'supernatural' phenomena. As said, it is on the anthropological contributions to the scholarly critical literature that this consideration of Melanesian sorcery beliefs and practices principally relies. Yet the influence of a credulous ideology on the construction of contemporary Western conceptions of social reality—and in

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6 Although my examination has been limited to literature appearing in the English language (originally and, in some cases, in translation), historiographic assessments contemplating original works in Greek, Latin, French, Italian, Spanish and Russian provide assessments that are essentially consistent with this division. See E.W. Monter, 'The Historiography of European Witchcraft: Progress and Prospects' (1972) 2(4) Journal of Interdisciplinary History 435-451.
consequence, on the premeditations of modern Western thought respecting the jural characterisation of witchcraft and sorcery—has been such that certain strains of the credulous literature cannot be dismissed *tout court*.

**A. Credulous Representations**

The common thread which draws the otherwise disparate elements of this genre in the literature together is the underlying premise of credulity. In every exemplary instance, credulous considerations of witchcraft, sorcery and related beliefs and practices may thus be seen to predicate on the assumption (express or implied) that *the phenomena themselves are real and significant*, occurring in actuality within the contours of a mundane social reality the parameters of which are accepted—or purportedly accepted—by the author as veritably authentic on demonstrably factual grounds.\(^7\)

Belief in the reality of sorcery and witchcraft, in the existence of sorcerers and witches and in the potency of their practices, is represented in the credulous literature as being entirely consistent with the broadly accepted epistemological parameters of that reality. Rare or eminently commonplace, events of sorcery or witchcraft are thus regarded as part and parcel of the natural order. Exceptional and even extraordinary, they are in no sense 'supernatural'. So too, the persons or entities responsible for the occurrence of such phenomena (witches, sorcerers, wizards, demons, spirits, and so forth) are understood to co-exist and interact with

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\(^7\) Whether or not a "credulous" author genuinely believes that the ideas and phenomena he or she describes and discusses actually exist and occur in reality is not a question I am capable of answering with certainty. For present purposes, the classification of a piece of literature as 'credulous' reflects only the apparent assumptions and intentions of an author as these are revealed in the text. There may always be some colourable incentive for an author to misrepresent the true nature of his or her beliefs in, or descriptions of, phenomena of any kind; and any critical analysis of the credulous literature would necessarily involve the identification and examination of such motives, should there be reason to suspect their existence. That kind of analysis, however, is not contemplated here.
ordinary human beings, even if some of those persons and entities themselves are
neither ordinary nor, in many cases, entirely 'human'.

For classificatory purposes, the credulous literature may conveniently be
divided into two analytically discrete sub-categories, reflecting the moral,
ideological and otherwise evaluative associations by which variants of their
fundamentally credulous assertions are characterised. The first of these sub­
categories, embracing what may be described as *approbatory* and *advocatory*
representations, need not detain us here, although some general comments are in
order. The second sub-category, embracing what may be described as *
*denunciatory* or *condemnatory* representations, is of greater significance, and thus
deserving of commensurate attention.

(1) Approbatory and Advocatory Representations

*Approbatory* variants of the credulous literature serve to validate belief in the
efficacy of the phenomena of witchcraft and sorcery and to legitimise, on various
bases, the practices by which those phenomena can be made to occur. Overtly, the
intendment of such literature may be merely to describe the technical elements or
procedures involved in the performance of particular acts of witchcraft or sorcery,
and to specify the results a successful performance may be expected to bring
about. Offering mere technical descriptions, however, such treatments oftentimes
provide what amounts to practical 'instruction' in the exercise of special, and
potentially destructive, powers. Whilst the purposeful application of those powers
may be a matter that is left un-addressed (that is, to be determined ultimately by
the practitioner), the preparation and dissemination of such literature, even on a
selective or consciously restricted basis, imports at the very least a qualified approbation of its use.\textsuperscript{8}

Actively \textit{advocatory} variants of the credulous literature move beyond mere approbation, seeking deliberately not only to advance an operational knowledge and understanding of the practical techniques and methods of witchcraft and sorcery, but to explain and elaborate the underlying nature and significance of those practices from an ideological perspective on which basis their employment may be justified. Typically, examples of advocacy literature place a particular set of beliefs about the purposeful practice of sorcery, witchcraft or magic within a larger cosmological framework, the fundamental validity of which is assumed, and in the dynamics of which such practices are seen to play a real and meaningful part. The mechanics of practical application may then be described with a view the furtherance of the underlying purposes they are intended to serve.\textsuperscript{9}

Thus, where approbatory variants of the credulous literature operate to legitimise belief in and, if only passively, to countenance the practice of, witchcraft and sorcery by describing what those powers consist in, how they may be used and to what particular ends they may effectively be applied, advocacy variants actively advance a structured context for those beliefs, specifying in

\textsuperscript{8} A contemporary analogy can be drawn in respect of the many, purportedly amoral, publications which provide readers with detailed instructions on the construction of effective explosive devices or the manufacture of psychedelic drugs. Without delving into the issues of the moral (to say nothing of legal) responsibility attaching to the dissemination of such literature, an author would be hard put to deny that he or she did not intend, or could not expect, that someone would read and follow the proffered instructions and apply the results to some purposeful end. Whilst the author may protest his or her disapproval of the specific objectives to which a particular reader may have applied the information provided, the provision of the information in itself necessarily imports some measure of general approbation, however qualified.

particular ideological terms how, when and where such powers ought (or ought not) to be used, by and against whom, and the reasons why such powers should (or should not) be so employed.

Whilst approbatory and advocatory accounts of sorcery and witchcraft may constitute a small and arcane sub-category within the larger body of credulous literature, this is not to say that such treatments have played an insignificant role in the construction of evolving Western conceptions of social reality. Indeed, examples of both of have enjoyed an enduring currency and influence. Their message has been widely received across all strata of Western society: from classical Greek and Roman civilisations, amongst whose populations a range of witchcraft, sorcery and related beliefs and practices were not only recognised, but often regarded as socially desirable and economically necessary;\(^{10}\) and

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> It was commonly practised by a great variety of people: the priests of specific deities on the one hand, and professional people, such as doctors, on the other. The state itself supported those whose business it was to augur the future or make prognostications for special occasions, and those who, in the public interest, discovered by divination what had happened or what was about to happen. . . . Even the austerest Roman authors included magic formulae for obtaining useful and beneficial results in their work. Treatises on agriculture and medicine and the offices used by priests for certain cults and rites contain collections of spells and obscure writings probably of an invocational nature [references omitted].

consistently, both before and since ancient times throughout the Western world.\[11\]

Even today, if the increasingly crowded shelves of the 'occult' sections in so many book shops provide any indication, credulous literature on sorcery and witchcraft representing both sub-variants of the genre seems to enjoy a remarkable popularity.\[12\]

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12 In the United States, it was reported in 1983 that: 'by the quantitative indices of books published and organizations founded, there can be little doubt that public interest in the occult has grown rapidly since the mid-sixties.' R. Galbreath, 'Explaining Modern Occultism' in *The Occult in America*, ed. H. Kerr and C.L. Crow (Urbana: University of Illinois Press, 1983), 11 at 20. More recently, and with respect to England, Luhrmann documents what she describes as a ballooning interest in sorcery, witchcraft and magic. *Persuasions of the Witch's Craft*, p. 5:

The largest mail order occult store, The Sorcerer's Apprentice, has over 25,000 customers who have placed at least two orders with them over the last thirteen years. Many of these regular customers buy once a month; most, the proprietor said, but at least once a year. The store turns over between 800 and 1000 items each week—books, magical robes, incenses—and employs ten people full time. [Ibid]

Much of this interest, one supposes, may be more indicative of a cynical tendency on the part of disingenuous writers and publishers to exploit the gullibility of a large and growing number of otherwise intelligent, urbane, well-educated and presumably rational members of the modern reading public than an accurate measure of genuine credulity. See e.g., A. Lavers, 'The Darker Side of Darkest Africa', *The Canberra Times* (5 October 1988):

Television reports of a witches' coven or wizards' convention in Canberra recently sounded interesting till the broadcast gave details: it seems that most of the witches were public servants or similarly harmless folk with time on their hands and a yen for drawing pentagrams and dispensing love potions.

(2) Denunciatory or Condemnatory Representations

Far more telling in its effect on Western conceptions of sorcery and witchcraft has been the equally credulous, albeit ideologically inverted, response to the ideas espoused in the approbatory and advocatory literature. Informed by, and embraced within, the prevailing Judeo-Christian cosmological traditions of Western society since at least the fourteenth century, most of the Anglo-European literature which has treated credulously of witchcraft and sorcery was unequivocally denunciatory or condemnatory of such beliefs and practices, and it remains so today. 13

The Old Testament injunction 'Thou shalt not suffer a witch to live' is clear enough in its import; 14 and if the date of the Deuteronomic code given by modern

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13 See K. Thomas, Religion and the Decline of Magic: Studies in Popular Beliefs in Sixteenth- and Seventeenth-Century England (London: Penguin Books Ltd, 1971), pp. 301-332. Before that time, ecclesiastical and popular sentiments alike tended rather to reflect a measure of diffident ambivalence towards sorcery and witchcraft beliefs. Thus, amongst the ancient Greeks and Romans, even where certain harmful practices were condemned, and their practitioners subject to a range of negative social and legal sanctions, a clear distinction was made between 'those with a professional knowledge of maleficent practices and amateurs'; and whilst 'almost anyone' might make use various magical or sorcerous practices 'in moments of violent stress, it was generally felt that they were more usually used by a particular type of person and in very specific circumstances.' Baroja, 'Magic and Religion in the Classical World', p. 74.

14 Ex. 22:18. The condemnation of the 'sorceress' is in the apodictic form in which the Decalogue is written. For the most part sorcery is considered a preoccupation of women (see I
biblical scholars, about 650 B.C., is accepted, even by that time the popular practices of sorcery and witchcraft, 'which had before been esteemed innocent, or regarded as the handmaidens of religion', were increasingly subject to formal condemnation and punishment. 15 Like the Romans and Greeks and the Hebrews before them, 16 the early Church recognised an implicit distinction between the innocuous motives and the sometimes seemingly salutary effects of what was called 'white witchcraft', which was traditionally employed to heal the sick, foretell the future or ensure fecundity, and 'black witchcraft', or maleficium, which relied on similar systems of belief and involved the harnessing of similar forces, but which was employed for harmful and destructive purposes. 17 Whereas an ecclesiastical modus vivendi might have been achieved in respect of the former, toleration of the latter was rather more difficult for the Church to countenance. 18

Characterising witchcraft generally as involving 'the practice of black magic, sorcery, or intercourse with evil spirits or demons in order, through supernatural aid, to accomplish evil of various kinds', contemporary Catholic authorities acknowledge that, until about the sixth century, the Church's position on the

Sam. 28; Jer. 7:18; 44:15). However, sorcerers are also mentioned (see Deut. 18:10; Mal. 3:5). The Interpreter's Bible (New York: Abingdon Press, 1952), vol. I, p. 1006.

15 The Jewish Encyclopedia, vol. 12, p. 545.


existence of witches and sorcerers reflected a kind of ambivalent scepticism, rejecting the substance of many popular and prevalent beliefs as fanciful and mere superstition.¹⁹ Synodal decrees dating back to that time called for the excommunication of magicians, and the active practice of malevolent witchcraft or destructive magic could attract a range of ecclesiastical penalties.²⁰ Even as late as the ninth century, however, doctrinal pronouncements were essentially dismissive of popular belief in such practices.²¹

During the thirteenth and fourteenth centuries, however—a period roughly concurrent with the early development of important aspects of the modern Western legal tradition²²—theological and ecclesiastical perspectives on the existence and nature of sorcery and witchcraft underwent a decided shift.²³ As the


[d]uring the first twelve centuries of the Christian era, ecclesiastical authorities generally doubted the reality of witchcraft or belittled its importance.


²¹ Thus, in his penitential *Corrector et Medicus*, Bishop Burchard of Worms was inclined to characterise 'witches' riding, flying demons, and the ability of witches to turn into animals (e.g., cats and wolves) as superstitious notions.' Ibid. See also S.G.F. Brandon (Gen. Ed.), 'Witchcraft' in *A Dictionary of Comparative Religion* (London: Weidenfield & Nicolson, 1970), p. 650.


²³ This shift was the product of what Berman refers to as the 'new theology... created by the canonists of the eleventh and twelfth centuries,' which came to be reflected in a 'new system of criminal law... which differed substantially from "God's Law"...': *Law and Revolution*, p. 185.

In the earlier period the words 'crime' and 'sin' had been used interchangeably. Generally speaking, not only were all crimes sins but all sins were also crimes. There was not a sharp distinction in underlying nature between offenses to be atoned for by ecclesiastical penance, on the one hand, and offenses to be dealt with by kinship negotiations (or blood feuds), by local or feudal assemblies, or by royal or imperial procedures, on
Scholastic theologians, 'with their insistence on literal acceptance of the Bible, their professed elaborate knowledge of the supernatural world, and their ardent warfare against heresy, returned the belief in witchcraft to respectability and called on church and state to enforce the command, "Thou shalt not suffer a witch to live"... ',24 what had theretofore involved a dismissive, relatively innocuous scepticism turned inexorably to a credulous and virulently condemnatory conviction.

It was only in the late Middle Ages that 'a new element was added to the European concept of witchcraft', which was to distinguish it not only 'from the witch-beliefs of other primitive peoples',25 but from the way in which such beliefs had theretofore been generally regarded from the dominant perspectives of Western society, culture and law. This 'new element' was the notion of the demonic compact, whereby the witch was believed to have been granted a range

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24 Ferm, 'Witchcraft', p. 827.

of malevolent supernatural powers in exchange for his or her promise of allegiance to the devil. From this perspective:\textsuperscript{26}

the essence of witchcraft was not the damage it did to other persons, but its heretical character—devil-worship. Witchcraft had become a Christian heresy, the greatest of all sins, because it involved the renunciation of God and deliberate adherence to his greatest enemy. ... Whether or not the witch injured other people, she deserved to die for her disloyalty to God.\textsuperscript{27}

Examining the cultural foundations of European beliefs in sorcery and witchcraft between the fourteenth and sixteenth centuries,\textsuperscript{28} Richard Kieckhefer has drawn a useful distinction between sorcery, which he defines as involving 'maleficient magical practices'; invocation, which consists in 'calling upon the devil to obtain instruction or execution of one's wishes'; and diabolism, or a 'deliberate worship of the devil, or of demons,' which involves the conclusion of 'a pact in which the devotee submits himself wholly before the devil, accepting him as lord.'\textsuperscript{29} Kieckhefer himself concedes that these analytical distinctions may be overly subtle, and he is unable to cite any evidence of their popular adoption amongst those whose beliefs he essays at length to explore. Significantly, however, it is clear that, in the credulous literature of the learned tradition of the period, the notions were inextricably inter-connected, and that the Scholastic theologians responsible for that literature held firmly to the view that 'in principle


\textsuperscript{27}Thomas, Religion and the Decline of Magic, p. 521.

\textsuperscript{28}European Witch Trials: Their Foundations in Popular and Learned Culture, 1300-1500 (London: Routledge & Kegan Paul, 1976). The geographic scope of Kieckhefer's survey extends to England, the Low Countries, France, Italy, Switzerland and Germany.

\textsuperscript{29}Ibid., 5-6.
both invocation and sorcery were accomplished only thorough alliance with the devil. 30

This bond might take the form of an explicit, deliberate pact, or it might be merely an implicit pact, entered upon through the simple consent of the devotee, without formalities. In either event, it would be through pre-established association with the devil that invocation and sorcery have their effect. 31

Thus, whereas the prevailing Western perspective on the nature and social implications of witchcraft and sorcery up until the fifteenth century had maintained a critical distinction between the beliefs and practices associated with 'white witchcraft', on the one hand, and 'black witchcraft' (or maleficium), on the other, by the beginning of the sixteenth century that distinction had been largely eroded. Ascending in its stead was a third form or style of belief, effectively subsuming the other two, and in which the idea of the demonic pact played a central role. 32

30 Ibid., p. 7.

31 Ibid. Thus, for example,

a man who began by invoking the devil would find himself persuaded to make a submissive pact with Satan, committing him to both diabolism and sorcery; he would receive his magical unguents and powders, along with instructions on how to use them, directly from the devil. [Ibid.]

32 Larner, Witchcraft and Religion, p. 3:

The witch became a witch by virtue of a personal arrangement with the Devil who appeared to his potential recruit in some physical form. At this meeting, in return for renunciation of baptism, services on earth and the soul of the witch at death, the Devil promised material advantages and magical powers. In addition, an integral part of the Christian witch theory was that the witch did not operate alone. Witchcraft involved midnight meetings to worship the Devil, to receive his orders and to have sexual intercourse with him or his subordinate spirits. [Ibid.]
In continental Europe, the agency principally responsible for the introduction of this new concept was the Roman Catholic Church, 'whose intellectuals rapidly built up a large literature of demonology, outlining the manner in which the witches or devil-worshippers were thought to conduct themselves, and laying down the procedure for their prosecution.\textsuperscript{33} To be sure, the association of magical activities of any kind with some sort of illicit relationship with the devil is 'as old as Christianity', and probably older.\textsuperscript{34} The development of what had theretofore tended to be regarded as only a vague, tacit connection with Satan into a new doctrine of heresy grounded in an explicit covenant, however, followed on more directly from two events: the promulgation of the papal bull, \textit{Summis desiderantes affectibus} in 1484, whereby Innocent VIII directed the Inquisition to investigate persons accused of practising witchcraft;\textsuperscript{35} and the publication, two years later, of the \textit{Malleus Maleficarum (Hammer of Witches)}, the notorious forensic manual designed to further that particular inquisitorial purpose.\textsuperscript{36}


\textsuperscript{36} The product of two Dominican Inquisitors, Heinrich Kramer and James Sprenger, The \textit{Malleus} has been described as 'the most important book on demonology ever written. . . .' Robbins, \textit{Encyclopedia of Witchcraft and Demonology}, p. 337. Ben-Yehuda summarises its contents as follows:

The book is divided into three parts. The first section attempts to prove the existence of witches and devils. To be more accurate, this section proves by argumentation (rather than factual demonstration) that those who do not believe in the existence of witches are themselves victims of witchcraft.
The *Malleus* was by no means the only denunciatory theological treatise on sorcery and witchcraft: Jacquier's *Flagellum haereticorum fascinario rum*, which sought to disabuse the faithful of the idea that witches did not exist or that they were not inherently inclined to do evil, preceded it by 30 years.³⁷ Beyond its extraordinary popularity, however—the book was printed fourteen times between 1487 and 1520³⁸—the *Malleus* was singularly significant for its establishment of a 'persuasive causal connection between the *maleficia* of popular sorcery and elements of heresy, through the agency of the Christian devil.'³⁹ As Monter explains:

> The momentous achievement of the *Malleus* was to emphasize the Devil as the common source of both sorcery and heresy more comprehensively than had any of its predecessors—and in such a way as to persuade secular courts and judges to pay increasing attention to witchcraft as a diabolical crime: the *Malleus* managed to join an ecclesiastical crime (heresy) to a secular crime (sorcery) in a uniquely deadly way. In late medieval Europe, witchcraft was already viewed as a *delictum mixti fori*, a crime that could be judged by either lay or church courts, or by both. By stressing the concrete damage of *maleficia*, this book helped accelerate witchcraft's transition from an Inquisitorially defined crime, most of whose horrors were founded in Inquisitors' beliefs about heretics and heretical behavior, into a crime to be normally judged by secular courts.⁴⁰

³⁷ Ben-Yehuda, 'Witchcraft and the Occult as Boundary Maintenance Devices', p. 234.

³⁸ According to Monter, 'far more often than any previous work and most subsequent ones on the subject'. *Witchcraft in France and Switzerland*, p. 24.


In England, of course, there was no Inquisition. By the late-fifteenth century, Roman Law was of little practical importance there, and papal authority was very much reduced. Innocent VIII's bull of 1484 extended only to Germany in any case; and although copies of the *Malleus Maleficarum* did find their way into the libraries of learned Englishmen, the volume was not actually translated into the English language until 1928. In principle, there was no reason why England should have been any less receptive to the kinds of demonological treatises that proliferated throughout continental Europe at the time. Their content, after all, was only 'an extension of ideas latent in early medieval Christian theology', and their common themes would certainly not have been unfamiliar to the late Anglo-Saxons. Yet 'medieval England does seem to have been largely isolated from the intellectual and judicial trends which encouraged witch persecution on the Continent.'

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During the early to mid-sixteenth century, when much of Europe is often characterised as writhing in the throes of an unmitigated 'witch mania', England is said to have remained something of a 'special case', principally on account of its geographic, cultural, religious and legal separation from the European mainland. By the later Elizabethan period, when Protestant writers in England (and rather more so, in Scotland) had begun to take up many of the arguments, explanations and zeal which had fuelled the dissemination of European concepts of witchcraft in the preceding decades, 'the influence of these new ideas upon the people at large was only partial.'

In England, where most demonological treatises remained locked up in Latin or some other alien language, witchcraft for most men was still an activity—doing harm to others by supernatural means—not a belief in heresy.

Unlike the witchcraft beliefs common throughout Europe at the time, English witchcraft beliefs in the late sixteenth century were 'simple, related to local experience and not very closely integrated with official Christianity.' But if the spate of publications—authored, in the main, by clergymen—which first began to appear in about 1590 and continued to proliferate into the middle of the

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48 Lamer, Witchcraft and Religion, p. 4. Thomas regards 'the substantial independence of the English Church' as having been largely responsible for this circumstance. Religion and the Decline of Magic, p. 522.

49 Thomas, Religion and the Decline of Magic, p. 525. In his forward to Lamer's Witchcraft and Religion, viii, Alan Macfarlane summarises key elements of Lamer's explanation for the difference between Scottish and English attitudes and approaches to witchcraft at the time: Scotland lies at the mid-point between English and Continental cultures. Roman law and the inquisitorial process, the remains of the Celtic clan structure and another language, gave Scotland many similarities with parts of Europe, that are reflected in the pattern of witch-hunting.

50 Ibid.

51 Lamer, Witchcraft and Religion, p. 21.
seventeenth century, provides any indication, even by the early years of the
seventeenth century a growing number of English intellectuals and theologians
were being 'converted more or less totally to the continental conception of
witchcraft.\textsuperscript{52}

To the extent its reflection in the literature to which it gave rise may be taken
as a measure of the depth and dimensions of popular belief, the ascendancy of
denunciatory and condemnatory variants of credulous representations of sorcery
and witchcraft was comprehensive and inexorable in continental Europe and
Britain alike, albeit later and less intensively developed in the latter case. And
even today, amongst those who openly profess a belief in the existence of sorcery
and witchcraft, far and away the most vocal, active and organised proponents of
such credulous perspectives are aligned or allied with the anti-diabolistic tradition
engendered by a theological ideology that continues to provide a remarkably
consistent basis of justificatory support for a range of otherwise divergent
arguments.\textsuperscript{53}

\textsuperscript{52} Thomas, Religion and the Decline of Magic, p. 524. A catalogue of such treatises is
provided at pp. 523 to 528.

\textsuperscript{53} In the United States, Huntington House Publishers of Lafeyette, Louisiana, disseminates a
number of publications actively advancing a credulous, anti-diabolistic credo. See, e.g., Teens and
Devil-Worship: What Everyone Should Know (Lafayette, LA: Huntington House Publishers,
1991), in which the author, Charles G.B. Evans (a self-confessed former Satanist), draws out what,
to him, demonstrate clear connections between the elements and attractions of a range of
contemporary witchcraft and sorcery-related activities and their palpable demonic origins.
Publications of this ilk have been widely distributed throughout North America. See J.S. Victor,
Satanic Panic: The Creation of a Contemporary Legend (Chicago: Open Court Publishing
Company, 1993), pp. 311-318; S. Carlson and L. Gerald, Satanism in America (El Cerrito, CA:
Gaia Press, 1989). The popularity of credulous, theologically-based denunciatory and
condemnatory literature of this kind is by no means a uniquely American phenomenon. See T.M.
Luhrmann, Persuasions of the Witch's Craft: Ritual Magic in Contemporary England (Oxford:
Basil Blackwell, 1989). In expressing his views on the ordination of women in 1993, Anthony
Kennedy, Anglican vicar of Luton in Lincolnshire, is reported as having remarked:

\begin{quote}
Priestesses should be burnt at the stake because they are
assuming powers they have no right to. . . . In the mediaeval
world, that was called sorcery. The way of dealing with
B. Critical Representations

Like their credulous counterparts, critical, or incredulous, representations of sorcery and witchcraft can also be characterised by the fundamental premise upon which such analyses predicate. As we have seen, the sub-variants of the credulous literature assume that the phenomena of sorcery and witchcraft are real, that sorcerers and witches actually exist, and that belief in their existence and in the efficacy of their practices (whether those practices are regarded as beneficial, innocuous or malevolent) are consistent with a tenable conception of the nature of reality. Contrariwise, critical representations of the same beliefs and practices predicate on the express or implicit assumption that sorcery and witchcraft are entirely irreal, that belief in the existence of the phenomena is perforce irrational and that the essential nature of reality, at least in so far as the parameters of reality can be known, is such that the possibility of their existence is precluded absolutely.

Relevant forms of this critical literature, including the anthropological and ethnographic representations from which our knowledge and understanding of contemporary Melanesian sorcery-related beliefs and practices are primarily derived, may be grouped broadly within three major classifications: historical, sociological and anthropological.54 And in so far as the 'legal' literature may be seen to instantiate the representational mode with which we are principally

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sorcerers was to burn them at the stake. [Courier-Mail (Brisbane), 10 March 1993].

54 Other classificatory models have been devised by historians and social anthropologists for use in connection with the various 'theories' of sorcery, witchcraft and related beliefs that have been developed within their respective disciplines (and, in some cases, on more or less interdisciplinary bases). Where relevant, these models will be considered below. For present purposes, however, the classificatory structure suggested here is intended to capture a broader range of the critical literature, and to organise that literature on terms less limiting than those that tend to govern the more particularised theoretical expositions with which those models are associated.
concerned here, it is particularly important to have regard to the historical and socio-anthropological formulations that have so influenced its development.

(1) Historical Representations

In the enlightened view of Dr Johnson, 'a history of magick' would surely be amongst 'the most interesting and instructive' works an enterprising scholar might undertake to write. But if the modern historical bibliography is replete with studies of magic and witchcraft that attempt to be both, the subject matter has proved in many cases to be what one of its own contributors has characterised as


'an irresistible lure to not a few freakish and facile pens.' Somewhat more prosaically, Keith Thomas warns the general reader that 'much nonsense has been written on this subject', and one must pick his or her way through the available materials with caution. Mindful of this admonition, and my own limitations as very much a 'general reader' of history, I have been obliged to rely largely on the discrimination of institutional academia to separate the sensible literary wheat from the less tenable chaff.

Even within the confines of a select bibliography reflecting the work product of scholars with demonstrably sound academic credentials, however, there are further difficulties to be encountered; difficulties which, in this case, have rather more to do with the representational methods of historical scholarship than with the peculiar subject of such representations. For on one widely held view, E.H. Carr has observed that the stuff of history may be prudently regarded as 'a corpus of ascertained facts,' available to the historian primarily, if not exclusively, in documentary forms, like so many 'fish on the fish-monger's slab.' These the historian collects and takes home, cooks and then 'serves them in whatever style appeals to him.' Invoking Croce's aphorism, Carr reminds us that, in so far as it 'consists essentially in seeing the past through the eyes of the present,' all history is effectively 'contemporary history', and that the principal task of the historian is not merely to record such facts as may be discerned in the accessible textual sources, but to engage actively and deliberately in their evaluation.

57 Summers, *Witchcraft and Black Magic*, p. 7. As it happens, Summers himself has not escaped criticism of this kind. See Keickhefer, *European Witch Trials*, p. 3.

58 *Religion and the Decline of Magic*, p. 519.


Thus committed to such a self-consciously evaluative process, serious historians of witchcraft and sorcery must continuously ask themselves, not only what the available facts convey, in terms of the beliefs and behaviours they depict, but why those beliefs were entertained amongst the communities in whose midst they flourished. Because they are obliged to extrapolate the substantive evidence on which their responses to both questions are based from the few and, in many cases, fragmentary documents that are available—theological tracts, Inquisitor's manuals, church records, trial reports and popular pamphlets—in formulating their answers, historians "must ultimately rely on taste or intuition, the feel of the language employed." And because their explanatory interpretations are necessarily derived from documentary sources generated within a particular segment of the societies in which they were produced, the resultant vagaries of this exercise can be especially problematic. In this connection, as Kieckhefer suggests, the general problem confronting historians of witchcraft is this:

it is notoriously difficult to glean the beliefs of the illiterate masses when the only sources are texts drawn up by the literate elite.

To fully canvas the implications of this problem for the construction of tenable, historically informed theories of witchcraft would involve an enterprise larger than that contemplated here. For present purposes, however, it is sufficient, firstly, to take cognisance of the doubt it has tended to cast on any assumption that the available facts accurately reflect the contours and content of the beliefs of the majority of the populations of the Anglo-European societies in which those beliefs flourished.

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61 Ibid., p. 87.


63 Kieckhefer, European Witch Trials, p. 2.
appear to have been rife;\textsuperscript{64} and secondly, to note that, in their effort to plumb the depths of genuinely popular beliefs and practices, a growing number of historians have turned, \textit{nolens volens}, to the methods of social anthropology.\textsuperscript{65}

The documentary evidence of Anglo-European witchcraft beliefs that is available to historians consists largely of materials having to do with the persecution and prosecution of alleged witches, rather than the substantive nature of such beliefs and practices as may have given rise to those distinctive responses. Relying principally on these kinds of materials, the views advanced in critical historical analyses tend to be grouped within three general sub-categories. These I

\textsuperscript{64} See Monter, 'The Historiography of European Witchcraft: Progress and Prospects'; Middlefort, 'Recent Witch-Hunting Research, or Where Do We Go From Here?'.


Recognizing the close correspondence between European witchcraft and witchcraft in non-Western societies, [some historians] have made use of anthropological comparisons in analyzing the development of witch beliefs and the motives for witch persecutions. Most importantly, they have followed anthropologists in attending to the social context that gave rise to accusations of witchcraft. Studies of this kind lend themselves to an important criticism: European society at the time of the witch trials was already distinct in many ways from primitive societies. Its political systems, family-structure, and educational development were significantly different from those of non-Western societies, and it is misleading to suggest that the social mechanisms in Early Europe are directly comparable to those of African or American Indian cultures. [\textit{European Witch Trials}, p. 1.]

have styled 'top-down', 'bottom-up' and interactive analyses, based on their characterisation of the witch beliefs under scrutiny as products of élite or learned culture; popular or mass culture; and particular processes of ideational interaction involving elements of learned and popular culture, respectively.

(a) 'Top-Down' Analyses—Witchcraft Beliefs as a Reflection of Learned Culture

Historians adopting a 'top-down' approach argue that the documentary sources of information about Anglo-European witchcraft beliefs on which they must rely necessarily reflect the beliefs of the élite, educated classes responsible for the literature examined in the course of historical analysis. Heavily influenced by credulous, theologically-based denunciatory doctrines—because they, themselves,
actually held such beliefs, because the expression of such beliefs could be put to particular forms of hegemonic advantage, or both—members and representatives of the privileged and powerful élite classes then projected those beliefs onto the uneducated peasant masses. In the event, rather than depicting the specific nature and dynamics of genuinely popular beliefs, the ideas of witchcraft reflected in the literature examined are said to represent the attitudes and fears of public disorder on the part of those who had a particular interest in the maintenance of social order.

Exemplifying this historical approach, Robbins has argued that, as 'a form of religion, a Christian heresy,' instantiated in the idea of the diabolical compact, witchcraft was 'never of the people.' Rather, 'clerics and lawyers ... made a trade of their witch-hunting, and by employing torture and leading questions, extracted from their victims the confessions of devil-worship which they themselves had invented.' On this view, the European populace in general is said to have come to accept witchcraft as a species of heresy only 'after decades of pounding in the new doctrine.'

In essence the persecution of witches was the product of a cold-blooded campaign launched by self-interested clerics and inquisitors. It had no genuine social roots, but was imposed from above.

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68 *Witchcraft and Religion*, p. 49.

69 Robbins, *Encyclopedia of Witchcraft and Demonology*, pp. 9, 144.

70 *Thomas, Religion and the Decline of Magic*, pp. 542-43.

71 *Ibid.* (footnotes omitted). See also Kieckhefer, *European Witch Trials*, p. 2. Noting that Robbins's interpretation provides 'a valuable reminder' that the witch-beliefs current in England during the sixteenth- and seventeenth-century 'contained an element for which no earlier precedent
(b) 'Bottom-Up' Analyses:—Witchcraft Beliefs as a Reflection of Popular Culture

Relying on the same primary materials, and employing the interpolative methods, historians adopting a 'bottom-up' approach to the analysis of those materials discern evidence of what, to them, appears to reveal elements of genuinely popular beliefs about witchcraft, sorcery and magic and the social role of 'the witch in the community.' Attending to the ancient origins and enduring nature of popular witchcraft and related beliefs, and the more immediate socio-political and economic functions those beliefs may be seen to have served at the level of local, inter-communal and more intimate inter-personal relations, the motives, intentions and objectives of those who sought to control, suppress, manipulate or even invent such beliefs for larger political or economic purposes become secondary, if not altogether unimportant, features in such analyses. From this perspective, it is the underlying foundations of popular belief upon which formal accusations of witchcraft were based that stand out as meaningful and historically significant.

Formal accusations of witchcraft may indeed have given rise to the official processes of ecclesiastical and secular disposition, overseen and directed by

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is to be found,' Thomas is critical of the application of Robbins's analysis of the European materials to the English situation for two reasons. Firstly, because:

it does not explain why there should have been such a time-lag between the propagation of continental ideas, in the fourteenth and fifteenth centuries, and the beginning of English persecution, well over a hundred years later. [Religion and the Decline of Magic, p. 543.]

But also, and more importantly, because 'the great bulk of witchcraft accusations in England did not relate to any alleged heretical activities upon the part of the witch, but to her maleficium (or 'sorcery' ... ).' Ibid.

72 Lanner, Witchcraft and Religion, p. 50.

73 See, e.g., Macfarlane, Witchcraft in Tudor and Stuart England; Thompson, Religion and the Decline of Magic; Boyer and Nissenbaum, Salem Possessed.
individuals holding particular positions of religious, political and legal authority, in connection with which proceedings the available documentary records were initially produced. Catastrophic as the consequences of those official processes may have been for the people affected by them, however, the processes themselves tend to be regarded as epiphenomenal; for without a firm basis of underlying popular belief in the existence of witchcraft, sorcery and malevolent magic, the institutionalised persecution and prosecutions of alleged practitioners would not have arisen in the first instance, nor could they have been maintained without a secure grounding of popular support.

Viewed historically in this light, the accused witch ceases to be regarded as an entirely 'innocent' victim, selected more or less at random by secular or religious authorities as an exemplary sacrifice to the aberrant beliefs or political machinations of the educated élite. Instead he (or, far more often than not, she) becomes: 'someone with particular social characteristics who had been accused of witchcraft by neighbours who also had particular social characteristics.' Of English witches, for example, it has been said that they were 'predictably old, poor, and female. Less obviously, they were older and poorer than, and sometimes dependent on, those who accused them.' What is more, '[t]hey were nearly always in a fairly close relationship to the accused, a relationship in which the accepted norms were those of love, neighbourliness, or charity.\textsuperscript{74}

\footnotesize{Quarrels and damaged relationships followed by specific accidents and misfortunes for which the accused witch could be blamed, were nearly always part of the evidence recorded at English trials for witchcraft.\textsuperscript{75}}

\textsuperscript{74} Larner, \textit{Witchcraft and Religion}, p. 50.

\textsuperscript{75} Ibid.
Interactive Analyses:—Witchcraft Beliefs as a Reflection of the Interaction between Popular and Learned Culture

A third category of historical analysis advances an intermediate proposition that goes some way towards reconciling the apparent differences between the 'top-down' and 'bottom-up' approaches described above, positing in their stead an alternative, and in my view a more compelling, explanation for the development of Anglo-European witchcraft and sorcery-related beliefs, which regards the process as necessarily involving fundamentally interactive features. As seems so often to be the case when analytical quests for truth—historical and otherwise—give rise to a polarisation of ideas, here too it is in the uncertain middle-ground between opposing views that a path towards more satisfactory understanding can be found.

Himself a staunch proponent of the 'top-down' approach, Kieckhefer concedes that one may well question the validity of distinguishing between popular and learned witch beliefs in early European society, and that the existence of certain commonalities between the two was not unlikely. There were, after all, numerous possibilities for contact and exchange between the literate and illiterate classes. Parish priests, and perhaps merchants and other groups, might stand midway between the two extremes; they were frequently from the lower or middle classes, yet at the same time they were exposed to the beliefs of cultured individuals. Sermons and plays could readily serve as media for popular dissemination of originally learned notions. . . . even woodcuts could fulfil a similar function so long as there was someone on hand to interpret their representations in the intended sense. The scandal aroused by trials for witchcraft might in itself spread learned notions about witches among the populace, whose presence at the executions would be a matter of common occurrence.

76 European Witch Trials, p. 4.

77 Ibid.
Yet Kieckhefer is adamant that there was always a 'substantial difference between the educated élite . . . and the illiterate masses'. The barrier between them might not have been entirely impenetrable, but 'the gap was wide enough that the preoccupations of one class can scarcely be assumed to have been shared by the other.'

Having closely examined the breadth of the historical literature, however, and having carefully assessed the analyses and the underlying evidence developed on the basis of both 'top-down' and 'bottom-up' approaches to the materials dealing with Anglo-European witch beliefs, Christine Lamer found that a certain confusion 'has arisen out of the sharp distinction between learned and popular witch beliefs', particularly where that distinction operates to identify, on rigidly segregative bases, ideas of and about witchcraft grounded implicitly and inextricably in Judeo-Christian diabolism as learned, and belief in the malevolent and beneficial powers of sorcery and sorcerers as popular. According to Lamer, the historical data seem rather to indicate that:

- there was more than one level of popular belief, that popular belief could vary from region to region, and that popular belief, like learned belief, was not static. Where there is more than one cultural level these will always interact . . . In any society in which the educated mingle with the uneducated, ideas will pass from one to the other.

For the purposes of an analysis of the relationship between law and sorcery in Papua New Guinea today—a relationship in which the jural characterisation of sorcery-related beliefs and behaviours can and does have such determinative

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78 Ibid.
79 Witchcraft and Religion, p. 53.
80 Ibid., pp. 53, 55.
social implications—it is interesting and not unimportant to note that critical elements of the interactive processes Larner has identified as historically significant in Europe and Britain are seen to have occurred in a distinctively legal context:

Canon Law synthesizers of the late fifteenth century were doing two things at once: they were learning from the courts about the possible activities of witchcraft and they were developing a rational doctrine of evil. Just as popular witch beliefs are an inversion of positive cultural values, so educated demonology is an inversion of official theology on the nature of God. The mutual learning of popular and educated inversions was a process which was greatly accelerated in the courts, both ecclesiastical and secular. In those courts, lawyer and peasant confronted each other and finally emerged, through accusation, boasting, torture and confession with an agreed story acceptable to both.81

More importantly, perhaps, consistent with their decidedly critical premises, and seemingly irrespective of the analytical camp with which a particular scholar may be associated, historical representations of Anglo-European magic, witchcraft and sorcery almost invariably adopt an approach to the description and analysis of the origins, nature and patterns of witchcraft and sorcery-related beliefs, as 'beliefs' only—and irrational beliefs in any case, when assessed from the diverse perspectives afforded by an otherwise modern, Western rational and scientific view of the world.82

81 Ibid., p. 55.

82 A sub-grouping of 'radical' historians, adhering to views that might be classified as falling broadly within what I have described as a 'bottom-up' analytical perspective, have advanced the argument that witchcraft beliefs were 'rooted not merely in popular tradition but in actual practice', and that 'people accused of witchcraft did in fact engage in some kind of illicit rites.' Montague Summers, 'whose faith in the real existence of demons and in the genuine alliance between witches and Satan remained unshakable,' has been described as 'the most extreme advocate of this view'. Kieckhefer, European Witch Trials, p. 3. I have excluded a consideration of the work of these historians from the instant discussion because their credentials as 'critical' scholars (in the sense of that term as I have defined it here) have been so seriously called into question, and the quality of their scholarship so roundly criticised by their modern, unequivocally 'critical' colleagues. See, e.g., M.J. Kephart, 'Rationalists vs. Romantics among Scholars of Witchcraft' in Marwick,
Thus, when approached from the 'bottom up', historical analyses of Anglo-European witchcraft and sorcery tend to characterise variable forms of ancient and enduring traditional beliefs in maleficium as genuinely entertained, \textit{a priori}, at the level of popular culture, and as having been given historically significant forms of public expression through the articulatory mechanisms of evolving religious and secular institutions, which did neither more nor less than respond to those beliefs, and to popular demands for 'appropriate' socio-legal action in the face of their behavioural consequences. Assessed from a 'top down' historical perspective, even where such beliefs might be characterised as bereft of, or no longer retaining, an active currency within the parameters of contemporary modes of popular thought, \textit{elite} custodians and sources of authoritative knowledge about the nature of reality are said to have successfully re-activated those ancient beliefs (or at least a vestigial propensity to believe), superimposing upon them a distinctively theological concept of Satanic witchcraft. On the strength of that conceptual synthesis of a 'new myth',\textsuperscript{83} the collective will and actions of malleable, largely illiterate masses were then marshalled and directed in the service of particular theological—and political—objectives by a plausible belief, not only in the existence of identifiable individuals who were able and inclined to exercise a


Indicative of the view that popular witchcraft beliefs were anchored in 'actual practice' are the arguments of Margaret Murray, \textit{The Witch-Cult in Western Europe} (1921), who suggested that witchcraft was 'a pre-Christian fertility religion that survived as an underground cult after the nominal adoption of Christianity in Europe'; Jules Michelet, \textit{Satanism and Witchcraft} (1959), who characterised popular diabolic practices as 'a protest against medieval society'; Pennethome Hughes, \textit{Witchcraft}, 2nd ed. (1965), who regards such practices as 'largely a female reaction against male domination; and Jeffrey Russell, \textit{Witchcraft in the Middle Ages} (1972), who explains witchcraft as 'an outgrowth of heresy, and a manifestation of dissent against the established Church.' Kieckhefer, \textit{European Witch Trials}, pp. 2-3, 154-155.

\textsuperscript{83} Thomas, \textit{Religion and the Decline of Magic}, p. 542.
range of malevolent occult powers, but in the diabolical origins of the powers that had been conferred on them.

On yet another view, wherein neither a 'bottom up' nor a 'top down' perspective is seen, in itself, to provide a sufficient explanation for the historical origins and development of Anglo-European ideas about witchcraft and sorcery, it is rather the interaction between, and the cross-fertilisation of, the beliefs entertaining a common currency amongst members of all levels of society and culture. In the end, however, as Hanlon suggests, '[t]he literature from centuries of . . . historical discourse in the European world has been committed to the rationalisation or interpretation of sorcery as something other than experienced.'

(d) Magic, Religion and Science—Deficiencies in Historical Representations of Witchcraft and Sorcery-Related Beliefs

Whatever approach they may adopt in the attempt to account for the distribution of witch-beliefs and 'for the developments within a particular society that have given rise to its characteristic pattern of beliefs,' historians of the larger social and intellectual developments in Anglo-European society with which the occurrence of those beliefs are associated generally tend to locate such occurrences along a temporal continuum, reflecting evolutionary advancements the development of Western thought. On this basis, a recognition of the primacy of certain ideas about the nature and contours of reality are portrayed as having

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84 'Sorcery, "Savage Memories", and the Edge of Commensurability for History in the Pacific' in Pacific Island Histories: Journeys and Transformations (Canberra: Division of Pacific and Asian History, Research School of Pacific Studies, Australian National University, 1992), p. 123 (emphasis provided).

85 Marwick, Witchcraft and Sorcery, p. 16.

progressed from explanatory beliefs in the powers of magic, witchcraft and sorcery, through more cognitively, intellectually and sociologically sophisticated forms of religious conviction and ultimately to science, in a manner at once consistent with, and arguably indicative of the ascendancy of a modern rationalist world view over traditional variants of an irrational world view. 87

Anchored in the principles of Greek science, with its insistence on logical argument and the necessary quality of demonstrability in relation to factual assertions about the natural world, the age of enlightened European rationalism has come to be characterised by its extension and refinement of empirically based explanations for phenomenological relationships of cause and effect. By the nineteenth century, under the influence of the proto-anthropological speculations of missionaries and other sojourners in the African and Pacific Island colonies and a growing inclination to 'historicise the Enlightenment's rationalist approach' to the study of religion, 88 historical representations of the development of Western cosmological belief systems came to be cast within a decidedly evolutionary framework, taking on the comparative dimension that was to become the hallmark of anthropological studies of religion. 89 Prior to the introduction of those elaborative refinements, however, and abetted by a Reformationist theology,
glorification of God, and its promotion of productive utilitarian economic activity both within Europe and beyond.\textsuperscript{90}

It was the linked developments of a scientific revolution and a range of concomitant intellectual, social and philosophical changes, that historians of Anglo-European witchcraft and sorcery regarded, and still regard, as leading inevitably to the liminality of those beliefs.\textsuperscript{91}

What is troubling about this historical premise—or rather, perhaps, this conclusion—about the evolution of Anglo-European beliefs in witchcraft and magic, is the paradox implicit in the assertion that, whereas magical beliefs are said to have inexorably 'succumbed to the more persuasive, explanatory, and democratic powers of science,' religious beliefs are seen to have effected something in the nature of 'an epistemological compromise' that has allowed them to co-exist with science.\textsuperscript{92} For it seems to me that to contrapose magic and science on the basis that the evolved rationality which came to support the latter necessarily operated to preclude an acceptance of the former, but had no such necessary effect in relation to religion, must either denigrate the integrity of Anglo-European rationalism on its own terms, or impute to post-Reformationist religious belief qualities of rationality which are, at best, difficult to identify as such.

\textsuperscript{90} Hanlon, 'Sorcery and the Edge of Commensurability for History in the Pacific', p. 123.

\textsuperscript{91} See Thomas, Religion and the Decline of Magic, pp. 767-800; S. Sharot, 'Magic, Religion, Science and Secularization' in Neusner, Freirichs and Flesher, Religion, Science and Magic, pp. 261-283. In specific relation to the cessation of witch trials in England in the seventeenth century, as opposed to the denouement of popular magical and witch-beliefs, Thomas is somewhat more guarded in his characterisation of these changes as determinatively causal. 'The Relevance of Social Anthropology to the Historical Study of English Witchcraft', 70.

\textsuperscript{92} Hanlon, 'Sorcery and the Edge of Commensurability for History in the Pacific', p. 123.
In his analysis of the decline of witchcraft and magic in England, Thomas advances just such an argument, exploring the separation of magic and religion—a distinction the medieval Church had done much to blur—as an historical process, which he traces to evolutionary developments in Christian theology and the accompanying ecclesiastical practices associated with the Reformation. Summarising his arguments in this connection, Thomas maintains that what he endeavoured to suggest:

was that a reclassification took place during the period with which I was concerned, whereby those elements in religion which ultimately came to be regarded as magical were gradually identified as such. . . . I further urged that a fundamental change took place in the idea of religion itself, as the emphasis came to be placed on formal belief rather than on a mode of living. Far from ignoring the emergence of the term 'magic' as something separate from 'religion,' I pointed out that the classic distinction between the two . . . was in fact originally formulated by the sixteenth-century Protestant reformers. It was they who first declared that magic was coercive and religion intercessionary, and that magic was not a false religion, but a different sort of activity altogether.

Drawing on the arguments elaborated by Stanley Tambiah, Hanlon suggests that the idea of 'magic as opposed to religion' was influenced by the Judaic distinction between 'god' and 'nature':

Judaism separated God from nature. Yahweh came to be regarded as omniscient, omnipotent, and eternal. Pagan cosmology, in contrast to Judaic thought, has been represented as accepting the existence of a primordial realm, anterior and parallel to the natural world. Thus, unlike Yahweh, pagan gods or spirits did not transcend the universe but were rooted in it. Approaches to this primordial realm included ritual action of

93 Religion and the Decline of Magic, pp. 27-89, 301-332.


the type identified as magic. Influenced by the tone of Judaic thought, magic came to be viewed as a ritual action valued for its effectiveness in dealing with forces or objects outside the realm of God.\(^97\)

To distinguish magic and religion on such terms, however, may be to elevate historical forms over experiential substance. Indeed, Thomas himself was obliged to resort to an anthropologically informed explanation to account for the apparent increase post-Reformation English witchcraft accusations revealed by his own research.\(^98\) In developing this explanation, Thomas points to the unavailability of erstwhile quasi-magical techniques of the Church—confession and absolution, exorcism and protective blessing—for dealing with personal problems and interpersonal conflicts in the intimate context of the English village.\(^99\)

A man who decided that God was responsible for his illness could do little about it. He could pray that it might be cured, but with no very certain prospect of success, for God's ways were mysterious, and, though he could be supplicated, he could not be coerced. Protestant theologians taught that Christians should suffer stoically like Job, but this doctrine was not a comfortable one. The attraction of witch beliefs, by contrast, was that they held out precisely that certainty of redress which the theologians denied. A man who feared that a witch might attack him could invoke a number of magical preservatives in order to ensure his self-protection. If the witch had already struck, it was still open to him to practise counter-magic against his supposed persecutor.\(^100\)

To the extent that it provided an explanatory system of belief and a coherent basis for action whereby an English villager might effectively cope with the vicissitudes of an inhospitable social reality, magic may well have been regarded

\(^{97}\) Ibid., pp. 122-23.


\(^{99}\) Ibid. See also, Douglas, 'Introduction: Thirty Years after Witchcraft, Oracles and Magic', in *Witchcraft Confessions and Accusations*, xxxiii.

\(^{100}\) Thomas, 'The Relevance of Social Anthropology to Witchcraft', p. 57.
as more serviceable than religion. Measured against the criteria of validity embraced by contemporary Western science, however, it is difficult to see how the perceived impracticability of religious belief serves to render that mode of belief somehow more rational than a magical alternative. If the tenets of a modern, scientifically informed rationality are meant to provide a secure intellectual and epistemological foundation, upon which the historical evidence proffered in support of a tenable analytical distinction between religion and magic is seen to be based, it is a distinction without much in the way of substantive difference.

A further feature revealed in an examination of the historical literature is more telling still, although it is one which historians and, until recently, most anthropologists, have been disinclined to recognise and reluctant to explore in any depth. Modern historical evaluations of earlier expressions of Anglo-European beliefs in and about witchcraft and sorcery readily acknowledge that, from the earliest times in recorded history, variants of a demonstrably critical literature, on the one hand, in which the plausibility of witchcraft and sorcery beliefs was disputed and the existence of persons capable of exercising or manipulating supernatural powers was rejected (even if such incredulity as may be seen to have been expressed was of a qualified nature\textsuperscript{10}), have co-existed with a literature

\textsuperscript{10} Thus, for example, whereas Plato is said to have 'attacked those who believed they could summon up the dead' or 'bend the gods to do their will' by the incantation of spells, he was quite prepared to accept that similar results might be achieved through prayer. See Baroja, 'Magic and Religion in the Classical World', p. 74. By the same token, Hebraic scholars have argued that the biblical condemnation of those who purported to consult with the dead and 'familiar spirits' (Isaiah 8:19-22) evidences a contemporary recognition that the feat very probably involved clever acts of ventriloquism rather than wizardry. The Jewish Encyclopedia, vol. 12, p. 544. And whilst magicians may have been excommunicated from the Catholic Church as early as the 6th century, up until about the 9th century, Church doctrine continued, in the main, to relegate witchcraft and related beliefs to the realm of mere superstition. It was not until the early thirteenth century that witchcraft, sorcery and related practices came to be formally recognised by religious authorities as both real and sufficiently serious as to attract potentially severe ecclesiastical penalties. See McRoberts, New Catholic Encyclopedia, vol. 14, p. 978.
instantiating patently credulous representations of those beliefs.\textsuperscript{102} At the same time, except to the extent that one is prepared to regard religious belief as rational, and subject to the contention that alternative forms of contemporary belief in magic and the occult are necessarily disingenuous, or at the very least, theoretically inconvenient,\textsuperscript{103} there exists today, in the very midst of the most industrialized, technologically sophisticated and highly educated societies of the Western world, a considerable—and by some accounts, a growing—number of people, who profess and act upon a variety of magical belief systems, inclusive in many instances of sorcery and witchcraft. However these systems may depart \textit{in form} from the kinds of beliefs entertained amongst early modern Anglo-European societies (or contemporary, pre-industrial native societies elsewhere in the world), they are otherwise quite similarly irrational \textit{in their substantive content}.\textsuperscript{104}

\textsuperscript{102} See e.g. Cohn, \textit{Europe’s Inner Demons}, p. 224.

\textsuperscript{103} In her essay, ‘Witchcraft Past and Present’, Lamer succinctly expressed such a view:

So-called witchcraft today in modern industrial cities is an entirely different phenomenon from the witchcraft of pre-industrial Europe or the witchcraft of primitive tribes. The difference lies in the social context: in pre-industrial witchcraft the community as a whole believed in the possibility and power of witchcraft and the witch was, therefore, seen as a public menace; an enemy of the people. . . . Witches today are private people; persons doing their thing. They inhabit the world of fringe religion. They do not matter to anyone but themselves.\textsuperscript{[Ibid.]} On this basis, Lamer was content to assume ‘that the witchcraft that is ascribed to early modern Europe and to today’s primitive societies should be allowed to set the standard as to what constitutes witchcraft.’\textsuperscript{[Ibid.]} Without invoking, in this context, the determinative distinction between rational and irrational beliefs, however, she was evidently prepared to regard ‘fringe religion’ as irrational; whereas, by implication, conventional religious beliefs fall within the realm of rational beliefs. For similar considerations, see Tiryakian, ‘Toward the Sociology of Esoteric Culture’; Truzzi, ‘The Occult Revival as Popular Culture’; Jorgensen and Jorgensen, ‘Social Meanings of the Occult’. For a more circumspect assessment, see Luhrmann, \textit{Persuasions of the Witches’ Craft}, pp. 7-15.

\textsuperscript{104} As Overing points out, serious consideration of this paradox, and the epistemological issues to which such consideration gives rise, has been the focus of discussion and debate within the fields of social theory and the philosophy of science only since the early 1970s, before which time such intellectual attention as it had attracted was shown more by continental European
The point is significant for several reasons. Firstly, it is important historically because it shows that pockets of doubt and critical scepticism could and did exist in the midst of Anglo-European society at a time when the dominant Weltanschauung strongly favoured a credulous perspective, and well before the advent of a flourishing scientific rationalism.\textsuperscript{105} It is also important from a sociological perspective, because it indicates that even today, when to hold anything other than a critical view in relation to witchcraft, sorcery and related beliefs is so readily regarded as manifestly irrational, a large, and arguably growing, number of people profess, or at any rate, respond with acceptance to, such beliefs.\textsuperscript{106}

For present purposes, however, the continuing co-existence of credulous and critical perspectives on, if not, perhaps, the same specific forms of belief in magic, witchcraft and sorcery current in Anglo-European society between the fourteenth and seventeenth centuries (and the forms of such belief that are current today in Papua New Guinea), then certainly on the expansive parameters of a social reality that admits of the nominally 'irrational' assumptions on which such beliefs are said to be based, is particularly important because it suggests that Western society—and as we shall see, Western law—has always entertained, and continues to


entertain, a palpable measure of credulity in respect of patently irrational and, in some instances, ostensibly supernatural phenomena.

* * *

Historians disagree about the extent to which the representations depicted in the available documentary evidence of supposedly popular sorcery and witchcraft beliefs amongst the masses of largely illiterate Anglo-European societies in centuries past provide an accurate index of the nature and dynamics of those beliefs, or whether they may not rather reflect a projection of the beliefs of the educated elite—or the tendentious assumptions of the educated class about the nature, depth and dimensions of popular beliefs.107 But we have seen, too, as Larner observed, that '[i]n any society in which the educated mingle with the uneducated, ideas will pass from one to the other.'108

Studies of beliefs in and about witchcraft and sorcery, in Britain and the United States today lend credence to Larner's view, revealing, as they appear to do, that the specific content and demographic dispersion of credulous and critical orientations can vary considerably from time to time and from place to place, though by no means necessarily depending upon the intelligence, education or sophistication of the population involved.109 The intensity with which such beliefs

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107 Distinguishing historical differences in the nature and content of systems of belief on the basis of literacy and education is itself problematic. Even today, well educated people are quite capable of entertaining 'irrational' beliefs, and low measures of literacy certainly cannot be said to preclude a capacity for 'rational' belief.

108 Witchcraft and Religion, p. 53.

109 See G. Gallup, 'Belief in Occult is Common in U.S.' (Princeton, NJ: Gallup Poll, 1978); Jorgensen and Jorgensen, 'Social Meanings of the Occult' (1982) 23(3) Sociological Quarterly 373, 377; Luhmann, Persuasions of the Witch's Craft, p. 29; Victor, Satanic Panic, pp. 29-56. Cf. Thomas, who reports that, in England, by 1660 there was a grammar school for every 4,400 persons, and that two and a half per cent of the relevant age group of the male population was receiving some form of higher education . . . . Religion and the Decline of Magic, p. 4.Acknowledging the limitations of the available evidence, however, he notes that this was also a
are held may wax and wane, and the kinds of conduct those beliefs may serve to provoke, condone or condemn may differ across a wide range of variable bases. In so far as comparatively recent scholarly efforts to construct a general theory of witchcraft may be concerned, the vagaries of the available evidence, historical and contemporary, have proven problematic to say the least.

And yet, for the purposes of an analysis that seeks only to assess the processes by which sorcery and related 'supernatural' beliefs have been determinatively characterised within the narrower confines of a jurisprudential consideration—and, more narrowly still, in relation to the supremely determinative characterisation of particular judicial dispositions—the data are remarkably stable and consistent. Indeed, the relativities in the data that have vexed historians bent on the achievement of a diachronic theoretical reconciliation, or anthropologists in search of a satisfactory cross-cultural paradigm, are far less troublesome in the context of a legal analysis; if only because, for better or for worse, the relativities with which the law has been concerned are not, and need not be, constrained by nearly such rigid constructs of rationality.

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Thus, for example, Holdsworth writes of Sir Matthew Hale's disposition of a particularly notorious case of witchcraft in the mid-seventeenth century:

It is probable... that his sincere religious beliefs led him to see no harm in the act which posterity, and more especially the unhistorically minded Whig historians of the last century, have most condemned—the sentencing of two witches to death, at a time when the rationalizing and sceptical spirit of the day was beginning to cause the more enlightened to doubt the existence of witchcraft. But we should remember that the sentence was...
(2) Sociological Representations—Dichotomous Formulations of the Relationship between Magic and Religion, Religion and Science

Where the apparent, if not necessarily the intended, object of historical analyses of sorcery and witchcraft beliefs in Anglo-European societies has been to chart the decline of magic's explanatory powers in the face of particular religious, scientific, intellectual and economic developments, sociological representations have sought to rationalise those beliefs and practices in terms more amenable to the theoretical grammar of a modern science of human social development.\footnote{Hanlon, 'Sorcery and the Edge of Commensurability for History in the Pacific', p. 123.}

Acknowledging that 'the borderlines are by no means clear-cut', sociologists are nonetheless concerned to distinguish magical and religious beliefs on similarly

\[\text{In accordance with the law, and that the existence of witches was vouched for by the Bible. Therefore a man of Hale's mind and temper could hardly be expected to doubt}\]


In his summing up of the case, Hale's reported observations are especially poignant:

\[\text{That there were such creatures as witches he made no doubt at all; For first, the scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence in such a crime. And such hath been the judgment of this kingdom, as appears by that act of parliament which hath provided punishments proportionate to the quality of the offence. [A Trial of Witches at the Assizes held at Bury St. Edmond's for the County of Suffolk (1665) 6 S.T. 647 at 700-701]}\]

Even by the end of the seventeenth century, however, when the 'more enlightened' judges of the English courts exhibited a growing scepticism in relation to the existence of witchcraft and routinely discontenanced prosecutions on that account, Holdworth observes that it would still have been 'difficult for an honest Christian to deny the existence of witchcraft.' \textit{A History of English Law, 2nd ed.}, vol. XI, p. 546. For an appraisal of Hale's approach to the trials of witches, amongst other matters involving women, as indicative of his alleged misogynistic inclinations see Geis, 'Lord Hale, Witches and Rape' (1978) \textit{5 British Journal of Law and Society} 26. For a rebuttal to this allegation see D. Lanham, 'Hale, Misogyny and Rape' (1983) \textit{7(1) Criminal Law Journal} 148, 152-153.
evolutionary bases.\textsuperscript{113} It is, as Goldthorpe remarks, only usual that they should do so:\textsuperscript{114}

We normally think of magic as an attempt by individuals to attain particular private ends—the success of a crop, good hunting, the death of an enemy, a favourable decision in a law case—by invoking supernatural means. . . . The aim is to manipulate or control occult forces in one's own favour and a person who wishes to do this may either do it for him- or herself, or call in a professional magician who will do it for a fee or reward. . . . By contrast we think of religion as a public matter, devoted to public, general ends—not just the fertility of one particular garden, for example, but the fertility of the land.\textsuperscript{115}

Emphasising the significance of the distinction between religion and magic on the basis of this public/private dichotomy, Giddens argues that all religions share the common characteristic of entertaining 'a set of symbols, invoking feelings of reverence or awe,' linked to rituals or ceremonials engaged in by a distinctive 'community of believers.'\textsuperscript{116} The nature of such rituals and ceremonies may vary from community to community and, in some instances, they may be carried on individually and even secretly. But it is the existence of the collective objects of the ceremonial and the participation of a congregation in its performance, on the one hand, and the absence of such public and communalistically orientated elements, on the other, that sociologists generally tend to regard as the principal features distinguishing religion from magic.\textsuperscript{117} Consistent with this dichotomous

\textsuperscript{113} Giddens, Sociology, p. 458.
\textsuperscript{114} Goldthorpe, An Introduction to Sociology, p. 195.
\textsuperscript{115} Ibid., pp. 195-196.
\textsuperscript{116} Giddens, Sociology, p. 454.
\textsuperscript{117} Ibid; Goldthorpe, An Introduction to Sociology, p. 196.
analysis, the roles of religious and magical practitioners can be similarly distinguished:

The priest is accordingly a publicly designated leader, not a privately rewarded professional. The priest leads a congregation, a magician [or sorcerer] has a clientele. And so far from manipulation or control, religious acts aim (in Frazer's classic definition) 'at the propitiation or conciliation of powers superior to man which are believed to control the course of nature and of human life'.

The Weberian grounding of such sociological assessments of the development of religious ideas, institutions and practices in evolutionary analyses of the historical development of Western civilisation is palpable. Indeed, in his effort to account scientifically for the dynamics of the modern, technologically advanced capitalism of the occidental societies with which he was familiar, Weber specifically identified the displacement of irrational magical beliefs by the more rational protocols of the Judeo-Christian tradition as a matter of singular developmental significance, and one of the principal bases on which late-nineteenth and early-twentieth century European society and culture were so favourably compared with its own classical precursors, as well as the classical civilisations of China and India.

Judaism was...of notable significance for modern rational capitalism, insofar as it transmitted to Christianity the latter's hostility to magic. Apart from Judaism and Christianity, and two or three other oriental sects (one of which is in Japan), there is no religion with the character of outspoken hostility to magic. Since Judaism made Christianity possible and gave it the character of a religion essentially free from magic, it rendered an important service from the point of view of

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118 Goldthorpe, *An Introduction to Sociology*, p. 196. Here, too, 'a wide category of borderline and ambiguous cases' must be accommodated, 'as, for example, when a Christian priest conducts weddings and funerals for a fee.'

economic history. For the dominance of magic outside the sphere in which Christianity has prevailed is one of the most serious obstructions to the rationalization of economic life.\textsuperscript{120}

Weber's articulation of the contrasting roles of priests and magicians, and the distinctive implications of their respective functions in society, is clearly echoed in the contemporary sociological expressions cited above.\textsuperscript{121} His persistent effort to qualify this, amongst other apparently 'hard and fast distinctions' that appear throughout his work notwithstanding,\textsuperscript{122} Weber's evaluative contraposition of religion and magic—that is, his contraposition of the Western 'systematisation of man's relation to the divine and a religious ethic based on such metaphysical conceptions,' on the one hand, and the absence of such conceptions in societies 'without an established priesthood or where magicians prevail', on the other—is


\textsuperscript{121} See text accompanying notes 113 to 118 above.

Priests' superintend the worship of the 'gods,' while magicians seek to compel 'demons'; priests are employed functionaries in a permanent organization for influencing the deities, while magicians are free-lance professionals hired by individuals from time to time; priests possess a knowledge of formulated doctrines and hence a professional qualification, while magicians—and prophets also—prove their personal charisma through miracles and personal revelation. . . . [T]he decisive criterion of a priesthood is the regular organization of religious worship that is bound by definite norms and occurs at specified times and places. Although such worship can occur without a separate priesthood, the latter does not occur without the former; and although magicians often were organized in guilds and developed religious doctrines, they have nowhere been associated with a religious organization. [R. Bendix, \textit{Max Weber: An Intellectual Portrait}, (London: Methuen & Co Ltd, 1960), p. 88, footnotes omitted]

\textsuperscript{122} According to Reinhard Bendix, the complexity of Weber's writing is often a product of his attempt to show the validity of a proposed distinction only \textit{after} a full discussion of the "gradual transitions" of the phenomena in question. Max Weber: \textit{An Intellectual Portrait} (London: Methuen & Co Ltd, 1960), p. 88, n. 14.
said to be very much the keystone in the structure on which his notion of the rationalisation of religious life is based.\textsuperscript{123}

Indeed, for Weber it was only in the context of such a rational religious structure that an ethical concept of a deity could develop, and in accordance with which an essentially ordered understanding and experience of life in human society could develop. Thus, as magical ideas of evil came gradually to be replaced by a religious ethic, social norms became sanctified norms from which unacceptable deviations were punishable in this life and the next. Misfortune came to be explained and understood as resulting, not from a failure or deficiency in the power of God, but from God's wrath, which might be aroused by violations of His commandments.\textsuperscript{124} In this way, the secularising processes of science and technology, and their attendant political and economic compromises between state and religious authorities, fostered the development of the utilitarian industriousness which transformed the religious ethic into a recognisably derivative, albeit 'specifically bourgeois ethos.'\textsuperscript{125}

Weber was prolifically interested in the implications of religious beliefs for the nature and dynamics of human affairs in Western and non-western societies alike.\textsuperscript{126} He devoted a considerable proportion of his intellectual energy to an extensive analysis of the influence of religion in the development of Western

\textsuperscript{123} Ibid., pp. 88-89.

\textsuperscript{124} Ibid., p. 89.

\textsuperscript{125} Ibid., pp. 67, 318–325.

society in particular,\textsuperscript{127} and in the context of this kind of analysis he underscored the innovative and progressive contributions of Christianity outlined above. Unlike Weber, Karl Marx regarded the role of religion as merely subservient to essentially conservative political and economic forces, in the service of which religion, amongst other institutionalised social forms, was deployed hegemonically to advance and preserve the interests of the dominant class.\textsuperscript{128} Beyond this, however, Marx's views on religion are largely derivative, drawing principally from the ideas of Ludwig Feuerbach,\textsuperscript{129} according to whom religion consisted in the ideological and ethical handiwork of human beings who, lacking a comprehensive understanding of their own cultural history, mistakenly attributed the origins of aspirational social norms to the divine.\textsuperscript{130}

By and large, Marxist sociological theory has produced little commentary on the general relationship between magic and religion, and less still on the role of witchcraft and sorcery-related beliefs in early European society and culture. Explaining this area of neglect in contemporary Marxist social theory, Larner suggested that, while Marx himself could hardly be said to have underestimated the power of religion as a social force in history,

modem Marxists are not encouraged to investigate forms of false consciousness, but rather to explore the historic development of true class consciousness. Much of the considerable sociological talent around today is, therefore,

\textsuperscript{127} See especially \textit{The Protestant Ethic and the Spirit of Capitalism} (1904-05; rpt London: Allen and Unwin, 1976)


\textsuperscript{130} See Giddens, \textit{Sociology}, pp. 463-64.
concentrated on the reinterpretation of historical materialism in relation to forms of contemporary capitalism.\textsuperscript{131}

Émile Durkheim's work, \textit{The Elementary Forms of the Religious Life},\textsuperscript{132} is still described as 'perhaps the single most influential study in the sociology of religion.'\textsuperscript{133} Like Weber, and consistent with the evolutionary presumptions of a universally applicable progression from magical to religious and, ultimately, to scientifically informed, explanations for natural and social phenomena, Durkheim similarly accepted the supercession of rational over irrational beliefs as inevitable. At the same time, however, he believed that social order and rational thought themselves could be seen to rest on a non-rational foundation:\textsuperscript{134}

\begin{quote}
that this substructure is a flow of emotions determined by the density of social interactions and especially by the tightly focused mutual actions of rituals; [and] that symbols like gods are charged with moral energies by the group whose membership they reflect.\textsuperscript{135}
\end{quote}

Durkheim insisted that religion is never merely a matter of belief only. Rather, all religious activity is built upon regularised systems of ceremony and ritual which, as collectively practised communal exercises, inculcate, affirm and heighten a profound sense of group solidarity. In this sense, magical practices too are ritual acts, and not just spontaneous individual creations:\textsuperscript{136}

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\begin{enumerate}
\item\textsuperscript{131} \textit{Witchcraft and Religion}, p. 110.
\item\textsuperscript{132} trans. J. Swain (1915; rpt New York: The Free Press, 1965).
\item\textsuperscript{133} Giddens, \textit{Sociology}, p. 465.
\item\textsuperscript{134} Collins, \textit{Three Sociological Traditions}, p. 161.
\item\textsuperscript{135} \textit{Ibid.}
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they are products of society handed down from generation to
generation. They are acts which derive their potency from the
values of society as a whole. . . . \textsuperscript{137}

Where Durkheim regarded the collective nature of expressive religious activity as
driving the process whereby individuals were transported away from the profane
preoccupations of social life to the elevated plane of the sacred, Henri Hubert and
Marcel Mauss, contemporaries of Durkheim who advanced an elaboration of his
theoretical propositions in this connection, could explain away the seemingly
counter-social, individual expression of magical beliefs as 'a private appropriation
of an emotional force that is, nevertheless, social in its origins.' \textsuperscript{138}

Both Weber and Durkheim considered the processes of secularisation as
involving 'a reduction in the whole area of thought appropriate to the supernatural
and a reduction in the area of the sacred—that must not be scrutinized.' \textsuperscript{139} In
different ways, both were implicitly committed to an evolutionary conception of
social progress in which magical and religious explanations were, or would
ultimately be, supplanted by scientific ideas. In the process, ceremonial and ritual
activities would inevitably come to play a diminishing role in the lives of
members of the affected societies.\textsuperscript{140}

\begin{flushright}
\textsuperscript{137} \textit{Ibid}. See also, M. Douglas, \textit{Natural Symbols: Explorations in Cosmology}


\textsuperscript{139} Lamer, \textit{Witchcraft and Religion}, p. 109.

\textsuperscript{140} Durkheim himself made vague references to the continuation of religious beliefs and
practices in some altered form, involving, perhaps, as Giddens suggests, 'the celebration of
humanist and political values such as freedom, equality and social cooperation.' \textit{Sociology}, p. 446.
In this connection, Robert Bellah has argued that most modern industrialised societies already
foster a range of secularised 'civil religions', replete with a range of sophisticated range of
symbols, rituals and ceremonials, all intended to reaffirm a kind of social cohesion. \textit{Beyond Belief}
(New York: Harper and Row, 1970). See also, A.D. Smith, \textit{National Identity} (Harmondsworth:
Penguin Books Ltd, 1991), p. 77, who expressly invokes this Durkheimian characterisation in
relation to the rituals, ceremonials and other symbolic accoutrements of nationalism.
\end{flushright}
In the context of his focused study of religion, magic and witchcraft in sixteenth- and seventeenth-century England, Thomas is particularly critical of the deficiencies evident in the theoretical explanations generated within the conventional sociological traditions of Weber and Durkheim alike:

If it is by religious ritual that society affirms its collective unity, they argue, then the decline of that ritual reflects the disappearance of that unity. The breaking of shared values, consequent upon the growth of urbanism and industrialism, makes such collective affirmations increasingly difficult. . . . Norms which had previously seemed God-given henceforth appeared as mere rules of utility needing adaptation in the face of changing circumstances. In the country villages, where some moral unity survived, it was possible for organized religion to retain some social meaning. But in the cities religious indifference became most marked, because it was there that society's moral unity had most obviously been broken.\(^{141}\)

This kind of interpretation, Thomas argues, exaggerates and idealises the moral unity of medieval society, romanticising the period as a time when 'men were cosily bound to each other in little units of manor, village and gild. . . .'\(^ {142}\) We simply 'do not know enough about the religious beliefs and practices of our remote ancestors to be certain of the extent to which religious faith and practice have actually declined,' he continues, nor can we speak with certainty about the levels and extent of apathy and agnosticism that existed before the advent of industrialism.\(^ {143}\)

Implicit in Thomas's criticism is the recognition that sociological explanations—no more so, perhaps, than historical explanations—of change in the

\(^{141}\) *Religion and the Decline of Magic*, p. 205.


depth, extent and quality of religiously inspired, as opposed to scientifically informed, beliefs and practices in Anglo-European society, which claim to be supported by demonstrable indici of a linear progression in human thought and action from the irrational to the rational, and which contrapose the epistemological currency, first of magic and religion, and then of religion and science on diachronic bases, are problematic at best. Even the most primitive societies have had their religious sceptics;¹⁴⁴ and Anglo-European society has always entertained (if not always sympathetically) a considerable measure of heterodoxy. No less so than historians, sociologists similarly struggle with, and similarly resist, a recognition of the continuing co-existence of what has been described above as credulous and critical systems of belief in Western society.¹⁴⁵

In this respect, the deployment of dichotomous models of nominally rational, as opposed to irrational, patterns of belief and behaviour in human society, even for the limited heuristic purposes of sociological theory, really provides little more in the way of explaining human experience, than has the more overtly ideological deployment of such models by those who have undisguisedly sought only to validate the moral judgements implicit in the characterisation of the distance between 'modern' Western and 'traditional' non-western societies as constituting the developmental heights achieved by the former, but which the latter have yet to scale.¹⁴⁶


¹⁴⁵ See discussion of the 'credulous' and 'critical' literature of sorcery an witchcraft in the earlier portions of this chapter. As we shall see, anthropologists have been far less reluctant to acknowledge the co-existence of such belief systems in non-Western societies, and at least to suggest their co-existence in contemporary Western society.

3. ANTHROPOLOGICAL REPRESENTATIONS OF SORCERY AND WITCHCRAFT BELIEFS

A. The Origins and Development of Anthropological Studies of Sorcery and Witchcraft

'Anthropology must choose,' Maitland warned at the close of the nineteenth century, 'between being history and being nothing.'\textsuperscript{147} The import of his admonition is poignantly echoed today in the introduction to a recent collection of ethnographic essays concerned with the dynamics of sorcery and social change in modern Melanesia,\textsuperscript{148} in which the reader and practitioner alike are reminded that the ultimate objective of social anthropology is 'the formation of general statements regarding the human condition.'\textsuperscript{149}

We strive to understand human beliefs and behaviour not only in one society or situation, but in many. Social anthropology is built on ethnography, but the goal is ethnology.\textsuperscript{150}

In many ways, of course, it has been through the anthropologist's and sociologist's (and for that matter, the historian's) deliberate departure from the evolutionist paths of nineteenth-century Eurocentric scholarship that has served, at once, to facilitate a more meaningful understanding of the nature and dynamics of


\textsuperscript{148} 'Sorcery and Social Change in Melanesia' (1981) 8 \textit{Social Analysis} [special issue], ed. M. Zelenietz and S. Lindenbaum.

\textsuperscript{149} \textit{Ibid.}, p. 5.

\textsuperscript{150} \textit{Ibid.}, p. 5.
the beliefs and behaviour associated with witchcraft and sorcery amongst non-western peoples, and to shed instructive new light on our understanding of those phenomena as they have occurred, and may occur still, in Western society and culture. To the extent that those early influences still 'haunt the mind of any scholar interested in the topic' of magic, religion, witchcraft and sorcery, however, their impress may continue to be reflected in contemporary scholarship, if only in the attenuated sense discussed above. And in so far as those continuing influences bear important implications for our understanding of witchcraft and sorcery-related beliefs in Papua New Guinea today, mediated as that understanding must be by the interpretations and analyses of contemporary anthropological studies, it behoves us to consider them critically, if briefly, at the outset.

(1) The Patrimony of Victorian Intellectualism

Anticipated in Homer, and reaching back at least as far as the sixteenth century, the more immediate intellectual origins of contemporary

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154 See Chapter Two.

anthropological interests in witchcraft and sorcery-related beliefs and practices can be identified with the spirit of inquiry by which the whole of Western scholarship was charged in the mid- to late-nineteenth century. This was an era 'imbued with a pervasive ideology of social progress,' driven by 'hopes for a general science of Man,' and committed to the discovery of 'social laws in the long evolution of humans toward ever higher standards of rationality.'

Searching in earnest for such tenable generalisations about humankind as might be discerned in what was known—or believed to be known—about Western, Asian and Near Eastern civilisations in the past, and the contemporary native societies of Africa, Australia, Oceania and the Americas, scholarly contributors to what still amounted largely to a kind of 'armchair' ethnology pursued a range of ambitious intellectual projects, the ultimate object of which was to uncover 'the origins of modern institutions, rituals, customs, and habits of thought through the contrasts of evolutionary stages in the development of human society.' In this process, the assembled materials on 'contemporaneous "savage," or "primitive," peoples served them as living cultural analogies with the past.'

Grounded in the then current theories of social evolution, this earnest search for a general understanding of the human condition was predicated on the implicit,


158 It is important to distinguish between these nineteenth-century theories of social evolution and contemporaneous developments relating to biological theories of evolution. Although the former 'acquired a certain luster from about 1859,' largely as a consequence of the popularity of Darwin's work, they were not, in any substantive sense, dependent on the latter. Nisbet, *Social Change and History*, p. 161:

In the first placed, all of the principal works in the formation of the theory of social evolution had made their appearance
underlying assumption that the rationalism of modern Western society and culture—which, after all, had given rise to both the intellectual capacity to ask the relevant questions, and the scientific wherewithal by which reliable answers to those questions might be found—provided self-evident proof that modern Western civilisation represented the most advanced point to which humankind had thus far progressed along the social-evolutionary path. Why and how we had become who we were constituted the fundamental question. Why we were once less than what we had become, and why contemporary primitive societies had not, or at least not yet, progressed so far as we had done, were subsidiary questions, the answers to which became interesting and important primarily because of they light it was before the publication of Darwin's book. This was true of Comte, Hegel, Marx, and Spencer. And even those which appeared shortly after the publication of The Origin of Species clearly involved work that had begun much earlier. I refer to the works of such men as Sir Henry Maine, Edward Tyler, and Lewis Morgan. None of these classics in social evolution refer to, or show any objective evidence of relation to, the line of study in biological speciation that came out of the eighteenth century and culminated in Darwin's great book. ...[9] In the second place ... whereas the biological theory became ... a populational and statistical theory, the theory of social evolution was, and remains to this day, a typological construction. [Ibid., pp. 161-162]

A similarly significant distinction can be drawn between the nineteenth-century historiography associated with the theories of von Ranke, Mommsen, Motely and Prescott, and the 'historical method' by which the social evolutionists often characterised their own approaches. The latter, as Nisbet explains, regarded history as 'abstract history' (Comte's term), that is, 'history divorced from all particularity of the events, actions, personages, places, and periods that was the very substance of what the historians were concerned with.' Social Change and History, p. 165. In sum:

The theory of social evolution is no more than the eighteenth-century theory of natural history—broadened, extended, ramified, and filled with a volume of ethnographic data not known to such men as Ferguson, Smith, and Rousseau (and also largely, though not wholly freed of the tendentiousness of eighteenth-century natural history), but the same basic theory, nevertheless. [Ibid.]
believed they would throw on the fundamental question, which was ultimately concerned with nature and anticipated evolution of Western society.\textsuperscript{159}

To be sure, the appearance, language and behaviour of traditional non-western peoples and the indigenous tribal societies of North and South America and Australia were markedly different to those of the modern Western world. Their technologies and other elements of their material culture were likewise different and, from the perspective of the civilised nineteenth-century Western observer, clearly simpler, cruder, less efficient and generally inferior to his or her own (similar though they may have been to those of our ancient forbears). Beyond such superficial and material differences, however, the assumption of Western evolutionary superiority was underscored by the apparent differences between modern and primitive beliefs about the nature of the world, the parameters of

\textsuperscript{159} This is not to carp on what Marcus and Fischer describe as the 'faddishly popular' tendency nowadays to 'dismiss the evolutionary thought of the nineteenth century as ethnocentric, crude, and self-serving of domestic elites and colonial rulers.' Indeed, as these authors suggest, one does well to remember that, in the circumstances, such thinking 'played a profound role in nineteenth-century battles to establish a secular-scientific outlook, to argue for the malleability, and thus the reformability, of society, and finally to initiate the modern sense of tolerant pluralism.'\textit{Anthropology as Cultural Critique}, p. 128. For all that, however, Marcus and Fischer acknowledge that the 'subliminal message' of much of the twentieth-century anthropology, which derived from the intellectual process begun by the evolutionists, tends—like the more overt message imported in the nineteenth-century scholarship itself—to affirm the basic superiority of modern Western society. This legacy of evolutionism seems to remain firmly embedded in popular contemporary thought, instantiated in 'the continua of modernization or development, or the paired schemata of traditional/modern, preliterate/literate, peasant/industrial', each of which draws support from the Victorian doctrine of progress and serves to reinforce a distinctively Western self-congratulatory complacency. \textit{Ibid.}, p. 129

Nisbet makes the same observation in his analysis of the directionality of change as a principal element of nineteenth-century theories of social evolution, referring, by way of illustration, to the ideas of progress and social development elaborated by Comte, Hegel, Marx, de Toquville, Maine and Morgan:

No one can miss the fact that in every instance—there is no exception—the direction of change found by the evolutionist was toward the specific set of qualities possessed by Western Europe alone... We should not overlook the ethnocentric overtones of the allegedly universal patterns of development uncovered. \textit{Social Change and History}, pp. 169-170.
experiential reality and the cosmological constructs in accordance with which men and women might correctly and rationally apprehend their place in the universe.

Indeed, in so far as the social, ethical, political, economic and technical emoluments of modern Western society were regarded as the products of an ongoing evolutionary process whereby true scientific knowledge and a rationally grounded understanding of the universe came increasingly to supplant the ignorance of our own ancestors, it was the patently irrational beliefs of primitive peoples that were seen to be at the bottom of their abject state. It was this recognition which served to draw the attention of nineteenth-century sociologists to the apparently evolutionary relationship between magic and religion (and the somewhat more troublesome relationship between religion and science) in Western society, and which likewise served to attract the interest of anthropology’s nineteenth-century founders to beliefs in, and the related practices of, magic, witchcraft and sorcery.¹⁶⁰

In England, the development of anthropological analyses of systems of religious, magical and scientific belief relate back directly, if by no means exclusively, to the ideas of Edward Burnett Tylor (1832-1917) and Sir James

Frazer (1854-1941), as initially explicated in the two principal works of evolutionist, proto-anthropological theory for which they are best known: Tyler's *Primitive Culture* and Frazer's *The Golden Bough*.

Consistent with an evolutionist analytical perspective, in accordance with which a rationally-based, scientifically informed system of beliefs about the natural world was understood as having come to supplant the irrational and supernatural modes of explanation and understanding by which earlier Western societies comprehended even the most ordinary elements of phenomenological and experiential reality, both Tylor and Frazer regarded the magical and religious beliefs of primitive non-Western peoples as involving a genuine, albeit inadequate, attempt to provide a rational interpretation of the world, and a means by which worldly goals might be achieved. Like our own, the beliefs of primitive peoples were seen to be based on their observations of the events and phenomena occurring and existing in the world around them. The thought processes through which they explained and imported significance into such events and phenomena might not necessarily be intrinsically less rational than ours. Bereft of the advantages of modern Western science and ignorant of the evolved intellectual processes an experience of the world informed by a scientific understanding would have afforded them, however, the observations of primitive peoples must

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be either mistaken or insufficient, or both. To that extent, their deductions must be faulty, their conclusions incorrect and the systems of belief in accordance with which their cosmological and phenomenological explanations were constructed necessarily false.

On such an analysis, there is no clear distinction between the magical beliefs of primitive societies, on the one hand, and the religious beliefs still widely entertained by the otherwise enlightened minds of nineteenth-century Western society, on the other. Moreover, to the extent that religious beliefs might properly be regarded as similarly false, the co-existence of science and religion in modern Western society is difficult to reconcile with the premise of a more advanced and superior Western rationality, short of assuming that some forms of irrational belief (religious) are simply more advanced than other forms (magical)—a view which neither Tylor nor Frazer frankly disavowed. 164

(a) Social Evolution and the Comparative Method of Ethnological Analysis

In their own ways, Tylor and Frazer did seek to clarify the difference between magical and religious beliefs; although Frazer was more inclined to recognise that an evolutionary relationship between the two must exist, and both were rather more concerned with articulating the distinction between the irrationality of magic and the rationality of science than to account for the persistence of religious beliefs. 165 The analytical technique they utilised in the process was the


165 Much of the following discussion relies on Penner, 'Rationality, Ritual and Science; Sharot, Magic, Religion, Science and Secularisation'; Horton, 'Neo-Tylorianism: Sound Sense or Sinister Prejudice?'; Back to Frazer?'; Mair, An Introduction to Social Anthropology, pp. 210-216; Luhrmann, Persuasions of the Witch's Craft, pp. 345-356; and E. De Martino, 'The Problem of
comparative method; and it was by this method that Tylor and Frazer, amongst many other nineteenth-century proto-anthropologists and natural historians, sought to make sense of the range of contemporary societies with which they became increasingly interested, fitting each one into its proper place in a serviceable evolutionary sequence. Before examining the results and implications of their efforts in this regard, it will be instructive to consider certain features of the comparative method itself.

Of the comparative method of historical and socio-cultural analysis, Nisbet writes, 'few subjects . . . have been more thoroughly and widely misunderstood.' The Comparative Method is thought to be the consequence of the 'scientific' anthropology of the late nineteenth century. It is not. Its roots and basic framework are as old in Western thought as Greek and Roman interest in origins and cultural stages. It is thought to have disappeared in the twentieth century along with the theories of Spencer and Morgan. It has not. It remains the framework of countless 'comparative' treatments of institutions and cultures. It is thought to provide evidence for the reality of the general line of social development put forth by the theory of social evolution. It does not, for fundamental to the Comparative Method and its assumed validity as a body of evidence are the very preconceptions—conclusions, too, actually—of the theory of social evolution that the Comparative Method purportedly verifies.

In fairness, Marcus and Fischer have argued—without, I think, intending to pun—that the comparative method was 'progressive for its day,' providing a compelling defence, in the form of the 'psychic unity of mankind,' against the

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166 Marcus and Fischer, *Anthropology as Cultural Critique*, p. 128.

167 Nisbet, *Social Change and History*, p. 189.

168 Ibid., pp. 189-190.
blatant racism of the day; forceful arguments for 'the principle of uniformitarianism against theological assertions of arbitrary acts of divine intervention'; a rejection of theological claims that 'the primitive was an example of the fall from grace (and hence subjectable on moral grounds to slavery and other tutelary dependencies)'; and a host of exemplary cases from the non-western world and the traditional indigenous societies of North and South America by which the values and practices of Victorian society might bear a more critical scrutiny in respect of property rights, political and domestic relations, law and religious authority.\textsuperscript{169} As Nisbet points out, however, it is, perhaps, this very assertion of universalism, and the assumption that the comparative method marked the beginning of a 'dispassionate and objective comparison of cultures and institutions of the world,' providing the 'instrument of Western scholarship's release from thraldom to its own past' and, at once, an intellectual and a moral point of departure 'from which new and more universalized criteria of history and development were gained', that represents the greatest misconception about comparative method.\textsuperscript{170} In fact, he continues, in its nineteenth-century iterations (and in some of its subsequent, more refined expressions in Western socio-cultural scholarship as well), the comparative method may be described as:

hardly more than a shoring-up of the idea of progressive development generally, and more particularly, of the belief that the recent history of the West could be taken as evidence of the direction in which mankind as a whole would more and, flowing from this, should move. The specific set of cultural qualities that seemed to most rationalists in the nineteenth century to manifest the direction of Western history were

\textsuperscript{169} Anthropology as Cultural Critique, p. 128.

\textsuperscript{170} Social Change and History, p. 190.
adapted for comparative purposes to become the criteria of
classification of the peoples and cultures of the world.\textsuperscript{171}

Regarding the beliefs and customs of contemporary primitive societies, by
way of an evaluative comparison with those of his own, to be 'rude' and
'barbarous', Frazer was thus emboldened to opine that the irrational beliefs and
practices with which the ancient (and, one may suggest, not so ancient) history of
Western European society is replete might themselves be rendered explicable
through an examination and understanding of former. Thus, with specific
reference to a particularly gruesome ritual, supposed to have been carried out in
the times of Roman antiquity at a lake near the Italian village of Nemi, he wrote:

It is the very rudeness and barbarity of the custom which allow
us a hope of explaining it. For recent researches into the early
history of man have revealed the essential similarity with
which, under many superficial differences, the human mind
has elaborated its first crude philosophy of life. Accordingly,
if we can show that a barbarous custom . . . has existed
elsewhere, if we can detect the motives which led to its
institution; if we can prove that these motives have operated
widely, perhaps universally, in human society, producing in
varied circumstances a variety of institutions specifically
different but generically alike; if we can show, lastly, that
these very motives, with some of their derivative institutions,
were actually at work in classical antiquity; then we may fairly
infer that at a remoter age the same motives gave birth to [the
first mentioned custom].\textsuperscript{172}

Somewhat more prosaically, but in very much the same comparative-
evolutionist vein, Tyler posited the view that:

the institutions of man are as distinctly stratified as the earth
on which he lives. They succeed each other in series
substantially uniform over the globe, independent of what
seem comparatively superficial differences of race and
language, but shaped by similar human nature acting through

\textsuperscript{171} \textit{Ibid.}, pp. 190-191.

\textsuperscript{172} \textit{The Golden Bough}, p. 2.
successively changed conditions in savage, barbaric, and civilized life.\textsuperscript{173}

Appending this claim with the passing \textit{caveat} that such comparison 'is but a guide, not a full explanation,' he confidently concluded:\textsuperscript{174}

So far as the evidence goes, it seems that civilization has actually grown up in the world through these three stages, so that to look at a savage of the Brazilian forests, a barbarous New Zealander or Dahoman, and a civilized European, may be the student's best guide to understanding the progress of civilization.\ldots\textsuperscript{173}

It may seem that I labour the point that the rationalist-intellectualist underpinnings of nineteenth-century proto-anthropological analysis, anchored in the foundation of the comparative-comparative method, involved so profound (and profoundly uncritical) a commitment to the substantiation of a lineal model of progressive socio-cultural development and the manifestly superior position of contemporary Western society on that continuum; that the classificatory protocols implicit in this paradigm effectively required the 'primitive' beliefs of indigenous Africans, Australians, the American Indians and most certainly Melanesians to be categorised not simply as exotic or different, but as reflecting a demonstrably lower stage along a developmental path regarded as universal. I do so, however, to underscore the significance of the impact of this perspective, not only on the nineteenth-century scholars who, like Tylor and Frazer, were so convinced of its

\begin{itemize}
\item \textsuperscript{173} 'On a Method of Investigating the Development of Institutions: Applied to Laws of Marriage and Descent' (1889) \textit{Journal of the Royal Anthropological Institute} 269 [quoted in Nisbet, \textit{Social Change and History}, p. 199 (emphasis provided)]
\item \textsuperscript{175} \textit{Ibid.}
\end{itemize}
validity, but on a later generation of anthropologists, whose works have served to perpetuate, mutatis mutandis, the idea that the technological and institutional sophistication of Western society necessarily implied the possession of superior intellectual capital (if not necessarily an innate intellectual superiority), and an effective monopoly on the prerogative to describe, in decidedly Western terms, the contours and content of human rationality.

For present purposes, an appreciation of the potency and pervasiveness of the nineteenth-century comparative-evolutionist perspective provides an essential backdrop to a meaningful consideration of the seminal—and still influential—anthropological and anthropologically-informed studies of witchcraft and sorcery-related beliefs in non-western societies.

(b) Tylor and Frazer on the Interrelations of Magic, Religion and Science

In broad scope, the religious beliefs of a people may be said to consist in the set of shared cosmological and ontological understandings around which their fundamental orientations towards, and their explanations of, social and experiential reality are organised, and in the active or symbolic expression of


177 The ethnographic paradigm developed in the 1920s and 1930s purported to turn many of these assumptions on their head, entailing, as it did, 'a submerged, unrelenting critique of Western Civilization'. But the lamentation that we in the West had lost what they—the cultural other—still had, and that we must learn from them in order that we might recover (from our own past? from a universal past?) a greater respect for nature, a more intimate and satisfying experience of social communalism and a renewed sense of the sacred in everyday life seems itself to imply a metaphorical turning-back of the evolutionary clock, bespeaking more of a romantic inversion of the evolutionary premise, than a rejection of it. See Nisbet, Social Change and History, pp. 205-208. Cf. Marcus and Fischer, Anthropology as Cultural Critique, p. 129.
which these elements of overarching collectivity are affirmed. Simply put, religious beliefs are concerned with the essential inter-relations between human beings, and between human beings and the totality of the physical and metaphysical world of which they consider themselves to be involved.\textsuperscript{178} More simply still, religious beliefs are concerned with 'what is and why it is—with the nature of the universe and man's place in it, what the nineteenth-century anthropologists, along with most theologians, called the "great mysteries".'\textsuperscript{179}

No society, past or present, modern or primitive, would appear to have been without some form of religious belief. Moreover, given the existential and socio-cultural significance of such immanent conceptions within their own society, it is hardly surprising that—beyond the variety of the modes by which the religious beliefs of other peoples might be expressed—the nature and variety of their religious beliefs themselves should have attracted the interest and attention of the comparative-evolutionist ethnologists of the nineteenth-century.\textsuperscript{180} Consistent with the evaluative ethos of their classificatory enterprise, it is no less surprising that nineteenth-century anthropologists should have analysed the cosmological and mystical beliefs of the more primitive peoples of the world against the rationalistic criteria of their own scientifically informed intellectualism, or that the conclusions netted by such analyses should have resulted in the placement of the


\textsuperscript{179} Mair, \textit{An Introduction to Social Anthropology}, p. 210.

\textsuperscript{180} What is surprising, perhaps, is that of all the discrete social institutions to which such attention was turned at the time—kinship, marriage, transportation, agriculture, warfare, law, etc.—comparatively few focused specifically on religion.
belief systems under study at positions lower down on the evolutionary scale than the religious, and certainly the scientific, beliefs of the modern West.

Amongst theologians, ideologically driven discriminatory exercises in respect of magical and religious beliefs had been going on for centuries.\textsuperscript{181} Indeed, important elements of the Protestant Reformation involved a deliberate attempt to eliminate much of what had come to be regarded as the magical embellishments of Catholic doctrine and ecclesiastical practice, which in many ways were seen to have blurred the distinction.\textsuperscript{182} For Tylor and Frazer, however, and for a considerable number of their intellectual progeny, the enterprise was more purely analytical and, in keeping with the Linnaean protocols of a distinctively scientific analysis, largely (and in certain respects, distractedly) taxonomical.\textsuperscript{183}

Tylor adopted a 'minimum definition' of religion as involving a belief in 'spiritual beings' \textit{simpliciter}. He introduced the idea of \textit{animism} to capture all such forms of belief, which he divided into two categories: the \textit{doctrine of souls}, which captured beliefs involving the idea that human beings entertained an essential spiritual existence that survived the cessation of their corporeal existence; and the \textit{doctrine of spirits}, embracing beliefs in the existence of a range of other spiritual beings.\textsuperscript{184} In Tylor's view, animistic beliefs of both forms arose


\textsuperscript{183} For a critical consideration of the implications of a preoccupation with such taxonomical exercises in more recent anthropological studies of witchcraft and sorcery, see T.O. Beidelman, 'Towards More Open Theoretical Interpretations' in Douglas, \textit{Witchcraft Confessions and Accusations}, pp. 351-356; V.W. Turner, 'Witchcraft and Sorcery: Taxonomy versus Dynamics' (1964) 34(4) \textit{Africa} 314-324.

from universal human experiences. In relation to his doctrine of souls, Mair offered the following explanation:

When a person dies, something seems to leave his body; and, short of death, people can be observed in conditions of unconsciousness, in trances or asleep. People dream that they see other people, and that they themselves are in strange places. All these experiences can be explained if one supposes that inside the body there is a soul which can leave it, temporarily or permanently, and go elsewhere.¹⁸⁵

Tylor invoked the doctrine of spirits to account for the attribution of a spiritual or supernatural quality to non-human entities in the natural environment, and the ascription to those objects and entities of a capacity to act and react in ways not unfamiliar to human experience.¹⁸⁶ 'Spirits,' he wrote, 'are simply personified causes', and the belief in their existence reflected the 'childlike philosophy' of primitive peoples whereby trees, stones, snakes or rivers are thus personified.¹⁸⁷ Animistic beliefs in spiritual beings of any kind were, on Tylor's analysis, the products of primitive delusions, which he was concerned to distinguish from the equally delusional, but potentially more pernicious, belief in magic, which, like


¹⁸⁶ Animism might be distinguished from totemism in that the latter involves the worship of a spiritual entity or object, as opposed to the mere ascription of a spiritual quality to it. See E. Durkheim, *The Elementary Forms of the Religious Life*, trans. J. Swain (1915; rpt London: Allen and Unwin, 1976); Giddens, *Sociology*, pp. 459, 465.

science, arose from otherwise rational thought processes and observations, except that the resultant associations were wrong:\textsuperscript{188}

\[H\]aving come to associate in thought those things which he found by experience to be connected in fact, \[the primitive man\] proceeded erroneously to invert this action, and he concluded that the association in thought must involve similar connections in reality.\textsuperscript{189}

For Tyler, magic was not so much an expression of religious belief as evidence of the primitive belief in bad science (‘occult science’), often malevolently directed, and indicative of a society at the ‘the lowest level of civilization.’\textsuperscript{190} Forsworn by modern, scientifically enlightened societies, where variants of magical beliefs were seen to persist in pockets of Western society (and elsewhere in the world where the scientific knowledge was, if not well known, at least known of), they did so as vestigial survivals of an earlier evolutional stage.\textsuperscript{191} Indeed, it was is in the context of his discussion of such survivals,\textsuperscript{192} not his consideration of religion, that Tylor addressed the topic of magic in \textit{Primitive Culture}, describing them as:

\begin{quote}
processes, customs, opinions, and so forth, which have been carried on by force of habit into a new state of society different from that in which they had their original home, and they thus remain as proofs and examples of an older condition of culture out of which a newer has been evolved.\textsuperscript{193}
\end{quote}

\textsuperscript{188} \textit{Primitive Culture}, vol. I, p. 112.

\textsuperscript{189} \textit{Ibid}, p. 116.

\textsuperscript{190} Sharot, ‘Magic, Religion, Science and Secularisation’, p. 262.

\textsuperscript{191} \textit{Ibid}.

\textsuperscript{192} Tylor is credited with introducing the term into anthropological usage, although the concept was presaged in the writings of Morgan and McLennan. See Mair, \textit{An Introduction to Social Anthropology}, p. 28.

\textsuperscript{193} \textit{Primitive Culture}, vol. I, p. 16.
It is interesting to note that Tylor's classification of contemporary indicia of magical and related beliefs in Western society as survivals, and his very elaboration of the concept itself, may have involved something of a tactical gambit in defence of the comparative method, and in support of the Western European ethnocentric ideal that method could not fail to serve when employed for the purposes of comparative cultural analysis.\footnote{As Nisbet notes, in the latter part of the nineteenth century, 'some shrewd, if sometimes fundamentalist, minds' had come to challenge the theory of progressive development, raising compelling questions about the certainty with which ethnologists had ordered particular societies along the developmental continuum; and, indeed, about the directional assumptions underlying the construct of a developmental continuum itself [Social Change and History, p. 203]. Thus, for example, it was asked:

Why, on strictly logical and even empirical grounds, could not a very different order be contrived, one in which, say, China or India is placed at the top in the status of 'developed' or 'more developed' instead of England or France and Western Europe as a whole? . . . . On what logical and empirical grounds do we assume that change in time tends to be progressive rather than regressive? [Ibid.]

Although Nisbet suggests that many such questions might have been officially disregarded, Tylor, it would seem, felt obliged to respond, so stung was he 'by the attacks on his cherished theory of developmental progress.' It was in the composition of that response 'that he literally created the idea of survivals as a form of counter-attack,' which he deftly proceeded to mount by elaborating the overarching distinction between traditionalism and modernism in Western society [Ibid.]:

Close inspection of some of the elements of traditionalism—to be found among the rural, the peasantry, the backward, even in children's games, as well as in the whole gamut of superstition—revealed, Tylor declared, very close similarity with elements of culture in one or other preliterate people, where such elements existed in perfect conformity with the consensus or social structure of that preliterate people. If this were the case, Tylor argued, could not the presence of these same traits among the 'backward' sections of Western populations or within purely superstitious or ritualistic or ceremonial contexts be taken as proof that Western society had once known a stage in which these elements were also perfectly conjoined to the larger belief system of the social order? Tylor . . . thought the answer was a clear affirmative. Once the kind of beliefs represented today by, say, Hallowe'en observances were standard, were quite literally functional parts of the Western cultural order. Time, however, has passed them by. The processes of progressive development have, by elevating rationalism and other more progressive}
Like Tylor, Frazer also recognised that magical and other equally irrational beliefs could still be found amongst the rural and less-well educated members of otherwise modern European societies. Rather than emphasising an explanation for the persistence of such beliefs in terms of Tylorian survivals, however, he focused instead on the correspondence between magic and science. In his view, although magic might have been amongst the most primitive forms of belief, it shared with modern science the essential quality of reliance on the existence of a set of immutable laws, the operation of which could be predicted and calculated with a measurable degree of precision. On Frazer's analysis, however, such science as might be discerned in primitive systems of magical belief and practice was spurious, and its theoretical dynamics unknown and unknowable to the primitive believer and practitioner, for whom 'the very idea of science is lacking in his undeveloped mind.'

'The primitive magician,' he wrote, 'knows magic only on its practical side' as the 'bastard art', behind which lay the logic of a 'spurious science' comprehensible only to the 'philosophic student' capable of disentangling 'the abstract principles from their concrete applications.' Formulating those principles theoretically, Frazer described primitive magical beliefs as grounded in a pseudo-scientific Law of Sympathy, the underlying assumption of which was that:

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197 The Golden Bough, p. 12.
things act on each other at a distance through a secret sympathy, the impulse being transmitted from one to the other by means of what we may conceive as a kind of invisible ether, not unlike that which is postulated by modern science for a precisely similar purpose, namely, to explain how things can physically affect each other through a space which appears to be empty.\textsuperscript{198}

Application of the \textit{Law of Sympathy} gives rise to the belief in sympathetic magic, which Frazer said is of two kinds: \textit{Homoeopathic (or Imitative) Magic}, founded on the false association of ideas by virtue of their apparent similarity; and \textit{Contagious Magic}, founded on the similarly false association of ideas by contiguity.\textsuperscript{199} In the first instance, objects appearing to have similar characteristics are regarded as capable of affecting one another, so that an effect on one can be produced by imitating that effect on the other. By way of illustration, Frazer refers to the fairly widespread belief and practice amongst ancient and primitive peoples whereby a person may be caused to suffer an injury, illness or death by inflicting damage on an image of the intended victim\textsuperscript{200}—the classic example of which might involve sticking pins into a doll representing one's enemy.\textsuperscript{201}

In the second instance, magical beliefs and actions are predicated on the assumption that:

\begin{quote}
    things which have once been conjoined must remain ever afterwards, even when quite dissevered from each other, in
\end{quote}

\textsuperscript{198} \textit{Ibid.}

\textsuperscript{199} \textit{Ibid.}

\textsuperscript{200} \textit{Ibid.}, pp. 12-13. A number of other examples are given of similar beliefs and practices amongst 'the sorcerers of ancient India, Babylon, and Egypt, as well as of Greece and Rome . . .', and such as are still resorted to 'by cunning and malignant savages in Australia, Africa, and Scotland' (pp. 13, 14-37). A New Guinea example is offered at pp. 18-19.

\textsuperscript{201} See Mair, \textit{An Introduction to Social Anthropology}, p. 214.
such a sympathetic relation that whatever is done to one must similarly affect the other.\textsuperscript{202}

Examples of contagious magic cited by Frazer include a variety of beliefs and practices based in the supposed relationship between an individual, on the one hand, and a range of objects, materials and substances which once were part or products of that person's body (fingers, eyes, limbs, hair, nails, teeth, blood, saliva, sweat, excreta) or otherwise closely associated with him or her (clothing, weapons, eating utensils, jewellery).\textsuperscript{203} Here, too, Frazer illustrates these exemplary propositions with descriptions of practices drawn from a variety of historical and contemporary accounts.\textsuperscript{204}

In his depiction of sympathetic magic, Frazer draws a distinction between what he describes as private and public magic, and practitioners (magicians and sorcerers) who apply their art privately for the benefit or injury of individuals, and publicly for, or in relation to, the community as a whole.\textsuperscript{205} In relation to the latter he wrote:

Wherever ceremonies [magical rites and incantations] are observed for the common good, it is obvious that the magician ceases to be merely a private practitioner and becomes to some extent a public functionary. The development of such a class of functionaries is of great importance for the political as well as the religious evolution of society.\textsuperscript{206}

\textsuperscript{202} Frazer, \textit{The Golden Bough}, p. 37.

\textsuperscript{203} Ibid., pp. 37-38.

\textsuperscript{204} Ibid., pp. 38-45.

\textsuperscript{205} Ibid., p. 45.

\textsuperscript{206} Ibid.
It is, in part, on the basis of this distinction between the private and public sphere of magical beliefs and practices that Frazer's effort to distinguish between magic and religion predicates.\textsuperscript{207}

Recognising that the practices of sympathetic magic could involve elements of what Tylor considered animistic beliefs, Frazer regarded such instances as exceptional. In its 'pure unadulterated form,' magic operates on the assumption that natural events follow on, one from another, 'necessarily and invariably without the intervention of any spiritual or personal agency.'\textsuperscript{208} Indeed, it is in this particular sense that Frazer saw the fundamental conception of magic as identical with that of modern science:

\begin{quote}
Underlying the whole system is a faith, implicit but real and firm, in the order and uniformity of nature. The magician does not doubt that the same causes will always produce the same effects, that the performance of the proper ceremony, accompanied by the appropriate spell, will inevitably be attended by the desired result, unless, indeed, his incantations should chance to be thwarted and foiled by the more potent charms of another sorcerer. . . . Yet his power . . . is by no means arbitrary and unlimited. He can wield it only so long as he strictly conforms to the rules of his art, or to what may be called the laws of nature as conceived by him.\textsuperscript{209}
\end{quote}

\textsuperscript{207} As to the political implications of publicly expressed magical beliefs and practices, Frazer discusses the logical ascription and imputation of prestige, influence, honour, wealth and power to those individuals regarded as the ablest practitioners, upon whom the general welfare of the community might be seen to depend. But in so far as the premises of magic are \textit{demonstrably} false (or at least potentially so), it is the ablest and most sagacious practitioner who must also have come to 'see through the fallacies which impose on duller wits', and who must, therefore, be 'more or less conscious deceivers.' The honest sorcerer, who sincerely believes himself to have mastered or possess the powers ascribed to him, is in far greater peril than the deliberate impostor, since he is much less likely to be ready with a plausible explanation for the eventual and inevitable failure of his efforts, and more likely to be 'knocked on the head by his angry and disappointed employers' before he can find one. In a 'savage society', therefore, the general result is that 'supreme power tends to fall into the hands of the keenest intelligence and most unscrupulous character.' \textit{[Ibid.], pp. 46, 47-48}

\textsuperscript{208} \textit{Ibid.}, pp. 48-49.

\textsuperscript{209} \textit{Ibid.}, p. 49.
The failing of magic is not a function of its general assumption that sequential events are determined by immutable laws, but only in the fundamental misconception of the laws governing the sequence. In Frazer's view, the logic of the thought processes giving rise to magical beliefs is as sound as that of science. It is only the perceived associations that are false; if they were true, magic would be science.\textsuperscript{210}

However close he may have seen magic to stand in relation to science, Frazer's conception of religion operated to place the two systems of belief on qualitatively different levels; even if magic might be said to have preceded religion in an evolutionary sense. By religion, Frazer said: 'I understand a propitiation or conciliation of powers superior to man which are believed to direct and control the course of nature and of human life.' Thus defined, he continued, religion could be said to consist in the essential conjunction of two aspects: a theoretical belief in 'powers higher than man', and a practical attempt to propitiate or please those powers. Of these two elements, 'belief clearly comes first, since we must believe in the existence of a divine being before we can attempt to please him'; but it is the combination of the two components that Frazer regarded as essential to a serviceable concept and definition of religion, since belief without practice is mere theology.\textsuperscript{211}

Even in the absence of a corroborative invocation of St James's dictum: 'faith, if it hath not works, is dead, being alone',\textsuperscript{212} Frazer's elevation of a distinctively, if not necessarily uniquely, Western Judeo-Christian conception of religion to the

\textsuperscript{210} Ibid., p. 50.

\textsuperscript{211} Ibid.

\textsuperscript{212} Ibid.
status of a universally applicable set of comparative criteria would be patent.\textsuperscript{213} But whatever form its theological structure and ceremonial expression might take, to the extent that religion can be said to involve essentially a belief in 'superhuman beings' who are capable of controlling and directing a range of natural phenomena, and the endeavour of human beings to secure the favour of those deities, 'it clearly assumes that the course of nature is to some extent elastic or variable, and that we can persuade or induce the mighty beings who control it to deflect, for our benefit, the current of events from the channel in which they would otherwise flow.'\textsuperscript{214}

Thus, in so far as religion assumes the world to be directed by conscious agents who may be turned from their purpose by persuasion, it \textit{stands in fundamental antagonism to magic as well as science}, both of which take for granted that the course of nature is determined, not by the passions or caprice of personal beings, but by the operation of immutable laws acting mechanically.\textsuperscript{215}

It was this 'radical conflict of principle' which Frazer regarded as serving to differentiate so clearly magical and religious systems of belief, and by which 'the

\textsuperscript{213} Cf. Giddens, who counsels the avoidance of 'the pitfalls of culturally biased thinking' in the understanding of religious ideas and practices by ruling out the necessary application of just such criteria. Sociology, pp. 457-458. See also Douglas, \textit{Natural Symbols}, pp. 17-43; P. Lawrence, 'Religion and Magic' in \textit{Anthropology in Papua New Guinea: Readings from the Encyclopaedia of Papua and New Guinea}, ed. I. Hogbin (Carlton VIC: University of Melbourne Press, 1973), pp. 201-226; and see generally Wilson, \textit{Religion in Sociological Perspective}.

\textsuperscript{214} Frazer, \textit{The Golden Bough}, p. 51.

\textsuperscript{215} \textit{Ibid.}, emphasis provided. In accounting for the presence of animistic elements in certain systems of magical belief, Frazer argues that such spirits and other supernatural agents are regarded in precisely the same way as inanimate elements of the natural world; that is, they too are magically constrained or coerced, rather than religiously conciliated or propitiated. Thus:

[\textit{magic}] assumes that all personal beings, whether human or divine, are in the last resort subject to those impersonal forces which control all things, but which nevertheless can be turned to account by anyone who knows how to manipulate them by the appropriate ceremonies and spells. [\textit{Ibid.}]
relentless hostility with which in history the priest has often pursued the magician' might be explained.\textsuperscript{216}

The haughty self-sufficiency of the magician, his arrogant demeanour towards the higher powers, and his unabashed claim to exercise a sway like theirs could not but revolt the priest, to whom, with his awful sense of the divine majesty, and his humble prostration in the presence of it, such claims and such a demeanour must have appeared an impious and blasphemous usurpation of prerogatives that belong to God alone.\textsuperscript{217}

At the same time, however, Frazer was obliged to acknowledge that amongst early European peoples elements of magic and religion were often combined 'or, to speak perhaps more correctly, were not yet differentiated from each other.'\textsuperscript{218} There was, too, he observed, a seeming fusion—or confusion—of magic with religion in the practices of Melanesian and other contemporary primitive societies; and even amongst the 'ignorant classes' of modern Europe there was evidence of a similar confusion of religious and magical ideas.\textsuperscript{219} Thus, for example, he reported how, in France:

\begin{quote}
'the majority of the peasants still believe that the priest possesses a secret and irresistible power over the elements. By reciting certain prayers which he alone knows and has the right to utter, yet for the utterance of which he must afterwards demand absolution, he can, on an occasion of pressing danger, arrest or reverse for a moment the action of the eternal laws of the physical world.'\textsuperscript{220}
\end{quote}

\begin{footnotes}
\textsuperscript{216} Ibid., p. 52.
\textsuperscript{217} Ibid.
\textsuperscript{218} Ibid.
\textsuperscript{219} Ibid., pp. 52-53.
\textsuperscript{220} Ibid., p. 53 (Frazer cites no source for the text appearing within quotation marks).
\end{footnotes}
Responding to this, amongst other examples of the religious beliefs and practices of otherwise civilised European peoples, Frazer was compelled to concede the appearance of clear counterparts in the magical ideas of ancient and contemporary primitive societies. But in surmising that magic nonetheless represented a system of belief that was both historically antecedent to religion and, in an evolutionary sense, more primitive than religion, Frazer's arguments are analytically at their weakest and most transparent; his explanations, a paean to the theory of progressive evolutionary development and the comparative superiority of modern Western intellectual rationality, coupled with a poignantly ironic piety:

We have seen that on the one hand magic is nothing but a mistaken application of the very simplest and most elementary processes of the mind, namely the association of ideas by virtue of resemblance or contiguity; and that on the other hand, religion assumes the operation of conscious or personal agents, superior to man, being the visible screen of nature. Obviously the conception of personal agents is more complex than a simple recognition of the similarity or contiguity of ideas; and a theory which assumes that the course of nature is determined by conscious agents is more abstruse and recondite, and requires for its apprehension a far higher degree of intelligence and reflection, than the view that things succeed each other simply by reason of their contiguity or resemblance. . .

Thus religion, beginning as a slight and partial acknowledgement of powers superior to man, tends with the growth of knowledge to deepen into a confession of man's entire and absolute dependence on the divine; his old free bearing is exchanged for an attitude of the lowliest prostration before the mysterious powers of the unseen, and his highest virtue is to submit his will to theirs. . . . But this deepening sense of religion, this more perfect submission to the divine will in all things, affects only those of higher intelligences who

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221 Ibid., pp52-54.


As a man of his time, Frazer could confidently assert that magic was conspicuously present, and religion conspicuously absent, in 'the most backward state of human society' then known. Accounting for the persistence of sympathetic associations amongst the less-sophisticated, but otherwise conventionally religious, communities of Europe (Scottish, Irish and Russian examples being cited for the purpose of illustrating the point), and reconciling the fast hold of religion amongst the better educated members of Western society with the manifestly more tenable explanations proffered by science, was rather more problematic. In the event, Frazer could but avoid the issues:

It is not our business here to consider what bearing the permanent existence of such a solid layer of savagery beneath the surface of society, and unaffected by the superficial changes of religion and culture has upon the future of humanity . . . . When we reflect upon the multitude, the variety, and the complexity of the facts to be explained, and the scantiness of our information regarding them, we shall be ready to acknowledge that a full and satisfactory solution to so profound a problem is hardly to be hoped for . . . .

In fairness, however, it might also be said that these critical, if troublesome, questions were not so much begged as they were deliberately held in abeyance, to be addressed more fully and more satisfactorily by a later generation of anthropologists in what Frazer himself may have anticipated would be a more amenable intellectual environment.

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224 Ibid., pp. 58-59.

225 Ibid., p. 55.

226 Ibid., pp. 56-57.

227 Horton's observations on this score are telling:

Modern social anthropologists have often presented Frazer to us as a rather simple man immersed in the ethnocentric
Evans-Pritchard and the Ethnography of African Witchcraft and Sorcery

Over the past 60 years, virtually all scholarly considerations of witchcraft, sorcery and magic, anthropological and otherwise, contain at least some discussion of the work of Sir Edward Evans-Pritchard, whose fieldwork amongst the Azande of southern Sudan between 1926 and 1930 is generally regarded as the first detailed and focused ethnographic study of witchcraft and sorcery-related beliefs. Even today, as Eva Gillies noted in the introduction to her abridgement of Evans-Pritchard's *Witchcraft, Oracles and Magic among the Azande*:


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it is quite difficult to write about witchcraft, magic, beliefs concerning causation, the expression of social conflicts and tensions in mystical idiom, or indeed the general sociology of knowledge, without mentioning the name of Evans-Pritchard. 230

As it happens, Evans-Pritchard's work was not the first ethnographic study to treat of witchcraft and sorcery-related beliefs and practices amongst what were still referred to as 'primitive' societies. Indeed, the publication of at least three important ethnographically based anthropological monographs dealing, to a greater or lesser degree, with aspects of sorcery-related beliefs and practices, preceded that of Witchcraft, Oracles and Magic—all of which, interestingly, were the products of field work undertaken not in Africa, but in New Guinea. 231 Albeit, the impress of Evans-Pritchard's analysis of Zande magic, witchcraft and sorcery on subsequent anthropological inquiries into such beliefs and practices in Melanesia and elsewhere has been particularly profound and enduring. 232 On that


232 See M. Stephen, 'Introduction' in Sorcerer and Witch in Melanesia, pp. 1-2. The counter-productive influence of African-based anthropological models on Melanesian studies generally was itself a matter of some debate at one time. See J.A. Barnes, 'African Models in the New Guinea Highlands' (1962) 62 Man 5-9; L.L. Langness, 'Traditional Political Organization' in Anthropology in Papua New Guinea, pp. 142, 143. And with respect to studies of sorcery and witchcraft in particular, Mary Douglas has remarked: 'It is interesting to reflect on what would have happened in British anthropology if work in New Guinea had developed as quickly as in Africa': 'Thirty Years after Witchcraft, Oracles and Magic', xxiii. In a similar vein, Kuper suggests that Bateson's Naven was somewhat overshadowed by the contributions of his contemporaries, at least in part, on account of his isolation in New Guinea: Anthropology and Anthropologists, p. 77.
account, both the substance of Evans-Pritchard's work and, more importantly perhaps, its theoretical premeditations, invite especial scrutiny here.

Like Frazer and Tyler, Evans-Pritchard regarded the belief in magic, witchcraft and sorcery amongst the Azande as grounded in a fundamental mistake of fact: 'Witches, as the Azande conceive them,' he wrote, 'clearly cannot exist.'

His analysis of such beliefs, however, represented a radical departure from the intellectualist approach of his predecessors in two important respects: first, in its commitment to the necessity of examining and assessing the content and dynamics of those beliefs in their natural social context; and second, in the recognition that, when carefully considered in situ, such beliefs and their associated practices could be seen to entertain a coherent and tenable logic of their own.

In rejecting the intellectualist predisposition to explicate the basis of an African system of magical belief in accordance with the rigid and implicitly evaluative tenets of a decidedly modern Western European epistemology, limited as he regarded such an ethnocentric orientation to be by its preponderate emphasis on formulary concepts of rationalism and the individuation of thought, Evans-Pritchard drew heavily on the ideas Durkheim and others associated with the Année Sociologique. Of these Continental influences on development of Evans-Pritchard's thinking, far and away the most significant was Lucien Lévy-Bruhl, the French philosopher cum sociologist of thought whose own earlier work was

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233 *Witchcraft, Oracles and Magic*, p. 18. Unless otherwise indicated, all subsequent references are to Gillies' abridgement.

234 See Kuper, *Anthropology and Anthropologists*, p. 5. In the introduction to her abridgement of *Witchcraft, Oracles and Magic*, Gillies suggests that Marx, too, may have stood as 'a less overtly acknowledged ancestor in the dimmer background' (xx).

openly critical of his British counterparts, and was itself much affected by Durkheimian notions of the primacy of a sociological over a psychological understanding of the human condition in primitive societies. Thus, whereas *Witchcraft, Oracles and Magic* continues to be regarded as a seminal work in the ethnography of magic, witchcraft and sorcery, it was also, and more fundamentally, a study in the sociology of knowledge and perception. It is in this sense that Lévy-Bruhl's early influence on Evans-Pritchard is most apparent.

(a) *The Social Context and Sociological Contextualisation of 'Primitive' Beliefs in Magic, Witchcraft and Sorcery*

Lévy-Bruhl used the term *collective representations* to describe the set of ideas common to all members of a primitive society, passed on from one generation to the next and effectively imposed upon individual members by an 'external source, both pre-existing them and surviving them.' It was this decidedly social process which he took to be the essential subject matter of a sociology of thought. And it was his firm conviction in the centrality of that process that fuelled Lévy-Bruhl's critique of English intellectualism, the proponents of which he accused of arrogantly accounting for the explanatory deficiencies of primitive thought patterns on the basis of a 'rudimentary, infantile

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238 Horton, 'Lévy-Bruhl, Durkheim and the Scientific Revolution', p. 64. In the introduction to her abridgement of *Witchcraft, Oracles and Magic*, xxii, Gillies suggests that the concept of 'collective representations', though elaborated considerably by Lévy-Bruhl, was initially developed by Durkheim.
and erroneous use of processes of reasoning found fully developed only in highly educated Westerners.\textsuperscript{239} Further to this critique, Lévy-Bruhl challenged the underlying intellectualist assumption that the object of primitive thinking was directed towards explanation at all. Rather, he argued that in primitive societies a variable set of emotional needs far outweighs any need for explanation, and it is these emotional needs which are, in the main, determinative of the content of a particular society's collective representations.\textsuperscript{240}

\begin{quote}
[T]he simpler the society, the greater the importance of collective representations in the individual's world-view, and the less the importance of beliefs arrived at by his own exercise of reason.\textsuperscript{241}
\end{quote}

On Lévy-Bruhl's analysis, the key to the interpretation of primitive ideation was not to be found in the protocols of reason but in the vicissitudes of emotion, the latter of which are played out collectively, rather than individually, in the \textit{mystical orientation} of the thought by which the distinctively 'primitive mind' was characterised. For primitive peoples, the content of every perception is coloured by and invested with emotion. The feelings they associate with objects become part and parcel of their conscious images, and it is in those images that the distinctively 'mystical' element is formed.\textsuperscript{242} As between different groups, communities and societies, the particular form in which this mystical aspect of experience is represented may vary widely. Irrespective of the manner in which it might be depicted or described, however, 'it is always represented as an invisible,

\begin{footnotes}
\textsuperscript{239} Horton, 'Lévy-Bruhl, Durkheim and the Scientific Revolution', p. 64.

\textsuperscript{240} Ibid.

\textsuperscript{241} Ibid. See P. Lawrence, 'Magic and Religion', pp. 202-203.

\textsuperscript{242} Horton, 'Lévy-Bruhl, Durkheim and the Scientific Revolution', p. 65
\end{footnotes}
intangible power.\textsuperscript{243} It was this experiential foundation of the mystical orientation that Lévy-Bruhl elaborated in his theory of a distinctive 'primitive mentality'.\textsuperscript{244}

An important constant in Lévy-Bruhl's analysis of primitive mentality was his insistence that consciousness and cognition were derived from and within a societal integument in which the orientations and objects of an individual's thought and actions were, of necessity, subordinated to those of the larger

\textsuperscript{243} Ibid.

\textsuperscript{244} Lévy-Bruhl identified four further salient characteristics of primitive thought, all of which derive from this underlying construct. Relying on Horton's analysis in 'Lévy-Bruh, Durkheim and the Scientific Revolution', pp. 65-68, and Needham's extended discussion in \textit{Belief, Language and Experience}, pp. 160-175, these characteristics features may be summarised as follows:

(i) There is an absence, or subordination, of objectivity, involving a diminution of any distinction between the perceptual and the experiential, coupled with a subordination of the former to the latter, whereby dreams and visions are admitted to primitive reality on the same footing as ordinary, everyday perceptions.

(ii) Participation is Lévy-Bruhl's term for the inextricable linkage between visual and tactual experience, on the one hand, and the emotional or mystical content of that experience, on the other, the effect of which is to virtually eliminate any conceptual difference between the two, rendering the material (natural) and spiritual or mystical (supernatural) qualities of an object effectively inseparable. Where two objects share the same or similar mystical associations, the objects themselves may acquire a close, effectively inseparable association. To the extent that primitive man is overwhelmingly mystical in his orientation, the way in which he associates the elements of the physical and metaphysical environment he inhabits is almost invariably in terms of such participation.

(iii) An indifference to logical contradictions follows on consequentially where 'participations' are involved. Thus, in affirming that an object may be both itself and something else—at once itself and not itself—the implicit and otherwise apparent contradiction is effectively overridden. Lévy-Bruhl described this feature of primitive thought as the quality of a 'pre-logical mentality'. He carefully qualified his use of this expression, however, negating the implication that contradictions are necessarily valued in primitive thought, or that primitive man is incapable of recognising them. Rather, he said, where participations are involved, they merely take precedence over any felt need to eliminate what might otherwise be a troublesome logical contradiction.

(iv) A special communion with the world similarly follows on from the emotional (mystical) content with which primitive people so heavily invest their perceptions of phenomena in everyday life. In Horton's words, primitive man 'does not so much perceive the world around him as feel it' (p. 66); and in so far as the elements of a world thus experienced are so thoroughly imbued with the subjective qualities of a projected mystical emotion, his relationship with the world that much more intimate. Because human beings, animals, plants and other material elements of the natural world are all similarly associated with this mystical influence, the tendency of primitive man is to regard all such creatures and objects 'as though they were in some sense personal.' [ibid.]
community. In such circumstances, 'the individual acquires the greater part of his idea-system via the accredited socializing agents of the community.'\textsuperscript{245} Like the disciple he fairly admitted himself to be, Evans-Pritchard vigorously defended Lévy-Bruhl's arguments in support of the view that beliefs (mystical or otherwise), and the understanding of reality to which such beliefs give meaning and significance, are fundamentally social constructs.\textsuperscript{246} In 1934, after Evans-Pritchard had completed the significant period of his field work amongst the Azande, but prior to the publication \textit{Witchcraft, Oracles and Magic}, he wrote:

\begin{quote}
'The criticisms of Lévy-Bruhl's theories are so obvious and so forcible that only books of exceptional brilliance and originality could have survived them. . . . Lévy-Bruhl is speaking of patterns or modes of thought which, after eliminating all individual variation, are the same among all the members of a primitive community and are what are called their beliefs. . . . Every individual is compelled to adopt these beliefs by pressure of social circumstances. . . . When Lévy-Bruhl says that a representation is collective, he means that it is a socially determined mode of thought and is therefore common to all members of a society. . . .'\textsuperscript{247}
\end{quote}

The 'obvious criticisms' to which Evans-Pritchard alludes in the passage quoted immediately above involved, in part, Lévy-Bruhl's postulate of a distinctively 'primitive' cast of mind to explain the apparently irrational beliefs of the native and tribal peoples in the real existence of spiritual beings, as well as the

\textsuperscript{245} \textit{Ibid.}, p. 67.

\textsuperscript{246} Reflecting on his own work, Evans-Pritchard eventually came to distance himself theoretically from Lévy-Bruhl, and to challenge many of the latter's conclusions concerning the qualitative differences by which a distinctively 'primitive' cast of mind might be characterised. In later years, however, and partly on the basis of Evans-Pritchard's contributions, Lévy-Bruhl himself came to modify much of his own thinking in this regard. See Horton, 'Lévy-Bruhl, Durkheim and the Scientific Revolution', pp. 68-69; Luhrmann, \textit{Persuasions of the Witch's Craft}, pp. 346-347.

\textsuperscript{247} 'Lévy-Bruhl's Theory of Primitive Mentality' (1934) 2(1) \textit{Bulletin of Faculty of Arts} (Egyptian University, Cairo), p. 9, quoted in Douglas, 'Thirty Years after \textit{Witchcraft, Oracles and Magic}', xv.
magical powers of witches and sorcerers. According to Lévy-Bruhl, 'the thought of primitive man was different not in degree but in quality from his civilized counterpart.'

The primitive did not think less well or less reasonably; he started from different assumptions, noticed different things about the world, and was untroubled by the contradictions in some of the conclusions to which this led him.

His own experience living amongst the Azande led Evans-Pritchard to reject the view that there was any qualitative difference between the mind and thought processes of 'primitive' African and 'modern' Western peoples. In his view, the mental structure of the Azande mind was not fundamentally different to that of an Englishman's, nor were the thought processes by which both understood and experienced their respective worlds essentially dissimilar. Indeed, the very thrust of his arguments in *Witchcraft, Oracles and Magic* has been described as an implicit attack on this particular aspect of Lévy-Bruhl's theory. At the same time, however, Evans-Pritchard held fast to Lévy-Bruhl's insights into the nature of 'collective representations', which provided an enduring theoretical platform for the development of his own arguments that the nominally irrational, collectively held and unconsciously accepted beliefs of the Azande were neither more nor less than the result of the pervasive influences of Azande society.

Even by the early decades of the twentieth century there would have been no great novelty in Evans-Pritchard's recognition that the mystical or religious beliefs of primitive people were influenced by social experience, or that the choice of one

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249 Ibid.

250 Ibid., p. 347. For an interesting commentary on what to some anthropologists appears to be an element of inconsistency in Evans-Pritchard's assessment of Lévy-Bruhl's ideas see R. Firth, 'Degrees of Intelligibility' in Overing, *Reason and Morality*, pp. 29, 32-33.
set of such beliefs as opposed to another was largely a reflection of social processes and experience. But whereas Lévy-Bruhl had refined the issue to raise the deeper question of why, in the context of primitive society, any particular set of religious or mystical beliefs might be accepted for its explanatory value, Evans-Pritchard refined the issue further still, broadening his inquiry to include the problem of explanation itself, and raising the more fundamental question of why any metaphysical system should be accepted. By addressing the question at this level, Evans-Pritchard effectively relegated the issue of the difference between mystical explanations and other explanations to one of secondary importance. Thus, as Douglas explains:

In an inquiry into witchcraft as a principle of causation, no mysterious spiritual beings are postulated, only the mysterious powers of humans. The belief is on the same footing as belief in the conspiracy theory in history, in the baneful effects of fluoridation or the curative value of psychoanalysis—or any proposition that can be presented in an unverifiable form. The question then becomes one of rationality.

For Evans-Pritchard, the question was simply this: 'Is Zande thought so different from ours that we can only describe their speech and actions without comprehending them, or is it essentially like our own thought expressed in an

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251 Douglas, 'Thirty Years after Witchcraft, Oracles and Magic', xv.

252 As we have seen, Lévy-Bruhl answered this question by postulating a special 'primitive' cast of mind that differed qualitatively from that of its civilised counterpart, and which, by virtue of that difference, readily accommodated the contradictions inherent in metaphysical explanations which, to the modern Western mind must prove unacceptably irrational. C.H. Hallpike develops a thematically similar argument in support of essential differences in primitive and modern mentalities, based on the developmental psychology of Piaget, in The Foundations of Primitive Thought (Oxford: Clarendon Press, 1979), pp. 32-40. For a critical assessment of Piaget's ideas, and a succinct critique of 'primitive mind' theories generally, see Goldman, The Culture of Coincidence, pp. 75-79.

253 Douglas, 'Thirty Years after Witchcraft, Oracles and Magic', xvi; see also Luhrmann, Persuasions of the Witch's Craft, p. 346.

254 'Thirty Years after Witchcraft, Oracles and Magic', xvi.
idiom to which we are unaccustomed? His analysis of the Zande system of mystical belief and action marked a watershed in anthropological thinking, with significantly broader implications for the development of Western ideas about the human condition per se, as a consequence of which the answer to the question he posed has come increasingly to reflect an affirmation of the latter proposition.

(b) The Zande System of Mystical Belief and Action: Witchcraft and Sorcery as Social Facts

According to Evans-Pritchard, the Zande scheme of mystical belief and action society consisted in an inter-related set of belief/action complexes constituting a single, comprehensible and self-sustaining system comprised of (i) witches and witchcraft; (ii) sorcerers and magic; and, of less significance for present purposes (iii) diviners and oracles. In the opening paragraphs of Witchcraft, Oracles and Magic, he identifies the key components and principal interactions of this system thus:

Azande believe that some people are witches and can injure them in virtue of an inherent quality. A witch performs no rite, utters no spell, and possesses no medicines. An act of witchcraft is a psychic act. They believe also that sorcerers may do them ill by performing magic rites with bad medicines. Azande distinguish clearly between witches and sorcerers. Against both they employ diviners, oracles, and medicines.


256 Evans-Pritchard himself captures these components more broadly within the triadic model instantiated in the book's title: witchcraft, oracles and magic. The material lends itself to a variety of subsidiary structures, and others have certainly been suggested. Kuper, for example, proposes four: witchcraft, witch doctors, oracles and magic: Anthropology and Anthropologists, p. 78. The categories employed here have been devised to preserve the basic, tri-partite structure of Evans-Pritchard's model, expanded slightly in order to identify the principal actors involved in specified processes, as well as the relevant forms of belief and action themselves.

257 Witchcraft, Oracles and Magic, p. 1.
Much of the remainder of the book is devoted to the description and analysis of the nature of these elements, the relationships between them and the social determinants of their interaction in Zande life. The ethnographic minutiae need not concern us here. To the extent that certain structural features of the Zande system, and Evans-Pritchard's analysis of those features more particularly, are reflected today in modern anthropological and anthropologically-informed understandings of sorcery-related beliefs and behaviour in Papua New Guinea, however, some of those features and their salient interrelations are discussed below.

(i) Witches and Witchcraft

To the Azande, witchcraft (mangu) itself was a material substance, described to Evans-Pritchard as 'an oval blackish swelling or bag', located in the bodies of persons who are, by virtue of the presence of that substance, witches. Carriage of the substance, and thus, the fact of being a witch, is an inherited trait that is transmitted by unilinear descent from parent to child. All male offspring of a male witch will be witches, though none of his daughters will be. Likewise, all of the daughters of a female witch will be witches, though none of her sons will be. Amongst the Azande Evans-Pritchard found that men and women were equally likely to be witches. Whereas a man might be bewitched by a witch of either sex, however, women tended to be the victims only of female witches\(^ {258} \)

Empowered by the presence of the witchcraft substance in his or her body, the Zande witch was capable of causing injury, illness or death to others, interfering with a range of social, domestic and economic activities, and damaging or

\(^ {258} \)ibid., pp. 1-8.
destroying crops, animals and property in a variety of indirect—though not, from the Zande perspective—supernatural means:

While witchcraft itself is part of the human organism its action is psychic. What Azande call mbisimo mango, the soul of witchcraft, is a concept that bridges over the distance between the person of the witch and the person of his victim. . . . The soul of the witch may leave its corporeal home at any time during the day or night, but Azande generally think of a witch sending his soul on errands by night when his victim is asleep.259

Because it is organically integral to the witch’s physical person, the witchcraft-substance grows as the person grows, becoming increasingly potent as the witch advances in age. As a consequence, Evans-Pritchard noted, Azande were inclined to be generally more apprehensive of older persons who might be witches, whereas children were only very rarely implicated as perpetrators in witchcraft accusations.260 Irrespective of a person’s age, however, a witch may be entirely unaware of the fact that he or she is a witch, reacting to the accusation with astonishment and insisting on his or her innocence—if not of the act, then at least in so far as any element of intent or conscious knowledge is concerned. Once made aware of his or her powers, however, a witch is more likely to employ those powers with design and deliberation.261

A man cannot help being a witch; it is not his fault that he is born with witchcraft in his belly. He may be quite ignorant that he is a witch and quite innocent of acts of witchcraft. In this state of innocence he might do someone an injury unwittingly, but when he as on several occasions been exposed

259 Ibid., pp. 10-11. Evans-Pritchard noted that some witches possess a special ointment, which, when rubbed into their skins, renders them invisible, suggesting that, in some instances, they may move about corporeally rather than psychically. Ibid., p. 14.

260 Ibid., pp. 7-8.

261 Ibid., pp. 56-64.
... he is then conscious of his powers and begins to use them, with malice. 262

Witchcraft was ubiquitous in Zande society and it was seen to play a part in every aspect of life, mental and physical, individual, interpersonal and communal. Success in any activity was routinely attributed to the absence of, or the triumph over witchcraft; although unusual success might itself be seen as brought about with mystical assistance. Failure in any important venture was invariably ascribed to its presence and supervening efficacy. Indeed, for the Azande witchcraft was at least potentially participatory in every instance of misfortune. It was the idiom in which they generally spoke about misfortune and the basis on which misfortune was commonly explained. On this view, because any misfortune could be due to witchcraft, all such misfortune might be, and as often as not, would be attributed to it, unless there was 'strong evidence, and subsequent oracular confirmation,' to support an alternative explanation. 263

At the same time, it was clear to Evans-Pritchard that the Azande did not attempt to account for the phenomenological consequences of witchcraft in terms of attribution involving an entirely mystical process of causation. Rather, what they explained were 'the particular conditions in a chain of causation which related an individual to natural happenings in such a way that he sustained an injury.' 264

This is a critical element in the process of Zande ratiocination, in that it highlights a cultural predilection, in the face of misfortune, for answers to the questions of why something happened and, in an ultimate sense, who was responsible, over and

262 Ibid., p. 58.

263 Tenable alternative explanations might include sorcery or the malevolent intervention of some other evil agent, as well as the clear incompetence or invitational wrong-doing on the part of the persons, if any, seen to be more immediately responsible for the event or occurrence of misfortune. Ibid., pp. 21-22.

264 Ibid., p. 21.
above (though by no means to the exclusion of) answers to the questions of what happened, how it happened and, only in a much more immediate sense, who might have been responsible. The point is well-illustrated in Evans-Pritchard's description of the Zande explanation for the collapse of a granary.

'Sometimes,' he wrote, 'an old granary collapses'—an event about which there is nothing inherently remarkable, since '[e]very Zande knows that termites eat the supports in the course of time and that even the hardest wood decays after years of service.'265 As the summer house of a Zande homestead, it was quite common for people to sit beneath a granary to escape the heat of the day. Consequently, it may happen that there are people sitting beneath a granary when it collapses, and that they should be injured as a result. In the event, the important, socio-culturally relevant question for the Zande is: why should these particular people have been sitting under this particular granary at the particular moment when it collapsed?266

That it should collapse is easily intelligible, but why should it have collapsed at the particular moment when these particular people were sitting beneath it? Through years it might have collapsed, so why should it fall just when certain people sought its kindly shelter?267

Faced with questions like these, the explanatory limitations of a Western causal analysis became obvious to Evans-Pritchard:

We say that the granary collapsed because its supports were eaten by termites; that is the cause that explains the collapse of the granary. We also say that people were sitting under it at the time because it was in the heat of the day and they thought it would be a comfortable place to talk and work; that is the cause of people being under the granary at the time it collapsed. To our minds, the only relationship between these

265 Ibid., p. 22.
266 Ibid.
267 Ibid.
two independently caused facts is their coincidence in time in space. We have no explanation of why the two chains of causation intersected at a certain time and in a certain place, for there is no interdependence between them.\textsuperscript{268}

The Zande analysis, however, is capable of providing what, for the Azande, is the crucial linkage. For in addition to an understanding of what caused the granary to collapse (viz. the supporting timber had been undermined by termites) and how it came to be that the injured people happened to be sitting underneath it at the time (viz. they had sought shelter from the summer sun), the Azande also understand why these two events occurred at precisely the same moment in time and space (viz. witchcraft). In the absence of witchcraft, although these people may have been sitting under the granary, it would not have collapsed on them; or whilst the granary may have collapsed, these particular people, perhaps no one at all, would have been sitting under it at the time.\textsuperscript{269}

Evans-Pritchard insisted that the powers of perception and relational apprehension of the Azande are every bit as acute as those of the Western observer. Even if the Azande did not articulate theories of causation in terms that were consistent with the formalities of Western logic and an empirically-based phenomenology of causation, they could and did describe events in an explanatory idiom that was perfectly serviceable in terms of Zande culture and society. Moreover, Zande witchcraft beliefs did not contradict empirical relations of cause and effect, they complemented them. Thus, the attribution of misfortune to

\textsuperscript{268} Ibid., pp. 22-23.

\textsuperscript{269} Ibid., p. 23. It may be suggested, in passing, that, when faced with serious misfortune, the extent to which we are, in fact, entirely satisfied with empirically validated phenomenological explanations of causation, coupled with a vague acceptance of chance and probability where particular causal conclusions cannot be demonstrated or validated, might be queried. Quickly dismissed as irrelevant in socio-cultural terms (or neurotically obsessive in the terms of a culturally bounded psychology), the question 'Why me?' remains as much an epistemological as a philosophical conundrum for modern Western society.
witchcraft did not serve so much to exclude what we might regard as 'real' causes as to superimpose an additional complementary, albeit mystical, dimension on the process of causal ratiocination, instilling particular social events with meaning, significance and value.\textsuperscript{270}

Zande witchcraft beliefs form part of an explanatory system that recognises a plurality of causes, the relevant causes in any given situation being those which are determined to be such on socio-cultural bases. Therefore, whilst witchcraft might be readily implicated for explanatory purposes in a wide range of circumstances, there was a range of situations in which something other than a mystical judgement of causes was required. Significantly, as Evans-Pritchard pointed out, Azande did not tend to entertain explanations based on witchcraft to account for instances of theft, adultery, lying or disloyalty. In such situations, 'witchcraft is irrelevant and, if not totally excluded, is not indicated as the principal factor in causation.'\textsuperscript{271}

As in our own society a scientific theory of causation, if not excluded, is deemed irrelevant in questions of moral and legal responsibility, so in Zande society the doctrine of witchcraft, if not excluded, is deemed irrelevant in the same situations. . . .

The Zande accepts a mystical explanation of the causes of misfortune, sickness, and death, but he does not allow this explanation if it conflicts with social exigencies expressed in law and morals.\textsuperscript{272}

\textsuperscript{270} Ibid., pp. 24-25.

\textsuperscript{271} Ibid., p. 26.

\textsuperscript{272} Ibid., p. 27.
(ii) Sorcerers and Magic

Magic is a critical variable in Evans-Pritchard's study of the triadic scheme of Zande mystical belief and action, integrally related, but significantly different, to the nature and functions of witchcraft and oracular processes. Indeed, with respect to the latter two features, Evans-Pritchard regarded magic as almost incidental.273 In describing the contours and content of Zande magic, Evans-Pritchard placed especial emphasis on this difference. It is in his effort to draw out the salient distinctions between witchcraft and magic in particular that we find the basis of the dichotomy between witchcraft and sorcery which still stands as one of the most important and enduring aspects of Evans-Pritchard's analytical legacy, and one which continues to inform—and complicate—much of our current understanding of Melanesian sorcery and witchcraft.274

As discussed above, Zande witchcraft (mangu) is a hereditary trait and an anatomical fact of life, the physical presence of which in a person's body makes the person a witch and empowers him or her to act destructively against others by purely psychic means. To be sure, the perpetration of an act of witchcraft may, in some cases, be accompanied by the performance of certain rites or rituals, and a witch may, on occasion, facilitate such actions through the employment of other material substances. By its very nature, however, the practice of efficacious witchcraft does not require these magical additives.

On Evans-Pritchard's analysis of the Zande understanding, magic (ngwa) constitutes the full panoply of rituals, special objects and substances, including the condition of the performer. Particular importance is placed on the material

273 Ibid., p. 176.
elements, generally botanical, which Evans-Pritchard called 'medicine', as it is around such medicines that the magical process could be seen to revolve.\textsuperscript{275} In its wider sense, then, magic refers to:

\begin{quote}
the whole complex of which medicine forms the nucleus, i.e., the spell (simatima in Zande), the rite, the condition of the performer, and the 'représentatifs magiques' which comprise ideas and beliefs (embodied in myth or current tradition) associated with the performance.\textsuperscript{276}
\end{quote}

Unlike witchcraft, which is perforce malevolent in its orientation, magic may be either good (wene) or evil (gbitabia), depending upon the objectives and objects of its application, the intentions of the performer and the perspective from which such an evaluative assessment is made. Whether it is adjudged to be good or evil, however, to the Azande it is all magic, and all practitioners of magic, professionals and amateurs alike, are magicians. In the absence of a discrete Zande lexicographical expression, Evans-Pritchard adopted the use of the English term sorcery to specify the practice of illicit or evil magic, and its cognate, sorcerers, to identify its practitioners.\textsuperscript{277}

The practice of magic involved the utilisation by the magician of powers believed by the Azande to inhere in, or to be facilitated by the employment of, particular medicines. As said, medicines themselves tended to be materials and substances derived or fashioned from various trees and plants, typically bulbs (ranga), arboreal parasites (ngbimi) and creepers (gire). Some of these things were used in the form in which they were found. Often, however, they might be prepared in a special way for use in a magical rite. The wood of certain trees, for

\textsuperscript{275} Witchcraft, Oracles and Magic, pp. 176-177.

\textsuperscript{276} E.E. Evans-Pritchard, 'Sorcery and Native Opinion' (1931) reproduced in Marwick, Witchcraft and Sorcery, pp. 24, 26

\textsuperscript{277} Ibid, pp. 26-27; Evans-Pritchard, Witchcraft, Oracles and Magic, p. 176.
example, might be carved to make a whistle; the fluids of certain shrubs might be incorporated in ointments, infusions and potions of various kinds; and creepers might be twisted into ceremonial cords. In some, though by no means all, instances there was a demonstrably homoeopathic relationship between the medicines selected and the object or purposes of the magical act in which they were employed. Certain medicines were specifically associated with particular magical purposes, however. In relation to non-sorcerous magic Evans-Pritchard identified seven such associative classifications, embracing medicines connected with natural forces and phenomena (e.g., rain and the setting of the sun); agricultural pursuits; hunting fishing and collecting; arts and crafts; other mystical powers (e.g., to warn off witches or sorcerers, to qualify as a diviner); social attitudes (e.g., to attract a wife or lover, to procure the return of stolen property, to ensure pregnancy); and the treatment of illness and disease.278

Generally, the magical powers contained in Zande medicines could not be released and directed towards their intended objects unless the magician performed the appropriate rites or rituals. Such performances might involve the observance of various taboos by the magician for a period preceding the performance of the magical act or during the collection and preparation of the relevant medicines. Spells or chants normally accompanied the performance of magical acts themselves, during the course of which the magician instructs the medicine in objects, purposes and targets its particular task.279

A good many medicines and their associated magical rites appeared to be commonly known, so that anyone who wished to use them might do so whenever circumstances warranted the employment of magic. Included amongst this

278 Evans-Pritchard, Witchcraft, Oracles and Magic, pp. 177-181.

279 Ibid., pp. 177-178
common fund of magical knowledge were the medicines and rites used in the cultivation of food-plants and simple hunting medicines. According to Evans-Pritchard, every Zande knew that the setting of the sun could be delayed by placing a stone in the fork of a tree.\textsuperscript{280} With few exceptions, however, more sophisticated magical techniques and magic having especial potency (and in both instances, the medicines required in the performance of such advanced or powerful magical acts) were individual possessions, used by their owner at his personal discretion. The existence of such proprietary rights, however, did not prevent a magician from selling his services to others, or, in effect, licensing the use of his knowledge by others for a fee.\textsuperscript{281}

In the main, Evans-Pritchard reported, magic in Zande society was a male prerogative. Although this was partly a reflection of the fact that a considerable number of activities with which the employment of magic might be appropriate were male activities, it appears to have had as much to do with the general norms of Zande gender relations: 'Magic gives power which is best in the hands of men'; and in so far as women might require the protection of magic, they could rely on their husbands to perform the necessary rites.\textsuperscript{282}

In much the same way as certain technical specialists in Western society—plumbers, electricians, appliance repair-persons and so forth—are regarded as necessary and, when their services are required, important, but not otherwise remarkable individuals, with the possible exception of those possessing powerful forms of vengeance-magic (for the use of which they might extract a considerable

\textsuperscript{280} Ibid., p. 185.

\textsuperscript{281} Ibid., p. 182-185.

\textsuperscript{282} Ibid., p. 184. Some medicines and associated magical practices which concerned matters of peculiar importance to women (e.g., childbirth, menstruation, lactation, abortion) were utilised exclusively by women.
price), magicians in Zande society did not appear to Evans-Pritchard to enjoy any great prestige or high status on account of their knowledge and skills. This is not to say that what magicians knew and were capable of doing was not recognised as involving a valued and, in many respects, essential contribution to ordinary life in Zande society. There was nothing in the knowledge and capabilities of magicians, or about magicians themselves, however, which to the Azande was in any sense extraordinary.

As said, the distinction drawn by the Azande between good magic and sorcery was essentially a function of its perceived objects and purposes, as assessed from the perspective of the person making the judgement. As Evans-Pritchard explained:

Azande do not stigmatize [sorcery] because it destroys the health and property of others, but because it flouts moral and legal rules. Good magic may be destructive, even lethal, but it strikes only at persons who have committed a crime, whereas bad magic is used out of spite against men who have not broken any law or moral convention.

Vengeance-magic (bagbuduma), for example, was regarded as the most potent and destructive of Zande medicines, yet its employment was considered one of the most honourable uses to which magic could be put. Bagbuduma was typically invoked in the face of a death of a kinsman, which was believed to have been brought about by witchcraft or sorcery, and was directed retributively at the witch or sorcerer supposedly responsible.

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283 Ibid.
284 Witchcraft, Oracles and Magic, p. 187.
285 Ibid.
Thus, whereas good magic gives effect to and, in that sense, is a veritable instrument of justice in Zande society—an idea which, in this context, Evans-Pritchard suggested, was commensurable with Western use of that term—neither the practice nor the practitioner of sorcery predicates on anything a Zande would regard as judicious or equitable. Rather, it is neither more nor less than a personal weapon intended to cause harm or injury out of sheer malice or enmity.\textsuperscript{286} Conceptualised in this way, the social boundaries that framed the perspectival feature of the Zande distinction between good magic and sorcery are manifest:

Good magic is moral because it is used against unknown persons. \ldots It is only when [a man] does not know who has committed a crime that he uses good magic against unknown persons. Bad magic, on the other hand, is made against definite persons.\textsuperscript{287}

To Evans-Pritchard it seemed that the Azande feared sorcery far more than witchcraft. This, he suggested, was partly a result of the observation that the sicknesses sorcery was believed to produce were more serious than those caused by witchcraft. But it was also because its perpetrators were so much more difficult to detect, and the means for countering its effects so much more difficult to come by; the latter circumstance being compounded by the fact that, at the time, particular forms of sorcery were increasingly being imported from distant places and unknown peoples.\textsuperscript{288}

\begin{itemize}
\item \textsuperscript{286} \textit{Ibid.}, p. 189.
\item \textsuperscript{287} \textit{Ibid.}
\item \textsuperscript{288} \textit{Ibid.}, pp. 194-195.
\end{itemize}
(iii) Diviners and Oracles

In rationalising Zande mystical beliefs, Evans-Pritchard observed an important similarity in Western and Zande understandings of misfortune. Retrospectively attributing the cause of a range of untoward and otherwise inexplicable occurrences to witchcraft or sorcery, the explanatory concepts marshalled by the Azande in the face of such events, he argued, were on a par with equally common, unselfconscious Western explanations, which linked them causally to amorphous notions of chance or fate:

When, in spite of human knowledge, forethought, and technical efficiency, a man suffers a mishap, we say that it is his bad luck, whereas Azande say that he has been bewitched. ... If the misfortune has already taken place and is concluded Azande content themselves with the thought that their failure has been due to witchcraft, just as we content ourselves with the reflection that our failure is due to our hard luck. In such situations there is no great difference between our reactions and theirs.\(^{289}\)

In the anticipation of misfortune, however, that Evans-Pritchard registered a marked difference between Zande and Western approaches to understanding and predictive causal explanation. Like the Azande, he noted, we too 'make every effort to rid ourselves of, or elude, a misfortune by our knowledge of the objective conditions which cause it'. To this extent our respective orientations are not at all dissimilar. But because the Zande believes that witchcraft or sorcery is likely to be the underlying cause of any misfortune, 'he concentrates his attention upon this factor of supreme importance.' Thus, whereas both a Zande and Western man similarly apply inherently rational means to control the conditions that can and do

\(^{289}\) Ibid., p. 65.
give rise to misfortune, we differ in our respective conceptions of the nature of those conditions and their susceptibility to human control and influence.\footnote{290}

On Evans-Pritchard's analysis, it was the absence of a culturally constructed barrier between the physical and metaphysical world, and the presence of a clear conceptual nexus between the mystical and the material, that explained so much about the ability of the Azande to coherently apprehend and constructively engage the vicissitudes of life in what, to Western consciousness, involves two irreconcilable realms, one natural, the other supernatural, to the latter of which Western rationality denies real existence. In the face of perennial threats of witchcraft and sorcery, this feature of Zande epistemology and phenomenology had significant implications for social action.

Since Azande believe that witches may at any time bring sickness and death upon them they are anxious to establish and maintain contact with those evil powers and by counteracting them control their own destiny. . . . Azande need not live in continual dread of witchcraft, since they can enter into relations with it and thereby control it. . . .\footnote{291}

It is in this endeavour to foresee and effectively manage countless, inevitable encounters with witchcraft and sorcery that diviners and oracles were seen to play so central a role in Zande social life.

The Zande witch-doctor was both a diviner and a magician, exposing witches with his oracular powers and thwarting their malevolent acts with his magic. When a person feared that he was, or might become, the victim of witchcraft, he would arrange for one or more witch-doctors to come to his home and there perform an appropriate ceremony, in the course of which various questions may

\footnote{290}{\textit{Ibid.}}

\footnote{291}{\textit{Ibid.}}
be put and answers provided about the nature and origins of existing or potential threats. Such ceremonies were usually public, drawing much of their persuasive force from the collective enthusiasm and participation of the group. They also offered a convenient opportunity for members of the assembled to query a witch-doctor themselves, effectively at their host's expense; although it was customary that everyone involved in the ceremony should present a gift or payment of some kind to the presiding diviner. Energetic dancing and elaborate chanting ensued, in the latter of which the congregants were expected to participate actively and supportively. At appropriate times in the ritual, questions would then asked of the diviner concerning the identity of a feared witch, the nature of the malevolence that might be expected (if it had not already been visited upon the victim), the reasons or motives behind the malevolence and, most importantly perhaps, what steps might be taken to induce the witch to desist, and what magic might be used either to counteract the effects of the witchcraft, or to incapacitate or destroy a witch whose actions might not otherwise be stopped. In some instances, the performance itself, involving and invoking such magical rites as might be necessary in the circumstances, would be sufficient to drive a witch away from its victim. 292

Whilst resort to witch-doctors was a common enough method of identifying and, in many cases, dealing with witches and witchcraft, the Azande did not tend to regard divination of this kind as capable of providing more than general and tentative information. Useful and important because they could quickly answer many questions and sort out likely suspects in a preliminary way, witch-doctors were not considered to be especially reliable, nor were their methods regarded as particularly dependable. Where significant responsive action against a suspected

292 Ibid., pp. 66-89.
witch was called for, a person would have been ill-advised to take such action on the evidence of a witch-doctor alone.\textsuperscript{293}

Amongst the Azande, oracles were generally considered to be a more satisfactory means than consulting diviners for ascertaining the future and uncovering covert mystical threats in the present. Hence, in all matters of any moment, and especially if one were contemplating taking determinative retaliatory action, the prognostications of the witch-doctor would be tested against one or another of the greater oracles for corroboration or confirmation.\textsuperscript{294} A variety of oracular procedures were available to the Azande, many of which involved simple techniques and readily available devices.\textsuperscript{295} Of these, however, far and away the most reliable was the poison oracle, or benge:

In many situations where we seek to base a verdict upon evidence or try to regulate our conduct by weighing of probabilities the Zande consults, without hesitation, the poison oracle and follows its directions with implicit trust. No important venture is undertaken without authorisation of the poison oracle. In important collective undertakings, in all crises of life, in all serious legal disputes, in all matters strongly affecting individual welfare, in short, on all occasions regarded by the Azande as dangerous or socially important, the activity is preceded by consultation with the poison oracle.\textsuperscript{296}

In essence, the poison oracle involved the administration of a particular medicine to fowls owned by the person seeking answers or corroboration from the oracle. Once the medicine had been ingested by a fowl, the relevant question was

\begin{itemize}
  \item \textsuperscript{293} Ibid., p. 120.
  \item \textsuperscript{294} Ibid. See also E.E. Evans-Pritchard, 'Witchcraft (Mangu) Amongst the Azande' (1929) 12 Sudan Notes and Records, pp. 163-249, reproduced in part in Marwick, Witchcraft and Sorcery, pp. 27, 30-31.
  \item \textsuperscript{295} Evans-Pritchard, Witchcraft, Oracles and Magic, pp. 164-175. See also A.S. Gregor, Witchcraft and Magic (New York: Charles Scribner's Sons, 1972), pp. 85-88.
  \item \textsuperscript{296} Evans-Pritchard, Witchcraft, Oracles and Magic, pp. 121-122.
\end{itemize}
repeatedly put to the benge inside of it by an interlocutor experienced in framing questions in the appropriate fashion. Each query would be followed with the instruction that the chicken should live or die, depending upon the answer to the question. The result then provided the answer sought, or served to corroborate (or repudiate) such answers as might have been previously provided by a witch-doctor or a lesser oracle. Evans-Pritchard described the critical elements of the procedure thus:

There may be only one man or there may be several who have questions to put to the oracle. Each brings his fowls with him in an open-wove basket. . . . As each person arrives he hands over his basket of fowls to the operator who places it on the ground near him. . . .

When everyone is seated they discuss in low tones whose fowl they will take first and how the question shall be framed. Meanwhile the operator . . . mixes the poison and water with his finger-tips into a paste of the right consistency and, when instructed by the questioner, takes one of the fowls and draws down its wings over its legs and pins them between and under his toes. . . . He holds open the beak of the fowl and tips . . . the liquid into the throat of the fowl. He bobs the head of the fowl up and down to compel it to swallow the poison.

At this point the questioner, having previously been instructed by the owner of the fowl on the facts which he is to put before the oracle, commences to address the poison inside the fowl. . . . The questioner does not cease his address to the oracle, but puts his questions again and again, in different forms, though always with the same refrain, 'If such is the case, poison oracle kill the fowl,' or 'If such is the case, poison oracle spare the fowl.' . . . When the last dose of poison has been administered and he has further addressed it, he tells the operator to raise the fowl. The operator takes it in his hand and, holding its legs between its fingers so that it faces him, gives it an occasional jerk backwards and forwards. The questioner redoubles his oratory . . ., and if the fowl is not already dead he then, after a further bout of oratory, tells the operator to put it on the ground. He continues to address the poison inside the fowl while they watch its movements on the ground.  

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On the basis of a chemical analysis Evans-Pritchard had arranged to be carried out in England, the poisonous substance was found to be alkaloidal in character and apparently related to strychnine. Its effects on fowls varied from almost instantaneous death to no unusual reactions whatsoever. Normally, at least two, and sometimes as many as four, tests would be conducted in relation to the same question, and it was only when the results were consistent that the answer thus confirmed was regarded as reliable. Where results were inconsistent—a consequence attributed to a deficiency in the quality of the benge, or sometimes to the disruptive influences of witchcraft or sorcery directed by someone with an interest in thwarting the oracular process—the procedure would be declared invalid and would have to be repeated again, immediately afterwards if the questions were of pressing importance, or at some later date. When a fowl died, and the death served to confirm or corroborate the presence and source of witchcraft or sorcery, a wing of the bird would be cut off and used as evidence of the verdict.

(c) From the Nemi to Zandeland: Evans-Pritchard's Analytical Legacy

In Witchcraft, Oracles and Magic, Evans-Pritchard provided a replete and detailed ethnographic account of Zande mystical belief and action. His data were methodically developed within an analytical framework that identified and organised the salient components of a coherent system with clarity and precision, and demonstrated the determinative social dynamics governing the interrelations of those components with a compelling cogency. In the process, and apparently

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298 Ibid., p. 121.

299 Ibid., pp. 136-138.

Beyond this, however, Evans-Pritchard's crucial contribution lay in his recognition that, considered from the Zande perspective, mystical explanations for relations of cause and effect in the material world were sufficient and perfectly serviceable. When apprehended within the contours of their social reality, the nuances of Zande beliefs in witchcraft, sorcery and magic, and the persistence with which those beliefs could be held in the face of seemingly patent contradictions and inconsistencies, were inherently logical. This, in fact, had been Evans-Pritchard's principal objective, and he was much less concerned with refining ethnographic methodology or the nuances of a descriptive taxonomy than with persuading his readers of 'the intellectual consistency of Zande notions', which, he argued, only appeared to be inconsistent 'when ranged like lifeless museum objects'.\footnote{Evans-Pritchard, \textit{Witchcraft, Oracles and Magic} (1937 edition), p. 540.}

\begin{quote}
When we see how an individual uses them we may say that they are mystical but we cannot say that his use of them is illogical or even that it is uncritical. I had no difficulty in using Zande notions as Azande themselves used them. Once the idiom is learnt the rest is easy, for in Zandeland one mystical idea follows on another as reasonably as one common-sense idea follows on another in our own society.\footnote{\textit{Ibid.}, pp. 540-541.}
\end{quote}

A considerable portion of \textit{Witchcraft, Oracles and Magic} is devoted to the exploration of what, to Evans-Pritchard, was a compelling conundrum: Why did a
people otherwise so eminently and demonstrably capable of perfectly rational thinking persist in practices deriving from mystical beliefs about non-existent entities? The Azande did so, he suggested, for two reasons: first, because the socially determined structure of their thought prevented them from discerning the errors in their beliefs;303 and secondly, because the integrity of those beliefs was inextricably enmeshed in a set of social relationships that were critical to the Zande's sense of identity and essential to his existence as a member of society.304

303 The Azande, observed Evans-Pritchard 'reason excellently in the idiom of their beliefs, but they cannot reason outside, or against, their beliefs because they have no other idiom in which to express their thoughts.' Ibid., p. 159.

304 These two reasons are distilled from Evans-Pritchard's specification of no fewer than twenty-two reasons why the Azande did not perceive the futility of their mystical beliefs. Ibid., pp. 201-204. Hirst and Woolley have condensed those twenty-two reasons into five thematically orientated categories of explanation:

1. **Social structural obstacles to the generalization of beliefs and the collation of information.** Social situations and mores determine the concept to be applied in any given case. The doctrine of witchcraft does not explain any misfortune, only a class of sudden and inexplicable deaths, illnesses and failures. . . . Beliefs . . . articulate specific contexts of action and conduct. Beliefs are thus fragmented across a series of situations and are never present at the same time. This means that contradictions between context-specific beliefs do not emerge. . . .

2. **Categorical reasons.** The Azande make no distinction between 'natural' and 'supernatural' phenomena. . . . They therefore lack the categorical conditions for the exclusion of phenomena as beyond the realm of demonstrable causality. This does not mean that the Azande ignore what we would call 'natural' causality, nor do they deny it a place in the events surrounding witchcraft. They employ what would be in our terms a plural or multiple scheme of causation. . . . Witchcraft explains the conjunction of elements in [an] event. . . . [and this] permits explanations of an order we would not permit. The conjunction of elements is for us a matter of coincidence or chance.

3. **Limits in the mode of experimentation practised by the Azande.** The Azande both incorporate the results of 'experience' into their conduct and are often sceptical of the reliability of oracles, the power of witch doctors, etc. But this reference to 'experience' and this scepticism alike operate to confirm the basic structure of belief, for they can account for experiences of failure in divination and healing. This is exemplified by the practices surrounding the poison oracle. . . ., which includes a cross check on erroneous answers due to the failure of bad poison or the intervention of witchcraft. . . . The Azande thus use procedures of testing and checks as to the efficacy of practices. But they do not experiment systematically to test whether their beliefs as such are true or not. Failures of the poison oracle cannot therefore serve to disconfirm the structure of their beliefs surrounding it. . . . The failure of the oracle . . . is 'explained' by reference to the
In effect, then, Zande mystical beliefs were protected by a set of social processes that served to sustain important moral values and cultural institutions, the operation of which served, in turn, to ensure that witchcraft and sorcery-related beliefs were only deployed in situations in which conflicts and contradictions were either unlikely to arise at all or, if they did arise, it was in situations in which they could either be disregarded or easily rationalised. At the same time, the Azande were able to ignore, or at least discount, the social implications of hereditary witchcraft and non-hereditary sorcery where individual relationships were at stake and their mystical beliefs were most vulnerable to challenge. Thus, for example, the Azande found no difficulty in the theoretical view that every death was caused either by witchcraft or by vengeance magic directed against a guilty witch. In their practical experience, however, every death was blamed on witchcraft; and when asked to tally the number of deaths attributable to witchcraft against the number of deaths of witches killed in vengeance, no one seemed to

4. The absence of the technology of reason. The Azande lack means of the rationalization of existence, of memory, of movement, and calculation of forces such that they could make an objective assessment of states of affairs. Having no clocks, they are unable to measure and therefore to recognize that the ritual of placing a stone in a tree in no way retards the arrival of sunset.

5. Thought as a 'mental structure'. Evans-Pritchard . . . treats the Zande as people capable of and often using 'common sense' who are nonetheless trapped within a self-reinforcing structure of 'mystical notions'. Witchcraft, oracles, and magic form a coherent and self-reinforcing system, each element of which explains away the contradictions and problems raised by others. [Social Relations and Human Attributes, pp. 260-262]

305 Douglas, 'Thirty Years After Witchcraft, Oracles and Magic', xvi. In this way, Zande beliefs in the hereditary quality of witchcraft fostered domestic stability, since a son could not accuse his father of being a witch without, at the same time, identifying himself as an heir to a tainted line of descent. Conservative political interests were similarly serviced by the hereditary nature of witchcraft, since the genetic trait was believed to be found only amongst Zande commoners, thereby eliminating the likelihood of accusations being levelled by a commoner against a Zande aristocrat. Evans-Pritchard, Witchcraft, Oracles and Magic, pp. 46-48.
know anything about the latter. For Evans-Pritchard, it was not difficult to identify the set of interests that enabled the Azande countenance an explanatory system of mystical belief that served so many practical needs, but was rife with so many apparent contradictions:

The source of his insight lay in examining beliefs always from the point of view of the actors in a given situation. Thus he disclosed the areas of the greatest concern, and those in which their curiosity could lie dormant. Gaps and discrepancies could be tolerated without in the least disturbing the illusion of a completed circle of beliefs.

Scepticism existed, but it was unproblematic for the Azande, and doubts about the reliability of an oracle or the competence of a witch-doctor were no more disruptive of the integrity of their belief system than our own doubts about the competence of a particular physician or the effectiveness of a particular drug serve to undermine a fundamental belief in the reliability of modern medicine and pharmacology. Discrepancies in the beliefs widely entertained and strongly held by members of a society can be tolerated when the kinds of questions one might otherwise be inclined to ask are limited by the terms of a socially constructed understanding of the universe. And on this score, as Horton suggests, there

306 Douglas, 'Thirty Years After Witchcraft, Oracles and Magic', xvi.

307 Ibid., xvi-xvii.

308 Ibid., xvii. This insight constitutes the essence of what Kuper describes as Evans-Pritchard's most powerful argument:

[Given the initial premise that harm can be caused by mystical agencies, the notion that ill-luck took the form of a person, an evildoer, then the rest of the beliefs follow logically enough. Moreover they are constantly reinforced by experience. Somebody becomes ill, hence witches are active. Oracles confirm this. Vengeance magic is made. Somebody in the neighbourhood dies, and the oracle confirms that he was the witch. [Anthropology and Anthropologists, p. 81]

309 See Douglas, 'Thirty Years After Witchcraft, Oracles and Magic', xiv.
would seem to be little incentive for agnosticism in Western and Zande society alike. 310

The enduring legacy of Evans-Pritchard's analysis lay in the force of his argument that there was no fundamental difference between the ways in which the Azande—and by implication, 'primitive' people anywhere—and Westerners understand and experience the world. Such differences as may appear to be obvious often tend to resolve themselves into differences of idiom rather than substance, 311 and where substantive differences are revealed, they are more properly explained as reflecting the determinative demands and limitations of the social context within which the subject processes of ratiocination are formed and function, than on the basis of any distinctively 'primitive' mentality. Socially driven and socio-culturally determined, the individual's need to believe readily overrides the need for consistency in the beliefs entertained, providing its own rationalisations for contradiction. As Geertz suggests, people everywhere plug the dikes of their most needed beliefs with whatever mud they can find. 312

B. Anthropological Analyses of Witchcraft and Sorcery in the Tradition of Witchcraft, Oracles and Magic

Due, in part, to the interruption of the Second World War, the influence of Evans-Pritchard's theoretical orientation and approach on subsequent anthropological research into the witchcraft and sorcery-related beliefs of tribal peoples did not become apparent for something more than ten years after the

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310 See R. Horton, 'African Traditional Thought and Western Science', in Patterns of Thought in Africa and the West, p. 222.

311 See Horton, 'African Traditional Thought and Western Science', p. 197.

312 Local Knowledge, p. 80.
publication of *Witchcraft, Oracles and Magic*. Post-war developments in Africa, and other areas of the world in which European colonial control was beginning to wane, deflected the attention of many anthropologists away from the socio-perceptual issues with which Evans-Pritchard had been concerned and towards a range of new problems posed by political transitions in what was to become the Third World. Nevertheless, his work and ideas came to dominate the writings of a small, albeit prolific, group of Africanist and Oceanist ethnographers in a remarkable way throughout the 1950s and well into the 1960s.

The impress of Evans-Pritchard's work amongst the Azande on subsequent anthropological research into witchcraft, magic and sorcery in primitive societies is evident in three areas. First, long before the publication of *Witchcraft, Oracles and Magic*, Evans-Pritchard was adamant about the importance of assessing the

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313 Douglas suggests that Clyde Kluckhohn's *Navajo Witchcraft* (Boston: Beacon Press, 1944), 'was clearly written independently'. 'Thirty Years After Witchcraft Oracles and Magic', xiii.

314 Ibid., xiii-xiv. Reflecting on this influence, Evans-Pritchard lamented that, in many cases, his ideas were being applied in ways he, himself, could not countenance, and he unequivocally denounced the 'crude functionalism' to which he considered a number of subsequent studies of witchcraft had contributed. See E.E. Evans-Pritchard, *Theories of Primitive Religion* (Oxford: Clarendon Press, 1965), p. 114.

In a more fundamental sense, the ideas set out in Evans-Pritchard's study of Azande witchcraft and magic laid the foundation for a philosophical debate, which only began in earnest in the early 1970s, around issues concerned with the sociology of knowledge, and which continues to draw fodder for arguments (and counter-arguments) from Evans-Pritchard's basic contention that a fuller understanding of the social context in which people formulate their ideas about magic, witchcraft and sorcery erodes the utility of characterising such beliefs as irrational. It was this contention which established the two poles in that debate: the rationalist (or intellectualist) position, which explains magic as based upon essentially mistaken beliefs, and the relativist (or symbolist) position, which explains magic away by showing how it actually has to do with belief, as such, in any case. See generally, Overing, *Reason and Morality*, pp. 1-28; Wilson, *Rationality*, vii-xviii. The debate has also been cast as involving a confrontation between Enlightenment theory and the Romantic rebellion. See R.A. Shweder and R.A. Levine, eds., *Culture Theory* (Cambridge: Cambridge University Press, 1984).

For present purposes it is worth noting that Evans-Pritchard's analysis of Azande beliefs advanced propositions capable of giving credence to both positions; and one suspects that in this context too, Evans-Pritchard would have regarded himself as having more in common with some of his latter-day critics than with those who invoked his arguments in support of their views.
meaning and import of the beliefs and behaviours in terms commensurate with the attitudes, orientations, understandings and experience of the people under study, as opposed the implicitly evaluative (and almost invariably devaluing) comparison of the empirical products of indigenous modes of thought and action with their apparent counterparts in earlier, or less-sophisticated contemporary, Western societies.  

The implications (indeed, the very possibility) of an anthropologist adopting such a perspective were, and to some extent continue to be, controversial. However, without implying that he had fully comprehended all of the subtleties and nuances of Azande culture, or that his understanding was so complete that he might accurately and faithfully articulate their nature and dynamics in the idiom of Western academic scholarship, Evans-Pritchard did bring a measure of sympathy to the objects and subjects of his research, which he recognised could only have been achieved by a thoroughgoing immersion in Zande life and society. In this respect, the need for the kind of protracted, close and intensive fieldwork in the  

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study of native witchcraft and sorcery beliefs, an approach by which Evans-Pritchard's research was characterised, came to be regarded as essential.\textsuperscript{318}

Secondly, Evans-Pritchard observed that the hostilities expressed by witchcraft and sorcery-related beliefs were patterned, and that the structure of these patterns were based on the relationship between the victims and targets or witchcraft and sorcery, suspected and alleged witches and sorcerers and most importantly perhaps, those levelling accusations of witchcraft or sorcery.

Accusations clustered in areas of ambiguous social relations. Where roles were buffered by unequal power, wealth, or other forms of social distance, witchcraft accusations were not made; they appeared where tensions between neighbouring rivals could not otherwise be resolved.\textsuperscript{319}

To be sure, particular interpersonal enmities played a role in the dynamics of such accusations, but social distance appeared to be equally determinative of who would, and who would not, be likely suspects, victims and accusers.\textsuperscript{320}

Thirdly, following on from Evans-Pritchard's suggestion that, amongst the Azande, witchcraft served as part of a homeostatic system of social control that had a discernibly normative effect on behaviour, Max Marwick's study of witchcraft and sorcery beliefs amongst the Cewa people of what was then Rhodesia in central Africa\textsuperscript{321} provided the ethnographic foundation for a functionalist elaboration on that notion, and gave rise to his theory of witchcraft.

\textsuperscript{318} See Marwick, 'The Study of Witchcraft', p. 231.

\textsuperscript{319} Douglas, 'Thirty Years after Witchcraft, Oracles and Magic', xvii.

\textsuperscript{320} Evans-Pritchard, Witchcraft, Oracles and Magic, pp. 46-48.

\textsuperscript{321} 'The Social Context of Cewa Witch Beliefs' (1952) 22(2) Africa 120-135; 22(3) Africa 215-233; Sorcery in its Social Setting: A Study of the Northern Rhodesian Cewa (Manchester: Manchester University Press, 1965).
and sorcery as a 'social strain-gauge'.\textsuperscript{322} Underscoring the utility of Evans-Pritchard's distinction between witchcraft and sorcery, especially where the patterns of belief and action in African and Oceanic societies were being compared, and canvassing the differences between the two regions (as evidenced in the ethnographic materials) in the sources and direction of accusations, Marwick found that, in both areas,

> the relationship between alleged witch or sorcerer and believed victim is not only close but strained; and this fact gives us the means of detecting the tension-points of a social structure by the frequency with which attacks of witchcraft and sorcery are believed to occur between persons standing in various relationships.\textsuperscript{323}

Consistent with results rendered by Marwick's functionalist approach, the data yielded by Clyde Mitchell's research in Nyasaland\textsuperscript{324} similarly emphasised the morality-sustaining, normative and explanatory roles of witchcraft in a Yao community. However, where Evans-Pritchard had offered a fairly simple model of witchcraft beliefs as an interpersonal social and moral regulator in an otherwise stable social environment, Marwick and Mitchell added a new level of sophistication to Evans-Pritchard's theory, of witchcraft beliefs as a social and moral regulator in an otherwise stable social environment. For whereas the witchcraft beliefs in Zande society might be characterised as quiescently omnipresent, quickly activated by incidental interpersonal frictions, the power of witchcraft beliefs in Yao and Cewa communities seemed to be mobilised in a

\textsuperscript{322} 'Witchcraft as a Social Strain-Gauge' (1964) \textit{26 Australian Journal of Science}, reproduced in Marwick, \textit{Witchcraft and Sorcery}, pp. 280-295.

\textsuperscript{323} \textit{Ibid.}, p. 286.

more generalised and regular response to the cyclical changes periodically experienced by the social system as a whole. \textsuperscript{25} Thus,

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\text{[w]hen a small village reached, by natural population increase, a certain critical size (beyond the numbers its frail authority structure could encompass), mutual witchcraft accusations began to be flung about by rivals for dominance within it. When accusations and counter-accusations had thoroughly poisoned the atmosphere, a point of fission would be reached: a part of the village would hive off some distance away, under the leadership of one of the rival claimants; and the remainder, once again reduced to manageable size, would settle down again in a climate lightened (for the time being) of suspicion.}\textsuperscript{26}
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For a good three decades after *Witches, Oracles and Magic* was published, Africanist ethnographers 'continued to dot the i's and cross the t's,' confirming the usefulness, and elaborating substantially on the basis, of Evans-Pritchard's general approach. \textsuperscript{327} It was only in the early 1960s that anthropologists began seriously to question, not so much the validity of the theoretical propositions and conclusions Evans-Pritchard had offered in respect of the Azande, but the extent to which so much of the subsequent data might have been forced into an analytical mould Evans-Pritchard himself would not appear to have intended for universal (or even

\textsuperscript{25} Douglas, 'Thirty Years After *Witchcraft, Oracles and Magic*', xviii.

\textsuperscript{26} Gillies, 'Introduction' in Evans-Pritchard, *Witchcraft, Oracles and Magic*, xxiv.

C. Implications for the Anthropology of Melanesian Sorcery and Witchcraft

As long ago as 1970, Mary Douglas acknowledged the spottiness of the ethnographic work, and the latent tautological quality of much of the ethnographically grounded anthropological studies of witchcraft and sorcery-related beliefs, the vast majority of which were based on African field studies carried out within, or corollary to, the tradition to which Evans-Pritchard's monograph gave rise:

Here witch accusations were used to challenge abuse of authority, there to strengthen it. Wherever a belief in witchcraft was found to flourish, the hypothesis that accusations tend to cluster in niches where social relations were ill defined and competitive could not fail to work, because competitiveness and ambiguity were identified by means of witch accusations.330

Inevitably, she lamented, 'the subject began to lose interest as the lack of predictive power in the irrefutable governing hypothesis was revealed.331

Unsurprisingly, Marwick disagreed with Douglas's suggestion that the apparent decline in a distinctively anthropological contribution to the sociology of


330 'Thirty Years After Witchcraft, Oracles and Magic', xviii.

331 Ibid.
witchcraft was attributable either to the weakness of its model or the staleness of its paradigm.\textsuperscript{332} Rather, he argued:

\begin{quote}
The virtual retirement of anthropologists from a field once indisputably their preserve has resulted, not from their clinging to an outworn paradigm, but rather from their failure to distinguish between the dogma derived from informants' statements and the social characteristics of accusers, witches, and victims aggregated from samples of case histories large enough to yield statistically significant results.\textsuperscript{333}
\end{quote}

Whatever the origins or nature of the deficiencies in the African data may be, and to whatever degree a perceived intellectual ennui may be attributed to those perceived deficiencies, the implications of these circumstances bear an especial significance for anthropologists, and an anthropology, concerned with Melanesian witchcraft and sorcery-related beliefs. The problematic influence of other sociocultural paradigms grounded in African ethnography on Melanesian analyses may have been recognised and constructively addressed some time ago. In the process, Melanesianists not only developed a clearer and more refined awareness of their own theoretical assumptions, but even persuaded some Africanists to reappraise the ideas and approaches they had theretofore sought to impose on their Melanesianist colleagues.\textsuperscript{334}

And yet, partly as a measure of the small interest Melanesianists have shown in the topic until recently, 'the influence of African theories on studies of sorcery and witchcraft has passed almost unnoticed.'\textsuperscript{335} Thus, where the microsociological and political approaches developed by the Africanists in the 1950s

\begin{footnotesize}
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\item \textsuperscript{332} 'Anthropologists' Declining Productivity in the Sociology of Witchcraft' (1972) 74(3) \textit{American Anthropologist} 378, 382.
\item \textsuperscript{333} \textit{Ibid.}, p. 378.
\item \textsuperscript{334} See M. Stephen, 'Introduction' in \textit{Sorcerer and Witch in Melanesia}, p. 1.
\item \textsuperscript{335} \textit{Ibid.}, p. 2.
\end{enumerate}
\end{footnotesize}
and 1960s concentrated almost exclusively on witchcraft accusations as indices of social conflict and tension, '[i]t has now become commonplace for Melanesianists also to treat sorcery primarily as an "idiom" for expressing human conflict . . . , or at least to confine their investigation to this aspect alone.\textsuperscript{336}

\[\text{[i]t has long been recognized that the New Guinea data by no means comfortably fitted Africanists' theories about the social functioning of witchcraft. . . . [I]n Oceania accusations of sorcery or witchcraft appeared to take place not within the local group as in Africa, but between members of different communities. Sorcery rather than witchcraft seemed to predominate. Legitimate as well as illicit uses of sorcery were reported for Oceania, whereas Africanists reserved the terms 'sorcery' and 'witchcraft' for socially condemned practices. Melanesianists have not been unmindful of these differences. . . . Nevertheless, . . . discussion over the last several years has been limited—and continues to be limited—by assumptions, definitions and theoretical orientations largely borrowed from African studies.}\textsuperscript{337}

It is not intended to conclude this chapter with the suggestion that a received anthropological understanding of the nature and dynamics of witchcraft and sorcery is without value or utility, or that the acknowledged deficiencies in that body of data must necessarily be compounded here as an inevitable function of the uncritical importation of 'flawed' African into the Melanesian context. Of course, in turning to a consideration of ethnographically informed anthropological analyses of specifically Melanesian sorcery-related beliefs and behaviours, it behoves us to be aware of the qualifications that properly obtain where reliance is placed on these materials for any purpose. But in so far as the instant examination of sorcery-related beliefs and behaviour is subsidiary to an analysis of the implications of those beliefs and behaviours, \textit{as social facts}—in which culturally significant meanings need to be discerned, so that appropriate, legally significant

\textsuperscript{336} \textit{Ibid.}, p. 6.

\textsuperscript{337} \textit{Ibid.}, p. 2.
meanings can be attributed to them—neither the absence of an aggregation of quantitative data capable of yielding statistically significant conclusions, nor the absence of a unified theoretical basis capable of supporting a comprehensive and exhaustive explanation of the subject phenomena, is particularly problematic.

Mindful of the intellectual, ideological and epistemological barriers to a serviceable understanding of the nature and dynamics of Melanesian sorcery-related beliefs, as discussed in this and the preceding chapter, we are at least better able to approach these issues with a keener sense of the barriers that must be surmounted or circumvented.
Chapter Four

THE DESCRIPTION AND ANALYSIS
OF MELANESIAN SORCERY

[A] perennial problem in the study of sorcery [is] the diversity of the data available, and the multiplicity of conclusions we may draw from those data. The current sorcery data base gives social anthropologists the capability to support almost any generalization, or any set of contradictory generalizations. We face the problem not only of understanding our sorcery information, but also of selecting an analytical perspective to best provide that understanding. . .

One alternative is to let the information speak for itself, to approach sorcery on a case-by-case basis as a unique phenomenon. But we work in a discipline that prides itself on its comparative approach, and we have been socialized within the comparative milieu. The ultimate goal of social anthropology is the formation of general statements regarding the human condition. We strive to understand human beliefs and behaviour not only in one society or situation, but in many. Social anthropology is built on ethnography, but the goal is ethnology.1

1. ANTHROPOLOGICAL THEORIES OF WITCHCRAFT AND SORCERY

The influence of the anthropological ideas to which Evans-Pritchard initially gave expression in his writings on Zande mystical beliefs—and which, in variant forms, found further expression in the spate of ethnographic studies dealing with aspects of witchcraft and sorcery in other African societies that followed on in the analytical tradition which may fairly be said to have begun with that ground-breaking work—was powerful, widespread and enduring. But if Evans-Pritchard

was the first and, for quite some time, the only, anthropologist to focus so acutely on the nature and dynamics of such beliefs and action, it would be wrong to say that the methodology he is credited with bringing so fruitfully to bear on the subject was peculiarly attributable to him; that the recognition of the necessity for developing an appreciation of native ideas within their social integument was uniquely his own; or that the field in which the protocols of the analytical approach with which Evans-Pritchard is invariably associated was uniquely or even originally African.

By the early years of the twentieth century, the idea, if not the practice, of localised and protracted field work was being actively advanced by the founders of the still new, but already well-defined, modern school of British social anthropology. In 1913, W.H.R. Rivers, who produced a two-volume treatise based on his field work in the Torres Straits in the late 1890s, strongly advocated what he called 'intensive work', the essence of which involved a deliberate limitation in the socio-geographic field of study combined with a meticulous and comprehensive analysis over an extended period of time. A 'typical piece of intensive work', he wrote, is one in which:

the worker lives for a year or more among a community of perhaps four or five hundred people and studies every detail of their life and culture; in which he comes to know every

2 See A.R. Radcliffe-Brown, 'Historical Note on British Social Anthropology' (1952) 54 American Anthropologist 276. Arguably, the actual practice of such an approach to anthropological field work was presaged in North America, as exemplified in the extended anthropological field studies conducted by Franz Boas amongst the Eskimo and Kwakiutl Indians of Vancouver Island between 1883 and 1902. See L. Mair, An Introduction to Social Anthropology, 2nd ed. (Oxford: Oxford University Press, 1972), pp. 28-29.

It was Bronislaw Malinowski, who, under the auspices of the London School of Economics and with the patronage of C.G. Seligman, a colleague of Rivers, became the first professionally trained anthropologist to develop and apply (some would say, to invent) the modern methods of intensive ethnographic field work, not in Africa, but in the Trobriand Islands of New Guinea between 1915 and 1918. More than a decade before the appearance of *Witchcraft, Oracles and Magic*, it was Malinowski who articulated the importance grasping the 'native's point of view, his relation to life ... [and] his vision of his world'; and who gave expression to the argument that the thinking of primitive man was, if no more, than certainly no less rational or reasonable than modern Western man's. And before Evans-Pritchard, it was Malinowski who insisted that, in coming to terms with the primitive man in his full humanity, 'we are confronted with our own problems [and w]hat is essential in ourselves'.

The modern anthropological explorer ... is bound ... to arrive at some conclusions as to whether the primitive mind differs from our own or is essentially similar; whether the savage lives constantly in a world of supernatural powers and perils, or on the contrary, has lucid intervals as often as any one of us; whether clan-solidarity is such an overwhelming

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4 Ibid.


and universal force, or whether the heathen can be as self-seeking and self-interested as any Christian.  

Whether or not Malinowski was singularly responsible—as he seemed to believe himself to be—for the founding of a distinctive methodological 'school' of social anthropology, his ideas about the social and psychological utility of otherwise seemingly irrational beliefs in sorcery, witchcraft and magic, clearly preceded subsequent and more eloquent elaborations of the proposition that the parameters of human rationality are fundamentally the products of determinative socio-culturally processes.

For all that, Malinowski's theoretical formulations have been described as impoverished; especially so, perhaps, as these related to magic, witchcraft and sorcery, in respect of which phenomena his representation of the 'multi-layered character of ethnographic reality' is said to have amounted only 'almost' to a theory. Most of Malinowski's Melanesian writing fastened on a particular

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institutional theme of Trobriand life—economic exchange, agriculture, domestic
relations and reproduction, myth and religion, normative social order. In each
case, however, although his ideas were finely developed around a specific
institutional core, 'following the threads to show the ramifications of each
activity,' he seemed unable to produce 'a single coherent statement of Trobriand
"culture" as a whole.' Perhaps, as Kuper suggests, he was unable to do so; 'for
despite his insistence upon interconnections he lacked the notion of a system.'

In Malinowski's view, magical actions and their underlying systems of belief
existed to fulfil particular purposes and, to that extent, he regarded their
importance in social life as fundamentally, if not entirely, instrumental. This
notion of belief and action as comprising a 'set of tools' was central to
Malinowski's analysis of the Melanesian's understanding of magic—the sense of
which could become apparent to the observer so soon as, but only if, its social
utility were properly discerned:

Thus, in his relation to nature and destiny, whether he tries to
exploit the first or to dodge the second, primitive man
recognises both the natural and supernatural forces and
agencies, and he tries to use them both for his benefit.

Magical beliefs and actions were *functional* because they served to minimise
anxieties about those elements of life that were otherwise beyond human control.

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12 See B. Mallinowski, 'Kula: The Circulating Exchange of Valuables in the Archipelagos of
Eastern New Guinea' (1919) 20 *Man* 97-105; *Argonauts of the Western Pacific* (London:
& Unwin, 1935); *Sex and Repression in Savage Society* (London: Routledge & Kegan Paul,
1927); *The Sexual Lives of Savages in Northwestern Melanesia* (London: Routledge & Kegan
Paul, 1929); *Magic, Science and Religion and Other Essays; Crime and Custom in Savage Society*


Like religion, magic was deployed in situations of emotional stress, in which circumstances its purpose was 'to ritualize man's optimism, to enhance his faith in the victory of hope over fear.' Belief in magic was rational in the same way that 'belief' in the efficacious of any other technical procedure could be seen to be rational. Thus, from the perspective of a Trobriand Islander, magic was a perfectly sensible attempt to shape the future, to cope with the unforeseeable accidents which may ruin the most carefully-tended garden, to set at rest the anxiety of the man who has done all he can in the usual way to ensure success in an enterprise, but still knows very well that success is uncertain.

Evans-Pritchard similarly endeavoured to demonstrate the logical consistency of Zande notions of magic and witchcraft and, as one of Malinowski's three graduate students at the London School of Economics in 1925, it is not surprising to see in his work evidence of Malinowski's influence in this respect. Thus, where Kuper suggests that the problem of rationality Evans-Pritchard confronted in his Zande monograph was very much the problem of Tylor, Frazer and Lévy-Bruhl, in his analysis of that problem his institutional focus was 'typically Malinowskian'.

It was in Evans-Pritchard's method of abstraction, however, that his approach represented a distinct departure from Malinowski's. For central to Evans-Pritchard's Zande thesis was the category opposition between mystical and empirical beliefs and action; an opposition which, according to Kuper, Evans-

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15 Ibid, p. 70.
16 Kuper, Anthropology and Anthropologists, p. 77.
17 Ibid., p. 82.
Pritchard had effectively taken over from Frazer and, more directly, from Malinowski. It was, moreover, an opposition Evans-Pritchard retained in his analysis, despite his showing that the Azande believed mystical forces operated in much the same way as physical forces and did not, themselves, make such a contrast.18 At the same time, however, Evans-Pritchard implicitly challenged the crudity of Malinowski's theoretical propositions—whereby magic was functionally linked to every activity with which it was associated—calling into question Malinowski's assertion that no single cultural institution (such as magic) could possibly be understood except as a functionally integral concomitant of the larger social system.

Thus, whereas Malinowski emphasised the importance, indeed, the necessity, of construing the mystical aspects of systems of native belief and action more-or-less exclusively on the basis of their functional implications for the total socio-cultural system,19 Evans-Pritchard resiled from that decidedly (though not exclusively) Malinowskian orthodoxy in his insistence that Zande mystical beliefs could, and should, be understood on their own terms. Disclaiming such analytical obligations to Malinowski as might otherwise have constrained his approach, in his introduction to *Witchcraft, Oracles and Magic among the Azande*20 Evans-Pritchard wrote:

If any one were to urge that in discussing magic I have made a partial abstraction of the activities with which it is associated, I would reply that I am dealing with only some of its relations. It would be grotesque to describe Zande economic life in a book on Zande magic, oracles, and witchcraft, since

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18 Ibid.

19 Ibid; and see also S. Wolfram, 'Facts and Theories: Saying and Believing' in Overing, *Reason and Morality*, pp. 71-84. [pp. 2-3]

agriculture, hunting, and collecting are not functions of these beliefs and rites, but the beliefs and rites are functions of agriculture, hunting and collecting.21

Malinowski's claim to being the founder of professional social anthropology in Britain is a strong one, and his reputation for establishing anthropology's distinctive apprenticeship in the form extended, intensive field work within a community of comprehensible size is equally well deserved.22 Beyond these accomplishments, his early and active appreciation for the practical implications of social anthropology in relation to the processes of social change in the rapidly diminishing quarters of an erstwhile 'primitive' world was, in some respects, prescient.23 With respect to the elaboration of a systematic anthropological understanding of sorcery-related beliefs and action, generally, and in relation to Melanesian societies more particularly, however, Malinowski's contributions proved to be rather less impressive.

As said, Malinowski never developed a full theoretical account of the role and—more importantly from his perspective—the function of sorcery within the totality of the socio-cultural system of the Trobriand community on which his field work was based.24 Indeed, he appears to have made no attempt to place sorcery-related phenomena in their broader context, except, perhaps, in what Patterson has described as his 'tendentious account of the way in which sorcery

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21 Ibid., pp. 2-3.


allegedly supports law and order. Whether this failing on Malinowski's part was a reflection of his complacent assumption that the theoretical explanations he had offered were sufficient, or whether it was indicative of a deficiency he himself recognised and had intended to address, is not entirely clear. In any case, what might otherwise have provided a seminal point of theoretical departure for subsequent anthropological analyses of specifically Melanesian patterns of sorcery-related belief and action—however far afield those departures may ultimately have led from their source—was inherently incapable of doing so. And even to the extent that Malinowski succeeded in articulating his ideas in a form that approximated to a tenable theory, his views in this connection have come increasingly to be regarded by scholars as lacking in both substance and cogency.

As we shall see, aspects of Malinowski's analysis of law and sorcery in Trobriand society continue to inform both anthropological and socio-legal

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25 M. Patterson, 'Sorcery and Witchcraft in Melanesia' [Part II] (1975) 45(3) Oceania 212.

26 In 1929, Malinowski wrote to his student, Raymond Firth, shortly after the latter had returned from the field:

I wonder whether you will proceed at once to a full straightforward account of the Tikopean [sic] culture or whether you will do what I did—that is write it up piecemeal. I hope you will do the former, as I would do now, if I could go back ten years. [quoted in R. Firth, 'Introduction: Malinowski as Scientist and as Man' in Man and Culture, ed. R. Firth (London: Routledge & Kegan Paul, 1957), p. 10]

Later, in his introduction to Reo Fortune's monograph on Dobuan sorcery, he wrote: 'I have not yet published the full account of sorcery in the Trobriands, and am only now engaged in working it out.' R.F. Fortune, Sorcerers of Dobu: The Social Anthropology of the Dobu Islanders of the Western Pacific (1932; rpt New York: E.P. Dutton & Co., 1963), xxii. In his preface to this revised edition of the volume, Fortune is pointedly critical and, in some cases, frankly dismissive of a number of Malinowski's underdeveloped theoretical propositions. Ibid., xi-xv.

considerations of the dynamic relationship between the two phenomena. In the absence of a serviceable theoretical basis developed with a particular view to the nuances of Melanesian culture and society, however, anthropological theories of sorcery and witchcraft grounded in Africanist research and data have, until quite recently, provided by default the analytical parameters in accordance with which virtually all of the Melanesianist studies have been pursued.

A. Psychologically and Sociologically Orientated Theories Generally Considered

In contradistinction to the earlier, more speculative representations of sorcery, witchcraft and magic discussed in the preceding chapter, modern, which is to say ethnographically informed, anthropological theories of sorcery, witchcraft and magic in so-called primitive societies may be grouped into two broad categories, reflecting their principal orientations and analytical grounding in the established premises of psychology and sociology, respectively. As the idea of a clear and determinate division between the fields of the social sciences is itself somewhat arbitrary, it would be misleading to suggest that these two categories are in any sense mutually exclusive. Indeed, such differences in approach as may be discerned between psychologically and sociologically orientated anthropological analyses often tend to reveal differences in focus, emphasis and style, rather than substance. Important elements of each approach frequently appear in the other.

(1) Psychological Theories of Sorcery and Witchcraft

The contemporaneous emergence of modern social anthropology and the elaboration of psychological theories (principally, though not exclusively, Freudian) of personality and human development during the first two decades of the twentieth century foreordained both a convergence of, and confrontation
between, the ideas propounded by scholars and practitioners in both fields.\textsuperscript{28} Given their common grounding in general principles of empiricism, and their common interest in the nature and dynamics of human thought and action, it is not surprising that a vigorous, if not always sympathetic, dialogue should have developed between psychoanalysts and social anthropologists across a range of issues.\textsuperscript{29} And given their common concern with the indicia and determinants of normality, aberrance and deviance, it is equally unsurprising that psychodynamic and cognitive theories should have played an influential role in the construction of anthropological explanations of the sorcery and witchcraft beliefs of primitive peoples.\textsuperscript{30}

Psychological theories have tended to emphasise the relation of sorcery-related beliefs and action to Freudian notions of the displacement of affect and derivative hypotheses involving the projection of infantile urges and other psychodynamic conflicts into culturally standardised fantasies. In the main, such theories are concerned with identifying and describing the intra-psychic origins of such phenomena, focusing on beliefs with a decidedly causal orientation.\textsuperscript{31} Thus, for example, in his analysis of mystical beliefs amongst the Navajo Indians of the

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\textsuperscript{31} M. Patterson, 'Sorcery and Witchcraft in Melanesia' [Part One] (1974) 45(2) \textit{Oceania} 133
American Southwest, Kluckhohn considered witchcraft 'as an expression in fantasy for the culturally disallowed, but unconsciously wanted.'\textsuperscript{32} And in his study of ritual practices amongst the Iatmul of New Guinea, Bateson developed the concepts of ethos, as 'the expression of a culturally standardised system of organisation of the instincts and emotions' of individual members of that culture,\textsuperscript{33} and eidios, which he defined as 'a standardisation of the cognitive aspects of the personality of the individuals.'\textsuperscript{34}

Freudian influences are manifestly apparent in Malinowski's general work on magic,\textsuperscript{35} and in other aspects of his Melanesian research in which he set out expressly to test the application of elements of psychoanalytic theory against his Trobriand data.\textsuperscript{26} Mead addressed similar psychological themes in her examination of the nuances of the mystical beliefs of children and adolescents on the island of Manus in the early 1930s;\textsuperscript{37} and more recently, Riebe returned to an explicitly Freudian analysis in her explanation of the basis of witchcraft accusations amongst the Kalam of northeastern New Guinea:

\begin{quote}
The early expressions of grief and anger at the death of a loved one soon turned to searchings for a culprit. Freud states that the task of mourning is to withdraw all libido from its
\end{quote}

\begin{footnotes}


\textsuperscript{34} \textit{Ibid.}, p. 220.


\textsuperscript{36} See e.g., \textit{Sex and Repression in Savage Society} (London: International Library of Psychology, Philosophy and Scientific Method, 1927).

\end{footnotes}
attachment to the loved object. This process, he states, is very painful and the task is carried through 'bit by bit, at great expense of time and cathetic energy.' In the long run the work of mourning is completed and, with the libido returned to it, 'the ego becomes free and uninhibited again.' Among Kalam, the private resolution from grief to recovery was paralleled publicly by the wake which merged into a sifting of information and a mobilizing of support, and thence to a killing. Compulsive concern with the death was channelled into the process of selecting the revenge victim, and a successful revenge killing was referred to as 'the avenged returning to the homestead'. This marked the return to wholeness and an end to grief. 38

In a paper entitled 'Sorcery, Sin and the Superego', Whiting sought to explain witchcraft beliefs amongst the North American Paiute Indians as evidence of a delusional paranoia with its origins in early childhood experiences. 39 Though critical of such simplistic applications of Freudian analysis to the sorcery and witchcraft beliefs of non-western peoples, Nadel developed a causal account for their appearance in African societies in similarly Psychodynamic terms, linking the belief in witchcraft to frustrations, anxieties and other mental stresses which he characterised as 'psychopathological symptoms ... related to mental disturbances of this nature.' 40 In a re-introduction of the idea of a distinctive 'primitive mentality' of the kind with which Lévy-Bruhl and Durkheim had been preoccupied, Hallpike derived the premises of his analysis of paranormal experiences and primitive notions of causality from Piaget's theory of the psychological development of the child. 41


39 Discussed in Patterson, Sorcery and Witchcraft in Melanesia [Part One], pp. 134-135.


Although such models have been predominant in the past, not all psychological theories of witchcraft and sorcery-related beliefs have been cast in purely Freudian or neo-Freudian moulds. In recent years, psychoanalytic and related approaches have come increasingly to be supplanted by a range of alternative psychological models focusing on the conceptual play in the interstices between the individual and society, and utilising novel considerations of personality, emotion, cognition and social learning theory. Winkelman, for example, has employed a complex ethnopsychological model (amongst other socio-politically based explanatory propositions) in developing a sophisticated cross-cultural analysis of the practice of sorcery and witchcraft, from which he has concluded that, in a statistically significant proportion of the cases examined, sorcerers and witches constitute a derivative species of shamans and healers, whose actions can be linked to psychologically, as well as hallucinogenically, induced states of altered consciousness.
(2) Sociological Theories of Sorcery and Witchcraft

Modern sociological theories of sorcery and witchcraft concentrate on the social and interpersonal, as opposed to the individual intra-psychic, nature and origins those beliefs and actions. On such analyses, belief may well precede, guide, direct and determine actions; but the beliefs themselves are generally regarded as essentially social constructions. Sociological theories tend to associate various forms of sorcery and witchcraft beliefs with particular aspects of the social structure of the society in which they occur. In relation to that society, they then draw out the latent and patent connexions between the uses and consequences of those beliefs and behaviours for other aspects of the larger social organisation. In this sense, it is fair to describe many, perhaps most, modern sociological theories of sorcery and witchcraft as functionally and institutionally orientated. Thus, for example, in his analysis of sorcery in Trobriand society, Malinowski depicted the relevant interpersonal dynamics as servicing a powerfully conservative force in social relations and community structure by furnishing 'the main source of the wholesome fear of punishment and retribution indispensable in any orderly society'.

When a real injustice or a thoroughly unlawful act is to be punished ..., the sorcerer feels the weight of public opinion with hi and he is ready to champion a good cause ... In such cases also the victim, on learning that a sorcerer is at work against him, may quail and make amends or come to an equitable arrangement. Thus ordinarily, black magic acts as a genuine legal force, for it is used in carrying out the rules of


45 See Patterson, 'Sorcery and Witchcraft in Melanesia [Part One]', p. 133.

46 Malinowski, Crime and Custom in Savage Society, p. 93.
tribal law, it prevents the use of violence and restores equilibrium.47

As suggested in the concluding portion of the preceding chapter, however, it was Evans-Pritchard's identification of the homeostatic forces of witchcraft in Zande society that provided the analytical basis on which a host of functionalist ethnographic research was subsequently pursued. Elaborated in the field-based studies of Wilson,48 Nadel,49 Krige,50 Gluckman,51 Turner52 and Marwick,53 amongst others, functional theories of witchcraft and sorcery have been characterised as postulating that:

the function (use, effect) of sorcery and witchcraft beliefs and practices is to reinforce the basic structural principles by which the society is organised by providing a means for (a) the projection of the hostility that exists in some crucial social relationships onto individuals who serve as scapegoats; (b) the rupture of obsolete social relationships thereby enabling the formation of new ones; (c) the stressing of values and norms which regulate the behaviour of individuals and groups in the society. In addition there is the basic and universally validated proposition that sorcery and witchcraft beliefs are a theory of

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47 Malinowski, Crime and Custom in Savage Society, p. 86.

48 See M.H. Wilson, 'Witch Beliefs and Social Structure' (1951) 56(4) American Journal of Sociology 307.

49 See Nadel, 'Witchcraft in Four African Societies'.


53 See M. Marwick, Sorcery in its Social Setting: A Study of the Northern Rhodesia Cewa (Manchester: Manchester University Press, 1965); 'Witchcraft as a Social Strain Gauge' (1964) in Marwick, Witchcraft and Sorcery, pp. 280-295.
causality which functions to explain the why of misfortune, disease and death.  

Once again, it was Evans-Pritchard's Zande analysis that provided the impetus for the theoretical elevation of a perceived causal relationship between sorcery and witchcraft beliefs, on the one hand, and the experience of misfortune, on the other, to the status of a basic and universally validated proposition. In applying this proposition to his own data, however, Marwick introduced an important shift in emphasis from beliefs to action, which has had significant ramifications for the emergence of a distinctively Melanesianist counter-position.

Assessing his Cewa research in the light cast upon his data by Evans-Pritchard's association of mystical beliefs with misfortune, Marwick arrived upon the hypothesis of witchcraft and sorcery-related phenomena as a 'social strain-gauge'. In accordance with this theory, a study of the social contexts in which sorcery and witchcraft beliefs are given operative (i.e., behavioural) expression—a study which necessarily entails a close consideration of the relationship between accuser, victim and accused—should reveal the critical tension points in the group, community or society under scrutiny.  

For Marwick, the crucial dynamic in the triadic relationship between accuser, victim and accused was the process of accusation.

The sociological importance of [an accusation of witchcraft or sorcery] lies in the fact that it provides direct evidence of tense relationships in the society being studied. Accusations of sorcery and witchcraft may be taken as indices of social tension in the relationships in which they occur, i.e. as social strain-gauges.

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54 Patterson, 'Sorcery and Witchcraft in Melanesia [Part One]', pp. 136-137.
55 Marwick, 'Witchcraft as a Social Strain-Gauge', pp. 280-281.
There is some poignancy in the fact that Marwick's first reflective restatement of his strain-gauge theory took the form of a paper addressed, not to his Africanist colleagues, but to an antipodean gathering of mainly of Oceanist and, more specifically, Melanesianist anthropologists.\(^{57}\) In the opening remarks of his Presidential Address to the Congress of the Australian and New Zealand Association for the Advancement of Science (Section F), convened in Canberra in January of 1964, he said:

> I have decided to examine some aspects of the sociology of witchcraft and sorcery that appear to me to be in need of clearing up and pruning if we are to make further progress in this field. I am encouraged to attempt this task because I now find myself better situated geographically for the exploration of a problem that has interested me for some time, and among colleagues better fitted to advise me on it.\(^{58}\)

The problem to which Marwick was referring was that, in Oceania, one of the 'well-founded propositions of the sociology of witchcraft and sorcery' did not seem to apply. That is, whereas in Africa both acts and accusations of sorcery and witchcraft were seen to occur 'only between persons already linked by close social bonds', in Oceania, the ethnographic evidence suggested that 'the sorcerer, who seems to be commoner here than the witch, is believed to direct his destructive magic outside his own group.'\(^{59}\) Thus, the principal object of Marwick's paper was to examine the difficulties ensuant on the attempted application of his 'strain-gauge' theory under social circumstances in which the operative social tensions

\(^{57}\) 'Witchcraft as a Social Strain-Gauge', (1964) 26(9) *Australian Journal of Science* 263-268, reproduced in Marwick, *Witchcraft and Sorcery*, pp. 280-295, to which all subsequent references are made.

\(^{58}\) Marwick, 'Witchcraft as a Social Strain-Gauge', p. 280.

\(^{59}\) *Ibid.*
arose on an inter-communal basis, rather than intra-communally, as they tended to do in Africa.

In pursuing this examination, it would appear that Marwick was less concerned with the possibility of any fundamental deficiency in the theory itself, than he was to locate potential causes for the difficulties in discrepant definitions, the inadequacy of the relevant ethnographic data and certain deficiencies in the field methods of Melanesianist ethnographers:

With a few notable exceptions, Oceanists usually equate the term 'sorcery' with destructive magic in general and do not apply it exclusively, as Africanists do, to destructive magic applied anti-socially or illegitimately. . . .

I have [also] found that most anthropologists in this region have not made a practice of systematically collecting specific instances of either believed attacks of sorcery or witchcraft or of observed or observable accusations of these. . . . A common failing in the case reports I have encountered in the Oceanian literature is an omission to specify the social relationships between the main characters concerned.

In the end, Marwick was satisfied to suggest that, with refined field techniques and a keener ethnographic attention to the analytically relevant details—the prescriptions for which he readily provided—there was no reason why the social-strain gauge theory, which had theretofore been applied so successfully to detect intra-communal tensions within particular African societies, could not eventually be employed with a similar measure of success in the identification of critical tensions in the inter-communal relationships between Oceanian societies.

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60 Ibid., p. 282.
61 Ibid., p. 289.
63 Ibid., p. 291.
Ten more years of ethnographic effort failed to render the proliferating mass of Melanesian data on sorcery-related beliefs and practices any more amenable to a strain-gauge theory, or any other African-based model for that matter. Nor did it produce a distinctively Melanesianist theory capable of providing a comprehensive analytical framework within which what was, by then, a quite considerable body of descriptive literature might organised, and on the basis of which consistent causal explanations might be generated. In the absence of a theoretical alternative for which anything even approaching a claim to 'universal validity' might be made, however, the experience did create a distinctively Melanesianist perspective from which, amongst other things, the analytical deficiencies in Marwick's model itself could be challenged.

In 1974-75, in the introductory segment of what was the first attempt to account comprehensively for the phenomena of sorcery and witchcraft in Melanesia, on the basis of a the Melanesian ethnographic data exclusively, and in heuristic terms specifically developed for purpose of a Melanesianist analysis, Mary Patterson criticised (and frankly rejected the applicability of) Marwick's strain-gauge theory.64 There were, she suggested, three principal points on which Marwick's own data, and much of the rest of the African-based ethnographic materials that appeared to support his hypothesis, could be questioned. Firstly, Patterson drew attention to an observation Marwick made, almost in passing, in the context of a discussion of his Cewa research, in which he noted that in 30 per cent of the cases he recorded, no quarrel or other discernible interpersonal

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64 'Sorcery and Witchcraft in Melanesia [Part One]', pp. 137-141.
disruption had preceded a believed attack or accusation of witchcraft.\(^{65}\) In those instances, Marwick said, blame for misfortune was 'laid at the door of someone who was not necessarily in a tense relationship with the victim or the accuser'; although such persons did tend to be regarded as 'eccentric' by the affected community.\(^{66}\) In the face of this observation, and the hardly insignificant incidence of its occurrence, Patterson queried the existence of so many accusations of witchcraft and sorcery appearing in Marwick's, amongst other Africanist ethnographies, which could fairly be classified as a kind of scapegoating, but which were not otherwise indicative of the existence of tensions in particular relationships between the individuals involved.\(^{67}\)

Secondly, referring specifically, but only by way of example, to Krige's and Gluckman's African materials, Patterson remarked that, whereas virtually all anthropological accounts of societies in which sorcery and witchcraft beliefs were entertained recognised the existence of numerous interpersonal relationships characterised by hostility, tension or Marwickian 'strain', a comparatively small proportion of such relationships were similarly characterised by the occurrence of sorcery accusations. In the event, it was difficult for her to accept the view that the occurrence of sorcery-related accusations necessarily provided an accurate, or even a valid, measure of social strain.\(^{68}\) Thirdly, Patterson noted that Marwick himself was unable to offer a solution to what he regarded as the problem posed by the fact that "a high absolute frequency of accusations in a particular category .

\(^{65}\) Ibid., p. 137. Kluckhohn, Marwick observed, had made a similar observation in relation to the Navajo. Marwick, Sorcery in its Social Setting, pp. 290-291.

\(^{66}\) Marwick, Sorcery in its Social Setting, p. 291.

\(^{67}\) Patterson, 'Sorcery and Witchcraft in Melanesia', p. 138.

\(^{68}\) Ibid.
is an index, not only of the degree of tension characteristic of the relationship, but also of the sheer frequency of interaction in it.\textsuperscript{69}

On the basis of these observations, Patterson concluded:

\begin{quote}
\begin{quote}
[E]ither, as Marwick suggests, 'one of the conditions for the resolution of tension in terms of sorcery is that alternative ways of expressing it are not available' or that the sociology of conflict, of which sorcery and witchcraft studies are part, is not advanced by the application of this theory. As I am forced, on the basis of the Melanesian data, to reject the former suggestion as well as the premise contained in it—that tension is necessarily resolved in terms of sorcery—I am inclined to accept the latter proposal.\textsuperscript{70}
\end{quote}
\end{quote}

Cognisant of the fact that Marwick's theoretical propositions represented what was generally regarded, at the time, as the epitome of anthropological thinking in relation to the nature and dynamics of witchcraft and sorcery-related beliefs, Patterson set out to specify the terms of a substantive departure from the conventional anthropological protocols, in accordance with which witchcraft and sorcery-related phenomena in both African and Oceanian societies had been analysed for nearly fifty years, and to encourage the development of new theoretical approaches, distinctively apposite to the beliefs and practices prevailing in Melanesian societies.\textsuperscript{71}

\textsuperscript{69} Ibid., quoting Marwick (citation omitted).

\textsuperscript{70} Ibid. (citations omitted).

\textsuperscript{71} In what may well have been a symbolic gesture, Patterson transposed the conventional rubric of 'witchcraft and sorcery' to the ethnographically more apposite 'sorcery and witchcraft', and proclaimed the Melanesianists' independence from their Africanist forebears thus:

The fact that a considerable proportion of accusations elude the strain gauge (as is the case in Melanesia) leads to the conclusion that a broader theoretical framework is required to account for scapegoating and intergroup as well as interpersonal conflicts as they are expressed in the idiom of sorcery and witchcraft. \textit{[Ibid.]}


2. MELANESIAN CONFIGURATIONS OF SORCERY AND WITCHCRAFT

It is not intended here to provide an encyclopaedic discussion of specific patterns of Melanesian sorcery and witchcraft, as these beliefs and associated practices have been identified, described and analysed by social anthropologists. To be sure, there is an immense body of ethnographic literature in which these issues are recognised and addressed as a nearly ubiquitous feature of indigenous cultural life in Papua New Guinea, and a considerable number of ethnographic accounts in which they are specifically examined in depth and detail. The sheer number and diversity of Melanesian and Papuan societies, groups and communities within which distinctive forms of sorcery-related ideas, beliefs and behaviours are known, or might reasonably be expected to be found, however, would make even the effort to identify them logistically impracticable. Such an undertaking would extend well beyond the scope and objectives of the instant inquiry in any case. In the following discussion, selected examples and illustrative cases are drawn from the extant ethnographic materials where they serve to demonstrate a particular point. For present purposes, however, there is neither the need for, nor the pretence to, anything approaching an exhaustive coverage or consideration.

No contemporary social anthropologist with Melanesian proclivities, of whose work I am aware, has shown the temerity to suggest that their ethnographic findings are replete, or their analysis is determinative of the many complex issues that invariably arise even in the most circumscribed studies of sorcery-related beliefs and behaviours. None of the theoretical models canvassed here purports to provide either a calculus or a Rosetta stone capable of giving certain or absolute answers to the simplest, to say nothing of the more perplexing, questions with which Melanesian sorcery and witchcraft are hedged about.
There is no tenable grand unifying anthropological theory of sorcery and witchcraft, Melanesian or otherwise, nor is one likely to emerge from the available data; for even if the construction of such a theory were something towards which a competent anthropologist might realistically aspire—or for which the rest of us might hope—the 'ethnographic picture', on which the composition of such a theory would necessarily be based, remains 'far from complete, or even adequate.'

Nevertheless, the very questions raised by searching ethnographic enquiries into the dynamics of sorcery-related beliefs and practices, and the cautiously tentative answers placed on offer in responsive, albeit preliminary, anthropological analyses of those phenomena, provide the only—and thus, a necessarily sufficient—foundation of social facts, on the basis of which the particular issues germane to a consideration of sorcery and witchcraft as problems of law in Papua New Guinea today may properly proceed, and to which a specifically jurisprudential enquiry should properly be limited.

The pressing, if as yet unanswered, question for Evans-Pritchard, and for his successors in epistemological interest, may remain one of why otherwise rational people believe in what, on empirical grounds, appear so clearly to be imaginary, supernatural powers and the capacity of certain individuals to direct those powers to particular, purposeful and often malevolent ends. But for anthropologists interested in the determinative dynamics of demonstrable social facts—and for judges and lawyers in Papua New Guinea today, who are obliged to concern themselves with the jurally determinative implications of those facts—that people do believe in such things is itself a sufficient and necessary reason to consider them.

More than thirty years ago, Ronald Berndt said of the social fact of witchcraft and sorcery beliefs:

We are not, as anthropologists, concerned primarily with the empirical 'reality' of the situation, with whether or not it actually takes place; local belief in it gives that degree of reality which is required for our purposes.73

If, by this remark, he meant that the anthropological study of witchcraft and sorcery-related beliefs is justified because, in Papua New Guinea, such beliefs have 'real social concomitants',74 then that justification must be equally compelling in the case of socio-legal scholars; and more compelling still for judges and lawyers, whose interests and actions involve the attribution of jurally determinative significance to those beliefs.

A. Sorcery, Witchcraft and the Sociology of Conflict

Two preliminary analytical points are generally, though by no means universally, accepted by modern anthropologists concerned with the nature and dynamics of witchcraft and sorcery-related beliefs of indigenous African and Melanesian peoples alike. First, there appears to be something of a consensual recognition that the relevant field of study is properly delimited to a range of ideas and phenomena involving the belief, and the practices associated with the belief, that certain human beings are capable of causing harm, injury, death and destruction to other persons and property by magical, metaphysical or otherwise


74 Marwick, 'Witchcraft as a Social Strain-Gauge', p. 285.
supernatural means.\textsuperscript{75} Although such a limitation formally precludes from the consideration of sorcery and witchcraft those beliefs and practices involved in a host of similarly mystical and equally potent forces deployed for constructive or beneficial purposes (e.g., curing illnesses, healing injuries, ensuring fertility, securing success in agriculture, hunting and other socio-economic pursuits),\textsuperscript{76} it retains the virtue of moral neutrality, in that the effects of an act of sorcery or witchcraft (and the motives behind such actions) will be regarded as either good or bad on the basis of the perspective from which those effects are observed and experienced by the people themselves.\textsuperscript{77}

Second, notwithstanding the somewhat arbitrary origins, and sometimes polemical ramifications, of the terminological distinction between witchcraft and sorcery, having become so much a part of modern anthropological discourse, its retention may well be justified on the grounds of convenience alone, if less so, perhaps, in many cases, on account its heuristic utility.\textsuperscript{78} Thus, with particular respect to Papua New Guinea, Glick observed:

Sorcery and witchcraft have to do with the malevolent use of superhuman powers. Although the two are closely linked and

\textsuperscript{75} Patterson, 'Sorcery and Witchcraft in Melanesia [Part One]', p. 132.

\textsuperscript{76} In fact, Patterson does touch on these kinds of magical phenomena, albeit briefly, in her consideration of what she describes as prophylactic beliefs and actions: that is, the measures taken for purposes of protecting against and preventing the harmful consequences of sorcerous acts. \textit{Ibid.}, pp. 147-148.

\textsuperscript{77} Although Patterson rejected the distinction between 'sorcery' and 'vengeance magic', as these expressions were used by Evans-Pritchard, Marwick and other Africanists to distinguish between characterisation of an act on the basis of one's positional perspective ('what is sorcery to one person or group will be simultaneously vengeance magic to another'), she adopted the use of 'sorcery' and '\textit{tabu}' to differentiate between the specific motive of the practitioner in particular cases—to cause harm in the first instance, and to prevent or protect against harm, in the second. \textit{Ibid.}, p. 141.

\textsuperscript{78} \textit{Ibid.}, p. 140. See also, V. W. Turner, 'Witchcraft and Sorcery: Taxonomy versus Dynamics' (1964) 34(4) \textit{Africa} 314-324.
in many cultures inseparable, anthropologists sometimes distinguish between sorcery as the use of powerful rites or poisonous objects and witchcraft as the projection of harmful personal power. A sorcerer's capacity to harm, in other words, depends on his ability to control extrinsic powers; whereas a witch, who can inflict sickness or death on others simply by staring at them or willing evil on them, possesses powers—inhaled or acquired—as an intrinsic part of his or her person. Beliefs in witchcraft are not uncommon in Melanesian cultures, but among most peoples of Papua New Guinea sorcery beliefs are predominant; moreover, where witchcraft is encountered it is likely to appear as part of a complex of ideas centring on sorcery. 79

Acknowledging that, in a general sense, these characterisations are shared in common by African and Melanesian societies, Patterson prefaces her presentation of a broader, peculiarly Melanesian theoretical framework by drawing a fundamental distinction between the social circumstances under which accusations of sorcery and witchcraft tend to arise in Africa and Melanesia, respectively. Relying on the African ethnographies, she notes that accusations of witchcraft or sorcery attendant upon illness or death appear almost always to be made against a

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Sorcery is a manly martial art practised by a select few and directed solely against the clan's enemies. It is known as 'war magic', and expression which uses the term for all benevolent magic . . . . Only the sorcery of the clan's enemies, directed against one's own group or some eminent individual within it, is considered bad—bad, that is, in its alleged effects, since its intention is understandable. Witchcraft is the reverse of war sorcery in nearly every way. Witches . . . are not men of standing, as sorcerers are, but are . . . men of little account. Whereas a sorcerer subjects himself to a stern discipline of taboos and fasting, and manages to carry out his duties without neglecting his work as a farmer, warrior, an marriage broker, a witch is lazy and inefficient and lacks both the energy and interest to be a creditable citizen. Further, a witch acts solely against members of his own community . . . [pp. 1-2]
person known to the accuser, and that apart from the anomalous cases of scapegoating, an accused African sorcerer or witch is almost invariably in a 'close and strained relationship with the victim and/or the accuser.\textsuperscript{80} In this respect, Patterson finds that the Melanesianist literature reveals a very different situation:

To begin with, it is necessary to distinguish between accusations that follow illness and accusations that follow death. In the event of death, with rare exceptions, the incidence of scapegoating accounts for almost all those accusations levelled at co-members of the community, while accusations levelled at members of another group, specified or anonymous are the norm. It is only accusations made during illness that conform to the African paradigm and then not invariably.\textsuperscript{81}

Patterson agrees that the locus of the study of Melanesian sorcery and witchcraft, like the study of their counterparts in other parts of the world, is properly within the ambit of a sociology of conflict. At the same time, however, she insists upon the need to qualify key elements of Marwickian tension-based theories of such conflict, broadening the analytical aperture in order to take account of inter- and intra-group accusations alike. In her view, acts and accusations of sorcery and witchcraft reflect the social conflicts that can arise when people harbour objectives, desires, ambitions, or expectations which, by their nature are incompatible or mutually exclusive. Sorcery and witchcraft constitute a particular strategy for dealing with those conflicts; but it is only one strategy and, as with any other social form in which such conflict may be expressed, sorcery and witchcraft should not be regarded as synonymous with the underlying conflict itself.\textsuperscript{82} Thus, in much the same way as the conflicts that exist

\textsuperscript{80} Patterson, 'Sorcery and Witchcraft in Melanesia [Part One]', p. 138.

\textsuperscript{81} Ibid., pp. 138-139.

\textsuperscript{82} Patterson, 'Sorcery and Witchcraft in Melanesia [Part One]', p. 139.
within and between groups may have both functional and dysfunctional aspects, the expression of such conflict in the idiom of sorcery and witchcraft may be seen to have both functional and dysfunctional implications— for the individuals involved and for the social relationships that obtain in both instances.  

On these premises, Patterson pursued her analysis of Melanesian sorcery and witchcraft beliefs, not to determine their origins, but rather to explain the consequences of those beliefs and their associated practices for the affected social relationships (intra- and intergroup), and to ascertain 'the reasons for the differential stress placed on certain aspects of the phenomena in different Melanesian societies.' In doing so, however, it was necessary first to describe the general features of Melanesian sorcery and witchcraft, the principal elements of which, according to the patterns Patterson identified, are summarised below.

(1) **Typological Configuration of Melanesian Sorcery and Witchcraft**

Relying on the extant literature of Melanesianist ethnography, Patterson identified several general types or techniques of sorcery, one or more variations of which are found amongst different groups. First, there is what she describes as *personal leavings and food remains sorcery*, which utilises some substance or item with which the intended victim has had some intimate contact, such as nail parings, hair clippings, excreta, semen and so forth.

Having secured the essential ingredients, [the sorcerer] ... places the remains in some sort of container ... , or wraps them in a bundle of bespelled leaves and then almost invariably destroys them by slow burning. Other potent

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'medicines' are often added to the remains. If the sorcerer wishes to cause illness only he partly burns or merely heats the remains but does not destroy them. The victim's symptoms may be enacted by the sorcerer during this procedure. To kill the victim the remains must be completely burnt . . . The recitation of spells usually accompanies the procedure in this technique and they may be vital to the efficacy of the sorcery. To restore the victim to health, the remains may have to be returned to the victim, neutralised or merely removed from the fire by the sorcerer. 85

**Disease sorcery** is a less sophisticated technique which, because it is not usually intended to be fatal, tends more often to be directed towards members of the sorcerer's own group. Here too, the recitation of a spell may accompany the practice, and may often be all that is necessary in order to bring about the desired result. Consistent with the objects and social dynamics of disease sorcery, each disease-causing spell tends to have a corollary, counter-active spell, which the sorcerer may be entreated to invoke at the request of, or on payment of a fee by, the victims or their kinsmen. 86

A third form of sorcery is identified by Patterson as vada or vele which, variously denominated, would appear to be widely practised throughout Melanesia. 87 **Vada sorcery** is distinguished by the fact that it commonly involves several sorcerers acting in concert. It is most notable, however, in virtue of the fact that it involves a direct physical assault on the victim. 88 Glick refers to this as

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a form of assault sorcery, using the Neo-Melanesian Pidgin *(Tok Pisin)* name, *sangguma*, which he described as follows:

The assailants spring on their victim from ambush, brutally overpower him, jab poisons directly into his body, sometimes twist or rip out organs, and perpetrate similar crimes against his person. They are not satisfied until he is thoroughly befuddled, unable to remember who or what has afflicted him. A characteristically sadistic touch is to ask simple questions or set simple tasks to test the victim's mental state . . . and resume the attack if he responds sensibly . . . The victim is permitted to stagger home but only as a shell, a mocking sign to kinsmen and neighbours that in this man's person they have all in a sense been assaulted and are now helpless to resist. Finally . . . , it is immediately evident to everyone except the victim that the illness is hopeless.  

Despite the brutality of the physical assault to which the victim of *sangguma* is believed to have been subject, it is to the overwhelming potency of the sorcery, as opposed to any supposed physical injuries, that the victim is believed ultimately to succumb. In a similar vein, Patterson identifies a range of miscellaneous sorcery practices involving the introjection of various objects (e.g., stones, miniature arrows) into, or the application of certain substances on, or in the way of, the physical person of the sorcerer's victim. Unless counteracted, these will also cause illness or death by a kind of 'poisoning'. Here too, however, it is the magical quality of the process and/or the instrumentalities used in a sorcerous attack, rather than any physical injury or inherent toxicity, that is seen to cause the harm. This interpretation is corroborated by the fact that, in many reported cases, the kinds of injuries inflicted and substances utilised by sorcerers are not medically recognised as capable of inducing the results experienced, observed or described by the people themselves.  

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90 Patterson, *Sorcery and Witchcraft in Melanesia [Part One]*, p. 146.
In terms of the definition of witchcraft she was prepared to accept for the purposes of her analysis—a definition generally consistent with Evans-Pritchard's characterisation of witchcraft—Patterson observed that witchcraft beliefs, as such, are much less common in Melanesia than in African societies. Referring to the relevant Melanesianist ethnographies, she noted that, in certain societies, there is an apparent propensity to associate witchcraft with women more so than with—and in some cases, to the exclusion of—men, and that this configuration may bear some relationship with specific patterns of gender relations.91 This is not always the case, however.92

With respect of those Melanesian societies in which ethnographers have identified specific patterns of witchcraft beliefs, Patterson discerned two general features which seem to be reported commonly in the literature: first, the idea that witches have certain extraordinary powers of a personal nature, including the ability to transform themselves into various creatures, to fly through the air and to render themselves invisible to their intended victims; and second, the belief that witches tend to be necrophagous. Especial social significance is attached to the latter of these features, since a witch's homicidal cravings for human flesh have the potential to put many people in harm's way.93 Brown's description of the witchcraft beliefs of the Mintima people (Simbu Province) is illustrative of both features, and serves to underscore key differences between Melanesian witchcraft and the conventional Africanist paradigm:

91 Ibid., pp. 144-145.

92 Amongst the Kuma of the Western Highlands, for example, 'the power of witchcraft is attributed to men, women, and even children, and all may be accused.' Ibid., p. 145.

93 Ibid., pp. 145-146. See also L. Steadman, 'The Cannibal Witches in the Hewa' (1975) 56(2) Oceania 114, 117-18.
The witch, involuntarily, has a small creature (most often a bat, but possibly a bird, lizard, rat, snake) which is the *kumo* [witchcraft] inside his or her chest or head. It can change into another animal, leave the witch's body, usually at night, and return... The creature goes out to take the flesh from a victim and bring it back for the witch to eat. Then the victim dies. Men, women and children are believed potential *kumo*. Sometimes both a man and his wife are thought to be *kumo*. *Kumo* are expected to be in a family with other kumo, and suspects are questioned about their close relatives, but no training or techniques are inherited or taught.  

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(2) Patterns of Action: The Social Contexts of Melanesian Sorcery and Witchcraft

To the extent that Patterson regards sorcery and witchcraft accusations as significant indicia of underlying intra- and intergroup conflicts, the socio-relational circumstances under which such accusations arise are critical variables in her theoretical model. Examining these key variables in the context of the Melanesian societies depicted in the extant ethnographic literature with a view to identifying such patterns as might be apparent, Patterson introduced an important refinement of one of the central dictums implicit in the Africanist studies of sorcery and witchcraft: the assumptions that all instances of illness, injury, death or misfortune are invariably linked to sorcery or witchcraft.

On the evidence educed, Patterson found that, in the vast majority of societies, a range of minor illnesses and injuries were regarded as quite 'natural', in the sense that they will inevitably be experienced by many people in the absence of the involvement of sorcery or witchcraft. To be sure, in a considerable number of the

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cases in which sorcery-related elements were absent, some other form of metaphysical intervention (e.g., where misfortune was regarded as retribution visited upon a person by a ghost or spirit because he or she had transgressed against an important religious tenet). Usually, however, she found that there were alternative agencies to which illness might be attributed, and it often happened that sorcery would be diagnosed only after all other possibilities had been exhausted.95

(a) Accusations of Sorcery

Acknowledging that in most Melanesian societies at least some and often many illnesses, diseases and deaths are recognised as having been caused by sorcery, Patterson found a significant difference between the nature of the social relationships involved when sorcery accusations related to illness, and the kinds of relationships involved when accusations followed on in the wake of a death. In relation to accusations arising in the first instance, it appeared that, where such allegations were made at all, they were just as likely to be levelled against a member of the alleged victim's local group (who may or may not be a kinsman) or against a member or members of another, often unspecified group.96 With particular respect to intra-group accusations, however, Patterson noted that:

[i]t the characteristic feature of . . . [an] accusation . . . is recognition of conflict which should be resolved in conciliation by the payment of compensation on the part of the

95 Patterson, 'Sorcery and Witchcraft in Melanesia [Part One]', p. 148. See Lawrence, 'De Rerum Natura', p. 25, noting the distinction made by the Garia between illnesses, and even deaths, regarded as naturally attendant upon human mortality, those that result from some offence to a ghost or a deity, and those that are caused by the deliberate malevolence of human agents (i.e., sorcerers).

96 Patterson, 'Sorcery and Witchcraft in Melanesia[ Part One]', p. 148.
sorcerer or by a reciprocal exchange between alleged sorcerer and victim. 97

In relation to accusations attendant upon a death, however, Patterson found that such accusations were made almost exclusively against a person or persons classified, from the point of view of the accuser, as a member or members of an 'out-group'. Even if the identity of the suspected culprit might not be known, the critical point in such a situation was that, 'while it is possible to conceive that an individual may bring about the misfortune of a fellow group member, it is not conceivable that he should wish to cause his death.' 98

(b) Retaliation and Response to Acts of Sorcery and Witchcraft

As suggested above, irrespective of whether the suspected perpetrator is within or outside the social group to which the victim belongs, the common response to a perceived act of sorcery resulting only in illness will normally result in a demand for compensation; or, in some cases, which Patterson considers to be 'exceptional', a proportional act of counter-sorcery. In the face of a death believed to have been brought about by sorcery, however (culpability for which is almost invariably attributed to a person or persons outside the group to which the victim belongs), the likelihood of some more severe form of retaliation is much greater. In the latter cases, such retaliation may involve a physical attack by the kinsmen of the victim on the group with which the supposed sorcerer is known or believed to be

97 Ibid.

98 Ibid., p. 149.
affiliated, although it may also take the form of similarly targeted vengeance sorcery. 99

In determining the nature and extent of such retaliation as may be considered appropriate in any particular instance, Patterson identified several factors that will be taken into account by the aggrieved kinsmen of the victim. These include the social status and character of the victim; the nature of the relationship between the accuser and the alleged sorcerer (assuming the latter's identity is known); the circumstances of the relations between the groups to which the accuser and the supposed sorcerer belong; the status of the suspected sorcerer himself (again, assuming his or her identity is known); and a circumspect consideration of the tactical and strategic implications—political, economic and military—of the contemplated retaliatory action. 100

(c) Personality, Character and the Socio-Political Position of the Melanesian Sorcerer

In addition to the quality of the misfortune suffered by the victim and the affiliational status of a suspected sorcerer with the victim's own or another group, Patterson identified certain features relating to the personal characteristics of persons believed to be responsible for an act of sorcery or witchcraft, which she considered to be significant in the patterned dynamics of accusations. As might be expected, co-resident in-group members accused of lethal sorcery or witchcraft were almost invariably classed as scapegoats, that is:

99 Ibid.
100 Ibid.
persons who have either alienated kin and neighbours through frequent anti-social behaviour or neglect of obligations, or . . . persons peripheral to the group with conditional status as members (e.g. immigrants or the spouses of group members). \textsuperscript{101}

In a few cases, however, she found that in-group accusations attendant upon the death of the victim of some social status might be directed at a political rival of the deceased. \textsuperscript{102}

The status of a sorcerer within his own group is often reciprocally related to his political position, in that the achievement of political importance can be a function of one's abilities as a sorcerer, and such abilities themselves can serve to enhance one's political position. In this connection, Patterson found that in those societies in which political power was held by a limited number of men, those individuals also tended either to monopolise, or to have an effectively monopolistic access to, important sorcery techniques. Specialist sorcerers serving the political elite might enjoy the benefits of their proximity to power; but such a position can be a precarious one, since it is dependent upon the protection of persons whose own status is subject to the vicissitudes of politics. \textsuperscript{103}

Ultimately, as Patterson suggests, 'a person with a reputation for sorcery or witchcraft is tolerated only so long as he is either powerful, supported by those with power, or not in conflict with his fellows.' Thus, where the protection afforded to a sorcerer in virtue of his political patronage erodes on account of a sorcerer's waning acceptance or popularity amongst his patron's constituency, or where his patron faces a reversal of his own political fortunes, the sorcerer may

\textsuperscript{101} Ibid.

\textsuperscript{102} Ibid.

\textsuperscript{103} Ibid., pp. 149-150.
quickly become the object of enmity and a potential scapegoat in the eyes of those who previously regarded him with awe, respect and admiration.\textsuperscript{104}

(3) Group Structure and Conflict: The Social Parameters of Melanesian Sorcery and Witchcraft

The descriptive generalisations that Patterson constructed on the basis of her extensive examination of the Melanesianist ethnographies provided the raw data in which she grounded her explanatory propositions about the social origins of sorcery and witchcraft accusations. Having laid that foundation, Patterson set out to articulate, in a preliminary way, a theory of Melanesian sorcery and witchcraft as a form of regulated social conflict. On the premises thus established, she formed the view that a probing scrutiny of the structure of individual Melanesian societies should reveal the ways in which conflict is regulated, and the frequency with which the 'contingent institutions' of sorcery and witchcraft are activated in those regulatory processes.\textsuperscript{105}

Analysing the features she regarded as salient for the purposes of identifying distinct social groups, Patterson developed a comprehensive scheme whereby the Melanesian societies represented in the ethnographic literature she examined could be classified in terms of prevailing socio-cultural rules and norms of descent, affiliation, inheritance and domicile, and then broadly differentiated on the basis of the types of society characterised by those features. The details of Patterson's classificatory method and the specific configuration of the various

\textsuperscript{104} \textit{Ibid.}, p. 150.

\textsuperscript{105} \textit{Ibid.}, p. 151.
groups evaluated need not be elaborated here. Essentially, however, her model yielded three archetypal social groups organised around the rules and norms described above. These she denominated Type A societies, characterised by 'an effective male membership that is continually fluctuating'; Type B societies, with 'a relatively stable and constant male membership'; and Type C societies, comprising a variant of the second type to the extent that effective male membership is closed and fairly constant. Evaluating individual Melanesian societies in terms of their stability and solidarity, Patterson placed each of the three categorical types into which those societies could be classified on a continuum, locating 'Type A at the negative extreme, Type C at the positive and Type B in an intermediary position.' Assessing the relevant socio-structural factors against the nature, type and frequency of sorcery and witchcraft allegations

106 Of doubtless interest and importance to anthropologists, these details are of a sophisticated technical nature and do not bear on the issues with which we are particularly concerned. Briefly stated, the social formations identified by Patterson were those constituted as parishes: local groups comprised of persons associated with a certain tract of land, bearing a distinctive name and organised as a discrete political unit. *Ibid.*

107 *Ibid.* Again, the ethnographic details of the basis of which a particular society qualified as consistent with Type A, B or C need not concern us here. For those to whom such matters are of interest, however, Patterson descriptions are summarised below.

*Type A* societies included monocarpellary parishes characterised by matrilineal descent and inheritance with either avunculo-virilocal domiciliary or bi-local residential features, and non-carpellary parishes characterised by non-unilineal descent and inheritance with optative residential features.

*Type B* societies embraced parishes consisting of members of a number of exogamous unilineal kinship groups that are either phyle wide or common to a particular parish only. The characteristic descent and inheritance system could be either matrilineal or patrilineal, with residential arrangements being avunculo-virilocal in the first instance and patri-virilocal in the second.


Particular individual Papua New Guinea societies identified by Patterson as falling within one or another of these three classificatory types are discussed in the second part of her essay, 'Sorcery and Witchcraft in Melanesia [Part Two]' (1975) 45(3) *Oceania* 212-230.
found to occur within and between the Melanesian societies classified in accordance with her tri-partite scheme, Patterson advanced three empirically based hypotheses:

- in those societies where effective male membership is variable and the in-group is dispersed, almost all disease, death and misfortune will be attributed to the malevolent supernatural capabilities of human beings;

- in those societies where effective male membership is segmental and relatively constant, and the in-group is largely co-terminous with the parish, almost all death and intractable illness will be attributed to the malevolent supernatural capabilities human beings, but non-human agencies will be blamed for some illness and death; and

- in those societies where effective male membership is relatively constant and the in-group is co-terminous with the parish, almost all disease, death and misfortune will be attributed to non-human agencies, and sorcery and witchcraft will be minor concerns.\textsuperscript{108}

Patterson's theory—or more accurately, perhaps, her typology—of sorcery and witchcraft as an expression of various forms of social conflict does not provide a simple set of correlations neatly linking high, middle-range and low measures of group stability and solidarity with commensurate incidences of intra- and intergroup conflict, and invariably corresponding nexuses to internally and externally directed sorcery accusations. Nor are the patterns she identifies with respect to the differential emphases on sorcery and witchcraft as explanations for disease and death simply related to differences in the constancy of what she

\textsuperscript{108} Patterson, 'Sorcery and Witchcraft in Melanesia [Part One]’, p. 157.
describes as effective male membership in particular parish groups. What she does clearly elucidate, however, is that there are demonstrable relationships between the kinds of social conflict associated with particular types of group structure, on the one hand, and the frequency with which resort may be had to particular kinds of sorcery-related beliefs, actions and explanations by members of those groups.\footnote{Ibid., p. 160.}

Her conclusions are important in several respects. First, she does not concern herself overly much with the origins of sorcery and witchcraft beliefs as intrinsically rational or irrational, but focuses exclusively on the facts and circumstances governing the expression of those beliefs as social facts, the reality of which is beyond question. This kind of approach enables constructive theorisation to proceed without the unnecessary ethnocentric complications engendered by express or tacit assumptions that there is something 'wrong' with the beliefs themselves.

Second, in her meticulous consideration of the distinctively Melanesian characteristics of the sorcery-related phenomena with which her theory is concerned, Patterson demonstrates that there are valid and compelling reasons for deviating from the African-based models on which much of the anthropological analysis of Melanesian sorcery and witchcraft has been based. Superficial similarities notwithstanding, the differences between the relevant Melanesian social configurations and their African counterparts are, on closer consideration, basic and obvious. As Read observed in relation to the New Guinea Highlands:

\[\text{[t]he area of effective social life is small ... [and] we find a highly fragmented social. Members of the cultural-linguistic group seldom have any conception of common identity; each}\]
such group, furthermore, comprises a multiplicity of socially distinct, autonomous communities which are characterised by strong internal solidarity and by an external opposition with all other like communities. 110

Moreover, as Patterson demonstrates, the maintenance of political identity in Melanesian society is largely a function of the limitation and expression of conflict both within and between local groups. Properly apprehended as an integral element of Melanesian polities, accusations of sorcery 'are no longer the anomalies that the African data made them appear.' 111

Finally, without denying that the various specific techniques of Melanesian sorcery and witchcraft are in many ways similar to those used by African and other traditional indigenous societies, Patterson does not permit these genuinely isomorphic features to override the importance of understanding the manifestations of sorcery and witchcraft as merely one dynamic expression of otherwise distinctively Melanesian intra- and inter-group relations. 112

B. Sorcery as a 'Cultural Form'

Patterson's typology of sorcery and witchcraft accusations was the first attempt by an anthropologist to construct a theoretical model designed to take comprehensive account of sorcery-related phenomena on a modern


111 Ibid.

112 Thus:

the expression and suppression of conflict in Melanesian societies is related to the structure of the groupings within them and ... sorcery and witchcraft (as forms of socially regulated conflict) will, therefore, vary in importance as explanations of disease and death in concomitance with variations in these structures. [Ibid., p. 230]
ethnographically informed basis. For the reasons outlined above, her achievement represents a significant step forward, both as an act of intellectual liberation from the distorting constraints of Africanist preconceptions, and as a continuation of the movement away from the erstwhile tendentious analyses of sorcery and witchcraft as cultural delusions and towards their ethnographically informed consideration as demonstrably real social facts. Limited though it was to the Melanesian social field, like all comparatist endeavours, its theoretical utility was weakened by unavoidable over-generalisations—a consequence of which Patterson herself was not unaware. 113

This, perhaps inevitable, outcome left Patterson's model open to an equally inevitable challenge by other anthropologists and ethnographers invoking a critique based on what Mary Douglas referred to as 'Bongo-Bongoism':

Hitherto when a generalization is tentatively advanced, it is rejected out of court by any field-workers who can say: 'This is all very well, but it doesn't apply to the Bongo-Bongo'. 114

Predictably enough, the indignant 'Bongo-Bongoist' might be expected to demonstrate the inapplicability of Patterson's theory to the Melanesian society constituting the particular objects of his or her ethnographic scrutiny. Bruce Knauff went further, however; complementing his critique with an alternative model of his own. 115

113 See Patterson, 'Sorcery and Witchcraft in Melanesia [Part One]', p. 160.
Knauft’s ethnography focused on sorcery beliefs and attributions amongst the Gebusi, a small society of some 450 persons inhabiting an area on the Stirkland Plain in the Western Highlands Province of Papua New Guinea. Departing from the pattern by which many Melanesian societies are characterised, the Gebusi recognise no formalised roles of secular authority or socio-political leadership. There are no 'big-men' or other singularly identifiable head men, and no gerontocratic group of elders. Unlike other highland societies, the Gebusi do not engage in competitive exchanges. Status rivalry is noticeably absent, as is any distinctively aggressive aspect to typical male demeanour. Conflicts and disputes are assiduously avoided, and arguments and fights within the group are rare. Knauft’s own field experience corroborated the observations noted in early patrol reports, in which life amongst the Gebusi was described as generally peaceful, cooperative and friendly. 'In many respects,' Knauft remarks, their communal and non-competitive spirit of amity is indeed idyllic.'

Paradoxically, however, Knauft suggests that the Gebusi have one of the highest homicide rates for any human society, with approximately 33 per cent of all adult deaths (calculated for the period from 1940 to 1982) being violent homicides committed, not by outsiders, but primarily by co-residents and kinsmen living near to one another and within the same community. What is more, the vast majority of Gebusi homicides were seen 'to follow directly upon attributions of sorcery—that is to say, they consist of the killing of the primary sorcery suspect.' It was this opposition between amity and homicide—'good company

116 Ibid., pp. 1-2.

117 According to Knauft’s interpolations, the rate of homicide amongst the Gebusi for the period was amounted to a notional 568 per 100,000 persons per year—approximately 50 times greater than the then current rate of all reported homicides in the United States. Ibid., p. 3.

118 Ibid.
and violence'—which Knauft regarded as fundamental in the shaping of Gebusi culture; and as such, a compelling reason to reject as an explanatory theory the sociology of conflict approach to sorcery and witchcraft accusations that Patterson imported, mutatis mutandis, into the Melanesian anthropological field.

Gebusi show little if any evidence of ongoing social or political tension in relationships that are sorcery-prone in a statistical sense. And to assume the existence of strain by virtue of the sorcery attribution itself is to adopt the functionalist tautology. In fact, there is a striking absence of Gebusi competition or political machination in sorcery-prone relations—and an absence of private backbiting or gossip as well. Gebusi sorcery attributions result not so much from conflict as from the pervasive denial of conflict in certain relations.¹¹⁹

The apparent inadequacy of even a modified social strain-gauge approach to the explanation of sorcery-related behaviour amongst the Gebusi drove Knauft to examine the phenomena at deeper level of cultural life—at the level of belief itself. This recognition drew him to the conclusion that it was the articulation of 'strain' at both levels that needed to be examined from a symbolic and psychological, as well as a sociological, perspective. In this connection he noted that, although '[a] comprehensive and systematic articulation of these perspectives has been routinely called for . . . by many of the major figures in the study of sorcery and witchcraft', none had ever actually been carried out; and it was towards just such an analysis that Knauft's efforts were directed.¹²⁰

With particular respect to the Gebusi, the details of Knauft's ethnographic study and conclusions need not concern us here. What is more important for present purposes is the larger comparative typology that he developed as an

¹¹⁹ Ibid.
¹²⁰ Ibid., p. 330.
alternative to Patterson's model. Drawing on his own research, and evaluating the now-expanded body of Melanesianist ethnographic literature on which Patterson relied in the construction of her hypotheses, Knauff postulated six types of pre-colonial Melanesian society on the basis of the socio-symbolic qualities of the sorcery beliefs and practices associated with each group.\footnote{In constructing this model, Knauff was significantly influenced by Burridge's ideal-type description of the Melanesian manager. See K.O.L. Burridge, 'The Melanesian Manager' in Studies in Social Anthropology: Essays in Memory of E.E. Evans-Pritchard, ed. J.H. Beattie and R.G. Lienhardt (Oxford: Oxford University Press, 1975). On Burridge's analysis, according to Knauff, indigenous Melanesian leaders must struggle with a moral and cultural dilemma: They should satisfy egalitarian ideals and remain equivalent with other men, but their attempt to become first among equals leads them to become self-willed, manipulative, and powerful—in short, to adopt the victimizing characteristics of the leader-as-sorcerer. These demands and ideals are in tension not only for the aspiring individual but also for the society as a whole, since the need for equivalence and the importance of leadership and authority under some conditions are recognized by all. . . . Hence, the prestige and will-to-power of the leader are admired but are also resented and ultimately constrained by his followers. [Knauff, Good Company and Violence, p. 340]}

In many Melanesian societies, Knauff observes, sorcery was a monopoly of hereditary leaders or of specialists working primarily in the service of such a leader. Here, the monopoly over sorcery was regarded as a legitimate means of social control, and served to increase the status of the recognised leader or leaders within a group. Amongst commoners, fear of this kind of 'chiefly or priestly
sorcery' also served to control political rivalries, dissent and other potentially destabilising disputes.\textsuperscript{122}

In other societies, de-facto control of sorcery techniques remained in the hands of a gerontocratic elite or other specialists. This circumscribed control resulted in a 'channelled limitation of sorcery accusations' thereby reducing (and in some cases precluding) divisive intra-group disputes based on sorcery-related accusations. In some instances, Knauft notes, inter-group 'warfare' might effectively be carried out almost exclusively through the sorcery and countersorcery within the control of these leaders and/or specialists, without any necessity to resort to conventional violence. At the intra-group level, sorcery could be used by the same select group either as a means of general social control, or sometimes for more self-serving purposes.\textsuperscript{123}

Amongst a third group of Melanesian societies, sorcery was more closely associated with 'war magic', and was utilised in connection with the competitive struggles for leadership amongst and between established and aspiring leaders. In these cases, Knauft suggests, sorcery was essentially an adjunct to a man's individual abilities as a fighter and an aspect of any number of hegemonic strategies.\textsuperscript{124}

In the larger and politically more centralised societies of the New Guinea Highlands, and also on the island of Manus, Knauft identifies a fourth

\textsuperscript{122} Ibid., pp. 340-341.

\textsuperscript{123} Ibid., p. 341.

\textsuperscript{124} Ibid.
characteristic pattern of sorcery belief and behaviour. In these societies, he suggests:

there was a relative absence of sorcery beliefs in pre-colonial times. Leadership and kin/political affiliation were relatively unconstrained by sorcery fears. Correspondingly, political integration on the basis of competitive bigman status hierarchy was highly developed.\textsuperscript{125}

Although such societies might be more or less continually involved in cycles of inter-group warfare and violence, these events appear to have been 'neither caused nor tempered by fears of sorcery.'\textsuperscript{126}

In stark contrast to the kinds of societies described immediately above, Kauft depicts a fifth group as those societies in which a reputation for sorcery was of considerable significance in the dynamics of leadership competition. To the extent that leaders within such societies actively exploit their reputations as powerful sorcerers, with a view to political ascendancy and the maintenance of control over their constituencies, sorcery suspicions 'and a concomitant lack of intragroup trust' tended to limit the development of stable political constituencies and institutionalised leadership hierarchies.\textsuperscript{127}

Kauft's sixth category embraces those Melanesian societies in which the political ascendance of individual leaders was actively restrained, if not entirely precluded, by beliefs and fears of sorcery.

\begin{quote}
In these cases, the leader was extremely wary of appearing too dominant over other men—for fear of either being suspected of sorcery or of being a vulnerable target of sorcery sent
\end{quote}

\textsuperscript{125} Ibid., p. 342.

\textsuperscript{126} Ibid.

\textsuperscript{127} Ibid.
against him. In these cases, leaders were careful not to appear domineering or ostentatious; the need to be seen as consensual and equivalent to other men was particularly pronounced.\textsuperscript{128}

Accounting for the shifting patterns of political leadership evident in many contemporary Papua New Guinea societies, and relating that circumstance to the kinds of constraints on sorcery-related beliefs and behaviour described above, Knauft associates the appearance of these features today to the prevalence of wage labour and increased migration. Under such conditions, he suggests, 'sorcery fears may intensify as a reaction against the increasing potential for socioeconomic stratification.'\textsuperscript{129}

Acknowledging that no pre-colonial Melanesian society could be said to fall neatly into one or another of the categories described above, Knauft condensed his six-part typology into four, constructed on the basis of specified complexes of factors which, on the ethnographic evidence, appear to co-occur:

(1) Societies in which sorcery practices and attributions were effectively, and fairly exclusively controlled by stable leadership. In these societies, sorcery fears tended to suppress intra-group divisiveness and to promote overall political integration.

(2) Societies in which sorcery was relatively absent or used primarily by leaders in active inter-group conflict. This pattern may be associated with strong competitive leadership relatively unconstrained by sorcery fears, but with greater potential for endemic warfare.

\textsuperscript{128} Ibid.

\textsuperscript{129} Ibid., p. 343.
(3) Societies in which the control of sorcery was a significant element of competitive leadership even within the group. Leaders competitively exploited their reputations as sorcerers as a means of gaining and maintaining political power. In such societies, distrust and fear of sorcery militated against group solidarity, and sorcery feuds could easily become politically divisive.

(4) Societies in which the actions of leaders have themselves been substantially restrained by fears of sorcery attack or retribution. In these cases, 't[he somewhat ambivalent relationship between sorcery and prestige shifts . . . to a more definitely negative and retributive character.'

Having set out what amounts, in my view, to a more fully developed and rather more sophisticated variant on Patterson's typology, it is curious that Knauft should level the criticism he does against her methodology:

A taxonomy of categories that are defined in absolute rather than in continuous terms become increasingly unwieldy as one tries to apply them systematically to a wide range of societies. Qualifications are invariably needed to account for ambiguous cases, and these easily lead to convoluted reasoning or cumbersome methodology . . . .

While Patterson's ideas are extremely interesting, in the service of typology they give rise to complexly defined and occasionally dubious generalizations . . . . My point in critiquing Patterson's article is not that her basic ideas are wrong, but that her method and typology are too strict in reducing these ideas to a uni-causal explanation on the basis of kinship and social structure.\textsuperscript{131}

\textsuperscript{130} Ibid., pp. 343-344. Knauft locates the Gebusi within the fourth of these condensed categories.

\textsuperscript{131} Ibid., pp. 346-347. Citing specific ethnographically documented examples, Knauft suggests that, in fact, the vast majority of Melanesian societies 'fall near the fine line between' two of Patterson's three 'types' of local groups. Ibid. p. 347.
Still, he does offer a model which, informed by a more recent trend in anthropological analysis, examines subtle variations in Melanesian symbolic structures, cultural orientations and ethical systems that Patterson failed to explore in depth. Thus, whereas Knauft, like Patterson, develops a continuum along which the sorcery-related beliefs and practices of various Melanesian societies are located in corresponding conjunction with discernible patterns of leadership and socio-political tensions, unlike Patterson, he is more sensitive to—or at least demonstrably more interested to understand—the interaction of those conflict generating/conflict suppressing tensions and a range of other equally important considerations:

It would be wrong to suggest that ethics or sorcery beliefs are the singular cause of prime mover of variations in status differentiation and political integration in Melanesia; sorcery beliefs interact with social structural, economic, and ecological factors.

At the same time, however, Knauft does ascribe especial significance to the role of sorcery-related beliefs and practices in these complex sequences of interaction.

Ethical orientations and sorcery beliefs can have an important independent influence in the feedback processes that

Patterson’s ethnographic categorizations are hence particularly prone to problems of data control. Even in terms of the data available, there are numerous Melanesian societies that appear to contravene Patterson’s predictions or categorizations. [Ibid., pp. 347, 421-422, nn. 10-12]


133 Knauft, Good Company and Violence, p. 344.
engender sociopolitical development. These cultural and symbolic factors cannot themselves be reduced to or 'explained' as a simple function of social structural, economic, or economic determinants.\textsuperscript{134}

\section*{C. Sorcery as an Expression of Socio-Political Power}

In his introduction to a collection of essays dealing with the dynamics of sorcery-related beliefs and practices in the then (and still) rapidly changing context of modern Melanesian societies, Zelenietz acknowledged, at once, that such a focused consideration of the phenomena had theretofore received 'only scattered and incidental treatment' in the ethnographic and anthropological literature, and that anything in the nature of a comprehensive or definitive assessment would be premature at best.\textsuperscript{135} For reasons which will be obvious at this point, he noted the difficulties inherent in approaching the subject matter, illustrating the fact by reference to the issue of legitimacy in respect of sorcery-related practices.

Thus, according to Evans-Pritchard, Zelenietz suggests that sorcery was generally regarded as illegitimate: 'an unacceptable means for handling social conflict'. Amongst the Azande, sorcerers were 'socially marginal people', and the existence of the practice was indicative of 'a lack or inadequacy of legitimate social controls', particularly where malevolent magic was direct against members of a sorcerer's (or his principal's) own group.\textsuperscript{136} Marwick advanced this view, arguing that 'sorcery . . . is best understood when regarded as . . . the illegitimate

\begin{itemize}
\item \textsuperscript{134}Ibid.
\item \textsuperscript{135}M. Zelenietz, 'Sorcery and Social Change: An Introduction', Special Issue: Sorcery and Social Change in Melanesia (1981) 9 \textit{Social Analysis} 1. All but one of the substantive essays focused specifically on a particular Papua New Guinea society.
\item \textsuperscript{136}Ibid.
\end{itemize}
sub-division of the destructive branch of magic\textsuperscript{137}—a perspective shared, in the main (though by no means universally) by the Africanists, but one with which Melanesianist ethnographers, beginning with Malinowski, were inclined to disagree.\textsuperscript{138}

This particular debate has waxed and waned over the years. Today, however, certainly amongst Melanesianists, it is clear that the legitimacy of sorcery, as an instrument of self-redress or a weapon of war, and irrespective of whether it is directed against a member of one's own social group or against another, tends to be function of the particular social context in which it is employed, rather than 'a hard and fast defining criterion for separating sorcery from some other phenomenon.'\textsuperscript{139} In other areas, too, as we have seen, the indeterminacy of the data, and the variety of approaches available by which means those data may be evaluated, seem to preclude even some of the basic generalisations.

And yet, Zelenietz observes, whilst universally valid and generalising hypotheses remain elusive, an examination of the Melanesianist literature does reveal the presence of certain general themes. One such theme is that of power:

Sorcery and witchcraft are inescapably enmeshed in the exercise of power. If we see power as a broad phenomenon,
as the ability to control or influence the actions of one's self and others, then the use of sorcery and witchcraft become expressions of this ability to control, or attempt to control, both one's own fate and the destiny of other individuals and groups.\textsuperscript{160}

Common to the models developed by Patterson and Knauf\textsuperscript{!} is the variable availability and utilisation of the power of sorcery in Melanesian societies. In some cases it is the exclusive preserve of the political elite, tactically and strategically deployed to enhance or to undo social solidarity at different levels, within and outside of a particular group or community. In other cases, it may be the means by which the most marginalised members of society endeavour, or are perceived as endeavours, to threaten established patterns of social structure and relations. As a corollary to the idea that the practice of sorcery itself constitutes an important exercise of power, sorcery accusations and other actions taken in response both to perceived acts of sorcery and to accusations, may likewise be understood as expressions of power—or manifestations of powerlessness.

Played out in the 'traditional' socio-political context, these complex interactive processes are all at least potentially indicative, generative and reflective of salient aspects of indigenous social, political and economic life. The reciprocal implications of those processes create the tangled web of human relations into (or out of) which even the most intrepid ethnographers have had difficulty reading meaning. The introduction into such 'traditional' environments of any novel and significant elements must invariably compound that difficulty; and in Melanesia, the novel and significant introduction of colonialism and the development of the post-colonial state have demonstrably had this effect. For if sorcery is properly analysed as an expression of power, then the alteration of traditional social,

\textsuperscript{160} Ibid., p. 5.
political and economic relations is bound to be radical where these fundamental institutions have been, and continue to be, the focal points of those erstwhile exogenous influences.

When brought into contact with the power of European colonialists, indigenous societies the world over faced the 'unpredictable and uncontrollable'. Transformation and change were the orders of the day as encapsulation altered balances and perceptions of power. One way in which people reacted to changes imposed on their social order was through the use of witchcraft and sorcery.\textsuperscript{141}

It is in this context that Zelenietz argues the relevant ethnographic research should be organised and interpreted. And in examining the various changes and problems that confronted, and continue to confront, indigenous Melanesians as a consequence of their exposure to agents and agencies of the West—and increasingly nowadays, the 'Westernised' agents and agencies of the contemporary post-colonial state—one particular issue is thrown into sharp relief: 'a basic indigenous concern with the redistribution and redefinition of power.'\textsuperscript{142}

The imposition of a colonial authority structure, partial integration into a different economic order, the coming of new religious creeds and doctrines, the appearance of new diseases, all modify notions of power, stability and control within and between groups. Sorcery is a way for people to exert power over their own destiny in an environment wherein the traditional bases of power have been changed . . . . Sorcery, in these Melanesian societies, is one means by which people redefine their relationships to themselves, to others, and to the world in general. Sorcery, then, provides a means of power not only to react to imposed changes, but it also gives people a context in which they can attempt to control change, to rewrite the rules and relationships of power.\textsuperscript{143}

\textsuperscript{141} Ibid., p. 6.
\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid.
Assessing the collected ethnographic materials, Lindenbaum draws a number of conclusions about the implications of the social changes precipitated by, or at any rate, associated with, the political and economic changes experienced by Papua New Guineans during the colonial and postcolonial period. First, she suggests, the evidence indicates there has been a recent and dramatic increase in sorcery and witchcraft beliefs. This is a curious proposition, as it is difficult to comprehend precisely what is meant by an 'increase' in belief. Presumably, however, Lindenbaum is referring to an increasing frequency with which, and a proliferation of instances in which, expression of one kind or another is seen to be given to sorcery-related beliefs, enhanced and re-iterated in modes reflecting the influences of inter-cultural articulation.

More significantly, Lindenbaum noted a shift in the practice of particular kinds of sorcery from what she refers to as exo-sorcery to what she calls endo-sorcery:

Sorcery attacks formerly directed against 'outsiders' are now said to occur within the phratry . . . , or the village . . . , within larger villages . . . , or between former allies and 'brothers' . . . . Participation in wage labour, a decline in indigenous trade, the cash cropping of coffee and copra, cattle raising and new evaluations concerning the ownership of land, along with the absence of warfare which lessens the need of for local alliances, are all factors that have strengthened relations between the village and the government or the village and the market, at the expense of local ties. Signs of increased marriage endogamy appear . . . as labourers attempt to keep

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their wages to themselves . . . , and accusations of sorcery come closer to home as the 'zones of safety' contract.\textsuperscript{146}

The paraphernalia of sorcerers has also changed, including now an updated technology of knives, razor blades, bicycle spokes and battery acid; while the commoditisation of sorcery as a product and/or a service has increased with increasing mobility, introducing new and different forms of sorcery from one area of the country into another where it had not hitherto been known (and against which local counter-sorcery techniques may not be effective on that account).\textsuperscript{147}

Perhaps the most telling revelations in the assessment of Melanesian sorcery and social change involve the recognition that the social dynamics of sorcery itself, as an instrument and an expression of power, are changing responsively and adaptively to the changing environments in which such beliefs and practices have always existed. As Lindenbaum observes: 'The sorcery syndromes of Papua New Guinea are the complex ideologies of particular kinds of moral economy, neither completely old nor entirely new', leading to the conclusion that:\textsuperscript{148}

\begin{quote}
there is no such thing as traditional sorcery. Sorcery is the ideology of a transitional moment, rather than an old 'tradition'. The irony is that it is as much 'ours' as 'theirs', a precipitate of our mutual encounter.\textsuperscript{149}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{146} Lindenbaum, 'Images of the Sorcerer', p. 119.
\item \textsuperscript{147} Ibid., pp. 122, 125.
\item \textsuperscript{148} Ibid., p. 127.
\item \textsuperscript{149} Ibid.
\end{enumerate}
\end{footnotesize}
D. 'Contrasting Images of Power': A Synoptical Analysis of Melanesian Sorcery and Witchcraft

As will be evident from the preceding discussion, where the issues have been addressed at all, anthropological interest in sorcery and witchcraft has been keen enough to generate debate and discussion amongst a small number of researchers and theoreticians for more than fifty years. In the main, however, such considerations have been tangential to the larger concerns of social anthropologists, and incidental to the focused ethnographic analyses of particular societies. Beyond that, it is only recently that Melanesianists have begun to show any particular interest in the topic. Valuable data were provided by a handful of ethnographers in the earlier decades of this century. But from the end of the Second World War, anthropological preoccupations with Papua New Guinea societies tended to focus on group structure, exchange systems and political adjustment. Indeed, except to the extent that discussions of sorcery and witchcraft formed an obligatory, if sometimes passing, consideration in specific ethnographic research centring on a particular group, community or region, the first modern theoretical approaches to the dynamics of the Melanesian phenomena in general were Patterson's typological survey of Melanesian witchcraft and sorcery, which appeared in 1974-75, Zelenietz and Lindenbaum's collection of essays dealing with sorcery and social change, which was published in 1981, and Knauft's

150 Most notably, Bronislaw Malinowski's Trobriand studies; Reo Fortune's examination of Dobuan sorcery practices; Francis Williams's ethnographic work as a Government Anthropologist in the Lake Kutubu area and in what is today the Gulf District of Papuan New Guinea; and Gregory Bateson's study of !matmul.

151 Most of the papers themselves were initially developed in connection with the symposium on 'Sorcery and Social Change' held at the annual meetings of the Association for Social Anthropology in Oceania in 1979 and 1980. See Zelenietz, 'Sorcery and Social Change', p. 14, n. 1. Lindenbaum's own earlier and continuing ethnographic fieldwork concentrated on sorcery issues. See S. Lindenbaum, 'Sorcery and Structure in Fore Society' (1971) 41(4) Oceania 277-
extended discussion in the concluding chapters of his Gebusi ethnography in 1985.

A conference on 'Sorcery, Healing and Magic in Melanesia', held by the Research Centre for South-West Pacific Studies at La Trobe University in 1982, gave rise to the third of what remains only three discrete scholarly undertakings devoted exclusively to a comparative overview of Melanesian sorcery and witchcraft, and takes the form of a concluding chapter in Stephen's edited volume of selected papers from the La Trobe conference, which was published in 1987.152

Before considering Stephen's synoptic model, however, it will be instructive to reiterate her observations, that the 'single most important result' of the La Trobe conference was to demonstrate the extent to which current anthropological understandings of Melanesian sorcery and witchcraft remain clouded by definitions and theoretical models that simply do not fit the complexity of the available data.153

The task of rethinking our way through the conceptual categories and explanatory models that have been applied to Melanesian sorcery and witchcraft has only begun. . . . The ethnographic picture is still far from complete, or even adequate', and much more data is required before the questions that have been raised by the extant research can begin to be answered satisfactorily.154

Examining the existing ethnographic evidence and anthropological arguments in light of the foregoing caveat, Stephen offers an overview of the diverse


153 'Introduction' in Sorcerer and Witch in Melanesia, pp. 2-3

154 Ibid., pp. 11, 12.
phenomena of Melanesian sorcery and witchcraft with a particular view to
problems categorisation and interpretation. Her limited objective is not to impose
an explanatory theory on the data presented, but rather to allow a pattern to
emerge from those data. Thus, she begins 'not by asking "What are sorcery and
witchcraft?" but rather by asking "What have scholars described as sorcery and
witchcraft?"', addressing that question in four sections. In the first of these she
identifies two contrasting roles represented by the sorcerer and the witch
respectively. In the second section she examines the nature of that polarity in
greater detail. The third section concentrates on the effects of social change and
the blurring of the two roles over time and under exogenous pressures. In the final
section she traces the psychological underpinnings of the opposed images of
sorcerer and witch. 155

[155] Moving through these several layers of analysis, the
discussion attempts to resolve the contradictions of the
Melanesian material into two contrasting concepts of cosmic
power. 156

(1) The Diversity of Melanesian Sorcery and Witchcraft

Much of the modern Melanesianist anthropology of sorcery and witchcraft
reflects the sociological emphasis on accusations that has dominated the general
theoretical literature on those phenomena. Such an approach, Stephen notes,
effectively reverses indigenous perceptions of sorcery and witchcraft as means of
mystical attack on innocent or defenceless victims, and advancing the idea that the
'real victim' is the accused sorcerer or witch. On analyses of this kind, which are,
by and large, consistent with the frame of reference developed by the Africanists, sorcery and witchcraft are dealt with as 'culturally standardized fantasies about the capacity of some people to injure others by occult powers.'

Assuming (a) that such practices are socially condemned and (b) that in fact no such powers exist and no one actually engages in such nefarious activities, this approach reasons that accusations of plying the black arts can best be understood as indirect attacks on the person accused, who is thereby branded as a despicable, anti-social being. Accusations thus reflect the tensions and conflicts existing between individuals and groups; and it is this context of social action that is the real concern of the social anthropologist, not the 'academic' differences in beliefs. . . . It further follows that there is little point in attempting to distinguish between sorcery and witchcraft; once their ideological frills are removed they are essentially the same social phenomenon.

The distinction drawn between sorcerers and witches in the Melanesian context also tends to follow the lines developed by Evans-Pritchard. But the Melanesian data, and the anthropological analyses of those data, deviate from the African model in that, witchcraft, as such, is rarer in Melanesia than sorcery; and whereas accusations in African societies tend to be directed at members of the accuser's own group or community, Melanesian accusations are more frequently directed against outsiders.

In Stephen's view, however, even after qualifying the Africanist generalisations with the Melanesian variation described immediately above, these widely accepted assumptions fail to do justice to the great diversity of phenomena depicted in the Melanesian ethnographies. They are also inadequate to deal with

157 Ibid.
158 Ibid., pp. 250-251.
159 Ibid., p. 251.
the evidence of contradictory patterns of sorcery and witchcraft accusations, and
the associated patterns of fear accompanying the apprehension of sorcerers and
witches in different Melanesian societies. Organising the available data, Stephen
develops a far more sophisticated framework to take account the multiplex
variations in these Melanesian expressions and experiences. In so doing, she
identifies no fewer than nine categories by which the nature, source and direction
of Melanesian (principally Papua New Guinean) sorcery and witchcraft fears and
accusations might be more appropriately classified, illustrating each with
examples from the ethnographic literature.¹⁶⁰

The variations Stephen observes demonstrate the inaccuracies contained in
many of the generalisations that have tended to be applied in relation to
Melanesian societies. Fears about sorcery and witchcraft within and outside the
community are complex phenomena, spanning the gamut of possible
configurations. Witchcraft, as distinguished from sorcery on the conventional
analytical basis, appears to be rather more common than is generally recognised;
and the phenomenon of 'sorcery and witchcraft' ought not, perhaps, to be regarded
as analytically unitary.¹⁶¹ At the same time, however, Stephen does note a
significant, and significantly consistent, pattern whereby the social roles of
Melanesian sorcerers (who consciously utilise particular techniques for the
deliberate and purposeful infliction of harm, injury, damage or death), on the one
hand, and witches (whose similar actions are the unintended expressions of an

¹⁶⁰ The categories denominated and discussed include: (1) sorcery from within; (2) sorcery
from without but also from within; (3) sickness from within, sorcery deaths from without; (4)
sorcery from outside but within the horizon of social interaction; (5) sorcery from without,
witchcraft from within; (6) witchcraft from within and from without; (7) witchcraft from within;
(8) witchcraft from without; and (9) sorcery or witch beliefs not acted upon. ibid., pp. 252-262.

¹⁶¹ Ibid., pp. 262-263.
unconscious power), on the other, can be distinguished. Thus, sorcery can be seen as:

the attribute of powerful men, or its attribution brings power and social rewards; its use is socially approved in particular contexts; revenge for sorcery deaths is usually carried out by counter-magic rather than open violence. When physical violence is involved, the local group and the kin of the sorcerer are implicated in his attack and serve as appropriate targets for revenge.

Whereas witchcraft tends to be:

imputed to the vulnerable or the weak, or its imputation brings social ruin; it is abhorred not only as an immoral but as an inhuman act; witchcraft deaths are usually acted upon publicly with physical violence. The insider witch is ostracized or killed; foreign witches are hunted down by raiding parties aiming to kill the offending witch alone, and kin are implicated only if they defend the culprit.

(2) Sorcerer and Witch

Proceeding on the basis of the polarity she identified between the positions of sorcerers and witches in many Melanesian societies, Stephen then assesses the implications of those positions for the individuals involved and the communities in which they live. Sorcerers enjoy a particular kind of status in society, depending upon the nature and circumstances in which they employ their personal and cosmic powers. As an intermediary between human beings, and between humans and the realm of spirits and ghosts, the sorcerer occupies a critical, if often precarious, socio-political position, which entails a range of special

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162 Ibid., p. 264.
163 Ibid.
responsibilities both to his fellows, and to other supra-human beings. In the
\footnote{164 Ibid., pp. 265-272.} event, there is a need on the part of the community in which a sorcerer resides to
ensure that he continues to use his powers for the common good, and some of the
variations in observed sorcery practices appear to reflect this imperative in
\footnote{165 Ibid., pp. 272-274.} particular.\footnote{166 Ibid., pp. 275-277.}

Similar features of differentiation are noted in respect of witches; although
consistent with the position generally occupied by witches in Melanesian
societies, these tend to reflect inversions of the qualities and social dynamics
associated with sorcerers.\footnote{166 'Contrasting Images of Power', p. 277.}

(3) Social Change, Sorcery and Witchcraft

Developing many of the same thematic issues addressed by Zelenietz and
Lindenbaum in their edited collection of ethnographic essays dealing with sorcery
and social change, Stephen focuses on ways in which sorcery and witchcraft
represent 'flexible ideologies and roles responding to external pressures and
change, as well as to internal needs.'\footnote{167} \footnote{167 Kuru Sorcery: Disease and Danger in the New Guinea Highlands (Palo Alto, CA: Mayfield Publishing Co., 1979).}

Illustratively, Stephen looks at Lindenbaum's study of Fore sorcery,\footnote{168} in
which the latter examined the processes by which an epidemic outbreak of \textit{kuru}, a
degenerative and ultimately fatal neurological disease,\textsuperscript{169} amongst the Fore of Papua New Guinea's Eastern Highlands, brought about a radical change in traditional attitudes towards sorcery and co-resident sorcerers. Kuru was endemic in Fore society, affecting about one percent of the population (mostly women), and was recognised as an arrow in the quiver of Fore, amongst other, sorcerers. When the mortality rate rapidly rose to affect about 15 percent of the population in the late 1950s and early 1960s, and the frantic search for an effective cure proved fruitless, suspicions fell increasingly upon sorcerers amongst the Fore themselves.

Acknowledging that Lindenbaum's account of this situation provided 'an impressive analysis of the processes whereby a community exposed to a severe epidemic becomes consumed by fears of internal mystical aggression', Stephen was critical of Lindenbaum's underestimation of the implications of the epidemic for the role of the Fore sorcerer, which she depicts as an instance of 'the emergence of the witch-like sorcerer—one who is seen to lose control of his dangerous powers, unleashing them indiscriminately on his own community.'\textsuperscript{170}

Fore sorcery was a complex art . . . and used against the enemy it was entirely legitimate. In the past, when deaths from it were few, Fore sorcerers had claimed responsibility for kuru; when deaths began to increase at an alarming rate, responsibility turned to blame. The sorcerers who had formerly been regarded as the defenders of their communities against enemy groups, now emerged as the destroyers of their own people.\textsuperscript{171}

\textsuperscript{169} Kuru is caused by a virus that attacks the central nervous system after an incubation period of up to 15 years. The virus, which concentrates in the brain tissues of the victim, was transmitted by a special Fore custom: Fore women and children ritually ate the bodies of their own dead relatives, including their brains. Only by eating the brain of a victim can a person become a future victim. See R. Keesing, \textit{Cultural Anthropology: A Contemporary Perspective}, 2nd ed (New York: Holt, Rinehart and Winston, 1981), p. 164.

\textsuperscript{170} 'Contrasting Images of Power', p. 277.

\textsuperscript{171} \textit{i}bid.
In Stephen's view, this development is indicative of the process and effects of, in this instance, endogenously derived social change, in the course of which traditional sorcery beliefs are marshalled for explanatory purposes, but the role of the sorcerer is necessarily recast in the face of novel, ambiguous and otherwise ideologically challenging events. She goes on to examine a host of examples in the ethnographic literature depicting a range circumstances and situations in which, both as cause and effect, the role, position and status of sorcerers and witches are implicated in the processes of social change.172

(4) Psychological Processes and Experiential Reality

To the extent that powerful psychological processes can be seen to add emotional force to the 'logic of investing certain human individuals with cosmic responsibility and blame', Stephen canvasses the Melanesian ethnographies to identify these features as they have been developed by other anthropologists, in order to explain the psychodynamic foundations underpinning the intellectual justification of a magico-religious world view.173

Here Stephen examines explanations for witch beliefs as projections of repressed fears or feelings of inferiority on to others. What is being projected, she suggests, is blame for misfortune and death, for which those accusing the witch are seen as attempting to avoid the fear that they, themselves, are somehow responsible.174 Noting the common, though not universal, association of disaster, misfortune, illness and death with punishment and guilt, Stephen identifies in the

\[172\] Ibid., pp. 278-288.
\[173\] Ibid., p. 288.
\[174\] Ibid., p. 289.
ethnopsychological literature of Melanesian sorcery and witchcraft beliefs the varied contexts in which suffering elicits the rhetorical question: 'What have I done to deserve this? In this connection she suggests:

[T]he psychological significance of witchcraft as an explanation for death is that it provides a means of dissipating . . . guilt feelings—particularly in circumstances where the usual explanations for death as punishment become inadequate or intolerable. 175

In much the same way that the Melanesian witch represents the person on to whom feelings of guilt may be projected, the sorcerer represents the person on to whom power—and more specifically, the power of punitive authority—is projected. 176 From a psychological perspective, the sorcerer is the symbolic embodiment of controlled, male power; he is 'the father figure writ large', whose image is conjured 'by conscious guilt and the fear of punishment'. 177

The community's willingness to accept the claims of certain individuals for responsibility over life and death can . . . be at least partly explained in terms of the belief in the effectiveness of magic; but this belief finds psychological support in feelings of dependency triggered off by conscious guilt and the aura cast by the parental image, the father who takes responsibility. 178

Further to this kind of analysis, Stephen argues that, just as sorcery is equated particularly with male power and the associated paternal imagery, in those societies recognising sorceresses a corresponding psychological projection is involved, with parental authority being represented in these instances by maternal

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175 Ibid.
176 Ibid., p. 290.
177 Ibid.
178 Ibid.
images and the powers appropriately associated therewith. Because the associative links with social authority and responsibility are generally within the domain of men (and sorcerers), however, linkages in the latter instances tend to be weaker.\textsuperscript{179}

Concluding her discussion of the psychological processes involved in Melanesian sorcery and witchcraft—though the matter is probably as much a feature of the sociological aspect of the phenomena—Stephen emphasises that real people are either forced into, or themselves elect, the roles of sorcerer and witch. That is to say, notwithstanding the implicit assumption in most anthropological analysis that sorcerers and witches are, in fact, imaginary figures, belief in their existence may be real enough, to accusers and the accused alike.

The individual's image of himself is in large part created by others' perceptions of and in response to him. People who are treated like witches may well end up convinced that they are. Sorcerers who are acclaimed for their cures... may come to believe in them, despite themselves.\textsuperscript{180}

From a psychological perspective, Stephen suggests, such convictions may provide a standardised cultural form through which the neuroses of the emotionally disturbed might be expressed. Also, since 'normal individuals' are prone to entertain repressed feelings of guilt and inferiority, it is not unreasonable that, under the stress of accusation, they may come to identify consciously with collective projections of those feelings.\textsuperscript{181} More convincingly, however, Stephen points out that in many Melanesian societies, mystical phenomena are closely

\textsuperscript{179} Ibid., p. 291.

\textsuperscript{180} Ibid., p. 293.

\textsuperscript{181} Ibid., p. 294.
associated with dreams and other trance-like states, and that in such states of altered consciousness, what is experienced is recognised to be as real as the qualitatively different experience of a waking, mundane reality.\textsuperscript{182}

Knauft, who had occasion to read Stephen's essay prior to its publication, found her analysis particularly compelling in its inter-linking of the political and cosmological aspects of Melanesian sorcery and witchcraft. At least to the extent that his Gebusi data did not seem to mesh smoothly with her 'binary categorization' of the processes of sorcery and witchcraft, however, he found her model problematic.\textsuperscript{183} Yet Stephen's concluding comments indicate she is well aware of the limitations inherent in any attempt to classify the elusive elements of Melanesian mystical belief and action.

Sorcery and witchcraft are not a single, or even two, institutions, but numerous cultural variations on two \textit{pace, Dr Knauft} themes, variations which are moulded by external pressures as well as internal structures, which vary over time, and which may serve many different social and cultural ends.\textsuperscript{184}

\textsuperscript{182} Ibid., p. 295. Without referring specifically to Melanesian culture, Holger Kalweit makes a forceful argument to this effect, extending the proposition to advance the suggestion that such altered states actually involve a heightened sense of reality, to which cynical non-believers deny themselves access. \textit{Shamans, Healers and Medicine Men}, trans. M.H. Kohn (Boston: Shambhala Publications, 1992), pp. 188-192. See also M.J. Winkelman, 'Shamans and Other "Magico-Religious" Healers: A Cross-Cultural Study of Their Origins, Nature and Social Transformations' (1990) 18(3) \textit{Ethos} 308.

\textsuperscript{183} Knauft, \textit{Good Company and Violence}, p. 344.

\textsuperscript{184} 'Contrasting Images of Power', p. 296.
Anticipating consideration of the issues to be dealt with in the sequel, \(^{185}\) it will be useful to conclude this chapter with some comment on the implications of the kinds of ethnographic descriptions and anthropological analyses discussed above for the ways in which sorcery-related beliefs and practices are apprehended from a jurisprudential perspective, and in the ultimately determinative context of law and the courts in Papua New Guinea today.

In a sense, the ethnographic endeavour to identify and describe relevant social facts is similar to the practical exercise of ascertaining the relevant legal facts in a jural context. Initially, the field of observation is potentially as wide in both instances, capturing the totality of human behaviour; and in both cases, the focus is quickly narrowed to embrace particular actions over a specified period of time within a delimited set of social and spatial circumstances. The criteria of selection, grounded in both cases in theoretical or hypothetical propositions, in accordance with which the ethnographer and the lawyer or judge separates relevant from irrelevant considerations, may differ, as will their respective methods of observation and assessment. Essentially, however, the processes and the objectives their scrutiny are much the same. So too, as each seeks to derive (or import) meaning and significance from or into the facts he or she has accumulated, the nature and purposes of the respective enterprises shift qualitatively. Ethnography becomes anthropology when questions about when, where and how particular persons do or say particular things are overtaken by the fundamental question of why such things were said or done. Legal investigation

\(^{185}\) See Chapters Six and Seven below.
becomes legal analysis when those same preliminary questions are overtaken by questions of knowledge, belief, intention and motive.

The analogy should not be overdrawn. But it is at this point that the similarities between the two undertakings begin to wane in any case, and certain salient differences begin to become apparent. Of particular significance here, is the profound difference between the need for theoretical consistency; for as we have seen, it takes only the slightest indication of variation from a model designed to explain the nature and contours of sorcery-related beliefs for an anthropologist to point out the inapplicability of that model to the society with which he or she is concerned (and in so doing, call into question the tenability of that model as a generalising explanatory construct). To the extent that the law advances a 'model' of expected belief and behaviour, however, it requires only that certain specified criteria be satisfied—sometimes beyond a reasonable doubt, but more often only on a balance of the probabilities—and the 'case' is drawn fully into the framework of the grand theory. Indeed, even where the 'model' is shown to be demonstrably inapposite, it may still serve not only to characterise and classify the facts in question, but to do so determinatively; and although arguments may be successfully mounted to show that the model is manifestly inappropriate in a particular instance, consideration of its appropriateness to such matters in general are not normally entertained.

Finally, perhaps the most significant difference between the anthropological and legal evaluation of particular kinds of belief and behaviour lies in the human consequences of the respective processes. Error in the first instance is by no means unimportant, since defective or deficient scholarship retards the advancement of knowledge and fosters intellectual misunderstandings the effects of which, in some cases, may be quite serious indeed. Error in the second
instance, however, will almost invariably result in an injustice, the immediate ramifications of which can, and often do, involve the imposition of tremendous personal hardship and suffering—the dispossesssion of one's property, the deprivation of one's freedom and occasionally, the loss of one's life.

With particular respect to the matters of sorcery-related beliefs and practices in contemporary Papua New Guinea societies, the nexus between law and anthropology is more than an intellectual intersection at which point interesting, controversial and sometimes polemical issues might be eloquently debated amongst and between scholars. For where ethnographically informed anthropological explanations of Melanesian sorcery beliefs are brought to bear on the legal and jurisprudential processes of interpreting, characterising and responding to the conduct that often follow on from the expression of those beliefs, the integrity of the data and tenability of theoretical classifications can have an impact that goes far beyond a critical footnote. And yet it is very rare today to find an anthropological exposition that actively engages the fundamental theoretical issues of sorcery-related beliefs as 'socio-legal facts' with a view with to their consideration (to say nothing of their application) in the context of a jurisprudential analysis. Rarer still, I hasten to add, are jurisprudential analyses that resolutely take on these particular issues with much cognisance of the ethnographic and anthropological literature.  

One exception relating specifically, though not exclusively, to the jurisprudential implications of Melanesian sorcery-beliefs is Goldman's recent study of the notions of causation and accident amongst the Huli of the Southern

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186 One of the very few examples of an ethnographically informed jurisprudential analyses of kind to which I refer here is B.Z. Tamanaha, Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law (Leiden: EJ Brill, 1993).
Highlands Province. Goldman is cautious not to label his ethnographic analysis as necessarily or exclusively 'jurisprudential' in nature, since its parameters are broader than that. What he sets out, in part, to accomplish, however, is:

> to bridge the chasms between law and custom, and between jurisprudential theory and practice—that is, to demonstrate how the operative dynamics of accident is similar in Western and Melanesian jural traditions as a basis for an effective inter-fusion of ideologies.\(^{188}\)

In the process, he is manifestly successful in the corollary effort to 'form the groundwork of an anthropologically informed jurisprudence.'\(^{189}\)

As we have seen, much of the anthropological literature on sorcery and witchcraft develops explanatory models based on an assumption that attributes causation (and hence, fault and responsibility) for misfortune to mystical entities, because rational alternative explanations, grounded in a more sophisticated understanding of the workings of natural phenomena are unavailable; and/or because of the unwillingness or inability of primitive peoples to account for otherwise unforeseen (and usually undesirable) events in terms of chance, probability or genuine accident. The assumption, however, as Goldman argues, may well be unfounded. Referring to Evans-Pritchard's observation that, amongst the Azande, witchcraft was invoked as an explanation for all misfortunes, Goldman describes how this conclusion has come effectively to settle a fate of exclusion for the concept of 'accident' in subsequent anthropological and ethnographic studies:


\(^{188}\) Ibid., p. 13.

\(^{189}\) Ibid.
Misfortune was to be handled within the framework of religio-cosmological beliefs. Witchcraft was at the same time a vision of natural causes, the idiom in which 'coincidences' were given meaning, and the language of misfortune. This causal model was supported by examples of what anthropologists called 'accidents', for nowhere in the classic literature on the Azande does any native gloss on this term emerge. Accident was swallowed whole by the conventional wisdom that witchcraft beliefs provided explanations of the why of misfortune, disease, and death. 190

As we have seen, the rejection of Africanist models notwithstanding, explanations for most, if not all, deaths amongst Melanesian societies are likewise reported in the ethnographic literature as attributable to sorcery or witchcraft. But in this connection, too, as Goldman notes, there is often a telling lack of statistical data to support such claims. Thus, he suggests:

[i]t may be that situational particulars have here been teased into statements of typicality. Notwithstanding this, we are asked to accept that any indigenous notion of accidental death is absent, even though a 'fortuitous death' . . . is not per se non-causal, though it may be non-agentive. 191

Beyond these apparent discrepancies in the received anthropological orthodoxy on sorcery and witchcraft beliefs, Goldman draws our attention to the fact that, in a number of ethnographic accounts, causal explanations based on witchcraft or sorcery are more particularly invoked in extraordinary circumstances. In more ordinary circumstances, 'everything but accident is permissible'; although, he continues, it is rare to find any suggestion to the effect that 'insignificant/non-serious accidents occur but not significant/serious ones.' 192

In Goldman's view, such glib assertions are inadequate:

190 Ibid., pp. 68-69.
191 Ibid., p. 71 (citation omitted).
192 Ibid., p. 72.
If the preferred form of wisdom is that 'accident' descriptions are possible, given a major/minor, rare/common, or serious/non-serious dichotomy, then surely this throws back on to the analyst the onus to explain and justify such a coding. 193

It probably bears mentioning here that Goldman's own research amongst the Huli has revolved around a close linguistic analysis of verbal exchanges associated with various problematic and otherwise socially significant interpersonal confrontations. 194 As a linguist, he is especially sensitive to the nuances and subtleties of the language of his indigenous informants, and to the ever-present dangers of inaccurate renderings of the expressions on which ethnographic descriptions and anthropological explanations necessarily rely. Thus, to the extent that much of the revealing light Goldman is able to shed on Huli society and culture is a reflection of his fastidious approach to transcription and translation, and in light of the curious discrepancies he highlights in the ethnographic and anthropological literature on sorcery and witchcraft beliefs in Melanesia and elsewhere, we should do well to retain a critical perspective of the kind discussed above in Chapter Two, in the consideration of ethnographically informed anthropological analyses of issues of sorcery and law alike.

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193 Ibid.

Chapter Five

THE LEGAL DISPOSITION OF SORCERY-RELATED BELIEFS AND PRACTICES

The British system of colonial administration, which we in Papua are seeking to follow, aims at the preservation of the native races, even of those 'weaker peoples' who are 'not yet able to stand by themselves.' The 'well-being and development' of these peoples is declared by the League of Nations to 'form a sacred trust of civilization,' and this declaration is entirely in accord with all the best traditions of British administration.

The truth is that law has been used throughout the ages as an instrument of domination and oppression by the ruling classes . . . In this country, the law was an instrument of colonialism and a means whereby the economic dominance of the white man was established over us . . . We do not have to resort to any high flown academic theory to expose the true nature of the law. Certainly Papua New Guineans do not have to do so. We have been at the receiving end of the stick since the white man reached this island.

1. SORCERY AND LAW IN ETHNO-HISTORICAL CONTEXT

In many essential respects, the ideas, forms and systems of law introduced by the British into Papua New Guinea in the latter decades of the nineteenth century, and which first came to bear on the sorcery-related beliefs and practices of Papua New Guineans at the time, are replicated in the laws and the legal institutions of Papua New Guinea today. This original situation, and its implications for the

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1 Sir Hubert Murray, *Papua of To-Day: or an Australian Colony in the Making* (London: PS King & Son Ltd., 1925), viii.


nature and direction of subsequent legal development in Papua New Guinea, have been the objects of a sustained critique and the focal point of an ongoing debate since, and before, the country achieved political independence in 1975.4

That these issues have been, and continue to be, problematic and controversial, however, does little to alter the demonstrable reality of the situation as it was then and as it is today. The facts of the matter are indisputable: the statute and common law in Papua New Guinea are largely, if not entirely, of English and Australian derivation; the underlying rules and principles of law and equity are essentially English; and the constitutionally established judicial system is organised and operates on bases that are virtually indistinguishable from those which underpin the Anglo-Australian models in whose likeness it has been deliberately fashioned.  

As suggested in Chapter One, a comprehensive assessment of law and colonialism in Papua New Guinea would extend beyond the narrower parameters of the present inquiry. However, to the extent that these issues are inextricably bound up with the particular questions raised by the matters with which we are immediately concerned, some of them must be addressed if the pertinent questions are not to be begged.

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5 This is not to say that the system of law initially introduced by the British into in Papua New Guinea was the common law of England. Rather, it was a distinctive 'colonial version of that law', which retained few of the checks and balances that restrained the excesses of English justice and few of the statutory protections which tended to mitigate some of its hardships. A. Paliwala, J. Zorn and P. Bayne, 'Economic Development and the Changing Legal System of Papua New Guinea' (1978) 16 African Law Studies 3 at 12. Whilst this system was potentially applicable 'to relations between the colonisers, between the colonisers and the colonised, and between the colonised' themselves, in practice it was 'only rarely applied in the latter two categories'. P. Bayne, 'Legal Development in Papua New Guinea: The Place of the Common Law' (1975) 9 Melanesian Law Journal 3 at 11.
All history is polemic; and more so, perhaps, than any other species of that particular scholarly genre today, colonial history is fraught with contention. In this regard, the history—or, at any rate, the historiography—of colonialism in the Pacific Islands generally, and in Papua New Guinea more particularly, is no exception. That the light thrown up by the past can and does illuminate our

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understanding of the present, and may even inform our expectations of the future, there can be no doubt. What is revealed, however, invariably appears in the crude glow of an imperfect incandescence, potentially blinding in its intensity when shed upon events at first hand, but often insufficient to provide clarity or resolution at its periphery; and refracted in both instances by a multiplicity of tendentiously fashioned lenses. All too frequently, our understanding of history subsists in reflections of ideas and phenomena whose meanings are distorted in the mirrors of time and space, and the most telling features of which are liable to be obscured in the penumbral shadows of passion, prejudice, ignorance and hubris.9

The bearing of 'whence' on 'whither' in the realm of human affairs may well be inexorable;10 for all that, however, it is invariably hedged about with a daunting and equally ineluctable uncertainty. And yet, even the most resolute critics of the

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9 In a particularly harsh condemnation of conventional Western historical analysis, Michael Oakeshott maintained:

History is nothing other than 'the historian's experience. It is "made" by nobody save the historian; to write history is the only way of making it.' History is historiography. Hence, there are no lessons to be derived from history, because in reading history we only read ourselves. If history possesses a verdict it is only because we have already sat in judgment. Those who 'learn' from the past are, in a manner of speaking, intellectual ventriloquists who specialize in throwing their own frail voices into the mouth of sagacious and authoritative 'history'. In so doing, history becomes 'retrospective politics,' where the naked present is paraded in the cloak of the past. [B. Susser, The Grammar of Modern Ideology (London: Routledge, 1988), p. 176]

historiography of colonialism in Papua New Guinea\textsuperscript{11} agree that 'it is only through an awareness of the nature and impact of colonial rule that certain aspects of contemporary Papua New Guinean society can be understood.'\textsuperscript{12}

Indeed, the dynamic processes of social, political and economic, cultural and legal change, experienced collectively and individually by the people of Papua New Guinea from the time of their initial contacts with the ideas and expressions of European civilisation to the present, do appear to reflect certain salient features of those early and ongoing encounters, even if the quality and magnitude of those influences often elude ready identification and precise measurement. So too, the enduring influences and imprints of these myriad instances of exogenous introduction and intercultural articulation are revealed, if not always (or always obviously) in the nature and dynamics of sorcery beliefs and practices themselves, then most assuredly in the ways in which these beliefs and practices, and the responsive conduct they induce, are determinatively characterised by and through contemporary ideas and institutions of the law.

If law was the 'cutting edge' of nineteenth-century European colonialism,\textsuperscript{13} and if the modern implications of nineteenth-century European colonial law are


\textsuperscript{13} S.E. Merry, 'Law and Colonialism' (1991) 25(4) \textit{Law & Society Review} 889, 890.
rendered intelligible only through a retrospective understanding of their underlying continuities, it is important to recognise at the outset that the forms and institutions of European colonial law, like the larger enterprise for which that species of law was pressed into service in Africa, Asia, Latin America and the Pacific, were as diverse and distinctive as the European nations whence they emanated, the cultures and societies in which they found expression and the individuals through whom the law was given expression in situ.\textsuperscript{14}

More to the point, if law was the 'cutting edge' of colonialism in Papua New Guinea—intended to serve, and demonstrably serving, the hegemonic interests of empire as a signal 'instrument of power' and an integral 'part of the process of coercion'\textsuperscript{15}—a more refined understanding of the implications of that process depends as much upon knowledge of the ideological basis upon which that weapon was wielded, the particular individuals by and against whom it was used, to what specific ends it was so employed and with what apparent consequences, as it does upon a working knowledge of the substance and procedural forms of colonial law itself.

Over fifty years ago, in what is still regarded as one of the most insightful treatments of intercultural contact in Papua New Guinea,\textsuperscript{16} the sociologist, Stephen Winsor Reed, thoughtfully observed:


A proper evaluation of the changes which have taken place in
New Guinea's native cultures as a result of white contact
demands background study of the whole history of European
penetration and settlement in this region. . . . We must
recognise at the start that the phrase 'European contact' covers
an indefinite number of concrete social situations in which
Europeans and natives meet. . . . In other words, it is no less
important to know the culture of the immigrant whites, and
especially their reasons for coming to this inhospitable land,
than it is to understand the cultures of New Guinea natives. It
is from the inter-action of these two traditional bodies of
behavior and belief that the modern society of New Guinea
has been created with all of its problems yet to be solved.17

More recently, and in much the same spirit, Edward Schieffelin and Deborah
Gewertz have argued that ethnographically informed approaches to colonial
history in Papua New Guinea must also attempt to give meaningful expression to
the distinctively Papua New Guinean experiences and understandings of
intercultural encounters.18 Criticising the absence of such a perspective in
conventional treatments of these issues, Shieffelin and Gewertz note that most
historical accounts of Papua New Guinea tend to reflect uniquely European
experiences, described from a decidedly Western point of view, adumbrating 'the
discovery, exploration and eventual political and economic consolidation of the
peoples' of Papua New Guinea.19

The continuities these histories represent are those with
European history. With very few exceptions they do not
reflect the continuities of P[apua] N[ew] G[uinea] culture and
experience. Indeed, like the majority of ethnographies at
present, they hardly acknowledge the historicity of P[apua]
N[ew] G[uinea] cultures at all.20

17 The Making of Modern New Guinea: with Special Reference to Culture Contact in the
18 E. Schieffelin and D. Gewertz, eds., History and Ethnohistory in Papua New Guinea,
Oceania Monograph No. 28 (Sydney: University of Sydney, 1985).
19 Ibid., p. 2.
20 Ibid., p. 2.
The circumspect introduction of ethnographically informed perspectives into analyses of the events and affairs of what cannot properly be regarded as other than a shared history poses a particular challenge to the fundamentally Western perspective which effectively dominates the discipline of history.

It means a shift from universalistic western assumptions about the basis of human motivations and historical processes to a consideration of how these are shaped by particular cultural configurations. It means accepting the possibility that we cannot really understand the nature of events from an objective point of view, but can only grasp their significance when we understand how the people themselves experienced and understood them at the time, and in retrospect.\(^{21}\)

Complementing Maitland's dictum—that anthropology must become history or be nothing\(^ {22}\)—the proposition that competent historical analysis similarly depends upon an infusion of relevant ethnographic perspectives is certainly no less compelling.

Of course, the effort to achieve an ethnographically informed history is no less problematic, and no less polemical, than the effort involved in the attempt to construct a historically informed ethnography.\(^ {23}\) To recognise this, however, is

\(^{21}\) Ibid.


simply to acknowledge that there are ideological, as well as intellectual and methodological nettles, which must be grasped along the path towards a more meaningful, if inevitably imperfect, understanding of the issues of law, culture and history with which we are here concerned.24

In the circumstances, then, beyond an earnest endeavour to bring the ethnographic and anthropological matters considered in the preceding chapter to bear in a meaningful way on the historical and legal issues to be addressed in the sequel, there is little more that can be done in the attempt to construct an analysis that strives represent a Melanesian perspective on the understanding and experiences of law and sorcery, *inter tempore*, and the ideological orientations which informed that understanding and those experiences.

2. THE RECEPTION OF ANGLO-AUSTRALIAN LAW: FORM AND SUBSTANCE

Underscoring the institutional dualism implicit in imposed regimes of colonial law,25 the characterisation of colonial law in Papua New Guinea as 'peculiarly' colonial draws attention to the historical fact that the systematised expressions of Anglo-Australian legal culture, *in situ*, were qualitatively and fundamentally different to their metropolitan counterparts in many important respects.26 As a

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26 In other words: 'The law exported from England...was not the common law of England but a colonial version of that law.' A. Paliwala, J. Zorn and P. Bayne, 'Economic Development and the Changing Legal System of Papua New Guinea' (1978) 16 *African Law Studies*, 3 at 12.
technical matter, this was necessarily so for two reasons. The first of these is of largely historical interest and need not detain us here. The second, however, has some considerable bearing on the very matters with which we are particularly concerned, and is thus more immediately deserving of appropriate enlargement.

A. The Limitation of Circumstantial Applicability

Firstly, then, at least passing cognisance must be taken of the fact that the formal reception of both English statutes and, more importantly, the rules and principles of English common law and equity, in Papua New Guinea was made subject from the outset to 'the qualification of circumstantial applicability'. This limitation, which frequently appeared in colonial legislation dealing with the reception of English law beyond the seas, provided, in effect, that English laws were received only to the extent that they were deemed to be appropriate to local circumstances. Embodying a common law rule of 'respectable antiquity', the logic of this qualification was explained by Blackstone as follows:

27 The integumentary nature of the common law tradition, within which the meaning and application of statutes are ultimately determined, is the principal focus of this analysis. Cf. P. Finn, 'Statutes and the Common Law' (1992) 22 Western Australian Law Review 7-30.


It hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being . . . are immediately in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their new situation in the conditions of the infant colony. . . . [A] multitude of other provisions are neither necessary nor convenient and therefore not in force.30

Towards the end of the nineteenth century the situation and conditions in New Guinea were, to say the least, considerably different to those prevailing in contemporary England. Thus, in accordance with the provisions of the British Settlements Act 1887,31 subject to the terms contained in Royal Instructions issued the following year32 and reflecting certain peculiarities in the administrative


31 50 & 51 Vict., c 54. Section 2 of the Act provided:

It shall be lawful for Her Majesty the Queen in Council from time to time to establish all such laws and institutions, and constitute such courts and officers, and make such provisions and regulations for the proceedings of the said courts and for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order and good government of Her Majesty's subjects and others within any British settlement.


relationship between England and the Australian colonies obtaining at the time, the Courts and Laws Adopting Ordinance (Amended) 1889 provided, in pertinent part, that in British New Guinea (and later Papua):

The principles and rules of common law and equity that for the time being shall be in force and prevail in England shall so far as the same shall be applicable to the circumstances of the Possession be likewise the principles and rules of common law and equity that shall for the time being be in force and prevail in British New Guinea.\(^{34}\)

The reception of enacted law was a somewhat more complicated affair. In this respect too, however, the relevant section of the adopting Ordinance made substantially equivalent provision and, to the extent that such legislation was 'applicable to the circumstances of the Possession ...', those portions of the Acts Statutes and Laws of England that were in force in the Colony of Queensland on the 17th day of September 1888 ... were likewise brought into effect.\(^{35}\)


\(^{34}\) Section 4 (emphasis supplied). As originally enacted, the Courts and Laws Adopting Ordinance 1888 provided for the adoption of the laws of Queensland as the laws of British New Guinea, with a number of statutes being expressly excepted therefrom. That arrangement, however, led to a number of administrative difficulties which, in MacGregor's words, made it '...difficult—sometimes impossible—to determine whether a given law was in force in the Possession or not.' Annual Report on British New Guinea, 1889 to 1890, p. 5. In due course, the 1888 Ordinance was repealed, and the amended Ordinance of 1889 substituted English law for Queensland law as the basic law of the Possession. See R.S. O'Regan, The Common Law in Papua and New Guinea (Sydney: The Law Book Company Ltd, 1971), pp. 1-2.

\(^{35}\) Courts and Laws Adopting Ordinance (Amended) 1889, sec. 3.
Thirty years later, when the mandated Territory of New Guinea came under Australian administration, the Laws Repeal and Adopting Ordinance 1921 provided in virtually identical terms for the adoption of the rules and principles of common law and equity that were in force in England at the commencement of that Ordinance on 9 May 1921, as well as 'those portions of the Acts, Statutes and laws of England' which were in force in what, by that time, had become the State of Queensland.

The technical processes by which the formal reception of Anglo-Australian law in Papua New Guinea was determined involved a variety of complex and sometimes dauntingly convoluted considerations. As said, these are matters of

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36 As amended to 1923.

37 Section 16.

38 Section 14.

39 The doctrine of circumstantial application was, of itself, problematical enough. As Lord Cranworth observed in Whicker v. Hume (1858) 7 H.L.C. 124 at 161 (11 E.R. 50 at 65):

Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies.... Who is to decide whether they are adopted or not? This is a very difficult question.


In Papua New Guinea, this difficulty was further exacerbated by the mediated adoption of English statute law (via Queensland), and the lapse of three decades between the adoption of Anglo-Australian law in British New Guinea (Papua) and the former German territory. Moreover, the Courts and Laws Adopting Ordinance (Amended) 1889 also provided that English statute law was received in British New Guinea only in so far as it was neither repugnant to, nor inconsistent with 'the provisions of any of the instruments, laws or enactments specified [in a designated Schedule to the Ordinance] (sec. 3), whilst the Laws Repeal and Adopting Ordinance 1921 (as amended to 1923) similarly provided that such enacted law was received in the mandated Territory only in so far it was:

not repugnant to or inconsistent with the provisions of any Act, Ordinance, law, regulation, rule, order or proclamation having the force of law that has been or may hereafter be
largely (though not entirely) historical significance today\(^{40}\) and they will not, on that account, be laboured here.\(^{41}\) For present purposes, it is rather more important to understand that, whilst the formally adopted rules and principles of Anglo-Australian law—and the integumentary tradition of the common law within which those rules and principles are embraced—could potentially have applied, *mutatis mutandis*, to order relations 'between the colonisers, between the colonisers and the colonised, and between the colonised', the actual application of those rules and principles to the latter two categories was a rare and, at best, highly attenuated, occurrence.\(^{42}\)

### B. The Legal Regulation of Native Affairs

Subject as it was to the formal qualification of circumstantial applicability, so much of the common law that could be adopted in New Guinea was effectively expressed to extend to or applied to or made or promulgated in the Territory [sec. 14].


received for the benefit of the colonisers exclusively.⁴³ So far as the conduct of Papua New Guineans was concerned, in terms of their relations inter se and with non-Melanesians alike (and to the extent that such conduct was practically amenable to colonial law in any meaningful sense), the only body of adopted Anglo-Australian law occasionally applied was the common law of crimes (and later, the Queensland Criminal Code).⁴⁴ Beyond that, however, virtually every aspect of native life was subject to a distinct and extensive set of legal regulations, made and administered, more or less ad hoc, by a handful of colonial officials and their delegates on the spot.

⁴³ See Bayne, 'Legal Development in Papua New Guinea: The Place of the Common Law,' p. 20; Ottley and Zorn, 'Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict,' p. 259. Even then, its application of English law in practice was further qualified by the political exigencies and vicissitudes of life in a remote colony, where so much was new, so much had been left behind and so much was wanting. Finn, Law and Government in Colonial Australia, p. 2 [footnotes omitted]. Thus, for example, as Fitzpatrick notes, it was unusual for any white expatriate to be charged with a petty criminal offence (particularly those involving breaches of public order). Even more serious crimes often went unprosecuted, when committed by colonial officials. Occasionally, colonists suspected of criminal conduct were accorded the expedient option of leaving the colony. Law and State in Papua New Guinea, p. 66 [footnotes omitted].

⁴⁴ The Queensland Criminal Code Act 1889 (63 Vic. c. 9) was adopted in British New Guinea in 1902 by the Criminal Code Ordinance 1902 (No. 7), and in the mandated Territory in 1921, pursuant to sec. 16 and Sch. 2 of the Laws Repeal and Adopting Ordinance 1921 (No. 1); the latter having been re-adopted, with minor amendments, by the Laws Repeal and Adopting Ordinance 1924 (No. 1). In both instances, the Criminal Code was technically applicable to natives and non-natives alike. Significantly, the adoption of the Code in British New Guinea did not contain express qualifications as to circumstantial applicability or repugnancy to existing laws; although in retrospect, the Supreme Court noted that parts of the Code were manifestly inapplicable and unenforceable at the time of its adoption. R. v. Ebulya [1964] P.N.G.L.R. 200 at 221-222. Unlike its British New Guinea (and later, Papua) counterpart, the adoption of the Criminal Code in the mandated Territory was subject to circumstantial applicability, 'although in practice this distinction made little or no difference as no substantive portion of the Code was ever ruled inapplicable.' Chalmers, Weisbrot and Andrew, Criminal Law and Practice of Papua New Guinea, pp. 236-237.

Also known as the 'Griffith Code', after its draftsman, Sir Samuel Griffith, the Queensland Criminal Code 'was intended as a progressive codification of the common law of crimes....' Incorporating a number of related scattered statutes, it was also exported for use in Nigeria. Weisbrot, 'Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict,' p. 61.
In British New Guinea, the system of native regulation derived its authority from the *British Settlements Act*, which provided for the delegation of all or any of the powers conferred by the Act on the Queen in Council 'to any three or more persons within the settlement.' Subject to such conditions, provisions and limitations as may be specified in the instrument defining the scope of the authority attaching to their offices, the persons to whom those powers were delegated were permitted:

> to establish all such laws and institutions, and constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts and for the administration of justice, as may appear ... to be necessary for the peace, order, and good government of Her Majesty's subjects and others within [the Possession].

Royal Instructions issued pursuant to the Act accordingly provided for the establishment of a Legislative Council consisting of an Administrator and at least two, but not more than five, appointed Members. The Legislative Council, acting collectively by majority vote, was in turn responsible for the enactment of the laws (styled 'Ordinances') of the Possession.

On 15 November 1889, William MacGregor, Administrator of British New Guinea, acting with the advice and consent of the Legislative Council, duly enacted an Ordinance *for the Better Regulation of Native Affairs*. More commonly known by its short title, the *Native Board Ordinance* provided, *inter*

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45 50 & 51 Vict., c. 54, s. 3.
46 50 & 51 Vict., c. 54, s. 2.
47 Royal Instructions, cl. XIII.
48 Royal Instructions, cl. XIX and para. XXII(1).
49 No. IX of 1889.
50 *Native Board Ordinance*, cl. XVI.
Alia, for the establishment of a 'Native Regulation Board', consisting of the Administrator and at least two members of the Legislative Council.\textsuperscript{51} Amongst its principal responsibilities, the Native Regulation Board was required:

\begin{quote}
\textit{to consider such questions relating to the good government and well being of the native population... and to give the Administrator honest and well advised Counsel thereupon and to submit to the Administrator any recommendations or proposals that they may deem to be for the benefit of the Native population.}\textsuperscript{52}
\end{quote}

Further to these obligations, the Board was empowered to make such regulations affecting the affairs of the natives, as to it seemed necessary and proper, in regard to: marriage and divorce, the succession to property in the case of intestacy and the testamentary disposition of property; the disposal of the dead; the jurisdiction, powers and procedures of specialised native courts and native magistrates; the rights to real and personal property; the cultivation of the soil; the observance of native customs; and any other matters 'bearing upon or affecting the good government and well-being of the Natives'.\textsuperscript{53}

\textsuperscript{51} Native Board Ordinance, cl. II.

\textsuperscript{52} Cl. VII.

\textsuperscript{53} Cl. VIII. Although not especially pertinent to the matters with which we are concerned here, it is interesting nevertheless to note that the definition of a 'Native' in the Native Board Ordinance (cl. I) included not only 'any aboriginal native of New Guinea or any island adjacent thereto or any part of the Possession of British New Guinea,' but also:

\begin{quote}
every aboriginal native of any island in the Pacific Ocean or any of the East Indian Islands or of Malaysia that shall whilst he is in the Possession of British New Guinea live after the manner that aboriginal natives of New Guinea or the islands adjacent thereto live and also every person that is wholly or partly descended from any aboriginal natives or native aforesaid and that shall whilst he is in the Possession... live after the manner that aboriginal natives of New Guinea or the islands adjacent thereto live.
\end{quote}
In remarkably short order, the lives and affairs of Papua New Guineans came increasingly to be governed by the divers regulatory pronouncements of the Native Regulation Board, the provisions of which invariably attempted to transform indigenous patterns of conduct and social relations in a manner calculated to suit, at once, the immediate political and economic needs of the colonial administration, and the projected aspirations and cultural pretensions of the white, Christian, Eurocentric society it represented. Indeed, most, if not all, of the regulations enacted in British New Guinea under the Native Board Ordinance of 1889, those subsequently re-enacted or made anew in Papua under the supplanting Native Regulation Ordinance of 1908 and those promulgated under the Native Administration Ordinance 1921 in the Australian-administered, formerly German, Territory of New Guinea, involved patent impositions on traditional Papua New Guinean life and society of an arbitrary, coercive, culturally repressive and sometimes seemingly absurd quality.

In their myriad expressions, the Native Board Regulations in British New Guinea, the Native Regulations in Australian Papua, and the cognate Native

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55 No. XXV of 1909.

56 No. 21 of 1921.

57 Pursuant to s. 5 of the Papua Act 1905 (No.9) (Cwth), British New Guinea was accepted as a Territory under the authority of the Commonwealth of Australia (thenceforth to be known as the Territory of Papua). Under the authority of that Act, the Native Regulation Ordinance of 1908 (No. XXV of 1909) repealed the Native Board Ordinance of 1889 (cl. 7 of the former), and vested authority in the 'Lieutenant-Governor in Council to make Regulations affecting the affairs of the natives' on the same terms as those provided in the 1889 Ordinance (cl. 5 of the 1908 Ordinance).
Administration Regulations in the mandated Territory of New Guinea,⁵⁸ all expressly conveyed or implicitly betokened the predominant ethos of colonial rule.

Differences between the regimes of native regulation administered by the British and the Australians are canvassed in some detail in A.M. Healey, 'Native Administration and Local Government in Papua, 1880-1960' (unpublished PhD Thesis, Australian National University, 1962), and more recently in K.J. Vizjak, 'The Native Regulations of Papua—A Form of Social Control' (unpublished Honours Sub-Thesis, Australian National University, 1988). Although the administrative styles and colonial philosophies of MacGregor (and his immediate successors), on the one hand, and those of J.H.P. Murray, the first Australian Lieutenant-Governor of Papua (and his successors), on the other, can be distinguished on a number of substantive bases, it may fairly be said that the similarities between the two regimes—English and Australian—out-number and out-weight any significant differences. For present purposes, it will suffice to refer to E.P. Wolters's general observation: 'The Native Regulation Board Ordinance of 1889 [sic] was no more than the legal seed from which MacGregor's Australian successors developed an increasingly bifurcated legal system.' Race Relations and Colonial Rule in Papua New Guinea, p. 18.

⁵⁸ Control of the German Territory of New Guinea (Kaiserwilhelmsland) and the islands of Bismarck Archipelago was surrendered to Australian Naval and Military forces on 17 September 1914. In accordance with the applicable rules and principles of international and military law, however, the existing German laws remained in force and effectively unchanged pending an appropriate constitutional disposition. In 1920, anticipating the grant of a Class C Mandate by the League of Nations to the Commonwealth of Australia, the New Guinea Act 1920 (No. 25) (Cwth) declared the 'Territories and Islands formerly constituting German New Guinea . . . to be a Territory under the authority of the Commonwealth, by the name of the Territory of New Guinea' (s. 4), upon a date to be proclaimed. In due course, the Mandate was issued and accepted, bringing the provisions of the New Guinea Act into effect on 9 May 1921. In pursuance of the powers conferred by the New Guinea Act, the Governor-General of the Commonwealth of Australia ordained the Native Administration Ordinance 1921 (No 21), under cl. 4(1) of which the Administrator of the Territory was empowered to make regulations affecting the affairs of the natives on precisely the same terms as those specified in the Native Regulation Ordinance of 1908 (Papua).

'that natives should do as they were told.' Spanning the gamut of what, from the distinctive perspective of the colonisers, constituted dangerous, threatening, insulting, indecent, rude, immodest, unhygienic, economically disruptive, morally repugnant, heretical, inconvenient, undesirable or merely aesthetically displeasing behaviour, the system of Native Regulations dictated, amongst other things:

dress codes (no shirts on men in town areas); language (no English spoken to Europeans...); health (required submission to VD examinations, building of latrines, burial of rubbish, burning of diseased clothing, bedding, drops and animals); village life (linear placement of houses, clean swept village squares, planting of trees outside the village whilst uprooting them within); agriculture (the promotion of cash cropping, particularly coffee, tea, cocoa and copra); and even sexual relations (adultery, recognized as a precipitator of trouble, was prohibited)...

In addition to such comparatively unremarkable prohibitions as those against theft, assault and other 'conventional' offences which were not otherwise punishable as crimes or misdemeanours, it was also an offence under the

In General, New Guinea's Native Administration Regulations imposed harsher penalties than their Papuan counterparts—and from 1923, all prison sentences for offences against the Native Administration Regulations, were deemed to 'be with hard labour unless it... [was] expressly enacted' that the reverse was to be the case. They were geared to the requirements of a plantation society, and only secondly to the protection of the village. In New Guinea, the indigenes were always at least potential employees; in Papua, villagers, to be protected from the effects of uncontrolled social change, and economic exploitation. Many of the Native Administration Regulations were, however, directly derived from the MacGregor-Murray tradition of asserting the administration's right of unilateral intervention in the village.... [Race Relations and Colonial Rule in Papua New Guinea, p. 92]


60 Weisbrot, 'Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict', p. 66.

61 See regulations 78 and 71, Native Regulations, 1939 (Papua); regulations 95 and 93, Native Administration Regulations, 1924 (New Guinea).
Regulations for a native to be abroad between the hours of nine o'clock in the evening and daylight in any town other than one in which he or she was authorised to reside. Whilst within the boundaries of a town where they permissibly resided, natives were nonetheless obliged to confine themselves to prescribed premises during those hours.\textsuperscript{62} Any native who was unable to justify his presence in a particular place at a particular time, or 'to give a good account of his means of support,' could summarily and, if necessary, forcibly be returned to his or her village.\textsuperscript{63} The drinking of intoxicating liquor, gambling and prostitution—common enough vices amongst members of the expatriate community—were all made forbidden acts under the Regulations.\textsuperscript{64} In New Guinea, it was even an offence for a native to ride a bicycle 'upon any street' in the town of Rabaul, 'unless he [was] authorized in writing by an officer, and ha[d] the authorization in his possession.'\textsuperscript{65}

Directly and indirectly, a good many of the Regulations were designed to provide punitive sanctions for actual or perceived violations by natives of employment contracts and indenturing arrangements into which they had entered with expatriate businessmen and plantation operators on theoretically private, voluntary bases.\textsuperscript{66} To be sure, the legal regulation of native labour also 'made

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\textsuperscript{62} Regulations 73 and 74, \textit{Native Regulations}, 1939 (Papua); reg. 80 \textit{Native Administration Regulations} 1924 (New Guinea)

\textsuperscript{63} Regulation 75, \textit{Native Regulations}, 1939 (Papua).

\textsuperscript{64} Regulations 83, 84 and 88, \textit{Native Regulations}, 1939 (Papua); regs 84, 103 and 104, \textit{Native Administration Regulations} 1924 (New Guinea).

\textsuperscript{65} \textit{Native Administration Regulations} 1924 (New Guinea), reg. 80D(2).

provision for such things as maximum hours of work and minimum wages and for health, dietary and accommodation standards,' as well as offering some measure of protection for workers against 'fraud and cruelty on the part of employers and labour recruiters.' For its part, however, the Administration itself could, and often did, compel natives to work on a variety of its own infrastructural projects under conditions no less onerous than those imposed by many suspect, private labour contracts, and readily punished natives who either refused to do so, or failed to do so in accordance with instructions.

Where they were not prohibited outright, many traditional cultural activities of deep spiritual and religious significance to Papua New Guineans were likewise constrained by the Regulations. Thus, for example, the organised celebration of customary practices associated with traditional spiritual or religious beliefs were declared to be 'illegal cults'. The encouragement or facilitation such practices and the mere possession of any 'charm or object' used or intended for use in connection with those activities, were all punishable offences under the Native Regulatio
Regulations.\textsuperscript{70} A wide range of traditional mortuary and funerary rites were similarly curtailed or forbidden absolutely.\textsuperscript{71} Indeed, no ceremony involving 'noise, shouting, beating of drums, singing and dancing,' all of which activities figure centrally in many Melanesian rituals and constitute an essential feature in the general pattern of traditional social relations, could lawfully proceed after nine o'clock in the evening.\textsuperscript{72}

In broad, largely discretionary provisions, the Native Regulations gave colonial officials effectively replete control over the lives and affairs of all Papua New Guineans. The principal instrument through which that discretion was exercised was the patrol officer, or \textit{kiap}:

Though the \textit{kiaps} were at the bottom of a hierarchy that wound upwards through sub-district and district officials to the Lieutenant Governor or Administrator, they had almost unlimited power—and unlimited duties—within their own domains. Each patrol officer, assisted by Papua New Guinean police constables, was in charge of all the villages in an area that might be as large as a hundred square miles. From his patrol post he kept the peace, made occasional forays into new areas to bring more villages under Australian control, protected missionaries and other expatriates under his jurisdiction, heard court cases, settled disputes, collected taxes, rounded up men to build roads and airstrips, took the census,

\textsuperscript{70} Ibid.


\textsuperscript{72} In New Guinea, the prohibition on such activities was limited to those occurring within a town. See sub-regulation 80(4) and reg. 80c of the \textit{Native Administration Regulations} 1924. In Papua, the restriction extended to towns and villages alike, although a Magistrate might grant permission 'to dance after that hour'. See sub-regulation 73(2) of the \textit{Native Regulations}, 1939.
and generally enforced the manifold rules created by the administration.

The kiap single-handedly embraced all the functions of the legal system. As an administrator, he relayed government policy to his charges. As a policeman, he arrested them when a rule was broken. As prosecutor, he charged them, and as magistrate, he meted out their sentences.73

Ultimately, the Regulations were administered by a separate system of specialised Native Courts—the Native Magistrates Courts, as they were called in British New Guinea74 (later styled Courts for Native Matters in Papua75), and the Courts for Native Affairs, as they came to be called in the mandated Territory of New Guinea.76 In both their structure and operations, the Native Courts were, ipso facto, quite different to conventional English or Australian courts of law. The

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73 Paliwala, Zorn and Bayne, 'Economic Development and the Changing Legal System of Papua New Guinea,' p. 27.

In all cases, except where a Regulation expressly provided otherwise, sentences of imprisonment could be imposed with or without hard labour, at the discretion of the magistrate. Regulation 65, Native Regulations, 1939 (Papua); reg. 48, Native Administrative Regulations 1924 (New Guinea). In Papua, although children under the age of fourteen years might not be imprisoned for an offence against the Regulations of which they had been convicted, the court could order that they be publicly whipped as a punishment. See reg. 61, Native Regulations, 1939 (Papua), providing further that '[t]he whipping may vary according to the age of the offender, but shall not be severe.'

74 Native Board Ordinance of 1889, cl. X.

75 Native Regulation Ordinance of 1908, cl. 3.

76 Native Administration Regulations 1923, Part II (cf. Native Administration Ordinance 1921, cl. 2, providing for the establishment of, but without formally denominating, 'such courts for native matters as the Administrator constitutes in pursuance of this Ordinance.')
presiding magistracy also played a role significantly different to, and rather more expansive than, that of a conventional Anglo-Australian judicial officer:

He was . . . the sole personification of the government: policeman, explorer, road-builder, health inspector, social worker and prison warder; even in court, where he dealt with most of the 'lesser offences' against the law . . . , he acted as prosecutor, defence counsel, judge and jury.

That such an arrangement should have resulted, from time to time, in 'judicial' excess and abuse was inevitable. The very existence of a separate system of courts, bifurcated on explicitly racial grounds, was so inherently discriminatory that any semblance of impartiality—in the dispensation of justice as between expatriate Europeans and indigenous Melanesians, on the one hand, or as between the Administration and those Papua New Guineans whose affairs became matters for judicial disposition, on the other—may fairly be regarded as largely, if not entirely, fortuitous. In fairness, it must be said that many of those responsible for the administration of justice in colonial Papua New Guinea sincerely, if naively, endeavoured to do so in fidelity at least to the spirit of justice, if not always to the strict rule of law. The intrinsic nature of the system, however, tended to militate against this.

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77 In British New Guinea, the Native Board Ordinance of 1889 expressly provided that 'any person whether a Native or not' might be appointed as a Magistrate for Native Matters (cl. X, emphasis supplied). In practice, however, no indigenous magistrates were so appointed. No equivalent provision was carried over in the Native Regulation Ordinance of 1908 (Papua), and certainly none appeared in the Native Administration Ordinance or the Native Administration Regulations (New Guinea).


79 Ibid.

The Courts for Native Affairs (or Matters) were wholly staffed by ... administration officers. Many of these officers regarded their judicial work as ancillary to their executive functions, and performed their judicial work with an executive mind. Although there were instances of arbitrary and illegal actions, the rationale for the system was compelling. On the whole, the individual integrity, devotion and goodwill of the officers concerned and the tradition of a service dedicated to the welfare of the native population tempered the inequities of the system. 81

In that same spirit, many of the Native Regulations earnestly, if somewhat clumsily, sought to introduce beneficial practices in the areas of health and hygiene, 82 to encourage industry and productive husbandry, and to provide a modicum of protection for indigenous Papua New Guineans against the more ruthless forms of exploitation at the hands of the most unscrupulous Europeans. 83 Characterised as generously as an informed historical circumspection permits,

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81 Bayne, 'Legal Development in Papua New Guinea: The Place of the Common Law,' pp. 14-15. Bayne has quoted here from the Report on the System for the Administration of Justice in the Territory of Papua New Guinea, prepared in 1960 by Professor David Derham (and commonly referred to as the Derham Report) at the request of the then Minister for Territories, Paul Hasluck. Professor Derham had been directed to 'enquire into the existing system of the administration of justice in the Territory...,' and to make suggestions for its improvement having regard to both the present and future requirements of the Territory: Derham Report, para 2, p. 1 (quoting from the terms of reference). In Chapter Two of his Report, Professor Derham addressed 'Defects in the Functioning of Courts for Native Affairs,' in which context he observed, at para. 18, p. 20:

One of the defects in the past ... was that many powers [of the kiaps] were exercised indiscriminately and without formal check ... . This produced in isolated areas the exercise of what has been called 'the divine right of kiaps', and the rights and interests of native subjects were at the mercy of personal rule uncontrolled by any effective law.

The 'potential dangers' of that situation was, according to Derham, 'kept in check in all but isolated cases by the individual integrity, devotion, and goodwill of the officers concerned...:' Ibid. Yet even in his essentially commendatory assessment, Derham was obliged to acknowledge: 'It would be naive to ... to suppose that all the arbitrary characteristics of personal rule by the kiap [were] in the past.' Ibid., para 19, p. 21.

82 MacGregor, as it happened, was a physician by training, and prior to his appointment as Administrator of British New Guinea he had served as Chief Medical Officer in Fiji.

however, the means adopted to achieve those ends were, at best, paternalistically
tended at the 'correction and improvement' of a people generally regarded as
wretchedly primitive, and whose benighted condition was beyond question even
in the most sympathetic assessments. Regulations designed to facilitate the
development of village economies were, in the main, wholly undisguised efforts
'to provide a potential source of tax-revenue, and to assist in the indigenes entry
into a [colonially controlled] cash economy.' Such real protections as were
offered to natives under the labour regulations operated principally to the
advantage 'of the literate and those who knew the law.'

In their every iteration, the Native Regulations purported to foster 'the good
government and well being of the native population.' Yet the realisation of those
intentions was invariably conceived in terms entirely consistent with a colonial
_Weltanschauung_ from which the native point of view was effectively excluded as
an irrelevant, if not impertinent, consideration. In its every application to, or in
relation to, the natives, colonial law in _Papua New Guinea_ was not, and was not

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84 _Ibid._, p. 18. From the outset, the administration of British New Guinea operated under
severe financial constraints and the need to generate internal revenue was constant. The curious
arrangement under which the protectorate was erected into a crown colony provided that a
number of Australian colonies, rather than England, would finance the administration for a
period of ten years. In that time, MacGregor operated on 'an annual pittance of £15,000....'
H.J. Gibney, 'The Interregnum in the Government of Papua, 1901-1906' (1966) _12(3)_
_Australian Journal of Politics & History_ 341 at 342.

85 'Most Papuans had to wait until they found, or were noticed by, a European who
recognized their plight, before they could assert their rights'. Wolfers, _Race Relations and
Colonial Rule in Papua New Guinea_, p. 39. Whilst it may be difficult today to ascertain with
certainty whether, in any particular instance, 'the law was even-handedly administered and
whether administration officials were conscientious in protecting labourers from abuses . . .','
contemporary analysts tend to agree that, as a rule, 'Australians and other white expatriates were
treated more leniently than were indigenous workers.' A. Paliwala, J. Zorn and P. Bayne,
from 1964_ (Melbourne: Cheshire, 1972); P. Fitzpatrick, 'Labouring in Legal Mystification'
(1976) _4 Melanesian Law Journal_ 133; H. Nelson, _Black, White and Gold: Goldmining in Papua
intended to be, anything like a faithful reflection or representative expression of
the common law tradition. In the circumstances, it could not reasonably be
expected to have been so. Thus, to the extent that it was meant to serve as a
'specific instrument for achieving the objectives of the colonial state' (however
one may be inclined to characterise those objectives or their underlying motives),
the law exported from England and Australia to Papua New Guinea was not the
common law.\textsuperscript{86} Indeed, it is not too much to say that, in many respects, colonial
law, as a juridical system and as a jurisprudential tradition, represented the very
antithesis of the common law.\textsuperscript{87}

\textsuperscript{86} Paliwala, Zorn and Bayne, 'Economic Development and the Changing Legal System of
Papua New Guinea,' p. 12.

\textsuperscript{87} See Bayne, 'Legal Development in Papua New Guinea: The Place of the Common Law,'
pp. 14-15. Reflecting on the fundamental differences between the common law and the system of
colonial law in Papua New Guinea, in respect of the latter, Weisbrod catalogues the absence of:

- the right to trial by a jury of one's peers (available for a time
to European defendants, but never to nationals);
- the separation of powers (the colonial administration both
promulgated and executed the laws; kiaps served as
magistrates—and often as the de facto prosecutors as well;
superior court judges often played an inquisitorial role at
trials due to the absence of counsel and jurors; and in Papua
the Lieutenant Governor from 1908 until 1940 was also Chief
Judicial Officer);
- the writ of \textit{habeas corpus}, although
theoretically available, was in practice unavailable due to the
absence of defence counsel and the centralization of the bench
in Port Moresby; prohibitions against unreasonable searches
and seizures meant little to kiaps in the field . . . ; the
separation of criminal and civil matters . . . ; the
presumption of innocence. . . ; and equal protection of the
law. . . .

'Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict,' p. 66
(footnotes omitted).
3. THE DISPOSITION OF SORCERY-RELATED MATTERS UNDER COLONIAL LAW

A. Preliminary Considerations

The epistemological, sociological and ideological problems posed by the sorcery-related beliefs and practices of the indigenous population for Papua New Guinea's colonial administrators were apprehended and approached by the latter in practical, political and legal terms. Although it is the last of these terms with which we are principally concerned here, it is difficult to account for any issue of law in society without some circumspect consideration of its practical implications and political premises.

The problematic practical and political ramifications of the sorcery-related beliefs and practices for the colonial administration of Papua New Guinea have already been touched upon, and will be considered again in the sequel. In its distinctively legal aspect, the problem of sorcery typically arose in three contexts. First, there was the issue of dealing with the practice (or the purported practice) of sorcery \textit{per se}, the occurrence of which would normally come to the attention of colonial authorities through information related or by way of accusation. In such cases, irrespective of the consequences of a reported act of sorcery, where the alleged sorcerer could be identified and located, the elements essential to any problem of law—an alleged act, a suspected human actor and usually (though not necessarily) a consequence—could be said to be present.

The second context in which sorcery posed problems of law involved situations in which the occurrence of conventional conduct or otherwise

\footnote{See discussion in Chapters One and Six.}
unremarkable events, themselves well recognised by the law as providing a potential basis for civil or criminal action of some kind, were complicated by the implication of sorcery-related issues. Thus, for example, where the destruction of a person's garden by another's pig might easily lend itself to legal disposition, such an apparently simple matter could become rather more complicated if the owner of the pig should insist that the pig's actions were not brought about by his or her negligent attendance, but were compelled by an act of sorcery on the part of some third party.

Finally, and far more commonly, sorcery-related issues problematised otherwise unproblematic matters of law when an action having clear legal implications was said or seen to have been taken in response to, or retaliation for, a prior or anticipated act of sorcery. Thus, a conventional case of assault or homicide—even one in which the accused might freely admit to the commission of the offence—raised complicating issues where the perpetrator claims that his or her actions were provoked, justified, excused or even compelled by an articulable belief that the victim had perpetrated, or was intending to perpetrate, an act of sorcery against the individual offender, or some other person or persons in whose interests the offender was expected or required to act.

In each of these instances, were the variable of sorcery to be treated in the same way some other fact or circumstance (denominated "X" for present purposes) cognisable by the law, the problems posed by such a consideration would not be difficult to address. Thus, in the first case, an act of "X" is either lawful or unlawful. If lawful, it is no matter for the law to consider; and if it is unlawful, the law will have specified the appropriate remedies or penalties. In the second case, consideration "X" might or might not be regarded as an independent intervening action, capable of cutting off or mitigating the responsibility or
culpability of the accused. So, if a mischievous third person was found to have let the pig loose from its enclosure, and even perhaps have led the pig into the victim’s garden with the expectation that it would do damage there, the responsibility of the owner of the pig (which might otherwise have been absolute), could be said to be overridden by the wrongful intervening actions of the third person. In the third case, the law readily contemplates such explanations for otherwise unlawful actions in terms of reasonable provocation, duress, compulsion, self-defence and the defence of others, all of which claims may operate to reduce, or cut off entirely, the responsibility or culpability of the accused. 89

Although different procedural and substantive rules of law govern the introduction and disposition of each of the three kinds of explanation described above, the fundamental legal conceptions underlying their rationale are essentially the same in all cases. As a matter of legal ratiocination, actions and defences to actions are either 'reasonable' or 'unreasonable', and intervening factors are recognised as either causal or insufficiently related in causal terms for the purposes of explaining actions and responses to actions alike. Therefore, except to the extent that the particular legal context in which one or another of these issues is brought to bear, it is unnecessary, for the purposes of this discussion, to differentiate between the consideration of sorcery-related beliefs and practices in relation to the three circumstances in which those considerations have arisen in a legal context.

89 In this context, the law also recognises that, even in the absence of a 'reasonable' explanation for unlawful conduct, the state of mind of an accused may operate to minimise or preclude liability or culpability for the consequences of such conduct. Hence, the defences insanity, diminished mental capacity and (in some instances) mistake of fact may be similarly invoked, even where the explanation provided is inherently 'unreasonable'.

B. Sorcery as an Offence under the Native Regulations

As we have seen, the sorcery-related beliefs and practices of the indigenous Melanesian population of colonial Papua New Guinea were matters of real and serious concern to government officials for eminently practical reasons. They were a disruptive influence on the effective and efficient administration of the colony, an impediment to the extension of colonial political and economic control, and an effrontery to the ideological premises on which civilising mission of the colonial enterprise understood to be predicated. Beyond this, however, kiaps and Resident Magistrates regularly reported that, in the eyes of the indigenous people themselves, sorcery and witchcraft were 'the curse of native life.'

Superstition and witchcraft are the two great causes of all native disturbances, and are the most difficult to combat. . . . Endeavours have been made to grapple with witchcraft through the chiefs or head men of villages but these do not seem to have much power in that direction. The wizard or witch is the person most feared.

To legislate against sorcery, however, presented its own problems for an administration committed to inculcating the indigenous population with, if not a complete understanding of, then at least a healthy respect for the authority and the legitimacy of colonial rule. As Zelenietz explained:

Colonial administrators . . . thought that laws against sorcery would be progressive tools of social change. However, the issue of sorcery presented inherent dilemmas that administrators never successfully resolved. On the one hand, they recognized the importance of sorcery and witchcraft as systems of beliefs and actions in indigenous cultures. On the other hand, their own upbringing in cultures which stressed scientific empiricism did not allow the administrators to accept the validity of native beliefs. Thus they faced the challenge of saying that sorcery and witchcraft did not exist, and yet

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91 Annual Report on British New Guinea, 1892-93, p. 46.
writing laws that would make these non-existent phenomena illegal.92

The problem here probably had less to do with the colonial legislator's experience of cognitive dissonance, than with the ambivalent message such legislation would send to those who were expected to be bound by it. As the cutting edge of colonialism, the indigenous Melanesians surely recognised that the law was regarded as a singularly significant institution by members of the society that represented itself to be masterfully in command of the natural world. Thus, for Europeans to enact and attempt to enforce laws against Melanesian beliefs and behaviour which the Europeans themselves rejected as irreal, would tend to reveal either a troublesome instance of contradictory action or, more seriously, a profound disingenuousness masking an unexpressed belief, on the part of the Europeans, in the reality of sorcery.

In the end, the administration did enact prescriptive legislation, the very glibness of which suggests that the epistemological conflicts ascribed to their ambivalence on the matter was not nearly so troublesome or disconcerting as scholarly reflections today seem to imply. Thus, in December of 1893, the Native Regulation Board promulgated Regulation No. II of that year in the following terms:

SORCERY FORBIDDEN

1. White men know that sorcery is only deceit, but the lies of the sorcerer frighten many people. The deceit of the sorcerer should be stopped.

2. It is a forbidden act for any person to practice or to pretend to practice sorcery.

3. It is a forbidden act for any person to threaten any other person with sorcery whether practised by himself or by any one else.

4. Any person who practises sorcery or who procures another person to do so or who threatens anyone with sorcery may be tried by a Magistrate.

PUNISHMENT

5. If the person tried is found guilty he may be sentenced by a European Magistrate to imprisonment not exceeding three months, or by a Native Magistrate to imprisonment not exceeding three days.

6. If the person is sent to prison he will be made to work without payment.

Explaining the necessity for the introduction of the Ordinance, the Administration adverted to the sorcerer as 'a weed of universal distribution in the Possession', who used sorcery as a means 'of extorting blackmail or revenge'.

On a somewhat doubtful basis, this explanation concluded by asserting that: 'the majority of natives approve warmly the suppression of sorcery and it is already manifest that the regulation will be productive of considerable good.' These optimistic sentiments notwithstanding, however, the Administration had great difficulty, as a practical matter, implementing the Ordinance. To begin with, it would certainly appear that neither the premises nor the object of the ordinance were nearly so well received by the indigenous population as the government seemed to suggest. Thus, two years after the introduction of the Ordinance, the Resident Magistrate for the Western Division was compelled to report:

Witchcraft ('Puri-Puri') still causes a deal of trouble and yet it is difficult to get a case against any practitioner of the black art . . . . The superstition may die out to some extent with the present adult population, but no law or native regulation will do much towards stamping it out.

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94 Ibid., p. vii.

Other Resident Magistrates described problems associated with obtaining reliable evidence or proof, and consistently complained of the futility of the law's operation in practice:

There is nearly always difficulty in sheeting home a charge. . . . owing to the extreme reluctance of many natives to give evidence or information against the most powerful of his class. . . . The native way of looking at this matter . . . is that if he denounces a sorcerer and the sorcerer is sent to gaol when he returns home he will, in revenge, bewitch the informant and cause him his due....

Some twenty years later, in a revealing reflection on the rationale behind the Sorcery Ordinance and aspects of its implementation, J.H.P. Murray, then Lieutenant-Governor of Papua, wrote:

Sorcery is another offence which comes very frequently before the native magistrate's courts, for it is, under the regulations, punishable with six months imprisonment. . . . The penalty imposed is perhaps sufficient to act, to a certain extent, as a deterrent, but it is quite insufficient as a substitute for private vengeance. . . . The difference is that the Papuan looks upon sorcery as reality, whereas the European (as a rule) does not; to the former no punishment would be sufficient short of death, or at any rate a long term of imprisonment, either of which seems to us to be out of the question in the case of what is after all, according to our view, only an imaginary offence.

In Papua, the sorcery ordinance was re-enacted in 1911 as a Native Regulation, under the Native Regulation Ordinance 1908, with a modified preamble and expanded substantive provisions. Maintaining the prohibition on

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99 (No. 25 of 1909).
100 Subregulation 80(1) provided:
practising or pretending to practise, threatening to practise, procuring or attempting to procure another to practise (or pretend to practise), sorcery, Regulation 80 now penalises '[a]ny native who—

is found in possession of implements or 'charms' used in sorcery; or accepts payment or presents in the shape of food or otherwise when the obvious intention of making such payments or presents is to propitiate a Sorcerer.101

In 1924, substantially the same provisions were adopted as regulation 97 of the Native Administration Regulations in the Territory of New Guinea (absent however, was any preambulatory statement whatsoever). The New Guinea regulation also included a provision penalising '[a]ny native who administers or is in possession of a drug assumedly used for unlawful purposes,'102 and allowed for the imposition of both a fine and imprisonment upon conviction.103

Sorcery is only deceit, but the lies of the Sorcerer frighten many people and cause great trouble, therefore the Sorcerer must be punished.

101 Native Regulations (Papua), para 80(2)(d). The penalty remained a period of imprisonment of up to six months, although this was in default of payment of a fine in the amount of three pounds [sub-reg 80(2)]. Omitted were references to sentencing by a Native Magistrate, and the obligation to work without payment.

102 Native Administration Regulations (New Guinea), para 97(f).

103 Queensland’s Criminal Code Act 1899 (63 Vic No. 9), popularly known as the Griffith Code, was adopted in British New Guinea in 1902 pursuant to section 1 of the Criminal Code Ordinance (No. 7 of 1902), and in New Guinea, pursuant to section 16 and Schedule 2 of the Laws Repeal and Adopting Ordinance (No. 1) in 1921. Reflecting the provisions of the English Witchcraft Act, 1735 (9 Geo II, c. 5)—which remained in force until it was repealed in 1951—section 432 of the Code, as adopted, made it an offence to pretend 'to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration', to 'tell fortunes' or to use some other form of 'occult science' as a method of discovering lost or stolen property. Conviction under that provision could result in a term of imprisonment of up to one year. Although it was theoretically possible for a native Papuan or New Guinean to be prosecuted under section 432, no such charges would appear to have been laid, at least up to the early 1970s. See Territory of Papua and New Guinea, House of Assembly Debates, Second House, 10th mtg, 1st sess., vol. II, no. 13, p. 4138 (9 March 1971); and in so far as I am aware, no charges against an indigenous Papua New Guinean have been brought under that provision (now s. 409 of the Criminal Code Act, Revised Laws of Papua New Guinea, ch. 262) since that time.
Chapter Six

RE-CONCEPTUALISING SORCERY FROM A JURISPRUDENTIAL PERSPECTIVE

Even though this Act may speak as if the powers of sorcery really exist... nevertheless nothing in this Act recognizes the existence or effectiveness of powers of sorcery in any factual sense except only for the purpose of and of proceedings under or by virtue of, this Act, or denies the existence or effectiveness of such power.¹

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.²

1. Preliminary Considerations

Of all the antinomic features by which Western representations of the relationship between tradition and modernity in contemporary Melanesia tend to be characterised, the dichotomy between law and custom stands out as one of the more persistent, problematic and misdirected.³ Perhaps the frequency with which such dichotomous representations recur is indicative of nothing more deliberate than the irrepressible exhibition of an acquired trait of intellectual character, a kind Lamarckian hereditament which has left its continuing impress on the

¹ Sorcery Act (No. 22 of 1971), Revised Laws of Papua New Guinea, c. 274, s. 9.

² American Law Institute, Restatement of the Law of Torts (Second), s. 46.

³ For a critical consideration of the conceptual dichotomisation of traditional and modern law see K. Kulcsár, Modernisation and Law: Theses and Thoughts (Budapest: Institute of Sociology, Hungarian Academy of Sciences, 1987)
development of fundamentally linear-evolutionist theories of social change and cultural variation.\textsuperscript{4} Or perhaps, as Roger Keesing suggested, the dichotomous characterisation of \textit{law} and \textit{custom} may reflect something more deeply embedded in the epistemological sub-structures of Western thought; something invariably, if unconsciously, displayed by Western scholars in their fidelity to constructs of statant, dualistic polarity and expressive of a craving for 'radical alterity' that is equally chronic and inevitable.\textsuperscript{5}

Whatever the origins of these dichotomous conceptualisations may be, it is eminently clear that they have enjoyed a predominant, and arguably unwarranted, currency in the interpretative grammars of comparatism. Their presence is particularly troublesome in comparative analyses of nominally Western and Melanesian jural processes and institutions in which the paradigmatic status of the dichotomy between \textit{law} and \textit{custom} conduces all too readily to an uncritical magnification of the significance of inter-cultural \textit{difference}. As a consequence of this overstatement of difference, situations of conflict and contradiction—at the practical, theoretical and ideological levels of analysis—are apt to be exaggerated.

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where they may well and truly exist, and invented where, in fact, they may not exist at all.⁶

Less problematic than the dichotomous portrayal of the relationship between law and custom, but all the more striking nonetheless, is the equally persistent conceptual misrepresentation of modern and traditional institutions of sorcery, witchcraft and magic, particularly as these ideas and phenomena are considered in comparativist discourses on law and society in Papua New Guinea. In the contemplation of this 'most bizarre and exotic aspect of native life,'⁷ the heuristic precedence of difference over similarity radically counterposes Western and Melanesian attitudes, beliefs and fundamental assumptions about the nature of the real world at the deepest levels of epistemological orientation. Essentialist distinctions between the ostensible rationality of a distinctively Western modernity on the one hand, and the presumed irrationality of an equally distinctive Melanesian tradition on the other, are powerfully and seemingly unalterably instantiated. The differentiae of scientific ontologies and pre-scientific approaches to the organisation of ideas, events and human affairs, are thus marked off as principal determinants amongst the features which are said to set Us apart from Them on sharply contrastive and ultimately irreconcilable bases. Here, too,

⁶ Margrit Eichler provides a compelling critique of related applications of this distorting superordination of difference over similarity, with particular respect to gender, in The Double Standard: A Feminist Critique of Feminist Social Science (London: Croom Helm, 1980), pp. 13-14. See also F. Olsen, 'Feminism and Critical Legal Theory: An American Perspective,' International Journal of the Sociology of Law, vol. 18, no. 2 (May 1990), pp. 199-215. I would like to express my gratitude to Dr Ngaire Naffine, Faculty of Law, University of Adelaide (Visiting Scholar, Department of Law, Research School of Social Sciences, The Australian National University, 1989-1990), for providing me with these references, and also for pointing out to me, in a more general way, the relevant bearing that feminist scholarship in law and the social sciences clearly has on many of the issues and problems with which I am especially concerned.

however, it seems to me that both the nature and extent of these supposedly incompatible differences between two worlds of experience and understanding are wont to be overdrawn. 8

To raise these issues is to engage questions central to an enduring debate over the proprieties of rationality and the vicissitudes of relativism in the interpretation of cultural variation. 9 The far-reaching importance of this debate should not be underestimated, for it is one in which some of the major presuppositions of a rationalist, empirically based, scientific view of the world—which is to say, of course, a pre-eminently Western view—are seriously challenged. 10 At the same time, it is a debate which bears crucial implications for the practical disposition of a growing number of very real problems of law confronting societies in which conflicts of cultural diversity are fast becoming inevitable facts of political and economic life. 11 Undoubtedly, these are all matters which fairly invite a close and

8 See Keesing, 'Theories of Culture,' pp. 5-6.


critically circumspect scrutiny. The immediate concerns of this chapter, however, are rather more narrowly focused. Thus, although some of these larger issues will be touched upon, they cannot be addressed here with the depth and sophistication of analysis they deserve. Instead, my primary objectives are, firstly, to demonstrate how they are implicated specifically in considerations of the relationship between law and sorcery in Papua New Guinea today; and secondly, to trace out the contours of an alternative perspective from which that relationship might be apprehended more constructively.

2. The Over-Valuation of Difference in the Consideration of Law and Sorcery

For most of this century, the task of describing, interpreting and representing the nature of culture and the purposeful dynamics of social life amongst peoples who have been variously labelled native, tribal, traditional, pre-industrial, pre-scientific, or primitive, has fallen almost exclusively within the province of social anthropology. Identification and explanation of the legal in the understandings and experiences of reality shared amongst the members of such societies, and illumination of perceived relationships between the distinctively legal and other categories of beliefs, attitudes, values and behaviour, have been and remain primary elements of what is still a predominantly anthropological enterprise.
Empirical studies and explanatory analyses of the beliefs and behaviours associated with sorcery, witchcraft and other expressions of the occult in the context of contemporary tribal societies have likewise been, and effectively remain, the prerogatives of social anthropology.  

was, in fact, something distinctively *legal* in the organisational arrangements of so-called primitive societies. See B. Malinowski, *Crime and Custom in Savage Society* (London: Kegan Paul, Trench, Trubner and Company, Ltd., 1926), p. 55. In taking that step, Malinowski expressly challenged what was then the prevailing scientific view on the matter, which held that the 'primitive mind' could be characterised as
draw[ing] no line between law and morality, religion, medicine or art. All of these are part of the social and mental fabric, and the traditions by which they are governed are the same. [E.S. Hartland, *Primitive Law* (London: Methuen & Company Ltd, 1924), p. 138].


There is today a rich and prolific ethnographic literature that deals with a broad range of issues and problems having to do with changing patterns of traditional indigenous beliefs and behaviour amongst the cultures and societies of Melanesia generally, and Papua New Guinea more particularly. Much of that literature is explicitly concerned with these developments as they relate directly to the phenomena of law\textsuperscript{15} and sorcery,\textsuperscript{16} respectively. Within the discrete ethnography of Melanesian societies, and as a dominant theme in the analytical literature of social anthropology as a whole, customary beliefs and practices associated with sorcery and witchcraft are commonly regarded as traditional features of 'social control' and hence, as subjects of study properly, but by no means exclusively, addressed within the sub-field of legal anthropology.\textsuperscript{17}


However anthropological and anthropologically informed studies of law and sorcery might be parcelled out amongst interested scholars, conventional ethnographic research will continue to provide the foundation upon which such studies are based. And yet, anthropologists themselves readily concede that 'the ethnographic picture is still far from complete, or even adequate.' Of course, there is always a need for more data and further analytical refinement where the products of basic field research are marshalled for practical application. To my mind, however, what is far more troubling than the doubts which may from time to time be expressed about the competence or sufficiency of Melanesian ethnography, is the largely unquestioned confidence which scholars who rely on it are prepared to repose in the fundamental analytical perspectives from which the very best ethnographic research is pursued.

The underlying objective of social anthropology has always been the achievement of synoptic, ethnological explanations; and hence, the 'ultimate goal'

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It often annoys Papua New Guinean administrators that academics offer qualified advice and suggestions only, and rarely come up with concrete answers. But given the complexity of any society and the countless behavioural responses possible in any situation, we are not often in a position to give hard and fast answers. We can only advise those in authority of the situation as we understand it, and leave them to make the policy decisions for which they are elected and appointed.
of anthropological explanations of the dynamics of Melanesian sorcery is said to be 'the formation of general statements regarding the human condition':

We strive to understand human beliefs and behaviour not only in one society or situation, but in many. An exercise which is purely ethnographic is unsatisfactory because, at some point or another, comparisons must be made. If not, we are little more than recorders of (supposedly) unique peoples and events.

As an expression of the programmatic ethos of social science, this is an objective with which I have no particular quarrel. It would seem, however, that the conventional ethnographic study of Melanesian law and sorcery, and the measured generation of qualified anthropological explanations accounting for those phenomena, proceed less on the basis of a demonstrable commitment to the science (or is it an art?) of comparatism, than to the search for 'the significance of cultural difference'. Indicatively, most of the comparisons which from time to time 'must be made' almost invariably identify, not simply noteworthy differences between the Western and Melanesian conceptions constituting the subjects of comparison, but radically divergent, diametric oppositions. With these kinds of analytical premises I most definitely do quarrel, and I argue here largely in support of an alternative to the dichotomous formulations they implicitly presuppose.

In the pursuit of a decidedly comparative examination of the relationship between Western and Melanesian conceptions of sorcery, as a particular category

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22 Ibid.


of 'supernatural' or 'metaphysical' beliefs, and the legally significant conduct with which such beliefs are frequently associated, I conscientiously reject preclusively overdrawn, \textit{a priori} emphases on the supposedly overriding significance of inter-cultural difference. In their stead, I favour an approach that is more readily inclined to entertain the significance of cross-cultural continuities and similarities.\textsuperscript{25} This preferred perspective is informed by the conviction that an exploration of features common to Western and Melanesian thought need not supplant, \textit{but must nevertheless precede}, the 'enumeration of differences,' since it is only by taking matters in that order that 'we shall be less likely to mistake differences of idiom for differences of substance...'.\textsuperscript{26} With our comparatist priorities thus arranged, we are also 'more likely to end up by identifying those features which really do distinguish one kind of thought from another.'\textsuperscript{27}

To adopt such a perspective is not to insist that the comparative pendulum ought to be swung completely in the opposite direction. Rather, it is an attempt to achieve a kind of balance that appears to be lacking in many scholarly attempts to account analytically for the inter-cultural relationship between certain fundamental conceptual principles. Vague and uncertain as these principles may be, it is important for several reasons that they be recognised as integrally related: firstly, because they function connectively in the interface between law and sorcery in Papua New Guinea today; secondly, because their circumspect consideration elucidates the amorphous boundaries which are commonly assumed


\textsuperscript{26} R. Horton, 'African Traditional Thought and Western Science', \textit{Africa}, vol. 37, no. 1 (January 1967), p. 50.

\textsuperscript{27} \textit{Ibid.}
to distinguish rational from irrational beliefs along much sharper lines; and thirdly, because a number of these principles are operatively active in the jural orientations of Melanesian and Western societies alike, indicating that, in certain respects, these supposedly different, socio-culturally defined orientations may themselves be far more similar to one another, than their conventionally dichotomous representations suggest or even allow.

Let me stress the fact that it is not my intention to argue that Melanesian and Western worlds of experience and understanding are merely 'minor variants of one another'—there is, to be sure, a great deal more to it than that. But in a balanced search for the significance of similarities and differences, it is nonetheless essential to maintain a sensitive appreciation for the genuinely crucial difference between distinctions which ought to be drawn at the level of idiom, and those which might properly be given a more substantive significance. 'Just how different the thought and experience of non-Western peoples are from our own,' as Keesing observed, 'is a moot point about which we could all argue ad nauseam'; and I am certainly no more inclined to erect (or resurrect) redundant arguments in support of an asserted sameness than I should be to reiterate propositions favouring the supremacy of cross-cultural difference. Like Keesing, however, I also see no compelling reason to assume, as a premise, that the pragmatic manner in which Melanesians find their ways through their worlds of law and sorcery are qualitatively different to the manner in which we find our ways through our own; or that their 'culturally constructed senses of individuation and agency (or

28 Keesing, 'Theories of Culture,' p. 6.

29 Ibid.
personhood or causality or whatever)' are necessarily so strikingly different to ours.30

3. An Operative Contextualisation of Law and Sorcery in Contemporary Papua New Guinea

In an effort to describe the relevant dimensions of the relationship between law and sorcery in Papua New Guinea today, let me begin by offering a series of broad averments about their respective positions in a contemporary context. Few of these propositions are incontrovertible. None, certainly, is uncontroversial and all of them, I own, are manifest generalisations. Nevertheless, they can provide a concise and reasonably accurate exposition of what would seem to be the more pertinent aspects of the current state of affairs. For present purposes, I might circumvent some of the more highly charged polemics with which the now familiar law-versus-custom debate has come to be so closely associated.31 I do so,

30 Keesing, 'Theories of Culture,' p. 6.

however, with the clear understanding that it is squarely in the context of that
debate that any consideration of the contemporary relationship between law and
sorcery in Papua New Guinea must ultimately be situated.

A. State Law as the Relevant Socio-Political Datum

Howsoever one may assess the circumstances which brought it about (and
regardless of the particular significance one may be inclined to attach to the fact),
Papua New Guinea is an independent, politically sovereign state. It is so
recognised by every other country in the world; and to a growing number of Papua
New Guineans as well, this particular status can hardly be a matter of complete
indifference. The State of Papua New Guinea is organised along the lines of a
modified Westminster model of government.32 It operates through constitutionally
created political structures, embracing the institutions of legislative, executive and
judicial authority ordinarily associated with what may conveniently (if less than
perfectly accurately) be referred to as the Western democratic form or system of
government.

The laws of the State of Papua New Guinea, by which I mean those forms of
law recognised by the state as legitimate authoritative and subject to enforcement
by the state as such, are enumerated specifically and exclusively in the
Constitution. They include the Constitution itself, the Organic Laws, Acts of the

Justice Melanesian Style,' in Alternative Strategies for Papua New Guinea, ed. A. Clunies Ross

32 See C.J. Lynch, 'Form and Style in South Pacific Constitutions,' Pacific Perspectives,
vol. 13, no. 1 (1988), pp. 32-54; idem, 'The Westminster Model in the Pacific,' The
Parliamentarian, vol. 63, no. 2 (July 1982), pp. 138-150; idem, 'Achievement of Independence
175-193; Y. Ghai, 'Constitution Making and Decolonisation,' in Law, Government and Politics
in the Pacific Island States, ed. Y. Ghai (Suva: Institute of Pacific Studies, University of the
Parliament, Emergency Regulations, such other laws as may be made under or adopted by the Constitution, the underlying law and none other.33

Despite the technical supremacy of the political state in Papua New Guinea, the effective extension of state law throughout much of the country is quite limited. Even in the cities and larger towns, where the problems of accessibility and communication are not nearly so great as they are in the remote and far more numerous villages where the vast majority of the people live, the popular acceptance of the legitimacy of state law is often tenuous, at best. Regard, to say nothing of respect, for the government officials charged with the administration of state law is frequently lacking.

33 Constitution of the Independent State of Papua New Guinea, s. 9 [hereinafter referred to as PNG Constitution]. Until such time as the Parliament shall declare and provide for the development of the 'underlying law,' the Constitution of Papua New Guinea provides that: 'custom is adopted, and shall be applied and enforced, as part of the underlying law' [PNG Constitution, s. 20(2); Sch. 2.1(1)] except: in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity [PNG Constitution, Sch. 2.1(2)].

Further adopted by the Constitution of Papua New Guinea as part of the underlying law are:

the principles and rules that formed...the principles and rules of common law and equity in England...except if, and to the extent that—(a) they are inconsistent with a Constitutional Law or statute; or (b) they are inapplicable or inappropriate to the circumstances of the country from time to time; or (c) in their application to any particular matter they are inconsistent with custom as adopted....[PNG Constitution, Sch. 2.2(1)].

The Constitution also places an affirmative duty on the National Judicial System, and on the Supreme and National Courts in particular, to formulate appropriate rules as part of the underlying law where neither custom nor the common law are applicable. [PNG Constitution, Sch. 2.3.].
B. 'Traditional' Socio-Cultural Orientations

The pace and extent of 'social change' in Papua New Guinea has been remarkable and, in many respects, dramatic. At virtually every level, 'traditional' Melanesian culture—however that concept may be understood and described—is in ferment, and indeterminacy seems very much to be the order of the day. Nevertheless, it is fair to say that most Papua New Guineans continue to understand the nature of reality, to order their lives and to manage their affairs in accordance with attitudes, beliefs and values which appear to be quite different to those by which most non-Melanesian peoples (and Western European peoples in particular) understand, order and manage theirs. Along these same dimensions, there is a great diversity and a wide range of variation amongst and between different groups of Papua New Guineans themselves. Notwithstanding these extremes of socio-cultural diversity and variation, however, ethnographers have identified a number of features in the expressed belief systems and observable behaviours of Papua New Guineans, which suggest that they share more in common with one another than they do with other, non-Melanesian peoples.

Moreover, it is the generally accepted and ethnographically informed view that many Papua New Guineans do, or would prefer to, attend to matters over which state law assumes (and attempts to extend its assertion of) exclusive control, in a fashion that differs substantially from both the manner in which state legal institutions operate in practice, and the ways in which those institutions are intended to operate in theory. The structural frameworks (cosmological, ontological, social, cognitive, and so forth) within which Papua New Guineans organise and employ their unique understandings and experiences of life are shaped, to a greater or lesser extent, by underlying customary systems of indigenous or 'traditional' values and beliefs. These systems are inextricably
bound up with the essential quality of 'being' Papua New Guinean—or more precisely, of 'being' a member of such group or groups with which an individual identifies him- or herself most intimately. The institutional structures of state law, on the other hand, are said to reflect fundamentally and essentially the systems of attitudes, values and beliefs of the people by whom (and presumably for whom) those institutions were initially devised. In other words, the norms and systems of state law in Papua New Guinea are the equally unique, culturally specific products of a particular Western society.

C. The Persistence and Incorrigibility of Sorcery Beliefs

Belief in the existence of witches and sorcerers, and in the potent efficacy of the powers they may exercise, is endemic in the cultures and societies of Papua New Guinea. In variable and changing forms, these beliefs are prevalent today amongst villagers and city-dwellers alike. Despite what, in many instances, has been a prolonged and seemingly thoroughgoing exposure to the countervailing influences of modern Western rationalism and the scientifically constructed materialist view of the world, such beliefs do not seem to have diminished appreciably. Indeed, by some accounts, these beliefs would appear in many ways to be held even more strongly now than they were in the recent colonial, and more distant, pre-colonial, past.34

Much of the conduct that belief in sorcery and witchcraft tends to induce and provoke amongst Papua New Guineans involves behaviours which, from a Melanesian perspective, demand and justify responsive and remedial actions

which are deemed impermissible under the system of state law. By the same token, other kinds of conduct associated with the belief in sorcery and witchcraft, and which, again, from an indigenous Melanesian perspective, ought to be prevented or punished, are not recognised by state law as legally wrongful, and such conduct is not, therefore, subject to be enjoined or otherwise negatively sanctioned by the legal authorities of the state.

4. Assumptions of Inter-Cultural Irreconcilability and Conflicting Beliefs in Law and Sorcery

In light of the foregoing propositions, compelling arguments have been made to the effect that officials of the state legal system in Papua New Guinea lack the will to reform the law in ways that would make it more responsive to the jural values, beliefs and orientations of the vast majority of the people. Corollary and complementary arguments, however, have also been made to the effect that, notwithstanding such failures of political and judicial will, an accommodating reform of the law would be unavailing in any case, because the institutional structures and the underlying operational rationale of state law—indeed, of the state itself—are so fundamentally at odds with prevalent popular beliefs and values, any attempt to reform the law in the direction of popular accommodation would inevitably prove futile.

As to the first category of arguments mentioned above, I am not particularly concerned here with the extent to which the administrators of the colonial and post-colonial state in Papua New Guinea may have demonstrated or failed to

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demonstrate sufficient will to reform the law. On that score, historical events and contemporary trends speak for themselves. As to the second category of arguments, however, whilst these may draw substantial support from the former, I disagree with the fundamental premises upon which they are based. I do not believe that there is anything inherent in the constituent nature of the adopted common law tradition which necessarily renders that tradition irreconcilably or irremediably inimical to a culturally appropriate and responsive accommodation of changing Melanesian jural attitudes, values and beliefs.

The situation of sorcery and witchcraft beliefs in Papua New Guinea provides a powerful example of the supposedly intrinsic incompatibility and irreconcilability of Melanesian and Western jural values. It is, at once, an instance of the broader and fundamental incongruity of the epistemological premises underlying the institutions of law and custom in the respective cultures and societies, and an illustration of the irresolvable contradictions instantiated in the model of the 'state versus stateless societies'.

To be sure, state law in Papua New Guinea has always been essentially an alien transplant. Colonial or post-colonial, introduced or imposed, received or adopted, the law is said to bear within its essential character the immutable, ratiocinative parameters of a culture and society which rejects out of hand supernatural or metaphysical explanations of cause and effect. The rationalistic tenets of Western ontology and epistemology simply do not admit of experiences or phenomena for which material explanations are not either readily to hand or capable of being adduced on equally tenable (which is to say, wholly rational) bases. These are the terms of reference by which modern Western society is said

36 Lawrence, 'The State Versus Stateless Societies,' p. 15.
to define the contours and delimit the content of cognisable reality. And it is in that reality that the state law of Papua New Guinea is seen to be firmly anchored.

A. Legal and Anthropological Perspectives

_Semble, there are no real sorcerers or witches in Papua New Guinea (or anyplace else for that matter), and people who genuinely believe themselves or others to be so might properly be considered delusional, insane, ignorant or, somewhat more charitably, unreasonably mistaken._37 So it is that genuinely held beliefs that the exercise of sorcery, witchcraft or related supernatural powers is capable of bringing about particular experiential or phenomenological consequences (which themselves may be quite indisputably real) are treated either as the products of ignorance or of some mental defect.38 For legal scholars and


In _People v. Strong_ (1975) 37 N.Y. 2d 568, 376 N.Y.S.2d 87, 338 N.E. 2d 602, the New York Court of Appeals was prepared only to contemplate a reduction in the offence for which the defendant was convicted from manslaughter to negligent homicide, where the defendant genuinely, albeit unreasonably, believed that his special 'powers' enabled him to thrust several knives and a hatchet into the body of a living person without doing the latter any harm. Here, the court held that 'objective indications of a defendant's state of mind' should 'corroborate, in a sense, the defendant's own subjective articulation' [per Jasen J, 37 N.Y.2d at 571-572, 376 N.Y.S.2d at 90]. Gabrielli J (dissenting), on the other hand, concluded that there was no justification for the majority's holding that the 'defendant's ... claimed lack of perception, together with the belief of the victim and the defendant's followers...' supported even a verdict on the reduced charge. Endorsing the lower court's decision, Gabrielli J would have found:

Defendant's belief in his superhuman powers, whether real or simulated, did not result in his failure to perceive the risk but, rather, led him consciously to disregard the risk of which he was aware [37 N.Y.2d at 572; 376 N.Y.S.2d at 90].
social anthropologists, then, the important issues of Melanesian sorcery have to do only with the belief in its existence, and the implications of such beliefs for those aspects of the real world of human affairs with which the practices of law and anthropology are concerned. Hence, with a fitting scholarly detachment, ethnographers speak of the beliefs of the people they study in the existence of sorcery and witchcraft, and the consequences of those beliefs for the ways in which these people conduct their lives and order their societies; and conventional legal analyses have tended to proceed on similar bases.

In much the same way, the state law in Papua New Guinea concerns itself today with the widespread belief throughout the country that there is such a thing

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> I wish to focus on the way in which sorcery beliefs in this society are related to concepts of illness and the curing of illness, and also the way in which they contribute to the resolution of social conflict.

J. Hughes, 'Ancestors, Tricksters and Demons: An Examination of Chimbu Interaction with the Invisible World,' *Oceania*, vol. 59, no. 1 (September 1988), p. 59:

> The reality of a spirit world which co-exists with Chimbu human beings is not doubted by village people who are ever mindful of their obligations.

G.D. Westermark, 'Sorcery and Economic Change in Agarabi,' *Social Analysis*, no. 8 (November 1981), p. 99:

> Agarabi believe that the practice of sorcery has increased and that it has reached a particularly pernicious stage. They also feel that there is a greater threat of sorcery attack coming from within their own clans and phratries.

as sorcery,\textsuperscript{41} statutorily providing for the punishment of those found guilty of its maleficent practice, 'just as if sorcery and the powers of sorcerers were real....\textsuperscript{42} There is an appreciable poignancy in this subjunctive formulation; a poignancy that is made even more apparent when the current statutory language is compared with the indicative certainty of the colonial legislation that preceded it, where it was summarily concluded that 'Sorcery is only deceit, but the lies of the Sorcerer frighten many people and cause great trouble, therefore the Sorcerer must be punished'.\textsuperscript{43} More poignant still, in light of the foregoing, is the tortuous equivocation reflected in the hortatory language appearing in a substantive provision of Papua New Guinea's present \textit{Sorcery Act}:

\begin{quote}
Even though this Act may speak as if powers of sorcery really exist (which is necessary if the law is to deal adequately with all the legal problems of sorcery and the traditional belief in the powers of sorcerers), nevertheless nothing in this Act recognizes the existence or effectiveness of powers of sorcery in any factual sense except only for the purpose of, and of proceedings under or by virtue of, this Act, or denies the existence or effectiveness of such powers.\textsuperscript{44}
\end{quote}

In a pointed criticism of the particular provisions of the \textit{Sorcery Act} quoted immediately above, then Acting Judge of the National Court, B.M. Narokobi, remarked in a 1981 decision: 'The real difficulty with the \textit{Sorcery Act} is that it was enacted by Australians who are not aware of the real and factual effects of sorcery.'\textsuperscript{45} Only a few months before the judgement in which these observations

\begin{itemize}
\item\textsuperscript{41} \textit{Sorcery Act} (No. 22 of 1971) [now Chapter 274, \textit{Revised Laws of Papua New Guinea}], Preamble, s. 1(1), sch. 1.1.
\item\textsuperscript{42} \textit{Sorcery Act} (No. 22 of 1971), Preamble.
\item\textsuperscript{43} \textit{Native Regulations Ordinance} 1939 (Papua), s. 80.-1(1). Cf. \textit{Native Administration Regulations Ordinance} 1924 (New Guinea), s. 97.
\item\textsuperscript{44} \textit{Revised Laws of Papua New Guinea}, c. 274, s.9 \textit{[Sorcery Act (No. 22 of 1971)]}, s. 9
\item\textsuperscript{45} \textit{The State v. Noah Magou} [1981] P.N.G.L.R. 1 at 4.
\end{itemize}
appeared was delivered, however, the Supreme Court of Justice had overturned one of Narokobi's earlier trial decisions. In that case, four men had pleaded guilty to charges of wilfully murdering a woman whom they genuinely believed to have been a sorceress. Each of the accused had been sentenced to three months' imprisonment with hard labour, and each was further ordered to pay five pigs in compensation to the deceased's son. The State's appeals were based, inter alia, upon the manifest inadequacy of the sentences. In upholding the appeals on this ground, the observations of the then Chief Justice, himself a Papua New Guinean, are telling:

'The learned trial judge properly took into account the background of the respondents. I have no quarrel on that score. For instance he found that the respondents came from a remote part of the country with minimal contact with the outside world; that they encountered 'modern life style' after they were taken into custody; that their area was sparsely populated and that what they did was out of fear of sorcery.

His Honour then, it seems to me, went into great lengths about the effect of sorcery or belief in it in the minds of believers. I agree, with respect, that in many communities in Papua New Guinea belief in sorcery and its powers is very strong and we cannot brush it aside. My own people believe it and great fear is caused by such belief.

That the cultural setting of the respondents must be taken into account is not disputed... However, it should not override the clear dictates of the Parliament that those who commit the crime of wilful murder attract to themselves the possible penalty of imprisonment with hard labour for life... Whether [the victim] was guilty [of sorcery] or not she was entitled to the protection of the law. The belief in sorcery was rightly taken into account in sentence but it seems to have outweighed other considerations.
in 1980, Narokobi was convinced that the legislation which had been drafted for Papua New Guineans under the directive influence of Western thinking, failed to properly accommodate a truly Papua New Guinean perspective on the nature of the realities associated with traditional Melanesian beliefs in the existence of sorcery and witchcraft.\(^{49}\) Yet the opinion expressed by the then Chief Justice suggests that it is, perhaps, as much a Westernised as a purely Western influence in state law, which may operate to that effect; and arguably with an even greater potency, since the former bears the *imprimatur* of indigenous judicial authority.

**B. The 'Westernisation' of Melanesian Conceptions of Law and Sorcery**

In a distinctively jural context, the circumstances to hand are very like those which Keesing criticised in his consideration of the effects of certain kinds of Western and Westernised misrenderings of Pacific Islands culture and history.\(^{50}\) In this instance, however, there is a curious twist.

Keesing argued that Western scholars are implicated in a process whereby their misrepresentative generalisations and stereotypes depicting aspects of Oceanic cultures, are seen to feed back into contemporary (mis)representations of those cultures, as these come to be understood and portrayed by Pacific Islanders themselves.\(^{51}\) Centrally featured amongst these misleading interpretations,


\(^{50}\) See R.M. Keesing, 'Creating the Past: Custom and Identity in the Contemporary Pacific,' *The Contemporary Pacific*, vol. 1, nos. 1 and 2 (Spring and Fall 1989), pp. 19-42

Keesing identified certain dichotomous formulations, which he described as maintaining 'a continuing impress on Pacific thought.'\(^{52}\) In his analysis of this process of replicated distortion, Keesing was largely concerned with the ways in which Western and Westernised \textit{idealisations} of pre-colonial Island histories and understandings of traditional cultures 'incorporate Western conceptions of Otherness' respecting 'visions of primitivity, and critiques of modernity.'\(^{53}\) It is this kind of 'Western criticism of Westernization' which then works its way back into the \textit{Weltanschauungen} of Pacific Islanders, reproducing and valorizing distorted conceptualisations of their own historical and contemporary realities.\(^{54}\)

The situation with which I am concerned involves a different kind of misrepresentative message. It is, however, a message which may well be transmitted by processes quite similar to those which Keesing identified. The Western (and Westernised) vision of a modern Melanesian society, free from widespread belief in the \textit{real} existence of sorcery and witchcraft and in which the believers in, and self-proclaimed or accused practitioners of, malevolent magic are generally recognised to be the deluded, insane or unfortunately ignorant souls they are considered to be in the scientifically advanced societies of the West, is a vision of a society which, like our own, shall have effectively purged its vital sense of tradition of any vestigial taint of primitiveness. This is a vision born of an eminently Western view of reality. At the same time, however, it is a vision that is increasingly sustained by a powerful assumption of 'Otherness' on the part of

\(^{52}\) \textit{Ibid.}, p. 23.

\(^{53}\) \textit{Ibid.}, p. 29.

\(^{54}\) A. Babadzan, '\textit{Kastom} and Nation Building in the South Pacific,' paper presented at Rothko Chapel Colloquium on Ethnicity and Nation, Houston, Texas, 1983 [quoted in Keesing, 'Creating the Past,' p. 29].
those who share the sort of views expressed by the (then) Chief Justice of Papua New Guinea's Supreme Court. In this case, therefore, unlike the situation of which Keesing is so critical, the more relevant 'Other' is the modern, rationalistic, secularised and scientifically enlightened societies of the West, and the mythologised vision of the 'legal culture' to which that society will give rise is one that is conveyed by and through received (mis)understandings and (mis)renderings of the common law tradition.

5. Metaphysical Misunderstandings and the Persuasive Illusions of Difference

Commenting on the allure of radical difference in the study of sorcery and witchcraft amongst 'other' peoples, Max Marwick accounted for this evident fascination on the basis of what he assumed to be 'Western society's emancipation from it'.

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55 To establish a meaningful definition of the concept 'legal culture' is as problematic and potentially controversial as establishing a meaningful definition of the term 'culture' itself. See M. Chiba, 'The Identity Postulate of a Legal Culture,' in S. Panou, G. Bozonis, D. Georgas and P. Trappe, eds. Philosophy of Law in the History of Human Thought (Stuttgart: Franz Steiner Verlag, 1988), p. 86. For present purposes, however, it will be sufficient to adopt J.H. Merryman's definition of the expression 'legal tradition' as referring to:

a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and polity [and] about the proper organisation and operation of a legal system . . . . [The Civil Law Tradition (2d ed. Stanford: Stanford University Press, 1985), p. 2]


Western travellers, missionaries, administrators and even anthropologists have often selected this, the most bizarre and exotic aspect of native life, for a disproportionate share of attention. People's witch-beliefs are as often recorded for their sheer entertainment value as for their scientific interest. They seem to reward the romantic search by both writers and readers for fantasies that come true.\textsuperscript{57}

Marwick readily acknowledged the validity of legitimate 'scientific' interest in these systems of belief, even though 'from our point of view they represent the standardized delusions of the societies concerned...'.\textsuperscript{58} Indeed, he continued, scientific studies of sorcery and witchcraft in 'native' societies are of especial importance 'because of the light they throw on human behaviour in general, including that of ourselves among whom they no longer command credence.'\textsuperscript{59} Or do they?

Like the assumptions about modern Western legal culture that implicitly underlie the premises of Papua New Guinea's current sorcery legislation and the views of Papua New Guinea's then Chief Justice, Marwick's assumptions about the rationalistic virtues of modern Western culture generally may be far more contentious than their glib assertion seems to suggest. Moreover, the uncritical way in which such assumptions are so routinely accepted serves to create and perpetuate egregious misunderstandings and misrepresentations of Western law and Western culture alike. To the extent that such misrendered constructions of Western law and culture may function as a kind of touchstone for jural ratiocination in Papua New Guinea, even in the circumstances in which sorcery-related beliefs are implicated (perhaps especially in such circumstances), these

\textsuperscript{57} Ibid., 15.

\textsuperscript{58} Ibid., p. 16.

\textsuperscript{59} Ibid., (emphasis supplied).
misunderstandings and misrepresentations undermine the legitimacy that the law must achieve if it is ever to be accepted as viably authoritative by the people it is meant to serve.

A. Law, Metaphysics and the Reality of Intangible Harm

In order to frame somewhat more narrowly the specific issues with which I am concerned, and thence to place them in an apposite context, let me offer here a brief ethnographic excursus:

THE DEATH OF K.

K. was a young man who was believed to have fallen victim to a powerful and malevolent form of sorcery, practised against him at the instigation of members of a clan with whom K.'s own had a long, hostile and at one time openly combative relationship. In response, K.'s people sought to invoke the forces of a remedial counter-magic. Toward that end, they enlisted the services of a sorcerer known to be sympathetic to their interests, and at odds with the sorcerer whom they held responsible for K.'s illness.

The magic of K.'s enemies, however, proved to be the more efficacious. K.'s physical and mental condition deteriorated. He grew increasingly morose and paranoid. Unable to attend to his customary obligations in the village, he withdrew completely to an abandoned dwelling at its outskirts. There, in the depths of the despondency brought on by his magically induced delusions, K. committed suicide.

The sorcerer, whom K.'s clan alleged had perpetrated the machinations resulting in the latter's death, denied all responsibility; denying further that he, personally, possessed the occult knowledge that would have been necessary to bring it about. Neither he, nor the members of the clan at whose behest K.'s people maintained he had acted, however, would likely deny that such things can and do happen in the ordinary course of human affairs. Unpersuaded by these denials, K.'s clan sought compensation from those whom they were convinced were directly and indirectly responsible for the death of their kinsman. And although they were unsuccessful in their efforts to secure the redress to which they believed themselves justly entitled, the traditional institutions within which their society customarily processes inter-group disputes of this kind were fully prepared to acknowledge the intrinsic legitimacy of their grievance, and to entertain their claim as justiciable....
Allowing for the variations and nuances of situation and circumstance so characteristic of ethnographic accounts dealing with alleged instances and accusations of sorcery in Papua New Guinea, the case related above is not atypical. As it happens, however, the story of K.'s death is not drawn from the literature of Melanesian ethnography. Rather, having taken a certain measure of literary licence—but very little licence with the actual facts of the case—the events I have described are drawn directly from a judgement of the California Court of Appeal in *Nalley v. Grace Community Church of the Valley*,\(^6\) which was delivered in 1987.

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\(^6\) (1987) 194 Cal.App.3d 1057, 240 Cal.Rptr. 215. This decision was subsequently reversed by the California Supreme Court in *Nalley v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948, and an earlier opinion of the Court of Appeal in the same matter (*Nalley v. Grace Community Church of the Valley* (1984) 204 Cal.Rptr. 303) had previously been withdrawn. For convenience, I shall refer to the first and second opinions of the Court of Appeal as *Nalley I* and *Nalley II*, respectively. The judgment of the Supreme Court will be referred to as *Nalley III*.

It is important to note that, whilst citation of the Court of Appeal opinion in *Nalley I* would have been inappropriate, *for precedential purposes*, even prior to the Supreme Court's reversal of the Court of Appeal's decision in *Nalley II*, on the Court of Appeal's second hearing of the matter it was deemed proper (and, indeed, necessary) for that court to consider factual findings and conclusions of law contained within the first opinion, for purposes related to application of the law of the case doctrine (see Cal Rules of Court, Rule 977; *Nalley II*, 240 Cal.Rptr. at 222, n. 2). In light of its reversal by the Supreme Court in *Nalley III*, reference to, or citation of, the opinion of the Court of Appeal in *Nalley II* (again, *for precedential purposes*) would likewise be inappropriate.

In this discussion, however, I am *not* relying on the respective decisions of the Court of Appeal for the purposes of formulating a 'legal' argument, such as would be cognisable in a court of law. Rather, my aim is to demonstrate that a common law court in a modern, Western jurisdiction was prepared to take account of the issues raised, and that it did not find itself precluded by the constraints of the law from doing so. In this discussion, then, reference to the opinions of the Court of Appeal in both *Nalley I* and *Nalley II* is properly made for two reasons: firstly, because it is only in those opinions that relevant factual matters (contested and uncontested), which were placed before the Supreme Court, are mentioned and discussed in any detail; and secondly, because the grounds upon which the Supreme Court ultimately reversed the then standing decision of the Court of Appeal in *Nalley II* involved the consideration of legal issues that are not determinatively relevant to the purposes for which I have provided the example here.
K. (Kenneth Nalley) was 24 years old at the time he shot and killed himself in 1979 in Los Angeles. There was no doubt about the fact that it was he who put the gun to his own head and fired the fatal shot, or that he was quite alone in the unoccupied flat of a friend when he did so. Nevertheless, Kenneth's parents sought to hold others responsible for their son's death—and it is upon that ground in particular that the crucial situational dynamics surrounding the entire incident may be seen to bear many of the hallmarks frequently associated with the 'bizarre' and 'exotic' circumstances of Melanesian sorcery cases.

Kenneth was a devout adherent to the beliefs of a fundamentalist religious sect, and was actively involved in his church's religious 'counselling programme'. This programme was operated in accordance with the view that answers and explanations for every question and problem ought to be sought, and would invariably be found, in selected biblical teachings, as interpreted and construed by church-trained spiritual counsellors. Upon these premises, the church's counsellors attempted to minister to the needs of a number of people suffering from a variety of emotional and psychological problems. Kenneth was amongst those receiving this kind of spiritual guidance.

Kenneth's parents were very much opposed to his involvement with the church. Although they were practising Catholics and had raised Kenneth within their understanding of the teachings of the Catholic Church, their principal objections to his affiliation with his chosen spiritual advisers reflected their general concerns with his increasingly aberrant behaviour and emotional state; the detrimental influence his association with fundamentalism was apparently having upon his mental health; and Kenneth's insistence on the superiority of the spiritual

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61 Nalley II, 240 Cal.Rptr. at 220.
attention he was receiving from his religious counsellors over the psychological attention his parents were equally insistent he required.

As it happened, Kenneth's parents had actively tried to persuade their son to seek psychological treatment from professionally qualified, secular clinicians. The church's view on such intervention, however, militated against that possibility—and Kenneth believed in the power of his church, as much as he did in its counsellors' mastery of that power. Summarising the nature of the church's position with respect to the efficacy and appropriateness of conventional, secular psychotherapy and psychiatry, the Court of Appeal referred to the views expressed at trial by one of Kenneth's counsellors:

He believes the Bible gives the root answer to why emotional or psychiatric problems exist.... It is his conviction that to settle for an answer from secular psychiatry or psychology is to settle for less than God's goal.... [H]e would not refer someone to a psychiatrist, generally, unless he believed the psychiatrist had a 'world view' or was 'coming from the viewpoint consistent with the scripture'.

During the period leading up to Kenneth's suicide, there were continuing disagreements and conflicts between Kenneth and his parents concerning the propriety (and, from his parents' perspective, the necessity) of Kenneth's seeking 'professional' psychological assistance. Kenneth remained firm in his belief in the power of his spiritual counsellors to bring about the relief he presumably desired, whilst his parents remained equally convinced of the power of the clinical psychologists whose advice and assistance they sought, as much in an effort to address their son's emotional problems as in the hope that their preferred 'magic' would release him from the 'spell' under which Kenneth's religious mentors had seemingly placed him.

62 Nalley II, 240 Cal.Rptr. at 220.
A crucial and contested piece of evidence in the trial involved a kind of instructional tape-recording made by the counsellors of Kenneth’s church, and used by them in the training of other counsellors. Kenneth’s parents sought to admit the recorded message to support an inference that the church counsellors ‘followed a policy of counseling suicidal persons that, if one was unable to overcome one’s sins, suicide was an acceptable and even desirable alternative to living.’ Excerpts from the tape recording were quoted in a prior opinion of the Court of Appeal:

‘And the suicidal says, “I am under such tremendous pressure, now I’ve got to [sic] pleasure of release! Now!, I don’t care about the future.” ... And ... if he is a believer, he’ll go to be with the Lord. Yes, there’ll be a loss of reward, but because of the Lord and his grace, he’ll go and be with the Lord. In fact, suicide is one of the ways that the Lord takes home a disobedient believer. We read that in the Bible. That death is one of the ways that the Lord deals with us... That’s right. And suicide for a believer is the Lord saying, “Okay, come on home. Can’t use you anymore on earth. If you’re not going to deal with those things in your life, come on home.”’

As Kenneth’s parents alleged in their complaint against the church counsellors, not only had they (the counsellors) ‘taught or otherwise imbued [Kenneth] ... with the notion that if he accepted Jesus Christ as his personal savior, [he] would still be accepted into heaven if he committed suicide,’ but through their affirmative actions and omissions, which is to say, by their manipulation of what they knew to be Kenneth’s—and presumably their own—genuine beliefs in the potency of a particular variety of supernatural powers (in this instance, divine powers), and

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63 Nalley II, 240 Cal.Rptr. at 223.

64 Nalley I (1984) 204 Cal.Rptr. 303 (Cal App 2d Dist.).

65 Nalley I, 204 Cal.Rptr. at 306.

66 Quoted in the decision of the California Supreme Court, Nalley III, 47 Cal. 3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 at 952.
their peculiar knowledge of those powers, they were, arguably, responsible for Kenneth's suicide.\textsuperscript{67}

B. Questioning the 'Rational' Bases of Legally Cognisable Wrongdoing—'Supernatural' Force and Intangible Harm

That Kenneth's parents ultimately failed to obtain the judicially ordered compensation they sought for their son's death is of far less significance than the fact that a 'modern' Western, rationalistically orientated, scientifically conscious and secular court was prepared to entertain their claim on the terms in which it was presented. Thus, I have selected this particular case to use as an illustration here, not because it bears so clear or consistent a resemblance to Melanesian sorcery cases on its facts, but only because it seems to involve a number of features which, for comparative purposes, might be juxtaposed instructively, \textit{mutatis mutandis}, to contemporary Melanesian examples. Concededly, Kenneth's case is extraordinary in certain respects. But it is by no means the only instance in which common law courts have been called upon to consider matters of this general type.\textsuperscript{68}

\textsuperscript{67} One of Kenneth's parents' allegations involved the claim that their son's spiritual advisors "actively and affirmatively dissuaded and discouraged [Kenneth] from seeking further professional psychological and/or psychiatric care." Another averred that they (again, the counsellors) had indoctrinated Kenneth with 'certain Protestant religious doctrines that conflicted with [Kenneth's] Catholic upbringing,' and that this served to exacerbate his "pre-existing feelings of guilt, anxiety and depression." [752 P.2d at 952].

More importantly, I have not relied on this particular example of a decidedly Western judicial disposition because it provides definitive answers (legal or otherwise) to the complex questions implicated in efforts to reconcile the seemingly contradictory 'beliefs' in the efficacies of law and sorcery in Papua New Guinea. Rather, in this context Kenneth’s case is useful principally because it brings to the fore particular questions, in the consideration of which some of the problems central to this inquiry are illuminated. As a point of departure, therefore, Kenneth’s case is both apposite and appropriate, because it unequivocally involves a legally cognisable consideration of issues and affairs in which the intentional infliction of 'metaphysical' harm was claimed to have injuriously affected, and ultimately brought about the death of, the alleged 'victim'; and because such a claim was regarded as cognisable and justiciable by a common law court—something which, in principle, common law courts are assumed to have great difficulty doing, and something which at least some Melanesian judges appear to be loath to do. 69


cultural circumstances surrounding and culminating in Kenneth's death might not logically be considered within a general theoretical framework of sorcery and witchcraft beliefs; and secondly, if so, whether those underlying factors might not profitably be considered in particular relation to issues of law and sorcery in a Melanesian context.

6. The 'Rationality' of Law and the 'Irrationality' of Sorcery Reconsidered

Of course, there are any number of differences between the circumstances of Kenneth's death and Papua New Guinea cases (ethnographic and legal) in which sorcery beliefs and allegations (or accusations) are involved. It is my contention, however, that many of these immediately apparent and distinguishing differences might more properly be seen as differences of idiom, rather than of conclusively determinative substance.

In the formulation of a preliminarily affirmative response to the questions posed above, consider the following remarks which appeared in a discussion of

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70 For example, amongst various Papua New Guinea societies, it is not uncommon that precise identity of the sorcerer suspected of a particular malevolent act of sorcery may not be immediately 'known', and that certain divination techniques may be necessary to ascertain his or her identity. See P. Sillitoe, 'Sorcery Divination Among the Wola,' in Sorcerer and Witch in Melanesia, ed. M. Stephen (Carlton: Melbourne University Press, 1987, pp. 121-146. Frequently, it is assumed that the perpetrator of an act of malevolent sorcery is a member of a particular antagonistic clan or is otherwise regarded as an 'outsider'. See D.M. Hayano, 'Sorcery Death, Proximity, and the Perception of Out-Groups: The Tuan, Awa of New Guinea,' Ethnology, vol. 12, no. 2 (April 1973), pp. 179-191. George Westermark reports, however, that amongst the Agarabi today, 'allies' are increasingly likely to be suspected of sorcerous attacks. See G.D. Westermark, 'Sorcery and Economic Change in Agarabi,' Social Analysis, no. 8 (November 1981), pp. 89-100. Cf. B.M. Knauf, Good Company and Violence: Sorcery and Social Action in a Lowland New Guinea Society (Berkeley: University of California Press, 1985).

71 See Horton, 'African Traditional Thought and Western Science,' p. 50.
the relationship between law and sorcery prepared by the Law Reform Commission of Papua New Guinea in 1977.72

Major world religions claim the reality of forces or personalities greater than the human and animal powers. Whether these powers or personalities can be shown to exist is often quite irrelevant to the belief. Many rational beings hold to belief which cannot be supported by empirical evidence. Many rational people believe in the Blessed Trinity, the Mystery of Incarnation and so on, even though they have no material evidence to prove these.73

From the conventionally orthodox perspective of the common law, even a preliminary response to either of the questions raised above would most likely be framed in the negative. Any serious suggestion to the effect that the kind of circumstances which, in a Melanesian context, may give rise to bona fide allegations or accusations of homicide as having been caused by sorcery or sorcery-like conduct (as an expression of 'mental force' or otherwise), can or ought to be cognisable within the rational framework of the common law, are generally rejected out of hand.74 For in the absence of demonstrably material,


73 Law Reform Commission, Sorcery, p. 9. Consider, too, in this regard, the remarks of a contemporary American legal commentator, Professor R.M. Perkins, who observed that, whilst it is sometimes said that no one may be held legally responsible for killing 'by any influence on the mind alone,' where death actually results, 'there has always been more than an influence on the "mind alone".' Criminal Law (2d ed. Mineola, N.Y.: Foundation Press, 1969), p. 736.


I am dealing here only with allegations or accusations of particular affirmative acts of sorcery (or the alleged use of metaphysical or 'supernatural' powers to cause harm), because implicit in such an allegation is the underlying assumption that such forces actually exist. This is not to suggest that, in a Melanesian context, there are or would likely be many instances in which such affirmative allegations will be the principal matters at issue before a court (with the exception, perhaps, of a Village Court, which entertains a prescribed 'criminal' jurisdiction in respect of affirmative acts of sorcery. See Village Courts Act 1973 (No. 12 of 1974), Village Courts (Amendment) Act 1977 (No. 17 of 1977) and the relevant regulations in Village Court Regulations (Statutory Instrument No. 41 of 1974); and see generally P. Keris, 'Village Courts
causal connections between the alleged conduct of a defendant and the death of his or her supposed victim, authorship of the killing will be deemed impossible of proof.\textsuperscript{75} Insofar as arguments about the means by which a person is said to have caused another's death are 'too much out of line with the prevailing views of the community,' there can be no evidence upon which a such attributions of homicide to the accused might \textit{reasonably} be based.\textsuperscript{76} Similar expositions of the principles of culpability and liability will be found in the most current iterations of the modern common law.\textsuperscript{77} It would appear that Sir Matthew Hale's pronouncements on such questions may remain as decisive today as they were over two hundred years ago:

\begin{quote}
If a man either upon working upon the fancy of another or possibly by harsh or unkind usage puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease, whereof he dies, tho, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet \textit{in foro humano} it cannot come under the judgment of felony, because no external act of
\end{quote}

\begin{footnotes}


\end{footnotes}
violence was offered, whereof the common law can take notice, and secret things belong to God. . . . 78

To be sure, there are both civil and criminal offences within the common law from the commission of which no actually harmful consequences must necessarily flow in order for liability or culpability to attach. 79 But where the legal wrongfulness of specified conduct is based, at least in part, upon the results or the effects of that conduct, some factual (and usually physical) connection between the alleged conduct of the defendant and the harm or injury suffered must be proven: for it is this material nexus which provides the necessarily rational relationship between cause and effect required by the law. 80

Bearing these conventional principles of causation in mind, it is interesting to note that the Criminal Code of Papua New Guinea (which expressly criminalises all unauthorised, unjustified or unexcused killings of one human being by another81) further provides, in pertinent part, that: 'any person who causes the death of another, directly or indirectly, by any means, shall be deemed to have killed the other person.' 82 Seemingly, this statutory language suggests that legal


82 PNG Criminal Code s. 291 (emphasis supplied).
cognisance may be taken of extraordinarily indirect means of causation in the ascertainment and attribution of criminal responsibility for homicide. Eliminating the conventional evidentiary requirement of proof of direct (i.e., physical) causation, it might be supposed that this particular statutory formation has been deliberately chosen to reflect a conscious response to prevalent Melanesian understandings and experiences of the nature of cause and effect, and that the culturally alien, epistemological preconceptions of the Anglo-Australian common law have been rejected.83 Judicial interpretations of these and related provisions of the Criminal Code, however, suggest that this is not the case. In the main, orthodox precepts of Anglo-Australian jurisprudence continue to govern the processes of legal ratiocination in the post-independence courts of Papua New Guinea.84 As David Weisbrot commented:

[I]t may still be said that in most material respects the legal system has changed very little with decolonization.... No coherent approach to law reform has yet been thought through or and adopted—whether it be integration of customary law and western law, or the development of a new strain of jurisprudence—nor is it at all clear that this is regarded as a failing.... Given an opportunity to review and substantially

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revise and adapt the [Criminal] Code, the [Law Reform] Committee [of the Justice Department] did remarkably little.85

One area in which customary Melanesian jural values have manifestly failed to have much impact on the common law in Papua New Guinea involves the processes by which ultimate questions of causation (and hence, responsibility) are determined.86 In this respect, the concerns that Weisbrot expressed about the potential entrenchment of wholly unreconstructed principles of Anglo-Australian legal culture in the emerging common law in Papua New Guinea would appear to have been realised to a very great extent.87

But howsoever one may be inclined to account for this particular turn of events in the development of law in Papua New Guinea, it is not, I reiterate, a necessary or inevitable reflection of any intrinsic incapacity of the common law tradition to allow for a socio-culturally responsive adaptation to the circumstances of Papua New Guinea today.

7. Legal Norms and Socio-Cultural Values

Whether it is ultimately the jural values of the people of Papua New Guinea or those reflected in the adopted emblems of Anglo-Australian legal culture which are to be reshaped, is a question to which, in my view, the only appropriate response should be eminently clear: it is the latter which ought to be altered to


86 Ibid., p. 76.

87 Ibid., p. 96.
accommodate the former. But as much as this may be to assert a normative proposition of legal and cultural sovereignty, it is, at the same time, to do no more than to recognise a truism grounded in the inchoate potential of the common law and the inevitable expressions of legal syncretism in Papua New Guinea. The suggested propriety of this particular course of jural development, therefore, is less a statement of preference in regard to the results of hegemonic, inter-systemic competition, than an acknowledgement of the necessary dimensions and direction of legal change.

A. Rationalist Preoccupations as Impediments to Legal Integration—The Reformation of Jural Perspectives

In the present circumstances of Papua New Guinea's adopted legal system, the extent to which prevailing (and changing) Melanesian understandings and experiences of reality might more effectively be incorporated into the conceptual principles upon which that system operates will be determined by the perspective from which the interpretation, application and, indeed, the creation of an apposite common law is approached. The tools by which that perspective can be shaped and re-shaped are readily available in the operative mechanics of the common law tradition itself. What is required is a more actively innovative sense of the range of uses to which those tools can be put in the effort to fashion a perspective from which a responsive and responsible 'merger of concepts' may be facilitated.

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Purposively approached, the underlying dynamics of causation and responsibility, such as those upon which the judicial disposition of sorcery and sorcery-related related actions so often turn, are demonstrably amenable to a circumspect contemplation within the parameters of the common law. They are, at any rate, far more amenable than would appear to be allowed by the restrictive orthodoxies to which the courts of Papua New Guinea have heretofore unnecessarily bound themselves.90 It is this recognition which, I believe, is illustrated by Kenneth's case, and which constitutes the instructive contribution a reflective consideration of that ease may provide to a sounder contemplation of law and sorcery in Papua New Guinea.

As said, it is not intended to deal here with the technical processes of institutional law reform, as such. By the same token, the reformation of fundamental jurisprudential perspectives is arguably one of the surest means of achieving meaningful, beneficial and enduring change in the law of Papua New Guinea. To that extent, some consideration of this pre-conditioning reformation must necessarily be involved in the more mechanical processes of institutional change, and it is with that sort of fundamental to law reform that this discussion is specifically concerned.


B. Sorcery in a Jural Context—Definitional Considerations

Problems of law frequently revolve around questions of definition. Where problems of law are comparatively examined in contexts of considerable socio-cultural diversity, questions of definition are multiplied and compounded. In the scholarly study of sorcery and witchcraft, terminological and definitional issues commonly give rise to similar difficulties in analysis and interpretation, and even within a field of inquiry as narrowly circumscribed as the social anthropology of Melanesian sorcery, problems of definition can be troublesome.

For their part, ethnographers interested in Melanesian sorcery and witchcraft beliefs have been able to avoid many of the difficulties of definition, since they

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tend to forgo generic definitions and rely instead upon their understandings of the descriptive meanings in current usage amongst the particular peoples with whom their researches are concerned. Where anthropologists deal with the broader and more generally theoretical issues respecting Melanesian sorcery and witchcraft, and are therefore obliged to consider questions of definition explicitly, their efforts have largely been directed towards the development of culturally appropriate, circumstantially specific taxonomies. Thus, significant and useful distinctions have been drawn between prevailing Africanist taxonomical formulations (which were once quite commonly 'imported' without qualification into the Melanesian field) on the one hand, and descriptive terminologies formulated to suit situations peculiar to a particularly Melanesian context (where the scattered diversity of the ethnographic data require open and more flexible, albeit categorical, definitions) on the other.

In what was the first attempt to formulate a comprehensive anthropological formulation of distinctively Melanesian sorcery and witchcraft beliefs, Mary Patterson offered the following broadly framed definition (really, more of a description) of the relevant phenomena:

It is acknowledged that sorcery and witchcraft refer to the belief, and those practices associated with the belief, that one human being is capable of harming another by magical or supernatural means.  

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As we have seen, Patterson's theoretical model of Melanesian sorcery beliefs and practices has been subject to some criticism. However, her basically descriptive definition of Melanesian sorcery and witchcraft—like her 'basic ideas'—still seems to retain a general anthropological endorsement, and in light of that continuing approbation, it may be relied upon here, too, to the extent that it provides an adequate and acceptable 'anthropological' definition of the general phenomena.

Despite the alien influences upon its drafting, the definition of 'sorcery' contained in Papua New Guinea's current Sorcery Act comports fairly well with Patterson's open and flexible description. Indeed, if anything, the legislative formulation appears to be framed in even more broadly flexible and inclusive terms:

'Sorcery' includes (without limiting the generality of that expression) what is known, in various languages and parts of the country, as witchcraft, magic, enchantment, puri puri, mura mura, dikana, vada, mea mea, sanguma or malira, whether or not connected with or related to the supernatural.

C. Sorcery as 'Outrageous Conduct'

Bearing these definitions in mind, and with a particular view to the significance of the distinction between idiom and substance, let us consider yet one more descriptive formulation of a particular kind of conduct, within the terms

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98 See Knauft, Good Company and Violence, p. 346; Stephen, Sorcerer and Witch in Melanesia, p. 8.

99 Ibid., p. 347.

100 Sorcery Act (No. 22 of 1971), Revised Laws of Papua New Guinea, Chap. 274.

101 Sorcery Act 1971, sec. 1 (emphasis of the parenthetical language has been supplied, otherwise emphasised terms are in the original).
of which both anthropological and legal representations of 'sorcery' in Papua New Guinea might be properly embraced:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.\textsuperscript{102}

It was on the basis of this formulation of the common law action for 'outrageous conduct' that Kenneth's parents sought to hold their son's spiritual counsellors responsible for causing his death.\textsuperscript{103} Notwithstanding its decidedly non-Melanesian pedigree, this particular description of legally actionable 'outrageous conduct' clearly encompasses very much the same kinds of behaviour, concerns and affected interests as would tend to be at issue in either a modern judicial or a 'traditional' consideration of alleged acts of sorcery in Papua New Guinea today. Viewed in that light, some of the nominally 'Western' legal questions implicated in Kenneth's case merit further consideration here, as matters involving palpable indicia of comparative similarity to their Melanesian counterparts.

Discussing the tenability of Kenneth's parents' claims alleging outrageous conduct on the part of the defendants in the \textit{Nalley} case, the California Supreme Court summarised the elements necessary to make out that cause of action:

The elements ... are (i) outrageous conduct by defendant, (ii) an intention by defendant to cause, or reckless disregard of the probability of causing, emotional distress, (iii) severe emotional distress, and (iv) an actual and proximate causal link between the tortious conduct and the emotional distress.\textsuperscript{104}

\textsuperscript{102} American Law Institute, \textit{Restatement of the Law of Torts} (Second), s. 46 [hereinafter referred to as \textit{Restatement (2d) Torts}]

\textsuperscript{103} \textit{Nalley III}, 47 Cal.3d 278, 253 Cal.Rptr.97, 763 P.2d 948 at 961 (1988).

\textsuperscript{104} \textit{Nalley III}, 763 P.2d at 961.
Citing the applicable judicial authorities, the Court went on to state that if the conduct in question was properly to be regarded as 'outrageous', it must be shown to have been so extreme as to exceed 'all bounds of that usually tolerated in a civilized community.' The more general statement of this principle (and the one from which the California rule is derived) is framed somewhat differently, however. Commenting on that general principle, the eminent American legal scholar, William L. Prosser, observed:

The requisite outrageousness of particular conduct may further be said to arise 'not so much from what is done as from abuse ... of some relation or position,' by virtue of which the wrongdoer is seen as entertaining 'actual or apparent power' to cause harm or injury. Outrageousness may also be found when it can be shown

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106 Restatement (2d) Torts, sec. 46, Comment d.

107 Professor William L. Prosser (1898-1972) had a great deal to do with the development and refinement of the rule in the United States, and his commentaries on the matter were, in no small measure, responsible for its judicial adoption. Thus, his observations to the effect that the courts had 'created a new tort' [see W.L. Prosser, 'Intentional Infliction of Mental Suffering: A New Tort,' Michigan Law Review, vol. 37, no. 6 (April 1939), pp. 874-892] have been described as 'unnecessarily modest.' G.E. White, Tort Law in America: An Intellectual History (New York: Oxford University Press, 1985), p. 102. For some contemporary, critical commentaries on aspects of the tort, see W.H. Theis, 'The Intentional Infliction of Emotional Distress: A Need for Limits on Liability,' De Paul Law Review, vol. 27, no. 2 (Winter 1978), pp. 275-292; S. Ingber, 'Rethinking Intangible Injuries: A Focus on Remedy,' California Law Review, vol. 73, no. 3 (May 1985), pp. 772-856.


109 Ibid., p. 61 [emphasis supplied].
that the actor knows, or has reason to know, 'that the plaintiff is especially
sensitive, susceptible and vulnerable to injury through mental distress at the
particular conduct.'

In Papua New Guinea, historical and ethnographic data clearly indicate that
the practice of sorcery was a common enough feature of traditional Melanesian
life and that, even today, it is by no means an unusual event. Indeed, as
mentioned earlier, relatively recent data plainly suggest that the frequency with

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10 Prosser and Keeton, The Law of Torts, p. 62. The Restatement (2d) Torts, sec. 46, note f, expands upon this proposition as follows:

The conduct may become heartless, flagrant, and outrageous
when the actor proceeds in the face of such knowledge,
where it would not be so if he did not know.

An illustrative case provided in this connection [Illustration No. 10, pp. 75-76] is remarkably apt:

A knows that B, a Pennsylvania Dutch farmer, is extremely
superstitious, and believes in witchcraft. In order to force B
to sell A his farm, A goes through the ritual of putting a
'hex' on the farm, causing B to believe that it is bewitched so
that crops will not grow on it. B suffers severe emotional
distress and resulting illness. A is subject to liability to B for
both.

111 Jennifer Totabu (now Popat), for example, reported that sorcery remains 'a common
practice in Tolai [East New Britain Province] society... 'Vunamami (Tolai) East New Britain
Province,' in Customary Law in Papua New Guinea: A Melanesian Perspective, Law Reform
Commission of Papua New Guinea, Monograph No. 2, ed. R. Scaglion (Port Moresby:
Government Printer, 1983), p. 93. Similar reports have been made in respect of the Henganofi
District, Eastern Highlands Province (see M.R. Atiyafa, in Customary Law in Papua New
Guinea, p. 142), Vailala East Mareke, Gulf Province (see H. Hulape, in Customary Law in
Papua New Guinea, pp. 157-159) and Kiriwina (Trobriand Islands) Milne Bay Province (see D.
Mark, in Customary Law in Papua New Guinea, p. 174). Bruce Knauff reports that, amongst
the Gebusi (Western Province), with whom he worked in the early 1980s:

Sorcery inquests continue to be carried out publicly, and the
accused is still liable to be killed, although subsequent
cannibalism is practiced only occasionally and in secret....
The main impact of the Administration on sorcery attribution
has been to reduce the frequency of killing and to make
killings that do occur hidden rather than public acts [Good
Company and Violence, p. 15].
which such practices occur is on the rise. Nevertheless, it is equally evident from these data that the practice of sorcery, in its 'evil' or 'forbidden' forms, is generally regarded as contrary to the welfare of 'decent' Melanesian society. In terms of currently prevailing Melanesian social values, then, the practice of such malevolent sorcery must certainly be regarded as a highly undesirable feature of life in contemporary Papua New Guinea society.

Beyond this, ethnographic data lend additional support to the contention that most members of a majority of Melanesian communities do consider themselves to be susceptible to the effects of sorcery; and that most people (sorcerers and non-sorcerers alike) fully recognise the general extent of that susceptibility. In this sense, too, therefore, and from the perspective of the ordinary and reasonable Melanesian, it may properly be said that the practice of sorcery in Papua New Guinea today may constitute potentially 'outrageous conduct', as that expression was used and understood by the Court in *Nalley*.

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> In villages nowadays, any person practicing or threatening other people with sorcery is seriously dealt with, because people believe this is a danger to the community. Sorcerers may be threatened to be murdered in cold blood with an axe or a knife by the people on whom they make sorcery [in *Customary Law in Papua New Guinea*, p. 158].

114 For example, George Westermark reports:

Agarabi believe that the practice of sorcery has increased and that it has reached a particularly pernicious stage. They also feel that there is a greater threat of sorcery attack coming from within their own clans and phratries ['Sorcery and Economic Change in Agarabi,' *Social Analysis*, No. 8 (November 1981), p. 99].

115 See *Restatement (2d) Torts*, sec. 46, Comment e.
D. Causation and Outrageous Conduct

In *Nalley*, the Court placed especial emphasis on the question of *causation*, referring to the nature and sufficiency of the connection between the defendants' allegedly outrageous conduct on the one hand, and the actual harm (in this case, suicide) that was said to have been suffered by the victim as a consequence thereof on the other.\(^{116}\) In its consideration of this question the Court was able to find only one prior case in which a California appellate court was prepared to entertain an action for wrongful death based on the defendants' outrageous conduct, and wherein the death in question was the immediate result of the decedent's suicide. In that case, *Tate v. Canonica*,\(^ {117}\) a decisive factor in the plaintiffs' successful action was their ability to demonstrate a necessary causal connection between the defendant's conduct and the decedent's suicide—a demonstration that was essential in order to counter the seemingly determinative precedents which held that:

> suicide is always an independent intervening cause, thus breaking the chain of legal causation in every case, and absolving the actors ... from responsibility.\(^ {118}\)

In *Tate*, the plaintiffs were the widow and surviving children of the decedent, the latter of whom allegedly became 'physically and mentally disturbed' and ultimately committed suicide as a direct result of the defendants' having intentionally made threats, accusations and other statements against the deceased, 'for the purpose of harassing, embarrassing, and humiliating him in the presence of

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116 *Nalley III*, 763 P.2d at 961 (per Lucas, CJ).

117 180 Cal.App.2d 898, 5 Cal.Rptr.28 (1960) [discussed in *Nalley III*, 763 P.2d at 961].

118 *Tate v. Canonica*, 5 Cal.Rptr. at 31.
friends, relatives and business associates.\textsuperscript{119} Using the 'language of causation,' but construing the question of causation as really having more to do with the extent to which the law will operate to limit the liability of an actor,\textsuperscript{120} the Court of Appeal (per Duniway J) quoted Prosser with approval:

\begin{quote}
'Essentially it \textit{[causation]} is a question of whether the defendant shall be relieved of responsibility for the result of his fault for the reason that another cause which has contributed to that result is regarded as playing a more important, significant and responsible part... \textit{[T]he issue is merely one of the policy which imposes liability, and any attempt to deal with it in the language of the fact of causation can lead only to perplexity and bewilderment... The question \textit{[of causation]} becomes one of whether the intervening cause is, in retrospect, so abnormal and irregular, so external, foreign and unrelated to the defendant\textquotesingle s original conduct, that it should relieve him of liability'.\textsuperscript{121}
\end{quote}

In holding that the plaintiffs had presented a supportable claim, the Court of Appeal in \textit{Tate} concluded that the causation question might be successfully met where it can be shown, firstly, that a defendant intended to cause serious mental distress and/or physical harm, and does so; and secondly, that such mental distress can be further shown to have been a \textit{\textquotesingle\textquotesingle substantial factor\textquotesingle\textquotesingle} in bringing about a decedent\textquotesingle s suicide.\textsuperscript{122} With particular respect to the issue of a defendants\textquotesingle \textit{intention} in this regard, the currently developing trend in judicial decision making indicates that such intention may be supplanted by evidence of a \textit{\textquotesingle\textquotesingle substantial certainty\textquotesingle\textquotesingle}, or even a \textit{\textquotesingle\textquotesingle high degree of probability\textquotesingle\textquotesingle}, that physical harm or emotional distress will result from the conduct, and additional evidence tending to show that the

\begin{footnotes}
\item[119] 5 Cal.Rptr. at 31.
\item[120] 5 Cal.Rptr. at 35.
\item[121] 5 Cal.Rptr. at 35-36 (emphasis supplied).
\item[122] 5 Cal.Rptr. at 36. No showing is necessary to the effect that the act of suicide was committed in a state of insanity or in response to an irresistible impulse.
\end{footnotes}
defendant proceeded with a conscious, wilful, wanton or reckless disregard of that risk.\textsuperscript{123}

Insofar as the judicial disposition of Melanesian sorcery claims might be concerned, far and away the greatest epistemological difficulty for a Western (or Westernised) legal mind would seem to be posed by the obvious problems of proof in relation to the issue of \textit{causation}.\textsuperscript{124} For if the operative means (i.e., the practice of an efficacious and malevolent form of sorcery) by which an act is claimed to have brought about a particular harmful result (i.e., physical harm, injury or death, or severe emotional distress) cannot credibly be regarded as within the realm of possibility, then it is logically impossible for the conduct to have \textit{caused} the consequences in question.

As we have seen, however, the question of direct and tangible causation, even in the case of a suicide, may be circumvented, where some combination of the following and legally more determinative questions can be answered in the affirmative: Did the defendant entertain the requisite intent (or its functional equivalents) to bring about a harmful consequence? Was the nature of the conduct demonstrably outrageous? Was it substantially certain that the consequences of the conduct would involve a harmful, injurious or fatal result? Could the injured party be shown to have been peculiarly susceptible or vulnerable to the kind of harm for which the defendant's conduct is said to be responsible? And if the


injured party was peculiarly susceptible or vulnerable, did the defendant actually know, or have reason to know, of that susceptibility or vulnerability?\(^\text{125}\)

E. **Intangible Force and Metaphysical Harm—Evolving Legal Perceptions**

Surveying the historical developments which have affected the nature and direction of growth in the law of torts in the United States, G. Edward White devotes some considerable attention to the ways in which judicial understandings of causation consistently operated as impediments to the common law's attribution of legal responsibility in cases of alleged mental distress and other kinds of 'intangible harm.'\(^\text{126}\) The evolutionary course of American jurisprudence, which White describes as having led to a sophisticated refinement of causation analysis and the eventual abandonment of its more rigidly orthodox formulations, is shown to have been profoundly influenced by a growing recognition of circumstantially and situationally sensitive issues of socio-cultural policy.\(^\text{127}\) Implicitly and inexorably, policy-orientated judgments of American courts have come to bear ever more determinatively on questions of legal responsibility for

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\(^{125}\) One of the grounds upon which the Supreme Court in *Nalley* felt obliged to reject the plaintiffs' claims, involved that court's difficulty in accepting the proposition that the defendants' conduct was both outrageous and a substantial factor in the decedent's suicide. *Nalley III*, 763 P.2d at 961. Cf. Kaufman, J (concurring), in respect of the latter consideration, 763 P.2d 964-970.


injury and harm. In this respect, the extension of tort law into the amorphous area of 'emotional distress' represents what White characterises as the presence of a 'new' and socio-culturally appropriate judicial perception about the boundaries of the common law.

Previous justifications for limiting legal claims for harm and injury to those resting securely on 'discernible physical injuries,' White suggests, were based on the speculative qualities of mental or emotional distress. Subsumed in this characterisation he identifies two particular features of emotional discomfort: 'a sense that emotional illness was hard to diagnose and a sense that, given the diagnostic difficulties, emotional illness was comparatively easy to feign.' In other words, the likelihood that this kind of harm or injury actually existed, in one case or another, was consistently subject to serious intellectual (and hence, judicial) doubt, because there was serious intellectual and judicial doubt about whether that kind of harm or injury 'actually existed' at all.

By the early decades of the twentieth century, however, an expanding appreciation for the complexities and nuances of human behaviour and 'a growing interest in the explanatory powers of the behavioural sciences' combined to erode the preclusive characterisations of mental or emotional distress as too 'speculative', illegitimate and, for the purposes of the law, effectively unreal. With this 'enhanced awareness of the psychological dimensions of human behaviour,' bona fide emotional discomfort (and, a fortiori, the discernible

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128 White, *Tort Law in America*, pp. 92-93.
129 Ibid., p. 106.
130 Ibid., p. 103.
131 Ibid.
physical consequences associated therewith) came increasingly to be recognised as a problem for which society bore some collective responsibility.' Hence, White argues: 'An altered awareness of the "seriousness" of emotional distress led to increased efforts in the courts to seek redress against its infliction.'

Ultimately, a commensurately altered awareness of the 'reality' of the relationship between certain kinds of conduct on the one hand, and the equally 'real' and emotionally distressful consequences of such conduct on the other, led to judicial recognition of the psychological and socio-cultural legitimacy of emotional distress; and from these socio-culturally mediated recognitions came further validations of the legal existence of emotional harm, along with an acceptance of the reality of the circumstances giving rise to its occurrence, for which legal redress has been made increasingly available. And, as the commentary accompanying the provisions dealing with 'outrageous conduct' in the American Law Institute's *Restatement of the Law of Torts* (Second) clearly indicate, the trend is continuing:

> The law is still in a stage of development, and the ultimate limits of this tort are not yet determined. This Section states the extent of the liability thus far accepted generally by the courts. The caveat is intended to leave fully open the possibility of further development of the law, and the recognition that other situations in which liability may be imposed.\(^{133}\)


\(^{133}\) *Restatement (2d) Torts*, Sec. 46, Comment c.
Expanding the Boundaries of Legally Cognisable Wrongdoing

Responding in this way to changing socio-cultural values in relation to the nature and extent of legitimate harm and injury, the common law reveals its inherent capacity to accommodate increasingly refined understandings of those values as the bases upon which legally cognisable claims might be founded. In so doing, the law continuously adjusts itself to the changing circumstances under which the causes of these, amongst other, kinds of harm and injury will be recognised as reasonable and hence, legally sufficient. Thus, for example, where the law once severely restricted the range within which actions based on insult and verbal abuse might be maintained, expanding socio-cultural perceptions of human dignity and personal integrity are leading to the creation of 'new' causes of action (or the expansion of existing ones), reflecting responsive jural considerations of relevant socio-cultural, ethnic, racial and religious standards of what constitutes 'serious' (and, in that sense, real) harm and the sort of conduct deemed capable of causing such harm. Even more suggestive of the expansive


136 In the United States:

The great weight of authority appears now to be that insulting and abusive language can be actionable if it is sufficiently outrageous to a person of ordinary sensibilities, both where the language is alleged to have caused purely emotional distress to the person to whom it is directed, and where the language is alleged to have caused emotional distress which in turn produced some physical injury in the person to whom it was directed. [Annotation, 'Civil Liability for Insulting or Abusive Language—Modern Status,' 20 A.L.R.4th 773, 777].

This is particularly so in respect of cases involving racial, ethnic or religious abuse. See Annotation, 'Recovery of Damages for Emotional Distress Resulting from Racial, Ethnic or Religious Abuse or Discrimination,' 40 A.L.R.3d 1290. In Australia, at least one state (New
capacity of the common law to incorporate changing socio-cultural values and perceptions of reality, legal scholars and critical commentators today are earnestly contemplating the implications of culturally specific belief systems (and associated patterns of behaviour) for the ways in which some of the fundamental principles of the common law are interpreted and operatively applied. 137

These are the intellectual matrices within which questions of legal causation are increasingly coming to be understood and within which, too, a growing number of common-law judicial decisions will likely be framed in the future. That

South Wales) now statutorily penalises verbal abuse of this kind. See Anti-Discrimination (Racial Vilification) Amendment Act (NSW) 1989.


the common law has shown itself amenable to what in many cases represents a radical shift in the fundamental criteria by which the ideas and phenomena of cause and effect are determined to be tenable, is evidence enough of the epistemological elasticity of the common law tradition, and of its intrinsic capacity to adjust and adapt to a wide variety of socio-cultural circumstances. Moreover, in doing so, the law is developing within, rather than exceeding the operative parameters of that tradition.

8. The Socio-Cultural Bases of 'Rational' Beliefs and the Responsive Capacity of the Law

In much the same way that the common law has shown itself capable of accepting and gradually (if not always readily) accommodating novel explanations of social and individual psychology into its ratiocinative processes, corollary recognitions and validations of other relevant socio-cultural considerations must eventually find their appropriate and equally rational loci in those processes as well. Of course, the psychological determinants of ordinary rational beliefs, and the behaviours to which those beliefs may give rise, are themselves continually being defined and redefined by particular, socio-culturally determined, normative values.

The tendency of the common law of England or Australia or Canada or the United States, etc. to accept and adopt the characterisation of certain beliefs as either rational or irrational, to characterise the conduct seen to flow from those beliefs as either lawful or unlawful and thence to dispose of the matters in which those characterisations are determinative, is itself no less a function of socio-culturally normative evaluation. The rational beliefs of the reasonable person which the common law is prepared to entertain (and upon which its determinations will be justified) must ultimately be those of the rational or
reasonable Englishman, Australian, Canadian, American or, as the case may be, Papua New Guinean. And this, I submit, is the singular strength of the common-law as a transplantable tradition.

A. Legal Expressions and Cultural Values—
The Ostensible Novelty of Sorcery Beliefs

It is interesting and instructive to compare the extent to which particular iterations of the common law tradition in different countries variably reflect the amenability of dominant socio-cultural institutions to the accommodation of the ideational and behavioural norms and values of the different 'minority' communities with whom the socially, culturally and, legally plural field is shared. What is more important for present purposes, however, is this: if the bases for such accommodations as may occur in countries where the common law represents the jural expressions of a dominant socio-cultural perspective can properly be found in respect of the more compelling interests of various 'minority' communities, then surely the prevailing socio-cultural perspectives of the dominant culture itself must be able to find expression in and through its own common law tradition. For even where the courts are favourably disposed towards the protection of genuinely held 'minority' beliefs, the larger interests of 'the community as a whole' must always 'override the privileges otherwise attaching to freedom of conscience and belief.'


To make a difference in the case of foreigners would be a most dangerous practice. It is of great importance that the administration of the law should be uniform. It must be administered without respect to persons, and it would be
The ostensible novelty of Melanesian sorcery beliefs and practices, when viewed from an Anglo-Australian perspective, need not and should not, therefore, constitute a bar to their effective recognition and cognisance under socio-culturally appropriate interpretations and applications of the common law in Papua New Guinea. Nor is there any reason why their recognition by the law as rational beliefs, entertained and acted upon by ordinary, reasonable Melanesians, should necessarily be seen as operating to the derogation of any fundamental principle upon which the common law tradition is based. Whilst an unnecessarily orthodox adherence to circumstantially inapposite applications of a peculiarly Anglo-Australian approach to legal reasoning in connection, say, with the tenable connections of cause and effect involved in a Melanesian case in which harm or injury is alleged to have been brought about by the exercise of sorcery might suggest otherwise, the better reasoned response to such a suggestion is that:

the principle adhered to does not create any new rule of law although it may operate to extend existing principles over a wider area than that previously recognized; and that to deny the right to maintain an action because of the novelty thereof would prevent the growth of the law by judicial decision.

Perhaps an even more appropriate response might be grounded in the Constitution of Papua New Guinea itself, which expressly directs the courts to

dangerous and unjust to introduce into a general rule an exception in favour of foreigners.[Quoted in S. Poulter, English Law and Ethnic Minority Customs (London: Butterworths, 1986), p. 272].

140 See e.g. Lynch v. Knight (1861) 9 H.L.C. 577, 11 Eng.Rep. 854 (per Lord Wensleydale): 'Mental pain or anxiety, the law cannot value, and does not pretend to redress, when the unlawful act causes that alone.'

develop the common law in Papua New Guinea in a fashion that is 'appropriate to the circumstances of the country.'

B. Intangible Force and Metaphysical Harm—Changing Legal Perspectives

Reflecting on the evolution of the action for intentional infliction of emotional distress as a jural expression of peculiarly, if by no means uniquely, American understandings and experiences of social reality—a culturally appropriate utterance, as it were, in one of the many vernaculars embraced within the 'tradition' of the common law—Prosser alluded to the reasons for the erstwhile reluctance of the American courts (and the continuing reluctance of the English courts) to redress claims of emotionally based harm. Accounting for this reluctance largely in terms of the courts' difficulties in accepting such claims as real or rational, he observed that 'mental injuries' were commonly regarded by the courts as 'something metaphysical' and therefore 'too subtle and speculative to be capable of admeasurement by any standard known to the law.' Even as modern society came increasingly to recognise that the experience of emotional injury was quite real indeed, and that it was thus both rational and proper for the courts to take legal cognisance of claims based on such injury (when brought about through demonstrably wrongful conduct), the courts were initially slow to respond. The

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143 For an exposition on the understanding of law as tradition, see M. Krygier, 'Law as Tradition,' in Philosophy of Law in the History of Human Thought (1988), pp. 179-191.


145 Ibid.
common law continued to view such injuries as 'too vague for legal redress,' ¹⁴⁶ because:

mental consequences are so evanescent, intangible, and peculiar, and vary to such an extent with the individual concerned, that they cannot be anticipated, and so lie outside the boundaries of any reasonable 'proximate' connection with the act of the defendant.¹⁴⁷

So long as physical injuries constituted the gravamen of a plaintiff's claim for damages, English and American courts alike had long been willing to recognise attendant mental anguish or 'nervous shock'.¹⁴⁸ Thus, in cases where some variant of outrageous conduct was clearly involved, and where such conduct could plausibly be seen as giving rise to palpable physical harm or injury, those circumstances could provide a sufficient basis for judicial recognition of associated mental distress 'without too obvious pretense'.¹⁴⁹ Hence, where some independent cause of action (e.g., assault, battery, false imprisonment, seduction) could be made out, that cause of action might then serve as the peg upon which a claim for 'mental damages' could be hung.¹⁵⁰ But for some time, the requirement of proof of physical manifestations of illness or injury remained a conditio sine qua non in American jurisprudence if an action for damages was to be entertained.

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¹⁴⁶ White, Tort Law in America, p. 102.


¹⁵⁰ Ibid., p. 57. See also Flemming, The Law of Torts, p. 32.
at law, and this is still a requirement of the law in England and Australia.\footnote{151} (Although in Australia, at any rate, there would not appear to be any binding judicial authority 'which lays down that damages are not available for the intentional infliction of purely mental distress.'\footnote{152})

One has not far to look in a search for the rational bases supporting earlier American (and the continuing Anglo-Australian) judicial tendencies to characterise mental pain and anguish as too vague and speculative for legal redress. Certainly, as mentioned above, part of the 'historic rationale for limiting tort claims to those resting on discernible physical injuries,' had to do with judicial concerns about the comparative ease with which 'emotional illness' could be feigned and the resultant potential for a multiplicity of perhaps spurious actions.\footnote{153} A larger and more determinative part of that rationale, however, seems to have involved society's general 'lack of confidence' in its capacity to evaluate the implications of emotional distress, 'apart from its physical manifestations'...\footnote{154} For if something could not be identified as a tangible, which is to say as a physical or psycho-physiological phenomenon, neither could it properly be regarded as real; and to attribute to such an unreal phenomenon the legal status of either cause or effect would be unacceptably irrational.

In the United States, judicial acceptance of 'parasitic' physical damages proved to be the entering wedge for the eventual recognition of outrageous conduct and

\footnote{151} So, too, in Canada and New Zealand. See Trindade and Cane, The Law of Torts in Australia, p. 68, n. 60. See also Fleming, The Law of Torts, p.32.

\footnote{152} Trindade and Cane, The Law of Torts in Australia, p. 69.

\footnote{153} White, Tort Law in America, p. 103. See also Prosser and Keeton, The Law of Torts, p. 56.

\footnote{154} White, Tort Law in America, p. 103.
the intentional infliction of emotional distress as the basis for a discrete cause of action, even in the absence of physical harm or injury. Responding to the changing expressions of a socio-culturally defined experiential reality, the courts ultimately came to acknowledge the real existence (and hence, the legal cognisability) of mental harm and the 'mental force' that might bring such harm about. In effect, the intentional infliction of emotional distress through outrageous conduct acquired its rational basis as an independent cause of action only when the courts finally conceded that 'there is no magic inherent in the name given to a tort, or in any arbitrary classification' in the law, and in so doing, recognised their further obligation to fulfil a principal purpose of the law by providing a remedy for a wrong which society now deemed deserving of redress.

Surely, then, one of the chief virtues of the common law tradition must be its capacity to respond to just such societal demands, and to do so on terms which accord with the relevant values and beliefs embraced by the society it serves. Indeed, as we shall see, it is arguably these very values and beliefs which effectively prescribe the applicable principles of justice upon which common-law decision making must ultimately be based. As we have already seen, different

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156 Ibid.

157 Ibid., p. 56.

158 Section 158(2) of the PNG Constitution provides: 'In interpreting the law the courts shall give paramount consideration to the dispensation of justice.' In 1978, John Goldring's prognosis, regarding the judicial interpretation of s. 158(2), was less than sanguine:

Given the background of the present judges, and those of the foreseeable future, in positive law, it is difficult to predict whether they will interpret the expression 'justice' as meaning anything more than the rules of the existing body of law, or at least that body of law as modified slightly by such expressions as 'justice, equity and good conscience', which has, at least, been given some positive content by colonial
iterations of socio-culturally appropriate jural values are bound to co-exist within the larger integument of the common law tradition. Thus, from time to time and from place to place, different principles of justice will inevitably emerge as courts endeavour to fashion remedial responses to the circumstances of the cases before them and in light of the regnant values which give legal meanings to those variable circumstances.

Naturally enough, the courts—which is to say, judges—demonstrate varying degrees of sensitivity, appreciation and understanding in respect of the socially determined bases upon which cognisable wrongdoing and appropriate remedial actions must rest. But that judges may be indeterminate, equivocal, ambivalent or even wrong-headed in this regard, reflects only the inevitable vagaries and frailties of human agency and the elusive complexities of changing socio-legal values. It says nothing about the nature or limitations of the common law tradition.

Chapter Seven

A REAPPRAISAL OF THE RELATIONSHIP BETWEEN LAW AND CUSTOM IN PAPUA NEW GUINEA

Concluding Considerations

We need... to conceive of the common law as a system of customary law, and recognize that such systems may embrace complex theoretical notions which both serve to explain and justify past practice... and provide a guide to future conduct.

[The traditional legal values, attitudes, beliefs and practices of the vast majority of the people of Papua New Guinea consist in the myriad, diverse and changing customs of the indigenous population. There is no 'larger' legal tradition or culture by which the customs and traditions of some 'other' people needs legitimately to be accommodated... Indeed, it is only the historical vestige of colonial fiat that places the dominant, albeit multi-faceted, legal culture of Papua New Guinea in the curious position of being 'outside' of, and persistently seeking entry into, its own legal home.

1. 'NEW DIRECTIONS' IN LEGAL THEORY AND THE ANTHROPOLOGY OF LAW

The advent of legal pluralism is well and truly upon us. For some, perhaps, this may signify little more than a recognition that two or more legal orders can, and often do, co-exist. For others, however, it is both a revelation and a mandate


warranting nothing short of a consummate reconceptualisation of the fundamental interrelations of law, culture and society. At all events, amongst a growing number of legal scholars and social scientists, it is generally acknowledged today that co-existing legal orders interact and evolve together, and in what has become very much a cross-disciplinary effort to identify coherent patterns of the distinctively legal in the complex interplay of human relations observable in all societies, the plurality, multiplicity and inherent multiplexity of law are coming to be regarded as empirical and theoretical facts of life.

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7 As Professor Tay observes, the expression 'legal pluralism' has become something of a 'hurrah-word' to which reference is frequently confused and imprecise. Most broadly, she notes, the phrase simply reminds us that there are many and different legal systems, legal arrangements, legal customs and legal "cultures" in the world, and that they may and do conflict with each other. A.E.-S. Tay, 'China and Legal Pluralism,' in *Legal Pluralism—Proceedings of the Canberra Law Workshop VII*, P.G. Sack and E. Minchin, eds. (Canberra: Law Department, Research School of Social Sciences, Australian National University, 1986), p. 29. Starr and Collier endorse what they see as a rejection of the term, because they believe it implies a sense of 'equality' in the arrangement of relations amongst different legal orders which belies the actual (and, in their view, invariably) hierarchical status of those relations. Legal pluralism, they argue: 'misrepresent[s] the
Accordingly, where the focus of theoretical concerns with the relationship between different forms of jural organisation and action once centred more or less exclusively upon the characteristic features that were seen to set those forms apart from one another, analytical interests are now shifting to concentrate more intensively upon the complex interconnections that link them together; and where the operations of discrete legal orders have been heuristically divorced from the contextual networks of socio-political relations in which they are inextricably embedded, those operations are coming to be understood more clearly as forming inseparable parts of the environments in which they occur. Contemporary representations of law in culture and society are thus beginning to provide a substantially expanded vision of an effectively integrated jural field; a vision in which the threads of demonstrable continuity, intricately weaving nominally legal phenomena into the fabric of a much broader array of integumentary social asymmetrical power relations that inhere in the coexistence of multiple legal orders. Various legal systems may coexist, as occurs in many colonial and postcolonial states, but the legal orders are hardly equal.' Starr and Collier, 'Dialogues in Legal Anthropology,' p. 9.

Professor Tay's broad and relatively uncontroversial definition adequately captures the more generally accepted meaning of the term 'legal pluralism'. Therefore, unless the context indicates otherwise, my own use of the expression here is intended to convey this general meaning. By the same token, Peter Sack offers what I regard to be a 'better' definition:

Legal pluralism is more than the acceptance of a plurality of law; it sees this plurality as a positive force to be utilised—and controlled—rather than eliminated. Legal pluralism thus involves an ideological commitment. However, this commitment takes the form of an opposition to monism, dualism and any other form of dogmatism instead of prescribing a certain, positive course of action [P.G. Sack, 'Legal Pluralism: Introductory Comments,' in Sack and Minchin, Legal Pluralism, p. 1].

To be sure, Sack's definition of 'legal pluralism' is narrower and, therefore, more precise than Tay's. More importantly, however, it embraces a distinct set of political sentiments that are quite different to those which Starr and Collier suggest the term necessarily imports—and to which I also happen to be quite sympathetic.
processes, have captured the keen attention of jurists, legal anthropologists and sociologists of law.\(^8\)

In their earnest efforts to construct tenable models of socio-legal affairs, responsible scholars endeavour to portray a sense of the dynamic arrangement of integral relationships, the nature of which is revealed in forms far more indicative of the kinetic inner workings of a kaleidoscope than the static display of a mosaic. In turn, meaningful concepts of legal rules, principles and processes are beginning to assume a more flexible, multidimensional character that is capable of accommodating the vicissitudes of an implicit indeterminacy in jural realities.\(^7\) Meaningful concepts of law are beginning to be understood and represented as continua 'rather than a discrete series of ideal types, models or paradigms.'\(^9\) Part and parcel of this seeming renaissance in the socio-legal sciences, however, provocative and disturbing questions are being raised from within the relevant disciplines which pointedly challenge the basic premises underlying virtually every aspect of their collective analytical pursuit. In a sustained self-scrutiny, reflexive critiques of conventional law and society research are laying bare the fibres of political value, moral purpose, ideological motive and the presumptive epistemological 'truths' which support the commitment to objectivity in contemporary scholarship.

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Today, as we approach what has been described as a critical 'experimental moment' in the vast plenum of the entire Western intellectual enterprise,\(^\text{10}\) the very authenticity of phenomenological reality becomes an object of poignant, searching doubt. The present, we are told, is a time for the wholesale reassessment of dominant ideas across the entire range of the human sciences, 'extending to law, art, architecture, philosophy, literature, and even the natural sciences.'\(^\text{11}\) And it is not simply conventional 'ideas' that are being subjected to this relentless process of radical deconstruction; equally under threat are the paradigmatic styles in which those ideas have for so long been unquestioningly presented. Although the ramifications of such revision are certain to be more salient in some disciplines than in others, their effects are pervasive.\(^\text{12}\)

Naturally enough, it is within '[t]hose fields most closely tied in their concerns to describing and explaining social phenomena' that some of the strongest internal challenges to reigning paradigms are being exhibited.\(^\text{13}\) Predictably, modern law and society scholarship is in full ferment, and for socio-legal theorists in particular these are heady, unsettling and, some would say, even 'dangerous' times.\(^\text{14}\) So it


\(^{11}\) Ibid., p. 7.

\(^{12}\) Ibid., pp. 7, 152ff.

\(^{13}\) Ibid., p. 15.

\(^{14}\) For example, Susan Silbey and Austin Sarat 'worry' about the fact—

that too much recent social theory and criticism, theory and criticism to which [they] are quite sympathetic, goes too far in leading, against its better instincts, to a dangerous reductionism. ['Critical Traditions in Law and Society Research,' *Law & Society Review*, vol. 21, no. 1 (1987), p. 167].

See also L. Nader, 'Post-Interpretive Anthropology,' *Anthropological Quarterly*, vol. 61, no. 4 (October 1988), pp. 149-159.
is, and so it must be, since it could hardly have been expected that this inexorable movement towards a pluralistically orientated reconstruction of fundamental socio-legal\textsuperscript{15} and legal-anthropological\textsuperscript{16} concepts could have proceeded so far as it has in the absence of controversy and dissent or, indeed, without its occasional excesses. Nor is it likely that such progress as it may yet make will not be similarly confounded.

And yet, there are good reasons to be more sanguine about matters. For in much of what on the surface appears to be iconoclastic deconstruction—in jurisprudence, no less so than in the social sciences—there are, in fact, palpable indications of a vibrant reconstructive spirit.\textsuperscript{17} All polemic may not be good scholarship, but all good scholarship is invariably polemic;\textsuperscript{18} and to the extent that novel propositions may be regarded as the harbingers of inchoate sedition, innovation is bound to invite resistance.\textsuperscript{19} If nothing else, however, a round


\textsuperscript{19} See Nader, 'Post-Interpretive Anthropology,' \textit{Anthropological Quarterly}, vol. 61, no. 4 (October 1988), pp. 149-159; O.M. Fiss, 'The Law Regained,' \textit{Cornell Law Review}, vol. 74, no. 2
knowledge of the law teaches that a good many of today's novel propositions are likely to become tomorrow's conventions.

Given the present volatility in the socio-legal sciences, it would be difficult to imagine a more propitious moment to embark upon a fundamental reappraisal of the manner in which the conceptual relationship between law and custom in societies like those of Papua New Guinea is understood and represented. And whilst that is precisely what I have set about to do here (at least in a preliminary way), it would be disingenuous if I were to suggest that mine is a project deserving of a 'post-modernist' imprimatur. What I have in mind is rather more modest and remarkably unsubversive. By the same token, because there has always been a critical edge to the meaningful study of law, culture and social change, today's responsibly conscientious and decidedly critical inquiries can, indeed, must be accommodated within that scholarly tradition, rather than being placed—or placing themselves—outside of it. Notwithstanding the tumultuous cut and thrust attending a veritable revolution in the human sciences, the present 'critical' turn of events serves, I think, rather to confirm than to undermine the strength and vitality of a venerable tradition in socio-legal theory.

The point deserves reiteration. Legal theory—and an eminently 'critical' strain of legal theory at that—has been around for a very long time. Arguably, many of its lasting contributions to our understanding of the place of law in culture and society have come less from discovery or invention than from its elucidation of the familiar and its clarifying reinterpretations of what is already

known (albeit less well understood). But these are no mean achievements, even if the important insights they offer are significantly 'new' only by virtue of their being newly recognised as significant. It was, in fact, a very wide set of concerns that occupied the precursors of contemporary socio-legal theory, and it is an even wider set of concerns that provides the foundation for such theoretical inquiry today. In that sense, 'modern' (or, if you will, 'post-modern') legal scholars and anthropologists of law share a common patrimony. And it is upon that basis, too, that the pursuit of a pluralistic approach to socio-legal inquiry is wholly in keeping with a continuing and genuinely critical tradition. For those who seek to preserve the critical edge in that tradition, the task today is 'to reconstitute and re-imagine the subject of socio-legal research.'

Legal scholars and anthropologists concerned with the relationship between law and custom in Papua New Guinea realise that legal institutions, processes and phenomena simply 'cannot be understood without seeing the entire social environment.' But that is only to take the first step towards the critical reconstitution and re-imagination of the subject-matter. Further inquiry must be

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directed towards the development and refinement of understandings concerning the relationship between legal institutions, processes and phenomena, on the one hand, and the environments in which they are observed to exist and operate, on the other. And beyond that, there must also be an attempt to explicate the dynamics of the interrelationships between various legal institutions, processes and phenomena as these may be seen to occur even within a single social environment. Both sorts of inquiry are important. In the latter pursuit, however, it seems to me that legal scholars have borne an especial responsibility which, perhaps, ought to be shared more equitably amongst all of those participating in the pluralistically orientated investigation of the relationship between law and custom.

William Twining observed that it has been the peculiar task of the legal scholar to venture forth from the law in order to 'garner what one or more neighbouring disciplines have to offer respecting questions of a general nature that have been thrown up in legal contexts.' It is the 'academic lawyer' who is expected 'to bring back the ideas, techniques, and insights of that other discipline and to integrate or assimilate them into the intellectual milieu of the law.' That this is a duty which legal scholars may not always have discharged well or often enough is a point well taken. But that such a responsibility exists, and that it should logically fall upon the lawyers' shoulders to act pro bono publico, as it were, in the pursuit and application of legal scholarship, cannot be denied. Moreover, to the extent that this tacit obligation to apply legal knowledge in pragmatic, 'problem solving' exercises is a characteristic feature of what has come

to be known (somewhat disparagingly in certain circles) as 'law and development' scholarship, I think it is rather an honourable charge than a professional vice. 27

Now, insofar as the development of a sound jurisprudential perspective on the relationship between law and custom in Papua New Guinea is concerned, that 'other discipline' has long been and will doubtless remain social anthropology (and more specifically, perhaps, the sub-discipline of legal ethnography). To be sure, what legal scholars return with from their forays into that domain has not always fitted neatly or comfortably into existing theoretical perspectives. 28 Nevertheless, when it does occur, the assimilation of anthropologically informed pluralist principles into the conventional frameworks and institutionalised methodologies of legal theory—and, just as importantly, those of modern legal practice—is a singularly salutary event; not only because aspects of an anthropologically informed pluralist thesis may forthrightly challenge the complacency into which certain strains of theoretical ideation in the law may periodically descend, but because many of the substantive contributions such insights make possible are already beginning to prove their value as instructive complements to both the theoretical and the practical tasks of the law. 29


In its theoretical and practical expressions alike, contemporary jurisprudence has measurably benefited from the 'new directions' in which it has been guided by social anthropology—and in an age during which 'multi-culturalism' is becoming less the politician's catch-phrase and more of a socio-demographic reality, it is certain to continue to do so. What I am urging here is that the corollary development of a more cogent legal ethnography and anthropology of law, particularly in regard to considerations of the relationship between law and custom in Papua New Guinea, also stands to profit by looking (again) to jurisprudence and legal theory for its own conceptual supplementation. As it happens, we have come a long way from Austin, Maine and even Hart.

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2. LAW AND SOCIAL CHANGE IN PAPUA NEW GUINEA: THEMATIC CONSTANTS IN ETHNOJURISPRUDENCE

In a logical extension of the movement towards an enhanced appreciation of the 'integral plurality' of socio-legal forms, the distinctive valences of law and custom in so-called primitive or traditional societies are coming to be seen in a new and different light. What were previously characterised as the unique features and especial domains of law and custom, respectively, are thus coming to be understood today as implicitly interfused and constantly shifting, both in relation to one another and in remarkably varied patterns of response to an enormous range of perpetually changing contextual circumstances. In part, the emergence of a pluralist perspective on the interaction of law and custom may be seen as reflecting a more generalised reassessment of the embracing conceptual relationship between 'tradition' and 'modernity', and the processes of syncretic socio-cultural change that have been identified as crucial in the evolution of that relationship. Current discussions about the authenticity of 'invented traditions' have had serious implications for the ways in which historians, anthropologists and social theorists generally interpret, and thereby give meaning to, a whole host

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32 Fitzpatrick, 'Law and Societies,' p. 115.


of changing attitudes, values and beliefs in a variety of cultures and societies.\textsuperscript{35} Not surprisingly, these same debates have had a pronounced influence on the ways in which a growing number of socio-legal scholars have come to characterise and construe the processes of cultural change, both in relation to the peculiarly jural understandings and experiences shared amongst the members of particular societies, and in relation also to the ways in which those understandings and experiences are interpreted by outsiders.\textsuperscript{36}

In large part, however, the impetus behind contemporary efforts to reformulate a jurisprudential understanding of the relationship between law and custom in cultures and societies like those of Papua New Guinea has come rather more directly from the products of conventional social anthropology. Legal ethnographers, whose first-hand perspectives put them in particularly close touch with the experiential realities of changing socio-legal relations, are regularly monitoring and logging a rapid erosion of the boundaries by which the 'semi-


autonomous' fields\textsuperscript{37} of law and custom were once described with an air of relatively confident sufficiency.\textsuperscript{38} What their current research unequivocally demonstrates is that the analytical lines which have heretofore divided both popular and scholarly conceptions of modern Western law and the jural parameters of traditional Melanesian custom may be seen today as decisively fixed only insofar as they are described exclusively by reference to the most formalistic criteria of difference. In virtually all other respects, these boundaries, which even as initially posited were recognised as flexible and permeable, are now beginning to blur almost beyond recognition.

In Papua New Guinea, as in other countries throughout the post-colonial world, syncretic interactions involving a blending of 'indigenous' and 'introduced' social forms are rendering inadequate many of the conventional criteria by which the concepts and phenomena of law and custom were once clearly distinguished. Today, the sheer pace and pervasive extent of change in socio-legal relations in Melanesian cultures and societies effectively nullify much of the contrastive utility previously ascribed to the convenient and simple dichotomisation of 'traditional' custom and 'modern' law.\textsuperscript{39}

Undeniably, social anthropologists were amongst the first to recognise that in Papua New Guinea, as elsewhere, there is arguably 'no such thing as modern or traditional law,' but rather that 'there are many and not only two forms of law, and


that they do not only differ from society to society and from culture to culture, but that different forms exist in each of them.\textsuperscript{40} And it is still primarily the work-product of legal ethnography which provides the mainstay of empirical support for the proposition that the sharp, facile distinction between modern law and traditional custom—like that between modern and traditional society—is a construct of diminishing theoretical value which can no longer be regarded as apposite to the pluralistic complexities of changing socio-political relations.

Following on from this ethnographically heightened sensitivity to the nuances and vicissitudes of change, a growing sense of urgency has been brought to bear upon the development of other analytical considerations concerned with these same transformational processes, but which focus upon a rather more narrowly defined range of their particular implications.\textsuperscript{41} With particular respect to Papua New Guinea, this sense of urgency is reflected in the ongoing debates about political development and progressive socio-legal change; debates in which a

\textsuperscript{40} Sack, 'Modern versus Traditional Legal Systems,' p. 1.

number of crucial issues having to do with the relationship between law and custom are centrally featured. 42

For obvious reasons, concepts of law and custom in 'traditional' and changing Melanesian societies are intrinsically interesting to Western scholars. To anthropologists, the jural qualities and functions of 'native custom' in Papua New Guinea have always been matters of especial theoretical importance. 43 With the encroachments of expanding white settlement and increased inter-racial contact during the late-nineteenth and throughout much of the twentieth centuries, those ethnographic interests have been expanded concomitantly to include questions germane to the relationship between indigenous jural custom and the exogenously introduced orders of Western social organisation, regulation and control. Historians, too, have long regarded the relationship between law and custom in Papua New Guinea as a crucial element in their analyses of inter-cultural relations 44 and, for their part, political scientists, sociologists and political economists have likewise devoted a substantial proportion of their own descriptive and analytical energies to the peculiarly legal aspects of relations between indigenous Melanesian groups and the various emanations of the colonial and

42 See D. Weisbrot, A. Paliwala and A. Sawyerr, eds., Law and Social Change in Papua New Guinea (Sydney: Butterworths, 1982).


post-colonial state.⁴⁵ Although academic lawyers in Papua New Guinea have been involved with many of the administrative and policy-making activities of colonial and post-colonial governments for quite some time, and whilst these involvements have necessarily included close considerations of the relationship between law and custom, legal scholars, as such, have come to develop a formal jurisprudential interest in these matters only rather late in the game.

For many of these scholars, the intellectual allure in studies of the relationship between law and custom in Papua New Guinea has always derived from something other than (or at any rate, in addition to) the inherent capacity of the subject matter to provide an exotic and richly interesting topic for theoretical analysis and discussion. Recognising the palpable salience of questions revolving around the historical juxtaposition of Western law and Melanesian custom, and sensing from their unique perspectives the urgency of the problems which those questions throw into sharp relief, academic lawyers and legal ethnographers have displayed a particularly acute (and arguably natural) interest in the practical implications of these issues.⁴⁶

Today, the debate about the relationship between law and custom in Papua New Guinea is at the core of a decidedly politicised discourse, the practical


urgency of which is spelt out graphically in the terms of the Constitution, in the actions of the Parliament and the courts, and in the jural affairs of day to day existence which increasingly press themselves upon the lives of ordinary people.\textsuperscript{47} Thus, even at a time when Papua New Guinea's political, economic and legal problems appear to mimic the fungible crises of any other Third World country; even \textit{in a year} described by scholars, policy-makers and journalists alike as involving some of the most serious difficulties and gravest dangers yet to be faced by Papua New Guineans in their fifteen years as citizens of an independent state,\textsuperscript{48} thoughtful and contentious debates about the relationship between law and custom are at least as timely, topical and important as they have ever been. Probably more so. And whilst some may express surprise at the persistence of these debates,\textsuperscript{49} others cogently argue that their resolution \textit{vel non} may well prove to be determinative of Papua New Guinea's continued viability as a nation.\textsuperscript{50}


Over a period of decades, the debate about the relationship between law and custom in Papua New Guinea has involved issues to which an extraordinary measure of ethnographic and otherwise anthropologically informed attention has been devoted. Many of the resultant analyses offer their own theoretical explanations of the nature and dynamics of that relationship. Some go on to prescribe, in more or less explicit terms, the practical bases upon which particular policy-orientated actions might be—or, perhaps, ought to have been—taken, in order that the course of the development of that relationship should be altered in one way or another. Few relevant aspects of legislative and judicial policy respecting the relationship between concepts and practices of 'modern' law and 'traditional' custom in Papua New Guinea have escaped some kind of critical, scholarly scrutiny. And in the years since the achievement of independence, the government itself has directed a good deal of its time and resources to research

51 References to such considerations are legion. See, e.g., the numerous entries contained in two comprehensive bibliographies published by the Australian National University (Department of Law, Research School of Social Sciences), C. O'Sullivan, Tradition and Law in Papua New Guinea (Canberra 1986); M. Potter, Traditional Law in Papua New Guinea (Canberra 1973). See also the relevant listings in Pacific Law Bibliography, comp. J.D. Elliott (London: Legal Division, Commonwealth Legal Secretariat and Commonwealth Legal Education Association, 1983).

52 See, e.g., D. Weisbrot, A. Paliwala and A. Sawyerr, eds., Law and Social Change in Papua New Guinea (Sydney: Butterworths, 1982); B.J. Brown, ed., Fashion of Law in New Guinea (Sydney: Butterworths, 1969). Criticising some of the failures in the attempt effect a practical reconciliation of law and custom in Papua New Guinea, David Weisbrot enumerates several areas in which that attempt has been made (prior to and since independence), and with respect to which there has, in fact, been some measure of success. D. Weisbrot, 'The Post-Independence Development of Papua New Guinea's Legal Institutions,' Melanesian Law Journal, vol. 15 (1987), pp. 9, 43-48.

expressly concerned with the ways and means by which that relationship might be reconciled more efficiently and with greater fidelity to Melanesian perceptions of jural propriety.\textsuperscript{54}

Clearly, the relationship between law and custom in Papua New Guinea has never been a matter of either scholarly or administrative indifference. Yet in both a theoretical and practical sense, the debates engendered by a recognition of the importance of that relationship, and the urgency of the problems to which it has given rise, remain largely 'academic' and effectively unresolved. Moreover, and with very few exceptions,\textsuperscript{55} the conventional anthropological and socio-legal wisdom informing those debates continues to hold, as it has all along, that the basic underlying issues themselves are intrinsically irresolvable.

The preliminary question addressed in this chapter has to do with some of the reasons why the 'problem' of the relationship between law and custom in Papua New Guinea remains so fundamentally intractable; and the preliminary answer to that question would seem to be, simply, that the fundamental premise supporting virtually every major proposition concerning the nature of that relationship implicitly assumes that the jural concepts and cognate regimes broadly instantiated in the notions of law and custom, respectively, are theoretically antagonistic and functionally incompatible. However, it is not as if the evidence


and arguments upon which this premise is based have been presented with anything approaching theoretical univocality. Indeed, the assumptions supporting the view that law and custom in Papua New Guinea are irreconcilably polarised have been variously described—by social anthropologists, legal historians, colonial administrators, political policy-makers, dependency and modernisation theorists, imperial apologists, Marxists, neo-Marxists, anti-Marxists and many others. Approaching a general contemplation of the relationship between law and custom from so wide a range of frequently conflicting perspectives, it would be most unlikely that many of those representing such disparate intellectual and ideological camps would be inclined to agree upon much of anything—anything, apparently, other than this one fundamental conviction which they all seem to share in common.

Considering the extraordinary variety of thematic contexts in which discussions of the relationship between law and custom in Papua New Guinea have been framed, and given the sometimes radical differences between the purposes for which those discussions have been entered into, this level of unanimity on so significant a point is quite remarkable indeed. Still, regardless of the ways in which the terms 'law' and 'custom' may be defined, and irrespective of the personal beliefs, intellectual predilections, political predispositions or ideological orientations which may colour their variable characterisation, virtually every participant in the debates about the relationship between law and custom in Papua New Guinea assumes, right from the start, that the relationship itself encapsulates fundamentally antinomic concepts, inimical phenomena and wholly incongruous processes and institutions.

'Right from the start,' however, the debates about the relationship between law and custom in Papua New Guinea were, and still are, 'dominated by preconceived
notions about law, history and the state and the inner logic of theories (and institutions) based on those notions. In the light of newly refined pluralist understandings which today broadly elucidate the interactive, integral relationship of all manner of socio-legal forms, these, perhaps, are the very notions which most require a thoroughgoing re-examination, reappraisal and reformulation. And it is the principal argument of this chapter that the fundamental assumptions underlying the virtually uncontested proposition that the relationship between law and custom is properly conceptualised only as a categorical contraposition, are fundamentally misconceived.

In what follows, I shall attempt, firstly, to outline the analytical bases in which the conventional debates about law and custom in Papua New Guinea continue to be anchored; secondly, to identify those areas in which much of that discourse appears to be wide of the mark; and finally, to suggest an alternative perspective from which the present and prospective circumstances of the relationship between law and custom might be reconceptualised in a way that captures the theoretical dynamics of interactive, syncretic legal change more adequately, and in a way which may also permit a more constructive approach to some of the enduring, practical problems involved in the integration of law and custom in Papua New Guinea.

There is one point, however, about which I should like to be quite clear at the outset. My concern about the analytical validity of the dominant paradigmatic formulations of the relationship between law and custom reflects my doubts about the underlying validity of some of the assumptions upon which those formulations tend to be based. The assumptions which I find particularly suspect, however,

56 P. Sack, 'Law, Custom and Good Government,' p. 3.
involve certain conceptions of 'modern Western law' rather than the associated conceptions of 'traditional Melanesian custom' with which the law is seen to interact. Thus, my criticisms here are directed not so much towards the processes or products of the ethnography of Melanesian custom, as towards the seemingly unexamined assumptions about the nature and dynamics of Western law which inform prevalent anthropological formulations of the relationship between law and custom in Papua New Guinea today.

3. 'MODERN LAW' AND 'TRADITIONAL CUSTOM': INDETERMINACY IN SOCIO-LEGAL RELATIONS

It is a commonplace in socio-legal and anthropological literature that the circumstances of jural relations in Papua New Guinea should be characterised as fairly beset by the historically troublesome co-existence of a multiplicity of diverse legal orders. In many ways, the situation does represent a veritable archetype of the legally plural field. Even the primal base of indigenous Melanesian socio-political organisation consisted in countless autonomous regimes, each of which provided its own essentially discrete and localised system of customary normative order and social control. Into these disparate arrangements, and over the course of little more than a century, a succession of European interlopers have imported a patchwork of alien forms of reglementation—initially through a shallow dispersion of 'theocratic' systems administered under the more or less charismatic aegis of Protestant and Catholic missionaries; followed by the introduction of a discrepant sequence of unevenly

penetrative secular arrangements designed to service the entrepreneurial interests of proto-colonial settlers; and finally, through the more classically colonial imposition of Anglo-Australian statutory and common law. All of this has tended to be seen as conducing to the inexorable subsumption of 'traditional' forms of popular jural custom in the 'tidal wave' of colonisation. With independence, in 1975, came an 'official' (i.e., constitutional) adoption of much of the introduced law along with a concomitant, albeit ambiguous, adoption of indigenous custom, and to this there has since been added the nominally autochthonous products of Papua New Guinea's own national and provincial

[Content from text follows]

58 See, Reed, The Making of Modern New Guinea


legislatures and courts. From the beginning, this inherently volatile admixture of socio-legal forms has been further complicated by the recurrent generation of the plural field's own syncretic, jural by-product: that eclectic, enigmatically protean and emotive conglomeration of jural attitudes, beliefs and practices variously labelled 'native custom', 'customary law' or 'traditional law', nowadays frequently included within the broader rubric of 'custom' simpliciter.

Amongst the mostly European and North American scholars who, along with a number of Melanesian politicians, have been primarily responsible for the contemporary proliferation of these last mentioned expressions, there is little in the way of agreement upon the precise meaning or encompassment of the terms. In a way, however, it would be surprising if there were. The empirical manifestations of even the most general notions of jural 'custom' in Papua New Guinea have yet to be fully or definitively articulated (arguably, it is unlikely that they ever could be) and their conceptual dimensions are certainly far from being clearly, to say nothing of fully, understood. In these indeterminate circumstances, as one legal ethnographer quite properly insists, it is only through the circumspect employment of historically informed, syncretistically attuned interactional approaches to the study of changing jural relations in Papua New Guinea that the 'dynamic qualities of legally plural situations' may ever be apprehended adequately; or, indeed, that even a preliminary understanding of the complex relationship between law and custom might be achieved.

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Corroborating this view, another field-seasoned legal anthropologist observes that the examination of even the most localised instances of 'conflict management' in Papua New Guinea can no longer be regarded as a valid anthropological undertaking in the absence of clear and explicit 'reference to the broader social milieu of which it is part'.

In situations of legal pluralism, the relationship between the local community and the state is of more central importance, and must be examined in the colonial and postcolonial context in which it developed.

Manifestly, then, what social anthropologists and other socio-legal theorists are coming to recognise and accept about emergent forms of contemporary jural understandings and experience in Melanesian societies, and what their research repeatedly and often dramatically demonstrates, is that in Papua New Guinea, as elsewhere:

- law is formulated in a socio-political context;
- it serves some interests rather than others;
- different social structures or forms of societal organisation display different forms of law and legal systems, and
- a combination of coercive and ideological processes are at work to ensure the continuation of existing systems of law and through these the perpetuation of existing social structures.

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65 Ibid.
Underpinning these propositions is a growing body of ethnographic and related empirical evidence indicating that 'the existence of one structural influence does not necessarily mean the exclusion of all others'. And with respect to the integral relationship between the introduced (*cum* adopted) law of the state and one or another of the various notions of 'traditional' Melanesian custom, it is becoming increasingly clear that 'the dominance of particular structural forms...does not deny the influence of existing or "subordinate" forms, *even though it may appear to do so.* Gradually, the appearance of the dominance of 'modern' state law (colonial and post-colonial) over pre-existing forms of 'traditional' custom is beginning to give way to a more sophisticated understanding of the complex processes of syncretic interaction, and it is towards those processes that social anthropologists and legal scholars are beginning to direct more of their critical attention.

The recognition of this highly problematic indeterminacy in contemporary Melanesian socio-legal relations casts doubt upon any conclusive propositions concerning the relationship between law and custom in Papua New Guinea today.

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67 Ibid., p. 9 (emphasis supplied).

But in the absence of much else about which one may be certain in the face of this changeable and interdigitated state jural affairs, one thing seems clear: efforts to analyse the central features of those affairs, and attempts to portray the general nature of the relationship between law and custom in particular, can no longer admit of explanatory or even descriptive models formulated along simplistic, bipolar lines. Heuristic constructs intended to differentiate 'modern' legal ideas from 'traditional' ones on sharply decisive bases, or to distinguish in similar terms between nominally 'endogenous' and 'exogenous' factors in the organisation of complex belief systems informing conceptualisations of law and custom, must be abandoned as inadequate and inappropriate to the complexity of the situation.

And yet, in perhaps the most fundamental sense, socio-legal scholars and legal anthropologists still tend to characterise the relationship between law and custom in Papua New Guinea in just such dualistic formulations. Implicitly—and often as not, quite explicitly—the relationship between law and custom in Papua New Guinea is represented today in much the same way as it has been right from the start, and almost always in some variant of the classic, dichotomous model of the state versus stateless societies. Essentially, the concepts and phenomena of law and custom in Papua New Guinea continue to be constructed as 'two radically divergent—indeed, diametrically opposed—systems . . .; each with its own highly idiosyncratic processes of social control geared to operate within it and meet its peculiar needs.' It is this model of dualistic opposition that is replicated, time and again and in a variety of sophisticated permutations, seemingly whenever the relationship between law and custom is ethnographically described in situ, or its

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70 Ibid., pp. 15, 16.
elements are analysed comparatively from either an ethnographic or an ethnographically informed socio-legal perspective. In so many of what are otherwise keenly insightful considerations of contemporary jural relations in Papua New Guinea, it is this kind of dichotomy that is almost invariably advanced as a theoretically axiomatic premise; and it is this constructive polarity that is introduced or insinuated into all manner of discussions in which the concepts and phenomena of law and custom are assumed, ipso facto, to be intrinsically and irreconcilably antagonistic.

4. IDIOMS OF DIFFERENCE:  
THE DICHOTOMISATION OF LAW AND CUSTOM

Various renderings of the conceptual dichotomy between law and custom in Papua New Guinea extend well beyond the realm of conventional ethnographic and anthropological exposition. Their influence today is as readily apparent in some of the most self-consciously 'critical' discourses on law, history and political economy in Papua New Guinea as it is in the less (or less overtly) politicised literatures of the social sciences. Irrespective of the discursive context in which it may occur, however, the representation of law and custom as theoretical and functional opposites is, I submit, a fundamentally flawed construct.

There are a number of grounds upon which the uncritical employment of dichotomous models of law and custom can be questioned. Some of these reflect broader considerations of the relationship between the concepts of tradition and modernity per se, and have already formed the bases of thoughtful challenges to the analytical validity of the general dichotomy between 'modern' and 'traditional' law.71 Others, like those with which I am specifically concerned here, are more

71 See, e.g., Chiba, Legal Pluralism; Kulcsar, Modernization and Law.
directly related to applications of that kind of conceptual polarisation to the distinctive socio-legal circumstances prevailing in contemporary Melanesian contexts. Thus, for example, it has been argued that contraposing Western and Melanesian jural systems as *culturally incompatible approaches to common problems of social control* implicitly involves the projection of certain assumptions about the centrality of 'social control' in the jural organisation and operations of Melanesian societies. Such assumptions may not, in every case, be wholly unjustifiable. However, within certain Melanesian cultures and societies whose members 'do not define "society" as the regulation of "individual behaviour", assumptions about social order and control may underestimate the direction of indigenous interests.

In a more generally theoretical sense, it has also been argued that, with respect to any given society, the characterisation of jural arrangements as a 'system' or 'systems' of law (or custom, as the case may be) similarly assumes too much in its universalist postulations regarding the essential nature of socio-legal organisation. Indeed, there may be far less evidence than we have been given to believe exists in

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73 M. Strathern, 'Discovering "Social Control",' *Journal of Law and Society*, vol. 12, no. 2 (Summer 1985), pp. 111-134.

74 Strathern, 'Discovering "Social Control",' pp. 113-114. This, in turn, Strathern points out, 'may also lead to misunderstandings about the impact of introduced judicial procedures and the nature of local dispute settlement alike' [p. 114]. See also idem, 'Self-Regulation: An Interpretation of Peter Lawrence's Writings on Social Control in Papua New Guinea,' *Oceania*, vol. 59, no. 1 (September 1988), pp. 3-6; 'The Persuasive Fictions of Anthropology,' *Current Anthropology*, vol. 28, no. 3 (June 1987), pp. 251-281; *Official and Unofficial Courts: Legal Assumptions and Expectations in a Highlands Community*, New Guinea Research Bulletin No. 47 (Port Moresby and Canberra: New Guinea Research Unit, The Australian National University, 1972); 'Legality or Legitimacy: Hageners' Perception of the Judicial System,' *Melanesian Law Journal*, vol. 1, no. 2 (1971), pp. 5-27.
support of the view that demonstrably 'systematic' qualities are inherent in the operative patterns of non-Western and Western legal orders alike.\(^{75}\)

In the light of the dramatic changes which have so radically altered the composition of a whole range of 'traditional' Melanesian beliefs and values (jural and otherwise), and in view of the pace at which such changes continue to occur, it might further be argued that dichotomous models constructed to represent the complex interactions of law and custom in Papua New Guinea today are simply obsolete; that they have, in effect, outlived whatever descriptive or explanatory utility they may once have provided in relation to earlier, less complicated times. No doubt, compelling and persuasive arguments could be made along these lines as well.

My particular quarrel with the dichotomous model of the relationship between law and custom in Papua New Guinea, however, proceeds on a rather more fundamental basis, in that it is directed squarely at the underlying validity of such dichotomous formulations and at the enduring force of the bi-polar analytical paradigm upon which those formulations invariably rely. It is my contention, therefore, that by organising the constructs of law and custom in the way that it does, the dichotomous model of law and custom in Papua New Guinea—like that of the 'state versus stateless societies'—is not only descriptively passé but, as a theoretical premise, it may never have been apposite.

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5. 'FALSE DICHOTOMIES' AND 'DOUBLE STANDARDS':
CONVENTIONAL REPRESENTATIONS OF THE RELATIONSHIP
BETWEEN LAW AND CUSTOM

Whilst it is a frank rejection of the fundamental premises upon which conventionally accepted formulations of the relationship between law and custom in Papua New Guinea have long been based that I am urging here, there are two important respects in which the argument I intend to present requires qualification. First of all, let me say that it is not my intention to supplant the orthodoxy of dichotomous paradigms with an alternative model or theory, as such. Rather, my objective is only to suggest an alternative perspective from which the relationship between law and custom might be critically re-appraised. The terms upon which I would conduct that reappraisal, however, are necessarily quite different to those in accordance with which conventional formulations are almost invariably constructed.

Secondly, I do not at all mean to suggest or imply that there were not, and are not now, real and significant differences between Melanesian and Western cultures and societies, or that these palpable differences are not reflected in the legal cultures and legal systems of the respective societies. To whatever degree historical and ongoing processes of syncretic interaction may have altered or attenuated their original dimensions, it is clear that such differences most certainly continue to exist, mutatis mutandis, in a variety of areas; and with respect to the ways in which jural realities are understood and experienced by Papua New Guineans today, I dare say many of these differences remain determinatively significant. Moreover, I do not doubt for a moment that many of the conflicts and contradictions inherent in contemporary Melanesian belief systems and reflected in the day to day experience of contemporary Melanesian life are inextricably
bound up in fundamental and enduring discrepancies between Western and Melanesian cultures.

What I am suggesting is simply that, in certain cases, the bases upon which some of these seemingly determinative differences are said to exist may be substantially overdrawn. And in other cases, I believe that the identification of such differences as the sources or causes of jural conflicts, tensions and contradictions may, in fact, have a good deal more to do with the predisposing attitudes and values of those who insist upon their existence in such exaggerated forms than with real (and possibly imagined) features of inherent, irremediable difference between the respective cultures, per se. In comparing the nuances and subtleties of law and custom in the contemporary Melanesian context, the likelihood that differences of idiom may be taken to be differences of substance is at least as great as, and probably greater than, the possibility that apparent resemblances might be similarly misconstrued.\(^76\)

A. Legal Cultures and Legal Systems Distinguished

The concept of 'culture' has been reified as a text, externalised as a symbol and deployed as an instrumentality of political strategy.\(^77\) In many contexts today, the mere utterance of the term is polemical and liable, therefore, to provoke heated ideological debate. Yet in its more familiar anthropological sense, the term may still provide a useful reference to discernibly integrated patterns of human


knowledge, belief and behaviour shared generally amongst the members of a society, and dependent upon their capacity to learn and transmit that knowledge to succeeding generations.\textsuperscript{78}

As an epiphenomenal concept, 'legal culture' is equally problematic and here, too, definitional propositions bear the attendant risks of controversy.\textsuperscript{79} For present purposes, however, it will be sufficient to adopt a more familiar definition of that term as referring broadly to 'the network of values and attitudes relating to law . . . which determine[s] the place of the legal system in the culture of the society as a whole.'\textsuperscript{80} In a slightly more elaborate formulation, then, by 'legal culture' I mean here:

\begin{quote}
 a set of deeply rooted, historical conditioned attitudes about the nature of law, about the role of law in the society and polity, about the proper organisation and operation of a legal system.\textsuperscript{81}
\end{quote}

There are, of course, other definitions which might have been adopted. Except for 'minor differences in literal expression,' however, most of these tend to describe the concept in much the same way, referring comprehensively to the


\textsuperscript{80} L.M. Friedman, 'Legal Culture and Social Development,' \textit{Law & Society Review}, vol. 4, no. 1 (August 1969), p. 34.

'culturally characteristic values and attitudes related to law.' It is that sense of comprehensiveness that I am especially concerned to capture here.

A more important point to be stressed in relation to the definition of 'legal culture' adopted for use here, however, is the crucial distinction it implicitly draws between the concept of a 'legal culture' and that of a 'legal system'. For whilst the idea of a 'legal culture' clearly implies the existence of a relationship of some kind between it and its associated legal system(s)—a relationship that could normally be expected to exist at both the conceptual and phenomenological levels—the concepts and phenomena denoted by the two expressions are not meant to be regarded either as synonymous or interchangeable. In any analysis of the relationship between law and custom in Papua New Guinea, therefore, it is essential that the conceptual and phenomenological distinction between legal systems and legal cultures remain clear; and by employing the expression legal system here, I mean neither more nor less than the full panoply of operative mechanisms, processes and institutions by and through which any society may give expression and effect to the jural values shared amongst its members. From this proposition, however, it should not be inferred that there is anything necessarily or intrinsically systematic in the organisation, arrangement or operation of those mechanisms, processes and institutions.

Now presumably, a certain familiarity with the structure and functions of a particular legal system will reveal something about the legal culture of the society within which that system is seen to operate. But it does not necessarily follow that even a close empirical understanding of the operations of that legal system will provide anything like a complete or perfectly accurate representation of the

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82 Chiba, 'The Identity Postulate of a Legal Culture,' p. 86.
complex, interactive elements constituting the *legal culture* within which the system is embraced,\(^3\) not, at any rate, in the sense that one may safely draw clear, definitive conclusions about the fundamental nature of a *legal culture* solely on the basis of limited observations of the institutional or processual activities of its constituent *legal system(s)*. Indeed, as legal ethnographers know only too well, whilst the study of *legal systems* may provide a window which opens on the values, attitudes and beliefs constituting their underlying *legal cultures*, the glass in such a window is bound to be translucent rather than transparent. It is far more likely on that account to refract the images one perceives through it than to allow for an undistorted reception of what lies behind. All too often, it may do no more than reflect the images projected on to it by an observer.

In Papua New Guinea, where contemporary jural relations are necessarily observed and assessed in an amorphous social context of extraordinarily indeterminate fluidity, the difficulties and dangers associated with the task of describing and explaining the nature of the relationship between *legal systems* and *legal cultures* are compounded. Faithful description and circumspect analysis require that innumerable elusive nuances of inter-relational dynamics be meticulously teased out, as it were, from an immense diversity of indigenous customary orders, overlain with the historical imbrications of exogenously introduced forms of *law* and the resultant interfusion of ideas and phenomena born of the ongoing processes of syncretic interaction. Confronted with such a daunting indeterminacy in the conventional correlates of socio-legal analysis, it is logically incumbent upon empirical and theoretical scholars to introduce some heuristic means by which at least a semblance of analytical order might be

\(^3\) See A. Watson, *Society and Legal Change* (Edinburgh: Scottish Academic Press, 1977), p. 130: 'There does not exist a close, inherent, necessary relationship between existing rules of law and the society in which they operate.'
achieved. Recognising this, it would be foolish to deny that it is 'probably preferable' to analyse the complexly plural fields of Melanesian jural reality 'by way of some simple dichotomies.' In doing so, however, there are certain risks.

One of the more serious risks inherent in the erection of simple, heuristic dichotomies to facilitate an understanding of the distinction between legal systems and legal cultures in Papua New Guinea lies in their tendency to be mistaken for the real thing—or rather, in the propensity of those who employ such dichotomous formulations to reify these models, and thus to confuse an explanatory device for the objects it has been contrived to explain. On this score, Peter Sack offers an instructive caveat:

If an analytical line is drawn between primitive and Western law, it is drawn because they are regarded as two different phenomena. But, having drawn this line, it can easily happen that primitive law is at the same time regarded as...not 'law' but only 'custom'... Generally speaking, reality and the world of analytical concepts are two separate spheres, the latter reflecting and explaining the former. The world of analytical concepts cannot and will not be a perfect image of reality: it must follow its own rules. In order to understand reality it is necessary to use analytical concepts which have no counterparts in reality or which even contradict real phenomena.

In the comparative analysis of the relationship between law and custom in the contemporary Melanesian context, however, it is not enough simply to be aware of the fact that the analytical lines one may be obliged to draw are artificial. For to the extent that the critical distinction between legal systems and legal cultures is a significant consideration in the process of differentiating law and custom in Papua New Guinea, there are at least two further and related analytical hazards


85 Ibid., p. 8.
against which many legal anthropologists and academic lawyers alike have failed to guard. These are discussed below.

B. The 'False Dichotomisation' of Legal Systems and Legal Cultures

Simple dichotomies may well assist in the analysis of complex social realities. But even simple, carefully constructed analytical dichotomies can be false, and even the most cautiously conservative reliance on such false dichotomies will be misleading. Thus, in dealing with the relationship between law and custom in Papua New Guinea, where the apparent tensions and contradictions of jural plurality fairly invite a kind of dialectical analysis, the uncritical employment of dichotomous models of radical, diametric opposition imports the very real danger that ostensibly operative jural theses and antitheses will be wrongly identified and, as a result, falsely contraposcd. The consequential risk in this is that one may proceed quite innocently upon the basis of analytical premises that are not just inadequate but fundamentally inaccurate.

In portraying the relationship between law and custom generally, many scholars have shown a particular proclivity for dichotomous constructs in which the purportedly dialectical relationship between law and custom is represented in models that contrapose the legal culture(s) of one type of society occupying the plural field, and the legal system(s) of another type of society with which that field is shared. With specific respect to analyses of the relationship between law and custom in Papua New Guinea, the delineation of sharply contrastive differences

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86 Ibid., p. 9.

between these conceptualisations frequently appears to be based on just such
dichotomies, falsely polarising Melanesian legal culture(s), on the one hand, and
Western (or, more specifically, Anglo-Australian) system(s) of law, on the other.\textsuperscript{88}
When comparative analyses are pursued on the basis of a category error of this
magnitude, it is difficult to see how they can yield much in the way of apposite
insights into the relationship between law and custom.

Now, the concept of a legal culture, of course, is an abstract representation.
No legal culture really 'exists'; and to the extent that it may be said to 'exist' at all,
it does so only as an intangible bundle of ideas, values, beliefs and attitudes
characterising a particular orientation to jural realities, which itself is assumed to
be shared amongst an identifiable group of people.\textsuperscript{89} A legal system, on the other
hand, is far more amenable to empirical observation, involving, as it does, more
clearly and readily identifiable mechanisms, processes and institutions. At an
exclusively systemic level of analysis, therefore, inter-cultural (or inter-societal)
comparisons of legal systems may be undertaken with greater confidence; for as
an empirical exercise focusing upon real phenomena and events, such
comparisons promise a measurable degree of certainty and competence, without
necessarily involving the fallacious dichotomisations implicit in the process of
comparing one society's legal culture with another society's legal system.

However, whilst the inter-societal comparison of legal systems may be
intrinsically interesting, to the extent that such comparisons represent purely

\textsuperscript{88} In the Papua New Guinea context, Gordon and Meggitt similarly take issue with the false
comparative dichotomisation of Western and Melanesian legal systems. Law and Order in the New
Guinea Highlands, pp. 197-198.

\textsuperscript{89} See S. Macaulay, 'Popular Legal Culture: An Introduction,' Yale Law Journal, vol. 98, no. 8
(June 1989), p. 1547; C. Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective,' in
Local Knowledge: Further Essays on Interpretive Anthropology (New York: Basic Books, 1983),
pp. 167-234.
descriptive exercises they are unlikely to be particularly significant. The obvious differentiae in the structure and operation of various jural institutions and processes may be observed (more or less directly) and recorded in meticulous detail. In the absence of deeper analysis, however, such data reveal little if anything about the nature of the features that have been selected for comparative analysis (presumably on account of their ostensibly distinguishing characteristics); nor are they likely to shed much light on the reasons why those features (and not others) should be characterised as sufficiently distinctive to warrant comparative analysis in the first place.

These considerations have not been lost on social anthropologists; and in the general ethnographic analysis of different Melanesian societies and cultures, there is a demonstrable adherence to the discipline of a deeper comparatist ethos. This kind of commitment, however, creates problems of its own. And in the field of legal anthropology, comparative endeavours raise a number of controversial questions having to do both with methodology and the selection of appropriate comparative criteria:

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The ultimate goal of social anthropology is the formation of general statements regarding the human condition. We strive to understand human beliefs and behaviour not only in one society or situation, but in many.... An exercise which is purely ethnographic is unsatisfactory because, at some point or another, comparisons must be made ['Sorcery and Social Change: An Introduction,' *Social Analysis*, no. 8 (November 1981), p. 5].

91 Eggan suggests that 'the comparative method is not a "method" in the broad sense, but a technique for establishing similarities and differences.' He goes on to conclude, however, that 'despite the considerable variation in the conceptions held by different anthropologists as to its nature..., the comparative method is still a useful procedure in cultural anthropology....' ['Some Reflections on Comparative Method in Anthropology,' p. 366].
In investigating legal phenomena, on what basis is the anthropologist to decide what he is looking for and what to look at? Is he comparing legal concepts or behavior? Are these different from each other, or are they facets of the same entity? Is he comparing whole legal systems? Cases? Rules? Systems of rules dealing with particular substantive matters...? Procedures? Is he interested in dispute settlement exclusively or in systems of social control in general? There is no end to the possible topics. Each person in the field defines somewhat differently what he is looking for. There is serious question whether there should be, or even whether there can be, consensus in the discipline about such matters.\textsuperscript{92}

Although these questions often tend to be addressed in connexion with \textit{intra-societal} comparisons (e.g., comparisons of 'Melanesian' societies), their broader, \textit{inter-cultural} implications are nonetheless apparent.

Even in the absence of an anthropological consensus on the protocols of an appropriate comparative methodology—and acknowledging that the desirability of such a consensus is itself open to question—the fact remains that it is still primarily through the comparative ethnographic study of various Melanesian legal systems that access of any kind to the inner-workings of the legal cultures with which those systems are associated has been achieved. Although most social anthropologists would readily admit that the insights they may obtain through such an indirect approach to comparative ethnological explanation will inevitably reflect the imprecision and inadequacies of a necessarily 'mediated' ethnographic inquiry, it must ultimately be conceded that these imperfect, ethnographically derived representations provide essentially the only (and consequently the best available) avenue leading to a deeper understanding of the nature and dynamics of Melanesian legal cultures. And given the limitations within which such inquiries must necessarily be pursued, an impressive collection of richly descriptive data

\textsuperscript{92} Moore, \textit{Law as Process}, p. 138.
and cogent analysis elucidating the organisation and operations of Papua New Guinean legal systems and legal cultures alike has been generated.

On the strength of the available Melanesian ethnographic data and comparative ethnological analyses, one might cautiously proceed to a comparative consideration of the two types of legal cultures co-existing in Papua New Guinea—Western and Melanesian. In attempting such a comparison, however, what must be borne in mind is the inherent imprecision involved in the processes by which access to understandings about Melanesian legal cultures has been achieved in the first instance, since this imprecision must have serious implications for the qualitative accuracy of the larger, comparative exercise. Indeed, at this 'higher level' of inter-cultural analysis, the conclusions one may reach will unavoidably reflect a kind of 'generation loss' in precision of far greater proportions than that which one could reasonably expect to encounter in comparisons made exclusively at the 'lower level' of legal systems. The development of cultural explanations for the empirical qualities of systemic legal phenomena must be recognised as an inherently interpretative process, and one which, at best, can only be inexact; for in the pursuit of that kind of inquiry, one is apt to read as much into the data as one may properly read out of them. To undertake such an inquiry unconscientiously means that one runs the constant risk of reading the data wrongly.

In the comparative analysis of Western and Melanesian legal cultures, therefore, perhaps the greatest threat to cogency is the common misapprehension that it is two legal cultures which are, in fact, being compared. Conventionally dichotomous formulations of the relationship between law and custom may portray custom in reasonably well constructed, ethnographically sound representations of Melanesian legal culture(s). But the law, against which those
representations are set, is invariably portrayed in the guise of a crude stereotype of nominally Western *legal system(s)*. The 'false comparison' underlying the dichotomy between law and custom in Papua New Guinea, therefore, may have less to do with the erroneous comparison of two different types of *legal system(s)*, than with the false dichotomisation of Western *legal system(s)* and Melanesian *legal culture(s)*.

C. 'Double Standards' in the Analytical Construction of Western and Melanesian Legal Cultures

One possible explanation for the persistent recurrence of the 'false dichotomy' between Western (or Westernised) *legal systems* and Melanesian *legal cultures* may be linked to the employment of a 'double standard' in the analytical construction of the conceptual models conventionally used in dichotomous formulations of law and custom. For it seems to me that in most representations of the relationship between law and custom in Papua New Guinea, the prevalent tendency amongst anthropologists and other socio-legal scholars involves the application of one standard of description and analysis in respect of indigenous Melanesian custom, and quite another in respect of the introduced or imposed Western law. It is this discrepancy in analytical standards which may result in the erroneous comparison of Melanesian *legal cultures* and Western *legal systems* whereby the appearance of radical difference is given substance, and which serves, in turn, to reify the dichotomous representation of the relationship between law and custom that I challenge here.

For the most part, legal anthropologists move with caution and restraint from their accumulated data on individual Papua New Guinea *legal systems* (the dynamic, empirical manifestations of jural *custom* in action) to guarded hypothetical propositions about the underlying Melanesian *legal culture*.
Ethnographic observations, normally undertaken over extended periods of time in the field, almost invariably focus exclusively upon small, individual groups or communities.\(^\text{93}\) Broad, sweeping generalisations about jural processes and institutions tend to be avoided. Exceptional or unique circumstances are duly noted, and ethnographically derived anthropological conclusions are usually framed with appropriate qualifications. By and large, grand theories are eschewed in favour of further research; and always there is the looming caveat that more data must be collected and assessed before anything other than the most tentative explanations concerning the essential nature of Melanesian jural values might be offered. Insofar as the legal-ethnographic study of contemporary Papua New Guinea societies increasingly require that anthropologists include within the ambit of their research the novel extensions of Western law into the conventional Melanesian ethnographic field, these too have been approached with balance, restraint and a prudent absence of bold speculation.

In the largely ethnographic and anthropological consideration of *Melanesian legal culture(s)*, therefore, it may be said that the analytical standards employed have been uniformly high. The problem of the 'double standard', as I see it, rather involves the manner in which *Western legal culture* has been dealt with by socio-legal scholars concerned with the historical, contemporary and emerging relationship between law and custom in Papua New Guinea. In this limited, albeit crucial, respect, there would seem to be either an egregious violation of the standards of analysis so rigorously applied in the process of moving from empirical considerations of Melanesian legal systems to conceptual considerations of Melanesian legal culture, or a distinct confusion of Western legal culture with the relatively few, relatively recent and demonstrably distorted indicia of that

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\(^{93}\) See R.M. Keesing, *Cultural Anthropology*, pp. 5-8.
legal culture, as these have been expressed through the institutions, processes, mechanisms and personalities associated with the legal systems of the colonial and post-colonial state in Papua New Guinea.

To be sure, the application of this double standard has not gone wholly unnoticed. Yet when it has been recognised as such, that recognition seems to take the form of observations made only en passant. For example, in the introduction to the volume in which Peter Lawrence first offered his exposition on 'the state versus stateless societies' in Papua New Guinea to a decidedly legal audience, whilst Geoffrey Sawer saw fit to question Professor Lawrence's stereotypical characterisation of Western legal culture, he did so in what amounted to an almost casual aside:

Professor Lawrence's picture of the west is more an 'ideal type' of the western tendency—whether hoped for, feared or merely predicted. Western society actually contrives to combine the abstract legal forms dear to a Hans Kelsen or a Herbert Hart with social realities which are much earthier, and include a great deal of status, caste, family and kin groups, and you-do-me-a-favour-so-I'll-eventually-do-the-same.

More recently, two legal ethnographers, Robert Gordon and Mervyn Meggitt, similarly called into question the commonly accepted assumption that Melanesian custom entertains a flexibility that simply does not exist in Western law:

[A]s in all societies, Western law undergoes frequent change; even when it retains its form, its content may change. Flexibility derives not so much from the form of law as from the interpretation of laws at various times and their discretionary enforcement. Thus, . . . assertion[s] that the uniqueness of Melanesian law resides in the continuum of simply acceptable, less acceptable, and unacceptable ways of doing things could be applied just as well to industrialized Western states, where popular knowledge of the vast body of

legal and other rules is severely limited. In their everyday life
people lump together whole realms of behaviour into just such
taken-for-granted categories.  

At this same level of comparison, Gordon and Meggitt raise further questions about the actual extent to which the procedural peculiarities of Western law and Melanesian custom really do differ to one another, and some of the reasons why those differences might so frequently be exaggerated:

It has been suggested that for ideological reasons the differences between Melanesian and Western dispute management have been exaggerated . . . . Most accounts of indigenous law refer to litigation in village situations, which are then compared with processes in superior courts in Western societies while ignoring comparable grass-roots phenomena in those societies . . . . A more acceptable comparison between the societies would concern the dispensing of justice at the truly local level, and it is clear that if this were done many of the alleged radical differences would disappear.  

Much to their credit, Gordon and Meggitt do consider the problem of 'false comparisons' between Melanesian and Western jural systems more seriously than most of their contemporary colleagues seem prepared or particularly interested to do.  Their discussion, however, is effectively restricted to matters of inter-systemic process and procedure; and the oversights in analysis of which they are particularly critical in this regard refer only to the 'obvious' fact that:

in industrial states many disputes, perhaps most, are in fact settled out of court and are handled by customary procedures, in which plea bargaining, negotiation, and mediation are crucial elements.  

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96 Gordon and Meggitt, Law and Order in the New Guinea Highlands, p. 196.

97 Ibid., p. 197.

98 See Gordon and Meggitt, Law and Order in the New Guinea Highlands, pp. 197-198.

99 Ibid., p. 198. With respect to the problem of the double standard in such inter-systemic, comparative analyses, see J. Van Velsen, Procedural Informality, Reconciliation, and False
In the main, and to the extent that their descriptions and explanations are based upon relevant and accurate historical and empirical evidence, anthropologists and other scholars have been circumspect in their analytical treatment of the ways in which particular Western legal systems have operated in Papua New Guinea. The fact that they have been 'critical' of those operations in many cases in no way necessarily detracts from the quality and precision of their research—indeed, as said, responsible scholarship quite properly involves a critical edge; most especially so, perhaps, when matters of socio-legal policy are under direct or indirect scrutiny.\textsuperscript{100} It is, however, when the level of analysis shifts from specific observations having to do with the actual operations of Western legal systems to the ostensibly governing values and principles of Western legal culture that the standards of comparative analysis so often appear to decay rapidly and abjectly.\textsuperscript{101}

The standard anthropological representations of Western legal culture—the law side of the dichotomy between law and custom in Papua New Guinea—are typically rife with gross and frequently erroneous generalisations about its essential nature. Situationally or circumstantially specific events and phenomena are regularly invoked as exemplary of timeless, cross-cultural features of the Anglo-Australian common law (or, more frequently, 'Western law' simpliciter). From these generalised misrenderings, facile and stereotyped representations of a monolithic legal tradition are adopted, adapted, inverted and manipulated with

\textsuperscript{100} Daniel Hughes spoke eloquently to this point in 'The Responsibility of Anthropologists to Pacific Islanders,' \textit{Pacific Studies}, vol. 3, no. 2 (Spring 1980), pp. 43-51.

\textsuperscript{101} In her excellent critique of Gordon and Meggitt's work, Jean Zorn recently called attention to this general failing in legal anthropological analysis. See J.G. Zorn, 'Lawyers, Anthropologists, and the Study of Law: Encounters in the New Guinea Highlands,' \textit{Law & Social Inquiry}, vol. 15, no. 2 (Spring 1990), pp. 271-304.
little regard for the actualities of variation, diversity and nuance. As a consequence, all manner of conclusive (and invariably disparaging) assertions about the fundamental and unalterable nature of law, and Western legal culture in toto, abound. Based upon exceptional events, cynical presupposition or wholly hypothetical caricatures, these simplistic and misconceived perceptions are routinely trundled out and paraded through the literature like so many medieval witches on their way to foreordained ecclesiastical judgment.

6. 'POLITICAL' AND 'ORGANIC' FORMULATIONS OF THE DICHOTOMY BETWEEN LAW AND CUSTOM IN PAPUA NEW GUINEA

Canvassing the range of the literature in which these deceptive caricatures of Anglo-Australian law and legal culture occur, it is possible to group the various discursive contexts in which they appear within two broadly overlapping categories. Signifying the central characteristics of the analytical perspectives they embrace, I denominate these categories political (or politicised) and organic (or ethnological) formulations, respectively.

Both of these approaches have given rise to substantial bodies of literature illuminating important aspects of the issues with which they are especially concerned, and together they may offer compelling, complementary explanations for historical and contemporary problems of jural relations in Papua New Guinea. The principal differences between political and organic formulations lie in the areas of analytical focus and methodology, reflecting, amongst other things, the fact that the former are more often the handiwork of political economists, social historians and legal scholars, whilst the latter are almost exclusively the products of anthropological and legal-ethnographic research. What is far more important than those features which may be seen to distinguish political from organic
formulations, however, is the singular feature that unites them; for both approaches proceed on the shared assumption that law and custom are accurately understood as involving discrete ideas and phenomena, properly conceptualised in a dynamic arrangement of diametric opposition.\footnote{102}

Before examining important aspects of the mutually reinforcing inter-dependency of political and organic formulations and how they both conduce to the false dichotomisation of law and custom in Papua New Guinea, let me briefly describe the contours and content of each approach individually.

A. Political Formulations

Perhaps the most distinctive characteristic of political formulations is their tendency to identify 'law' possessively with the \textit{state}, whilst 'custom' and its cognates are linked in similarly possessive terms to 'traditional' forms of \textit{stateless} socio-political organisation. Typically, political formulations of the relationship between law and custom in Papua New Guinea represent that relationship as the embodiment of perpetual hegemonic conflict. Thus, from the earliest European attempts to 'pacify' Melanesian peoples to the most recent programmes of 'development', the imposition of Western cultural values (legal and otherwise) is seen as having been effected principally (if not always directly or 'officially') through the instrumentalities of the colonial and post-colonial \textit{state}.\footnote{103} In this way, the essentially exogenous forces and ideas of the modern Western (or Westernised) \textit{state} have been historically pitted against the endogenous forces and


ideas of traditionally *stateless* Melanesian societies in the former's relentless efforts to subdue, suborn, subsume and, ultimately, to extinguish the popular custom of the latter.\(^{104}\)

Conceding that the major colonial powers involved in Papua New Guinea, namely Britain and Germany, initially 'adopted the view that the indigenous population should remain . . . governed by its own "custom"," political formulations are quick to point out that this accommodation was intended to last only until Melanesian society 'had "advanced" far enough to be fully absorbed into the introduced "legal system'. From the outset, Western law was regarded as the 'dominant' legal order,\(^{105}\)

> 'custom' was to be tolerated temporarily by the 'legal system' rather than being integrated or abolished. The aim was the gradual replacement of 'custom' by 'law', not a synthesis of the two, let alone a development of 'custom' to a point where it became a viable alternative to 'law'. . . \(^{106}\)

The relationship between law and custom in Papua New Guinea thus comes to be seen as having been forged in a crucible of essentially inter-cultural confrontation. Indicatively and inevitably, the contemporary ramifications of that continuing confrontation are reflected in the jural arena, just as they are in virtually every other sphere of social affairs. At bottom, then, the antagonism implicit in the relationship between law and custom tends to be regarded merely as an epiphenomenal expression of the antagonism inherent in the larger,

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\(^{106}\) *Ibid.*
hegemonic relationship between the political forms of the state and stateless societies.107

From a politicised perspective, law and custom are conceptualised dichotomously because they are ideologically incompatible: 'Law is seen as a type of state action, distinctive in certain operational ways, but sharing its functions with other types of state action.'108 Custom, or 'traditional law', on the other hand, is 'embedded in and supportive of' traditional forms of stateless socio-political organisation.109 As a manifestation of the conflicting political ideologies represented by the dichotomy between state and stateless societies, the dynamics of the dichotomy between law and custom logically instantiate expressions of the state's hegemonic assertion and the inexorable exertion of the state's political will. Ultimately, it is the state which will not permit the development of a symbiotic relationship between law and custom, since to do so would undermine the competitively advantageous position enjoyed by the state and those whose interests it is said to serve.

Familiar critiques of capitalism, imperialism and colonial law are frequently anchored in political explanations of this general type;110 although the same


109 Ibid., p. 68.

analytical assumptions can be found to underlie a much broader range of politically based formulations in which the role of the state is viewed as determinative in the fashioning of the relationship between law and custom. Indeed, notwithstanding the ideological predilections of their proponents, and irrespective of the form in which the state is represented (colonial, post-colonial or neo-colonial), it is the hallmark of political formulations that the relationship between law and custom should be characterised as one of inter-cultural and eminently political conflict.

Sir Hubert Murray, Lieutenant-Governor and Chief Judicial Officer in the Territory of Papua from 1908 to 1940, was a man with few illusions about the motives of the colonial state he served and who unequivocally supported the palpably political purposes behind its administrative efforts to establish and secure the supremacy of an Anglo-Australian legal order. In his memoirs, Murray candidly observed:

The material fact is that ... [w]e came here for our own purposes ... and we have remained on for our own purposes; it is merely self-deception to say that we are any of us ... in the Territory for the good of the natives.

And in his active pursuit of these imperialist objectives, it is clear that Murray entertained little doubt about the capacity of the colonial state to provide

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'something better' than indigenous Melanesian custom as a supplanting legal order for Papua New Guineans.\textsuperscript{113}

Some native ideas are excellent, but others are bad; in a country like Papua, apparently, they must all, or nearly all, go, sooner or later, but it is desirable that the good should remain until their place is taken by something which is equally good or better, and which will be more lasting.\textsuperscript{114}

In Murray's day, to the extent that a case for the value and propriety of retaining traditional Melanesian forms of socio-legal order was put at all, that case was advanced largely on the basis of anthropological arguments, cautiously and often quite unofficially presented.\textsuperscript{115} On both practical and ideological grounds, however, Murray frankly rejected these preservationist sentiments; especially where they concerned the conservation of 'native custom' in its jural aspects. In doing so, Murray revealed his deep ambivalence, if not hostility, towards the contributions of anthropology to what he understood to be the primary tasks of colonial administration, in which connexion he reflected: 'I think . . . an anthropologist would probably make rather a mess of things—he would ride his hobby-horse too fast and too far.'\textsuperscript{116}

Throughout the period of British, and subsequently Australian, rule in Papua New Guinea, the tone, timbre and content of colonial rhetoric varied in accordance

\textsuperscript{113} Murray, \textit{Papua of To-Day}, p. 225.

\textsuperscript{114} Ibid.

\textsuperscript{115} For example, in an address before the 1939 meeting of the Australian and New Zealand Association for the Advancement of Science, F. E. Williams, who served for a time as government anthropologist during the period of Murray's tenure in Papua, was obliged to qualify as 'unofficial' his remarks about the value of preserving native custom, since his views were, '[I]n some particulars,' at variance with those of the government that employed him. See F.E. Williams, 'Creed of a Government Anthropologist,' in \textit{The Vailala Madness and Other Essays}, ed. Erik Schwimmer (Honolulu: The University Press of Hawaii, 1977), p. 396.

\textsuperscript{116} Murray, \textit{Papua of To-Day}, p. 227.
with the parameters of the particular discursive context and the changing political
tenor of the times. Nevertheless, the same general type of dichotomous,
confrontational model employed to portray the relationship between law and
custom during the early years of colonial administration has been consistently
invoked, *mutatis mutandis*, to characterise and explain the nature and dynamics of
that relationship. Moreover, political formulations of jural relations in the
independent state of Papua New Guinea continue to organise discussion and
debate about the relationship between law and custom in very much the same
terms—which is to say, in terms of fundamental conceptual and practical
opposition and irremediable ideological irreconcilability. Today, the underlying
construct invoked and employed to explain the contradictory relationship between
law and custom in Papua New Guinea remains effectively anchored in the pre-
eminently *political* premise:

that a customary legal system, created to serve the needs of
small, homogeneous, stateless societies, constitutes a threat to
the state and to the system of codes and common law cases,

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created by the agencies of government in order to reinforce the authority and legitimacy of the state.\(^{119}\)

This is not to confuse the individual political \textit{persuasions} of those involved on either side of the debate about law and custom in Papua New Guinea with the wider, embracing political \textit{perspective} from which everyone participating in that debate views the total situation. Disparate expressions of preference and dissent regarding the propriety of particular motives and the desirability of particular outcomes in the hegemonic conflict between the state and stateless societies have always played a part in considerations of the relationship between law and custom—Murray had his contemporary critics, as have his successors.\(^{120}\) The consistent feature of political formulations, however, is that regardless of whether sympathy, support or allegiance is displayed towards the jural integrity of the \textit{state} or \textit{stateless societies} (that is to say, towards law or custom), participants in the debate invariably present their arguments arrayed in a scheme of competitive opposition. Thus, when the paradigmatic framework of the political formulation is viewed as a genre, the differences of opinion about the nature of the relationship between law and custom in Papua New Guinea embraced within that genre may be seen as amounting rather more to differences of idiom and nuance than of determinative substantive. General representations of that relationship are derived from commonly held and essentially uncontroverted assumptions about the inevitability of bilateral political conflict; assumptions shared in common amongst the members of otherwise disparate political camps.

\(^{119}\) Ottley and Zorn, 'Criminal Law in Papua New Guinea,' p. 254.

In this fundamental sense, then, there is no significant disagreement between those who hold to the view that no greater benefit than the common law has ever been conferred upon Papua New Guineans, and those who insist that the law is nothing other than 'an instrument of domination and oppression by the ruling classes.' To recognise that conflict is inevitable, and even to accept the inevitability of certain outcomes as a result of such conflict, of course, by no means necessarily implies an endorsement of the conflict per se or approval of its presumably foreordained consequences.

To sum up, political formulations of the relationship between law and custom in Papua New Guinea predicate on the assumption that custom is ideologically incompatible with law, because

it [custom] is seen as incompatible with the existence of the state and the processes of replacing the traditional social order of stateless societies with that of the modern social order. In the latter context it is the state which is supposed to exercise authority on behalf of the aggregate of individual citizens. The localised, communal and subjective qualities of custom as a means of social control are seen as incompatible with, and, on occasion, subversive of, the existence and extension of state authority.

B. Organic Formulations

Consistent with their ethnographic origins and the anthropological orientations of their proponents, organic formulations of the relationship between law and custom in Papua New Guinea generally identify determinative discrepancies between traditional Melanesian custom and the introduced (or

121 See Paliwala, Zorn and Bayne, 'Economic Development and the Changing Legal System of Papua New Guinea,' p. 12 (criticising that view); Hasluck, A Time for Building, pp. 177, 189.


imposed) *cum* adopted Anglo-Australian law with the respective cultural systems in which the fundamental jural concepts of each type of society are embedded. Thus, the distinctive features which serve to differentiate Western law from Melanesian custom tend to be seen, not so much as the unmediated consequences of hegemonic conflict between the state and stateless societies (*qua* political forms), but rather as indicia of a much more deeply anchored complex of inter-cultural disparities. Unlike political formulations, therefore, organic formulations neither require, nor even necessarily involve, so direct an appeal to hegemonic paradigms of political tension in order to validate the dichotomous conceptual premises upon which they, too, are based.

Organic formulations regard the incompatibility of law and custom as merely emblematic of the underlying epistemological differences which separate, distinguish and contrapose Melanesian and Western cultures more generally. From this perspective, the irreconcilability of law and custom in Papua New Guinea is seen as having less to do with conflicts or failures of *political will,* than with the intrinsic polarities of the jural forms (*qua* cultural forms) peculiar to Melanesian and Western societies, respectively. As in political formulations, the opposition of law and custom in organic formulations is also seen to be coeval and largely co-extensive with the oppositional relationship between the state and stateless societies. The organic approach, however, emphasises the deeper, cultural basis of both jural and political dichotomies. Anthropology, after all, is said to be 'the study of the significance of cultural difference,'124 and from the

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organic perspective, 'culture' is properly regarded as constitutive of jural and political forms alike.\textsuperscript{125}

Within the framework of organic formulations, the \textit{legal cultures} of Melanesian and Western society are understood and represented as significantly different to one another upon independent and autonomous bases. Indeed, the differences between Western and Melanesian \textit{legal culture} are considered to be so fundamental, that the peculiar jural forms and systems to which each type of society has given rise are deemed to be entirely incompatible, structurally and functionally, in both a conceptual and practical sense. It is this underlying incompatibility that is \textit{reflected in} conflicts between the state and stateless societies, rather than it being a \textit{product of} those political and ideological conflicts. Because organic formulations of the troubled relationship between law and custom in Papua New Guinea regard the bases of the incompatibility of the state and stateless societies as \textit{culturally} rather than \textit{politically} constituted, questions of political (or judicial) \textit{will} become only marginally relevant. The inter-systemic contradictions manifested in political conflict are viewed as the effects, not the causes, of inter-culture incongruities.

The complementary theoretical enterprises of legal anthropology and the sociology of law have been largely devoted to the identification of the salient \textit{differentiae} of law and custom, and to the explanation of those differences on demonstrably socio-cultural bases.\textsuperscript{126} These common objectives notwithstanding,

\textsuperscript{125} Thus, although Lawrence underscores the point that the discrete compartmentalisation of jural and political, amongst other, forms of social organisation and interaction, is itself a distinctively Western construct, an overarching cultural emphasis is implicit in the dichotomous scheme he advances, and which he supports on the strength of essentially ethnological arguments. 'The State Versus Stateless Societies,' pp. 17, 20.

attempts to specify and isolate adequate criteria upon which such determinative
distinctions might be drawn, and to formulate appropriately expressive grammars
through which these might be accurately conveyed, have generated far more
contention than consensus amongst social scientists engaged in that collective
pursuit. Legal scholars, too, have consistently tried to define and clarify the
relationship, which is to say, the differences, between law and custom, although
the debates these parallel undertakings have engendered tend to proceed upon
rather different terms of reference. None of these efforts, however, has come
close to achieving anything like a universally acceptable theory or analytical basis
upon which broad intra- or inter-disciplinary understandings might be secured.

With specific reference to the relationship between law and custom in Papua
New Guinea, efforts to develop tenable, organic explanations for the nature and
dynamics of that relationship have been significantly influenced by the
vicissitudes of ongoing theoretical and methodological considerations in the social
sciences and the humanities. As with their political counterparts, however, there is a remarkable degree of consistency in the thematic structure of the disparate arguments marshalled in support of all of the organic formulations in which that relationship is represented. Thus, legal ethnographers discern and abstract those features of Melanesian custom which, in their view, best serve to distinguish it from Western law. From these analyses, they have been able to develop a plethora of richly detailed descriptions of the techniques of 'traditional' dispute management and the relationship of those techniques to the larger social matrices within which they have evolved.

But to set about such tasks with the intention of devising sharply differentiating descriptions and meticulous distinctions in the first instance, necessarily presupposes the existence of fundamental differences between both the concepts and the phenomena denoted by the expressions 'law' and 'custom'. Inevitably, therefore, the conclusions towards which such inquiries are drawn are effectively predetermined. For the most part, organic formulations of the relationship between law and custom in Papua New Guinea have produced, and continue to generate, what is by now a familiar litany of intrinsic, irreconcilable differences between the respective jural forms—differences which invariably manifest themselves in terms of the institutional structures, substantive content, processes and procedures, scope and objectives of law and custom.

C. The Inter-Dependency of Political and Organic Formulations of Law and Custom

For the purposes of the kind of analysis with which I am concerned in this chapter, political and organic formulations of the relationship between law and custom in Papua New Guinea may be seen to differ significantly only in terms of the aspects of incongruity in that relationship which each approach emphasises. The formulations themselves are neither contradictory nor incompatible; and when drawn together, they can and do provide persuasive, complementary explanations to account for the tensions and conflicts which both approaches tend to regard as central features in the dichotomy between law and custom. In some cases, the state-centred (political) conviction that it would be impolitic to allow for a greater congruency between law and custom may be stressed (and as said, arguments of this kind may either support or criticise the policies and practices of the state which give rise to that conviction); whilst in other cases, underlying (organic) factors may be focused upon, underscoring the contention that a better integrated relationship between law and custom is impossible to achieve in any event. Beyond this, however, the distinctive characteristics of political and organic formulations of the relationship between law and custom are not especially important.

Nowadays, as ethnographic analyses are employed with increasing frequency to reinforce political formulations of the relationship between law and custom in Papua New Guinea, and as ethnographers begin to take a greater, more sophisticated cognisance of the historical and political-economic determinants of socio-legal change, it is ever more common to find combinatorial variants of the political and organic arguments interfused and advanced in mutually supportive concert. Like the distinctive formulations of which they are comprised, however, these amalgamated analyses uniformly predicate upon the shared assumption that
law and custom are properly conceived of only as discrete ideas and processual phenomena, contraposed in dichotomous constructs of radical opposition. And it is this common predicatory point to which I take particular exception.

Since it is rather the synthesised fusion of the political and organic perspectives which provides the theoretical foundation upon which the contemporary dichotomy between law and custom in Papua New Guinea is consistently based, it is sensible that the concepts of law and custom represented by that inter-dependent formulation should be the objects of critical scrutiny here.

(1) Melanesian Custom from the Dichotomous Perspective

Allowing for the myriad variations that must attend any typification of 'at least 1000 different customary legal systems' in a country 'well known for its social diversity and richness of cultures,' custom, or customary law, in Papua New Guinea is still generally described as the distinctively Melanesian approach to the maintenance of normative social order and control in stateless, non-hierarchically organised societies. It is flexible, unsystematic and fluidly applicable to different persons in different ways, varying further in its application from time to time and from place to place (even within the same group and locality) depending upon the status and relationships of the persons involved.

Custom is not comprised of specific rules of conduct, as such. Thus, although broader principles of conduct are sometimes recognised, acknowledged as

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128 Although the relationship between law and custom is sometimes said to be manipulated for ideological purposes, in order to produce the illusion of partial complementarity. See Fitzpatrick, Law and State in Papua New Guinea.

relevant to instant circumstances and normatively invoked, custom is said rather to consist in relatively loose, open-ended and freely flowing processes whereby disputes and grievances of all kinds may be considered, discussed, managed, directed (or re-directed) and occasionally resolved. Whilst the operations of such processual mechanisms may involve particular techniques, styles, routines and rituals, the dynamics of custom are essentially informal.

The institution of traditional Melanesian custom is eminently malleable and politicised, in that the identities, reputations and relationships of the persons involved in its operation may influence (sometimes determinatively) the manner in which it is performed, as well as its outcomes. Invariably, the processes of jural custom are interpersonal affairs. Two, and frequently many more persons may negotiate towards the settlement of a grievance, although third parties may assist or participate mediatiorily and, occasionally, even adjudicatively (and grievances themselves are apt to involve a complex of ongoing, sometimes seemingly unrelated issues).

The customary management of a dispute may lead to a definitive resolution of the matter or matters to hand, although it is equally, perhaps more, likely that what will be achieved will involve only a partial or temporary settlement. But this is not quite so problematic as it may seem, since the successful conduct of 'traditional' Papua New Guinean disputing processes does not necessarily depend upon their being carried out to a final conclusion. Rather, their underlying purpose is to permit the ventilation of festering grievances and to permit aggrieved parties to work out some sort of mutually acceptable modus vivendi. In Papua New Guinea, as Professor Lawrence so aptly put it:

there is no concept of *fiat justitia, ruat coelum* but a clear recognition that the sky must be kept up. In settling a dispute, the aim is to restore the social order, or to patch up relationships that have been broken or damaged. Somehow,
for the good of all, plaintiff and defendant must be made to resolve their quarrel. 130

Custom may operate, however, to oblige, compel or otherwise to permit aggrieved individuals to seek unilateral self-redress against assumed offenders on either an individual or a collective basis. The remedies they seek may be compensatory, retributive or both. In the end, however, the object is to restore a sense of balance (if not harmony) to a relationship or a set of relationships which have been disturbed as a consequence of some act or omission, and regardless of whether the precipitating conduct is real or imagined, actual or constructive, proven or alleged.

In the absence of a state there can be no notion of 'crime,' as such, within the jural order of traditional Melanesian social organisation. There are, however, various kinds and gradations of interpersonal delicts and offences which may be committed against certain quasi-religious norms (the latter of which can, on occasion, invite retributive sanctions from decidedly human agencies). Responsibility for wrongdoing (which can extend well beyond what, in 'modern' Western experience, amounts to demonstrable culpability) is commonly shared amongst several members of a group or community. Liability for certain forms of conduct causing harm or injury, and the prerogative to enforce sanctions against the perpetrators, are likewise often matters of collective or communal concern. Questions of causation, which give rise to the attachment of customary responsibility and/or liability, may not, in every case, require proof or even evidence of a tangible link (direct or proximate) between an alleged act and its consequences. Indeed, the eduction of such evidence as may be necessary (or desirable) to establish a causal connection between an actionable delict and the

130 Lawrence, 'The State Versus Stateless Societies,' p. 34.
accused wrongdoer may involve all manner of metaphysical or supernatural processes.

Finally, a central feature of the organic model of 'traditional' Melanesian custom is that custom, or customary law is, by its very nature, inherently unamenable to fixed formulation or recordation in any permanent form. Custom is unwritten—not simply because its practice is prevalent amongst 'traditionally' non-literate peoples, but because any attempt to codify or otherwise memorialise it in writing would rob custom of its dynamic and indeterminate plasticity. Once written down, custom would simply cease to be custom.

(2) Western Law from the Dichotomous Perspective

For the purposes of contrasting law and custom in Papua New Guinea, Western law (that is to say, the introduced and adopted Anglo-Australian common law) is typically understood and represented in dichotomous formulations as the complete inversion of virtually all of the features by which Melanesian custom is generally characterised. Thus, it is portrayed as the specialised and uniform means by which the centralised, hierarchically configured authorities of the modern state provide for the normative regulation of society.

Law is rigidly systematic and universally applicable to all persons within its clearly defined jurisdictional spheres of operation upon demonstrably impersonal, impartial and apolitical bases. Substantively, it is understood to consist exclusively in the fixed formulations of rules and principles, which are either positively enacted by designated legislative bodies, or else they are embodied in the closely framed pronouncements of judicial decisions. In either form, however, the law delineates clear and specific rights and duties, from none of which may a person's conduct lawfully depart in the absence of an equally clear and specific
provision of the law allowing for such deviation. Rules and principles further define and constrain the institutional and processual aspects of the law's operations, and these, too, tend to be tightly structured, closely bounded affairs, formalistically routinised at every stage. In this way, the law provides both the basis upon which the broadest range of human affairs are ordered and directed in organised society, and the means by which disputes and grievances arising out of the breach of that order are expected, and in many cases required, to be addressed. And in both respects, it is a strict, unwavering compliance with these requirements that the law demands of all who participate, willingly or otherwise, in the social life of the state.

The law seeks to maintain and restore its own sense of balance in social relationships, which may or may not reflect the relevant values of the larger community (or even necessarily the values of those in whose relationships it intervenes). Moreover, this distinctively legal balance is achieved through an adversarial process by which an aggrieved party must challenge and, if he or she is to succeed, prevail in the prosecution of his or her claim over the defences or counterclaims of an alleged wrongdoer. But before they may be addressed in this way, issues of legal contention are narrowed to their barest essentials. Circumscriptive rules of evidence delimit the quality and quantity of information which the law will regard as admissible in its disposition of the matters to hand, and the mere passage of time (measured in pre-determined and arbitrary increments) may render claims stale, and thus inactionable, despite their otherwise legitimate bases.

Upon these exclusive terms, one party will be adjudged to have acted (or to have failed to act) in such a way as to be legally wrong, whilst another will be found to have acted rightly (at least to the extent that the latter's conduct is
deemed to have been in compliance with, or not in violation of, the law). One wins because the other has lost in a process commonly characterised as an intricately structured, competitive engagement. Whilst not necessarily 'illegal', negotiated compromises or mediated settlements entered into by parties to a legal dispute with a view to the achievement of an arrangement mutually acceptable to themselves, are nonetheless extra-legal. And if such extra-legal arrangements are to be regarded as within the law, they must receive the formal approbation of the state in one form or another. At all events, finality and certainty are amongst the law's principal objectives and temporary, ad hoc dispositions are disfavoured.

The law draws clear and definitive distinctions between interpersonal conduct of a wrongful nature, and wrongful conduct directed against the state. In the former instance, remedies tend to be compensatory rather than restorative (although on occasion, the law may direct remedial actions whereby certain kinds of conduct may be compelled or restrained). In the latter case, however, where one's unlawful action involves a direct affront to state, the consequences are punitive and often quite severe.

Regardless of whether a particular instance of wrongdoing is directed against the state or another person, responsibility (and/or culpability) for wrongdoing under the law always attaches, at least preliminarily, to the acts or omissions of an individual person. As a general rule, there is no presumption of 'corporate' responsibility, unless the corporate entity itself entertains a legally cognisable personality (in which case the law may or may not provide for some allocation of responsibility amongst the members of the legally recognised group). Even in clear cases of a legally legitimate grievance, however, unilateral self-help is condemned and may itself constitute illegal conduct. The state maintains a
covetous monopoly over the acceptable use of force and coercion in the effort to achieve the remedial ends of the law.

Except in the rarest of circumstances, liability for wrongdoing must be premised upon fault; and fault, amongst other things, must be proven on clear and convincing evidence demonstrating tangible relations of cause and effect. Thus, actionable wrongdoing of any kind must be linked directly and proximately to the conduct of the alleged wrongdoer. Having evinced the required causal linkages, however, a claimant may still be required to show that the harmful or injurious consequences of the conduct in question were reasonably foreseeable before legal liability will attach.

Finally, law is, and, in a sense, must be, recorded in writing and preserved, so that it may continue to provide a clear and specific exposition of norms of conduct to those who must abide by it, and in order also that it may serve as a certain, fixed and consistent reference for those who have been delegated to construe, interpret and apply it. Memorialising the law in this way not only ensures its ready availability, but operates further to secure the signification of its authority and legitimacy. Indeed, the premium placed upon the written enunciation of law in Western society is so significant that, lacking that form of presentation, its very validity may well be denied.

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These radically divergent characterisations constitute the substantive elements from which the persistent dichotomy between Western law and Melanesian custom in Papua New Guinea has historically been, and continues to be, formulated. Despite mounting evidence to the effect that the foundations of this dichotomy are grounded in stereotypical and what are increasingly coming to be
regarded as untenably simplistic notions of law and custom alike, this bi-polar contraposition remains as pervasive, and seemingly as persuasive, today as it has always been. As Peter Sack observes, however, the dichotomous formulation of law and custom 'is not only in itself unsatisfactory but also seriously misleading because it tends to merge the "law"/"custom" dichotomy with a distinction between the indigenous and the imposed colonial law.' Although this identification 'is in line with official colonial usage,' Sack continues, 131

and while there was, at the time of independence, a widespread belief that the end of colonial rule would miraculously alter the status of 'custom' as well as the character of 'law' in the country, it is likely to prevent a better appreciation of legal reality in Papua New Guinea instead of facilitating it. 132

But if the dichotomous representation of law and custom in Papua New Guinea is so fundamentally misconceived, how is one to account for its prevalent and enduring influence in the discrete (and complementary) political and organic formulations of that relationship? If such constructions are the products of inadvertence, what are the factors that have permitted these kinds of egregiously misdirected conceptualisations to emerge and to remain effectively unchallenged in the context of what is otherwise generally competent and responsible scholarship? And if they are deliberately erected, to what end?


7. THE OVER-VALUATION OF DIFFERENCE
IN THE DICHOTOMISATION OF LAW AND CUSTOM

Of all the antinomic features by which Western representations of the relationship between tradition and modernity tend to be characterised, the dichotomy between law and custom stands out as one of the more enduringly problematic and persistently vexing. Indeed, its conceptual origins can be traced back to the dualistic propensities that shaped the ontological and epistemological orientations of Graeco-Roman philosophical thought, and which have influenced the controversial evolution of the entire Western Weltanschauung ever since.

This, of course, is not the place to explore, au fond, the historical development of these issues, which even today charge debates about the relationship between law and custom in Papua New Guinea—and in the contemplation of which the questions raised above are certainly implicated. For present purposes, however, in considering of some possible answers to these questions, a useful and instructive light may be shed upon some of their more immediately relevant aspects.

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A. The Ideological Deployment of 'Law' and 'Custom'

One of the minor ironies of modern intellectual history, suggests the eminent symbolic anthropologist, Clifford Geertz, is the extent to which the term 'ideology' has itself become 'thoroughly ideologized':

A concept that once meant but a collection of political proposals, perhaps somewhat intellectualistic and impractical but at any rate idealistic . . . has now become . . . 'the integrated assertions, theories, and aims constituting a politico-social program, often with an implication of factitious propagandizing . . .'.

Nowhere, perhaps, is the poignant accuracy of this observation more readily demonstrable than in the discursive contexts in which the concepts and phenomena of law and custom are considered in connexion with the relationship between Western (or Westernised) and Melanesian legal cultures; and although I am not especially concerned here to develop a general discussion of the 'ideology of law' (either as a theoretical polemic in contemporary socio-legal scholarship, or even in the narrower context of inter-cultural comparison), it is quite apparent that the relationship between law and custom in Papua New Guinea has come to be regarded as something of a barometer, if not the touchstone, of ideological contradiction and conflict in colonial and post-colonial jural relations.

For example, and as we have seen, the ideological rhetoric of the political and politicised organic formulations of the relationship between colonial law and

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136 Geertz, The Interpretation of Cultures, p. 193.

indigenous custom in Papua New Guinea has been effectively wielded as both a sword and a shield (although, perhaps, 'two-edged sword' provides the better simile). Essentially the same kind of arguments have been employed to exalt the introduction of the Anglo-Australian rule of law as the greatest 'gift' ever bestowed upon a benighted native population, and to condemn the imposition of law as an abject 'colonial fraud' and the 'ultimate indignity' visited upon subject Melanesian peoples by their erstwhile European overlords. In both cases, the law is set hegemonically against custom; and custom is devalued accordingly:

Ultimately, custom remains peripheral because it is seen as incompatible with the existence of the nation-state and the processes of replacing the traditional social order of stateless societies with that of the modern social order.

As the peculiarly jural expression of the hegemonically expansionist culture it represented, the Anglo-Australian rule of law in Papua New Guinea epitomised the great 'civilising mission' of Western imperialism, the undisguised objectives of

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British administration in overseas countries has conferred no greater benefit than English law and justice. That may be a trite observation, but I offer no apology. It has been said so often by so many people—as many laymen as lawyers and perhaps more Africans than Englishmen—that it must be assumed to be true. [The Adaptation of Imported Law in Africa,' Journal of African Law, vol. 4, no. 2 (1960), p. 66].


which were to supplant 'savage anarchy' with 'order and rationality.' Thus Mr Justice Gore, a former Chief Judicial Officer in colonial Papua, could unabashedly declare: 'All they [Papua New Guineans] know, which is worthwhile, has been taught them by Europeans.'

But the transparent ideology of Anglo-Australian colonialism is said to have contained a 'convenient duality', enabling it to be deployed in order to justify 'the adaptation and exploitation of resident social formations' and, at the same time, as a corollary 'ideology of protection' invoked to justify 'conserving the traditional mode.' As Peter Fitzpatrick explains:

Traditional law could hardly be ignored or suppressed, as it was the law of the vast bulk of the people. It was embedded in and supportive of the traditional mode of production which the colonist sought to conserve. Yet traditional law was also seen as uncivilized, arbitrary and partial and, in short, contrary to bourgeois legality ...

This particular apparent conflict between law and custom was effectively resolved ideologically by Papua New Guinea's colonial administrators 'by extracting something called "native custom" [or customary law] from the operative dynamic of traditional dispute settlement':

The perceived vices of traditional law could then be attached to dispute settlement. Provision was usually made for the recognition of 'native custom' in colonial courts, subject to broad exceptions including one that the custom concerned must not be inconsistent with colonial law. Even where there

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143 Fitzpatrick, Law and State in Papua New Guinea, p. 68.

144 Ibid.

145 Ibid.
was no such formal recognition . . . custom was allowed 'in every case where it can be reasonable fitted in with our idea of good government.'

Carried forward into the post-colonial milieu of the independent state, this dualistic ideology is said to have found its counterpart in the ideology of 'development and modernisation':

Such doctrines have it that the introduction of modern or western values and institutions will transform third world social formations into a metropolitan likeness and in this way they will eradicate the backwardness that causes underdevelopment . . . . As well as obviously serving the interests of metropolitan capital, the ideology of modernization . . . serve to legitimate the position of the national bourgeoisie, the 'new elites', the resident agents and the indigenous vanguard of modernization. This ideology also helps legitimate the arrogation of tremendous state power for the Herculean task of development and helps legitimate the broad discretionary form of law. Such legitimations underlie the emphasis in academic theorizing about law and modernization on the efficacy or ever omnipotence of law as an instrument of development . . . . As with the general ideology of modernization, this theorizing sometimes explicitly sets a better, modern, western world towards which transforming the law is to aim.

In the post-colonial context, however, the devaluing transmogrification of Melanesian custom is more subtle and more insidious.

The independent state has made bold claims which, on the surface, reflect a genuine interest in the preservation (or resurrection) of indigenous jural custom. Indicatively, and in anticipation of independence, Papua New Guinea's first Prime Minister (then Chief Minister) proclaimed in 1973:

\[\text{\textsuperscript{146} Ibid. (quoting Sir Hubert Murray).}\]

\[\text{\textsuperscript{147} Ibid., p. 47.}\]

\[\text{\textsuperscript{148} Ibid.}\]
[W]e are facing, at this very moment, the need to devise a system of laws appropriate to a self-governing, independent nation. The legal system that we are in the process of creating ... must respond to our own needs and values. We do not want to create an imitation of the Australian, English or American legal systems. We want to build a framework of laws and procedures that the people of Papua New Guinea can recognise as their own—not something imposed on them by outsiders.\textsuperscript{149}

And subsequently, Papua New Guinea's Law Reform Commission reasserted this objective in terms of the now constitutionally mandated task of fostering the development of a genuine Melanesian jurisprudence—

a common law of Papua New Guinea that would reflect the values, customs, traditions, beliefs, perceptions, and cultures of the people, and would secure the kind of justice that the people would understand and appreciate.\textsuperscript{150}

Ideologically, however, law remains an inseparable part of the state, colonial or post-colonial. As such, it tends to be regarded merely as 'a type of state action, distinctive in certain operational ways, but sharing its functions with other types of state action.' Hence, even when the state appears to be engaged in the active advancement of traditional jural values and practices, it is actually, albeit clandestinely, striving only to conserve the 'traditional mode'.\textsuperscript{151} Under this pretext, the independent state, no less so than its colonial predecessor, manipulates, co-opts and suborns custom for ideologically self-serving purposes.

Contemporary proponents of the development of a genuinely 'home-grown' Melanesian jurisprudence (as the expression of authentic customary legal values)

\begin{flushright} 
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\textsuperscript{151} Fitzpatrick, \textit{Law and State in Papua New Guinea}, pp. 28, 247.
\end{flushright}
are thus cynically identified as 'Papua New Guinea lawyers, expatriate academics, and legal consultants with extensive experience in the Third World,' promoting 'home-grown' jural adaptations intended to serve the state's ideological need 'to give fuller recognition to elements of traditional social formations so as to incorporate and contain them more integrally within the same system.'

From this perspective, any effort designed to promote the fuller integration of law and custom in Papua New Guinea can only be understood as disingenuous or deluded; and nowadays, the term *customary law* is usually employed only in a pejorative sense, connoting the products of those machinations by which 'traditional' jural values are said to be distorted, invented and massaged this way and that, before they are ultimately pressed into ideological service on behalf of the state. Because 'customary law' is really rather more like *law* than *custom*, the 'rule of law' and the 'order of custom' remain dialectically antithetical, and the theoretical integrity of the dichotomy between law and custom remains intact.

Thus, whilst the newly politicised anthropology of law in Papua New Guinea predicates on the assumption that 'Western law may well be a colonial fraud,' its modern ideological critique is directed even more pointedly at 'the possibility of

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154 Gordon and Meggitt offer these observations in respect of the term 'customary law':

[I]n view of the ideological importance that Papua New Guinea nationals attach to making a fresh start on the basis of recognized customary law, it is rather surprising that the definition of custom they have accepted is essentially alien, a confection of ethnocentric Australian administrators . . . . The product of legal draughtsmen, lawyers, and academics, it reflects their cultural biases and disciplinary inclinations [Law and Order in the New Guinea Highlands, p. 195].

customary law being transformed into a neocolonial fraud . . . '156 And as every lawyer knows, fraud is, by definition, intentional deceit.

B. Epistemological Bases of the Dichotomy Between Law and Custom

Ideologically, the dichotomy between law and custom in Papua New Guinea usefully serviced the political requirements of the colonial state, and it continues, mutatis mutandis, to provide quite similar services in relation to the needs of the independent state.157 At the same time, various conceptualisations of law and custom (and the dichotomous nature of their inter-relations) have been ideologically deployed by individuals and groups in Melanesia who, whilst not necessarily acting as agents of the state, per se, nevertheless have come to recognise and appreciate the potent political utility of adopting and adapting dichotomous formulations of the relationship between law and custom (amongst other significations of the differences between modern and traditional culture), for decidedly political purposes.158

More subtle and more sophisticated than these patently political applications, however (although not, I think, unrelated to them), the perpetuation of the dichotomy between law and custom may also involve processes that are largely

156 Gordon and Meggitt, Law and Order in the New Guinea Highlands, p. 204.


inadvertent or, at any rate, less deliberative. Such processes may well entertain distinctively ideological characteristics and objectives; but they are anchored, it would seem, more deeply in the epistemological substructures of Western thought.

With particular reference to anthropological and historical renderings of Pacific Island societies, Roger Keesing elucidated the processes whereby aspects of 'Western' conceptualisations of 'culture' may pass through our scholarly discourses and into the 'cultural nationalist rhetoric' of 'Third World elites'. However much Melanesian appeals to custom (kastom) may be distinctively Melanesian, the exogenous influences of Western ideology and epistemology are palpable.

In both contexts, Keesing observed, essentialistically reified, 'thinglike' concepts of 'culture' provide 'an ideal rhetorical instrument for claims to identity, phrased in opposition to Modernity, Westernization, or neocolonialism.' And in this sense, anthropologists, amongst other Western scholars, may be directly implicated in the initial misrepresentation of 'traditional' Oceanic cultures, as well as the transmitted reproduction of those misrepresentations:

Some of the classic accounts and generalisations about the cultures of Polynesia and Melanesia by expatriate scholars—to which Islanders have been exposed through books and other media—are misleading. Western scholars' own misrenderings and stereotypes have fed back into contemporary (mis)representations of the Pacific past.

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159 Keesing, 'Theories of Culture,' p. 5.


161 Keesing, 'Theories of Culture,' p. 5.

In his description of the many ways in which such derivative and misrendered images are perpetuated through 'discourses of cultural identity', Keesing underscored the importance of the pervasive incorporation of 'the structures, categories, and premises' underlying the hegemonic ideology of colonial domination into contemporary counterhegemonic discourses. Dialectically, he argues, 'elements of indigenous culture are selected and valorized (at the levels of both ideology and practice) as counters to or commentaries on the intrusive and dominant colonial culture.' And in constituting these idealised images, he notes, the conceptual contributions of Western anthropology 'particularly ideas about "culture"... as the[se] have entered Western popular thought,' are prominently featured.

To the extent that the machinations Keesing described in relation to the larger, embracing concept of 'culture' regularly occur in the generation and transmission of Western scholarly discourses, it must follow that the embedded concept of 'legal culture' (and its integrands of law and custom) should be a salient component in this process of 'political mythmaking'. It is certainly apparent that the ideological utility provided by formulary invocations of law and custom derives principally from the deployment of those expressions as conceptual, as well as practical, antagonists.

163 Keesing, 'Creating the Past,' p. 23.

164 Ibid. Keesing accounted for this process as follows:

In part this is because those who are dominated internalise the premises and categories of the dominant; in part, because the discourse of domination creates the objective, institutional realities within which struggles must be fought; and in part, because it defines the semiology through which claims to power must be expressed ['Creating the Past', p. 20].

165 Keesing, 'Creating the Past,' p. 20.
Twenty years ago, theoretical anthropology was said to have ratified a shift in conceptual emphasis from notions of law and culture to the idea of law in culture. Today, 'new directions' in the anthropology of law are said to point unerringly towards a reformulated concept of law as culture. Responsively, analytical approaches have been recast to concentrate greater attention 'on the ways in which legal ideas permeate daily life and how common-sense understandings of the person, time, and causality inform legal processes.' Manifestly, it is no longer only anthropologists, 'but also the people they study, [who] assume that legal systems are cultural systems.'

Perhaps, as Keesing's arguments suggest, the dichotomisation of law and custom is but a further expression of enduring Western cravings for 'radical alterity.' At all events, it is a persistent and recurring feature in contemporary representations of the distinctively 'legal' in the comparative consideration of Western and Melanesian societies, pervading the interpretative theories of anthropology, law, philosophy, history, sociology, economics and politics alike. It is, as we have seen, a hallmark of the conceptual orientations which set the conventional constructs (political, organic and politico-organic) of modern and traditional jural arrangements against one another in formulations of radical opposition, and it forms the basis of a dichotomous model that reifies and

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168 Ibid., p. 11.

169 Ibid.

170 Keesing, 'Theories of Culture,' p. 1.
perpetuates an irreconcilable contraposition of 'the state versus stateless societies' in Papua New Guinea.

If Melanesian custom must be valorized in order to sustain the vigour of a counterhegemonic discourse, then as a corollary of that proposition, Western law must be devalued commensurately. Implicitly, then, the dichotomisation of law and custom magnifies instances of difference; and in that continuing overstatement of difference, situations of conflict and contradiction are necessarily accentuated. In turn, these preoccupations may be seen as tending not only supplant equally important considerations of resemblance and continuity, but as operating further to diminish the likelihood that existing and potential bases for complementarity and integrative concord may be recognised as such.

Indeed, approaching the relationship between law and custom as one of dichotomous opposition, at the epistemological and ideological, levels may well invite and exacerbate the very problems of conflict and contradiction at the practical level which the dichotomous model is supposedly intended only to explain. Thus, if the conception of 'culture' itself represents a reification—or, as Keesing so persuasively argued, '[a] complex system of ideas and customs, attributed a false concreteness... turned into a causal agent'; and if 'cultures are viewed as doing things, causing them to happen (or not happen),' then to the extent that misrendered notions of law and custom are taken to represent instantiated expressions of Western and Melanesian legal culture, similar, and commensurately misrendered conclusions will logically be drawn in respect of those concepts. If "opposing the values of kastom to those of the West... [represents] a Western criticism of Westernization... [which] borrows from the

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171 Keesing, 'Creating the Past,' p. 33.
West a number of its patterns", then contraposing the values of Western and Melanesian legal cultures is liable to involve the same processes of reification, distortion and misrepresentation.

Insofar as the conventionally dichotomised relationship between law and custom in Papua New Guinea is concerned, this appears to be the case. And whilst it is heartening to see that anthropologists are now beginning to take the first tentative steps towards a necessary reappraisal of their understandings concerning the nature and dynamics of Melanesian custom, these important strides will only be complete when the nature and dynamics of the common law are similarly reassessed.

8. AN ALTERNATIVE PERSPECTIVE ON THE RELATIONSHIP BETWEEN LAW AND CUSTOM

Referring illustratively to a standard introductory volume on Western jurisprudence, the American legal anthropologist and lawyer, Sally Falk Moore, has drawn critical anthropological attention to what she described as a failure on the part of the text's author to extract 'any general sociological significance from the study of societies quite different from our own.' In a subsequent essay, Moore extended her criticism to the whole of jurisprudential scholarship in relation to its treatment of law and custom. Expressly challenging the patently
evolutionary orientations characteristically reflected in the conceptual categorisations 'which used to be dear to the hearts of scholars of historical jurisprudence' (and amongst which the dichotomy between law and custom was once prominent), Moore condemned the influence of those categorisations, which she regarded as operative still *(circa 1978)* in modern jurisprudential scholarship.\(^{175}\)

Reminding us that 'the origins of law and the course of legal development were the subject of much evolutionary speculation' in the nineteenth and early twentieth centuries, and that in such analyses custom was invariably treated as the 'precursor of law, its evolutionary source,'\(^{176}\) Moore decried the fact that, even today, when virtually all works on jurisprudence might be credited for including at least 'some introductory remarks on primitive law,'\(^{177}\) most of these more recent works (of which she cites only two examples) still tend to:

> treat the law of technologically simple societies as the historical or typological precursor of modern law—as an early stage subsequently replaced by that of the supposed apogee of excellence, the Western European tradition, or perhaps still better, the Anglo-American tradition. The law of pre-industrial society is...treated as a phenomenon that has been superseded, rendered obsolete by later improvements.\(^{178}\)

To render Moore's general comments about the jurisprudential treatment of the relationship between law and custom specifically applicable to the consideration of that relationship in respect of Papua New Guinea, it is only necessary to replace 'Anglo-American' with 'Anglo-Australian'; and as Peter Sack


\(^{176}\) Ibid.

\(^{177}\) Ibid., p. 219.

\(^{178}\) Ibid., pp. 219-220.
has noted, custom (or customary law) in that context has typically been characterised as 'obsolete', 'ineffective' and 'irrational', in contradistinction to the 'modern law' of the developed Western state (although, as we have seen, this is a dichotomous formulation which is quite capable of cutting in precisely the opposite direction at the ideological level).

In certain respects, of course, it must be owned that Moore's critical observations regarding the place of 'primitive law' in conventional jurisprudential analyses are not entirely inapposite. What she fails to acknowledge, however, is that most contemporary legal scholars have fairly well rejected analytical schemes of universal legal evolution, and also that legal theorists had certainly begun to expand and refine their treatments of 'primitive law' long before Moore offered her critique. Even ten years ago, then, Moore's misgivings about the extent to which ethnocentric, evolutionist preconceptions (and the dichotomous models of law and custom they embrace) had been responsively purged from the consciousness of modern jurisprudence were probably overstated. Unfortunately, a great many legal anthropologists today still seem to share Moore's suspicion of legal scholars, along with her doubts about the capacity of legal theory to come to terms with the complexities of 'primitive law' other than from a blinkered, ethnocentric and evolutionist perspective.

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181 Indeed, as Peter Stein has shown, the movement away from evolutionary paradigms in jurisprudence was itself influenced largely by the contributions of anthropological and ethnographic research. See P. Stein, Legal Evolution: The Story of an Idea (Cambridge: Cambridge University Press, 1980), p. 104.

182 See Zorn, 'Lawyers, Anthropologists and the Study of Law.'
But assuming, if only for the sake of argument, that the anthropological criticisms of the way in which jurisprudential scholars deal with the concept and phenomena of 'primitive law' are well founded, if anthropologists mean to include a broader, comparative consideration of the general nature and operations of custom within the ambit of what they would regard as a proper contemplation of 'primitive law' (and as social scientists, they are fairly obliged to do so), then they still paint with far too broad and cynical a brush, in their glib dismissal of the treatment accorded that subject by legal scholars. For the literatures of historical and theoretical jurisprudence have consistently offered thoughtful and quite detailed discussions of the relationship between law and custom, with scholars of comparative law in particular demonstrating a lively and growing interest in that area of inquiry.

Perhaps, if anthropologists were less encumbered by their own preconceptions and biases about the nature and development of legal thought, they


might be surprised to discover that custom has long been regarded as a dynamic ingredient in both the theoretical and practical expressions of Western law.\textsuperscript{185}

As it happens, the conventional anthropological assumption that custom is jurisprudentially cognisable \textit{only as a precursory source} of law has never been universally accepted amongst legal scholars and theorists. Thus, for example, in a critique of Eugen Ehrlich's otherwise cogent efforts to minimise the differences between 'law' and other 'norms of social compulsion,' Wolfgang Friedmann astutely pointed out that even in 'modern state society,' custom is properly regarded as both a 'source' and a 'type' of law.\textsuperscript{186} Though critical himself of Friedmann's disposition of the matter, Peter Sack underscores both the importance of recognising the analytical \textit{faux pas} involved in the delimiting classification of custom 'as a mere \textit{source} of law' and the confusion to which this assumption has given rise in connexion with conventionally dichotomous characterisations of the relationship between law and custom in Papua New Guinea.\textsuperscript{187}

Acknowledging the relevance of discernible differences between Melanesian custom and Western law, Sack endorses 'the step from "source of law" to "type of

\textsuperscript{185} Interestingly, it was a legal scholar who, in 1905, called attention to the ideological uses to which politicised notions of 'customary law' can be put in academic discourse, well in advance of the same 'discovery' by post-modern social science. Thus, W.J. Brown mused on what he called the 'despotism of ulterior purpose' in contemporary debates about the relationship between law and custom:

Accounts of customary law have been written, less often to represent actualities, than to promote an ulterior purpose—to justify a political or constitutional policy...to justify or deny the validity of judicial legislation, or to support some \textit{a priori} theory of the nature of law in general. As a result, that which may have purported to be scientific has been in reality polemic. ['Customary Law in Modern England,' p. 562].

\textsuperscript{186} Friedmann, \textit{Legal Theory}, p. 203.

law" as 'a major improvement' in the conceptualisation of custom.\textsuperscript{188} I agree; and in proposing an alternative perspective from which the relationship between law and custom in Papua New Guinea might be apprehended more clearly, I would go even further to suggest that, in Papua New Guinea, not only might custom more properly be understood as a type of law, but that law itself might more properly (and more constructively) be regarded as a species of custom.

A. Law as Custom

As an alternative framework within which the legal cultures, as opposed to distinctive iterations of the various legal systems, of Anglo-Australian and Melanesian society may usefully be conceptualised, the characterisation of law as custom is not nearly so radical as it might at first seem. As Sir Carleton Kemp Allen noted, it is hardly novel in a jurisprudential sense:

\begin{quote}
Blackstone's 'general customs' and 'customs of the realm' are those fundamental principles in legal relationships which for the most part are not to be found in any express formulations, but are assumed to be inherent in our social arrangements. They are, in short, the Common Law itself.\textsuperscript{189}
\end{quote}

Like their Realist forebears, critically oriented legal scholars regularly demonstrate the truly variegated influences upon and sources of modern law. Anthropologically, too, as we have seen, emergent analytical formulations are stressing the significance of continuities between legal orders and wider cultural systems, thereby diminishing the theoretical importance of differentiating between state law and indigenous custom in so-called pre-industrial or tribal societies. This forthright equation of law and culture would seem logically to imply a

\textsuperscript{188} Ibid.

commensurate equation of law and custom;\textsuperscript{190} and with particular respect to the contemporary legal-ethnographic critique of the relationship between law and custom in Papua New Guinea, anthropologists are, in fact, tending to regard the state itself as 'problematic and ambiguous.' At the same time, the relations of the indigenous constituents of traditional, stateless Melanesian society to the state tend to be described as effectively 'open' and negotiable.\textsuperscript{191}

In rejecting the dichotomous premises of both the political and organic formulations of the relationship between law and custom in Papua New Guinea, however, I am not so much inclined to eliminate the state from the conceptual equation, as to reduce its ostensibly determinative significance to that of a single, albeit important, element amongst many influential factors operative within the processes of social organisation and normative order. More importantly, by focusing upon legal cultures rather than indeterminate legal systems, by stepping back theoretically in an effort to apprehend two jural forests and not simply a profusion of trees, as it were, the alternative perspective I propose reveals with a refreshing clarity the unifying features of Melanesian custom and Anglo-Australian common law, enabling one to formulate a meaningful understanding of their inter-relations in a decidedly non-dichotomous configuration; that is to say, as different jural iterations within the same kind of tradition.

As a point of departure in the analysis of the relationship between law and custom in Papua New Guinea today, there are distinct advantages to the adoption of this non-dichotomous perspective in a theoretical as well as practical sense. Theoretically, to regard law and custom as species of the same kind of tradition

\textsuperscript{190} Starr and Collier, \textit{History and Power in the Study of Law}, p. 11.

\textsuperscript{191} Gordon and Meggitt, \textit{Law and Order in the New Guinea Highlands}, pp. 11-12.
redresses the distorting imbalances implicit in the essentialistic characterisation of both variants of which Keesing is justly critical, and which are conceptually inherent in any analytical approach that assumes, \textit{a priori}, that comparison must lead to the specification of super-ordinate differences. Thus, as Robin Horton argued in justifying his approach to the comparative consideration of African thought and Western Science:

\begin{quote}
[A]n exhaustive exploration of features common to Western and traditional African thought should come before the enumeration of differences. By taking things in this order, we shall be less likely to mistake differences of idiom for differences of substance, and more likely to end up identifying those features which really do distinguish one kind of thought from the other.\footnote{R. Horton, \textit{African Traditional Thought and Western Science}, \textit{Africa}, vol. 37, no. 1 (January 1967), p. 50.}
\end{quote}

As a practical matter, insofar as the real problems generated by the inter-relations of law and custom in Papua New Guinea are approached on the basis of the conviction that law and custom represent two distinct, diametrically opposed and mutually exclusive sets of culturally based orientations to jural organisation and order in society, the likelihood of reconciling those troubled relations (and thereby, perhaps, mitigating some of the tensions present within that historically troubled relationship) is effectively precluded. On the other hand, if law and custom are approached as variations upon a demonstrably consistent theme, equally demonstrable similarities and continuities are bound to become more apparent; although this view neither denies the existence of patent differences nor necessarily hinders the recognition more subtle contradictions. As a result, new and relatively unexplored grounds upon which appropriate institutional compromise, adjustment and accommodation may be based will inevitably present themselves, broadening the scope for genuinely structural law reform.
Scholars of comparative law are generally cautious in their recognition of the differences between a legal system and a legal culture. In calling attention to those important and determinative differences, some prefer to draw an analytical distinction between a legal system and a legal tradition, employing the latter term as a synonym for legal culture. Thus, for example, John Merryman commences his discussion of the civil law tradition of Western Europe and Latin America with the following remarks:

The reader will observe that the term used is 'legal tradition,' not 'legal system.' The purpose is to distinguish between two quite different ideas. A legal system . . . is an operating set of legal institutions, procedures, and rules . . . . In a world organized into sovereign states and organizations of states, there are as many legal systems as there are such states and organizations . . . , [and] there is great diversity among them [legal systems], not only in their substantive rules of law, but also in their institutions and processes . . . .

A legal tradition, as the term implies, is not a set of rules of law, although such rules will always be in some sense a reflection of that tradition. Rather it is:

a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective. 193

Others, however, may expand the concept of a legal tradition to include several cultures; all of which may be related by common historical experience, but each of which retains its own distinctive qualities and characteristics as to language, race, religion and so forth. In this way, what Merryman describes as the 'civil law tradition' might be considered only a sub-category within a larger,

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embracing 'Western' legal tradition.\textsuperscript{194} So, too, one may speak broadly of African, Asian, Melanesian and other legal 'traditions'.

But the shared sense of traditionality by which I characterise the relationship between law and custom in Papua New Guinea today is not quite the same as either of those which inform the notions of legal tradition described above. In certain respects, to be sure, any configuration of legal traditions in Papua New Guinea must reflect the interdigitated realities of a shared experiential history of inter-cultural co-existence (however brief and contentious that history may have been), and I recognise that there is and must be a close conceptual relationship between what comparative legal scholars might refer to either as the (or a) 'modern Melanesian legal tradition' or 'modern Melanesian legal culture' which necessarily reflects that syncretically interactive experience. The notion of legal tradition that I have in mind, however, is rather different to that of legal culture, and I would not use the terms synonymously.

Because it is a construct that gives precedence to the threads of continuity which run through law and custom alike, the concept of jural tradition that I am advancing here is one within which the legal cultures of Western and Melanesian society are both embraced. The alternative perspective from which I am urging that the relationship between law and custom in Papua New Guinea ought to be reconsidered is formulated along the lines of a general theory of tradition, albeit with particular jural applications, rather than a parochial theory of law or custom as such.

Law, says Martin Krygier, 'is a profoundly traditional social practice, and it must be'.

That is to say, not only do particular legal systems embody traditions, which of course no one would deny; tradition is central to the operation of every legal system. To understand much that is most characteristic of the nature and behaviour of law, it is not enough to analyse it in terms of one or even several of the 'time-free' staples of modern jurisprudence. One needs to explore and understand the nature and behaviour of traditions in social life.

But the very same observations can be, and frequently are, made in respect of custom as well; hence the interchangeability of the terms 'custom' or (polemics notwithstanding) 'customary law' and 'traditional law'. This is the gravamen of the argument I present here in support of an alternative perspective on the nature and relationship of law and custom in Papua New Guinea.

According to Krygier's formulation, the concept of tradition itself involves three essential characteristics, each of which can be shown to apply appositely, not just to the common law (as Krygier has done with impressive cogency), but to the jural custom (or, again, the 'customary law') of Papua New Guinea. Firstly, then, there is what Krygier describes as the pastness of tradition: the notion that the content of a tradition has, or is believed to have, originated some time in the past. Thus, he argues, 'the legal past is central to the legal present' in all legal cultures.

Like all complex traditions, law records and preserves a composite of (frequently inconsistent) beliefs, opinions, values, decisions, myths, rituals, deposited over generations. The stuff of legal doctrine...has been proclaimed, applied,

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196 Ibid.

197 Ibid., p. 181.
recorded, and passed down, by officials specifically entrusted with these functions.198

In Western (and Westernised) society, it is the state that authorises and delegates the specific and specialised tasks of recording, reproducing and disseminating the 'stuff' of the law; and as we have seen, it is the tangibly memorialised nature of Western law that supposedly sets it apart so distinctively from custom. But anthropologists themselves are quick to observe that, amongst traditional Melanesian societies, a given customary practice is inevitably imbued with this same sense of pastness. Moreover, it is not at all unusual for particular individuals within a group or a community to be recognised, by common consensus, as especially knowledgeable in the 'old ways', they ways in which this or that 'has always been done' (even if the idea or institution is a relatively recent innovation), and it is frequently to these individuals that other members of the community turn for a gloss on the relevant custom. At this level, therefore, the outstanding differences between Western and Melanesian evocations of the pastness of law and custom (between a written and an oral tradition, between state as opposed to a popular designation of recognised authority) become really rather more differences of idiom than of substance.199

Much in this portrayal of the traditional pastness of the law pointedly refutes the stereotypical model of law upon which conventionally dichotomous formulations of the relationship between law and custom necessarily rely, and Krygier's more accurate characterisation of the eminently traditional nature of law resonates exceptionally well with the ostensibly distinctive traditionality of

198 Ibid.

199 'Even if legal systems did not institutionalise the recording, preservation and transmission of so much of the legal past,' Krygier notes, 'residues of this past would still mould what can be done, indeed thought, in the present' ['Law as Tradition,' p. 181]. Again, the application of these observations about Western Law to Melanesian custom is readily apparent.
custom. Many of the fundamental qualities ascribed to the pastness of law (and essential to the tenability of a dichotomous representation of its relationship with custom) are revealed as illusory. Consistency, coherence, univocality, even the fixed centrality of rules are all likely to be invoked in what Krygier correctly points out to be a largely symbolic and often exaggerated elevation of 'the power of the past over the present.'

Within the operation of jural tradition, however—Western or Melanesian—the significance of symbolic invocations of pastness should not be underestimated. In judging cases at common law or in managing village disputes, reference to the past, in fact or hypothetically, plays an important part. Thus, in law:

> a judicial decision is one which is justified publicly by reference to authorised institutional tradition. In those hard cases that lawyers and legal theorists so enjoy to contemplate, the need publicly to justify one's decision in terms of the legal past remains important, long after the rules have run out.

And so, too, with Melanesian custom.

Secondly, legal traditions entertain what Krygier calls authoritative or normative presence. Thus, although derived from a real or imagined past, a traditional practice, belief or more complex set of attitudes and general orientations have not, as it were, remained in the past; for traditionality consists in its present authority and significance for the lives, thoughts and activities of participants in the tradition. Of course, not every jural idea or event that is past

200 Ibid.

201 Ibid., p. 182.


203 Krygier, 'Law as Tradition,' p. 182.
enters into tradition. Indeed, much of it 'simply disappears without a trace, or leaves traces which survive without present consequences for anyone.' By the same token, 'not everything from the past which has consequences in the present . . . enters a tradition linking the past with the present.'\textsuperscript{204}

Moreover, the authoritative presence of the past in jural traditions may pass effectively unnoticed even by those participating in the tradition. As Krygier suggests,

\begin{quote}
the past is often most powerfully and persuasively present when it is not known either to be past or present. It is simply 'obvious' or 'natural', an unremarked piece of the furniture of the world.\textsuperscript{205}
\end{quote}

In this sense, an understanding of one's own legal culture may be held quite unconsciously, and Krygier employs the analogy of language to illustrate the point. Likening the intuitive way in which a person 'knows' his or her own legal culture to that of one's knowledge of the grammar of his or her native language, he reminds us that,

\begin{quote}
law is a language and it is not only lawyers who speak it. We all do, and even the least legally expert of us arrange and transact some of the most and least significant of our everyday affairs in terms of our understanding of it.\textsuperscript{206}
\end{quote}

Interestingly, Peter Sack uses the same analogy to language in connexion with his discussion of the unselfconscious way in which the Tolai of East New Britain speak of their law as 'the way we do things.' Intuitively (although this intuition, of course, is a product of acculturating and historical experience), Tolai know when a

\begin{flushright}
\textsuperscript{204} Ibid.
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\textsuperscript{205} Ibid., p. 183.
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\textsuperscript{206} Ibid.
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grammatical utterance is correct because it 'sounds' or 'feels' right; and so it is, too, with a sense of a legal culture. 207

Thirdly, a tradition is not merely the past made present. It must have been—or be thought to have been—passed down over time, deliberately or otherwise. 'Traditions,' Krygier writes, depend on real or alleged continuities between past and present; and whilst these continuities may be formalised, as they are in Western (or Westernised) societies, it is not necessary that they be so. 208 Whatever the mode of transmission used in a particular tradition will affect directly and profoundly what passes from generation to generation, what is added, what subtracted, and how the transmitted past enters and is received into the present. 209

Naturally, in both Western and Melanesian societies, the content of a jural tradition can, and invariably will, be altered in the process of transmission. But change in law and custom alike is an aspect of their shared traditionality, and is in no way inimical to either. In fact, as Krygier observes, 'the very traditionality of law ensures that it must change'. 210

For although interpreters might police the present to see that it does not stray too far from their interpretation of the past, it is impossible for traditions to survive unchanged . . . . The changes thus made are then incorporated into the tradition and come to be interpreted in traditional ways. 211

207 Sack, 'Coming to Grips with Melanesian Law,' p. 12. With respect to the traditional law of the Tolai, Sack stresses the decidedly 'non-normative' context in which such expressions tend to be offered. But the authoritative presence of a legal tradition need not be normative in every case.

208 Krygier, 'Law as Tradition,' p. 185.

209 Ibid.

210 Ibid.

211 Ibid., pp. 185-186.
Viewed in this way, law and custom can be seen as essentially the same kind of traditional jural form. The distinctive features of both legal orders, whence derive the dichotomous opposition of the respective jural systems and the false dichotomisation of the two legal cultures, proportionately dissolve, whilst the patent resemblances and continuities that link law and custom together effectively eclipse what, from this perspective, begin to look more and more like mere superficialities at the processual, institutional and substantive levels.

At this point, I should probably do well to reiterate that in adapting Krygier's formulation of 'law as tradition' to the gravamen of this chapter I am not advocating a simple (and arguably simplistic) theory of law and custom, collapsing two demonstrably different concepts and groups of phenomena into a single analytical category. Rather, what I am proposing is only an alternative perspective, from which the conceded differences between law and custom are not assumed, a priori, to subsume and negate those equally significant features which, in a very fundamental sense, form the bases upon which they may be seen to share a great deal more in common with one another; far more in common, at all events, than conventionally dichotomous models of the relationship between law and custom suggest or allow for. This perspective, I believe, provides a new and demonstrably more appropriate point of departure from which the debate about law and custom in Papua New Guinea today might proceed more productively and more constructively.

B. Custom as Law

In urging the reconceptualisation of law as custom—or rather, in suggesting that law and custom, as different iterations within the same traditional framework of jural experience and understanding, might properly be regarded as more similar than dissimilar to one another—I have been advancing an essentially theoretical
argument. The cogency of that argument, however, is enhanced by a supportively practical complement, demonstrating that, in Papua New Guinea, custom is (or again, can properly be regarded as) law. In denying this proposition, political and organic formulations of the dichotomous relationship between law and custom have shown much confusion. In the case of political and politicised formulations, I think this confusion may simply reflect the tendentious nature of any polemical consideration; in the case of organic or ethnological formulations, I suspect it is the result of misunderstanding.

If, however, the organic formulation of the relationship between law and custom in Papua New Guinea can be shown to be analytically wanting—and I would hope to have gone some way in showing that it is—then countering the political formulation of that relationship becomes a more comprehensible, if by no means simple, task. For there is a great difference between what cannot be effected because it is intrinsically impossible to do so, and what has not been achieved because of an absence or failure of political will. And whilst a reformulated theoretical perspective may facilitate the process whereby law might be made into custom, in Papua New Guinea today, it is the Parliament and the courts which must make custom into law. Moreover, although I oversimplify a complex and convoluted political situation in saying so, the fact remains that the mandate and the means for that latter transformation do exist.

This is not the place to engage in an extended consideration of the provisions of Papua New Guinea's constitution which deal quite explicitly with the adoption and integration of law and custom. Nevertheless, it is accurate to say that, under

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the Constitution, the law is defined to include within its intended purview the practices of Melanesian custom. Constitutionally, custom is law (albeit not the only law) in Papua New Guinea today. Custom, too, is defined in the Constitution, somewhat tautologically perhaps, but broadly enough to entertain a fairly wide range of formulations.

This, of course, is only the beginning of a complex and controversial inquiry which, apart from the relevant judicial interpretations and dispositions, has been, and will doubtless continue to be, at the core of debate and discussion framed in both a political and an organic idiom. Thus far, much of the scholarly discussion concerning the constitutional status of law and custom in Papua New Guinea, and the bases upon which their reconciliation might be achieved, has moved from an early, somewhat idealistic optimism to a bitter cynicism (this with particular respect to the state's failure to undertake the expressly mandated task of attempting actively to integrate law and custom and to develop an appropriate, traditionally based underlying jurisprudence). In terms of Papua New Guinea's relatively short constitutional history to date, the facts of the matter speak for themselves, and there are good grounds for disappointment. Abject cynicism, however, is premature at best. Hearteningly, there have been some recent indications of a shift back in the direction of a more constructive optimism insofar

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213 PNG Const., sec. 9.

214 PNG Const., sch. 1.2 provides:

'Custom' means the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.
as informed commentary is concerned. The constitutional basis for a purposeful integration of law and custom certainly remains intact.

So long as the issues germane to the debate about the relationship between law and custom in Papua New Guinea are perceived as governed ultimately by the parameters of dichotomous formulations of radical, irreconcilable opposition, any approach to a resolution of that debate is bound to result in frustration and failure. And to the extent that conventional theoretical orientations towards law and custom continue to dictate the terms upon which that debate is pursued, the practical problems its resolution would purport to address will remain intractable. Thus, political (and politicised) analyses throw up organic arguments in their tenacious critique of the state's inability to do that which, from the political perspective, the state must be unwilling to do in any case; whilst organic (or ethnologically based) formulations persistently castigate the state for its failure (or refusal) to do that which, from an organic perspective, cannot be done.

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215 See Zorn, 'Making Law in Papua New Guinea'.

Without impugning its past or even its present empirical validity and descriptive accuracy, the conventional model of the relationship between law and custom in Papua New Guinea, formulated along political or organic lines and built upon false dichotomies derived from double standards of analysis, has become a self-fulfilling and damning theoretical prophecy for the future. In this, it is not so much wrong as wrong-headed. As a practical matter, the continued adherence to the protocols of this model foreordain the persistence of the pattern described in the preceding paragraph and, I fear, the undoing of the nation.

The alternative perspective on law and custom suggested here, and the reappraisal of the relationship between law and custom implicit therein, promises no more—but nothing less—than an opportunity to break a decidedly counter-productive cycle in the contemplation of jural relations in Papua New Guinea today. Theoretically reformulated, a unified concept of law and custom lends itself to the further development of a salutary jurisprudential methodology, which recognises the full panoply of differences and similarities in the nature and dynamics of law and custom. This, in turn, may provide the practical basis upon which the courts, Parliament, academic lawyers and the organised bar in Papua New Guinea might actively and purposefully take up their collective responsibilities to foster the development of a viable, socio-culturally appropriate and genuinely autochthonous Melanesian jurisprudence, and thereby begin to lay the necessary foundations for a uniquely Papua New Guinean contribution to the rich and diverse tradition of the common law.

If we disregard the institutionalisation of certain views about law, the translation of certain legal theories into legal technologies, and their inter-dependence with human thought and action in other fields, the acceptance of a fundamental and lasting plurality of law does itself no more than rule out any single, coherent theory of law. General legal theory can no longer be concerned with discovering what law is, but must investigate what it can be. It can no longer confront law as a single phenomenon (however complex), but must see it as a
range of possibilities. It cannot even assume that this range has any theoretical limits: everything is henceforth possible and nothing is certain. 217

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