LAWS RELATING TO FERTILITY CONTROL AND FAMILY PLANNING IN PAPUA NEW GUINEA

BY

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1. *INTRODUCTION*

A. CUSTOMARY MEANS OF FERTILITY CONTROL AND FAMILY PLANNING

In the past, customary practices in Papua New Guinea ensured that the number of children born into most families was fairly small, that births were widely spaced, and that the population level remained fairly constant. Some of these practices were specifically directed towards fertility control, whilst others brought about this result incidentally.[1] Today the practices are still widespread, but observed less strictly.

Customary methods of fertility control have not been well-documented in Papua New Guinea, and the extent and effectiveness of their use remains uncertain.[2] It must also be kept in mind that there is much variation between cultural groups as to knowledge of the various customary methods of fertility control, and as to the propriety of using them.

(a) *Methods*

The most effective customary method of family limitation is the observance of customary taboos which restrict the frequency of sexual intercourse between husband and wife, and forbid sexual intercourse outside the relationship of marriage. Opportunities for sexual intercourse are further limited by the lack of privacy consequent upon communal living arrangements, and by the practice in some areas of living and sleeping in separate men's and women's houses.

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1. For information relating to traditional forms of family limitation in Papua New Guinea see generally R.N.H. Bulmer, 'Traditional Forms of Family Limitation in New Guinea' 42 New Guinea Research Bulletin 137 (1971); M. O'Collins, 'Family Planning Programmes in Papua New Guinea and the Solomon Islands' (report presented at the 49th Congress of the Australian and New Zealand Association for the Advancement of Science, 1979), I; *Papua New Guinea National Health Plan* 1974-8, para. 33.2, 2.2.

2. For a survey of the extent and effectiveness of traditional means of fertility control throughout the world, see Elizabeth Draper, *Birth Control in the Modern World* (Penguin Books, 1972), chapter 4.

Conception is also controlled to some extent by customary means of contraception and sterilization. Unwanted pregnancies are sometimes terminated by abortion, and unwanted or defective children eliminated by infanticide. Knowledge of these methods resides generally with the women, who may use them surreptitiously. These methods are described in detail below.

In addition, the high infant and maternal mortality rate and the high incidence of natural and disease-induced sterility until recently contributed to the limitation of family size and population growth.

Family planning is concerned with augmentation, as well as limitation of families, and customary adoption procedures enable sterile couples to rear the children of relatives as their own children.

(b) *Enforcement*

Fertility control is not regarded by Papua New Guineans as a private matter to be decided by the individuals directly concerned. The birth of a child is of concern not only to the child's father and mother, but also to their respective clans. A child increases the strength, wealth and prestige of the clan to which it belongs, affects inheritance rights, and provides new paths for economic exchanges and political alliances. Thus, the birth of too many or too few children, or of children outside the marriage relationship affects the well-being of the whole clan, and transgressions against community standards relating to sexual conduct are strongly discouraged by social and legal sanctions.

Deliberate flouting of the sexual mores of the community leads, at the least, to ridicule and ostracization - this applies, for example, to a married couple who conceive a child before their youngest child is weaned. An unmarried girl who becomes pregnant suffers the shame of depriving her kin-group of a high bride-price payment. Adultery is often punished by death, depending on the circumstances. At the least, the woman is beaten by her husband, and compensation demanded from the male adulterer and his kin-group.[3] If a woman is caught covertly practicing contraception or abortion, or suspected of inducing sterility by use of plant-substances or magic, her husband and his kin-group may demand compensation from her kin-group. She also deprives her own kin of child-birth payments, and her husband may demand divorce and repayment of bride-price.[4]

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3. See Marilyn Strathern, *Report on Questionnaire Relating to Sexual Offences as Defined in the Criminal Code* (1975); Law Reform Commission of Papua New Guinea, *Report No. 5: Adultery* (February, 1977): H. McRae, 'Note. The Law Reform Commission's Report on Adultery' (1977) 5 Mel. L.J.115

4. O'Collins (1979), *op. cit.*, 4; M. Strathern, *Women in Between, Female Roles in a Male World. Mount Hagen, New Guinea* (Seminar Press, 1972), 43-4.

Maternal kinsmen have rights over children in matrilineal societies, and Fortune describes one such kinsman in Dobu who beat his sister's daughter for using an abortifacient.[5]

When disputes relating to sexual behaviour arise, they are sometimes settled by peaceful traditional dispute settlement procedures. If this fails, there may be fighting between the parties and their clans. Nowadays, the parties can also bring the matter before the Village Courts or the Local Courts for settlement.[6]

B. DECLINE IN USE OF CUSTOMARY MEANS OF FERTILITY CONTROL AND FAMILY PLANNING

Many of the practices outlined above are still in current use, especially among the 84% of the population who live in rural areas. However, in general their use is on the decline, particularly in urban areas.[7]

Social pressure to conform to the customary sexual mores which once controlled the frequency of sexual intercourse has declined, and the sexual taboos are increasingly disregarded. The hunting, trading, fishing and fighting expeditions and ceremonies which formerly gave rise to periods of sexual abstinence now occur less frequently. Living arrangements have changed, especially in urban areas, so that privacy has increased and there is less segregation of husband and wife.

Knowledge of customary methods of contraception, sterilization and abortion has declined as the young women move out of the villages and lose contact with the older women. The practice of infanticide and abortion, and sometimes contraception, has been discouraged by religious teaching and by the introduced law.

Nevertheless, it is important that customary methods and attitudes should not be set aside altogether in favour of modern, introduced methods of fertility control. As well as providing new options, family planning programmes should aim to educate people in the use of customary methods which may sometimes prove more acceptable than new and unfamiliar methods. Moreover, those who organise family planning programmes must be familiar with and sensitive to customary attitudes, otherwise programmes are more likely to meet with hostility than acceptance.

The decline in the use of customary methods of fertility control has coincided with improved health care. This has lowered the infant and maternal mortality rate, and has controlled the illnesses which in the past induced sterility.

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5. R.F. Fortune, *Sorcerers of Dobu: The Social Anthropology of the Dobu Islanders of the Western Pacific* (Routledge and Kegan Paul, 1963), 240.

6. See below.

7. Bulmer, *op. cit.*, 137-149.

Papua New Guinea women now give birth on average to seven children. An increasing number of unmarried women are burdened with unwanted pregnancies, and married couples are tending to have larger and more closely-spaced families. The rate of growth of the population is about three per cent per annum and is high in comparison with that of other developing countries.[8]

C. FAMILY PLANNING POLICIES AND SERVICES IN PAPUA NEW GUINEA

The right to plan one's family is an internationally-recognised basic human right. This was established by the United Nations Conference on Human Rights at Teheran in 1968 at which it was stated that 'parents have the exclusive right to determine freely and responsibly the number and spacing of their children' together with the knowledge and means necessary to enable them to exercise this right.[9] The Economic and Social Council in 1971 urged that member countries should ensure that these rights become available to all citizens by 1980.[10]

Although these resolutions are not legally binding, they give a clear directive to Papua New Guinea and other member countries to implement family planning programmes which will enable their citizens to exercise this basic human right.[11]

In Papua New Guinea the first moves to set up a government-sponsored family planning programme were made in 1962, when the Health Department opened a family planning clinic in Port Moresby after requests for advice from national women who recognised that traditional methods were no longer working effectively.[12] Further progress was made in

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8. *Papua New Guinea National Health Plan* 1974-1978 (hereafter referred to as NHP), para. 33.2, 3.1 and 3.5. Detailed statistics are not available as it is not compulsory to register births in all areas under the *Civil Registration Act* 1963 (no. 3 of 1964), and the last Census was taken in 1972.

9. See Resolution XVIII on Human Rights Aspects of Family Planning; Declaration on Social Progress and Development: General Assembly Resolution 2542 (XXIV) of 11 December 1969. See also *World Plan of Action*, approved at the U.N. World Population Conference in Bucharest, August, 1974.

10. Resolution 1672 (LII) on Population and Development (1971).

11. These resolutions were passed before Independence. Records kept by the Australian Department of External Affairs show that no Papua New Guinea delegates attended the 1968 or 1974 Conferences. Two special advisers from the Papua New Guinea House of Assembly were included in the Australian delegation to the 1969 United Nations General Assembly.

12. NHP para. 33.3, 3.1.

1973, when Cabinet approved a submission to expand family planning services and to seek assistance from international agencies.[13] The following year, the *Papua New Guinea National Health Plan* 1974-1978 (NHP) set out a comprehensive plan for implementing a nation-wide family planning programme using modern methods of fertility control.

(a) *National Objectives and Government Policy*

The NHP emphasises *family planning* rather than *population control*, and it is important to understand the difference between the two concepts.

Population control has been defined as 'state-encouraged contraceptive programmes *for the purpose of affecting national birth rates*'.[14] Population control programmes aim to decrease population growth on a national scale, and they have been implemented in India, Latin America, Singapore, Taiwan and other countries with large and increasing populations.[15] It has been found that programmes which merely make contraceptives accessible have little effect on population growth. Population control requires stronger and more controversial measures: compulsory proselytizing sex education courses in schools; intensive media compaigns; provision of incentives in the form of money payments or taxation, housing, education, etc. benefits for those who undergo sterilisation or successfully limit their families to the prescribed number; automatic provision of contraceptive injections for women following birth or abortion; legalisation and promotion of abortion when contraception fails; imposition of penalties such as additional taxes, withdrawal of child allowances and housing, medical and educational benefits from families which exceed the prescribed number; and even involuntary sterilisation.[16]

Programmes aimed at population control give rise to considerable resistance and controversy. The civil rights and individual freedom of citizens are curtailed. Right-wing nationalists argue that reduction in population will weaken the country militarily and economically, and 'the invasion of foreign morality disturbs both religious and secular rightists, for it is a form of "psychic imperialism" that imperils spiritual and cultural values viewed as close to the heart and soul of the nation'.[17] Foreign funding of programmes is also viewed with suspicion, for population control 'may be used as a lever for the international egotism of the rich nations, in allowing them to evade their duties of assistance and solidarity with the developing nations'.[18]

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13. NHP, para. 33.1, 1.4.

14. J.M. Stycos, 'Family Planning and American Goals' in D. Chaplin (ed.), *Population Policies and Growth in Latin America* (Lexington Books, 1971) 111, 126 (emphasis supplied).

15. See generally Chaplin (ed.), *op. cit.*

16. B. Berelson, 'Beyond Family Planning' in Chaplin (ed.), *op. cit.*, 71.

17. Stycos, *op. cit.*, 120.

18. *Ibid*, 119.

The Left, on the other hand, sees population control as an 'ameliorative measure to shore up a crumbling society whose demise had much better be brought about by revolution.'[19] Three Columbian academics expressed this idea as follows:

> Birth control is dangerous because it can become a distraction, or a justification for the bourgeoisie to reject change ... It might prevent the agrarian reform from ever taking place.
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> With our system of production we can support about ten million. Since we have seventeen million we are over-populated, but if our pattern of production were altered we could support fifty million or more. The reason why they want birth control is that they don't want technical revolution. Birth control is a palliative measure which cannot lead to anything.
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> Birth control is being proposed as a panacea, which is utopian, false, and treacherous.[20]

Family planning is concerned, not with effecting national population trends, but with providing a means for individuals to limit and space their families if they so choose. It gives rise to far less controversy than population control. Berelson writes that this is because:

> ... [family planning] is closely tied to maternal and child care, [so] it can be perceived as a health measure beyond dispute; and, since it is voluntary it can be justified as a contribution to the effective personal freedom of individual couples. On both scores, the practice ties into accepted values and thus achieves political viability.[21]

Davis also emphasises the conservative features of family planning policies, and points out that these features make it ineffective as a means of population control:

> [Family planning], far from de-emphasizing the family, is familistic. One of its stated goals is that of helping sterile couples to *have* children. It stresses parental aspirations and responsibilities.

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19. *Ibid*, 120.

20. Quoted in Stycos, *ibid*, 120-121.

21. Berelson, *op. cit.*, 71.

> It goes along with most aspects of conventional morality, such as condemnation of abortion, disapproval of pre-marital intercourse, respect for religious teachings and cultural taboos, and obeisance to medical and clerical authority ...
>
> The things that make family planning acceptable are the very things that make it ineffective for population control. By stressing the right of parents to have the number of children they want, it evades the basic question of population policy, which is how to give societies the number of children they need. By offering them only the means for *couples* to control fertility, it neglects the means for societies to do so.[22]

The NHP, whilst it explains the disadvantages of rapid population growth, clearly envisages the implementation of family planning rather than population control. It defines the programme in terms of family planning, as follows:

> Family planning is concerned with the improvement and welfare of the family, particularly involving planning of pregnancy, and includes the spacing of childbirth, regulating the size of the family, helping sub-fertile couples to have children, and providing information and counselling on matters related to parenthood.[23]

and it states that the national objective of the family planning programme is:

> To provide parents with the knowledge and means to have the desired number of children at adequately spaced intervals, and thereby to improve the quality of family life.[24]

The NHP does not contemplate the use of any of the controversial measures, described above, necessary to ensure population control, and it emphasises that the family planning programme 'will have no significant demographic effect and the population will continue to expand rapidly.'[25]

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22. K. Davis, 'Population Policy: Will Current Programs Succeed?' in Chaplin (ed.), *op. cit.*, 49, 66.

23. NHP, para. 33.1, 1.1.

24. NHP, p.227.

25. NHP para. 33.12.

These objectives are consistent with the National Goals and Directive Principles and the Basic Human Rights set out in the *Constitution*. The *Constitution* makes no specific mention of family planning, but it emphasises the quality of family life, the freedom of the individual, and the right of women to equal participation.[26]

In accordance with the NHP, government-sponsored family planning services have been integrated into the country's total maternal and child-care health programme. In urban areas these services are provided by hospitals, clinics and health centres, and in rural areas by village aid posts. The following methods are available: Lippes loop, oral contraceptives, tubal ligation, injectable contraceptives, copper 7, condoms, ovulation method, Dalkon shield.[27]

(b) *Private Organisations*

The government-sponsored family planning services are supplemented by two private organisations.

The Family Planning Association of Papua New Guinea, a member of the International Planned Parenthood Federation, provides information and education services in Port Moresby and in some rural areas. It has been particularly active in running a controversial campaign to promote the sale of condoms. Comic-strip advertisements which regularly appear in the Port Moresby *Post-Courier* invite readers to:

> Become an official distributor and help your friends and fellow workers whilst earning money. Send K4 for a box of 144 condoms. You sell them for 5t each and make K3.20 profit.[28]

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26. See the first, second and fifth of the National Goals and Directive Principles, and ss.49 and 55. Compare s.10 of article XII of the Constitution of the Philippines which states that 'it shall be the responsibility of the State to achieve and maintain population levels most conducive to the national welfare.'

27. NHP para. 33.3, 3.4 sets out the methods in this order of popularity.

28. For comments, see O'Collins (1979), *op. cit.*, 12-13; P. Chatterton, 'Condom Caper is Taking Birth Control Too Far', *Pacific Islands Monthly*, February 1979. In a letter published in the *Post-Courier*, 9 October 1978, signed by Archbishop H. ToPaivu and all the parish priests of the Arch-diocese of Port Moresby, it was stated that '... the crude advertising for the indiscriminate and irresponsible use of condoms encourages immorality, discourages real responsibility in sex, shirks the need for mature sex education and leads to breakdown of family values'. Recently, the last sentence in the advertisement has been deleted.

The Family Life Association's Natural Family Planning Programme, sponsored by the Catholic Church, is integrated into a general family welfare programme, and promotes the unreliable ovulation method.

In addition, those able to afford the fees may consult private practitioners.

(c) *Constraints on Implementation of Family Planning Programmes*

Family planning services are affected by the same difficulties which hamper the provision of general health services in Papua New Guinea, a country which has a widely-spread population with diverse customs and languages, difficult terrain, undeveloped road systems, and limited financial resources. In addition, particular difficulties arise in relation to family planning.[29]

First, the programme suffers from lack of finance. There is a division of opinion among government officials as to the desirability of promoting family planning. Some officials (perhaps confusing family planning with population control) fear that it will reduce manpower, hamper economic development, encourage promiscuity, and offend religious sensibilities.[30] In September 1979 the Health Minister, Mr. Doa, announced that he was considering the implementation of legislation to prevent access to the contraceptive pill by unmarried women and by married women without the consent of their husband. He said he would also like to see the contraceptive injection Depo Provera restricted to women with more than three children. Mr. Doa said that contraceptive methods should not be provided that would prevent married women from getting pregnant.[30a] Mr. Doa's remarks were castigated by the P.N.G. Nursing Association, the Family Planning Association, and the womens' affairs section of the Home Affairs Department.[30b] The Port Moresby *Post-Courier* published many letters from readers, and an editorial,[30c] strongly critical of Mr. Doa's remarks, and the legislation was dropped. However, funds allocated to the family planning programme have been limited, and this has led to cancellation of training programmes for health workers and prevented the introduction of some of the more expensive methods of contraception.[31]

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29. For social welfare aspects of family planning, see O'Collins (1979) (*op. cit*); M. O'Collins, 'A Review of Social Welfare and Family Planning Programmes in the Solomon Islands' (Report prepared for the United Nations Inter-Regional Technical Meeting on Social Welfare Aspects of Family Planning at Manila, 1978).

30. See NHP, para 33.4, 4.1; *Review of the Solomon Islands National Development Plan 1975* (1977).

30a. Port Moresby *Post-Courier* 27 September 1979.

30b. *Ibid.*, 1 October 1979.

30c. *Ibid.*, 18 September 1979.

31. NHP, para. 33.4, 4.9.

Second, certain restraints are voluntarily assumed by the national and provincial[32] government departments responsible for administering the programme. These self-imposed restraints are prompted sometimes by an over-cautious interpretation of the law by members of the department, sometimes by the imposition of what the department considers acceptable standards of sexual conduct, and sometimes by an unrealistic standard of health care. For example, the Health Department's attitude towards the availability of abortion is more restrictive than the law requires.[33] In the nearby Solomon Islands single women are ineligible to use family planning services and contraceptives are available only from doctors, not from other health workers. As there are few qualified doctors this effectively denies many women access to contraception.[34]

Restrictions of this kind are imposed also at a lower level of administration, especially by medical personnel who are missionaries or missionary-trained. In Papua New Guinea, women who are refused services for reasons of this kind find it hard to obtain alternative advice because of the shortage of medical staff and the difficulty of travelling.

Third, delivery of the programme is hampered by lack of properly trained and suitable personnel, particularly among the health workers who staff the village aid posts responsible for administering health care to the rural areas. It is the responsibility of the health worker to inform the people of the area of the availability of family planning, to ensure that each man or woman uses a suitable method, that there is continuing supervision of acceptors, and that supplies are maintained. In rural areas, delivery of family planning and other health services entails travelling on foot to outlying villages through difficult terrain. The effectiveness of the most dedicated workers may be negated by factors beyond their control - for example, village women may refuse to seek advice from a male worker, or the worker may be unable initially to speak the local language. Health workers must be sensitive to local customs and attitudes. They are not always aware of how best to communicate with women in rural areas. According to the *Solomon Islands National Development Plan:*

> Government and Mission contacts have been almost exclusively with the men, who normally represent the family in contacts with the outside world. Comparatively little attention has been given in extension or adult education programmes to the need to communicate with the women. This has occurred partly because extension services tend to think of the village as the basic social unit; in village meetings women are inhibited from speaking whereas in

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32. The Organic Law on Provincial Government s.28(p) lists matters relating to health and family welfare as concurrent matters on which provincial legislatures may make laws. None has done so yet.

33. See below. Admittedly, the law in this area is uncertain.

34. O'Collins (1978), *op. cit.*, 4.

> family or clan gatherings their real influence is apparent; and partly because extension workers are virtually all men, who again are inhibited from communicating directly with groups of women.[35]

This of course requires proper training, and at present it seems that lack of initial and follow-up training and supervision hampers the effectiveness of many health workers.

Fourth, family planning programmes meet considerable resistance from the consumer. Even in countries where modern methods of contraception have been readily available for a considerable period a high rate of unwanted pregnancies occur.[36] In Papua New Guinea, where new methods are being introduced and where conservative community attitudes have a more direct influence on consumers, it is even more difficult to promote acceptance.

It was stated above that in Papua New Guinea the birth of a child is a matter of importance to the whole clan, and that decisions affecting family planning are not regarded as a private matter between husband and wife. Contraception is often viewed with disapproval - in general, children are thought to increase the strength and prestige of the clan. As well, the men and the older women fear that accessibility by younger women to contraception will increase promiscuity, and it is often condemned on religious grounds. Thus, women who would like to restrict their family, using either modern or traditional methods of contraception, are likely to encounter hostility from husbands and other clan members. It is difficult to practice contraception secretly. O'Collins reports that village women feel conspicuous travelling to the aid post by village truck on family planning days.[37] Further, women who practice fertility control surreptitiously, either to prevent contraception or to get rid of an unwanted pregnancy, run the risk of involving their whole clan in compensation payments, on the ground that they have deprived their husband's kin group of a potential member. This would be a source of great shame to the woman.

It seems obvious, then, that family planning programmes should aim at acceptance by local communities as a whole, rather than by individuals. Health workers now try to promote acceptance by going to the villages and holding group discussions.[38] Such discussions must be

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35. *Solomon Islands National Development Plan* 1975-9, vol.1, p.15.

36. Almost 40 per cent of all Australian girls are becoming pregnant before they reach the age of 20, and more than half of these will seek an abortion, according to a survey conducted for the New South Wales Family Planning Association reported in *The Australian*, 31 May 1979, p.7.

37. O'Collins (1979), *op. cit.*, 9-10.

38. *Ibid.*

handled sensitively if they are to avoid arousing hostility rather than acceptance. In many societies direct discussion of sexual matters causes embarrassment and offence, especially in mixed groups. If negative attitudes are inadvertantly reinforced women may feel obliged to give up traditional methods, and find it impossible to start using modern methods.

There are, then, many difficulties which hamper the implementation of family planning in Papua New Guinea. The following extract from a report by a WHO/UNFPA team in January, 1978, indicates that to date the health care programme, including family planning, has not been entirely successful:

> Basic health services including maternal and child health care, family planning and nutrition are not reaching the vast majority of the rural population in Papua New Guinea. This despite the fact that Papua New Guinea, more so than many other developing countries, has a fairly large health structure at the national, provincial and peripheral levels with many conventional health service outlets, including hospitals, rural health centres, sub-centres and aid posts, managed by many distinct categories of health personnel.

In the Solomon Islands, where similar conditions apply and a similar health care programme exists, only about 6 per cent of the female child-bearing population is using family planning services.[39]

2. *LAWS RELATING TO FERTILITY CONTROL AND FAMILY PLANNING IN PAPUA NEW GUINEA*

In this section customary law and written law relating to traditional and modern methods of fertility control are examined in turn.

Customary law still regulates the lives of many Papua New Guineans in the area of fertility control and family planning. When disputes in this area arise, they are often settled by customary informal dispute settlement methods, without reference to the written law or the official courts.

In addition, customary law is in some circumstances applied by the official courts, though only to the limited extent defined by the written law. Schedule 2.3 of the *Constitution* states that custom forms part of the underlying law and is to be applied by the courts where no rule of law is applicable and appropriate. Under schedule 2.1, however, custom cannot be applied where it is inconsistent with a statute or 'repugnant to the general principles of humanity'. So far the judges have been rather reluctant to utilize custom, and have recently taken

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39. O'Collins (1978), *op. cit.*, 4.

the narrow approach that a custom cannot form part of the underlying law unless the custom applies throughout the whole country.[40] The Local Courts have jurisdiction over 'all matters arising out of and regulated by native custom' under s.13(1)(c) of the *Local Courts Act* 1963. The Village Courts, set up under the *Village Courts Act* 1973, are required to settle disputes which arise in their area in accordance with custom.

The written laws relating to family planning and fertility control are derived from Australian legislation, which was in turn derived from England. The legislation was not designed originally to implement a coherent population or family planning policy. Rather, the provisions were inserted in Anglo-Australian statutes in an *ad hoc* manner for two underlying reasons: *First*, the provisions reflect western standards of morality then current. Abortion was strictly regulated on the ground that it violated the sanctity of human life. The availability of contraceptives and other methods of fertility control was restricted for fear that ready access would lead to promiscuity. Advertising and literature relating to family planning and fertility control were considered inherently obscene, and public references to the subject deemed offensive. *Second*, the legislation reflects western standards relating to public health and safety. For example, it forbids medical workers other than fully qualified doctors and pharmacists to carry out even the most simple surgical procedures or to prescribe and dispense drugs.

These western-derived laws were adopted in Papua New Guinea and, with a few modifications, remain on the statute books in Papua New Guinea even when they have been repealed in their country of origin. They have not been reviewed in the light of Papua New Guinea customs and values, nor in the light of Papua New Guinea's national objectives on family planning. The law reflects health standards devised for countries with highly developed medical services and large numbers of qualified doctors and pharmacists. Public health and safety is obviously of great importance in Papua New Guinea, but the imposition of unnecessarily high standards forms a serious impediment to the availability of family planning.

A. RESTRICTIONS ON SEXUAL INTERCOURSE

(a) *Customary Law*

Most societies impose restrictions on sexual intercourse, both outside and within marriage.[41] Within marriage, the most important restriction is the post-partum sexual taboo, which forbids intercourse between husband and wife for between one to four years following the birth of each child - it is considered shameful for a wife to become pregnant before the youngest child is weaned. Mann C.J. referred to this taboo in *R.* v. *Asamakan* [1964] P. & N.G.L.R. 193, 196:

> By custom the husband must avoid his wife altogether during the first month [after she gives birth], but apparently he can talk to her during the second month. He must strictly avoid intercourse with her for the first month, or

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40. See the section on abortion, below, for further discussion.

41. Bulmer, *op. cit.*, 137-149.

> perhaps two months, and may live with her after the second ...
>
> The evidence does not establish whether there is a further period of abstinence imposed whilst the mother of a child is breast-feeding it. This is a very common form of abstinence until the stage when the child is able to walk or ceases to be breast fed. The latter period greatly varies according to local conditions and experience.
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> It is clear that on some points very strict rules are still observed as to avoidance and abstinence ... It is not entirely clear what restrictions arise from the fact of birth, or for what period they apply, or what further restrictions ... arise from lactation, or for what period they apply, or to what degree Mission or other influences might have mitigated their severity ...

As well, husband and wife are expected to abstain from sexual intercourse for a period immediately following marriage, and also to prepare for fighting, hunting or trading expeditions, and ceremonial occasions.

Girls and boys are not considered ready for marriage until they attain puberty, but 'the marrying age varies so considerably that it is not possible to generalise beyond saying that most men are married by twenty-five and most girls by twenty'.[42] Pre-marital sex is in most societies strongly discouraged,[43] and if an unmarried girl becomes pregnant she is usually forced to marry.

Adultery is regarded as a serious offence.[44]

In some societies widows are not permitted to remarry until they have observed a period of mourning ranging between several months to several years.

Potential sexual partners are further reduced by the laws relating to incest. Strathern writes:

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42. *Encyclopaedia of Papua New Guinea*, vol. 2, 703-4.

43. In some societies, however, sexual intercourse is institutionalised as part of the courtship procedure. For an account of courtship and marriage procedures in a selection of Papua New Guinea societies, see Law Reform Commission of Papua New Guinea, Occasional Paper No. 5, *Customary Marriage and Divorce in Selected Areas of Papua New Guinea* (October, 1977).

44. See the references in footnote 3, above.

> The range of relationships which would fall under the local definition of incest are generally wider than included in the present Code. Close in-laws may be mentioned; all lineage or clan kin; all "blood" kin; or persons who have been brought up and lived together as a family although unrelated by blood.[45]

These restrictions on sexual intercourse are enforced partly by social sanctions. Those who breach them are made to feel shame, and are subjected to ridicule, contempt, and perhaps ostracization by members of their community. Offenders may also be punished - an adulterous couple may be savagely beaten or killed by the offended husband and his relatives, though a wife whose husband commits adultery is unlikely to obtain redress.[46] Transgressions against sexual taboos may also lead to claims for compensation. If an unmarried girl is seduced her father and other kin may claim compensation from the seducer and his kin-group. If a woman commits adultery, her husband and his kin-group may demand compensation instead of killing the offender. If satisfactory compensation cannot be arranged the situation may develop into tribal fighting between the clans of the parties concerned. Further, it is believed that supernatural sanctions may strike wrongdoers and their families, especially in case of incest.

(b) *Written Law*

The written law places few restrictions on sexual intercourse between husband and wife.[47] Under s.9 of the *Marriage Act* 1963 the minimum age for entering non-customary marriage is 18 years for males and 16 for females.[48] No minimum age is set for entry into customary marriage - under s.55 of the *Marriage Act* 1963 the validity of the marriage depends upon its acceptance by the custom of the parties.

Pre-marital sex is not prohibited as such, but s.219 of the *Criminal Code Act* 1974 makes it an offence to have sexual intercourse with a girl aged under 16 irrespective of consent.[49]

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45. Strathern (1975), *op. cit.*, 40.

46. This is because the husband and his kin are regarded as having proprietary rights over the wife but the wife in most societies has no equivalent rights over the husband. See McRae, *op. cit.*, 115-116.

47. Under s.357 of the *Criminal Code* a man cannot, by definition, rape his wife.

48. Under s.10 of the *Marriage Act* 1963 (no. 8 of 1964) males aged 16 and females aged 14 may obtain permission to marry if the court is satisfied that there are 'exceptional and unusual circumstances' which justify the marriage. Permission is granted usually where the girl is pregnant and the court is satisfied that the marriage has a reasonable chance of success. See *Re K* (1963) 5 F.L.R. 38; *Re W* [1968] Q.W.N. 45.

49. No exception is provided where the parties are married.

Adultery between automatic citizens constitutes an offence under reg. 84 of the *Native Regulations* (Papua) and reg. 84 of the *Native Administration Regulations* (New Guinea).[50]

Incest is defined more narrowly by ss.226 and 227 of the *Criminal Code Act* 1974 than by customary law, and recent decisions establish that sexual intercourse with an adopted daughter does not amount to incest under the Code.[51]

The Local Courts have jurisdiction to hear claims for compensation arising out of the breach of a customary sexual taboo. In *Michael Maduku* v. *Patrick Wau* [1973] P.N.G.L.R. 124 the respondent, the father of a girl named Gula, complained that the appellant Madaku 'did have sexual intercourse with one Gula (the daughter of Patrick Wau) who is his "clan sister" (the girl's mother and Michael's mother are sisters) thereby breaching an extremely strict traditional custom', though it did not amount to incest under s.226 of the *Criminal Code Act* 1974. The Local Court magistrate awarded the respondent $100 damages after hearing evidence from a witness who was an ex-Councillor and village elder that the intercourse constituted a serious breach of custom. On appeal, Minogue C.J. found that the Local Court had jurisdiction to grant compensation under s.13(I)(c) of the *Local Courts Act* 1963, but for procedural reasons he sent the matter back for retrial. However, in a recent case, *In the Matter of Schedule 2.3 of the Constitution* (unreported judgement No.SC131, 1978) the Supreme Court rejected a claim for compensation by a husband against the man who enticed away his wife, on the ground that the courts will not enforce a custom that does not obtain throughout the country. This approach is open to the criticism that it in effect excludes the enforcement of custom in many cases because there are few customs which are nation-wide, and customary law by its nature varies throughout the country.

Thus, the written law has the effect of restricting sexual intercourse to some extent, though enforcement of the law in this are is difficult, and it probably has little direct influence on fertility control.

B. CONTRACEPTION

(a) *Customary Law*

Little has been written about the extent and effectivness of customary methods of contraception. The evidence suggests that methods like *coitus interruptus*, vaginal insertions, and plant substances - sometimes in conjunction with 'magic' - are used.[52] Oeser, who interviewed a group of women living in the Port Moresby suburb of Hohola, reports that many of them knew of various kinds of traditional contraceptives, but few actually used them. The methods

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50. The Law Reform Commission is currently reviewing these sections. See McRae, *op. cit.*

51. *The State* v. *Misimb Kais* (unreported judgement No. N157, 1978); *Sanguma Wauta* v. *The State* (unreported judgement No. SC134, 1978).

52. Bulmer, *op. cit.*, 150-151; O'Collins (1979), *op. cit.*, 4.

> ... included a mixture of soot and betel nut prepared and eaten by the women, a bitter root extract mixture taken by men, or the chewing of a certain kind of tree bark. Soot, produced by burning a particular kind of wood and the infusion of the young leaves *Alstonia Macrophylla Barringtonia*, was drunk weekly at certain periods by some women.[53]

Oeser adds that the last-mentioned plant 'was subject to scientific investigation in Australia and the United States in the early 1960s, and showed definite anti-littering properties in rats'.[54] Some of the women did not believe that traditional methods worked, and gave examples of cases where pregnancy occurred despite their use.

It was mentioned above that the decision to restrict family size is not regarded as a matter for the individual. A wife suspected of practicing contraception without her husband's knowledge may be punished and divorced, in which case her kin may be obliged to make repayment of bride-price to the husband's kin. Further, she deprives her kin of child-birth payments, and may involve them in paying compensation to her husband's kin-group because she has deprived them of new members. A married couple who practice contraception may be regarded as depriving their kin-group of new members, and subject to social sanctions. Use of contraception may also constitute evidence of adultery or pre-marital sex. Thus, there is strong pressure on married couples, and especially women, to conform to customary standards.

(b) *Written Law*

The most commonly used introduced methods of contraception are oral contraceptive pills, injections, IUDs, and condoms.

It is pointed out below that there is doubt as to whether some of these methods should be classified as contraceptives or as abortifacients, but for present purposes they are classified as contraceptives because this seems the more likely legal interpretation.

(i) Legal Restrictions on Sale

Substances classified as 'poisons' or 'dangerous substances' under ss.11 and 12 of the *Poisons and Dangerous Substances Act* 1952 (No. 22 of 1953) may be sold only upon a doctor's prescription, under the supervision of a doctor, or from a registered pharmacist. Most contraceptive pills are subject to these restrictions. They may not be sold by vending machine (s.19) or by hawkers (s.16), or to persons aged under 18 years (s.18).[55] However, these

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53. L. Oeser, *Hohola: The Significance of Social Networks in Urban Adaptation of Women* (New Guinea Research Bulletin No. 29, 1969), 80-81.

54. *Ibid*, 81.

55. This means that some married women are, in theory, denied access to the pill. However, the provision is not strictly enforced.

stringent requirements were considerably relaxed in 1977, when the two most commonly-used types of oral contraceptive pills were removed from the ambit of Act.[56] They may now be sold over the counter, and may be dispensed by family planning personnel without medical qualifications.

The legislation described above has no application to condoms, which may be sold over the counter. The Family Planning Association of Papua New Guinea's campaign to promote their use was mentioned above.

The sale of contraceptives of all kinds and literature relating to contraception is subject to legislation which prohibits the sale of indecent or obscene goods. Section 232 of the *Criminal Code* provides that -

> Any person who knowingly, and without lawful justification or excuse -
>
> (a) publicly sells or exposes for sale any obscene book or other obscene printed or written matter, or any obscene picture, photograph drawing or model, or any other object tending to corrupt morals is guilty of a misdemeanour ...
>
> It is a defence ... to prove that it was for the public benefit that the act complained of should be done.

Section 178 provides that it is an offence to send by post 'anything which encloses an indecent or obscene ... article ...'.

In 1879, the English Court of Appeal in *Re Besant* II Ch. D. 508 held that a book advocating birth control was an obscene work 'calculated to deprave public morals ... abhorrent to the feelings of the great majority of decent Englishmen and Englishwomen and [which] would be regarded by them ... as violations of morality, decency, and womanly propriety ...'. Using this and other similar decisions, it is possible to construct an argument that contraceptives, and books dealing with contraception, are obscene or indecent and tend to corrupt morals.[57] However, taking into account current attitudes to family planning in Papua New Guinea this argument would almost certainly fail to convince a court that the sale of contraceptives from reputable sources, or sale of literature with educational value, should be restricted. It might be used to restrict the operation of 'sex shops' specializing in more exotic goods and literature.

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56. In the National Gazette, No.G39, 19 May 1977, the Minister for Health declared the exclusion of eugynon and neogynon from Division II of Schedule 2 of the *Poisons and Dangerous Substances Act* 1952.

57. For example *Bremner* v. *Walker* 6 N.S.W.R. 276; *Ex parte Collins* (1888) 9 L.R. (N.S.W.) 497. See R. Fox, *The Concept of Obscenity* (Law Book Co., 1967).

In the United States statutes which totally prohibit the use of contraceptives or restrict their use to married couples were struck down in *Griswold* v *Connecticut* 381 US 479 (1965) and *Eisenstadt* v *Baird* 405 US 438 (1972) for violating the constitutional right to privacy. Any attempt to pass similar legislation in Papua New Guinea would, arguably, be in breach of s. 49 of the Constitution.

As a matter of policy it may be desirable to obtain spousal consent, and possibly consent of other relatives with an interest in the decision of married persons to restrict the size of their family. Some medical workers require parental consent before they will prescribe contraceptives for unmarried persons. However, the present law requires the consent only of the patient, and any attempt to require consent by other persons would, arguably, violate the right to privacy under s. 49 of the *Constitution*.

Packaging, labelling and quality of contraceptives must conform to the standards set out in the *Drugs Act* 1952 (No. 2 of 1953) and the *Goods Act* 1951 (No. 52 of 1951).

(ii) Legal Restrictions on Advertising

The *Criminal Code* s. 232 prohibits the public display of obscene pictures, photographs, drawings and advertisements relating to obscene matters unless done 'for the public benefit'. The *Summary Offences Act* 1977 (No. 35 of 1977) s.24 provides that any person who, in a public place or within the view of any person in a public place, 'writes any word which grossly offends against accepted standards of public decency' is guilty of an offence. It seems unlikely that the courts would find that advertising by family planning groups breaches these provisions, though they may decide that the legislation prohibits the advertising of specific products by private business concerns.

The *Pharmacy Act* 1952 (No. 65 of 1952) s. 12 (1) specifically prohibits the publication of 'any statement, whether by way of advertisement or otherwise, to promote the sale of any article as a drug, medicine, instrument, or appliance ... for the purpose of preventing conception.' Under s. 12 (3) 'statement' includes any book, document, or paper containing any such statement. However, the effect of the section is cut down by s.12 (5) which provides that 'nothing in this section shally apply to any books, documents, or papers published in good faith for the advancement of medical or surgical science, or to any advertisement, notice or recommendation published by the authority of the Director of Public Health ...'. Under s.12 (5) advertisements by family planning groups are probably permitted, but the legislation should be amended to make this completely clear.

C. STERILIZATION

(a) *Customary Law*

In most societies of Papua New Guinea it is assumed that women but not men are capable of sterility, and if a marriage is childless the husband is often entitled to divorce his wife. It is believed that women

can produce sterility by ingesting plant substances,[58] and sorcery may be used to cause or cure sterility. Little research has been done on the effectiveness of these methods.

Bulmer describes a rite performed by the Karam of the Kaironk Valley intended to ensure the sterility of a married couple where the husband was an albino and it was thought undesirable that he should have children who might inherit his disability.[59]

If sterilisation is used the sanctions described above in relation to contraception apply.

(b) *Written Law*

Sterilization is the most reliable introduced method of preventing conception. It is induced by a safe and simple operation and can be performed on men (vasectomy) or on women (tubal ligation). However, its use is limited by the fact that it is in many cases irreversible.[59a] The circumstances in which the Health Department encourage sterilization as a means of family limitation are described in *Arinuma* v *Likeman and the Government of Papua New Guinea* [1976] P.N.G.L.R. 200, 204:

> ... women in the Goroka area have shown a trend away from ... methods of contraception ... towards tubal ligation operations. In the case of women with five or more children who considered that they had completed their families the Department advised the operation. With mothers with seven, eight or more children the Department recommended it. It was said that the principal reason underlying the policy was that the greater the number of pregnancies undergone by a woman the greater the risk to the woman's life and health in subsequent confinements.

In P.N.G. sterilization is performed almost exclusively on women, as few men are willing to undergo the operation.

(i) <u>The Legality of Sterilization</u>

There is no legislation in Papua New Guinea which deals specifically with sterilization.

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58. O'Collins (1979), *op. cit.*, 4.

59. Bulmer, *op. cit.*, 150-152.

59a. However, according to 'Asian-Pacific Population Programme News' Vol. 8 No. 3 (1979) p. 46: 'Surgical reversal of male and female sterilization can now be successful 60 to 80 per cent of the time ... To do so, however, requires delicate and expensive microsurgery, and [in the case of women] leaves the patient with a 6 per cent chance of having an ectopic pregnancy when she does become pregnant.'

It is possible to construct a technical argument that sterilization operations not strictly necessary to preserve the health of the patient, but carried out solely as a means of fertility control, are unlawful on the ground that they constitute an assault under the *Criminal Code Act* 1974. Section 249 of the *Criminal Code* makes it clear that an assault is unlawful unless it is authorized or justified or excused by law, and that the consent of the victim is not necessarily a good defence. *Prima facie*, performance of a surgical operation amounts to an assault under the definition of assault in s.248. However, s.285 clearly exonerates doctors from criminal liability where a surgical operation is performed in 'good faith and with reasonable care and skill ... upon any person for his benefit ... if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case'. In 1954, Lord Denning L.J. (as he then was) suggested in the English case *Bravery* v. *Bravery* [1954] 3 All E.R. 59, 67-68 that sterilization as a means of fertility control is unlawful according to common law. He said:

> An ordinary surgical operation, which is done for the sake of a man's health, with his consent is, of course, perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation, it is unlawful even though the man consents to it.... Likewise with a sterilization operation. When it is done with a man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease: but when it is done without just cause or excuse, it is unlawful even though the man consents to it. Take a case where a sterilization operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it. The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman he may marry, to say nothing of the way it opens to licentiousness and, unlike contraceptives, it allows no room for a change of mind on either side. It is illegal, even though the man consents to it.

Applying this reasoning to the provisions of the *Criminal Code* it is arguable that a sterilization operation, in the absence of pressing medical reasons, amounts to an assault under s. 248 which is not justified by law under s. 249, and that the doctor is not exonerated from criminal responsibility by s. 285 because the performance of the operation is not 'reasonable' and not really for the 'benefit' of the patient, despite his consent. Identical reasoning may be applied in relation to sterilization of women.

Adrian McGregor, in a recent article in the *National Times*, February 10-16, 1980, p.5, writes that in Queensland the State Solicitor-General advised the Justice Department that a

doctor who performs a vasectomy purely as a family limitation measure is not exculpated from criminal responsibility under s. 282 of the Queensland *Criminal Code*, the equivalent of s. 285 of the Papua New Guinea *Code*. Doctors working for the Queensland Health Department were advised accordingly, and few vasectomies are now performed in Queensland public hospitals, though some private practitioners are still willing to provide them. Queensland Justice Minister Mr. Lickiss, in reasoning similar to that of Lord Denning, told McGregor:

> The word benefit has not been judicially defined, particularly in relation to a vasectomy.
>
> However, in the context, the term benefit would seem to involve something related to the health, physical or mental, of the person on whom the surgical operation is to be performed. Accordingly, an operation which has not any physical or mental significance would not exculpate persons from criminal responsibility.
>
> The view is presently held that the desire to avoid parenthood is not sufficient excuse or benefit. In the final analysis the matter can only be determined by a court.

However, Lord Denning's comments are merely *dicta* made during the course of a dissenting judgement. As such, their legal authority is slight and most commentators agree that they do not state the common law correctly.[60] Where a husband or wife with an already large family requests sterilization to prevent further pregnancies a court in Papua New Guinea today would almost certainly find the performance of the operation 'reasonable' and for the 'benefit' of the patient. The position is perhaps more contentious in the case of married couples without children or with small families, and of single people. The issue would be further complicated if the Court considered the motive for the operation immoral - for example, if a prostitute requested sterilization to prevent unwanted pregnancies from hampering her work. It is also a moot point whether s. 285 would exculpate a doctor who performed a vasectomy because the medical condition of the patient's wife made it dangerous for her to become pregnant or to use other means of contraception - the section seems to apply only to operations carried out for the patient's own benefit, though the court must have regard to 'all the circumstances of the case'.

In general, it is submitted that the courts should give s. 285 a wide interpretation, refrain from imposing morality, and avoid entanglement in the controversial debate over the relationship between law and morality.

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60. H.A. Finlay and J.E. Sihombing (ed.), *Family Planning and the Law* (2nd ed.) (Butterworths, 1978), 98; T. Buddin, 'Voluntary Sterilization', in Finlay and Sihombing (ed.), *op. cit.*, 164, 179-180.

Further, it is strongly arguable that the right to privacy set out in s.49 of the Papua New Guinea Constitution (as restricted by s.38) encompasses the individual's right to control his or her powers of procreation. Buddin argues that -

> The right to privacy is particularly significant insofar as it relates to the woman's right to elect to be sterilized. That right to privacy should include under its umbrella respect for her decision to have children or not. It is axiomatic that she should not be compelled to undergo the risk of undesired pregnancies and its (sic) attendant difficulties whether they be financial, physical or psychological.[61]

In conclusion, then, although there is a small margin for doubt, it seems that the law poses no serious barrier to the use of sterilization as a method of fertility control, so long as the conditions described below are fulfilled.

(ii) Consent

1. Consent by the Patient: As sterilization is usually irreversible, it is extremely important to make sure that the patient gives full and informed consent.

If a medical practitioner performs the operation knowing that the patient has not consented, the practitioner will be guilty of the criminal offence of assault under ss. 248 and 249 of the *Criminal Code*.

If the doctor or other medical staff mistakenly and negligently assume that the patient has consented, then the patient may bring a civil action for trespass to the person and obtain compensation. Such a case arose in *Arinuma* v *Likeman and the Government of Papua New Guinea* [1976] P.N.G.L.R. 200. The Plaintiff gave birth to her seventh female child at the Goroka General Hospital. Two days later, thinking that her consent had been obtained, a doctor sterilized her. The defendants contended that the plaintiff consented orally, but she denied this, saying that she and her husband still wanted to have a male child. After weighing up all the evidence, the court was not satisfied that the plaintiff consented, and she was awarded damages of K400.00.[62]

Sterilization carried out for eugenic purposes poses serious problems and is open to abuse. Some countries permit involuntary sterilization of mental incompetents, the criminally insane, sex offenders and others deemed socially undesirable.

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61. *Ibid.*, 191.

62. See D. Weisbrot and B.L. Ottley, 'Law and Medicine in Papua New Guinea: Licensing and Liability of Practitioners' (1977) 5 Mel.L.J. 175, 199-200.

In *Buck* v *Bell* (1927) 274 U.S. 200 the United States Supreme Court upheld the constitutionality of a Virginia statute providing for the compulsory sterilization of mental incompetents committed to institutions, Holmes J. (at 207) remarking that 'three generations of imbeciles is enough'. Recent studies in the U.S. estimate that 100,000 to 150,000 low income earning people are sterilized involuntarily each year under federally funded programmes.[63] Such programmes have been carried out in South America and in India.

In Papua New Guinea (as in England and Australia) there is no legislation which permits involuntary sterilization for eugenic purposes and any such legislation would probably violate the right to privacy guaranteed by s. 49 of the Constitution.

English case law sets stringent standards for obtaining the patient's free and informed consent, and in view of s. 49 of the Constitution the Papua New Guinea courts would be most likely to take a similar approach. In the English case *Re D (a minor)* [1976] 1 All E.R. 326 the parents of an eleven year old mentally retarded girl arranged with a doctor to sterilize her because they were afraid that she would be seduced and possibly give birth to an abnormal child. The girl was of dull intelligence but not incapable of marrying in due course. Heilbron J. said (at p. 332) that 'the type of operation propsed is one which involves the deprivation of a basic human right, namely the right of a woman to reproduce...' and he concluded (at p. 335):

> A review of the whole of the evidence leads me to the conclusion that in a case of a child of 11 years of age, where the evidence shows that her mental and physical condition and attainments have already improved (as a result of special schooling), and where her future prospects are as yet unpredictable, where the evidence also shows that she is unable as yet to understand and appreciate the implications of this operation and could not give a valid or informed consent, but the likelihood is that in later years she will be able to make her own choice, where, I believe, the frustration and resentment of realising (as she may one day) what had happened, could be devastating, an operation of this nature is, in my view, contra-indicated ...
>
> I have come to the conclusion that this operation is neither medically indicated nor necessary, and that it would not be in D's best interests for it to be performed.

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63. Baker, 'Sexual Sterilization - Constitutional Validity of Involuntary Sterilization and Consent Determinative of Voluntariness' (1975) 3 Miss.L.R. 509.

Where (unlike *Re D (a minor)*) there is compelling evidence of medical necessity, or evidence that sterilization would be in the best interests of a person incapable of giving informed consent, the extent to which the courts will imply or dispense with consent is still to be decided.

2. Consent by Relatives: *Arinuma's Case* also raises the question whether the consent of the patient's spouse is required. The evidence in that case indicated that doctors at the Goroka hospital usually obtained written consent of both husband and wife, and the Medical Society of Papua New Guinea's *Code of Ethics*, s. 2.6 (j) states that 'sterilization should normally be performed only if consent is provided by both the patient and the spouse'. However, there is no legal requirement to this effect and, in Buddin's opinion 'the individual's right to privacy expressed in terms of the ultimate control of his or her body, overrides any necessity for spousal consent'.[64] The question whether the law in Papua New Guinea should acknowledge the interest of the spouse and other relatives in the procreative capacity of a clan member by requiring their consent is considered below.

(iii) Standard of Medical Care

The general standard that reasonable care and skill be exercised is imposed upon medical practitioners. In the United States patients have sued doctors where direct injury resulted from the doctor's negligence, and also where pregnancy occurred due to failure of the operation.[65]

D. ABORTION

(a) *Customary Law*

Abortion is practiced in most societies of Papua New Guinea. It is induced by crude and dangerous methods like binding the abdomen, heavy massage, use of sticks or sharp instruments, and by ingestion of plant substances. Women who specialize in midwifery often have knowledge of customary methods of inducing abortion as well.[66]

Attitudes to abortion vary. In most societies abortion is disapproved of, but people frequently turn a blind eye if it is performed unobtrusively. In some societies, for example among the Kuman, it is not regarded as wrong.[67] It is generally used where a woman wants to conceal

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64. *Op. cit.*, 191.

65. Buddin, *op. cit.*, 182-185.

66. Bulmer, *op. cit.*, 152-3; O'Collins (1979), *op. cit.*, 4; Strathern (1972), *op. cit.*, 44.

67. See Nilles, 'The Kuman of the Chimbu Region, Central Highlands, New Guinea' (1950) 21 *Oceana* 25.

her pregnancy because she is unmarried or has participated in an adulterous or incestuous relationship, or has quarrelled with her husband, and rarely as a deliberate method of family limitation.[68] A woman who terminates pregnancy because she does not want to bear her husband's child is seen as depriving her husband's kin-group of a potential member. She is liable to punishment, and (in the same way as women who practice contraception or sterilization) may involve her kin group in compensation payments and possibly in return of brideprice if her husband and his kin group demand divorce.

(b) *Written Law*

(i) The Criminal Code Act 1974

The criminal law relating to abortion is set out in the *Criminal Code Act* 1974. The present legislation leaves uncertain the circumstances in which abortion may be performed lawfully, and is in urgent need of clarification.

Sections 228 and 229 of the *Criminal Code* provide that a woman who '*unlawfully*' aborts herself is liable to seven years' imprisonment, and that anyone else who performs an '*unlawful*' abortion is liable to fourteen years' imprisonment. The use of the word '*unlawful*' in the sections suggests that in some circumstances the *Criminal Code* contemplates the *lawful* performance of abortions, and s. 285 states that:

> A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

It has been generally accepted that the phrase 'upon an unborn child for the preservation of the mother's life' applies in determining the legality of abortion under the *Criminal Code*[69] though, as indicated below, upon closer examination of s. 285 it is not clear that that phrase is in fact applicable. Before examining the alternative interpretation of s. 285, however, the implications of the phrase 'for the preservation of the mother's life' will be examined at some length.

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68. Bulmer, *op. cit.*, 153; O'Collins (1979), *op. cit.*, 4; Strathern, *op. cit.*, 143-4; D.L. Oliver, *A Solomon Island Society. Kinship and Leadership Among the Siuai of Bougainville* (Beacon Press, 1970), 174.

69. See Weisbrot and Ottley, *op. cit.*, 214; Bruce L. Ottley, *Cases and Materials on the Criminal Law of Papua New Guinea* (U.P.N.G. Printery) 189-193; Health Department Circular cited in footnote 80.

This phrase causes difficulties of interpretation, and it has not yet been judicially construed in Papua New Guinea. Judges in England and Australia, interpreting provisions from which the Papua New Guinea legislation is derived, have taken the various approaches described below. These decisions are not binding on the courts in Papua New Guinea, but they will be closely considered when a case raising similar issues arises in this jurisdiction.

1. The Bourne-Davidson Approach: In the leading English case *R.* v *Bourne* [1939] I K.B. 687 Macnaughten J. said that the phrase 'preservation of the mother's life' in the English legislation[70] has a more extended meaning than that of saving the mother from instant death, and (at p. 694) he instructed the jury that abortion was lawful where 'the probably consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck'. This instruction resulted in the acquittal of the accused, an eminent surgeon who performed an abortion on the fourteen-year old victim of a violent rape though it was conceded that her life was not in immediate danger.

The leading Australian case is *R.* v *Davidson* [1969] V.L.R. 667. Menhennit J., considering the Victorian legislation in 1969, arrived at a conclusion similar to *Bourne*, stating (at p. 672) that abortion is not unlawful where the accused 'honestly believes on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health'.

In what circumstances, then, does the *Bourne-Davidson* approach permit abortion? Clearly, abortion is lawful where continuation of the pregnancy would cause serious, tangible and direct impairment to the mother's physical or mental health. Equally clearly, abortion is unlawful if performed upon demand - Ashworth J. said in *R.* v *Newton and Stungo* [1958] Crim. L.R. 469 that 'if a doctor decides to terminate a pregnancy merely in order to oblige the woman, or to relieve her of embarrassment, or for a substantial reward, if it is merely that, then he is just as guilty of the criminal offence of abortion as would be the woman in a back street'. But is the mental disturbance to a single girl, or to a married woman with an already over-large family, sufficient to justify abortion? The likelihood that the child will be defective (for example, because the mother contracted rubella) is not of itself relevant, but will the anxiety and distress of the mother, before and after the birth, justify abortion? Woods concludes that -

> ... generally, the *Bourne-Davidson* approach gives few guidelines. However, it would appear from the reluctance of juries to convict medical practitioners that if the doctor does give careful consideration to

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70. The provisions of the U.K. *Offences Against the Persons Act* 1861 relating to abortion have now been replaced by the *Abortion Act* 1967.

> each case, does attempt an evaluation of the woman's problems and does exercise proper professional care and skill, the scope for lawful terminations is fairly wide.[71]

2. The Wald Approach: In New South Wales, the criteria for lawful abortion was significantly widened in 1971 by the decision in *R* v *Wald* [1971] 3 D.C.R. 25 when Levine J. (at p. 29) said that the doctor could take into account social and economic, as well as medical, factors in determining whether there was serious danger to the woman's mental or physical health. This reasoning was confirmed by Goran J. in *R* v *Smart* (1973, unreported).

Woods comments -

> Under this doctrine the doctor can take into account the fact that the 35 year old housewife with three children and a bad back cannot afford to employ assistance in caring for a new child. He can take into account the threat of a callous husband or de facto husband to desert the woman if she has another child. He can take into account, in the case of a pregnant unmarried girl, the effect upon her mental health of bitter condemnations by parents and of likely financial difficulty.[72]

In view of the difficulty of obtaining convictions in New South Wales since the *Wald* decision prosecutions against doctors for abortion have fallen off almost completely and the position comes close to abortion on request.[73]

However, the authority of the decisions in *Wald* and *Smart* is lessened by the fact that they were decided in the District Court, and there is no guarantee that they will be followed in the higher courts.

3. The Ross Approach: A much more restrictive approach was taken in the 1955 Queensland case *R* v *Ross* [1955] St. R. Qd. 48. Here, the judge referred to *Bourne*, but he refused to direct the jury as to the meaning of the words 'preservation of the mother's life', saying that they bore no technical meaning and that it was sufficient to read the words to the jury without further explanation. Woods calls this reasoning 'absurd nonsense' and he suggests that in the light of the later decisions in *Davidson* and *Wald* it should be reconsidered by the Queensland courts.

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71. G.D. Woods, 'Minors, Fertility Control and the Law in Australia' in Finlay and Sihombing (ed.), *op. cit.*, 141. Woods is describing the situation in Victoria, Australia. In Papua New Guinea there is no jury system, so the verdict is reached by the judge alone.

72. *Ibid.*, 141.

73. *Ibid.*, 142.

> The ... result is that in Queensland the doctor needs considerable courage before he will undertake termination except in dramatic circumstances such as those of a woman about to die immediately (due to, say, heart or blood circulation failure). Beyond such examples it is almost impossible to predict what a jury would regard as being "for the preservation of the mother's life". A jury ... might well be persuaded to the narrow view that "preservation" equals "saving" ... which would confine the scope of lawful abortions very considerably and result usually in a conviction for the doctor. Clearly the Queensland medical profession must be intimidated by the uncertainty of this situation.[74]

Ross is of particular relevance in Papua New Guinea because the wording of the Queensland Code and the Papua New Guinea Code is identical. However, there is no jury system in Papua New Guinea, so it will be left to the judges to consider *Bourne*, *Davidson*, *Wald* and *Ross* and to decide how the provisions should be applied in this country.

4. An Alternative Approach to s. 285: Although the words 'a surgical operation ... upon an unborn child for the preservation of the mother's life' have been generally accepted as determining the criminal responsibility of persons who perform abortions it is submitted that these words are not in fact applicable. Firstly, it is not obvious that a foetus meets the description of an 'unborn child', at least at an early stage of development. This doubt is strengthened by reference to s. 319 of the *Criminal Code*, under which the offence of killing an 'unborn child' does not arise until the mother is about to be delivered of the child. Second, an abortion operation is performed primarily on the *mother*, rather than on the child or foetus. The part of s. 285 which refers to unborn children refers, it is submitted, to the situation where the doctor is forced to operate on a child about to be born in order for example to remove it from the mother's body when this is necessary to preserve the mother. It does not apply to abortion, at least where the foetus has not reached viability.

It follows that the words of s. 285 which relate to an operation on a 'person', rather than on an 'unborn child', should be applied in the case of abortion. 'A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit ... if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case'. In applying this test the court could take a very restrictive approach. For example, in determining whether the operation is for the mother's benefit, the approach of Denning L.J. in *Bravery* v *Bravery* [1954] 3 All E.R. 59, 68-9 (see above) could be adopted, or the courts could revert to *Bourne* and the other cases described above in determining the reasonableness of the

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74. *Ibid.*

operation. It is submitted, however, that the courts should take the opportunity of discarding the old case law, and reconsider the issue afresh in the light of the Constitutional directives especially those relating to the right to privacy and the relevance of custom, outlined below.

(ii) The Constitution

1. The Right to Privacy and the National Goals and Directive Principles: Section 49 of the *Constitution* of Papua New Guinea (not as yet judicially construed) states that 'every person has the right to reasonable privacy in respect of his private and family life ...'

The United States Supreme Court in the landmark decision *Roe* v *Wade* 410 US 113 (1973); 41 US LW 4213 held that the right to privacy (not explicitly mentioned in the U.S. Constitution but developed in a long line of cases) is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The right to privacy is not absolute, however, and the state's interests in safeguarding the mother's health and protecting potential human life become sufficiently compelling in the later stages of pregnancy to limit the woman's right to privacy. Accordingly, the court pronounced that: (a) During the first three months of pregnancy the rights of the woman prevail and the decision to terminate the pregnancy rests solely with the woman and her doctor, (b) During the second three months the state may regulate abortion procedures in ways that are reasonably related to the protection of maternal health, (c) During the final three months, the foetus is regarded as viable, that is capable of existence independent of the mother, and the state's interest in protecting the foetus has reached the compelling point so that the state may then regulate, and even proscribe, abortion except when necessary for the preservation of the life or health of the mother.[75]

In developing the underlying law, Sched. 2.3 (I)(d) directs the courts to have regard to decisions of courts of countries which

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75. For more extended discussion see Weisbrot and Ottley, *op. cit.*, 222-223; E. Veitch and R.R.S. Tracey, 'Abortion in the Common Law World' (1974) 22 Am.J. Comp. Law 652. In *Wade* the Supreme Court struck down as unconstitutional Texas legislation which (like the Criminal Code of P.N.G.) proscribed abortion except for the purpose of saving the mother's life. In the companion case *Doe* v *Bolton* 410 US 179 (1973); 41 US LW 4233 the Court struck down Georgia legislation which proscribed abortion except where necessary to preserve the life and health of the mother, or where the foetus is likely to be born with serious defects, or where the pregnancy resulted from rape. Many of the states of the United States were forced to amend their abortion legislation so that it would comply with *Wade* and *Bolton*, and there is at present a strong anti-abortion movement lobbying for return to more restrictive laws. See 'Abortion under Attack', *Newsweek*, June 5, 1978, pp.22-28 and 'The Coming Abortion Backlash', *The National Times*, week ending June 24, 1978, pp. 24-26.

have a legal system similar to that of Papua New Guinea, and in determining matters relating to the Basic Rights decisions of the courts in the United States are of particular importance. Thus, the decision in *Roe* v *Wade* should be closely examined. The Right to Privacy in Papua New Guinea is also a qualified right, as set out in s. 38 of the *Constitution*. The approach of the U.S. Supreme Court is compatible with the National Goals and Directive Principles set out in the *Constitution*. The second directive calls for 'equal participation by women citizens in all political, economic, social and religious activities'. The right to terminate unwanted pregnancy, at least in the early stages, is a pre-requisite to such equal participation.[76]

In the light of this interpretation of s. 49 the court has two alternatives in the case of a prosecution under s. 228 or s. 229 of the *Criminal Code*. It may interpret the sections of the *Criminal Code* in such a way that they are compatible with the Right to Privacy and the National Goals and Directive Principles: that is, the words of s. 285 'for the preservation of the mother's life' or 'for the mother's benefit ... having regard to all the circumstances' would be interpreted as allowing abortion in the circumstances set out in *Roe* v *Wade*. Alternatively, if the court decides that the words of s. 285 cannot bear this extended meaning, the sections of the *Criminal Code* should be declared invalid and ineffective under s. 11 of the *Constitution*.

2. The Right to Life: At first glance it appears that the Right to Life guaranteed by s. 35 of the *Constitution* may restrict the availability of abortion. However, as Weisbrot and Ottley point out 'this provision, although bearing the same title used as a rallying cry by anti-abortion groups, states that "No *person* shall be deprived of his life intentionally ..." (emphasis supplied)'.[77] Under s. 295 of the *Criminal Code* a child does not become a 'person capable of being killed' until 'it has completely proceeded in a living state from the body of its mother', and there is nothing in s. 35 which indicates that 'person' should be construed more broadly to include a foetus, at least until the

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76. The Constitutional Planning Committee did not appear to envisage that s. 49 might cover a woman's right to terminate pregnancy. They considered the section to be complementary to freedom from arbitrary search and entry. However, they do not specifically exclude the possibility, and their Report is merely an aid to interpretation under s. 24 of the *Constitution*. See the *Final Report of the Constitutional Planning Committee 1974 Part 1*, para. 73-74, p. 5/1/13.

77. *Op. cit.*, 220-221.

foetus becomes viable.[78] Thus, s. 35 has no bearing on the law relating to abortion.

3. The Relevance of Custom: Schedule 2 of the *Constitution* sets out the circumstances in which the courts must apply and enforce custom as part of the underlying law. It was stated above that in most societies of Papua New Guinea abortion is widely practiced and widely, though not universally, disapproved. The question whether the courts should take account of custom in interpreting the provisions of the *Criminal Code* relating to abortion raises difficult problems.

Schedule 2.3 (1)(c) of the *Constitution* directs the courts to 'formulate an appropriate rule as part of the underlying law' having regard *inter alia* to custom 'where there appears to be no rule of law that is applicable and appropriate to the circumstances of the country'. In *Sanguma Wauta* v *The State* (unreported judgment SC134, 1978) Prentice C.J. (at pp. 4, 9), in considering the accused's liability for incest under s. 266 feared that applying customary law as an aid in interpreting the provisions of the *Criminal Code* would be in violation of s. 37(2) of the *Constitution:* 'nobody may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law'. Clearly, s. 37(2) precludes the use of custom to create a new offence, but it does not seem to preclude its use in the interpretation of imprecise or ambiguous sections like those relating to abortion. Prentice C.J. felt further constrained from applying customary law in criminal cases by the operation of s. 7 of the *Native Customs (Recognition) Act* 1963 (no. 28 of 1963):

> Subject to this Act, native custom shall not be taken into account in a criminal case except for the purpose of:-
>
> (a) ascertaining the existence or otherwise of a state of mind of a person;
>
> (b) deciding the reasonableness or otherwise of an act, default or omission by a person;

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78. See *R* v *West* (1848) 2 Cox C.C. 500; *R* v *Castles* [1969] Qd.L. Reporter 77; Q.W.N. 36; Weisbrot and Ottley, *op. cit.*, 221. Under s. 6(1) of the *Civil Registration Act* 1963 (no. 3 of 1964), 'birth' means the complete expulsion or extraction of the child from its mother -

> (a) after the twentieth week of pregnancy; or
>
> (b) where the duration of the pregnancy is not reliably ascertainable, the expulsion or extraction of a child weighing not less than four hundred grammes, who after the separation breathes or shows any other evidence of life including beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached and "born" has a corresponding meaning.

(c) deciding the reasonableness or otherwise of an excuse;

(d) deciding, in accordance with any other law in force ... whether to proceed to the conviction of a guilty party; or

(e) determining the penalty (if any) to be imposed on a guilty party,

or where the court considers that by not taking the custom into account injustice will or may be done to a person.

It is submitted that it is open to a court to find that the words of s.7(d) of the above Act are wide enough to allow the court to take custom into account in determining guilt,[78a] and further that failure to take custom into account in determining criminal liability in relation to an abortion operation may lead to injustice to the accused under s. 7. In any case, s. 7(e) clearly requires the court to consider custom in determining penalty.

Assuming that it is open to the courts to apply custom as part of the underlying law in the interpretation of the provisions of the *Criminal Code* covering abortion, the next question is whether the courts will apply a local custom, or whether they will apply only a nation-wide custom as recent cases suggest. In *Poisi Tatut* v *Chris Cassimus* (unreported judgment SC131, 1977) Prentice C.J. said (at p. 3) that the word 'custom' in Schedule 2.1 of the *Constitution* means 'custom prevailing throughout the country'. In *The State* v *Aubafo Feama and others* (unreported judgment N165, 1978) Wilson J. in determining whether the accused's act of eating human flesh amounted to improper or indecent interference with a corpse under s. 241 of the *Criminal Code* applied 'uniform blanket standards' of morality (at p.14) which he defined in terms of 'the average contemporary Papua New Guinean standard' with which 'a moderate Melanesian man' should conform (at p. 15).[78b]

In *Sanguma Wauta* v *The State* (unreported judgement SC134, 1978) Prentice C.J. explained his reluctance to apply local custom, as opposed to a nation-wide custom, on the ground that the criminal law would not apply uniformly throughout the country, but rather conviction would depend on the local custom of the accused. Such an approach would 'militate strongly against the development of "a coherent system" of underlying law' as required by Schedule 2.4 of the *Constitution* (at p.9). It is submitted, however, that the courts should reconsider this approach. The *Constitution*

78a. *cf.* Prentice C.J. in *Sanguma Wauta* v *The State* (unreported judgement SC134, 1978) at p.10.

78b. See also pre-Independence *Prosecutor's Request No. 2 of 1974* [1974] PNGLR 317 for a similar approach.

itself acknowledges the variety of customs throughout Papua New Guinea and appears to contemplate the application of local customs: 'Custom' is defined in Schedule 1.2 as the 'customs and usages of indiginous 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 ...' The Courts' insistence that a custom apply nation-wide in fact precludes almost totally the recognition of custom, since in a country of diverse customs very few customs have this universal application. The requirement in Schedule 2.4 that the underlying law 'develops as a coherent system' does not entail the application of uniform custom throughout the country, but rather the development of coherent and uniform rules determining the circumstances in which it is appropriate to apply a local custom. Further, the difficulties of determining the content of a custom and the circumstances in which it should be applied, outlined below, become almost insurmountable if the courts have to tackle them on a nation-wide scale.

Assuming that the courts are willing to apply custom (preferably local custom) in determining the liability of persons accused of procuring an unlawful abortion, they have wide powers under s.5 of the *Native Customs (Recognition) Act* 1963 to obtain evidence relating to custom. But difficulties remain. In a society where abortion is practiced, tolerated in the sense that people often turn a blind eye, but disapproved of, can it be said that custom accepts or rejects the practice? Abortion is generally a preoccupation of the women, and they might accept the practice more readily than men. What should the courts do if perceptions of custom differ in this way within the society? The teachings of the churches have influenced many Papua New Guinea societies. Should the courts attempt to distinguish between 'religious' beliefs and practices and 'customary' beliefs and practices, or have the two become inextricably interlinked? If the abortion operation takes place in a hospital using modern methods is it appropriate to apply custom at all? If so, should the court apply the custom of the doctor, or the patient, or of the area where the operation occurs? What should the courts do if the custom is more restrictive than the woman's right to terminate pregnancy under the Right to Privacy, s. 49 of the *Constitution*? Here, it is submitted, the custom must be modified in the light of the Basic Rights.

4. Reform Proposals: The Law Reform Commission of Papua New Guinea has proposed new legislation under which traditional customs, perception and beliefs are relevant in determining guilt so that persons acting under such a belief may be relieved of criminal responsibility.[79] The enactment of new legislation may clarify this confused area of the law.

(iii) Need for a Second Medical Opinion

A circular issued by the Director of Public Health in 1974 to all medical practitioners in the Papua New Guinea Public Health

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79. Law Reform Commission of Papua New Guinea, Report No. 7, *The Role of Customary Law in the Legal System* (November, 1977).

Department, headed 'Abortion: Legal Liability of Medical Practitioners', and based on an opinion by the Justice Department, advises that 'the opinion of another experienced medical practitioner should be obtained'.[80] There is no such requirement according to the law in Papua New Guinea, though in fact consultation with another doctor tends to show that the doctor performing the abortion acted in good faith. However, it is probably unfeasible to write such a requirement into the law in Papua New Guinea because the shortage of doctors in many rural areas would lead to excessive expense and delay.[81]

(iv) Parental and Spousal Consent

The right of minors to have abortions, with or without parental consent, and the relationship of confidentiality between doctors and patients who are minors (usually raised when the doctor informs parents that their daughter is pregnant) are currently under debate in the United States. Fourteen states of the United States have enacted parental consent requirements for underage girls,[82] though these may be unconstitutional because they violate the girl's right to privacy. The Papua New Guinea Health Department Circular states that -

> As for any other operation if the patient is under the age of 16 years the parent or guardian's consent should always be obtained. Where the patient is above the age of 16 years and apparently has the intellect to understand what she is consenting to, her consent is sufficient.[83]

The right of a husband to prevent his wife from having an abortion was raised in a recent English case reported in the *Sydney Morning Herald*, May 26, 1978, p. 9. Sir George Baker, President of the High Court's Family Division, ruled that under the *Abortion Act* 1967 (U.K.) 'the husband ... has no legal right whatsoever and certainly no right enforceable in law or in equity, to stop his wife having this operation or to stop doctors carrying it out'. Under existing legislation, the position is clearly the same in Papua New Guinea. Any attempt to limit the woman's right to abortion in this way may be in breach of her right to privacy. However, it was pointed out above that in Papua New Guinea the woman's relatives have a strong interest in her decision to have an abortion. The question whether the law should recognise this interest by requiring their consent or consultation is discussed generally in relation to fertility control, below.

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80. File no. 25-9-17, circular no. 265, 27 August 1974.

81. The U.K. *Abortion Act* 1967 and the South Australian *Criminal Law Consolidation Act* 1935-1975 both require that two registered medical practitioners must be consulted.

82. Buddin, *op. cit.*, 190.

83. *Op. cit.*

(v) The Relationship Between Abortion and Contraception

A further difficulty is whether prostaglandins, IUDs and uterine aspiration (i.e. treatment by cannula and syringe which results in expulsion of the contents of the womb, often used to regulate menstruation but incidentally terminating any pregnancy which may have occurred) which operate after conception should be treated by the law as abortifacients or as contraceptives. Tunkel argues that 'abortion' appropriately describes displacement of the ovum at any time after fertilization, which takes place within a few hours after sexual intercourse.[84] Woods (at p.145-146), on the other hand, considers that 'abortion' cannot, by definition, occur until after implantation, which occurs about a week after sexual intercourse. In Tunkel's view, Woods' interpretation 'gives a sort of free-for-all moratorium of a week or more after intercourse during which every sort of abortionist could ply his craft with impunity'. Nevertheless, it is submitted that Woods' interpretation is preferable, and most likely to be accepted by the courts.

(vi) Standard of Medical Care

The law attempts to ensure that abortion, like other surgical procedures, is performed with reasonable care and skill. If doctors or other medical workers (including 'village surgeons' and, presumably people who practice traditional methods of abortion[85]) fall short of the required standard and cause injury or death, they may be sued for damages and, in cases of gross negligence, liable to criminal prosecution.[86]

(c) *Availability of Abortion in Papua New Guinea*

The circumstances in which abortion may be performed lawfully in Papua New Guinea, then, are uncertain, and will remain so until a test case arises for decision, or until new legislation is passed.

In this state of uncertainty, the availability of abortion depends upon the policy of law enforcement agencies and upon the willingness of doctors to perform the operation. It has been shown that in New South Wales, where the law is similar to Papua New Guinea, abortion is available almost upon demand, whereas in Queensland, with similar laws, few doctors are prepared to perform abortions in the absence of a serious threat to the mother's health.

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84. B. Tunkel, 'Modern Anti-Pregnancy Techniques and the Law' [1974] Crim. L. Rev. 461, 465.

85. On the liability of customary medical practitioners see *The Queen* v *Laki and Talipuani* (unreported judgement No. SC 782, 1974; digested in [1974] PNG Law 23) and *Prosecutor's Request No. 2 of 1974* [1974] P.N.G.L.R. 317.

86. For general discussion of licensing and liability of medical practitioners in Papua New Guinea see Weisbrot and Ottley, *op. cit.*

In Papua New Guinea, the position is similar to that in Queensland, and it is almost impossible to obtain an abortion on therapeutic grounds.

The Code of Ethics of the Medical Society of Papua New Guinea suggests that abortion should not be performed on social or economic grounds. At s. 2.6(k) it states that 'termination of pregnancy is performed only if justified on medical grounds' and at s. 3.3 that 'procuring or attempting to procure an abortion for non-therapeutic reasons is unethical and illegal'. It also reminds doctors of 'the importance of preserving human life from the time of conception until death.'[87] Private practitioners appear generally unwilling to perform abortion except on the most pressing medical grounds. This is partly because they are intimated by the law - there is a common belief among doctors, as well as other people, that abortion is 'illegal' - and partly because many doctors are missionaries or mission-trained, and personally opposed to the practice of abortion.

A circular issued for the guidance of medical practitioners working for the Health Department[88] sets out the law in more liberal terms. It states that 'economic and social grounds could be considered as factors which could lead to serious danger to health ...'. Nevertheless, according to officers working in the Health Department's family planning division, abortion is carried out only where the mother's health is in very serious danger.

Abortion carried out by qualified medical practitioners, then, is unavailable to the majority of women in Papua New Guinea. Those who can afford it fly to Australia or other countries where the law is more liberal, or more liberally interpreted. It is notorious that if women are unable to obtain abortion by legal means they will resort to self-help measures, or to unqualified abortionists. The extent to which abortions are carried out in Papua New Guinea by unqualified 'back yard' abortionists, customary specialists and clandestinely by qualified doctors is unknown. Health Department officers say that women are frequently referred for treatment after unsuccessful attempts at termination by unqualified persons.

It is sometimes suggested that abortion is less in demand in Papua New Guinea than in western countries because the social stigma attached to illegitimacy is less strong. In general, it is true that ex-nuptial children do not in Papua New Guinea suffer social stigma, though they may lose inheritance rights traced through the father's

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87. See Weisbrot and Ottley, *op. cit.*, 216.

88. *Op. cit.*

lineage.[89] However, the mother suffers considerable stigma and shame. If she is unmarried, she may be forced to marry the child's father even if this is against her wishes. If marriage is impossible, she may lose the chance of later entering a good marriage and of obtaining a high bride-price for her kin group. A married woman who conceives a child as a result of an adulterous relationship may be divorced and savagely punished by her husband and his kin, and disgraced in the eyes of her own kin. Thus, there is strong motivation for abortion amongst women in Papua New Guinea.

E. INFANTICIDE

(a) *Customary Law*

Infanticide was considered an acceptable practice in most societies of Papua New Guinea to get rid of defective babies, or all but the strongest male baby following multiple births.[90] It was also accepted, and even expected, when a child was born in circumstances of great shame as in *R* v *Iakapo and Iapirikila* [1965-6] P.N.G.L.R. 147 (see below).

It was also practised secretly by women when the child was unwanted for reasons similar to those described above in relation to abortion. If the killing occurred immediately after birth and before the child became an accepted member of the community it was not regarded as murder, but punishment of the woman and compensation claims by the husband's kin might follow, as for abortion.[91]

Bulmer points out that it is difficult to calculate the incidence of infanticide:

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89. This opinion has been expressed in several decided cases. In *R* v *Dabat and others* [1963] P. & N.G.L.R. 113, 114, Mann C.J. said that 'the general rule based on the experience of this Court is that children of natives living in uncontrolled areas are not subject to loss or disgrace by reason of any question of biological paternity'. He expressed a similar view in *R* v *Asamakan* [1964] P. & N.G.L.R. 193, 195, saying of a child conceived as a result of the mother's adultery: 'It is likely that the child would not have been allowed to suffer, although the evidence gives no idea of his status. Either he would be looked after at some appropriate stage of development by the traditionally appropriate relations; or the husband, if by custom he had any claim to the child, might become a willing foster father, or adopt it as his own'. However, the description of the position of the child conceived as a result of an incestuous relationship in the passage quoted below from *R* v *Iakapo and Iapirikila* [1965-6] P. & N.G.L.R. 147, 148 suggests that it would be subject to very considerable social and legal handicaps.

90. See Bulmer, *op. cit.*, 153-154.

91. Strathern (1972), 44.

> ... in nearly all societies the woman is secluded at the time of birth, and sometimes completely alone, so that often no-one except the mother can really know whether a child was stillborn, died of natural causes, or was killed. Even where other women are normally present to attend on a parturient mother, the baby may be born so quickly that she is alone when it appears ... Even in societies in which some categories of infanticide are regarded as legitimate, the practice is now covert because of knowledge of disapproval by missionaries and other outsiders and of possible punitive action by Administration authorities. It is also difficult to know where to draw the line between deliberate infanticide and selective lack of positive care ...[92]

(b) *Written Law*

Under s. 295 of the *Criminal Code* 'a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother ...'. From this point, killing the child constitutes wilful murder, murder or manslaughter.

However, if the mother kills her child aged under 12 months while the 'balance of her mind was disturbed by reason of her not having fully recovered from giving birth to the child or by reason of the effect of lactation' she may be convicted of the lesser offence of infanticide instead, under s. 306 of the *Criminal Code*. She is then punished as if she had been guilty of the manslaughter of the child, under s. 306(1).[93]

The onus of proving all the elements of infanticide rests with the Crown.[94] It is incorrect to apply ss. 26 and 27 of the *Code*, which cover insanity and raise a presumption of sanity which must be rebutted by the defence, to the provisions relating to infanticide. In *R* v *Asamakan* [1962] P. & N.G.L.R. 193, 198, Mann C.J. said that the words 'balance of her mind was disturbed' in s. 306:

> are not appropriate to describe the kind of insanity which relieves a person from criminal responsibility for his actions. A whole range of emotional disturbances, such as jealousy, anger, revenge or lack of self-control, are excluded from section 27 ... and these are typical of matters affecting mental stability or balance, as distinct from insanity.

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92. Bulmer, *op. cit.*, 154.

93. The *Infanticide Act* 1953-6 (no. 96 of 1953) sets out the law in identical terms. It has fallen into disuse though it has not been repealed.

94. *R* v *Yigwai and Aku* [1963] P. & N.G.L.R. 40, 43.

If the child is killed during birth, but before it has become 'a person capable of being killed' under s. 295, the appropriate charge is that of 'killing an unborn child' under s. 319 of the *Criminal Code*. A penalty of life imprisonment - the same as that for murder and manslaughter - is imposed.

It is no defence to any of the charges outlined above that the killing occurs because the child is seriously deformed or abnormal. Section 23 of the *Criminal Code* provides that the motive of the accused is irrelevant to criminal responsibility.

The fact that the custom of the accused does not forbid the killing in the particular circumstances provides no defence under the *Criminal Code*. Un *R* v *Iakapo and Iapirikila* [1965-6] P. & N.G.L.R. 147 Iakapo became pregnant as a result of sexual intercourse with a member of her own moiety, in breach of a strict incest taboo. Mann C.J. (at p. 148) explained that -

> Such a prohibited relationship brought great shame not only on the parties but upon the entire moiety, for any offspring would be outside the whole pattern of inheritance, and would be regarded as members of the "fools clan". Relatives would have an obligation to look after them, but would carry these out to the least possible extent, and unwillingly, because the child would be a constant symbol of great shame.

Immediately after the birth, Iakapo ordered her daughter to bury it alive, and Mann C.J. said (at p.150) that killing the child would be accepted by most of the people as a practical solution to the problem. Nevertheless, he found Iakapo guilty of the wilful murder of the child.[95]

The provisions of the *Constitution* which require the courts to enforce custom in formulating the underlying law have no application since any custom which condones infanticide is inconsistent with the statutory provisions. Further, such custom is, arguably, inapplicable as being 'repugnant to the general principles of humanity' under Schedule 2.1 (2) of the *Constitution*. There is however no reason why custom should not be taken into account in determining whether the state of the mother's mind is such that she should be convicted of infanticide rather than one of the more serious offences related to homicide.

If recent proposals by the Law Reform Commission become law an accused who kills under the influence of a traditional custom, perception or belief held by other members of the customary social group to which the person belongs may be convicted of a 'diminished responsibility killing' instead of the more serious offences of wilful murder, murder, manslaughter or infanticide, and subject only to three years' imprisonment.[96]

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95. The judgement is concerned mainly with the criminal responsibility of Iapirikila, Iakapo's daughter, under s. 29 of the *Criminal Code*.

96. Law Reform Commission of Papua New Guinea, Report No. 7, *op. cit.*

The parties place little emphasis on the welfare of the child as such. They are concerned primarily with the rights of the parents and their clans. However, this is not necessarily detrimental to the child who is brought up by numerous members of the extended family group.

Adoptions made according to custom are recognised by the courts. Section 5(1) of the *Adoption of Children (Customary Adoptions) Act* 1969 provides:

> ... where a child is or has at any time been in the custody of and is being or has been brought up, maintained and educated by any person or by two spouses jointly as his, her or their own child under any adoption in accordance with native custom, then for the purpose of any law ... the child shall be deemed to have been adopted by that person or by those spouses jointly, as the case may be.

In *Sanguma Wauta* v *The State* (unreported judgment No. SC134, 1978), Prentice C.J. (at p.8) emphasised that 'proof of custody, bringing up, maintenance and education is not of itself proof of adoption by custom ... the actual custom must be proved as though a matter of fact, under the Native Customs (Recognition) Act'. It is further provided by s.5(2) that the adoption shall take effect in accordance with custom, and shall be 'subject to any provisions of that custom as to limitations and conditions, including limitations and conditions as to the period of the adoption, rights of access and return and property rights or obligations'.

Section 6 enables the Local Court to grant a certificate to the effect that a customary adoption has taken place. The certificate is conclusive as to the adoption and as to the relevant terms and conditions.

Before granting the certificate the court, under s. 9, must ensure that all interested parties are given an opportunity to make representations. In *The Queen* v *Benhamboken and Asini, Re Jimmy Napkai An Infant* (unreported judgement No. SC697, 1972) the child's father was not notified of the proceedings, and the Supreme Court decided that as the certificate of adoption was invalidly granted it was not conclusive evidence of adoption and custody of the child was granted to the father.

Section 4 provides that nothing in the Act derogates the provisions of the *Native Customs (Recognition) Act* 1963. Section 6(1)(d) of the *Native Customs (Recognition) Act* 1963 prohibits the application of custom where its recognition or enforcement would not be in the best interests of a child under the age of sixteen years. Thus in administering the *Adoption of Children (Customary Adoptions) Act* 1969 the courts have an overriding duty to ensure that the best interests of the child will be promoted by the adoption. In practice, however, Local Court magistrates almost invariably grant the certificate upon proof that the adoption has taken place according to custom, without entering into discussion of the interests of the child.

The vast majority of adoptions in Papua New Guinea are made according to custom. The number of applications for certificates is increasing because adoptive parents believe that this makes their position more secure, and prevents the natural parents from claiming back a child after the adoptive parents have paid for its education, or from claiming back daughters when they become old enough to enter into marriage negotiations. As well, the court sets out clearly the relevant terms and conditions, thus decreasing the chance of disputes between the parties, and making disputes which arise easier to settle.

(b) *Non-Customary Adoption*

The concept of adoption in western countries is in marked contrast to customary adoption in Papua New Guinea. Western law vests the adoptive parents with exclusive legal and social rights over the child, putting them as far as possible in the same position as natural parents. Simultaneously, the natural parents lose all legal and social rights over the child, and in consenting to adoption they agree, in effect, to sever all contact with the child, though an exception is made in the case of adoption by relatives. Adoption is organised through social welfare agencies and is complete when the adoptive parents obtain an adoption order from the court. The Hurst Committee, which reviewed the adoption law of England and Scotland in 1954, described the aims of the legislation as follows:

> *The children* must be protected from unnecessary separation from natural parents who, with adequate help and guidance, could provide security and love in their own home. They must be protected from adoption by children who are unsuited to the responsibility of bringing them up or want a child for a wrong motive. When they have settled satisfactorily in their adoptive home they must not be interfered with. *The natural parents* must be protected from hurried or panic decisions to give up their children and from being persuaded to place them unsuitably. *The adopters* must be protected from undertaking responsibilities for which they are not fitted or which they have not appreciated, and from interference after a child has been legally transferred to them.[1]

In Papua New Guinea this concept of adoption is embodied in the *Adoption of Children Act* 1968, and adoptions under the Act are handled by the Child Welfare Department.

Section 27(1) of the Act of 1968 severs legal rights and obligations between the child and its natural parents, and vests them in the

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1. U.K. *Report of the Departmental Committee on the Adoption of Children*, Cmd. 9248, para. 19 (1954) (emphasis supplied).

adoptive parents.[2]

Written consent to adoption by the persons set out in s. 18 of the Act is required. In the case of a legitimate child the consent of both father and mother must be obtained. Where the child is illegitimate, the consent of the mother only is necessary. Except in the case of adoption by relatives the consent is a general consent under s. 19, and under s. 20 it becomes irrevocable after 30 days.

The Act precludes contact between the adoptive parents and the child on the one hand, and the natural parents on the other, during the adoption process and after the adoption order has been made. Once the natural parents have consented to the adoption they must place the child in the care of the Child Welfare Department, which then selects suitable adoptive parents from its register of applicants, under s. 26. It is an offence under ss. 43 and 44 to disclose the identity of the natural parents and the adoptive parents to each other, or to disclose to the child the identity of the natural parents. An exception is made in the case of relatives, however, between whom privately arranged adoptions are permitted under s. 42.

After caring for the child for a certain period - the time is not specified by the Act but is usually about three months - the adoptive parents apply to the National Court for an adoption order. In deciding whether to make the order the Court must regard the welfare and interests of the child as the paramount consideration under s. 8, having regard to the age (s. 11), the general circumstances and the suitability of the adoptive parents (s. 12).[3] Once the court order has been made it can be discharged only where there are exceptional circumstances and the discharge will not be prejudicial to the welfare and interests of the child, under s. 16.[4]

Section 41 prohibits payments in consideration of adoption. This section gave rise to problems in two cases where expatriates applied to adopt national children, and the parents agreed to consent on condition that they receive compensation payments from the adoptive parents. After careful consideration, the Court decided that it had the power to authorise

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2. The relationship between the natural parents and the child is deemed to continue for purposes of the law relating to incest under s. 27(2). Two recent controversial cases decided that, as a matter of statutory interpretation, sexual intercourse between a man and his adopted daughter does not amount to incest because she is not his 'lineal descendant' as required by s. 226 of the *Criminal Code*. See footnote 51.

3. See *Re T.K. (an infant)* 1973 P.N.G.L.R. 364.

4. In *Re S.* [1969] V.R. 410 an order was discharged after it was discovered that the child was mentally retarded and spastic. This situation should not arise under s. 12(3) of the Act which requires a qualified medical practitioner to report on the child's mental and physical condition before the court makes the adoption order.

the payment under s. 41(2)(c) of the Act so long as the payments were reasonable according to the custom of the natural parents and negotiations were conducted by officers of the Child Welfare Department, thus eliminating direct negotiations between the natural parents and the adoptive parents.[5]

It was suggested above that the western concept of adoption embodied in the Act of 1968 is foreign to Papua New Guinea concepts, and officers in the Child Welfare Department generally encourage nationals to use customary procedures instead. As well, the idea of preserving anonymity is difficult to achieve in Papua New Guinea where the child's area and even village can often be identified from the child's appearance.

The Act of 1968 is used mainly where non-nationals are involved and the adoption is not, therefore, a customary adoption. It is occasionally used where a national parent - usually a single mother - wishes to sever all contact with the child. Where an adoption occurs between nationals it appears at present to be assumed by the courts that the adoption is by definition a customary adoption even if made outside the usual customary context, and this assumption will have to be examined more closely in the future.

The Child Welfare Department handles only a handful of non-customary adoptions per year under the Act of 1968[6]. There are many more applicants on the register than there are babies available for adoption. However, it is thought that informal private arrangements, bypassing the Child Welfare Department, are made quite often, but these are almost impossible to detect and deter.

G. OTHER METHODS OF FAMILY AUGMENTATION

(a) *Artificial Insemination*

Artificial insemination is accomplished by placing the sperm of a donor into the reproductive organs of the woman, where the sperm fertilizes the ovum, and the woman bears the child. Sperm banks store frozen donor semen. The donor may be the husband, a man selected by the woman, a stranger, or a mixture of sperm may be used.[7] At present there are no facilities for storing sperm in Papua New Guinea.

The courts have considered the question of whether a wife's utilization of artificial insemination without the husband's consent amounts to adultery and reached different conclusions in *Maclennan* v *Maclennan* (1959) S.L.T. 12 and in *Orford* v *Orford* (1921) 58 D.L.R. 251. The better view (adopted in *Maclennan*) is that she has not committed adultery because the

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5. *Re A.B.* [1965-66] P.&N.G.L.R. 53; *In the Matter of XY and YY* (unreported judgement, SC 29 May 1973).

6. Under the *Civil Registration Act* 1963 (no. 3 of 1964) and the *Civil Registration (Customary Adoption) Act* 1971 (no. 45 of 1971) non-customary and customary adoptions must be registered when the court grants the certificate of adoption. However, the Registrar-General does not keep a record of the number of adoptions which are registered.

7. Finlay and Sihombing (ed.), *op. cit.*, 108-110.

essential element of sexual intercourse is missing, but that the husband can obtain a divorce on the ground of cruelty. Presumably the same applies where a husband donates sperm to another woman without his wife's consent.

Where the donor is the husband the child is legitimate. Where another man is the donor the child is probably illegitimate even where the husband consents. In this case the child may be legitimated by adoption.

Where the woman is not married to the donor legal problems concerning the relationship between the donor, the child, the mother and the mother's husband or de facto husband (if any) arise. For example, has the donor any legal obligation to support the child or its mother, or any right to custody of the child, or any right to prevent the mother from having the child adopted? Such problems arose in a recent English case, as yet unreported, where a married couple hired a prostitute to bear a child for them, after artificial insemination by the husband. After the birth the prostitute refused to give up the child and the court made a custody in her favour.

(b) *Embryo Transplantation (Test Tube Babies)*

This new technique involves (a) the removal of human egg cells from the ovary; (b) fertilization of the eggs in a test tube; (c) obtaining a culture of the fertilized egg cells to achieve an embryo; and (d) transplanting the embryo into the uterus of the woman from whom the egg cells came or the uterus of another woman.[8] This technique is not available in Papua New Guinea as yet.

Walters (at p. 197) describes three situations in which this procedure can be used -

> An infertile woman with normal, functioning ovaries, a normal uterus but absent or grossly diseased fallopian tubes is married to a normal, healthy husband ... An infertile woman with normal ovaries but no uterus is married to a normal healthy husband ... An infertile woman is married to an infertile husband whose seminal fluid contains no spermatozoa ...[9]

In the first case the embryo is transplanted into the mother's uterus. In the second case the embryo is transplanted into the uterus of another woman (a surrogate or incubator mother). In the third case the embryo is transplanted into the uterus of the mother or incubator mother. This latter case may be one of artificial insemination by donor as to the mother (egg cells) and the father (the spermatozoa). The birth

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8. *Ibid.*, 110.

9. W.A.W. Walters, 'Legal and Ethical Problems of In Vitro Fertilization and Embryo Transplants' in Finlay and Sihombing (ed.) *op. cit.*, 197.

of the world's first 'test tube' baby occurred in London in 1978.[10]

This technique raises complex legal problems relating to the relationship between the husband and wife, surrogate mother, donors, and the child. Who should be regarded as the child's parents? On whom rests the duty to maintain the child? Should the technique be freely available to anyone who wishes to use it? As yet the law provides no answers.

3. *CONCLUSION*

The laws relating to fertility control and family planning should now be reassessed in the light of conditions and attitudes prevailing in Papua New Guinea - in particular, in the context of the Papua New Guinea extended family and Papua New Guinea standards of public health - and with the aim of facilitating the national family planning programme. All the relevant provisions should be consolidated in a single statute, clearly and simply drafted, and readily comprehensible to social and medical workers and the general populace, as well as to lawyers.

As stated above, Papua New Guinea does not aim to implement a policy of population control. The law should stress the requirement of consent by the recipient. Laws which attempted to coerce people into limiting their families would be contrary to the spirit of the Constitution which stresses individual freedom and civil liberties, and would directly contravene the constitutional right to privacy guaranteed by s. 49 of the *Constitution*.

A successful family planning programme cannot be implemented by passing new legislation: the task of motivating people and providing them with access to fertility control methods rests with health and medical workers and educators. But new legislation is necessary to facilitate the programme by removing all the unnecessary restrictions which at present hamper implementation of the programme, thus providing the maximum choice of family planning methods compatible with public health and safety, together with full access to information and publicity relating to these methods. The law reform process itself promotes publicity and public discussion.

In Papua New Guinea, as in other countries, many people hold the view that certain methods of fertility control are immoral or contrary to religious precepts and should be prohibited by law. It is submitted that the correct approach is to leave the decision to the patient in conjunction with his or her medical advisers - the law should not impose restrictions purely on moral grounds. In this area notions of what is right or wrong are based on value judgements which cannot be subjected to empirical proof or analysis. There are no clear-cut or absolute answers and the choice should be left to the person directly concerned. In relation to the availability of abortion, it is submitted that recognition of the right of women to control their own bodies and their own fertility is a prerequisite to the equal participation of women citizens in all political, economic, social and religious activities called for in the second of the National Goals and Directive Principles. Restrictions on fertility control imposed on either men or women for reasons of morality unrelated to health

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10. *Post-Courier*, 20 July 1978.

and safety requirements are, it is submitted, contrary to the first of the National Goals and Directive Principles which call for 'every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others'. Such restrictions also contravene the right to privacy guaranteed by s. 49 of the *Constitution*.

In Papua New Guinea, more so than in western societies, the lives of individuals are very closely linked with other members of the extended family group. For this reason individuals who make a unilateral decision to use fertility control methods - in particular, women who fail to consult with their husband, or couples who fail to consult members of their kin group or clan - may well provoke a hostile response from those who see such a decision as contrary to the interests of the kin group or clan. Similarly, a family planning programme directed towards acceptance by individuals rather than by the community as a whole would be likely to cause dissension and hostility. Medical workers should certainly inform recipients of the consequences of making an independent decision. Nevertheless, the right to make decisions whether or not to use any particular method of fertility control rests with the individual, and the law should not require spousal or parental consent, or the consent of other relatives.

The only restrictions which may validly be placed on access to fertility control methods, it is submitted, are those necessary in the interests of public health and safety. Quality control should be exercised and products should be properly packaged and labelled. The level of training necessary to prescribe and dispense drugs and to perform surgical procedures should be set out in the legislation. Dangerous self-medication should be discouraged. However, the dangers of denying access to products like the contraceptive pill must be weighed against the dangers of making them available without much supervision. As Stepan and Kellogg remark:[11]

> Mechanically to restrict access to contraceptives by the 'prescription only' rule is in some countries tantamount to actual prohibition of family planning. The number of deaths and health hazards resulting from unwanted pregnancies would, naturally, be incomparably greater than that resulting from unlimited access to the pill: "In developing countries, where maternal mortality may exceed 1,000 deaths per 100,000 live births, the hazard to life for young women may be *hundreds of times greater* from unwanted pregnancy than from use of oral contraceptives."[12]

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11. J. Stepan and E.H. Kellogg, 'The World's Laws on Contraceptives' (1974) 22 Am. J. Comp. Law 615, 643-644.

12. Ravenholt, Piotrow and Speidel, 'Use of Oral Contraceptives' (1970) 8 Inter. J. Gynaecology and Obstetrics 941, 945, quoted in Stepan and Kellogg, *ibid*.

Thus, whilst standards compatible with Papua New Guinea's health services should certainly be preserved[13], unnecessarily high standards derived from western countries where qualified doctors and pharmacists are readily available and often reluctant to allow even simple procedures to be carried out by para-medicals should not be imposed in Papua New Guinea. As well, restrictions ostensibly based on health needs but in reality operating merely as obstructions to access - for example the requirements written into English and Australian legislation that the patient must consult several doctors before receiving an abortion[14] or that abortion is unavailable after the first trimester - should be avoided. As with other surgical procedures, the decision should be made by the patient in conjunction with his or her medical advisers. There is no need, it is submitted, for the law to interfere in the doctor-patient relationship in this area more than in any other area.

The new legislation should be strong enough to ensure that people can exercise their right to access to family planning without obstruction due to the whims or personal prejudices or convictions of administrators. Hospital administrators who disapprove of abortions, for example, should not prohibit doctors from carrying them out; health workers who disapprove of dispensing contraceptive pills to unmarried women should not refuse to supply them. It would be advisable, therefore, to write the internationally-recognised right of couples and individuals to plan and limit their families into the legislation, and perhaps include it in the Basic Rights set out in the *Constitution*. Then, any person denied a particular method of fertility control could bring legal action demanding access to that method. However, difficult problems arise where, for example, a health worker refuses to carry out an abortion or sterilisation operation on the grounds of his or her moral convictions. In this case, even if the patient cannot obtain alternative treatment, it is probably inadvisable and contrary to the rights of the health worker to enforce performance of the operation.[15]

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13. For example, there have been disturbing reports about indiscriminate use of the contraceptive injection Depo Provera in Third World countries, including Papua New Guinea, without proper account being taken of its frequent side effects.

14. See footnote 81, above.

15. Section 4 of the U.K. *Abortion Act* 1967 provides that: '(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection: Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it. (2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman'.

The law should also facilitate the dissemination of information and publicity relating to fertility control methods and programmes. The laws relating to obscenity should be reappraised to make it clear that literature and advertising of an informative and popularising nature is not proscribed. Public advertisements may at first provoke embarrassment or ribaldry, but such attitudes should be attacked and broken down rather than used as an excuse for restrictive laws. In the area of family planning there is a need for explicit, frank and perhaps attention-seeking publicity and popularisation. However, there should perhaps be restrictions on deliberately offensive or exploitative displays, though the boundary is very difficult to define.