

WHEN THE ALTERNATIVE FAILS

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What happens when a popular justice program fails? Academic discussions of alternative dispute resolution have frequently questioned the likelihood that popular justice programs will be accepted by their publics in either advanced industrial or Third World nations (Abel 1982, Hayden 1990, Merry 1993). In this paper, however, I examine an instance in which a popular justice program had been positively received for a decade, but where, because of a variety of circumstances, it ceased to perform effectively. My aim here, however, is not to concentrate on why this occurred, but, instead, to explore the consequences of this change in the legal system. I will argue that in understanding this transformation we must simultaneously examine both the local dynamics of dispute resolution and the impact of transnational processes that have altered the socio-economic context of the program (Merry 1992).

The subject of my paper is the Papua New Guinea village courts, especially the courts of the Agarabi region of the Eastern Highlands Kainantu District. I will begin by briefly outlining the village court's operation through the mid-1980s, then turn to the circumstances that led to the court's decline toward the end of the decade. The official alternatives to the village court available to disputants in 1989 will be reviewed next. Since many disputes are not subject to the jurisdiction of these forums, however, I then discuss the interconnections of economic change and dispute resolution. Finally, since religious change has altered the pattern of community order to a considerable extent, I conclude by analyzing the impact of Christian ideology upon the nature of conflict in the Eastern Highlands.

Village Courts Program

The village courts of Papua New Guinea were set into operation with independence in 1975. Although under the Australian colonial regime there was firm resistance to the idea of establishing courts to be run by villagers, as the end

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of the colonial era began in the early 1970s the need for an official village forum was recognized by both colonists and nationalists. Members of the National Parliament were, on the one hand, urging the return of power to local leaders, while, on the other hand, colonial officials were worrying about the absence of law and order in rural areas. The result of this debate was the creation of the village court, a forum that combines customary substantive and procedural law managed by village magistrates, but which is linked to the national judicial system through the processes of appeal, police enforcement, and imprisonment.

Village courts include within their jurisdiction anywhere from 2,500 to 10,000 people; thus each court normally serves several villages. The court's jurisdiction extends over cases that take place within its area, as well as cases in which the parties typically reside within its area. Village courts hear both criminal and civil matters, though a sharp distinction is not made between the two types of wrong at the local level. The magistrates of the court can impose a range of outcomes from compensation to court fines, and, when their orders are not followed, they may order a defendant to be imprisoned.

Nevertheless, the primary purpose of the village courts, as set out in the Village Courts Act,

is to ensure peace and harmony in the area for which it is established by mediating in and endeavoring to obtain just and amicable settlements of disputes (Village Courts Act, Part 3, section 52).

In order to carry out this directive the courts are to follow the relevant provisions of the Act and local custom. Each village court can select the procedures it will use in court, but the Act does stress the importance of mediation. In fact, the primary work of the court was envisioned as mediation handled by a single court official (Chalmers and Paliwala 1977: 88-89; Keis 1988: 4).

The village court functions are carried out by three officials: the magistrate, the clerk, and the peace officer. Appointments are made by the government in consultation with the local government councils, the latter usually selecting officials through village elections. Supervision of the courts was intended to be performed by local and district court magistrates. They were to inspect village courts periodically to check records and review practices and procedures, and to support 'traditional' procedures. In most parts of the country, however, these officials never actively adopted this role, allowing the courts in the formative years to develop in a supervisory vacuum.

The village court system continued to expand through the 1980s, growing to

nearly 1000 courts by the end of that decade (Keris 1988: 4). Although not all rural Papua new Guineans have village courts, more than 80% of the nation is served by these forums, and neighbourhood courts have been added to urban centers (Zorn 1990). Plans call for the entire country to have village courts by 1997.

Agarabi Village Courts - The 1970s

The Agarabi people of the Kainantu District in the Eastern Highlands province received some of the first village courts opened in 1975. Yet the village courts that began working then were based on a long history of involvement with colonial institutions. Because Agarabi people were familiar with the style of court proceedings during the Australian period, the Village Courts Act's emphasis on customary rules and mediation did not meet with wholehearted acceptance. Rather, adjudication was given more attention in the Agarabi village courts, though custom and mediation were retained as significant components of the overall local system.

In their courts Agarabi court officials created a legal space which was clearly differentiated from the village community. Court houses, though never intended to be part of the system, were constructed with local materials and given the design and symbols of the Australian common law courts. Books, badges, and benches, the paraphernalia of the court, were always on display. The officials' expectations of behavior and evidence also tended to be quite formal.

Moreover, even though the Village Courts Act called for all cases to be mediated before a formal hearing, officials segregated attempts at reconciliation to the village moot (Westermarck 1987a). Magistrates determined their own system for categorizing those disputes that should be mediated and those that should be adjudicated. They distinguished cases that appeared before them as either 'big trouble' or 'little trouble', and usually adjudicated the former and mediated the latter. More than the issue in dispute, it was the proximity of the social relationship that determined their categorization, with those of the same lineage believed to be able to resolve more easily a dispute, and those unrelated to have potentially serious problems.

The separation of the court and the moot served to extend the range of disputes the system could absorb at the local level. The authoritative court complemented the informal moot, offering an alternative for dispute management that was decisive yet accessible. In addition, the specter of the severe village court was frequently used in mediations in the moot to encourage disputants toward reaching a compromise. In almost all instances court officials were the individuals called

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upon to mediate cases, creating a direct link between the moot and the court in personnel and communication. Recommendations made in the moot, therefore, would be known and, in most instances, supported in the court.

This structure of separate but allied forums was not part of the original village court plan. Critical to the emergence of this pattern was the absence of consistent local supervision in the late 1970s. Local and district court magistrates never carried out the village court supervision assigned to them, blaming lack of transportation and heavy case loads of their own for the neglect. The limited scrutiny the Agarabi village courts received came from a single local government council clerk's periodic visits to collect fines.

There were a number of cultural, historical, and structural factors that led Agarabi court officials to reorganize the official village court plan as they did. First, mediation and compromise were not the primary characteristics of Agarabi disputing practice. Like other Highlanders, they tended to be more confrontational in response to conflict, initiating or responding to disputes aggressively and then reducing hostilities through talk and ritual reconciliation. Thus the presence of the authoritative court under the control of village leaders created an accessible forum that was culturally appropriate. Second, after decades of colonial rule, Agarabi leaders sought to control the seats of authority that had been denied them by Australian colonial administration (Westermarck n.d.). Third, because the disputants most magistrates were likely to see before them were relatives, friends, or acquaintances, the officials' demonstration of association with the government accentuated the neutrality and authority they needed to impose decisions on their fellow villagers. As we will see later, the absence of government support in the 1980s was significant for the transformation of the court at the end of the decade.

The restructuring of the village court plan was favourably received by Agarabi people in the late 1970s. My record of the disputes brought to one court clearly shows that the court supplanted all other forums. In one village that I studied intensively, twice as many cases went to the court as were heard in village moots. The court records show that over 75% of the hearings involved complainants and respondents who were from the same village.

Interviews with the litigants in cases from this court for three months revealed that few forums other than the village court were used in processing the disputes. Based on the population within the court's geographic jurisdiction and the number of cases heard, the study shows there was an average of one case to 10 people, a figure that is comparatively high for primary or neo-traditional courts in other Third World countries (Benda-Beckmann 1985: 195). Finally, a review of the records of the Kainantu local court, the primary court in the pre-village court era, indicated that most of the village-centered disputes that were being brought to that

forum in the past shifted to the village courts after 1975.

Several factors explain this avid court use in the 1970s. First, the nature of the outcomes reached in these forums appealed to disputants. Compensation, an important aspect of precolonial dispute management, was the most common order made by the court I studied. Second, the court expanded the range of methods for handling disputes that the disputants could apply as they saw fit. If, for instance, a complainant made a report to the court, they were not forced to proceed with their case, but could use the threat of the court to assist them in their negotiations with a stubborn opponent. Third, village courts added a positive legal resource for Agarabi women (Westermarck 1985). Over 40% of all hearings in the court I studied were initiated by women, a singular number given the reticence of women to voice their views in public settings. The fact that court magistrates gave support to the new national laws against domestic violence, rather than displaying the older acceptance of a husband's aggression to control his wife, may have been one factor in the court's appeal for Agarabi women.

Village Courts in Transition - The 1980s

The basic pattern of court structure and use described above was maintained into the 1980s, yet changes both internal and external to the system gradually altered the condition of the village court. In 1983 the government established the role of the village court inspecting officer within the Village Courts Secretariat to perform the neglected work of the supervisory magistrates. Funding limitations, however, meant that few were appointed. In the province of the Eastern Highlands, where there are 88 village courts, only two officers were posted. Moreover, even though supervision of the courts improved through their presence, the absence of support staff or regular transportation still meant that inspections were infrequent. Furthermore, budget cuts eliminated the officer based in Kainantu in 1988, leaving one officer located more than 50 miles away to cover the six Agarabi courts, along with the 82 other courts in the Eastern Highlands.

In the 1970s village court officials had continually complained of the lack of support from government. The vision of the government had always been that these forums would be a source of traditional wisdom added to the legal system to reflect the customary heritage of Papua New Guinea. Government authority would be added to indigenous village institutions that would enable the country to be more self-reliant in the expansion of its judiciary. However, as we have seen, this national ideology, often called the 'village court philosophy' in government documents, did not match the ideas of officials at the local level. They were desirous of a clearer demonstration of government assistance in the form of permanent court houses, uniforms, police aid, and higher salaries. This local

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ideology continued to coalesce through the 1980s to the point of confrontation with the government by the end of the decade (Westermark 1991).

Repeatedly during these years there were demonstrations and work stoppages by officials frustrated with their status. In 1983, for instance, Kainantu village court officials met to form an association to urge the government to strengthen its support. Elsewhere in the Eastern Highlands court officials in the Goroka area organized a 1986 demonstration in Goroka town that saw 200 of their number march to the headquarters of the provincial government to present their demands. By the end of the decade, a national association of village court officials was formed by representatives from all the country's provinces. Clearly, officials were beginning to unify and resist the government-imposed definition of their work situation.

Still, the coordinated action of officials did not bear fruit, and the unmet needs of the courts had an impact on the operations of the courts at the local level. Frustrated with their working conditions and low salaries, Agarabi officials' morale sank to a low ebb by the end of the decade. As a result, frequently one or two officials did not appear on the days designated for the court sittings. Without three magistrates present, there can be no quorum, and, therefore, no official court business. Interviews with Agarabi indicate that the decline in work performance by the officials began about 1987 and increased in ensuing years. It is certainly no coincidence that this shift corresponded to the removal of the inspecting officer from Kainantu. Nevertheless his absence merely increased a trend that was already under way.

The disruption of court activities is reflected in court records. Records for the court I have studied most closely indicate that during the mid-1980s the court operated at a level similar to that of the 1970s, but that by the late 1980s the court was dealing with only 15% of its former case load. My own observations of court operations for the two-month period August-October 1989 parallel the decline in court functions shown in the records. During these months very few cases were brought to the court, and fewer still were decided upon by the magistrates. In fact, during that period only one full case was heard where there was a decision made and an order issued.

The Alternative's Alternatives

The initial cause of the court's transformation was not the dissatisfaction of the people using this institution, but the attitude toward their work of the court officials. Thus, it was not the case, as has sometimes been argued for popular justice programs elsewhere in the world, that the courts met with local apathy.

Nevertheless, while they recognized that the officials had what they considered just grievances with the government, by late 1989 disputants were not inclined to waste their day sitting at the court site waiting for officials. Given the service of the courts in the 1975-1985 period, this raises an interesting question: if the court was not operating effectively and disputants were now avoiding it, what happened to the hundreds of disputes that this court heard each year during the first decade of its existence? To answer this question we must look to two possibilities: (1) other forums absorbed the village court's case load, or (2) local patterns of disputing changed.

Local courts

As was noted earlier, once the village courts began work in 1975, cases that had been brought out of the villages to the local court in Kainantu town shifted to the new forums. The decline of the village courts in the late 1980s did not, however, once again flood the local court with cases. Agarabi people were using the local court for disputes within its jurisdiction. Most of the civil cases brought to court dealt with matters associated with the national capitalist economy. The repayment of loans, the damage of property, and the fulfilment of contracts were some of the typical cases appearing. Although it is impossible to establish what the local court officials may have handled informally, one Kainantu magistrate told me that he still was discouraging any cases that should have been heard in a village court, and referring back to the rural forums any such cases that had slipped on to his court docket.

Village moots

One alternative that did undergo an increase in cases was the village moot. As with the moots of the 1970s, it was still the village court officials who convened these village gatherings, but, unlike the official court hearings, moots were held when only one official was present. In 1989 such meetings were held more frequently than the court. This may, in part, have been due to the fact that moots were arranged on the basis of need rather than schedules; however, it also was the case that these gatherings were usually convened on the weekend. Additionally, since moots were always focused on intra-village cases, they were situated among the official's immediate neighbors, friends and relatives. Thus, with both convenience and social pressure influencing them, there was little to keep the officials from conducting the meeting. Ironically, this pattern of village moot mediation more closely reflected the government's original intent for the operation of the village court.

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In one Agarabi village in the 1977-78 one-year period of research, 33 cases were heard in the moot, whereas during the two months in 1989, moots dealt with 12 cases. Since there is no record of moots, I cannot be sure that there was a similar rate of disputes throughout the remaining ten months of the year, nor can I be certain of how the moot was used throughout the 1980s. Nevertheless, it does appear that a significant increase in the use of this alternative had occurred over the 1970s, and it seems likely that it was one alternative adopted by disputants in the absence of the village court.

Land and coffee

The decline in court performance at the end of the 1980s may have been a less significant cause of the decline in numbers of cases than changes in patterns of conflict among the Agarabi. I believe that this was the case with respect to disputes caused by grievances concerning animals. There were two sources for this modification in conflict: land and religion.

With the goals of both expanding the planting of village coffee and increasing national coffee exports, during the 1980s low-cost loans for the development of smallholder coffee plantations were made available through a program encouraged by the government (Gimbol 1988; Stewart 1992). The result was a rapid change in land use. In the first five years of the program land committed to these group projects in the Highlands expanded by over 2000 hectares. Most of the projects were established in the Eastern Highlands (62%), with the majority of these in the Asaro Valley and around Kainantu (Gimbol 1988: 7). In the latter area, new coffee plantations led local growers in 1987 to initiate their own management group separate from the government, the Kainantu Development Corporation.

One of the unintended consequences of the move to incorporate lands for the purpose of planting coffee, however, was the reduction or elimination of cattle projects. Some of the first cattle projects in the Kainantu District had been initiated by the Agarabi Seventh-Day Adventists (Grossman 1984: 57-58). Seeking an alternative to the pork banned by their church, Adventists had first adopted goats in the 1950s, but became avidly involved in cattle raising when this alternative was introduced in the 1960s. The opportunity for the smallholder plantations necessitated expanses of land that were not available amidst the well-planted garden areas. As a consequence, many of the lands selected for plantations were derived from the former cattle pastures.

In turn the reduction of cattle eliminated one prominent source of conflict. In the late 1970s the leading cause of disputes brought to the village court was domesticated animals. Over 20% of the cases for the court I studied stemmed

either from livestock damaging gardens, or the hostile garden owner injuring or killing the offending animal (Westermarck 1986: 141). With the reduction of the cattle herd, in some areas by as much as 90%, a major irritant to community relations was removed.

Christian conversion and dispute reduction

Religious change has resulted in other modifications in social relations. The Seventh-Day Adventists are one of the largest Christian groups in the Eastern Highlands. From the early years of colonization in the Highlands, Adventists have had a presence in Kainantu. The first Adventist converts in the Highlands were Agarabi, as were the first men recruited to go off on evangelizing missions to Eastern Highland regions uncolonized in the 1950s. In the 1980s there was a dramatic expansion in the rate of conversion to this sect, and the Agarabi have been at the forefront of this process. Church figures for the province suggest that there was a 60% increase in the 1985-90 period. The Adventists' largest baptism in their history was held in August 1989 in the Eastern Highlands, with over 3000 converts joining the church in a single afternoon (PNG Post-Courier 1989). I do not have precise figures for the number of Agarabi converts, but one indicator of the significant presence of Adventists among the Agarabi is the fact that the number of Adventist churches in Agarabi villages doubled in the 1980s. Moreover, some of them stand in what were previously communities associated with the Lutheran church.

The relevance of this religious conversion for our understanding of the village court situation is both ecological and ideological. As with the diminution of the cow herds, an expansion of the Adventists has meant a decrease in the number of Agarabi pigs. As was mentioned above, a central tenet of Adventist faith is the avoidance of pork in adherence to Old Testament dietary prohibitions. This also has meant that foods could not be cooked with pork. Many Adventists have even found it objectionable to be around pigs, especially because of the faeces they leave along village paths. With this antipathy toward pigs and the growth of its members, the rise of Adventism has all but ended garden damage by pigs as a source of disputing.

Another element of Adventist ideology opposes aggressive disputing and the use of courts (Westermarck 1987b). Instead, they stress harmony in social relationships and the use of church methods for resolving disputes. The latter include mediation led by elders, ritual resolution, and confession. Based on my research in the 1970s, I found Adventists less likely to actively pursue their disputes, though many did use the village courts. The 1980s fervor for Adventism, along with its expanded community penetration, suggests the possibility that they have placed a

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greater reliance upon avoidance and church procedures due to their 'harmony ideology' (Nader 1990). Although I did not examine this hypothesis in the field, it may be that the fading of the village court was paralleled by a growing reluctance to use such an adversarial process among Adventists.

Conclusions

The scholarly examination of popular justice programs has questioned the utility of these institutions for both advanced industrial and Third World nations. In fact it is frequently argued that such programs primarily serve to extend the control of the state beyond its formal legal institutions. The Agarabi village courts provide an unusual case, however, where the failure of the state to increase its contributions to popular justice undermined the program rather than expanded it. Whether the village courts would have regained their former popularity if the government had bolstered its support for the courts it is now impossible to say. Clearly, the absence of this support as well as the resistance of court officials in protests and work slowdowns, had its impact.

In the late 1980s the grassroots movement of the court officials to improve their working conditions resulted in a disruption of village court services among the Agarabi. While the village court went on providing only a low level of dispute management, other changes meant that its absence had a less disruptive effect than it might have had with a similar decline in the early 1980s. The village moot began to operate in ways similar to those of the pre-village court era and, ironically, followed a pattern more reflective of the government's original plan for the program. The local court continued to respond to many extra-village disputes more closely associated with the national capitalist economy. But these local dynamics in dispute resolution do not fully account for the patterns of disputing in the absence of the courts. An additional element in the profile of Agarabi conflicts in the late 1980s results from transnational processes. Thus the Agarabi example suggests that it is not only the action or inaction of the state that we must look to in understanding the performance of popular justice programs. The alteration of local life stimulated by global economic and religious concerns modified in critical ways the sources of and responses to conflict in Agarabi communities. Although it played a critical role in the pattern of Agarabi disputing during the country's first years of independence, global social transformations overtook the village court, marginalizing it within the configuration of regional order and conflict by the end of the last decade.

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