LETTER TO THE EDITOR

Dear Madam,

In glancing at Chalmers and Paliwala's *Introduction to the Law in Papua New Guinea* (The Law Book Company, Sydney, etc., 1977) in order to check on some work that I was doing, I came across two passages both of which appear to be slanted and one of which is, to my knowledge, unfactual. Such errors, in what is obviously intended to be a textbook or handbook for students (amongst others) should not, I think, be left uncorrected and unchallenged.

Native Courts.

I should say that,in dealing with the native courts issue, I am drawing on my memories of my own active involvement with it. D.M. Fenbury's *Practice without Policy* (esp. Ch. 6) deals with it more fully from the point of view of his involvement and beliefs.

On p. 77 of Chalmers and Paliwala, dealing with the Courts, we find the following passage :-

> J. K. Murray attempted to introduce native courts with native magistrates and a Bill was prepared and passed in 1952. This was only bringing into effect s. 63 of the *Papua New Guinea Act* 1949 which envisaged the establishment of native courts.

No such "Bill" was ever passed. In fact, as far as I am aware no draft of such a Bill even got close to being presented to the Governor-General of Australia or the Legislative Council of the Territory of Papua New Guinea for enactment.

I do not myself know how far (if at all) Colonel J.K.Murray was involved in any such project, since I arrived in Papua New Guinea only in January 1952; he, of course retired as Administrator on 30 June 1952, but as far as I remember left the Territory much earlier that year.

Over the period 1949-1954, however, there were at least three approaches of which I was personally aware made to the drafting of a Native Courts Bill, but I emphasize that they were drafts only, prepared for discussion purposes.

Firstly, somewhere about 1949 a draft was prepared by the Australian Department of External Territories - by T.P. Fry of the Law Revision and Legal Research Section of the Department, I think. As a junior officer in that section I was not particularly involved, but I remember getting hold of a copy of it when David Fienberg (he later changed his name to Fenbury) and I were in a similar project in 1952-54.

Secondly, Fenbury, who objected to the "legalism" and complexity of the Fry draft, produced his own draft, somewhere about 1951. (It is possible that this was Hogben's 1946 draft, or a revision of it by Fienberg - See D.M. Fenbury, *Practice without Policy*, pp. 96-97) Again I was not involved, although I had a copy with me during the 1952-54

exercise: I could therefore be wrong both about the dates and about the order of the Fry draft and the Fenbury draft. As I remember it, the Fenbury draft - which was certainly simpler than the Fry draft - was based on British African (and possibly B.S.I.P.) precedents. In any event, the power of review was basically an extra-judicial one, through field officers (*kiaps*) of the then Department of District Services and Native Affairs.

Thirdly, I had met Fenbury at the Australian School of Pacific Administration (where the Law Revision Section had its offices) in 1950-1951, and we talked, and later corresponded, at some length about the possibility of setting up native courts - which were, of course, part of his three-pronged approach to what he called "Area Administration", involving courts, local government councils and economic development through co-operatives (a co-ordinated approach that was not proceeded with effectively).

As a result, somewhere about the end of 1952 or early 1953 the then Administrator (D.M. Cleland), knowing of our interest, more or less unofficially told Fenbury and me to continue working and to produce a draft *for consideration*. As a result, at least once I went to visit Fenbury in Rabaul specifically to discuss drafts that had been passing between us. Incidentally, much of the correspondence between us, which was written in highly unofficial language (not being intended for official files), was quoted, without our knowledge, in A.M.Healey's basically excellent A.N.U. thesis *Native Administration and Local Government in Papua*, 1880-1960.

We did in fact produce a draft that more or less satisfied us -again, I have not kept a copy, but a 1954 version of it appears as Appendix VI to Fenbury's *Practice without Policy* and as Appendix E to the Derham Report on the System for the Administration of Justice (1960): as I remember, we passed it on to the Administrator. According to Sir Paul Hasluck (then Minister for Territories), the work that we were doing was done unknown to him at the time. Both Fenbury and I found this almost unbelievable, since there had been work done on the matter since about 1946, and it appears from Fenbury's *Practice without Policy*, p. 95, that in that year the Administrator (Colonel J.K. Murray) was under the impression that the then Minister for External Territories (E.J. Ward) had decided as a matter of policy that "Native Village Courts" would be established without delay. However, in view of Sir Paul's statement in *A Time for Building*, pp. 186 *et seq.*, and comments that I have heard or read elsewhere on this and other matters, I accept the statement, strange as may be the situation that it reveals. It is, however, noteworthy that the Territory of New Guinea Annual Reports for 1947-1948, 1948-1949 and 1950-1951 refer to the active preparation of legislation to provide for 'Native Courts' or 'Native Village Courts', while in 1953-1954-

> ... the ... appropriate time and manner of superseding the primitive tribunals is under continuing examination...,

and in 1954-1955-

> ... the ... problems involved in this proposal *(apparently the recognition of 'indigenous tribunals' as part of the judicial system of the Territory)* are complex and a decision has not been taken.

The decision not to proceed was taken on 27 January 1956 (Hasluck, *A Time for Building*, p. 191). The decision does not seem to have been referred to in the Annual Reports,until the Report for 1960-1961.

Sir Paul mentions *(ibid*, p. 186), that "a bill had been drafted and adopted by the Executive Council ... for submission to the Legislative Council". My memory is not as precise as that. I do not have the Executive Council minute, but I very much doubt whether the intention, at least, was as definite as that. Fenbury and I (in my more junior capacity) were the main proponents of the idea at the time, and I doubt that we got more out of the Executive Council than reluctant agreement to refer the draft to the Minister for Territories: the form of the minute may, of course, have been different.

To sum up, although a lot of work had been done, no Bill was ever passed, and the best we got was a qualified approval (without positive support or commitment) in 1953 or 1954 at official level in the Territory.

But Chalmers and Paliwala go on to say (p. 77) -

> However, expatriate opposition prevented any development of native courts.

This is a statement that, although literally true, is so partial and so biassed as to be for practical purposes false. The people who opposed native courts (including the then Chief Judge, F.B. (later Sir Beaumont) Phillips and ultimately the Minister for Territories) were as it happened "expatriates" (a term that I take to mean "non-native"), in the racial sense at least: *so, however, were the main and original proponents of the scheme* (a fact that Chalmers and Paliwala ignore). "Expatriates" like Fenbury and I were convinced that the scheme was workable and would be for the benefit of Papua New Guinea: the "opposition", notably Phillips and the Minister, but ultimately also Derham, feared basically that it would provide a second-class type of justice-just the kind of argument that was to be made against Courts for Native Affairs.

Incidentally, it might be noted that many of the ideas in the Native Courts Bill were subsequently taken into the *Local Courts Act* 1963, in particular the idea of settling as many matters as possible by mediation: in fact, I used a draft of the Native Courts Bill in the preparation of the Local Courts Act (although Fenbury, I fear, uncompromising as ever, regarded this "compromise" as treason to the cause). The emphasis on mediation was, of course, simply an extension of the practice in the better "Kiaps" courts, and I for one had hopes that "mediation" would spread to the settlement of most civil and many petty criminal proceedings (as it had done in those courts).

Autochthony

A second misleading passage is on p. 35, dealing with the Constitution -

> The Constitution of Papua New Guinea is therefore autochthonous because it was made by the legal authority of the people themselves and independent from the legal authority of the former colonial power. In many former British colonies, the independence constitution was made by the United Kingdom government. These colonial constitutions were later found unsatisfactory for the needs of the country and often rejected, for example in Sri Lanka in 1971.

This again is a partial and biased account. *Some* autochthonous constitutions have been successful, some have not; *some* non-autochthonous constitutions have been successful, some have not. Autochthony in the legal sense (the sense in which one would expect it to be used in a legal textbook) is a matter of the legal or extra-legal basis of a constitution, not of its contents or its satisfactoriness. While I for one was an early proponent of the idea of full autochthony for the Papua New Guinea Constitution, it was not because that would make it a substantively better constitution - had it been made (as it could have been made) by virtue of an Australian Act, as the Australian Constitution was made by an English Act, the same substantive result could have been achieved. It would also only be fair to note Roberts-Wray's comment (*Commonwealth and Colonial Law*, p. 291) that "Independence constitutions are not *imposed*" (emphasis added) and, although I for one do not accept them, the practical and legal arguments that he (and others) advance against the concept should not be disregarded.

The legal importance of autochthony, which may be obscured or lost sight of if such partial observations are taken as expressing the justification for it, is that it should make clear, even to the legal mind, a clean break with the past.

Incidentally, Chalmers and Paliwala's reference to "the legal authority of the people" may, in this context, be misleading, because it suggests the question, by what law did the people get their "legal" authority. The point about autochthony is that it denies that such a question can be asked (except perhaps in some metaphysical sense). The principle of autochthony says, *this* is our constitution and all our other law derives from it. It was to make this point quite clear that, for example, all pre-Independence laws in force in Papua New Guinea, whether made by Australia, England or Papua New Guinea, ceased to have effect an instant *before* Independence Day - *Laws Repeal Act* 1975 (P.N.G.), *Papua New Guinea Independence Act* 1975 (Australia) - and were replaced, an instant later on Independence Day, by the National Constitution and the laws that that Constitution adopted (and only by them). It was partly for that reason, also, as well as for more practical reasons of greater adaptability to local circumstances, etc., that the Constitution itself specifically adopted an "underlying law", rather than saying nothing and running the risk of one being implied in reliance on the pre-Independence situation.

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In conclusion , might I say that we as lawyers do a disservice to people generally, and in particular to students, if, through carelessness, over-simplification or bias, we allow our political views or hang-ups to colour what purport to be our statements of legal fact. It is important our lawyers recognize the legal, social and political bases of our legal system, but it is also important that in so doing we keep the distinction between these aspects clear in our own minds. The fact that the political or "colonial" (whatever that expression really means) origins of a law may be disliked does not necessarily make it a bad law; as we all know, a "home-grown" law may be a bad one. As the Prime Minister has pointed out, Independence is no guarantee that one will be right.

C.J. Lynch
Constitutional Draftsman and
Special Legislative Counsel
Department of the Prime Minister
Papua New Guinea.