JUVENILE DELINQUENCY AND THE CONSTITUTIONAL GOAL OF SELF-RELIANCE: THE PROPOSED YOUTH COURT SERVICES ACT IN PAPUA NEW GUINEA

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1. *Introduction*

Reform of juvenile delinquency law in Papua New Guinea is proceeding on a well-worn path of failures in the Western legal system. Despite frequent calls for 'a Melanesian way' in new legislation, the *Youth Court Services Act*, proposed by the Law Reform Commission in late 1979, has forsaken self-reliance in legal and social development. Instead, Western legal institutions and service delivery concepts for handling young offenders have been recommended in the face of evidence that many such institutions and concepts have broken down in developed countries. The purpose of this article is to analyse the draft *Youth Court Services Act* on the basis of findings in other jurisdictions that operate youth courts. Commentary on the philosophy of the draft Act and the specific strengths and weaknesses of the statute will be offered. In addition, the notion of self-reliance through customary law and traditional institutions will be discussed.

The proposed *Youth Court Services Act* is the fulfilment of the Law Reform Commission's 1975 mandate to examine juvenile justice and corrections problems in a general review of the criminal justice system. The draft Act is an accompaniment to the Commission's Report No.9, 'Young Persons in Conflict With the Law', submitted to the Justice Minister in October, 1979. The Report was preceded by Joint Working Paper No.14, with the same title, in November, 1978. The deliberations behind the draft Act have included a Joint Committee of advisors from the Department of Home Affairs, private social welfare organizations, other government departments, the police, the University of Papua New Guinea, and Correctional Services. At the time of writing, no public meetings had been held on the draft Act, but public views were being sought. At the same time, the Department of Home Affairs was continuing to debate with the Law Reform Commission over the merits of some provisions of the Act. The Commission seems to have done an admirable job of consulting the professional and voluntary sector that is directly working with juvenile delinquency. It remains to be seen whether nationwide public input will be fully encouraged.

The draft Act is technically a straightforward attempt to replace only ten sections of the *Child Welfare Act* 1961.[1] The simplicity of the task ends there. The question of juvenile justice philosophy, service delivery, children's rights, effectiveness of rehabilitation, community responsibility, and a host of others overwhelm the most casual reader of the Commission's Report. Yet the contents of the draft Act and its

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1. *Child Welfare Act* 1961 (no.34 of 1961 as amended), Part VI, ss.31-52.

detailed handling of many issues are not as astonishing as what has been omitted. Former Prime Minister Somare has criticized the existing imposition of Western family law, with its over-reliance on the nuclear family and has stated:

> We need to work out new ways of strengthening traditional forces. For example, the *wantok* system is often criticized by those who say that the extended family and the obligations that go with it are an obstacle to development. I think we must begin to look at the issue the other way round. Let us see how the *wantok* system can be recognized in the law and its strengths made to work for our goals. Let us not use the law to eliminate what may be a valuable aspect of our traditional society.[2]

These views and the Commission's own work on underlying law[3] seem to have been forgotten in the creation of youth court services legislation. To be sure, there are references to lay members for the courts, compensation as a disposition, and the involvement of 'responsible adult' relatives of an offender. But the main concepts of pre-trial procedure, trials and dispositions and youth court services in the draft Act have borrowed nothing from the customary law of Papua New Guinea.

Why should a Canadian lawyer and law teacher have anything to say about juvenile law in Papua New Guinea? When first reading the draft *Youth Court Services Act*, it had a familiar ring and I later confirmed that the drafting relied heavily upon a 1975 Canadian government report and draft statute.[4] I was amazed to learn that this Canadian transplant, along with some revised pre-Independence (i.e. Australian) sections of the *Child Welfare Act* 1961, made up the bulk of the new proposals. In view of the fact that a 1977 Canadian report and many later revisions to the Canadian draft *Young Offenders Act*[5] have completely changed Canada's initiatives on juvenile delinquency since 1975, the acceptance of those castoff approaches in Papua New Guinea warranted some curiosity. Furthermore, although my visit to the country and observations of Village Courts and Children's Courts were limited, I could not fail to notice the absence of youth court services and the growing opposition to western law and legal institutions throughout the

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2. The Hon. Michael T. Somare, 'Law and the Needs of Papua New Guinea's People' in Zorn, Jean and Bayne, Peter, eds. *Lo Bilong Ol Manmeri*, University of Papua New Guinea, 1975, 16.

3. Report No. 7, *The Role of Customary Law in the Legal System* (1977).

4. *Young Persons in Conflict with the Law*, Ministry of the Solicitor-General of Canada, Ottawa, 1975.

5. A 1977 Report, titled, 'Highlights of the Proposed New Legislation for Young Offenders', Ministry of the Solicitor-General, Ottawa, superceded much of what was said in the 1975 Report. Since 1977, extensive federal-provincial consultation has produced numerous changes in draft legislation, but none of these changes has emerged in Bill form.

country.[6] Finally, I felt that if the people and the Government of Papua New Guinea really want to accept this Western model for juvenile law, they should be aware of the research and criticism that now challenges the notions of an informal, 'helping' Children's Court and 'rehabilitative' dispositions such as 'secure custody'.

This is not to say that existing juvenile law in Papua New Guinea is adequate. It is not. The revelations of the Mount Report[7] alone should be shocking enough to bring about early reform of the abuses suffered by young persons in the present juvenile justice system. On the other hand, new comprehensive legislation requires considerably more thought, financial commitment, and community services commitment than there is apparent in the draft *Youth Court Services Act*.

II *Juvenile Justice Philosophy*

The draft Act is an excellent reflection of a major struggle in Western nations over the philosophical basis for juvenile delinquency legislation. Is the young offender to be regarded as a child whose 'mistakes' can be 'treated' by rehabilitation services ordered by an 'informal' legal tribunal? Or is the young offender to be accorded full legal rights before a court dominated by careful criminal procedure and sentencing policies that mete out the punishment, neither more nor less, that an adult would receive for the same offence? The Papua New Guinea draft legislation does nothing to resolve this dilemma: it intensifies the conflict in philosophy that began with the work of the 'child savers' early in the twentieth century.

The 'child savers' were the reformers who brought about the first juvenile courts in the United States and other developed countries. Anthony Platt defines the 'child savers' as

> ... a group of "disinterested" reformers who regarded their cause as a matter of conscience and morality, serving no particular class or political interests. The child savers viewed themselves as altruists and humanitarians dedicated to rescuing those who were less fortunately placed in the social order.[8]

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6. The author visited the University of Papua New Guinea, Faculty of Law, October-November 1979. Interviews were conducted with numerous officials and visits were made to Children's Courts and Village Courts in Port Moresby, Mendi, Mount Hagen and Goroka.

7. Brother Gabriel Mount, *Report on Children in Court*, Office of Home Affairs, Port Moresby, 1979. This Report to the Minister of Home Affairs outlined violations of the Constitution (especially the guarantee of separate prison facilities for young persons), sentencing excesses of Magistrates, and inadequate training for youth service workers. With some notable exceptions, the Report is an up-to-the-minute record of breakdown in most areas of the juvenile justice system.

8. Anthony M. Platt, *The Child Savers: The Invention of Delinquency*, Chicago, University of Chicago Press, 1969, 3.

Although these earnest volunteers, and their counterparts in other Western countries like Canada and Australia,[9] entrenched the separate juvenile court, the system was soon taken over by the professionals in social work, criminology, and law. These professionals have been responsible for Western juvenile courts that follow the child savers' model of a therapeutic court - one where misguided youths will be protected from their own harmful behaviour by institutional care and discipline.

In such a court, the judge was encouraged to act as a 'judicial therapist',[10] a friend of the delinquent child who could administer individual justice. The court's authority was extended to 'pre-delinquent' behaviour (acts which would not be an offence if committed by an adult) and child-saving dispositions were recommended by social workers who conducted thorough examinations of the child's home life. The reality behind these kindly dispositions was that a substantial number of children, who had not committed criminal offences, were removed from their homes and placed in 'reformatories' that were nothing more than prisons for young people.[11]

The paternal philosophy of the courts was justified by proponents who claimed that the *parens patriae* doctrine of English courts of equity could embrace the juvenile court. In other words, the notion that the state can act as a substitute parent for children could be stretched from 'poor laws' and property guardianship to a whole range of deviance-correction activities by a court. The 'state as a parent' (*parens patriae*) justification became an article of faith among most analysts of the early juvenile courts.[12] However, an eminent lawyer, Dean Roscoe Pound, and a top sociologist, Paul Tappan, later asserted that the child-savers invented this legal rationale and 'evolution'[13] after they had founded their protective jurisdiction over children. Whatever the origin of the juvenile court's assumption of the child protector role, it is submitted that the protective philosophy, based on child-saving, is an essential feature of today's Children's Court in Papua New Guinea.

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9. See Jeffrey S. Leon, 'The Development of Canadian Juvenile Justice: A Background for Reform' (1977) 15 *Osgoode Hall L.J.* 71; Lynn Foreman, *Children or Families*, Canberra, Australian Government (Social Welfare Commission), 1975, 18-21.

10. Platt, *op. cit.*, 142; see also *The Royal Commission Inquiry Into Civil Rights* (Report 1, Vol. 2), Toronto, Queens Printer, 1968, 554.

11. Platt, *op. cit.*, 140-141, 145-152; Leon, *op. cit.*, 83-84.

12. Julian W. Mack, 'The Chancery Procedure in the Juvenile Court', in J. Addams, ed. *The Child, The Clinic and The Court*, New York, New Republic Inc., 1925, 310-319; Gustav L. Schram, 'The Juvenile Court Idea' (1949) 13 *Federal Probation* 19; Douglas Re. Rendleman, 'Parens Patriae: From Chancery to the Juvenile Court' (1971) 23 *So. Carolina Law Rev.* 205.

13. Roscoe W. Pound, *Interpretations of Legal History*, 1923, 135; Paul W. Tappan, *Juvenile Delinquency*, New York, McGraw-Hill, 1949.

In the draft *Youth Court Services Act* and the Law Reform Commission Report, the heritage of the child-savers is well preserved. The Commission states that 'time and again it has been emphasized that where a young person has become involved with the law he is in need of protection and advice'. They claim (without any empirical evidence) that a small number of youth service workers, with poor finances, are 'very effective in their efforts to secure guidance, justice and rehabilitation'. Nevertheless, it is admitted that only a small number of young people are reached by these services and that the 'vast majority' are caught in an adult-oriented criminal law administration.[14]

This is precisely what the critics of the child-saving philosophy have complained about. The rhetoric about protection of children hides the reality that there are few programs of rehabilitation that, on empirical testing, are achieving their goals.[15] Furthermore, the history of similar legal reforms elsewhere demonstrates that the promised land of finances and fully-staffed services is rarely reached. In fact, law reform premised on financial commitment to new resources sometimes increases judicial power to incarcerate young persons without delivering alternative resources. This was the experience in New York state, where a new legal power over 'young persons in need of supervision' (PINS) was built around non-coercive 'intermediate' treatment facilities. The money for intermediate facilities dried up, but the legislation went ahead. The court received 'temporary' power to place PINS children (who had not committed criminal offences) in training schools with convicted juvenile delinquents. The government then made the new judicial power permanent and the intermediate facilities were forgotten, although the 'reform' legislation remained.[16]

In Papua New Guinea, the Law Reform Commission makes a strong pitch for financial commitment to new personnel and facilities.[17] Yet the danger of the New York failure is close at hand. The draft Act proposes sentences of imprisonment for up to three years[18] in place of the existing limit of six months.[19] In the name of promised, but undelivered, rehabilitation programs, a young person could spend 2½ years more in prison under

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14. Law Reform Commission of Papua New Guinea, Report No. 9, *Young Persons in Conflict with the Law* (1979), 3-4, (hereafter Report No. 9).

15. James Robison and Gerald Smith, 'The Effectiveness of Correctional Programs', in Rose Giallombardo, ed. *Juvenile Delinquency: A Book of Readings*, 3rd ed., New York, Wiley and Sons, 1976, 585-597.

16. Note, 'Persons in Need of Supervision: Is There a Constitutional Right to Treatment?' (1973) 39 *Brooklyn Law Rev.* 624, 629-644; Silver, 'The New York Family Court: A Law Guardian's Overview' (1972) 18 *Crime and Delinquency* 93.

17. Report No. 9 *op. cit.*, 10-11.

18. *Draft Youth Court Services Bill*, 1979, s. 24 (1) (viii).

19. Report No. 9, *op. cit.*, 1.

the 'reform' law than under the 'outdated' *Child Welfare Act* 1961. The Commission should have insisted that any sections in the legislation which grant a greater power to incarcerate young persons should not be proclaimed in force unless its recommendations on finance and manpower are implemented first.

Coercive power without improved services is one danger of the child-saving philosophy. Even more apprehensions should arise from the section of the draft Act that states the conflicting philosophies of the law-makers in a nutshell:

> s.2 (1) Any person who exercises in respect of any young person any power responsibility or authority shall regard the interests of the young person as the first and paramount consideration.
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> (2) To the extent that it is consistent with Subsection (1) that person shall do all things necessary to -
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> (a) secure for the young person such care, guidance, treatment, correction, rehabilitation or punishment as is necessary for the welfare of the public interest; and
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> (b) conserve or promote as far as it may be possible a satisfactory relationship between the young person and others (whether within his family, his domestic, educational or work environment, or the community at large.)

The goal for all those who work with young offenders will be the best interest of the child. This is another tenet of the child-saving philosophy that has found its way into the draft Act, although there was no such statement in the Canadian precedent. The section is copied from New Zealand legislation which in turn was borrowed from South Australian legislation[20] that deals with Ministerial responsibility for neglected and uncontrolled children; it has leaped national borders and the usual conceptual boundaries between child neglect and juvenile delinquency.

The 'interests of the young person' are not defined, nor does the young person have any say in such a definition. Nevertheless, persons in authority (judges, social workers, corrections officers) are directed to secure '... treatment, correction, rehabilitation or punishment as is necessary for the public interest' and to 'promote ... a satisfactory relationship between the young person and others'. These directions are quite often in blatant contradiction. How can young persons sentenced to six months' imprisonment really believe that it is in their best interests? Likewise, how can a social worker promote strong family ties for a young person committed to treatment in one of Papua New Guinea's long-term residential programs?[21] These contradictions do not disturb the proponents of

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20. *Children and Young Persons Act* 1974, s.4 (N.Z.); *Community Welfare Act* 1972, s.42 (S.A.)

21. For example, Boys' Town in Wewak prefers to have offenders committed for long periods (1½ to 2 years), although they may be distant from their homes: *Report on Children in Court, op. cit.*, 19.

a child-saving philosophy because the draft Act will allow them to punish in the 'public interest' and still claim that it is consistent with the interests of the young person. A lawyer defending the young person could argue that imprisonment 'in the public interest' is not 'consistent' with the accused's interests, as required by subsection (2), but lawyers are rarely present in Children's Court. The absence of trained lawyers in a system geared for adversary arguments will leave the interpretation of the draft Act's philosophy to judges and social workers who may be committed to an informal, therapeutic process.

This notion of 'socialized justice' in which the whole of the young person's problems and social background are considered proper subjects for official inquiry and action, not just the offence, has drawn the following criticism:

> It is important ... to recognize that when, in an authoritative setting, we attempt to do something *for* a child "because of what he is and needs", we are also doing something *to* him. The semantics of "socialized justice" are a trap for the unwary. Whatever one's motivations, however elevated one's objectives, if the measures taken result in the compulsory loss of the child's liberty, the involuntary separation of a child from his family, or even the supervision of a child's activities by a probation worker, the impact on the affected individuals is essentially a punitive one. Good intentions and a flexible vocabulary do not alter this reality .... We shall escape much confusion here if we are willing to give candid recognition to the fact that the business of the juvenile court inevitably consists, to a considerable degree, in dispensing punishment.[22]

For the young person, treatment or punishment under the guise of 'best interests' must surely produce a sense of injustice. While everyone tells offenders that 'treatment' is good for them, they feel that they are being deceived when they receive penal custody in some dressed-up form.

Furthermore, the whole standard of 'the interests of the young person' is questionable when it has no accompanying guidelines for application in the individual case. The judge or social worker therefore gets an open licence to decide what constitutes the best interests of the person in each case. As Mnookin has accurately pointed out, in the context of custody and child welfare disputes, the 'best interests' standard is 'indeterminate'.[23] We simply do not have the resources to amass sufficiently reliable data from the behavioural sciences, or from personal judgments, to permit a disposition that is 'best' by any objective criteria. Therefore, even if we accept the standard's paternalism, criticized above, we must still demonstrate that the test can somehow be applied fairly and reasonably accurately to each individual before the court. Instead, Mnookin argues, we should develop more precise standards for decision-making, shaping each standard to reflect the degree of power held by the state.

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22. Francis A. Allen, *The Borderland of Criminal Justice*, Chicago, University of Chicago Press, 1964, 18.

23. Robert H. Mnookin, 'Child Custody Adjudication: Judicial Functions in the Fact of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 258-277.

Furthermore, we should pay more attention to who makes the decision and consider alternative methods of informal adjudication.[24]

Section 2 of the draft Act can be pilloried for the directions concerning 'interests of the young person', and treatment in the 'public interest'. However, the mandate to 'conserve or promote' family, school, and community relationships for the young person is one that would be praised by many Western commentators. Although it could be viewed as motherhood statement, it fits with a 'community approach' to delinquency that is widely advocated now.[25] In this approach, better community understanding of delinquency is encouraged and community participation in prevention and sentencing is solicited. The other tendencies of the draft Act towards a community approach will be discussed later. If section 2 is re-drafted, the family support and community support objectives are worth preserving, if they are linked to the cultural meanings of 'family' and 'community' in Papua New Guinea.

III *The Critics of Child-Saving*

The philosophy of saving children for their own good has come under severe attack in the past two decades. One line of criticism comes from the 'legal moralists' who believe that society has a moral right to punish offenders who consciously break the law. Their philosophy is rooted in retributive justice. Another group of critics, sometimes called the 'constitutionalists', argue that the children's court ignores individual rights of the young person and denies a fair trial to the accused. This approach grew out of the guarantees of the United States Constitution, but in other nations it could be termed the 'individual rights' viewpoint. More recently, the whole network of juvenile delinquency services has been under fire from a third group who espouse a 'nonintervention' philosophy of dealing with young offenders. They believe that if we do not 'label' and officially process as many young offenders as in the past, we can focus on the remaining offenders and a variety of policies that will lessen, but never eliminate, juvenile delinquency. The draft *Youth Court Services Act* draws on the philosophies of the moralists and the individual rights enthusiasts, but does not contain much influence from the nonintervention critics.

The fact that philosophies critical of child-saving are reflected at all in the draft Act is not an indication of any radical new policy. It is submitted that the dash of moralism and sprinkle of individual rights reveal only the acceptance of compromises that went into the original Canadian precedent. In order to placate various constituencies, from lawyers to prison guards, and to handle the demands of ten provinces in a

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24. *Ibid.*, 277-293.

25. E.g. Edwin M. Schur, *Radical Nonintervention*, Englewood Cliffs, N.J., Prentice-Hall, 1973, 102-105; Phyllida Parsloe, *Juvenile Justice in Britain and the United States*, London, Routledge, Keagan and Paul, 16-21; Stewart Macpherson and Maev O'Collins, 'Probation in Papua New Guinea: A Fundamental Re-Orientation of Attitudes and Institutions' (1978) 6 Mel. L.J. 100.

federal political system, the Canadian effort had to be a compromise.[26] It is not clear why the Papua New Guinea draftsmen felt bound to accept the same compromises.

A. The Moralist Criticism

One alternative would have been the full acceptance of the legal moralist viewpoint. Moralists hold that society has a moral duty to express its revulsion for crimes. Punishment is used simply to underline the community disapproval of the criminal and his act; punishment is not expected to protect society or reform offenders.[27] The children's court, in their view, does not use the criminal law as an instrument of moral education because it does not make juvenile delinquency an unattractive behaviour for young persons. The moralists do not necessarily call for harsh punishment, but they cannot abide the failure of the children's court to dispense straightforward, punitive justice in some measure. This line of thinking has been distorted to some extent by 'law and order' politicians who seek retributive justice through harsh sentences that are out of proportion to the crime. At the same time, some dedicated social workers have also turned to legal moralism for a distinct 'class' of youth - the 'hard core' offender.[28] The qualifications for the 'hard core' offender are rarely spelled out by those who claim ability to classify such an offender. However it appears that a repeat offender or an offender who fails to respond to 'treatment' in 'rehabilitative' institutions will be assigned to the 'hard core' class.

In line with the moralist trend of thinking, the draft *Youth Court Services Act* departs from the child-saving ethic in some respects. In sentencing a young offender to some form of institutional custody, the court may use 'open custody', 'secure custody', or imprisonment.[29] The Law Reform Commission evidently believes that open or secure custody are options where 'rehabilitation and training' facilities will be available. The facilities are not described nor is there any proof that they will effect rehabilitation. Nevertheless, the Commission had enough confidence in these two forms of committal that they attached only three main restrictions to its use. The court must give written reasons for its decisions; it must consider a list of factors concerning the youth and the offence; the

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26. The 1975 Canadian Report, *op. cit.*, was a committee report. The next step, the 1977 'Highlights' document, represented feedback from professional constituencies, politicians, and the public in addition to the official views of ten provinces. By early 1980, the representations of the provinces were a regular part of the federal re-drafting process that seemed destined to go on *ad infinitum*. As more concessions are made to the policies and practices of each province, the prospect of a unified core philosophy for the Canadian legislation seems remote. As a result, the basic child-saving philosophy of Canadian juvenile courts is unlikely to be substantially changed by new governing legislation.

27. Platt, *op. cit.*, 155-158.

28. Mount Report, *op. cit.*, 14; W. Liebert, 'The Case for a New Juvenile Code' in *Lo Bilong Ol Manmeri*, *op. cit.*, 138.

29. Draft *Youth Court Services Act*, s. 24 (1) (vi) (vii) (viii).

sentence cannot exceed three unbroken years.[30] The factors, which must also be considered if imprisonment is ordered, indicate a return to child-saving justifications even when penal custody is being ordered. The factors are:[31]

> (a) the degree of seriousness of the offence and the circumstances in which it was committed;
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> (b) the age, maturity, education, health, character, and attitude of the young person, including his willingness to make amends if possible;
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> (c) the social and community environment from which the young person has come and to which he may return;
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> (d) the previous history of the young person in respect of offences and delinquencies, and the response of the young person since being so involved;
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> (e) the community facilities and services that are available for the help of the young person and the willingness of the young person to avail himself of such facilities and services;
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> (f) any plans that are put forward by the young person, his parents, family or community, or changes in his conduct or participation in activities or measures that are available for his improvement; and
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> (g) the views of the youth services worker, a probation officer or any person involved in the education, training or custody of the young person;
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> (h) any views expressed or representations made by or on behalf of the young person in respect of the factors mentioned in paragraphs (a) to (f) or any other aspect of the case;
>
> (i) any other relevant factor.

The crucial limitation of keeping the custody period within the term an adult would receive for the same offence is not imposed.

The use of the latter restriction on the imprisonment disposition indicates that the Commissioners believe that extended open or secure custody can be 'good' for a young offender. Imprisonment, on the other hand, implying placement in the juvenile compounds of adult prison facilities, is meant to be punishment. In that context it seemed fair to limit

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30. *Ibid.*, s.24(3)(8)(9).

31. *Ibid.*, s.25.

the prison term to the maximum that an adult could receive. Note that the factors quoted above can be used easily to support imprisonment for the so-called 'hard core' offender. If an accused has not responded to past 'treatment' and 'rehabilitation', his or her attitude and 'willingness to make amends' will be regarded as negative. Furthermore, any unwillingness to accept eagerly 'community facilities and services' will go against the young person. For this type of young person, punishment will suddenly take over from rehabilitation.

A true moralist would abhor this mixture of philosophies. To claim that three years in 'secure custody' is 'rehabilitation' while ten months imprisonment for the same offence is 'punishment' must pose some problems for the most ardent supporter of the draft Act. In a complete framework of moralist thinking, the legislation would be very much like a criminal code for young persons. Specific punishment would be assigned to fit each offence and there would be no pretence that a wide range of dispositions is 'adapted to rehabilitation and supervision rather than punishment'.[32]

To construct the new philosophy of juvenile justice, Sanford Fox argues that:[33]

> ... the place to start is with criminal jurisprudence. An analysis of the principles of punishment is likely to yield those general concepts necessary to resolve some of the tensions between traditionalists and their critics and control the aimlessness and drift of the present state of juvenile justice. It is a matter of course that I would expect the result to yield a more satisfactory justice.

The logical extension of this analysis has been a call for the abolition of the juvenile court.[34]

Although the existing draft Act does little to incorporate straightforward punishment as an essential element of juvenile justice philosophy, it is my view that Papua New Guinea should not yet abandon the children's court. In future, the moralist notion of punishment should not be reserved for the 'hard core' offenders, who I believe are the independent youths who openly refuse to buy the euphemisms of 'treatment' and 'rehabilitation'. Punishment should be a stated aim of all dispositions available to the children's court. Nevertheless, it is within the structure of a children's court that the assessment of punishment can also be controlled, tailored to the offence, and reviewed.

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32. *Ibid.*, s.24, Note.

33. Sanford J. Fox, "Philosophy and the Principles of Punishment in the Juvenile Court" (1974) 8 *Family Law Quarterly* 373, 380.

34. Sanford J. Fox, "Abolishing the Juvenile Court" (1977) 28 *Harvard Law School Bulletin* 22.

B. The Individual Rights Criticism

The child-saving commitment to treatment of the offender has also been attacked by the proponents of individual rights. This approach emphasizes the right of the young offender to a fair trial and it criticizes the invasion of rights under the guise of pseudo-medical efforts at rehabilitation. The effectiveness of various treatment dispositions is questioned and social science studies often support these critics.[35] For example, one empirical study asked:

> Will the clients act differently if we lock them up, or keep them locked up longer, or do something with them inside (counselling treatment) or watch them more closely afterward, or cut them loose officially?

The conclusion: 'Probably not'. In other words, institutional treatment, parole supervision, and complete release all have about the same effect on recidivism by offenders. The individual rights advocates dismiss the child-savers' praise of therapeutic correctional programs:[36]

> The real choice in correction, then, is not between treatment on one hand and punishment on the other but between one treatment-punishment alternative and another.

While pointing out the reality of dispositions and their effectiveness, the critics do not seek a return to regimes of harsh punishment and institutions. It has been pointed out that a humanitarian policy in juvenile correctional institutions does not produce a lower rate of successful rehabilitation in young boys; but neither does a humanitarian policy *increase the risk* of potential failure.[37] The individual rights proponents therefore do not embrace fully the moralist position. They believe that humanitarian justice and social work policies can be pursued, but that we must protect the legal rights of the accused and be realistic and cautious about the success of 'treatment-punishment' dispositions.

In the draft *Youth Court Services Act* , the individual rights position has been influential in the elaboration of legal protections at arrest and trial. This philosophy has not prevailed in the creation of youth court services (pre-trial investigations and probation) and the expansion of rehabilitative dispositions. On the other hand, the new judicial power to review and vary dispositions may be used to further individual rights.

The draft Act requires a 'child' (person under 10 years of age) to be released to a responsible adult or a youth services worker within 12 hours of his arrest.[38] Failing that, the arresting officer must go

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35. James Robison and Gerald Smith, *op. cit.*, 596; in the second edition (1972) of the same book, see also Sol Rubin, "Illusions of Treatment in Sentences and Civil Commitments", 593-604.

36. *Ibid.*, 590.

37. Paul Lerman, ed. *Delinquency and Social Policy*, New York, Praeger, 1970, 326.

38. Draft *Youth Court Services Act*, s.4.

before a magistrate and give adequate reasons for holding the young person in detention. The accused may then be placed in the care of the Director of Child Welfare or released.

Having protected the 'child', who cannot be subjected to criminal proceedings, the draft Act is silent on the arrest rights of the 'young person' (aged 10 to 18). The legislation does make it clear that bail can be obtained and that release into the community pending trial should be a favoured option.[39] This check on the present abuses of lengthy pre-trial detention is welcome, but the rights of the young person at an earlier stage should also be safeguarded. Perhaps the most common evidence for a conviction in the children's court is the young person's own statement to the police. Adults are more experienced and may claim the right to remain silent. Young persons should not only have the right to refuse a statement; they should be entitled to a warning about this right and no statement should be accepted in evidence unless a parent or other independent adult is present when a statement is made. This protection in admissibility of statements is built in to the recent drafts of the Canadian *Proposed Young Offenders Act*.[40] It should be regarded as an integral part of the individual rights package in the draft *Youth Court Services Act*.

The draft Act contains several important rights for the time of trial. The magistrate must follow strict rules before accepting a plea of guilty from the young person. The age and understanding of the young person should not be a liability in court provided that magistrates are fully trained in the application of this section. In difficult trials, the court may appoint a lawyer to assist as a 'friend of the court'.[41] This section does not deny the young person the right to a separate lawyer, but the draft Act does nothing to see that legal representation is guaranteed to the accused alone. The 'friend of court' method of legal representation recognizes that there are few lawyers in Papua New Guinea and virtually none in the children's court. This reality will be discussed later. The value of this court-appointed lawyer in an adversary setting is questionable.[42] It emphasizes the child-saving notion of the court as 'one happy family' that will help the child - even when his individual legal rights are at stake.

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39. *Ibid.*, s.15.

40. *Proposed Young Offenders Act*, Ministry of the Solicitor-General, Ottawa, Canada, 1977, s.12.

41. Draft *Youth Court Services Act*, s.17.

42. For a critique of the various forms of legal representation of children see: Katherine Catton and Jeffrey Leon, 'Legal Representation and the Proposed *Young Persons in Conflict with The Law Act* ' (1977) 15 *Osgoode Hall L.J.* 107-135; *Platt, op. cit.*, 183-172, recounts the ways that even a defence lawyer for the child becomes captured by the child-saving philosophy of the workers around the lawyer. Platt concludes (at 178) that the introduction of lawyers in juvenile courts will do more to process offenders efficiently than it will to protect individual rights.

The protection against lengthy adjournments - limiting them to fourteen days - is a token gesture in view of the fact that a parent or youth service worker can agree with the prosecutor to a longer adjournment.[43] The young person has no absolute right to withhold consent and insist on a trial. It is entirely possible that adjournment without a fixed date will be used for detention or as a stick to guide future behaviour under the supervision of a worker. That this detention can only be in a remand or assessment centre[44] should give us no comfort in view of the fact that all such centres in Papua New Guinea are either non-existent or exist as part of adult jails and correctional facilities. The use of adjournment to 'treat' the young person violates the fundamental right to be presumed innocent until a fair trial demonstrates otherwise.

Once again, the draftspersons have borrowed just enough from the individual rights critics to control the most blatant abuses of the existing juvenile justice system. Yet there is no thorough commitment to individual rights and the lapse back to child-saving is soon revealed in the rules governing the conduct of a trial:[45]

> s.22 (a) subject to Section 17 the strict rules of procedure need not be complied with;
>
> (b) the proceedings shall be conducted in such a manner as to allow the young person, any responsible adult or any other person involved in the proceedings as well as the prosecution and the youth services worker, to freely state fact, feelings and opinions, and the weight to be given to such matters shall be determined by the court having regard to the normal rules of evidence.

The judge will determine what evidence is acceptable only after hearing all manner of opinion, allegation and investigatory reports. In an adult trial, this evidence is selected out by the rules of evidence before the judge hears much of it. The theory in children's courts is that a broad social investigation into the roots of the crime, the offender and his or her background should not be impeded by the narrow application of individual rights. It must be acknowledged that this theory fits well with the Melanesian oral tradition and the open methods of traditional dispute resolution. Unfortunately, this is not the expressed purpose of the Law Reform Commission. They believe that legal formality 'can frighten or prevent a young person from being able to express himself'.[46] The point of the individual rights approach, which insists on basic rules of evidence and 'formality', is that the young persons can also convict themselves in an informal setting. Furthermore, the draft Act's informality guarantee relies once more on the training of magistrates to select and weigh the evidence fairly - without the protections of adult court rules of evidence.

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43. Draft *Youth Court Services Act*, s.21.

44. *Ibid.*, s.15(6).

45. *Ibid.*, s.22(1).

46. *Ibid.*, s.22, Note.

Despite these shortcomings in the pre-trial and trial processes, the individual rights philosophy is well executed in the review of dispositions. The children's court may review its sentence and change it if it finds one of the following grounds:[47]

(a) that he is being detained in a category of custody that was not directed in the disposition;

(b) that he has been subjected to unreasonable restrictions in respect of probation or custody;

(c) that he has made progress that justifies a change in the disposition;

(d) that alternative arrangements can be made to secure correction, rehabilitation, training or education which are in the better interests of the young person;

(e) that the circumstances that led to him being committed to probation or care and custody have changed materially;

(f) that services are available which were not available at the time when the disposition was made or last reviewed; and

(g) such other grounds as the court considers to be substantial and relevant.

These reviews can be conducted every six months on request or annually on an automatic basis.[48] They could substantially affect the young offender who is being improperly held in custody or subjected to an unreasonable programme of rehabilitation. In effect, it is also a parole scheme because the offender may get 'time off' for progress in his programme. The judiciary controls the shortening or easing of a sentence, so there will be no complaints of a liberal parole board undoing the work of the courts. The Law Reform Commission admitted that many of its committee members wanted the new Director of Youth Court Services to review all dispositions. The Commission is to be applauded for expressly supporting the court power over review and variation. As they note in their reasons, the court will keep an oversight of young persons, retain control of the sentencing function, and be impartial in its review of the Director's programmes and institutions.[49] This judicial control is consistent with the maintenance of individual rights although it departs from the moralist argument for irreversible punishment. Review of a sentence can only work in one direction. Because the court can only decrease a term of custody or transfer to a less strict penal setting, there is no chance of the 'best interests' doctrine being used to increase the young person's sentence.

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47. *Ibid.*, s.28.

48. *Ibid.*, s.27(2)(3).

49. Report No.9 *op. cit.*, 5.

In summary, the individual rights philosophy has received some attention in the draft *Youth Court Services Act*. This approach depends upon legislative rights, legal services, and willingness to review correctional methods, forcing them to prove their efficacy. The rights set out in the draft Act are an important step in curing the worst abuses of detention but they do not rescue the Act from an overall child-saving philosophy. Since there are virtually no legal services for young persons beyond law student services,[50] Papua New Guinea may have to rely on conscientious, well-trained magistrates to give effect to the individual rights approach. The test of this trust in the magistrates may come when reviews of dispositions come to the courts under the new provisions of the draft Act.

C. The Nonintervention Criticism

The most recent critics of child-saving to emerge have been the noninterventionists. They have reacted against the notions of delinquency being caused by internal psychological factors in a youth, or being caused by an unsavoury environment. Instead of looking to causation factors and individualized justice to treat those causes, the noninterventionists have examined the official machinery that singles out the behaviour that will be labelled 'delinquency'. They assert that youthful misconduct occurs across all socioeconomic groups and that the so-called delinquent is no different from the non-delinquent - except that he has been caught and processed by the juvenile justice system.[51]

The shift from looking at the young persons and their background to examining the broad net of official processing has been supported by researchers of the 'labelling' school. In their view, the rulemakers create delinquency by labelling certain behaviour as deviant[52] and then use various agencies to react officially to that behaviour. This does not mean that by ignoring crimes like housebreaking or assault they will go away. The noninterventionists recognize that juvenile crime will always be with us. However, they point out that the law-makers go far beyond the boundaries of adult criminal law when it comes to labelling juvenile behaviour as 'law-breaking'. Many statutes, including those in Papua New Guinea, make it a crime for a young person to be 'incorrigible' or 'uncontrollable' - vaguely defined behaviour that is not criminal for an adult.[53]

Edwin Schur has described the policy implications of 'radical nonintervention':

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50. The Public Solicitor's office in Papua New Guinea admits that it can provide legal representation only in the most serious juvenile cases. A fledgling Rural Legal Education and Assistance Programme, run by the Faculty of Law at the University of Papua New Guinea, was providing legal assistance to young persons through supervised law students in 1979-80, but the programme is not run all year.

51. Schur, *op. cit.*, 153-4.

52. Edwin Schur, *Labelling Deviant Behaviour: Its Sociological Significance*, New York, Harper & Row, 1971.

53. *Child Welfare Act* 1961, s.46 (P.N.G.); *Child Welfare Act*, ss.80-81 (N.S.W., Australia).

> Basically, radical nonintervention implies policies that accommodate society to the widest possible diversity of behaviours and attitudes, rather than forcing as many individuals as possible to "adjust" to supposedly common societal standards ...
>
> ... The basic injunction for public policy becomes: *leave kids alone wherever possible.* This effort partly involves mechanisms to divert children away from the courts but it goes further to include opposing various kinds of intervention by diverse social control and socializing agencies ... Subsidiary policies would favour collective action programs instead of those that single out specific individuals; and voluntary programs instead of compulsory ones. Finally, this approach is radical in asserting that major and intentional sociocultural change will help reduce our delinquency problems. Piecemeal socioeconomic reform will not greatly affect delinquency; there must be thoroughgoing changes in the structure and the values of our society.[54]

Nonintervention will not eliminate the need for prevention of delinquency, court processing and sentencing. Because some amount of crime will continue to bring society's sanctions down upon it there will still be a need to acknowledge the criticisms of moralists and advocates of individual rights. However, the noninterventionist wants to narrow the definition of juvenile crime. This should be done at least by making juvenile crime definitions no broader than adult crime labels. Indeed, some nonintervention critics would challenge adult crime definitions and urge a smaller scope for them.[55] The nonintervention philosophy, if applied to the draft *Youth Court Services Act*, would necessitate a new meaning for crime in Papua New Guinea.

A new meaning of crime has been explored by the Law Reform Commission in its Report on the role of customary law in the legal system.[56] For example, they have suggested that some murders be treated as 'diminished responsibility killings'.[57] This more narrowly defined crime would take into account the accused's customary law, traditional perceptions and beliefs. Likewise, in sentencing decisions on all crimes, customary law is given greater recognition.[58] However, the Commission's draft *Youth Court Services Act* could benefit from a similar scrutiny of what constitutes juvenile crime and appropriate punishment. At first reading, the Act seems to follow the Canadian precedent by confining the Children's

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54. Schur, (1973), *op. cit.*, 154-5.

55. E.g. F. Allen, *op. cit.*, Herbert L. Packer, *The Limits of the Criminal Sanction*, Stanford, Stanford University Press, 1968.

56. Report No.7, *op. cit.*

57. *Ibid.*, 78-9.

58. *Ibid.*, 62-5.

Court jurisdiction to offences that would also be crimes in adult court.[59] The inevitable loophole appears later when the *Child Welfare Act* 1961 (the existing law on child welfare and young offenders) is examined.

The draft *Youth Court Services Act* is tied to the *Child Welfare Act* 1961 by two key sections. The new draft statute grants jurisdiction to 'hear and determine all complaints and applications under the *Child Welfare Act* 1961 ...'[60] A second section, dealing with sentencing after the judge has declared the young person guilty, empowers the court to: in the case of a young person of under the age of 16 years, declare the young person to be a destitute, neglected, incorrigible or uncontrollable child under the provision of Part VII of the *Child Welfare Act* 1961 and the provisions of that Part shall apply as if an application had been made under Section 43 of the Act.[61]

This means that the Children's Court's powers over juvenile crime and child neglect (child welfare) will remain intertwined. What began as a case of parental neglect can be handled as a crime by the child. What started as a criminal act can be disposed of as a matter of child welfare. This approach is perfectly consistent with a child-saving philosophy. The behaviour that brought the young person to the attention of the authorities represents a need for intervention and treatment. We don't need to be precise about whether it was criminal behaviour, equally punishable at law for adults. This view is opposed by proponents of individual rights, as noted earlier. But it is even more objectionable to the noninterventionist.

The Child Welfare Act 1961 empowers the Children's Court to declare a young person 'destitute', neglected', 'incorrigible', or 'uncontrollable' and thereafter impose criminal penalties such as probation or commital to an institution.[62] The nonintervention critics object to these labels when they are applied along with criminal penalties or benevolent dispositions (e.g. placement in the care of the Director of Child Welfare) that are in fact used as punishment. Why should we penalize young persons for non-criminal misbehaviour that causes distress to their parents? Parents and social workers may well agree that a young person is 'incorrigible' or 'uncontrollable', but that does not amount to a crime. By maintaining a special category of 'status offences' for juveniles, the state is inviting itself to act as a disciplinarian in the place of parents. It is argued that excessive intervention in the family and attacks on youth 'problems' should be replaced by a greater tolerance for non-criminal juvenile misbehaviour.[63] A certain amount of this misconduct is inevitable in any

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59. Draft *Youth Court Services Act*, s.6(1) states that 'Subject to this Act and the *Village Courts Act* 1973, the court: (a) shall in respect of young persons hear and determine summarily all offences which would otherwise be triable summarily in a District Court or a Local Court'.

60. *Child Welfare Act* 1961, s. 6(1) (c).

61. Draft *Youth Court Services Act*, s.24(1)(ix).

62. *Child Welfare Act* 1961, s.46.

63. Schur, (1973), *op. cit.*, 167.

society. The noninterventionist belief holds that we should overlook 'incorrigible' or uncontrollable' behaviour and refuse to process officially young persons who cannot be charged with crimes.

The Law Reform Commission has supported those who believe that early intervention in non-criminal misconduct will nip juvenile crime in the bud. No empirical evidence in Western countries backs up this assertion. The Commission and the government should examine the views of the noninterventionist critics and reconsider whether the 'incorrigible' and 'uncontrollable' misbehaviour proscribed by the draft Act and the *Child Welfare Act* 1961 should be retained.

Noninterventionist thinking may have already influenced two other policy decisions behind the draft *Youth Court Services Act*. First, there are strict controls placed on who may be charged with breach of probation or failure to comply with a sentence.[64] Instead of the breach going directly to court or imprisonment resulting from non-payment of a fine, each case must be reviewed by the new Director of Youth Court Services. He alone can bring a prosecution for breach of these obligations. This screening device will eliminate some of the injustices related in the Mount Report.[65] The Commission has taken the position that selected breaches of a sentence do not justify automatic intervention through prosecution.

A second policy decision, which does not appear in the draft Act, was to delete any reference to a formal mechanism for diverting offenders from the Children's Court. Diversion is ordinarily a concept that would be endorsed by noninterventionists. It means that many alleged offenders are screened out by a body such as a 'screening panel' or 'Children's Board'. They are not brought before the courts and labelled as offenders. The original Canadian proposals called for a formal screening body, but the Law Reform Commission declined to follow them. Despite influential precedents for these non-judicial diversion bodies in South Australia[66] and New Zealand,[67] the Commission may have taken the wiser route.

The elaborate new diversion methods are doing what the police officer on patrol and the prosecutor used to do: give the accused a warning and send him home. If more formal, official panels get involved, we may see more young persons processed by the system for misbehaviour.[68] If that

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64. Draft *Youth Court Services Act*, s.31.

65. *Op. cit.*

66. *Children's Protection and Young Offenders Act* 1979, ss.25-41.

67. *Children and Young Persons Act* 1974, ss.13-19.

68. A recent U.S. study evaluated diversion programmes and predicted that diversion may increase the number of youths regulated by the state, under the 'informal' guise of welfare agencies: Andrew Rutherford and Robert McDermott, Juvenile Diversion, Washington, Government Printing Office, 1976, 42.

happens, diversion legislation and policy becomes too interventionist. There is not sufficient evidence on the South Australian and New Zealand practices to determine whether more young persons are being unnecessarily dealt with by the justice system. Until evidence demonstrates that formal diversion schemes really do produce less intervention, Papua New Guinea should be content to rely on informal screening methods that mean nonintervention in practice.

A final thought from the nonintervention philosophers should be considered: 'the construction of a just system of criminal justice in an unjust society is a contradiction in terms'.[69] If a society has great disparities in socioeconomic status or it discriminates against minority cultural or racial groups in the application of criminal law, no amount of 'tinkering' with the justice system will make it fair to the accused. Noninterventionists therefore argue that juvenile delinquency is a political phenomenon, defined by those in power, and sometimes enforced by the majority in an oppressive manner. For law reformers, this means that more than a redrafted *Youth Court Services Act* is necessary. Equality of opportunity and participation in political power from all sectors of the society are the goals of those who recognize the political nature of juvenile delinquency.

IV. *Conclusion: Self-Reliance over Borrowed Mistakes*

The three major criticisms of existing juvenile delinquency policy could be influential in shaping new legislation for Papua New Guinea. The Law Reform Commission's draft *Youth Court Services Act* uses ideas advanced by moralists, advocates of individual rights, and noninterventionists. Nevertheless, the guiding philosophy of the draft Act pursues a child-saving model - one that has been a proven disaster in many Western Countries. In re-writing the proposed statute, the government should be prepared to draw on the best of all three lines of criticism. From the moralists, it may be time to learn that punishment should not be disguised as 'treatment'. The accused young persons will understand that offences carry reasonable, specified punishments more readily than they will understand an indefinite, paternalistic programme of rehabilitation. When imposing punishment, the state has a duty to respect individual rights, from the time of arrest to the moment of sentencing. While these rights will require new diligence from police officers, courts and child welfare workers, they will gain the respect of young persons who have been victims of legal 'informality' in the past. From the noninterventionists, we may appreciate the need to re-define crime and to process fewer offenders. The young person who is misbehaving in a minor fashion, like most others in his or her age group, will no longer be caught in a broad net of official delinquency.

Papua New Guinea, in following the criticisms, would at least produce a reformed Western model for delinquency legislation instead of borrowing the problems of a revised child-saving approach. But the concept of self-reliance, prominent in the Constitution and other national objectives, should be the dominant theme of new juvenile delinquency policy. Self-reliance in this context should mean the use of traditional institutions and cultural supports for handling delinquent youth. It is submitted that self-reliant methods can be consistent with the recommendations of the critics.

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69. American Friends Service Committee. *Struggle for Justice: A Report on Crime and Punishment in America*, New York, Hill and Wang, 1971, 16.

The wisdom of this combined approach is confirmed by the realities of the current juvenile justice system in Papua New Guinea. There are few preventive services, volunteer or professional, to work with so-called 'pre-delinquent' youth. Existing institutions for rehabilitation are not regionally well-distributed and work with a young person's family or community becomes an illusion. There is no full-time probation service for juveniles anywhere in the country. There are no specialist magistrates, trained in children's law and associated disciplines, in the Children's Court. There are virtually no lawyers available to the accused in the Children's Court. In contrast, the Director of Child Welfare has powers over children and young persons that cannot be checked by lawyers or the courts.[70] Police and child welfare workers, as demonstrated in the Mount Report,[71] have little training in the protection of individual rights of the accused.

These realities imply a number of new methods, consistent with self-reliance, if juvenile delinquency is to be faced squarely by the government. First, the idea of a 'professional' orientation to delinquency problems should be abandoned. There is not now, nor will there ever be, enough government spending to develop a professional bureaucracy to handle all aspects of delinquency. In the United States, building on an extensive professional bureacracy, all government spending on criminal justice rose from $10.5 billion to $15.0 billion between 1971 and 1974.[72] Recent empirical studies show that this investment 'has neither reduced the amount of crime nor improved the quality of justice.'[73] A core of professional expertise will be needed to develop local, community-based programmes for delinquent youth; but it would be a mistake to think that professional services can supplant the resources of local villages and their institutions for social control.

Secondly, it will be essential to give community legal education a high priority if local communities are more responsible for juvenile justice. Community legal education, spread by radio, newspaper, the schools and village meetings will be the basis for tempering some traditional punishments, appreciating the protection of individual rights, and encouraging local methods of diversion.

In addition, the training of police, Local Court magistrates, and Village Court magistrates and constables will have to be reviewed. In order to emphasize individual rights and nonintervention, implemented at the local level, these respected officials will require specialist training and clearly written regulations to follow. Furthermore, there must be a

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70. E.g. *Child Welfare Act* 1961, ss.75, 79 permits the Director to place a ward (child committed to the Director) in apprenticeship and control all his earning or land; under ss. 50-52 the Director has complete power over placement of the ward in institutions and locked jail facilities, whether the child was delinquent or neglected.

71. *Op. cit.*

72. Anthony M. Platt, *The Child Savers: The Invention of Delinquency*, 2nd ed., Chicago, The University of Chicago Press, 1977, 187.

73. *Ibid.*

swift and efficient method of correcting any mistakes by these officials. The existing system of court appeals against abuse of process only works when lawyers are available to initiate it. In juvenile matters, for the short term, a rapid process of review and a power of release from unlawful detention is necessary.

In order to re-draft the *Youth Court Services Act* and move toward self-reliance, the Law Reform Commission and the Government will have to be decisive and innovative. They must use the strengths of Papua New Guinea's existing institutions and customs. Father Liebert, the Director of Boys' Town in Wewak, has suggested a number of reforms that are consistent with the themes of this paper: individual rights at the time of arrest; diversion of less serious cases at the village level; punishment carried out at the community level, with minimum use of detention; and culturally appropriate definitions of crime.[74] If the government committed itself to certain principles of law reform and sought specific proposals similar to the above, the makings of a self-reliant juvenile justice system would be in place.

In this spirit, the following recommendations are offered:

(1) *Reform of the Children's Court:* The work of the Children's Court should be limited to a handful of serious offences. No new Children's Courts should be created and the existing Courts should be bound by more formal rules of due process. At the same time, the jurisdiction of Village Courts over juvenile delinquency should be expanded, although they should not be permitted to order incarceration. Village Court Secretariat officials should develop informal diversion programmes for implementation at the village level. A straightforward code of individual rights should be drafted and made available to all police, court officials, child welfare workers, and village constables. If accompanied by community legal education and special training for magistrates, police and court workers, this method of enforcing individual rights has better prospects than an adversary system which, at present, has few lawyers.

These changes would be consistent with individual rights and non-intervention. They encourage a more limited role and limited expectations for the Children's Court, almost to the point of making it an adult court. However, the need for specially trained magistrates and an understanding of sentencing in juvenile cases will still require a separate court for children and young persons.

(2) *Protection of Individual Rights:* The few individual rights that are guaranteed by existing law are not well enforced. The Mount Report cited numerous violations of the constitutional right for juveniles to be detained separately from adults.[75] If an expansion of individual rights is to be a cornerstone of new legislation, enforceability is a key issue. For the short term, perhaps less than five years, the government should demonstrate a strong willingness to enforce individual rights in the juvenile justice process by taking unusual measures. For example, the Ombudsman could be empowered to investigate cases of unlawful detention in juvenile institutions, local jails, and prisons. When improper detention is discovered, there should be immediate power in the Ombudsman or a Cabinet Minister to order release of the individual. Such powers are exceptional

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74. Fr. William Liebert, 'The Case for a New Juvenile Code' in *Lo Bilong Ol Manmeri, op. cit.*, 140-141.

75. *Op. cit.*

in a system that relies on a system of police, courts, and prison officials. Nevertheless, without a fully functioning adversary system, Papua New Guinea must devise new means of righting injustices quickly. Another power, already proposed in the draft *Youth Court Services Act*, is the automatic annual review of Children's Court sentences.[76] This measure recognizes that the accused, usually represented by a lawyer, will not always initiate a review, even in a meritorious case. Imaginative steps may safeguard individual rights in the short term, but intensive education for police, court officials, magistrates, child care workers and the general public will be the best long range protection for individual rights.

(3) *Community Participation:* One of the associated dangers of excess professionalism in handling delinquency is that local communities lose a sense of responsibility and concern for their young people. Increased authority to the Village Courts would return some of this responsibility to the local level. The composition of the Children's Courts also deserves attention. At the present time, a lay member sits with the magistrate as an informal advisor on the question of sentencing.[77] The draft *Youth Court Services Act* would continue that practice. Unfortunately, this form of community participation has not been spread around and it is common to have a 'lay member' who is actually part of a youth services organization sitting with the magistrate.

The rules surrounding lay participation should be tightened. In sentencing decisions, participation should be mandatory. Lay members should be drawn from a list of community representatives who are willing to serve. This list will not come into existence without a recruitment effort. In order to encourage working people to serve, out-of-pocket expenses and travelling expenses should be paid to a lay member by the Department of Justice. If the lay member has an equal say in the sentencing decisions, backed up by statute, there will be the legal reality of participation as well as the appearance of community input.[78]

The Law Reform Commission has already suggested that community work orders be an available sentence in criminal matters.[79] This concept would be implemented in the draft *Youth Court Services Act*, permitting 'community service' orders up to a service value of two hundred kina.[80] This idea is

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76. Draft *Youth Court Services Act*, s.27(3).

77. *Ibid.*, s.9(4).

78. Many of the detailed rules for lay participation in a judicial hearing were developed in a pilot project in British Columbia, Canada. They included a confidential equal vote for the two lay members of a three-person panel. The judge had sole control over questions of law. See: 'The Family, The Courts, and The Community', Fourth Report of the Royal Commission on Family and Children's Law, Victoria, B.C., Queen's Printer, 1975.

79. Report No. 7, *op. cit.*, 63.

80. Draft *Youth Court Services Act*, s.24(1)(b)(i).

a sound one because the community can see the price paid by the offender. However, the community service concept could be improved by making it part of a community probation service. At the present time, the draft Act contemplates a traditional professional probation service, using government officers. Perhaps a more local, volunteer probation service should be considered. Following the model of village constables, who are now attached to the Village Courts, community probation officers could be appointed. They could be given jurisdiction over community service and supervision orders. As noted earlier, the decision to charge a young person with a breach of probation would still remain with the Director of Youth Court Services.[81] This type of local probation service, drawing on community volunteers, backed by some government funding but a minimum of central control, would have an enormous chance of success in rural Papua New Guinea.

Community participation and control are key elements of a delinquency policy guided by nonintervention philosophy. By getting away from the official processing of professional bureaucracies and moving toward community responsibilities, standards, and institutions, the government will also recognize the realities of the scanty professional resources that exist now.

(4) *Limiting the Criminal Law:* In their work on criminal law, the Law Reform Commission dealt with the principles of criminal responsibility and the determination of penalties.[82] By permitting defences based on customary law and encouraging sentences based on community responsibility, the Commission hoped to bridge the gap between the European criminal law and the perceptions and beliefs of the people of Papua New Guinea. The larger job of re-defining all criminal offences has not been undertaken. When that task is begun, juvenile delinquency policy should be firmly settled, not an afterthought of the draftspersons.

In an emerging nation there are voices calling for new laws to govern all manner of things. In the field of juvenile law, it should be recognized that law is limited in its ability to control juvenile crime. The law needs to be re-written to reflect Papua New Guinea values and customs. It also needs re-drafting to eliminate excessive and unfair intervention of law into the lives of young persons. However, with the benefit of the knowledge we have about Western juvenile law, its successes and failures, one cannot be optimistic about the expansion of juvenile delinquency 'control' programmes.

Professor Hazard has summed up the limited effectiveness of law neatly:

> Perhaps we should begin by recognizing that most of the deviance that the law seeks to control is simply inaccessible from any external position. To the extent it is caused by psychological factors in the individual, we now know those factors are hard to identify and harder to modify through legal and governmental processes. To the extent

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81. See footnote 64, above.

82. Report No. 7, *op. cit.*, 37-80.

> it is caused by the actor's immediate social environment (family, peers, neighborhood), we now know such environments are largely impervious to the intervention of planners. To the extent it is caused by breakdown of self-control, we now recognize that inculcating self-control through legal compulsion is essentially a contradiction in terms. To the extent it is caused by chance opportunity, we now know that the state cannot establish controls on the exigencies of everyday life. Put differently, it is possible for society to create government of sorts, but it has proved impossible for government to create society.[83]

If law, as an instrument of government, cannot create a social order for young persons, what can it do? Law can punish and thereby educate by example. Law can be precise enough to define crime as misbehaviour that is uniformly condemned and culturally understood. Law can limit juvenile crimes to those acts that are also crimes for adults. Finally, law can enumerate individual rights, but the practice of those rights is dependent on an informed community and conscientious legal administrators.

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83. Geoffrey C. Hazard, Jr., 'The Jurisprudence of Juvenile Deviance', in Margaret Rosenheim, ed. *Pursuing Justice for the Child*, Chicago, University of Chicago Press, 1976, 18.