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OF

PAPUA NEW GUINEA

DECLARATION & DEVELOPMENT OF UNDERLYING LAW

WORKING PAPER NO. 4

SEPTEMBER 1976

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PREFACE

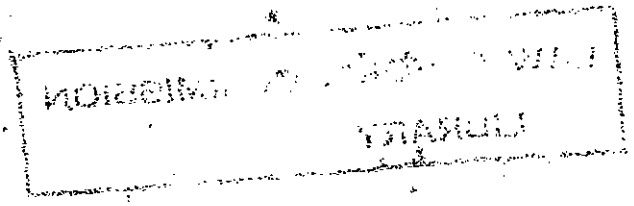
This working paper sets out a draft bill dealing with the declaration and development of the underlying law. Each section of the draft bill is annotated. The major objective of the draft bill is to encourage the rapid but consistent development of a common law of Papua New Guinea based primarily on custom.

This working paper is the most important one so far issued by the Commission because it sets out proposals which, if adopted, will have considerable impact on the way Papua New Guinea's law develops. For this reason the Commission is anxious to obtain views and comments from as many people as possible on the matters raised in the working paper. Views and comments should be directed to -

The Secretary
Law Reform Commission
P. O. Wards Strip
Papua New Guinea

Phone: 258755 or 258941

and they should be submitted before Monday 15th November, 1976.



CHAPTER I - INTRODUCTION

Section 20 of the Constitution of the Independent State of Papua New Guinea provides -

(1) An Act of Parliament 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 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*).

(3) Certain pre-Independence statutes are adopted and shall be adopted, as Acts of Parliament and subordinate enactments of Papua New Guinea, as prescribed by Schedule 2 (*adoption, etc., of certain laws*).

The Minister for Justice, Mr. N. Ebia Olewale, MP has requested the Commission to consider whether it is appropriate to this stage of the development of Papua New Guinea's legal system to pass an Act to give effect to section 20(1) of a Constitution.

It is our view that such legislation should be drafted and considered because we believe that the present provisions in the Schedule 2 of the Constitution relating to the declaration and development of the underlying law are not effective.

It was intended to make a new start on the legal system at Independence. Papua New Guinea kept only the pre-independence statutory law that it wanted and repealed the rest. It adopted very few statutes from foreign countries and most of this legislation was adopted temporarily. A greater role was given to custom. The principles and rules of common law and equity of England were adopted as part of the underlying law, but only to the extent that they there were appropriate and applicable to the circumstances of Papua New Guinea.

The Supreme Court and the National Court were freed from the shackles of pre-Independence precedents.

All of this was done with the intention that the judges and the legal profession would get down to the business of developing a legal system that would take far greater account of the customs and the perceptions of the people than was taken before Independence.

It was hoped that the common law of Papua New Guinea would quickly develop. Unfortunately this has not happened. The judges have moved very slowly, prefering to re-adopt pre-Independence legal rules or the English common law rules than developing new rules to suit conditions in our country. The judges have spent little time considering whether the pre-Independence law or the English law is really appropriate to the circumstances of Papua New Guinea. If that law appears to deal adequately with the problem before them for decision, the judges are likely to use it, and to say, without giving any reasons, that it is applicable to Papua New Guinea. The blame does lie entirely the judges however. There is very little evidence that the profession is putting pressure on the judges to consider developing new legal rules in Papua New Guinea by arguing cases on that basis and by presenting material on custom to the judges for their consideration.

We consider that if the mode of declaring and developing the underlying law was re-stated in a way that requires the profession and the judges to consider customary law and to consider if it meets the needs and aspirations of the people, then a new common law of Papua New Guinea would begin to develop.

But this is not all. The Constitution sets out clear goals for our country to pursue. Self-reliance is one of these. This means that we should embark upon a deliberate policy to develop our own jurisprudence, based largely on our customs and perceptions.

For these reasons we have set out a draft Underlying Law Bill for consideration and comment. We appreciate that no bill will solve all the problems with this area of law. We have included alternative drafts for some sections of the bill and we hope that people will state their preferences on these. We have annotated the bill to explain the way in which its drafted. We hope that this will help elicit useful comment.

The draft bill is intended to replace Parts 1, 2, 3 and 5 of Schedule 2 of the Constitution, a course of action evisaged by Section 20 of the Constitution.

The draft bill does not cover the role of custom in the criminal law. This matter is dealt with in Section 7 of the *Native Customs (Recognition) Act*, 1963. The Commission will issue a working paper on this topic in due course.

CHAPTER 2 - THE ANNOTATED BILL

The draft bill is set out below with each section annotated. Alternative drafts of some sections are provided. The Commission would be grateful comments on the general approach of the bill on the sections themselves and on the policy reasons behind the sections.

The bill is intended to help the development of Papua New Guinea's own common law and to set out how the courts and therefore the practitioners and members of the public find the law. The way the bill is intended to work is briefly summarized below.

When any legal question arizes the first step is to look at the written law ie the Constitution, Organic laws, Acts of Parliament and subordinate legislation. If the written law does not provide the answer then one looks to the rules of underlying law already developed. If they do not provide the answer, then the next step is to look at what are called in the bill, the sources of the underlying law. The first of these is customary law which must be applied unless it is inconsistent with the written law or contrary to the National Goals and Directive Principles, Basic Social Obligations and basic rights set out in the Constitution. The second source is the common law of England, this source can be applied only if customary law is inapplicable. Furthermore English common law shall only applied if its consistent with the written law, the National Goals and Directive Principles, Basic Social Obligations and basic human rights and is applicable to the circumstances of the country. A rule taken from one of the sources, becomes part of the underlying law.

If the sources of law cannot supply an appropriate answer, then the courts have the power to formulate an appropriate rule as part of the underlying law. In formulating these rules, the courts are to take into account the National Goals and Directive Principles, Basic Social Obligations and basic human rights. They can draw analogies from the written law and customary law and may consider the law of foreign countries.

Once rules of the underlying law are made either by application from the two sources or by formulation, the Local and District Courts are bound to follow these. The Supreme and National Courts will also follow them unless they consider that they have become inappropriate to the circumstances of the country. If either the Supreme or the National Court considers that a rule of the underlying law has become inappropriate they have the power to formulate a new rule of the underlying law.

The bill also provides that when the courts are interpreting the written law they shall take into account customary practices and local perceptions.

(LAW REFORM COMMISSION DRAFT)

THE INDEPENDENT STATE OF PAPUA NEW GUINEA

No. of 1976

Underlying Law Bill, 1976

ARRANGEMENT OF CLAUSES

(LAW REFORM COMMISSION DRAFT)

THE INDEPENDENT STATE OF PAPUA NEW GUINEA

A BILL

for

AN ACT

entitled

Underlying Law Act 1976

Being an Act to –

(*a*) state the sources of underlying law; and

(*b*) provide for the formulation of rules of the underlying law; and

(*c*) provide for the development of the underlying law;

and for related purposes.

MADE by the National Parliament to come into operation in accordance with a notice published in the National Gazette by the Head of State, acting with, and in accordance with, the advice of the Minister.

ANNOTATIONS

Section I - INTERPRETATION.

1. The interpretation section defines or describes the terms in constant use throughout the rest of the bill. Because a term does not have to be defined every time it is used, the sections of the bill can drafted be more simply.

2. Subsection (2) sets out the rules for deciding whether a person is a member of a community. This is important for Section 14 of the bill.

1. INTERPRETATION.

(1) In this Act, unless the contrary intention appears -

"Chief Justice" means Chief Justice of Papua New Guinea.
"common law" means the principles and rules common law and equity of England.
"court" means a court within the National Judicial System.
"customary law" means the customs and usages of indigenous inhabitants of the country existing in relating 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.

"Deputy Chief Justice" means Deputy Chief Justice of Papua New Guinea.
"Judge" means the Chief Justice, the Deputy Chief Justice a judge or an acting judge of the National Court of Justice.
"law of foreign country" includes the principles and rules of common law and equity of England.
"National Court" means the National Court of Justice.
"Supreme Court" means the Supreme Court of Justice.
"written law" means the Constitution, Organic Laws, Acts of Parliament, laws made or adopted by or under the Constitution, subordinate legislation made under any of those laws.

(2) For the purposes of this Act -

(*a*) a person is a member of a community if he adheres to or has adopted the way of life of the community or has been accepted by that community as one of themselves irrespective of whether the adherence, adoption or acceptance is effective either generally or for particular purposes.

(*b*) a person ceases to be a member of a community if he adopts the way of life of another community or is accepted by some other community as a member of that community.

Section 2 - ABOLITION OF ROYAL PREROGATIVE.

Under the Schedule 2 of the Constitution much of the Royal Prerogative could become part of the underlying law.

The draft Bill makes it clear that the Royal Prerogative cannot become part of the underlying law. The Royal Prerogative are those powers which the Queen of England can exercise without reference to Parliament. These powers were developed many centuries ago when the Kings of England were virtual dictators. They could do what they liked because the Parliament was too weak to control them. However the English Parliament asserted its supremacy in the 17th century after the English Civil War in which the main issue was whether the King or the Parliament was the more powerful. Since the 17th century the powers of the monarchs of England have slowly diminished. The present Queen of England, Queen Elizabeth II, is a ceremonial Head of State, but she does have a number of powers based on the Royal Prerogative which she could use.

If these powers became part of the underlying law of Papua New Guinea, they would give the Government a source of power outside the Constitution. This is entirely contrary to the concept of Papua New Guinea as a parliamentary democracy operating under a constitution in which it is clear that all three arms of Government have clear limits to their powers. The Parliament is the supreme arm of the Government and the Executive, which is usually called the Government, is responsible to the people through Parliament. The Government is intended to have only those powers given to it by the Constitution or by the National Parliament.

Some aspects of the Royal Prerogative, such as the prerogative of mercy, have been incorporated in the Constitution.

A final reason for excluding the Royal Prerogative from the underlying law is that if there are enormous uncertaintes and ambiguities in the law on the Royal Prerogative and there is always the chance of revival of long dormant rules of the Royal Prerogative that have not been used for centuries in England.

2. ABOLITION OF ROYAL PREROGATIVE.

Notwithstanding the provisions of this Act or of any other law, it is declared that the rules of common law of England known as the Royal Prerogative are not a source of the underlying law.

Alternative formulation

Restate section 3(1) as follows -

(1) The sources of the underlying law are -

(*a*) the customary law; and

(*b*) the common law inforce in England immediately before 16th September, 1975, excluding that part of the common law known as the Royal Prerogative.

Section 3 - SOURCES OF UNDERLYING LAW.

1. The word "sources" is used to indicate that custom and the common law are not by themselves the underlying law, but provide the sources from which the underlying law is to be derived. This helps to indicate the idea that the underlying law is to be developed to suit Papua New Guinea conditions. It is not to be simply a collection of principles and rules adopted from elsewhere.

2. The term "customary law" is used throughout the bill, but it is defined in the same way as a "custom" in the Schedule of the Constitution. That definition is in turn derived from the definition of "custom" in the *Native Custom (Recognition) Act*, 1963.

3. Setting a specific date - and Independence Day, 16th September 1975 is the most appropriate one - for looking at the common law of England, is a matter of convenience. Alternative A, would allow the courts to take into account developments in the common law after 16th September 1975 with a view to incorporating them into the underlying law.

This formulation reduces certainty without adding much because under section 7 of the bill, a post-Independence development of the common law of England could be incorporated into the underlying law by the courts formulating a new rule of the underlying law in its terms.

4. The need for subsection (3) arises from the implications of the decision in *Booth v Booth* (1935) 53 C.L.R.1, in which the High Court of Australia held that a statutory modification of the common law became part of the law of Papua New Guinea by virtue of the reception of the common law, and thus threw into considerable doubt the status in Papua New Guinea of English legislation not otherwise adopted in this country. There has been much controversy as to the effect of *Booth v. Booth*, and there have been decisions which oppose its approach such as *Murray v. Brown River Timber Co. Ltd.* [1964] P. & N.G.L.R. 167, and which support it such as *Re Johns* [1971-72] P.&N.G.L.R. 110.

Section 3 (Continued)

The problem to be solved is what parts of the common law should be sources of the underlying law and in what form? The choices are -

(*a*) All the common law of England that has ever been in force up to 16th September 1975 regardless of any statutory modifications or repeals.

(*b*) Those parts of the common law that were in force in England immediately before 16th September 1975, not including those parts of the common law that had been repealed by statute, before that date, but including in their *unmodified* form those parts of the common law which had been modified by statute in England.

(*c*) Those parts of the common law that were in force in England immediately before 16th September 1975, not including those parts of the common law repealed by statute in England before that date but including, in their *modified* form, those parts of the common law which had been modified by statute in England.

Choice (a) is reflected in subsection (3) whilst choice (b) is reflected in alternative B. Choice (c) is a restatement of the *Booth v Booth* decision which introduces undertainties about what English modifying statutes are in fact adopted. Choice (a) leaves fewer gaps in the common law source of the underlying law but it leaves available for consideration many archaic common law rules which have been manifest. Choice (b) is far from perfect, and whilst it overcomes most of the disadvantages of choices (a) and (b) it creates its own problem of requiring research to discover the exact nature of certain common law rules before they were modified by statute.

There are problems with the present statement of the law in this area found in Schedule 2.2 The common law of England is adopted in the state it was in immediately before 16th September 1975, but the Schedule 2.2 (3) goes on to say notwithstanding any revision of it by any statute of England. Schedule 2.2 (3) is unnecessary and the word "revision" in it raises the problem what does it mean? Does it mean both "modification" and the "repeal" or does it mean only "modification"?

3. SOURCES OF UNDERLYING LAW

(1) The sources of underlying law are -

(*a*) the customary law; and
(*b*) the common law in force in England immediately before 16th September, 1975.

(2) Customary law shall be applied with the qualifications and subject to the conditions set out in this Act.

(3) The principles and rules of the common law shall be applied notwithstanding their modification or repeal by a statute in England, unless the modifying statute has been adopted in Papua New Guinea.

Alternative formulations

A. (1) The sources of underlying law are -

(*a*) the customary law; and
(*b*) the common law and equity as currently in force in England.

B. (3) The principles and rules of common law shall be applied notwithstanding their modification by statute in England, unless the modifying statute has been adopted in Papua New Guinea.

(4) For the avoidance of doubt it is declared that the principles and rules of common law repealed in England by legislation before 16th September 1975 are not part of the common law for the purposes of this Act.

Section 4 - APPLICATION OF SOURCES OF UNDERLYING LAW.

1. The section applied provides that rules of customary law or the common law are not applied automatically. Both common law and customary law are sources of the underlying law, rather than the underlying law itself. They have to satisfy certain conditions before they become part of the underlying law. As regards the common law, the adoption on the basis of certain qualifications is understandable, and needs little justification.

2. The section also sets out the qualifications on the application of customary law. Before these qualifications are discussed, it may be helpful to set out the perspective on customary law which has influenced the draft.

The unwritten law of a community is determined by its socio-economic characteristics. As these characteristics change, the law also changes to reflect the changes in society. Whilst the nature and rules of the law may also affect the pace of change, it would be correct to say that it is the socio-economic characteristics, and in particular the level of technology the community employs, that have a decisive influence on the law. Many of the features of the customary law of the communities in Papua New Guinea rise from the nature of the economies of these communities, and the relationships of dependence, co-operation or hostility among its members or vis-a-vis members of other communities are in significant ways influenced by economic factors. Another influence on the law is the nature of the relationship of a local society to the larger national and international community, in particular, the ways in which its economy is tied to that community, e.g. the penetration of cash cropping, the system of marketing, the nexus between the rural areas and the cities. In all these aspects, considerable changes are taking place in Papua New Guinea. Often the law accommodates itself to these changes, but sometimes it lags behind them, and occasionally it acts as a brake on these changes. What should be the policy in this regard -

Section 4 - (Continued)

(i) should it facilitate these socio-economic changes by repealing the old law and enacting new ones more conducive to certain kinds of changes? or,

(ii) should it seek to prevent the socio-economic changes by entrenching the customary law, or

(iii) should a selective approach be adopted, so that some changes are encouraged, while others are discouraged?

The Constitution has adopted the selective approach. In chapter II of its report, the Constitutional Planning Committee said -

The process of colonization has been like a huge tidal wave. It has covered our land, submerging the natural life of our people. It leaves much dirt and some useful soil, as it subsides. The time of independence is our time of freedom and liberation. We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundations of our ancestral land. We must take the opportunity of digging up that which has been buried. We must not be afraid to rediscover our art, our culture and our political and social organizations. Wherever possible, we must make full use of our ways to achieve our national goals. We insist on this, despite the popular belief that the only viable means of dealing with the challenges of lack of economic development is through the efficiency of Western techniques and institutions.

99. We should use the good that there is in the debris and deposits of colonization; to improve, uplift and enchance the solid foundations of our social, political and economic systems. The undesirable aspects of Western ways and institutions should be left aside. We recognise

Section 4 (Continued)

> *that some of our own institutions impose constraints on our vision of freedom, liberation and fulfilment. These should be left buried if they cannot be reshaped for our betterment.*

The National Goals and Directive Principles spell out the areas for consolidation and the directions for change, and these have clear implications for the future of customary law. While the basis of our development must be traditional values and practices, the National Goals recognise that some of these values and practices are incompatible with the desired goals, e.g. equal rights for women.

Subsection (1) provides that customary law shall apply unless it is inconsistent with written law, the National Goals and Directive Principles and Basic Social Obligations or the basic rights guaranteed by the Constitution. These qualifications are different from the present restrictions on customary law. Under Schedule 2, custom is inapplicable if it is inconsistent with the law, or if it is "repugnant to the general principles of humanity". The draft removes that qualification as well as the "repugnancy", "injustice" and "public interest", qualifications in section 6 of the *Native Customs (Recognition) Act*, 1963. These qualifications are vague and can be used by a court unsympathetic to customary law to exclude unduly its application. If the application of customary law is made subject to the National Goals and the basic rights (it is subject to the latter anyway), this should ensure the necessary and adequate safeguards.

Subsection (2) provides the conditions for the application of the common law. Conditions (a) and (b) are the same as provided in Schedule 2.2 (1) of the Constitution but (c) and (d) are new. But the subsection changes the emphasis. Under Schedule 2.2 (1) of the Constitution, the common law is "applicable unless", the draft provides that it "shall *not* be applied unless". The draft thus removes the presumption that the common law of England is appropriate to the conditions of Papua New Guinea. It also makes it clear that the courts must consider applying customary law before they consider applying the common law of England.

Section 4 (continued)

Subsections (3) and (4) reinforce the points made above. If a court does not apply a rule of customary law, it has to justify its *refusal* by showing clearly why it thinks that the rule should not be applied. If it does apply a rule of the common law, it has to justify the application. At present the courts seldom discuss if the rule of the common law they apply is appropriate. They blandly state that it is. In some of these cases if the implications of the rule were analysed in terms of the National Goals and Directive Principles, it may well be found unsuitable.

Subsection (5) is a statement of logic. Once a source of the underlying law is applied, it is incorporated into the underlying law. The underlying law can be varied at a later date if it is not appropriate to the circumstances of the country, see section 7.

4. APPLICATION OF SOURCES OF UNDERLYING LAW

(1) Customary law shall apply unless -

(*a*) it is inconsistent with written law; or
(*b*) its enforcement would be contrary to the National Goals and Directive Principles and Basic Social Obligation established by the Constitution; or
(*c*) its enforcement would be contrary to the basic rights guaranteed by Division III.3 (*Basic Rights*) of the Constitution.

(2) The common law shall not be applied unless -

(*a*) it is consistent with written law; and
(*b*) it is applicable and appropriate to the circumstances of the country; and
(*c*) its enforcement would not be contrary to the National Goals and Directive Principles and Basic Social Obligations established by the Constitution; and
(*d*) its enforcement would not be contrary to the basic rights guaranteed by Division III.3 (*Basic Rights*) of the Constitution.

(3) A court which refuses to apply a rule of customary law shall give reasons for its refusal in terms of Subsection (1) (a), (b) and (c).

(4) A court which applies the common law shall give reasons for the application in terms of Subsection (2)(a), (b), (c) and (d).

(5) Customary law and the common law applied under Subsection (1) and (2) respectively shall become part of the underlying law.

Section 5 - DUTY OF COURTS WITHIN THE NATIONAL JUDICIAL SYSTEM.

The section states the general duty of the courts to develop the underlying law. It follows the provisions of the Schedule 2.4 of the Constitution, except that it omits the words "from time to time" and the words "except in so far as it would not be proper to do so by judicial act" at the end of the section. The first omission is made because the words seem redundant, but there is no harm in retaining them if it is feared that the courts might "freeze" the underlying law prematurely. However this matter is best taken care of by liberalising the rules of precedent. The second omission is redundant but it may provide an excuse for a court unwilling to discharge its law making responsibility under the bill.

5. DUTY OF COURTS WITHIN THE NATIONAL JUDICIAL SYSTEM.

It is the duty of all courts in the National Judicial System, and expecially 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.

SECTION 6 - APPLICATION & FORMULATION OF THE LAW.

1. This is the key section of the bill. It lays down the manner in which the law is to be applied. Written law takes precedence. If there is no written law dealing with the issue, then the underlying law, Papua New Guinea's own common law, is applied. If no rule of the underlying law deals with the issue, then the common law is looked to. If either the customary law or the common law are applied, then the rule applied becomes part of the underlying law. If neither the customary law nor the common law is applied, then the court may formulate an appropriate rule to become part of the underlying law. Formulation of rules of the underlying law is dealt with in Section 7.

2. The section is also important because it determines the relationship between common law and customary law, and aims to reverse the existing situation. Under the section, customary law will become the primary source of the underlying law and common law, the secondary. The general presumption is that customary law is to be applied, and the common law applies by way of an exception. The common law is to be applied only if -

(*a*) the parties intended that law to apply; or

(*b*) if the transaction or matter in question (e.g. judicial remedies against administration action) is not known to the customary law; or

(*c*) there is no relevant rule of customary law which can be applied by analogy.

It is intended under (c) that the courts will have to consider whether there are principles or rules of customary law which can be modified and extended to the matter at issue before they turn into the common law. The first exception to the application of customary law is intended to deal with, such things as transactions between expatriates, or large scale

Section 6 (continued)

commercial transactions which the parties want to be governed by the common law. It is possible that this exception may be used to restrict severely the scope of customary laws and to bring particular matters unjustly within the ambit of the law contrary to the spirit of the bill.

3. The proposed relationship between the common law and customary law reflects what is implicit in "directive" parts of the Constitution. It will, no doubt, be argued that the aspirations of the draft bill are out harmony with the economic and social developments of the country, the development of the "modern" commercial sector of the community in particular. It is true that to a significant extent, the continued viability of customary law will depend on the manner in which it can be developed, and adapted to changing needs and conditions. The draft entrusts responsibilities to the judiciary in this respect, but even if the courts fulfil that responsibility constructively and imaginatively, other forms of action (e.g. legislation) may be necessary to ensure that proper recognition and development of customary law.

4. Subsection (4) provides that if a court finds that there is no rule underlying law already in existence and there is no rule of either the customary law or the common law that is applicable to the matter before it, then the court is to formulate an appropriate rule of the underlying law. The section sets out the criteria by which the new rule is to be formulated. It follows closely the provisions of Schedule 2.3 of the Constitution, but differs from it in the following respects -

(*a*) it permits the courts to look at the laws of any other country, not only those which have a legal system similar to Papua New Guinea. What is a"similar legal system"? It is not easy to determine what a "similar legal system" is, and there is a danger of being attracted by superficial similarities. A more relevant criterion than similarity of legal system is the similarity of social, economic and political policies, and there is no reason

Section 6 (Continued)

why our courts should not look to progressive Third World countries which may, for example, have civil law systems of law.

(b) It omits the reference to the decisions of the courts who exercise or have exercised jurisdiction in this country. These decisions are dealt with in sections 17 and 18.

(c) it omits the reference to the "circumstances" of the country from "time to time", as such a provision seems redundant. Such a requirement is inherent in the notion of "appropriate".

6. APPLICATION AND FORMULATION OF THE LAW.

(1) In any proceedings where the written law does not apply, the court shall apply the underlying law.

(2) If the underlying law does not apply to the subject-matter of the proceedings then the customary law shall apply unless -

(*a*) the court is satisfied that the parties intended that customary law should not apply to the subject-matter of the proceedings; or

(*b*) the subject-matter of the proceedings is unknown to customary law and cannot be resolved by analogy to a rule of customary without causing injustice to one or more of the parties.

(3) If neither the underlying law nor the customary law apply to the subject-matter of the proceedings, then the court shall consider applying the common law under the criteria set down in Section 4 (2).

(4) If none of the underlying law, customary law or the common law apply to the subject-matter of the proceedings, the court shall formulate a rule of the underlying law appropriate to the circumstances of the country having regard to -

(*a*) the National Goals and Directive Principles and Basic Social Obligations established by Constitution; and

(*b*) the basic rights guaranteed by Division III.3 (*Basic Rights*) of the Constitution; and

(*c*) analogies to be drawn from relevant written law and customary law; and

(*d*) the law of foreign countries.

(5) Customary law shall not cease to apply by operation of Subsection (2)(a) if the court is satisfied that a party to the matter intended to avoid, for an unjust purpose, the consequences of the customary law.

SECTION 7 - DEVELOPMENT OF THE UNDERLYING LAW.

1. The draft bill is based on the premise that the nature of society in a country changes over time and that the law must change with it. Rules of the underlying law appropriate in one period may well be inappropriate in another period. This section empowers the Supreme and National Courts to replace inappropriate rules of the underlying law.

2. This section covers what was intended by the constitutional draftsmen in his constant references to "from time to time" in the Schedule 2 of the Constitution.

7. DEVELOPMENT OF THE UNDERLYING LAW.

Where either the Supreme Court or the National Court considers that a rule of the underlying law is no longer appropriate to the circumstances of the country, it may formulate a new rule, appropriate to the circumstances of the country, as part of the underlying law, having regard to -

(*a*) the National Goals and Directive Principles and Basic Social Obligations established by the Constitution; and

(*b*) the basic rights guaranteed by Division III.3 (*Basic Rights*) of the Constitution; and

(*c*) analogies to be drawn from relevant written law and customary law; and

(*d*) the law of foreign countries

SECTION 8 - REMEDIES.

The section is intended to assist in the development of a Papua New Guinean common law by allowing remedies from both sources of the underlying law, customary law and English common law, as well as from statute law to be used by the courts. The section by clear implication empowers the courts to develop new remedies where these appear desirable.

8. REMEDIES.

In any proceedings before a court, where the remedy sought is based on the underlying law, the court may grant any remedies that are available under either source of the underlying law or under a formulated rule of the underlying law.

SECTION 9 - EVIDENCE & INFORMATION.

There is no comparable provision in Schedule 2 of the Constitution. Since the draft bill places so much emphasis on a creative judicial process, and requires the court to take into account social and policy considerations, it is important to ensure that the parties before a court are free to produce arguments, data and opinion on points which are neither matters of fact nor law. It is probable that under existing law, such arguments, etc. would be inadmissible.

9. EVIDENCE AND INFORMATION.

If in any proceedings a court is considering whether -

(*a*) to apply a rule of customary law; or

(*b*) to apply a principle or rule of common law or equity of England; or

(*c*) to formulate a rule of the underlying law,

the parties in the proceedings shall be permitted to bring evidence or information to help the court to decide;

(*a*) whether it should apply a rule of customary law; or

(*b*) whether it should apply the common law; or

(*c*) whether it should formulate a rule of the underlying law; and

(*d*) the manner in which a rule of the customary law or underlying law should be formulated.

SECTION 10 - REVIEW INSTITUTED BY CHIEF JUSTICE.

1. The purpose of this section is to enable the judges to keep under review the development of the underlying law to ensure that it is consistent and in conformity with the provisions of the Bill. Schedule 2.4 of the Constitution places the judges under a duty to see the underlying law develops as a coherent system of law appropriate to the circumstances of the country.

2. The section operates in a different way, however, from Schedule 2.3(2) of the Constitution. In effect the section requires the magistrates to refer decisions they make involving law development to the Chief Justice. If the Chief Justice or his brother judges consider the decisions ought to be reviewed, then a review will take place.

3. Schedule 2.3(2) of the Constitution requires the lower courts to refer a law development issue to the Supreme Court for decision. If this requirement was followed to the letter, the Supreme Court would be flooded with references. The judges can keep proper control over the development of the law consistent with the duty imposed on them by section 5 of the bill if they are given the power of review set out in this section.

4. The section allows the judges to consider the formulated rule of underlying law in its context rather than in abstract as proposed by Schedule 2.3(2) of the Constitution. The approach in the bill also saves a protracted adjournment whilst the issue is prepared and argued and then decided by the Supreme Court.

10. REVIEW INSTITUTED BY CHIEF JUSTICE.

(1) If a court other that the Supreme Court or National Court makes a decision under Section 6 the court shall, forthwith, send a copy of the decision to –

(*a*) the Chief Justice; and

(*b*) the Chairman of the Law Reform Commission.

(2) The Chief Justice shall consider the decision and if he considers that it should be reviewed, he shall, within 40 days of receiving it, refer to it the National Court and call upon the parties to the proceedings and such other persons as he considers appropriate to present arguments as to the appropriateness of the decision.

(3) If the National Court changes the decision it shall state what it considers to be the appropriate rule of the underlying law to dispose of the case.

(4) If the National Court changes a decision in the exercise of its powers under Subsection (3), a person aggrieved by the decision of the National Court may appeal to the Supreme Court within 40 days after the decision in question or within such further period as is allowed by a judge upon application made to him within that period of 40 days and the appeal shall be conducted as if it was an appeal under the *Supreme Court Act*, 1975.

SECTION 11 - REVIEW INSTITUTED BY LAW REFORM COMMISSION.

1. The Law Reform Commission has a special responsibility under Schedule 2.14 of the Constitution" to investigate and report to Parliament and the National Executive on the development and on the adaption to the circumstances of the country of the underlying law and on the appropriateness of the rules and principles of the underlying law to the circumstances of the country from time to time." The Commission also has the power under section 19 of the Constitution to challenge in the Supreme Court the constitutional validity of any law or proposed law.

It is consistent with these powers for the Commission to have power to monitor developments in the underlying law and to test in the National Court those decisions which it considers inconsistent with the proper development of the underlying law.

2. Subsection (1) requires the reference to be made within 40 days of the Chairman of the Commission receiving the decision. He must consult with his fellow commissioners before a reference could be made.

3. Subsection (2) requires the Chairman of the Commission to argue any reference he makes to the Court and he may, with the leave of the Court, ask other people he thinks will help to appear on the reference.

11. REVIEW INSTITUTED BY LAW REFORM COMMISSION.

(1) Where the Chairman of the Law Reform Commission receives a copy of a decision made under Section 6, he shall consider the decision and if, after consulting the other members of the Law Reform Commission, he believes the decision to be inconsistent with the proper development of the underlying law, he may, within 40 days of receiving the decision, refer it to the National Court for review and call upon the parties to the proceedings to present arguments as to the appropriateness of the decision.

(2) The Chairman of the Law Reform Commission shall appear or be represented at a review instituted by him under Subsection (1) and may, with the leave of the Court, call upon other persons to make submissions to the Court in relation to the decision.

(3) If the National Court changes the decision it shall state what it considers to be the appropriate rule of the underlying law to dispose of the case.

(4) If the National Court changes a decision in the exercise of its powers under Subsection (3), a person aggrieved by the decision of the National Court may appeal to the Supreme Court within 40 days after the decision in question or within such further period as is allowed by a judge upon application made to him within that period of 40 days and the appeal shall be conducted as if it was an appeal under the *Supreme Court Act*, 1975.

SECTION 12 - DUTY OF COUNSEL IN RELATION TO CUSTOMARY LAW.

If customary law is to be the primary source of the underlying law and if the courts are to be called upon to incorporate it into the underlying law, counsel must be required to play a greater role in researching customary law and bringing the relevant rules of customary law to the attention of the court. Discovering the customary law is a painstaking business and we believe that counsel should be placed under a duty to encourage them in this difficult but creative task.

12. DUTY OF COUNSEL IN RELATION TO CUSTOMARY LAW.

Counsel appearing in proceedings in which a question of whether customary law applies arizes are under a duty to assist the court by calling evidence and obtaining information and opinions that would assist the court in determining -

(*a*) the nature of the relevant rules of customary law; and

(*b*) whether or not to apply those rules in the proceeding.

SECTION 13 - ASCERTAINMENT OF CUSTOM.

1. The section provides the manner in which customary law may be proved. It differs from section 5 of the *Native Customs (Recognition) Act*, 1963 by providing that customary law should be a question of law, not of fact, i.e. that the courts should take judicial notice of customary law. However it is unrealistic to expect that all the courts will have knowledge of, or ready access to knowledge of customary law, thus the section provides for a variety of ways of ascertaining customary law.

2. Subsection (3) is intended to overcome the limitations on accepting fresh evidence that the Supreme and National Courts may impose on themselves. A hint of such limitations is contained in the pre-Independence case *R v Ivoro* [1971-72] P & N.G.L.R. 374 at 379.

13. ASCERTAINMENT OF CUSTOMARY LAW.

(1) Any question as to the existence or content of a rule of customary law is a question of law and not a question of fact.

(2) When determining a question as to the existence or content of a rule of customary law, the court shall consider the submissions made by or on behalf of the parties and may -

(*a*) refer to cases, books, treaties, reports or other works of reference; and

(*b*) refer to statements and declarations of customary law made by local, provincial or other authorities in accordance with any law empowering them to make such statements and declarations; and

(*c*) consider evidence and information concerning the customary law relevant to the proceedings presented to it by a person whom the court is satisfied has knowledge of the customary law relevant to the proceedings; and

(*d*) of its own motion obtain evidence and information and obtain the opinions of persons as it thinks fit.

(3) Notwithstanding any provision in any other law, when a court is hearing an appeal or conducting a review and is considering a question of customary law, the court may make further enquiries into customary law by exercising the powers set out in Subsection (2).

SECTION 14 - CONFLICT BETWEEN DIFFERENT REGIMES OF CUSTOMARY LAW.

1. When the court has decided to apply customary law, a further question will arise in a number of cases, which customary law? The parties may belong to different ethnic communities with different rules of customary law, or the parties may live in an area where their own law does not apply. It is therefore necessary to provide rules to choose from the different systems of customary law. In order to stimulate comment on this section, the issues involved in it are set out below -

(*a*) Rules of conflict of law are difficult to draft and difficult to apply, especially as it is in the lower courts that cases requiring their application will most often arise. The choice may be between a set of detailed rules or a general direction to the courts to apply the system of customary law that it thinks will do justice in the case. It is the latter approach which is adopted in the *Native Customs (Recognition) Act*, 1963.

(*b*) There is also the problem of definition. Who is to be subject to customary law? Should only a person born into a community be subject to its customary law? Should the customary law of community X be applicable to a person who, although born into community Y, has lived for a number of years among community X - subject perhaps to a further condition - that he has adopted the way of life of community X or been accepted by them? Should an expatriate be deemed subject to the customary law of a community on similar conditions? Should it be possible for a person to move out of the system of customary law of a community on similar conditions? Should it be possible for a person to move out of the system of customary law into the common law e.g., by adopting the life style of expatriates? Should the law permit, but discourage such trends? There will be increasing migration of people within Papua New Guinea, and greater contact between persons from different parts of the country. There will also be great social

SECTION 14 (Continued)

and economic changes in people's life especially in the urban areas. How far should the conflict of law rules anticipate and provide for these changes?

(c) It is possible to deal with conflict of laws problems in many ways. A rule can be made that, as a general rule, the applicable law is that of the area of jurisdiction of the court which hears the case; or specifying that each person has his own law which he carries with him and the applicable law is that one of parties. Both of these methods have their advantages and disadvantages. The first is easier to administer, but the second may give results more proximate to the expectations of the parties. The first provides greater promise than the second of the emergence of a genuine common law of Papua New Guinea.

2. The draft differs from both these approaches, but it tends to emphasize the personal law approach in Subsection (1) (a) (b) and (c). Subsection (1) (d) gives the court a broad discretion to apply the customary law it considers appropriate in a wide range of cases. It should be remembered that the law relating to disputes of customary land is now found in the *Land Dispute Settlement Act*, 1975 and so this draft bill does not affect those disputes.

3. The two formulations of Subsection (2) are intended to help the court decide what customary law to apply when it is difficult to resolve the conflict. The first formulation is more specific than the alternative one. The alternative one gives the court an unfettered discretion to apply the customary law it prefers in a situation of conflict.

14. CONFLICT BETWEEN DIFFERENT REGIMES OF CUSTOMARY LAW.

(1) Where customary law is applicable to the subject-matter of any proceeding the particular customary law to be applied shall be determined by the following rules -

(*a*) where the parties belong to the same community, the customary law of that community;

(*b*) where the parties belong to communities with different rules on the matter, the customary law that the parties intended to govern the matter, or, if no such intention can be discovered, the customary law that is, in the opinion of the court, most appropriate to the matter;

(*c*) where the matter concerns a question of succession, the customary law of the community to which the deceased belonged, except with regard to interests in land in which case the customary law of the place where the land is situated shall apply;

(*d*) in all other cases the court shall apply the customary law it considers most appropriate to the particular case.

(2) In deciding which customary law to apply under Subsection (1) (b) and (d) the court shall have regard to -

(*a*) the place and nature of the transaction; and

(*b*) the nature of residence of the parties.

Alternative Formulation

(2) Where in a proceedings before a court a question arizes at to which of two or more systems of customary law shall prevail, and the court is not satisfied on the evidence before it as to that question, the court shall consider all the circumstances of the matter and shall adopt that system of customary law which it considers the justice of the case requires.

SECTION 15 - RES JUDICATA.

1. The section is intended to make it clear that the English common law rule of *res judicata* is part of the underlying law, but that the rule may be changed in future in Papua New Guinea by statute or by judicial development of the law. Schedule 2.8 of the Constitution left the source of the rule of res judicata unidentified and did not state under what conditions it was adopted into Papua New Guinea.

2. The section differs from Schedule 2.8(1) by not refering to judical precedent, judicial comity or the rules of private international law.

3. Part V of the bill purports to set out those rules. Any gaps that emerge should be filled by the formulation of an appropriate rule of the underlying law if it is considered that the English common law rules of judicial precedent are not to be transferred to Papua New Guinea.

4. Judicial comity should be left for the development of local rules. It should be remembered that the members of the pre-Independence Supreme Court did not consider themselves bound by the decisions of their brothers and were prepared to differ from them. (See, for example, *R v Kakius Isiura* [1964] P & N.G.L.R. 84, *Pasul v Robson* judgment 818 and *Kakore v Sing*, judgment 820).

5. The rules of private international law are rules of the English common law and they should be considered for acceptance in Papua New Guinea under the conditions laid down in the bill.

15. RES JUDICATA

(1) Subject to Subsection (c), for the avoidance of doubt, it is declared that the rule of the common law of England known as *res judicata* is part of the underlying law.

(2) Except to the extent set out in this part, nothing in this part affects the rule of *res judicata* referred to in Subsection (1).

(3) Nothing in this section precludes the variation or repeal of the rule of *res judicata* by the Supreme Court or the National Court under this Act or by operation of any written law.

SECTION 16 - RULES OF PRECEDENT.

1. It is appropriate that the final court of appeal in any country is not bound by its own decisions, because the nature of society in every country changes over time which means that some decisions that were appropriate in one period may be inappropriate in another. Because society is changing so rapidly in Papua New Guinea, it is even more important that the Supreme Court not be bound by its own decisions. This fact is recognized in Schedule 2.9(1) of the Constitution.

2. The judges of the pre-Independence Supreme Court did not consider themselves bound by the decisions of their brothers. Of course, they did not refuse to follow each other's decisions except for good reason. It is appropriate that the National Court develop the same approach. Since *Young v Bristol Aeroplane Co. Ltd.* [1944] KB 718, the Court of Appeal in England has considered itself bound by its own decisions. This has caused a considerable number of problems for that court over the years. The most recent difficulty to emerge can be seen in *Farrell v Alexander* [1976] 1 ALL ER 129. The English rule is entirely inappropriate for a court with a law development role.

This provision reflects Schedule 2.9(2) of the Constitution but differs from it by not providing that where more than 1 judge sits on a case in the National Court has that decision has greater authority than the decision of a single judge. That provision could cause considerable difficulties and the experience of *R v Ebulaya* [1964] P & N.G.L.R. 200 in which the 4 judges expressed differing views of most of the issues in the case should serve as a warning.

3. Subsection (3) which is similar to Schedule 2.9(3) and (4) of the Constitution that the inferior courts are bound by the decisions of the superior courts. This provisions is necessary to assist in the coherent development of a common law of Papua New Guinea.

16. RULES OF PRECEDENT.

(1) All decisions of law made by the Supreme Court are, binding on all other courts but not on itself.

(2) Subject to Section 17, all decisions of law of the National Court are binding on all other court except the Supreme Court and itself.

(3) All decisions of law by a court other than the Supreme Court or the National Court are binding on those courts whose decisions may be appealed to it or may be reviewed by it.

SECTION 17 - CONFLICT OF PRECEDENT.

This section provides a simple solution to the problem of conflict of precedent than Schedule 2.10 of the Constitution. The section is consistent with the ideas that the lower courts should have some law development powers and that the common law of Papua New Guinea should develop along the lines set by the National Goals and Directive Principles and Basic Social Obligations. The section also avoids the delays built into the scheme set out in the Schedule.

17. CONFLICT OF PRECEDENT.

When it appears to a court that there are more decisions of law than one which are binding on it by operation of Section 16 and that, in relation to the matter before it, the decisions are conflicting, the court shall apply that decision which appears to it to be most compatable with the National Goals and Directive Principles and Basic Social Obligations.

SECTION 18 - STATUS OF DECISIONS OF FOREIGN & PRE-INDEPENDENCE COURTS.

1. The section is intended to allow the courts to consider decisions of any courts whether they are courts from a legal system similar to that of Papua New Guinea or not. Pre-Independence decisions are to have no binding or persuasive effect. This is consistent with the idea that Independence meant a new start in Papua New Guinea's legal system.

2. The section specifically indicates that foreign or pre-Independence decisions have neither binding nor persuasive effect in order to allow the courts to look for helpful solutions to legal problems, without feeling required to follow or distinguish those decisions. If the post-Independence courts are to be free to develop a Papua New Guinean common law they must not be fettered by outside decisions which reflect the perceptions and world-views of other societies.

3. Even if decisions are "persuasive" only, this implies that they will have to be "considered" and "rejected" before the court may formulate a rule of the underlying law.

4. The section differs in emphasis from Schedule 2.12 of the Constitution dealing with outside decisions for the reasons set out above.

18. STATUS OF DECISIONS OF FOREIGN AND PRE-INDEPENDENCE COURTS.

Nothing in this part shall prevent a court from considering the decisions of foreign courts or the decisions of any of the courts exercising jurisdiction in Papua New Guinea before Independence but none of these decisions are of binding or persuasive effect.

SECTION 19 - PROSPECTIVE OVER-RULING.

This section is virtually identical with Schedule 2.11 of the Constitution. It will help reduce the adverse effect on individuals of a changes in the law made by the courts.

19. PROSPECTIVE OVER-RULING.

(1) Subject to this Act, when over-ruling a decision of law or making a decision of law that is contrary to previous practice, doctrine or accepted custom, a court may, for a special reason, apply its decision of law only to situations occuring after the new decision.

(2) In the circumstances described by Subsection (1), a court may apply to a situation a decision of law that was over-ruled after the occurence of the situation, or a practice, doctrine or custom that was current or accepted at the time of the occurence of any relevant transaction, act or event.

(3) In a case to which Subsection(1) or (2) applies, a court may make its decision subject to such conditions and restrictions as to it seem just.

SECTION 20 - INTERPRETING THE WRITTEN LAW.

1. The way the courts interpret the written law has considerable impact on the meaning of the law. When the courts decide what factual situations the written laws apply to, they also introduce their perceptions of how the law affects people's life styles, behaviour, personal and commercial arrangements. The courts make a lot of policy decisions under the guise of interpreting the written law. This is unavoidable and on many occasions has good effects.

The Constitution contains a number of provision relating to the interpretation of Acts of Parliament. Section 158(2) requires the Courts to give paramount consideration to the dispensation of justice when interpreting the laws.

Section 109(4) provides that Acts of Parliament "shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the law according to its true intent, meaning and spirit", whilst section 25(3) makes oblique references to the National Goals and Directive Principles. It provides that where a law can reasonably be understood "without failing to give effect to the intention of Parliament or this Constitution in such a way as to give effect to the National Goals and Directive Principles or at least not to derogate them, it is to be understood, applied or exercised and shall be enforced in that way."

None of these provisions requires customary practices or local perceptions to be taken into accout when interpreting laws.

2. Subsection (1) is intended to avoid the infiltration of foreign practices and perceptions into the law which happens as a result of the courts interpreting the written law of Papua New Guinea in the light of

precedents made from other societies.

3. A considerable amount of Papua New Guinea's written law has been imported from Australia and England. Subsection (2) allows the courts to look to see how those written laws have been interpreted in their country of origin. But the Subsection is meant to apply only when the courts are unable to interpret the law by reference to Subsection (1).

4. The section will not affect the provision of the *Interpretation (Interim Provisions) Act* and it will operate only where the words of the law being interpreted are not clear.

20. INTERPRETATION OF WRITTEN LAWS.

1. When interpreting any provision of, or any word, expression or proposition in, any written law, the courts shall, give effect to any relevant customary practice, usage or perception recognised by the people to be affected as a result of the interpretation.

2. Subject to Subsection (1), when interpreting any provision of, or any word, expression or proposition in, any written law, the courts may consider how the courts in foreign juridictions have interpreted indentical or similar provisions, words, expressions or propositions.