THE ADOPTION OF AN UNDERLYING LAW BY THE CONSTITUTION OF PAPUA NEW GUINEA[1]

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I *INTRODUCTION*

Section 9 of the Constitution of the Independent State of Papua New Guinea states that -

"The laws of Papua New Guinea consist of -

(a) this Constitution; and
(b) the Organic Laws;[2] and
(c) the Acts of the Parliament; and
(d) Emergency Regulations; and
(e) laws made under or adopted by this Constitution or any of those laws, including subordinate legislative enactments made under this Constitution or any of those laws; and
(f) the underlying law,

and none other."

The purpose of this paper is to explain what, as far as the Constitution is concerned, the "underlying law" consists of; and in so doing to consider the problems found in the preparation of the Constitution in deciding whether, and if so how, an underlying law might be adopted, and what shape it might take for the future.

II *PRELIMINARY POINTS*

Five important preliminary points might be made with advantage.

First, the expression "the underlying law" is a fairly novel one, and indeed terms such as "common law", "unwritten law", and so on were considered in the drafting of the Constitution and for various reasons (mainly practical ones) rejected.

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1 I have deliberately retained the word "Adoption" as against the word that is more commonly used in academic writing, "Reception", because the term exphasizes the *active* element in the operation.

2 The nature of Organic Laws is set out in *Constitution*, S.12. Briefly, they are laws of a constitutional nature, made under (and so subordinate to) the Constitution but superior to other statutes (Acts of the Parliament). The Constitution and the Organic Laws are together known as "the Constitutional Laws" (*Constitution*, Sch. 1.2. (1)).

Broadly speaking, it means the same in essence as "the common law" (including the rules of equity) as the latter expression is used in Anglo-American legal systems and in systems derived from them. It means the "unwritten" law, the rules of which have not only to be applied, but also enunciated and developed, by the courts.

As will be seen, however, the underlying law differs significantly from the English Common Law and most, if not all, other common laws in the way in which rules of local customary law are grafted onto it by the Constitution.

Secondly, from the beginning the Papua New Guinea Constitutional Planning Committee[3] asserted, and both the Government and the Parliament agreed, that the Constitution should be "home-grown" or autochthonous. There is not the space here to go in detail into the question of autochthony.[4] It is sufficient to say that autochthony involves the creation of a constitution that does not derive its validity or its standing in law from any outside law: the pre-Independence constitution of Papua New Guinea (the Papua New Guinea Act 1949-75) was non-autochthonous, because it was an Act of the Australian Parliament. Similarly, the authority of the Australian Constitution (the Commonwealth of Australia Act 1901) was derived from an Act of the Imperial Parliament. We could not rely on the acceptance of the English Common Law (or any other system) as what, speaking of the Australian Constitution, the late Sir Owen Dixon described as an "antecedent system of jurisprudence".[5] The principle of autochthony underlies the entire Constitution, and an appreciation of it is essential to an understanding of the Constitution.

Thirdly, Section 20 of the Constitution which adopted an underlying law was a compromise between various schools of thought, and provides in fact for two alternative approaches, a "permanent" one and an "interim" one. The relevant portions read as follows:-

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3 The Constitutional Planning Committee was established by the pre-Independence Government, with the approval of the House of Assembly, on 27 June 1972, to "make recommendations for a Constitution" (initially for full internal self-government, but ultimately for independence). *House of Assembly Debates* 23 June 1972, 279; 27 June 1972, 361: see also 31 August 1972, 463.

4 See K.C. Wheare, *The Constitutional Structure of the Commonwealth* (1960) 89-114; K. Robinson, "Constitutional Autochthony in Ghana", (1963) 1 *Journal of Commonwealth Political Studies*, 41; S.A. de Smith, *Constitutional and Administrative Law*, (1971) 76-82; and for critical definitions Sir K. Roberts-Wrey, *Commonwealth and Colonial Laws*, (1966).

5 Sir Owen Dixon, *Jesting Pilate*, (1965) 211; Sir Owen Dixon, "The Common Law as an ultimate Constitutional Foundation" (1953) 31; A.L.J., 240.

"(1) An Act of Parliament[6] shall -

(a) declare the underlying law of Papua New Guinea; and
(b) provide for the development of the underlying law of Papua New Guinea.

"(2) Until such time as an Act of Parliament[6] provides otherwise -

(a) the underlying law of Papua New Guinea shall be as prescribed in Schedule 2 (adoption, etc., of certain laws); and
(b) the manner of development of the underlying law shall be as prescribed by Schedule 2 (adoption, etc., of certain laws)."

Section 20(1) might be called the "permanent" formula, Section 20(2) the "interim" one. However, since no attempt has yet been made to introduce a "permanent" adoption, the rest of this paper deals only with the "interim" formula.

Finally, there was never any real suggestion but that pre-Independence statute law would (subject to conformity with the Constitution) be carried over in one form or another,[7] so that the underlying law was never intended to bear a greater burden of filling interstices than a "common law" would normally be expected to do. In other words, it would fit into a legal system of a fair (if perhaps not altogether appropriate) level of development.

III *THE SCHOOLS OF THOUGHT*

As mentioned above, there were a number of schools of thought about the adoption of an underlying law, and also about its possible content. Their respective attitudes could be summarized thus:

(a) There is no need to adopt an underlying law at all; the courts are quite capable of making up appropriate rules as need arises (the anti-adoption school).

(b) Papua New Guinea custom provides, or if developed by the courts can provide, all the unwritten or insterstitial law that is needed (the custom-alone school).

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6 *Sic.* Strictly, the phrase should be "Act of the Parliament" (*Constitution*, Sch. 1.2. (1)).

7 Again, autochthony had to play its part. All statute law was repealed immediately before Independence, and then locally enacted or adopted statutes and selected Australian and English statutes were specifically adopted by *Constitution* S. 20(3) and Sch. 2.6, and Schedule 5.

(c) If an underlying law (other than custom alone) is to be adopted, it should be adopted at large, limited only by referring to, say, "the common law" (the adoption-at-large-school).

(d) A specific set of rules should be adopted, at least initially - say, the Common Law of Australia, England or pre-Independence Papua New Guinea (the specific-adoption school).

Proponents of the adoption-at-large school and of the specific adoption school were further divided on two additional questions:

(a) Should any adoption be regarded as a provisional one while a totally indigenous or home-grown underlying law was worked out?

(b) In any event, should an underlying law be provided for at all in the Constitution, or should we not leave it to be provided for (as in other countries and as in pre-Independence Papua New Guinea) by an ordinary Act of the Parliament?

The relevance of the attitudes and schools of thought will become obvious as we turn to the problems that came up in the working out of this aspect of the Constitution.

IV *OUTLINE OF MAIN PROBLEMS*

The main problems can be divided into two groups - the more general ones, that would apply to the question of a constitutional adoption of an underlying law anywhere, and one more especially associated with Papua New Guinea and its legal and constitutional history.

The more general problems can be expressed as follows:

Problem 1 - Should we adopt an underlying law (the question raised by the anti-adoption school)?

Problem 2 - If we are to adopt an underlying law, should it be in the Constitution?

Problem 3 - What is to be the status of the underlying law? (e.g., as against the Constitutional Laws, Acts of the Parliament, custom, etc.).

Problem 4 - What should be adopted as the underlying law?

Problem 5 - As at what point should the underlying law be adopted and its content, as adopted, be ascertainable?

Problem 6 - Will the adoption leave gaps in the law, and if so how should they be filled?

Problem 7 - Should provision be made for the development of the underlying law?

It will be obvious that these headings are far from being exclusive and in fact overlap. It will also be obvious that no answers could be given that would be absolutely or unarguably correct: except so far as they were determined by the over-riding principle of autochthony. All are matters of the balancing of preferences, especially theoretical desirability as against practical feasibility.

For just these reasons, however, I would not logically expect a workable "permanent" solution to be in practice much different from the "interim" one unless there were an ideological change over a much broader field than merely that of an underlying law.

The second group of particular local problems are:

Problem (a) The effect of the differing adoptions of of the English Common Law in the Possession of British New Guinea (and hence in the former Territory of Papua) on the one hand and in the former Territory of New Guinea on the other.

Problem (b) The principle of *Booth v Booth*,[8] that the adoption of the English Common Law carries with it certain specific statutes (which might well apply to the adoption of any specific system).

V THE PARTICULAR PROBLEMS

(a) Differential Pre-Independence Adotpions

This problem has been more thoroughly discussed elsewhere.[9]

Briefly, the situation is that British New Guinea (later the Territory of Papua) adopted, by Section 4 of *The Courts and Laws Adopting Ordinance (Amended) of* 1889 -

> "The principles and rules of common law and equity that for the time being shall be in force and prevail in England".

In the former Territory of New Guinea, however, the *Laws Repeal and Adopting Ordinance* 1921 adopted, by Section 16 -

> "The principles and rules of common law and equity that were in force in England on the ninth day of May, one thousand nine hundred and twenty-one".

Both sections were subject to applicability and repugnance tests.

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8 (1935) 53 C.L.R. 1.

9 See J.R. Mattes, "Sources of Law in Papua New Guinea", 37 *A.L.J.*, 148; R. O'Regan, "The reception of the Common Law and the Authority of Common Law Precedents in the Territory of Papua and New Guinea, *I.C.L.Q.*, Vol. 19, 1970, 217; C.J. Lynch, "A Description of Aspects of Political and Constitutional Developments and Allied Topics" in B. Brown (ed.), *Fashion of Law in New Guinea*, Butterworths (Aust.) 1969, 39; *Murray v Brown River Timber Co Ltd.* [1964] P. & N.G.L.R. 167.

The relevance of this was, that a Papua New Guinean common law could not be simply assumed to exist and could not be adopted as such (as has commonly been done elsewhere). A positive decision had to be made if the fairly basic legal differences between the laws in the former two parts of the country were to be minimized.[10]

(b) Booth v Booth[11]

The details of this well-known case are not really important for present purposes. What is important is that the High Court held that by virtue of the adoption of the English Common Law the English Married Women's Property Acts became law in the Territory of New Guinea for the common law was to be taken subject to and together with statutory modifications.

In an analogous case arising under the Papuan adoption provisions,[12] Mann C.J. of the Supreme Court of the Territory of Papua and New Guinea held that, whatever might be the situation in the other Territory, the Papuan provision did not adopt statute law.[13]

The importance for present purposes of Booth v Booth is that it recognized as being adopted a statute on a very specific point. In relation to the Constitution, it forced a decision on the question, whether or not statutes should be incidentally caught up in an adoption of common law. Leaving out of account the specific statutory provisions on which they were respectively based (though, as Mann C.J. seemed to agree in *Murray*[14], there was little or no substantive difference), there is no doubt that the principles and approaches of *Booth v. Booth* and *Murray* were quite incompatible, and that if the door were left open *Booth v Booth* would give us a very uncertain type of adoption of any common law.

VI *THE GENERAL PROBLEMS*

Problem 1. - Should we Adopt an Underlying Law at all?

There seems, and there seemed, to be little doubt that an underlying law is necessary - even the greatest codification does not last long without one.[15]

The general alternatives to an adoption were, to allow the courts to develop one - this, it appears, could be done by

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10 In the result, certainly statutory differences continue after Independence: see *Constitution* Sch. 2.6(2).
11 (1935) C.L.R. 1.
12 *Murray v Brown River Timber Company Limited, op. cit.*
13 *Ibid.*,172.
14 At 169.
15 There are some interesting comments (and a possible alternative approach to that of the National Legal System - an alternative that might well be explored in depth) in G. Eorsi, "Some Problems of Making the Law" *East African Law Journal*, Vol. 3, No. 4, (1967) 272.

handing over to the courts an entire field of law to be legislated for by them subject only to Parliamentary interference in one form of another; or to allow them to legislate subject to guidelines legal or extra-legal.

The first of these possibilities was "just not on". Even if we could expect a Parliament to abdicate its functions in this way, the result would be fragmentation and something approaching chaos. On the other hand, to wait for authoritative decisions to be given by the superior courts themselves would involve acceptance of a wide and continuing area of "nothingness" in the law until those courts (if they ever could) got round to doing something about it rule by rule.

The other possibility amounted, in effect, either to creating (adopting) an underlying law in the guise of legal guidelines (which would merely push the real problem back one step or so without solving it); or to make legal decisions depend as a matter of law on extra-legal policy or political directives. There may be nothing wrong in principle with such an approach - which appears to be the orthodox Chinese one, for example - indeed to a limited and fairly orthodox extent that approach was adopted with the National Goals and Directive Principles, etc.[16] However, it does pre-suppose a coherent and formulated pre-legal ideology that does not yet exist in Papua New Guinea, and also it offends those to whom the "Rule of Law", however formulated, is the correct approach in these matters.[17]

A special alternative was that proposed by the custom-alone school - to allow custom to fill the gaps in statute law. The objection, both theoretical and practical, to this was that even if custom had the potential to do so, it did not have the immediate capacity to do it: accordingly, to leave the matter to custom would involve on the one hand a long wait and on the other laying the system open to just the sort of trouble discussed earlier. However, to anticipate a little, the potential of custom could be recognized by allowing it a qualified over-riding status vis-a-vis non-customary rules of the underlying law.

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16 See *Constitution*, Preamble and S.25 for the National Goals and Directive Principles and their "enforcement". See, also, *Constitution*, Sch. 2.3 for their role in the development of the underlying law.

17 See, for example, Dixon, *op. cit.*, (1965) 165 -

> "For if the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the abrupt change of conception according to personal standards or theories of justice or convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor chart. The courts would come to exercise an unregulated authority over the fate of men and their affairs which would leave our system undistinguisable from the systems which we least admire."

One does not have to accept His Honour's stress on technique or the technique that he favours, in order to appreciate the basic point.

Problem 2. - If we are to Adopt an Underlying Law, Should it be in the Constitution?

To adopt an underlying law directly by a constitution is certainly uncommon and possibly unique - and of course it would add to the length of the Constitution: more to the point, the fact that it was not found necessary in other places argued that it is safe to leave it out, while to include it might well be to rigidify it overmuch. On the other hand, if the basis of the underlying law was to be an imported law, then to include it in the Constitution would appear to offend against the spirit of autochthony and perhaps that of Independence.

A logical, but perhaps not the political or emotional, answer to the last point is first, that autochthony is related to the legal basis of a constitution and to formal matters, not to the content of a constitution or of a law; and secondly, that if a particular set of laws is good enough to be adopted, it should be good enough to be acknowledged, and it would be positively confusing in law and in practice if its sources were not recognized.[18]

Problem 3. - What is to be the Status of the Underlying Law?

As far as its status within the national legal system as a whole is concerned, orthodox legal theory answers this question, and for once not even the most extreme proponents of autochthony need argue against orthodoxy.[19] The underlying law must be subject to the Constitution and other Constitutional Laws and to all other statute law[20] - Coke's theory of the supremacy of the English Common Law over statute[21] was not to be resurrected.[22]

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18 D.Grove,"The Sentinels of Liberty", 7 *Journal of African Law* (1963), 164 et sq., suggests that a misunderstanding of the nature of a U.S. legal doctrine misled the Nigerian courts on constitutional matters (fundamental rights, in that instance). This is not directly in point, but illustrates how a partial failure to appreciate the principles of an imported rule in the place where it was formulated might lead to a misapplication of it.

19 In the legal sense, the achievement of autochthony is truly a revolution. It substitutes one legal principle of legality (grundnorm in Kelsen's terminology - the legal principle from which all legal rules in the particular legal system derive their legal validity) for another.

20 See *Constitution*, Ss. 10, 11(1).

21 See, for example, *Bonham's Case* (1610) 8 Co. Rep. 1136; See also *Day v. Savadge*, (1615) Hob. 87.
"...because even an Act of Parliament, made against natural equity, as to make a man a Judge in his own case, is void in itself, for jura naturae sunt immutibilia, and they are leges legum".
This is, of course, not now good law, if ever it was - see *Lee v Bude & Torrington Junction Railway Company* (1871) L.R. Vl. C.P. 582 and Dixon *op. cit.*, (1965) 206.

22 But see *Constitution*, S.158(2), and below, for a rather puzzling possible exception to this principle.

Problem 4. - What Should be Adopted as the Underlying Law?

For fairly obvious practical reasons, the initial choices here were limited. Essentially, they were -

(a) custom alone.

(b) the common law in one or other of its forms.

(c) a combination of custom and the common law.

For legal, political and practical reasons custom could in no way be ignored; on the other hand, it did not seem capable at the moment of covering the necessary field. Accordingly, the combination had to be the initial answer.

But this left unanswered the question, which of the versions of the common law was to be adopted?[23] There were four immediate practical possibilities:

(a) The pre-Independence "common law" of Papua New Guinea.

(b) The common law of Australia, or perhaps of Queensland (as the Australian State the law of which had been most closely associated with the development of law in pre-Independence Papua New Guinea).

(c) The common law considered as a single system applicable with minor modifications in various parts of the world (the approach of the adoption-at large school).

(d) The Common Law of England.

In deciding between these possibilities, one practical point had to be kept in mind - whatever system was adopted, the necessary source-material, including text-books, law reports, etc., had to be fairly readily available to courts, practitioners and other persons interested.[24]

Of the possibilities outlined above, the pre-Independence "common law" could be rejected at once, for the reason set out in this paper.

The second possibility, too, could be rejected. So far as there could be said to be an "Australian" common law its scope

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23 It also left unanswered the question, what customs should be adopted? This is, in the present context, a matter of detail rather than of principle.

24 Grove *op. cit.*, (1963) illustrates the dangers that lie in having inadequate, or second-hand, comparative materials in such cases - if the dangers are not self-evident.

would be limited to the points of law relevant under the Australian Constitution to the Commonwealth. The common law of any one State, on the other hand, would be limited by the requirements and history of the particular State.[25] In comparison with the common law at large or the English Common Law it seemed clear that the amount of practical assistance with technical legal problems that we could get would not be as great as we would like.

The adoption-at-large school had strong supporters (including Professor O'Regan[26] and the late Chief Justice of the Supreme Court of the Territory of Papua New Guinea, Sir Allan Mann).

O'Regan, for instance, proposed in 1971[27] that -

> "...a provision in the following form might be appropriate:
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> 'Subject to any Act, Ordinance or subordinate enactment in force in the Territory or a part of the Territory the principles and rules of common law and equity shall be in force in the Territory so far as they are applicable to the circumstances of the Territory'..."

He commented that[28] in his proposal -

> "...the refernece to the common law of England is omitted. The Territory would inherit the general body of English common law but its courts would not be precluded from developing these received principles and rules as local circumstances suggest. No English precedent would ever be binding in either Papua or New Guinea...the omission in the proposed reception provision of reference to the common law of England licenses local courts to declare the common law for the Territory. In performing this task the courts would, no doubt, pay due respect to relevant English decisions and they would also have regard to decisions of courts in other countries which have inherited the common law...However, no such decisions would ever be binding..."

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25 But, for a brief period in 1888-9, *The Courts and Laws Adopting Ordinance of* 1888 (S.I) of British New Guinea did adopt the "Queensland" common law.

26 R. O'Regan, *op. cit.*, (1970) 227; R. O'Regan, *The Common Law in Papua and New Guinea* (1971:1).

27 O'Regan, *ibid.*, (1971:1) at 73.The constitutional terminology is outdated now.

28 O'Regan, *ibid.*, at 74-6.

The difficulty with this approach is that it assumes the existence as a single coherent legal system of "the Common Law-at-large", and not as only a recognizable philosophical or jurisprudential approach to legal problems. The problem for the framers of the Constitution was, if we adopted "the Common Law-at-large" and there happened to be drastically different "common law" rules on a given point in different "common law" jurisdications, what rule did we adopt? The answer would presumably be, whichever one the courts thought the most applicable or the most just - but, is the adoption of specifically conflicting rules a real adoption at all?

The total abandonment of foreign precedent, too was seen to involve undesirable uncertainty, but clearly foreign precedent could not be allowed to alter the substance of the law after adoption.

The other question connected with this problem is the question of applicability of the imported rules: are they to be adopted irrespective of whether they are applicable to, appropriate for, or relevant to, the country? Here the adoption-at-large school, the specific-adoption school and the historical precedents[29] are in considerable agreement. The imported rules can be adopted only to the extent that they are applicable to the circumstances of the importing country, and this implies of course the need to adapt them to those circumstances.

A vital question is, what do we mean by "circumstances"?[30]

Gaps will be left in the adopted law in cases where no available imported rule exists or is appropriate. This consequence had to be faced in the Constitution and provision was made to deal with it.[31]

As at what point is appropriateness to be judged? And is appropriateness a constant for the country both in time and in place (which means, may the imported element of the underlying law vary from place to place within the country? - As custom certainly does.)

Problem 5. - As at what Point should the Underlying Law be Adopted and be Ascertainable?

If a common law is to be adopted, and if that common law is to be the common law of a particular place, the possibilities are basically -

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29 And indeed the English Common Law itself - see, for example, W. Blackstone, *Commentaries on the Laws of England*, J.E. Archbold (ed) (1811) 107-8; *Cooper v Stuart* (1889) XIV App. Cas. at 291-2; R.O'Regan, "The Common Law Overseas - A Problem in Applying the Test of Applicability" (1971) 20 *I.C.L.Q.* 342 (1971:2).

30 *Aika v Uramany* Supreme Court Judgement No. SC.91, 9th February, 1976 is of interest on this point.

31 See *Constitution*, Sch. 2.3 and Part 9(d) below.

(a) to adopt a common law as in existence from time to time.

(b) to adopt it as at a fixed time.

If there had been a common date of adoption in the former Territory of Papua and the former Territory of New Guinea that date might have been a convenient one, but as things were, Independence Day[32] was as good as any: it had the additional advantage that it was the logical date at which to adopt the initial statute law, and thus the same date for the adoption of an underlying law might conceivably lessen confusion.

Adoption of the common law "from time to time" was the course chosen in 1889 in what was then British New Guinea[33] and was also suggested by O'Regan[34], and indeed it follows pretty naturally from the views of the adoption-at-large school. In the context of that school, a principal disadvantage is that as the years go by not only will the number of jurisdictions from which the imported law is to be derived change, but the rules of that law will similarly be changing from place to place: thus, not only will the elements making for uncertainty increase, but the area of uncertainty will increase as it were in geometrical progression with the lapse of time.

O'Regan's reason for suggesting the approach "from time to time" was that -

> "...the Territory would not be tied to the common law as it was in England at some time in the past, and the very real difficulty of ascertaining precisely what the common law was at that time would be avoided..."[35]

With all respect, if the date is a relatively recent one that is not a very strong argument, but the thoroughly objectionable feature of it in relation to the whole basis of the Constitution is that given such a situation it is hard to see how we could avoid treating English decisions (at least at the highest level) as being either binding or tantamount to binding. Given the strong policy against the involvement of courts outside Papua New Guinea in the administration of justice here, this was just not on.[36]

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32 16 September 1975: *Constitution*, Preamble. Actually, the adoption was as at "immediately before Independence Day" (*Constitution* Sch. 2.2).

33 *The Courts and Laws Adopting Ordinance (Amended of* 1889, S.4. But S.1/ of *The Courts and Laws Adopting Ordinance of* 1889, on the other hand, adopted, until its amendment by the 1889 Ordinance, the English Common Law in force in Queensland.

34 O'Regan *op. cit.*, (1971:1), 74.

35 *Ibid.*

36 C.P.C. *Report*, p. 8/3 para. 24, p. 8/18 Recommendation 4(1); *Constitution*, Ss. 155(2)(a) and Sch. 2.12.

O'Regan himself admits[37] that in relation to the former Territory of Papua the formula "from time to time" means that -

> "whenever an English precedent authoritatively states the principles or rules of the received common law, that precedent is binding".

Whatever the Constitution might say about what is to be the final court of appeal, it is difficult indeed to see how a court here could differ from the highest judicial authority in England as to the state of the English Common Law at the time.

The deicison on a date as at which the common law should be adopted does not, however, conclude the present question. Since it is obvious that circumstances change, as at what date is the law available for adoption to be judged for appropriateness to the circumstances? Clearly, there are a number of possibilities:

(a) The date of adoption (i.e., in the present case, Independence Day): this seems to have been the view taken by the Supreme Court of the Territory of Papua and New Guinea (Smithers J. in R. v Akundagru.)[38]

(b) The date of the event leading to the litigation.

(c) The date of the litigation.

Again, O'Regan has given the matter careful analysis, and in substance his conclusions are followed in the Constitution (though with an addition as to place). Rather than run the risk of plagiarizing or misconstruing, I prefer to quote them at length:[39]

> "It is clear...that a common law doctrine inapplicable to conditions in a colony at the time of reception may, as the colony develops, become attracted to it...
> "The merit of the doctrine of subsequent attraction ...is that the basic law always remains appropriate to the changing needs of the community. However,...the doctrine makes for uncertainty and could result in the application of a common law doctrine which had previously been rejected as inapplicable. This appears to be a function more appropriate to the legislature than to the courts. Nevertheless it should be noted that in so

37 O'Regan *op. cit.*, (1970) 219 and generally 219-223; O'Regan *op. cit.*, (1971:1) 59 and generally 59-65.
38 Unreported, 1962. Referred to in O'Regan *op. cit.*, (1971:1) at 16, 17, 20 and O'Regan *op. cit.*, (1971:2) at 346.
39 O'Regan *op. cit.*, (1971:1) 17-19.

> doing a court is not amending the law as the legislature does. It is merely applying the law to changed circumstances..."Thus it is submitted that the time of events giving rise to the case is preferable to the date of reception. Is it also preferable to the time of proceedings? It would seem obnoxious, save in matters of procedure, to govern a past transaction by law coming into force at a later date. In general principle therefore the selection of the time of proceedings has little to commend it..."

Five points of relevance to the provisions of the Constitution might be made concerning this reasoning.

First, O'Regan seems to have adopted (possibly by an accident of expression), the theory that the common law is merely declared and not made, which elsewhere he rejects.

Secondly, "the doctrine of subsequent attraction" may also involve subsequent rejection, as when a change of circumstances makes inappropriate what was formerly appropriate.

Thirdly, there is no doubt that uncertainty is involved: in this respect as in others, the Constitution as adopted represented a compromise between certainty (and concomitant rigidity and a degree of inappropriateness) and flexibility (with concomitant uncertainty). The general principle was, relatively certain adoption and relatively wide adaptation by the courts, but the possibility that the doctrine might work injustice in individual cases where its application was not expected cannot be overlooked, and should, if practicable, be allowed for.

Fourthly, using the time of the events concerned does have the disadvantage that circumstances may well have changed as between that time and the time of the decision, in such a way that the rule earlier applicable may be no longer appropriate and the decision may already be outdated (this is often the case with decisions on statutes but in that case there is less possibility of confusion). Again, it would be desirable to allow for this.

Finally, there may be more than one event or transaction involved (particularly in a land matter) and these may be widely separated in time, with the result that there may be more times than one to be taken into account.

Before leaving Problem 5 four associated matters should be referred to.

Assuming that the imported law is adopted only so far as it is appropriate to the circumstances of the country, should account be taken of the fact that circumstances differ from place to place, as well as from time to time, in the country? If that is accepted, however, does it not lead us, at least in principle, to a concept of applicability in the circumstances of the particular case?

Secondly, what do we mean by "circumstances"? The expression must cover all relevant circumstances - physical, social, economic, legal and political. This goes beyond the relatively simple tests suggested by Allott[40], for example, but it is not at all clear why he limited himself to his very generalized criteria.[41]

Thirdly, allied to the "doctrine of subsequent attraction" is the attractive concept of "dormant reception". This phrase is suggested by a comment by O'Connor J. in *Delohery v Permanent Trustee Co.* of New South Wales,[42] referred to briefly by O'Regan.[43] The suggestion is that even though there is a fixed date of adoption, nonetheless there is adopted as at that date all the common law that, with changing circumstances, may later become relevant and appropriate. To take the example of *Fitzgerald v Luck* referred to by O'Regan,[44] it is as if the law of New South Wales had said in 1828 (the adoption date): if you introduce public markets the Common Law as to sale in market overt applies - a satisfactory and usual way to formulate a law.

If "dormant reception" is only another name for "subsequent attraction" it has the double advantage of being self-explanatory and of giving a definite answer to the basic question, that the other name begs, what rule is "subsequently attracted"?

Problem 6. - Will the Adoption Leave Gaps in the Law, and if so, How will they be Filled?

Unless special provision is made to prevent it, there is no doubt that gaps may very likely be left, either because of gaps in the unwritten law available for adopting (including cases where the law has been abrogated by statute in the place of its origin) or because parts of it may be inappropriate and hence not adopted or no longer adopted.

There are really five possible approaches:

(a) To accept the situation and do nothing about it.

(b) To let the situation be corrected by legislative means as and when it becomes apparent.

(c) To leave it to the courts to fill in gaps as they think best.

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40 A. Allott, *Essays in African Law*, (1960), 21 *et seq.*

41 See Sawyerr: "The High Court of Uganda and Customary Law" 3 *East African Law Journal* (1967) 27 on the possibility of custom itself being part of the "circumstances"; and *Aika v Uramany* (1976) S. Ct. case No. 91.

42 (1904) 1 C.L.R. at 291. See also the suggestion (*obiter*) by Lord Watson in *Cooper v Stuart*, (1889) xiv App. Cas. 292.

43 O'Regan *op. cit.*, (1971:1), at 17.

44 O'Regan *Ibid.*, (1971:1), p. 23;
O'Regan *op. cit.*, (1971:2), 343.

(d) To avoid the first kind of gap, by disregarding statutory revisions of the original law.

(e) To give specific directions about the filling of the second kind of gap.

Of these, (a) is hardly likely to be acceptable; while (b), although effective in the long run, is slow and obviously will work individual injustice.

Approach (c) may well be desirable as a general back-stop provision or reserve judicial power, but of course it involves a fairly unfettered judicial discretion.[45] If the theory is accepted, that courts make and do not just declare law,[46] this power is of course inherent, though the permissible degree of its exercise is arguable.

Approach (d) would, partly at least cure the especially-immediate problem for Papua New Guinea raised by *Booth v Booth*. It creates its own problems, of course, since certain statutes may well have become so enmeshed in the general law as to give them, in addition, something like a common law status.[47]

Approach (e) gives a much better chance of controlled development to fill gaps - especially if basic provisions of the Constitution such as the National Goals and Directive Principles, the Basic Social Obligations and the Basic Rights, legal policy as laid down in other laws and custom and the general approach or spirit of "the common law system" are taken into account as guidelines, to lessen uncertainty while providing for or facilitating development and adaptation.[48]

Problem 7. - Should Provisions be made for the Development of the Underlying Law?

As I have stressed, the adoption provisions of the Constitution represent a compromise between absolute certainty and maximum appropriateness (and therefore involve capacity for adaptation).

Some of the possible approaches were obvious and orthodox enough - the exercise of the normal powers of the Parliament,

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45 See *Constitution*, S.155 (though with reservations concerning the meaning and effect of Subsection (2)); Sch. 2.4.

46 See, for example, O'Regan *op. cit.*, (1970), 223 and *passim*; O'Regan *op. cit.*, (1971), 66 *et seq.*

47 Mann C.J. in *Murray v Brown River Timber Company Limited*, at 172 (but *quaere*, how far the Chief Justice meant to go).

48 The *Constitution* already provides for these to be taken into account generally (Ss. 25 and 63, and Division III, 3; Sch. 2.13, 2.14).

re-enforced by a Law Reform Commission,[49] annual reports on the state of the law by the Judges and other officials concerned[50] and the ordinary supervisory and co-ordinating role of the superior courts.[51] Even here, however, explicitness in the Constitution would add weight to the principle of development and adaptation, and this is an important aspect of the approach of the Constitution.[52]

There are, however, problems in this regard. The first is the scope for development to be given by the adoption provisions, and related provisions, themselves. The second, is the likely attitude of the courts themselves, as by-and-large common law courts tend to be conservative and non-innovatory. A third lies in any filters that might be placed on the courts by the system, or any system, of judicial precedents, and by the relationship between various courts.

As to the first and second of these problems, Allott[53] has commented that a wide power to make substantive changes in the adopted law was given by the common African formula that the received or adopted law was in force -

> "subject to such qualifications as local circumstances may render necessary".

He suggests further that even in the absence of such a provision -

> "...the courts have an inherent power in similar terms by virtue of their general duty to administer justice. Otherwise the application of English law would be stultified and the legal system would be brought into justifiable contempt."[54]

One might have reservations as to how far a court could go in removing any stain on the legal system at large caused by statute (and even more so by the Constitution).

Further to the second point, Bayne[55] has pointed out that courts in this country have not been over-enthusiastic in finding any truly developmental power in the pre-Independence formulas (which included the common African formula referred to above). Bayne seems to place some reliance on the fact that in the future all courts will be localized, but personally I think such confidence rather optimistic. Left to themselves, I feel, the courts

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49 *Constitution*, Schedule 2, Part 6.
50 *Constitution*, S. 187, S.256 and (especially) Sch. 2.5
51 For example, *Constitution*, Sch. 2.4.
52 Indeed *Constitution* Sch. 2.4, quite unusually, imposes on "the National Judicial System, and especially...the Supreme Court and the National Court" an express <u>duty</u> in this regard.
53 Allott *op. cit.*, (1960), 24-5.
54 Allott *Ibid.*, 25.
55 P.J. Bayne, "Legal Development in Papua New Guinea: The Place of the Common Law" *Melanesian Law Journal* Vol. III No. 1 1975 at 37-8.

would be inclined to follow the approach of Mann C.J. in *Murray v Brown River Timber Company Limited*[56] when, in commenting on Lord Denning's famous "tending of the English Oak" analogy in *Nyali Ltd. v Attorney-General*[57] he said -

> "Throughout this passage, it seems to me that in spite of the bold approach indicated, the process envisaged cosists more of cutting down and rejecting unsuitable laws, than of filling omissions which may be found to occur. This process of rejection is in any event authorised in the Papuan Adopting Ordinance, by the limitation of the laws adopted to those which are applicable to the Territory, and it was a like provision that Denning L.J. was then considering. This places emphasis on rejection of unsuitable laws, rather than on creating any principles to fill any vacancy."

If there were a danger of Mann C.J.'s approach being adopted as a judicial principle, then it seems better and safer to give a general legislative instruction to the courts to actively develop the law, and not alone in cases of gaps left by strict inappropriateness, nor even only in respect of the imported law. Naturally, this would be more effectively (as well as more palatably) done by the Constitution than by an Act of the Parliament - and in addition would not raise the bogey of legislative interference with the judiciary.

VII *THE ROLE OF CUSTOM*

So much for the imported element of the underlying law: what of custom, since the principle of "home-grownness", requires custom to be incorporated into the system (as, at least in theory, it was pre-Independence by virtue of the *Native Customs (Recognition) Act* 1963)?

If we assume that the Constitution must deal in some detail with custom, at least six questions immediately suggest themselves.

First, is custom to be received as part of the underlying law, or as a separate element? The pre-Independence Adopting Ordinances avoided answering this question, but it is really answered if a Concept of a national legal system[58] is embodied in the Constitution. Most appropriately, such a system would set written (statute) law over against unwritten law (the underlying law), so that custom and the imported law would together form the underlying law.[59]

Secondly, what is to be its relationship with the written law? It does not automatically follow that written law will prevail over the common law.

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56 At 171.
57 (1956) 1 Q.B. 16-17.
58 *Constitution*, S. 155, Sch. 2.9.
59 *Constitution*, Sch. 2.12.

Thirdly, what should be its relationship with the other element of the underlying law - the imported law? This depends in part on the answer to the fourth question: is custom, as part of the law, to be of general, local or personal applicability? At this stage, the anwer to the latter question, is that custom is not a coherent, generally - applicable system, so that its "rules" cannot be said to be of general application, as the rules of imported law can be. There is no doubt that custom can and should govern those transactions to which it is relevant. The last point, incidentally, is one that the Pre-Independence Recognition Act simply avoided. O'Regan arrives at much the same conclusion, on the legitimate but partly question-begging basis that -

> "A rule of customary law develops in response to the particular needs of the community in which it operates. Now if such a rule is in conflict with a common law rule how can it be said that the common law rule is applicable to local circumstances?[60]

Fifthly, what do we mean by custom in this context? It goes without saying that it must be custom of a kind that the courts (including courts specifically designed to deal with custom, such as the pre-Independence Village Courts) can apply.

The *Native Customs (Recognition) Act* 1963, defines custom as -

> "...the custom or usage of the aboriginal inhabitants of the Territory at the time when and the place in relation to which...(the)...question arises, regardless of whether or not that custom or usage has obtained from time immemorial".[61]

Would it be possible, to prescribe some date as from which the usage must have been in existence - faced with an analogous problem of deciding upon a date as of which customary ownership of land should be taken to have "frozen", so as to supply the only equivalent of a root of title, the Land Titles Commission tried to do this sort of thing, and generally failed.[62]

Sixthly, how is custom to be ascertained? The matter might, like the ascertainment of the imported law, be left to the courts. There is little doubt, however, that the courts would welcome legislative guidance as before, especially in relation to conflicts of custom and on the desirability of encouraging, as a matter of policy, uniformity.

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60 O'Regan *op. cit.*, (1971:1), 14.
61 S. 4.
62 See, for example, P. Sack, C.W. Kimmorley, J. Nilles and M.B. Orken in *Problem of Choice*, P. Sack (ed.), (1974) at 13, 123-4, 139, 147-9 respectively; and C.J. Lynch *op. cit.*, (1969) 63.

VII *JUDICIAL PRECEDENT*

There are two aspects of the doctrine of judicial precedent. Firstly, the effect that the adoption of the English (or any specific) Common Law as an element in a developing underlying law might have on the doctrine; secondly, the influence that the doctrine might have on the development of the underlying law.

O'Regan[63] has discussed both aspects in relation to countries that have adopted the English Common Law as such: the same principles would, however, apply in respect of adoptions from other places.

O'Regan's conclusions are -

(a) in relation to the former Territory of Papua (that is to say, in the case of an adoption "from time to time") -

> "...whenever an English precedent authoritiatively states the principles or rules of the received common law, that precendent is binding."[64]

(b) in relation to the former Territory of New Guinea (that is to say, in the case of an adoption as at a fixed time) -

(i) "...the analysis of the authority in Papua of English decisions relating to the common law applies mutatis mutandis in respect of pre-reception English decisions in New Guinea,"[65]

(ii) "One's assumption about the nature of the common law also determines one's conclusions about the authority of post-reception English decisions in New Guinea. Once it is conceded that the common law does change, it follows that English precedents, thereon after that date cannot be binding."[66]

Allott discusses only the second situation, and only in relation to Anglophonic Africa, but his conclusions are substantially the same.[67]

One must agree with this, but with one rider as far as (b) (ii) is concerned. In a fully autochthonous legal system, even if the common law does not change but is merely declared, not made, the task of its declaration is a task for the local

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63 O'Regan *op. cit.*, (1970); and *op. cit.*, (1971:1) 59 *et seq.*
64 O'Regan *op. cit.*, (1970), 219.
65 O'Regan *Ibid.*, (1970), 223.
66 O'Regan *Ibid.*, (1970), 225.
67 Allott *op. cit.*, (1960), 30-33.

courts, not the courts of the country of origin, although decisions of the latter might have great weight. This would be progressively more true the more that local circumstances pile modifications on modifications, since the distinction between what was the starting point and what is the result of development must become more obscure and, probably, less relevant in relation to a given case.

The conclusion must be that adoption as at a fixed date is the more "autochthonous" means of adoption, since it excludes reliance on foreign decisions.

However, a consciously-accepted legislative policy of development of the adopted element of the underlying law towards an indigenous jurisprudential system[68] demands more in the present regard if the courts are to take part in it: it demands the unifying effect of a single ultimate judicial authority. This is even more true if the underlying law consists of both an adopted element (the common law) and an indigenous element (custom).

Such a policy would strongly suggest, the exclusion of foreign decisions from a decisive voice, or any real authority in the statement or development of the underlying law.[69] Of course, this can hardly be true in the case of an adoption of a body of foreign law "from time to time", and so this aspect is another argument, against that type of adoption.

The second aspect of the doctrine of judicial precedent relates to the influence of the doctrine in the development of the underlying law as an indigenous jurisprudential system. The courts are naturally in a key position as far as such development is concerned.

Here, three other aspects will be considered: the question of direction and impetus to the judicial function; the early resolution of conflicts or potential conflicts in lines of development; and problems of alterting accepted doctrines.

I have already commented that positive judicial creativity has not been a marked feature of the common law courts, at least in the sense and to the degree that the development of an indigenous jurisprudential system would require.[70] As I suggested, a positive instruction to the courts to give due emphasis and uniformity to the work of development seems to be required, and such an instruction should be aimed primarily at the superior courts.

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68 Compare *Constitution*, S. 20(1) and Sch. 2.4.

69 See *Constitution*, Sch. 2.12. The discussion in the text does not go into the vexed question of the status of decisions of pre-Independence courts in Papua New Guinea, which is also dealt with by Sch. 2.12.

70 This is not to be wondered at. Day-to-day business does in fact demand a certain, if static, approach if a legal system is to be administered. Administration, much more frequently than creation, is the function of the courts. Pace Bayne *op. cit.*, (1975), 37-9.

Allied to this is the need to give guidelines as to the direction of development, if the warnings expressed by Sir Owen Dixon [see Note 14] are to be avoided.

As a machinery matter, the above approach really requires provision for cases in which adaptation or development is required (which are particularly likely to arise in the case of gaps in the adopted law) to be referred to, or taken in, the superior courts for authoritative decision and guidance.

This leads to another aspect, the need for early resolution of actual or potential conflicts in lines of development. The important thing here is to ensure, as far as it can reasonably be done, that divergent lines of authorities and decisions are recognized and referred, as a matter of policy, to the top of the courts structure. It follows since that it is both impractical and wrong to leave this matter to the parties - it should be a responsibility of the State or of the judicial system itself.

A third aspect is that one of the difficulties about relying on disputes as a means of demonstrating legal problems (and in the present context, as a basis for developing the underlying law) is that the parties may, for reasons of expense or other reasons, prefer certainty to legal correctness and may be quite happy to accept a decision that a higher court might hold erroneous. From the same angle, to hold that a principle that has been accepted and acted upon is no longer good law (if it ever was) because of changing circumstances may result in more difficulties for the parties and others, and do more individual injustice, than the courts may be prepared to put up with for the sake of development (which anyway they may tend to regard as fundamentally legislative, rather than judicial, business).

Thus, there may be the fear that in the particular case before a court injustice would be done if a change in circumstances meant that a rule of law formerly accepted, and presumably acted on, were to be changed, whether immediately or as at a date between the date of the relevant event and the date of the judicial decision.

Section Sch. 2.11 of the Constitution embodies a solution in the technique, which is known as "prospective overruling" - i.e., it is a technique that allows of the overruling, for the future and not as affecting past transactions, of an erroneous (or, in our case, outdated or inappropriate) principle in a case where to do otherwise would be to create individual injustice.[71] Section Sch. 2.11 does, however, take the technique rather further than elsewhere, in view of our peculiar

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71 For a description of the technique, see W. Friedmann, "The limits of Judicial Law Making and Prospective Overruling" 29 *M.L.R.* (1966), 573 where English attempts to achieve the same sort of result without saying so are also discussed.

needs for fairly rapid development.

The importance of the matters discussed here is that they are neither extraneous to, nor merely machinery aspects of, the substantive problems of the adoption of an underlying law. In the thinking behind the adoption provisions of the Constitution the concepts were in the first instance adoption-plus-development (considered as a single whole) and, as a later stage, the emergence of an "indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea".[72] In this scheme of things, the development provisions are at least as important as the adoption provisions.

A matter that is related to the question of the application of the doctrine of judicial precedent to the development of the underlying law is the hierarchical system of courts. Little need be said in this connexion, except that, unless in constitutional matters, there is a clear-cut system, the development of the underlying law may tend to fragment and the "coherent system" directed by Section Sch. 2.4 of the Constitution may be hampered, or may not evolve (at least by judicial process). For this reason, as well as in order to allow an ultimate central direction of development, it is highly desirable that a hierarchical organization be positively laid down. Furthermore, since there will almost certainly be co-ordinate courts each capable of diverging from the other, there is a need for some built-in mechanism to have such divergencies dealt with authoritatively before they create something approaching chaos in the lower courts. Section Sch. 2.9 of the Constitution in fact makes specific provision for such matters.

The point must therefore be made strongly, that the relevant provisions are in the Constitution not as an aberration but as part of a coherent scheme that involves not only the adoption of an imported law but its adaptation in the interests of autochthony.

In this regard the Constitution broke new ground, largely because for once the requirements of the legal system, as distinct from the political, administrative and governmental systems, were given weight. Further, it gave to the judiciary an assured and creative function in the development of the law.[73]

IX *THE CONSTITUTIONAL PROVISIONS*

(a) Preliminary

The purpose is to set out the more important provisions of Schedule 2 to the Constitution relating to the adoption and development of the underlying law.

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72 *Constitution*, S.21(1).

73 See O'Regan *op. cit.*, (1970), 219 *et seq.* and O'Regan *op. cit.*, (1971:1), 65-7. *Constitution*, Sch. 2.11, clearly recognizes judicial lawmaking in this field.

Additionally, it includes notes on the rather puzzling entrenchment[74] provisions and on three allied topics - including the extremely enigmatic and potentially explosive provision of Section 158(2).

(b) The Imported Law

Constitutional Provision: Section Sch. 2.2
Adoption of a common law

"(1) Subject to this Part, the principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England are adopted, and shall be applied and enforced, as part of the underlying law, except if, and to the extent that:

(a) they are inconsistent with a Constitutional Law or a statute; or

(b) they are inapplicable or inappropriate to the circumstances of the country from time to time; or

(c) in their application to any particular matter they are inconsistent with custom as adopted by Part 1.

.....

"(3) The principles and rules of common law and equity are adopted as provided by Subsections (1) and (2) notwithstanding any revision of them by any statute of England that does not apply in the country by virtue of Section Sch. 2.6 (adoption of pre-Independence laws).

"(4) In relation to any particular question before a court, the operation of Subsection (1) (b) shall be determined by reference, among other things, to the circumstances of the case, including the time and place of any relevant transaction, act or event."

Comment

The formula "inapplicable or inappropriate" adds to the flexibility provided by the more conventional expression "inappropriate".

Subsection (1) (c) embodies the answer suggested in the third question discussed in Part VII of this paper.

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74 An "entrenched" provision is one that can be altered only by a special process - in our case, majority greater than a simple majority and a special procedure: see *Constitution*, Subdivision II.2B. The word "entrenchment" is a useful colloquialism to describe devices frequently adopted to ensure that laws of particular importance cannot be altered except by a special legislative process: Roberts-Wray *op. cit.*, (1966), 410.

Subsection (3) is an attempt to avoid the *Booth v Booth* situation. It does not, of course, deal with the problem of an indirect adoption, in order to fill a gap, of inappropriate custom.

Subsection (4) relates back to the applicability problem. It relates applicability to the particular case, and hence recognizes geographical as well as temporal applicability and inapplicability.

(c) Custom

Constitutional Provisions:

A. Section Sch. 2.1 Recognition etc., of custom.

"(1) Subject to Subsections (2) and (3), custom is adopted, and shall be applied and enforced, as part of the underlying law.

"(2) Subsection (1) does not apply in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity."

B. Section Sch. 1.2(1) - Definition of custom

"'Custom' means the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial."

Comment

Section Sch. 2.1(3), which is not reproduced, provided for proof and enforcement of custom, and the resolution of conflicts of custom, to be covered by an Act of the Parliament. A significant point is that the section (like the pre-Independence *Native Customs (Recognition) Act* 1963) makes no direct provision for judicial recognition of custom. On the other hand, perhaps it is at this stage best simply to rely on the general judicial duty to administer the law (including the underlying law), and not to exclude development such as was suggested by the Privy Council in *Aryeh v Ankrah*,[75] referring to *Angu v Atta*,[76] and discussed in Sawyerr.[77] As is seen in Section (c) of this Part, custom, in a particular case, becomes the over-riding element in the underlying law.

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75 (1958) 2 *Journal of African Law*, 30-1.
76 (1916) Gold Coast P.C. *Judgments* 1874-1928, at 43, 44 and in Allott *op. cit.*, (1960), 90-4.
77 (1967) *op. cit.*, at 28-31.

(d) Development

Constitutional Provisions

A. Section Sch. 2.3 - Development, etc., of the Underlying Law.

"(1) If in any particular matter before a court there appears to be no rule of law that is applicable and appropriate to the circumstances of the country, it is the duty of the National Judicial System, and in particular of the Supreme Court and the National Court, to formulate an appropriate rule as part of the underlying law having regard -

(a) in particular, to the National Goals and Directive Principles and the Basic Social Obligations; and

(b) to Division III.3 (basic rights); and

(c) to analogies to be drawn from relevant statutes and custom; and

(d) to the legislation of, and to relevant decisions of the courts of, any country that in the opinion of the court has a legal system similar to that of Papua New Guinea; and

(e) to relevant decisions of courts exercising jurisdiction in or in respect of all or any part of the country at any time,

and to the circumstances of the country from time to time.

"(2) If in any court other than the Supreme Court a question arises that would involve the performance of the duty imposed by Subsection (1), then, unless the question is trivial, vexatious or irrelevant -

(a) in the case of the National Court - the court may; and

(b) in the case of any other court (not being a village court) - the court shall,

refer the matter for decision to the Supreme Court, and take whatever other action (including the adjournment of proceedings) is appropriate."

Comment

Primarily, Section 2.3(1) provides for the filling-in of gaps left by inapplicable and inappropriate rules of the English Common Law otherwise available for adoption, and provides guidelines for the development or making of new rules.

However, it is not limited to the Common Law. In the context of Schedule 2, and bearing in mind that since Section Sch. 2.3 is in a Part of that Schedule that is not otherwise directed solely at the adopted law, it operates in the absence of rules deducible from either the adopted law or custom: to that extent its area of operation may seem reduced, but on the one hand the important position of custom is again recognized while on the other hand a lead is given to the courts not to act as if custom in its original state provided a universal answer - a lead that seems essentially to accord with Section Sch. 2.4. The aspect of the development of custom is given some emphasis by Subsection (1) (c), while subsection (1) (e) and (f) go at least part of the way with the adoption-at-large school.

Subsection (2) is a machinery provision, deisgned to concentrate and unify the developmental function.

B. Section Sch. 2.4 - Judicial Development of the Underlying Law

> "In all cases, it is the duty of the National Judicial System, and especially of the Supreme Court and the National Court, to ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country from time to time, except insofar as it would not be proper to do so by judicial act."

Comment

This section sets out the general judicial duty in this field.

In addition, Section Sch. 2.5 provides for reports by the Judges -

> "on the state, suitability and development of the underlying law, with any recommendations as to improvement that they think it proper to make".

(e) Entrenchment

The provisions of the Constitution relating to entrenchment are, in relation to the underlying laws, rather curious.

Although, as was pointed out in the third preliminary point in Part 2 of this paper, Section 20 of the Constitution provides that the "interim" adoption provision (Schedule 2) can be replaced by a simple Act of the Parliament, both Section 20 itself and Schedule 2 can be amended only by an absolute majority vote of the Parliament.[78] Presumably an Act made under Section 20 to replace the interim adoption provisions

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78 *Constitution*, S.17(2).

in toto could be made in the ordinary way, while an Act to amend Schedule 2, by way of a partial replacement, would require an absolute majority? On the other hand, might it have the effect of requiring a Section 20 Act to be made by an absolute majority?

Again, Section 158(2) of the Constitution requires a 2/3 absolute majority vote for its alteration. This entrenches the "dispensation of justice" provision deeper than the other rules of interpretation, which is presumably as it ought to be.

(f) Anomalous Cases

Although at least one of them cannot really be called anomalous, three special points in the Constitution need some short comment here.

Division III.4 of the Constitution makes provision in respect of "principles of natural justice". However, these are within the system of the underlying law, since Section 59 (1) states that -

> "...the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings'.

Possibly the most relevant provision is Section 60, which makes special provision for the development of this aspect of the underlying law-

> "In the development of the rules of the underlying law in accordance with Sch.2 (Adoption, etc. of certain laws) particular attention shall be given to the development of a system of principles of natural justice and of administrative law specifically designed for Papua New Guinea, taking special account of the National Goals and Directive Principles and of the Basic Social Obligations, and also of typically Papua New Guinean procedures and forms of organization."

The second point relates to Division III.2 of the Constitution. This Division provides for a "leadership code" with regard to the official (and to some extent the private) conduct of certain officials. The "code" will largely be unwritten. It will be administered and enforced by the Ombudsman Commission, possibly in conjunction with a special enforcement or policing authority, which will no doubt develop its own rules (subject always to the principles of natural justice).[79] Presumably, since enforcement will be ultimately under the judicial control of the Supreme Court and the National Court by virtue of Section 155 of the Constitution, the "code" will be developed within the general system of the underlying law - hopefully, with some cross-fertilization.

Much the same applies to the general jurisdiction of the Ombudsman Commission.[80]

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79 See *Constitution*, S.28(5)
80 See *Constitution*, Division VIII.2.

Both the "leadership code" and the jurisdiction of the Ombudsman Commission will presumably form part of the corpus of the underlying law dealing with administration.

Thirdly, Section 158 of the Constitution provides as follows:

> "(1) Subject to this Constitution, the judicial authority of the People is vested in the National Judicial System.
>
> "(2) In interpreting the law the courts shall give paramount consideration to the dispensation of justice."

No indication is given of what "justice" means in Subsection (2). Presumably it does not mean "natural justice" as referred to in Division III.4 which is only a branch of the underlying law anyway. It is possible that it means no more than that legal technicalities are not to be allowed to govern substantial justice according to the underlying law, and that courts should "do substantial justice without undue regard to legal technicalities" - i.e., largely as an adaptive provision: if this were the intention, however, it is hard to see why the usual form was not used. On the other hand - and in this there lies the real danger (or perhaps in the right hands the real opportunity) - it may be that the Constitution is working back to a natural law principle seen as being the legal basis of the Constitution itself. This raises the possibility of a new type of equity raising itself, with unpredictable consequences.

The problem is made more difficult in that "justice" is to be dispensed in <u>interpreting</u>, not simply in <u>applying</u>, the law. In the context of the narrower sense of the expression "justice", "interpreting" may mean, for example, giving an "equitable construction"[81] to statutes; in a wider sense, Subsection (2) may mean as noted earlier, that there are some fundamental and unstated principles, possibly outside the Constitution, to which even the written law must as a matter of law conform.

Going behind the Constitution, (as Section 24 allows) two relevant, though hardly helpful, references in C.P.C. *Report* pp. 8/1 para. 2 and 8/12 Recommendation 1 can be found. The first refers, apparently, to -

> "...peacefully determining conflicts that arise ...in accordance with law and justice",

as a function of the courts. The second reads -

> "Justice shall be administered in the name of the people. Particular responsibility for its dispensation shall vest in the judiciary."

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81 In the older and broader sense: see *Maxwell on the Interpretation of Statutes*, (1969), 236-8.

In a lay document, both of these statements make good sense, without reading in a distinction between "law" and "justice" such as is made by Section 158(2), or by calling in the natural law or an immanent "justice".

All-in-all, Section 158(2) is (like the infamous Section 92 of the Australian Constitution) a short, simple statement of doubtful meaning and with unforeseeable possibilities - perhaps the most worrying sentence in the Constitution.

X. *CONCLUSION*

In this rather brief study, I have tried to explain the constitutional provisions concerning the underlying law.

The major themes that emerge, and that will be equally relevant for a "permanent" approach to the problem of the underlying law, are firstly, the consequence of the acceptance of the concept of autochthony, not only in its narrower sense relating to the formal source of the Constitution and the laws but in its wider sense in relation to the creation or evolution of an underlying law of specifically home-grown content; and secondly, the compromise between certainty and appropriateness, arrived at through the key concept of development. To ignore the effect of these factors would be to twist the whole logic of the Constitution.

No matter what law is imported as part of the underlying law (or indeed even if no law is imported), the whole framework of the ideas in and behind the Constitution looked on simply as a document, and its whole mode of expression both legal and other, clearly derive from and are contained in the common law system in its more general meaning. I would be very much surprised if, say, a European, a Chinese or even an American would not hold this to be self-evident at first glance. If that be so, then it is logical to assume that the attitudes of mind towards, and the manners of thinking about, legal, constitutional and administrative problems that are characteristic of the common law system, with all its diversity and irrespective of the specific content of laws and rules, will continue to be of vital importance for some time to come.