LEGAL DEVELOPMENT IN PAPUA NEW GUINEA: THE PLACE OF THE COMMON LAW

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The notion that the common law has been received into the legal system of Papua New Guinea is widely held by both lawyers and non-lawyers, and its validity is generally thought to be self-evident. There have even been lengthy studies of the reception of law provisions and of the manner in which these provisions have been or might be considered by the courts.[1] I shall not attempt in this essay to cover this ground again. Instead, I shall examine the notion of common law reception as an example of the kind of legal system that operates in Papua New Guinea. I shall then attempt to judge the significance of the common law to this country by analysing the matter in which the legal system has functioned in Papua New Guinea society.

The analysis will be historical. Although this has value in itself, an examination of the historical place of the common law has contemporary importance. The period since the commencement of the 1972 House of Assembly has seen major changes in the social and economic policies of the government in Papua New Guinea, and all sides are now agreed on the need for law reform. These policies will necessarily impinge on the legal system which must change to reflect new values and to facilitate their implementation.

Mistaken views about the real significance of the common law could distort law reform. The common law system has developed in and is adapted to western societies and an unthinking application of the common law system to Papua New Guinea could make much of the legal system dysfunctional in this society. In the past, policies about the kind of court structure, the kinds of judges, the appropriate laws, legal

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1 H. Gibbs, "The laws of the Territory of New Guinea: their constitutional source and basic content", (1945) L. M. Thesis, University of Queensland; R.S. O'Regan, *The Common Law in Papua New Guinea* (1971).

education and legal drafting have been influenced by the common law approach. As a result, administrative officers and politicians, and many ordinary Papua New Guineans, see the legal system as an alien institution. For example, the former Minister for Justice, Mr John Kaputin, has described the law as "a colonial weapon."[2] And the Chief Minister, Mr Michael Somare, after stating that the received law had revolutionised Papua New Guinea society declared: "Now we are seeking to reform the law so it will again be a revolutionary force in developing the nation - but this time the law will be tailor-made for our own society and circumstance."[3]

It is hoped that this essay will contribute to law reform by providing both lawyers and non-lawyers with a clearer view of the role of the common law in the legal system. The essay will be divided into two parts. First will be an historical analysis of the significance of the common law model in the legal development of Papua New Guinea. Second, the future role of this model will be considered.

I. *The common law in Papua New Guinea*

English law was "received" in Papua New Guinea as a result of colonisation. The legal systems that existed in the country prior to annexation did not suit the needs of the colonisers.[4] These needs were met by the creation of a court system based

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2 J. Kaputin, "A Policy Statement" (Mimeo, November 1974).

3 M. Somare, "Speech to N.S.W. Law Society" (Press Release, 19 October 1973).

4 For an analysis of the indigenous legal system, see Epstein, "Law, Indigenous," in *Encyclopedia of Papua New Guinea* (1972) 631. Papua was colonised by the British and New Guinea by the Germans in 1884. German law was received in New Guinea until 1921, but no analysis of this period is attempted.

on common law models and the reception of English common law.[5] The position regarding statute law is more complex. Local legislatures were soon established, but provision was also made for the application of English and Australian statute law. It is difficult to be certain how much of this law applies, for the residuum is such of the statute law of England as applied in New South Wales in 1828.[6]

This system could potentially apply to relations between the colonisers, between the colonisers and the colonised, and between the colonised. However, the social facts were such that it only rarely applied in the latter two categories. Relations between the colonial administration and the colonised were regulated through a special system of courts and by a special body of law (supplemented by the Criminal Codes). Relations between the colonised were usually regulated by their own legal systems.

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5 Thus, for Papua, section 4 of the *Courts and Laws Adopting Ordinance* 1889 reads:

> The principles and rules of common law and equity that for the time being shall be in force and prevail in England shall so far as the same shall be applicable to the circumstances of the Possession be likewise the principles and rules of common law and equity that shall for the time being be in force and prevail in British New Guinea.

For New Guinea, section 16 of the *Laws Repeal and Adopting Ordinance* 1921-1922 provides:

> 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, shall be in force in the Territory so far as the same are applicable to the circumstances of the Territory, and are not repugnant to or inconsistent with the provisions of any Act, Ordinance, law, regulation, rule, order or proclamation having the force of law that is expressed to extend to or applied to or made or promulgated in the Territory.

6 For a brief sketch, see Mattes, "Sources of Law in Papua and New Guinea" 37 *A.L.J.* (1963) 148.

The common law is that body of legal rules (including the rules of equity) which has been developed by the courts in England over the centuries. When used in comparisons with other legal systems, this body of law also includes statutes that have modified the rules developed by courts. These rules and statutes and said to be based upon principles of equity and justice. Thus, the common law is generally understood to embody the fundemental characteristics of English justice. In his essay *"What is the Common Law"*, Goodhart identified four such characteristics:[7]

(a) the jury system ("the most distinctive part");

(b) the writ of *habeas corpus;*

(c) the independence of the judiciary (and it may be interpolated here that this independence is felt to be compromised if judges perform executive functions or if they take an active role in the conduct of proceedings before the court);[8]

(d) "that under the common law no one, however great the position he may hold, may open my door unless he does so under the specific authority of the law. This is the hallmark of government under law." But an historical examination of the total legal system in Papua New Guinea will reveal that, until very recent times, the common law model and the fundamental characteristics summarised by Professor Goodhart have been insignificant, if not entirely absent from Papua New Guinea.

Historically, there have been two broad phases in the legal development of Papua New Guinea, before and after the partial implementation of the Derham Report in 1963.[9]

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7 A.L. Goodhart (ed) *The Migration of the Common Law* (1960) 7 - 10.

8 See *Adan Haji Jama v. The King* [1948] A.C. 225, 233.

9 D.P. Derham, *Report on the System for the Administration of Justice in the Territory of Papua and New Guinea* (Unpublished, 1960), benceforth cited as Derham Report.

A. *The period prior to 1963*

1. The court system

The court systems in both Papua and in New Guinea were ostensibly unified, but incorporated into them was an element of dualism which in practice dominated. The superior court in each territory was the Supreme Court, which had unlimited civil and criminal jurisdiction. Below the Supreme Courts were District Courts in New Guinea and Courts of Petty Sessions in Papua; these courts had limited civil jurisdiction, criminal jurisdiction over non-indictable offences, and jurisdiction to commit for trial in the Supreme Court persons charged with indictable offences. Papua New Guineans could have been subject to these courts, but in practice they were involved only when charged with indictable offences. Thus, in practice, there was one court system for whites and another for Papua New Guineans.

The courts designed to regulate Papua New Guineans were the Courts for Native Affairs in New Guinea and the Courts for Native Matters in Papua. These courts were established under the Native Regulations of each territory. They were given limited civil and criminal jurisdiction "as between natives and over natives" and were the means for the enforcement of the Native Regulations.[10] In theory, an appeal lay to the Supreme Court.

2. The personnel of the courts

The first major divergence from the fundemental principles of the common law model is found in the manner in which these courts were staffed. In this period, the norm of the system was a mixture of judicial and executive functions, and it applied at all levels. At the level of the Supreme Court, the Chief Judicial Officer of Papua was, for many years, the Lieutenant-Governor,[11] and a similar situation existed in German New Guinea.[12] Of more significance was the character of the judicial process in the Supreme Court. The judges in Papua and to a lesser extent

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10 *Native Administration Ordinance* 1921 (New Guinea); *Native Regulations Ordinance* 1908 (Papua).

11 L. Mair, *Australia in New Guinea* (1970) 11.

12 P. Sack, *Land Between Two Laws* (1973).

in New Guinea, played a major role in the presentation of evidence in criminal trials.[13] The explanation for this was that neither the accused nor the prosecution were represented by counsel. Though this system was not necessarily unjust, it did not accord to common law notions.

At the other levels of courts, there was very little separation of judicial and executive power. Derham observed in relation to the District Courts and the Courts of Petty Session that it was only "in cases between Europeans or between the Administration and Europeans, in places like Rabaul and Port Moresby where legal practitioners were available, [that] these Courts operate very much as would similar Courts in Australia."[14] Only in the towns were legally qualified Stipendary Magistrates appointed; otherwise senior administration officers presided. The system for appointment and control of magistrates was such that they "could be fairly effectively restricted in the exercise of magisterial functions in a way that would be virtually impossible in the exercies of similar functions in summary jurisdiction Courts in the various States of Australia."[15]

The Courts for Native Affairs (or Matters) were wholly staffed by district administration officers. Many of these officers regarded their judicial work as ancillary to their executive functions, and performed their judicial work with an executive mind. Although there were instances of arbitrary and illegal actions,[16] the rationale for the system was compelling.[17] On the whole, "the individual integrity, devotion and goodwill of the officers concerned and the tradition of a service dedicated to the welfare of the native population" tempered the inequities of the system.[18] Thus, it is not a

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13 See Groves, "The Criminal Jurisdiction of the Supreme Court of Papua New Guinea," 25 *A.L.J.* (1952) 582 and 636, at 586-7.

14 *Supra* at footnote 8, 38.

15 *Ibid.* 39.

16 Such as punishment for forced labour; see Derham Report, 21. Occasionally Supreme Court has found that the executive role of the magistrate has disqualified him from a judicial role: *Lemu Maribu v. Croft* (1968) Sup. C. 496, 497; *Anide v. Denehy* (1972) Sup. C. 693.

17 Lynch in B. Brown (ed) *Fashion of Law in New Guinea* (1968) 58-61.

18 Derham Report, 20.

criticism of the system to say that it represneted the opposite of the common law model.

3. The mode of trial

The absence of juries has been a distinctive feature of the legal system in Papua New Guinea. Between 1907 and 1964 Papuan law provided for four-man juries in cases involving a European charged with a capital offence, and similar provisions applied in New Guinea between 1951 and 1964.[19] Derham commented, "There is little doubt that the present jury provisions are not only discriminatory upon their face but that they tend to be discriminatory in substance. It is a common belief in the Territory that no white man will be convicted of any ordinary capital offence by a European jury."[20]

In addition, there were few official attempts to involve the indigenous people in the criminal process by the use of assessors, although such schemes had proved successful in comparable African jurisdictions.[21]

4. The functioning of the courts

The Derham Report contains a valuable analysis of court operations as they were in 1960:

> In the history of the two Territories there was a natural and understandable tendency for governmental development to be heavily weighed on the executive side. This, together with an understandable though all persuasive paternal attitude towards the native population, prevented the development of a complete judicial system which was genuinely independent of the Executive Government and which could operate according to law rather than according to the policies and wishes of the Executive from time to time ... only those cases came to the Supreme Courts which, with some exceptions, it was convenient for the executive

19 *Jury Ordinance* 1907 (Papua); *Jury Ordinance* 1951 (New Guinea); *Juries Repeal Act* 1964.

20 *Supra* at footnote 8, 69.

21 Mair, *op. cit.* 76; Papua Annual Report 1932-1933, 25; A. Allott *Essays in African Law* (1960) 78-81. However, by 1960 it was the general practice of officers sitting in the Courts for Native Afairs (Matters) to sit with assessors: Derham Report, 29.

side of government to permit to reach them.[22]

The exceptional cases were, by and large, those involving Europeans, for the report states that the Supreme Court "has had very little to do with and comparatively little influence upon the administration of justice where the native population is concerned outside the area of serious criminal cases."[23]

In contrast to the Supreme Court, the Courts for Native Affairs (or Matters) were wholly concerned with the indigenous population. However, the body of law they applied, the Native Regulations, had almost nothing to do with common law principles and at many points was contrary those principles. The Derham Report's summary of the main defeats of these courts illustrates something of their nature:[24]

(a) lack of effective communication with the native population subject to the Jurisdicion; and hence lack of effective means the to ascertain the facts in particular cases and to present the facts at a hearing;

(b) lack of effective means to ascertain the requirements of the law;

(c) conflicts of duties and functions affecting the Native Affairs Officer acting as magistrate;

(d) lack of effective supervision by way of appeals or otherwise;

(e) lack of an adequate recording and clerking system.[25]

The District Courts and the Courts of Petty Session operated in much the same way so far as they dealt with the indigenous population; between Europeans, they operated according to the common law model.[26]

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22 *Supra* at footnote 8, 49.

23 *Ibid.* 50.

24 Note however, the Report's general comment on the work of these courts, 16.

25 *Ibid.* 27-28, and see generally 20-28.

26 *Ibid.* 38.

5. The rejection of Village Courts

Most disputes between Papua New Guineans were (and still are) settled by villagers using their own dispute settlement procedures. Until recent times this occurred wherever the colonial administration had not established control over large sections of the country, but even in controlled areas the imposed court system did not attempt to regulate most disputes within the indigenous population.[27] However, the colonial administrations resisted the introduction of native or village courts similar to those introduced in African colonies.

Not all colonial administrators were opposed to the appointment of indigenous magistrates. Both Scratchley and MacGregor appointed such magistrates,[28] and Hahl gave some recognition to the traditional dispute settlement procedures in German New Guinea.[29] Early attempts in Papua were not however continued by Murray, who became Lieutenant-Governor in 1908. Murray's view in 1924 was that there was no part of Papua "where native administration of justice could be introduced with any prospect but the certainty of absolute failure."[30] In 1937 he expressed the hope that some Papuans might be found to deal with "trivial native cases" but it was difficult to find men of sufficient "strength of character."[31] Murray's remarks were made in criticism of the Ainsworth Report which recommended that the New Guinea Mandate administration continue to recognise the judicial functions of luluais.[32] This report was not adopted.

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27 See the figures and references provided by Oran, in A. Clunies-Ross and J. Langmore, *Alternative Strategies for Papua New Guinea* (1973) 12.

28 Barnett, "The Courts and the People of Papua New Guinea," 1 *Journal of the Papua and New Guinea Society* (1967) 95, 96.

29 B. Jinks, P. Bisku and H. Nelson, *Readings in New Guinea History* (1973) 186-190; C. Rowley, *The Australians in German New Guinea* (1958) 223-228.

30 Jinks, *op. cit.* 259.

31 *Ibid.* 136.

32 *Ibid.* 256-7.

The pre-war attitude shows a basic lack of respect for indigenous legal systems, but even in the more enlightened atmosphere of the post-war period, the Australian administration continued to resist the introduction of a village court system. The Labour Party administration (1945-1949) favoured such courts. Section 63 of the *Papua and New Guinea Act* 1949 permitted their establishment, and anthropoligists conducted government-sponsored research into their feasibility.[33] However, the advent of the Liberal-Country Party government in Australia saw the end of these moves, and a sophisticated statement of the case for opposition to the Village Courts was made in the Derham Report in 1960.

The report recognised that unofficial courts were flourishing,[34] rejected the proposals for a *Native Local Courts Ordinance* which had been put forward in 1954.[35] Arguments against village courts were based on what was believed desirable as a matter of policy. Thus, the arguments were explicitly grounded in the assumption of the cultural superiority of the British system of justice:

> The proposals may undermine the principles which the Australian Government commonly accepts with respect to the administration of justice ... The individual is more likely to receive justice through an extension of British courts than through a system of village courts supervised by administrative officers.[36]

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33 See Hogbin, "Local Government for New Guinea" 17 *Oceania* (1946) 38.

34 In summary, these arguments were that unofficial or illicit courts were widespread, even in towns such as Rabaul and Port Moresby where official courts functioned regularly; that these courts would continue to flourish because the people regarded all official courts as alien institutions; that the abuses of unofficial courts could best be controlled by affording them official recognition and supervision; that the official courts were not competent to apply custom; and that the technicalities of English law were not appropriate to Papua New Guineans. See Derham Report, 30-31 and Appendix G.

35 *Ibid.* Appendix E.

36 *Ibid.* 31.

In addition, the report argued that it was undesirable to have two systems of courts. Opponents of village courts feared that they would be arbitrary and corrupt.[37] Finally, Derham said that Village Courts would not function according to the customs of the people, because many communities were undergoing social change, and thus custom was no longer fixed. He concluded, "The question becomes one not of taking account of native custom but one of deciding who should decide new problems as they arise." This must be "some agency of the Central Government .... (i)f we are committed to the development of a self-governing community comprehending the whole Territory."[38] These criticisms of Village Courts were implicitly rejected by a Papua New Guinean government in 1972.

6. <u>The law applied</u>

Most legal disputes were decided in village dispute settlement procedures in accordance with customary law. For most of this period, large parts of the country were without more than intermittent Administration contact. There was no alternative to the customary process. However, even in areas of more sustained influence, Papua New Guineans preferred their own courts. The only official courts regularly involved in the application or recognition of custom were the Courts for Native Affairs (Matters). In civil matters, these courts would be approached only if village institutions had not produced a binding result. The Derham Report found that: "A review of records of Courts for Native Affairs at several patrol posts chosen as representative revealed almost no civil matters recorded as having been decided and a fairly consistent pattern of minor criminal matters decided."[39]

It was only in the field of criminal law that the Supreme Court took account of the customs of the people. It is not clear whether the judges took account of customs to mould the substance of the criminal law (as they have to a small extent done since 1963), but it is clear that they took account

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37 *Ibid.* See too at 62.

38 *Ibid.* 36

39 *Ibid.* 19, and Appendix B for patrol post records of settlements.

of customs when fixing sentence.[40]

An assessment of the role of the common law as a body of rules must recognise that in a colonial society such as that of Papua New Guinea, the common law played a dual role, on the one hand as the personal law of the largely Australian expatriate community, and on the other as a national law for all communities. The question for analysis is how far the common law served as a national law.

The national laws with most impact on Papua New Guinean's were the criminal Codes, the Native Regulations, the law relating to the acquisition of their land and the law governings their employment. The Criminal Codes were adopted from the Queensland Code, which was in turn based on English common law principles.[41] Application of this body of law was significant, and probably had a positive effect in discouraging such practices as infanticide, widow-immolation and cannibalism. Tribal fighting and payback have also been reduced.[42]

The Native Regulations were, however, of greater significance to Papua New Guineans. The Regulations provided the legal means for enforcement of the system of colonial administration for most of this period.[43] In Lucy Mair's judgment, "the theoretical basis of the system was the idea that natives should do as they were told."[44] The Regulations governed every aspect of the life of Papua New Guineans. They forbade

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40 Appendix H of the Derham Report tabulates Supreme Court sentences between 1946 and 160.

41 Accretions such as the *Criminal Code (New Guinea) Amendment Ordinance* 1934, which punished miscegenation between a white woman and a black man, reflected peculiar colonial policies; this section was not repealed until 1958 (No. 40 of 1958). In addition, the *Marriage Ordinance* 1935-136, sec. 14, provided that a "native" might marry "any other person" only with the written consent of a District Officer. This section was not repealed until 1963.

42 For an illustrative study of the impact of the criminal law, see Nilles, "The Kuman People," 24 *Oceania* (1953) 1.

43 *Native Regulations* 1939; *Native Administration Regulations* 1924.

44 Mair, *op. cit.* 66.

criminal activities, such as stealing or homicide, but they also regulated what Papua New Guineans should wear, how they should construct their houses, and where they could live and work. As a body of legal rules, the Regulations owed very little to the common law. Labour laws were similar in that their intent was not so much to protect Papua New Guineans workers from abuses but to ensure a steady supply of indigenous labour. The welfare state legislation which has ameliorated employment law was not applied to Papua New Guinea until after World War II. Instead, numerous restrictions on what would have been the common law rights of employees.

7. Conclusion[45]

This brief review justifies three conclusions as to the role of the common law. First, the operation of the legal system was, in respect of Papua New Guineans, diametrically opposed to common law principles. Second, as a body of rules the common law did not, apart from the criminal law, have any significant impact as a national law, although it did function as the personal law of the expatriate community. The significant elements of the national law as it affected Papua New Guineans derived from statutory law which in many respects displaced the common law. Third, this national law did not bear the hallmarks of government under law. The theoretical availability of *habeas corpus* was of little practical significance, as lawyers were not available to provide protection against abuses, and the Native Regulations gave a lawful basis for restrictions on movement. The law and practice of colonial administration showed little respect for the personal integrity of the colonised. In making initial contact or in patrolling "difficult" areas, Administration officers respected neither the property of the villagers nor, in several cases, their lives.[46] Those officers brought to court as a result of excessively brutal behaviour found judges sympathetic to the point of straining the law.[47] While this can be explained by point-

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45 For a general review, see Mair, *Ibid.* Chapters 9, 10, 11.

46 The shooting of Papuans by miners and government officials was criticised by Murray in 1906; he believed "the two men who shot nearly all of them are ... Mr. Monckton and Mr. Bruce": Jinks, *op. cit.* 103. Monckton was a Resident Magistrate and Bruce the Commandant of the Armed Constabulary. For more modern examples, see Nilles, *op. cit.* 15-16.

47 *R. v. Alder* (1962, unreported). O'Regan in *The Common Law in Papua New Guinea* (1971) 31, observes that Mann's interpretation of the Code was "exceptional."

ing to the difficulties of exploration, it remains that fundamental notions of English law were sacrificed in the process. Once contact had been made and the area pacified, the laws applied were the Native Regulations, which authorised massive government interference in the enjoyment of personal and property rights. The law had a racist cast.[48] Racism was so pronounced that Murray observed:

> It is, in fact, quite impossible to administer even-handed justice in these countries - public opinion is so strong against it and one has to be so certain that one is right; and a native must have a very strong case indeed to get a conviction against a white man.[49]

B. *The Period after 1963*

In the 1960's, many of the Derham Report's recommendations were implemented, though often after a considerable delay.[50] For example, reforms to the court system, perhaps the most important changes, did not operate until 1966. Theoretically, the reforms moved the legal system towards the common law model. Thus, most Native Regulations were abolished, as were the Courts for Native Affairs (Matters). In practice, however, a dual legal system still prevailed. The reforms affected the few Papua New Guineans who lived in urban areas, but in the rural villages, where almost 90 per cent of the population lives, justice was meted out very much as it had been in the past.

1. The Courts

The constitution of the Supreme Court was little altered, though an appellate division, the Full Court, was introduced

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48 See Wolfers, "Trusteeship without Trust" in F. Stevens (ed.) *Racism: The Australian Experience*, Vol.III (1972) 61. for a detailed study. The common law has an ambivalent attitude towards racial discrimination: see A. Lester and G. Bindman, *Race and Law* (1972) Ch. 1.

49 Quoted in A. Inglis, *Not a White Woman Safe* (1974) 79, who provides examples at 79-80, 117, 129-30.

50 For a review up to 1967, see G. Nash, *Some Problems of Administering Law in the Territory of Papua and New Guinea*, Inaugural Lecture at UPNG (1967).

in 1969.[51] An important change occurred, however, in the quality of the bench. In the early 1960's, appointees were drawn from the senior ranks of the Australian profession. As a result, the court began to operate in a manner similar to comparable Australian courts, and, in particular, has displayed much less sympathy to arguments of administrative convenience. On the other hand, the newer appointees have not shown great understanding of Papua New Guinean custom. Attempts have been made to improve the quality of services provided to the court though the government has been some what niggardly. Provision for juries for expatriates were abolished in 1964, and only in 1974 have there been suggestions to introduce assessors.[52]

In recent years, the Supreme Court has begun to play a more significant role as an appellate bench for District and Local Courts. The number of appeals heard in the Supreme Court has increased from 8 in 1962-3 to 65 in 1967-67, but dropped to 55 in 1971-2. These figures represent percentages of 0.04, 0.15 and 0.07 of the total number of convictions in the District and Local Courts in these periods. There is not however, enough contact between the Supreme and lower courts, but the alternative of some sort of revising jurisdiction has not been considered.

The District Courts (New Guinea) and the Courts of Petty Sessions (Papua) were abolished and replaced by a uniform system of District Courts.[53] Efforts have been made to appoint more legally qualified magistrates but at mid-1972 there were only five fully qualified Stipendary Magistrates, thirteen Resident Magistrates and five Reserve Magistrates.[54] Officers of the Division of Development Administration still sit in these courts, sometimes in important cases.

The Courts for Native Affairs (or Matters) were abolished, replaced by a system of Local Courts based on the precepts that they have jurisdiction over all races, that their jurisdiction should be concurrent with that of the District Courts, that

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51 *Supreme Court (Full Court) Act* 1968.

52 See Frost, "The Development of a Papua New Guinean Supreme Court Bench" (Mimeo, 1974), and M. Somare, *"Papua New Guinean to help Courts,"* Press Release (13 September 1974).

53 *District Courts Act* 1963-1970, in operation 1966.

54 *Papua New Guinea Report* 1971-72, 52.

there should be a firm basis for the recognition and application of customary law, that there should be a separation of their work from police and administrative functions, that indigenous Local Court Magistrates should be trained, that other Papua New Guineans should be involved as Assistant Magistrates, and that the courts be empowered to mediate as well as to adjudicate.[55] The reforms followed from the Derham Report and evinced the intention of the Australian administration to push the common law model downwards to the village level, rather than to permit the emergence of an indigenous system through recognition of unofficial courts.

However, financial support for a more judicialised Local Court system has been lacking. Barnett observed in 1966 that "the Government appears to have instituted a legal revolution without creating an authority to give it direction."[56] Thus, by mid-1972, there were only 37 full-time local Magistrates, with 18 soon to be appointed, and 140 Assistant Magistrates.[57] The gap has been filled by administration officers, and as a result that separation of judicial from administrative functions which Derham considered essential has not occurred. The following quotation from the *Report of the Committee Investigation Tribal Fighting in the Highlands* describes the judicial process which usually followed incidents of tribal fighting:

> In the past, few pleas of "not guilty" were recorded. This was because the arresting officer usually ascertained on the spot who was fighting and who was not. All members of the groups involved would be asked separately if they were fighting and those claiming that they were not fighting were separated. In the event of no-one being able to identify them as having taken part in the fight, they were released. Subsequently, the same officer would hear the case against

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55 See generally Barnett, "The Local Court Magistrate and the Settlement of Disputes" in B. Brown (ed.) *Fashion of Law in New Guinea* (1969) 159.

56 *Ibid.* 166. See too the comments of Quinlivan, "Village Courts in Papua New Guinea and Local Courts in the Two Largest Centres" Seventh Waigani Seminar (1973).

57 *Supra* at footnote 54, 52.

> the rest and, because the magistrate had arrested and already investigated the accused few would, at that stage, deny their guilt... Even if the magistrate was not involved personally in breaking up the fight, his experience as a DDA officer strongly inclined him towards seeing the administrative necessity for the government law to seem strong and certain. The most important thing was to put those who fought in jail.[58]

There are other indications that the Local Courts are not functioning as part of a unified system of common law courts. Even in established urban areas such as Rabaul, unofficial courts still flourish, as they do throught the country, demonstrating that people prefer to settle their disputes outside the official system. In addition, many magistrates do not formally convene court or make any record of cases brought before them.[59] People appearing before these courts are without legal assistance, and the courts punish such popular activities as drunkenness and gambling, matters which enhance the alienation felt by most people. The population do not see these courts as different from the former *kiap* courts.[60]

The most significant change in the post-1963 period has been the enactment of the *Village Courts Act* in 1974.[61] The principles underlying the act mark a change in the direction of official thinking about the courts system, and they have influenced other areas of dispute settlement.

There are a number of features of the act which depart from the common law model. "The primary function of a Village Court is to ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of settlements of disputes" There are juridciction limits in respect of both civil and criminal matters, but these apply only where a court cannot

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58 (1973) 27-28. For the judicial aftermath, see (1972) Sup. C. 727 and (1972). Sup. C. 728. Prentice found substantial irregularities in both cases. See too cases cited at footnote 16 *supra*.

59 Based on Barnett, *op. cit.*, and on personal interviews.

60 See generally, Sam, Passingan and Kanawi, "Bringing Law to the people of Papua New Guinea," Seventh Waigani Seminar (1973).

61 No. 12 of 1974.

achieve a settlement and must itself decide the dispute. No distinction is drawn between civil and criminal cases, and the court may order compensation, a fine or the performance of community work as it thinks fit. (A fine or community work can be imposed only where the court finds that an offence has been committed.)

There are no formal qualifications set for Village Court magistrates, and Local Government councillors are eligible for appointment, although they are excluded where the court hears a complaint brought on behalf of the Council. Appointments will be made by the High Commissioner on a submission made by the District Supervising Magistrate, who is however obliged to consult with the Local Government Council and other appropriate persons and bodies. In the Kainantu Subdistrict, the unofficial "area communities"(each of which embraces several Council wards) have elected magistrates whose names will be forwarded to the High Commissioner.[62] The people in other areas have also begun to elect magistrates.[63] The persons elected in Kainantu are all male, most are partly literate in Pidgin, and most have held or still hold office in local government or in missions. Court houses have been built in most of the area communities and the elected magistrates have in fact begin to operate the courts despite the lack of official sanction.

The sections of the act concerning the law to be applied represent a radical departure from the logic of the 1963-66 reforms to the court structure. A Village Court "is not bound by any law other than this Act that is not expressly applied to it, but shall...decide any matter before it in accordance with substantial justice" (section 30). Section 30 (2) provides that a person charged with an offence is presumed innocent until proved guilty, and section 29 provides that Village Courts must apply relevant custom as determined in accordance with the *Native Customs (Recognition) Act*. Custom may be applied notwithstanding that it is contrary to some other law, and a Local Government Council may make rules declaring the custom of its area.

The supporters of the *Village Courts Act* implicitly re-

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62 This information and the following references to the situation in the Kainantu Sub-district is based on my field work in that area in May 1974.

63 Based on my field work in Baluan Island, Manus District, in February 1974, and on discussions with government officials in Port Moresby.

jected the arguments of Derham and others who had opposed the creation of similar bodies in the 1950's.[64] Derham argued that social change would make customary law obsolete. While in some areas close to large urban centres there is a generation gap, in others the basic pattern of social relations has not greatly changed. Moreover, the customary laws governing family and marriage relationships have remained stable throughout the country. In any event, the customary law of Papua New Guinea is not just a system of rules but a process of dispute settlement adaptable to social change.

The potential for corruption was also exaggerated. In so far as it exists, it relates to the time that has elapsed since contact, for studies in particular areas show that the *bosbois, luluais* and councillors who have adjudicated in unofficial courts were more prone to abuse their powers in the early years of government contact. With the passage of time, unofficial courts become less corrupt.[65] A more fundamental objection to the corruption argument is that "the perception of problems relating to power is largely a cultural matter."[66]

What appears corrupt to a European may not be so viewed by a Papua New Guinean. Marilyn Strathern found that Hageners were not "concerned with "corruption" as such: and that although individuals might complain of personal injustices "they do not question the general principle that persons of public prominence will take care of their own interests in also taking care of others."[67] Strathern also makes the point that a regulated system of Village Courts would reduce the problem (in so far as it exists); for example, by providing a fund into which fines could legally be paid.[68]

The Village Courts are seen by Papua New Guineans as an essential part of an effective system of social control. Strathern argues that Hageners are preoccupied with the

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64 *House of Assembly Debates*, Vol. III, at 1163-1168, 2881-2883, 3081-3090; and 3182-3185, for a sampling of the Papua New Guinean view of Village Courts.

65 Strathern, "Sanctions and the Problem of Corruption in Village Courts," Seventh Waigani Seminar (1973) 4-5.

66 *Ibid.* 2.

67 *Ibid.* 6, 7.

68 *Ibid.*

problem of the sanctions that may be imposed by these courts, and warns that a failure to allow them to utilise traditional sanctions might jeopardise the system.[69] Papua New Guineans view the courts as means whereby the new problem of juvenile deliquency and older problems such as sorcery may be handled. Papua New Guineans are not impressed by arguments about the cultural superiority of English justice. When it is remembered that their perception of this system has been shaped by the manner in which "justice" has been administered at the local level, this attitude is fully understandable.

2. The law applied

Although the place of customary law in the legal system was put on a firmer basis by the *Native Customs Recognition Act* 1963, there have been few cases in the Supreme and District Courts based on customary law claims. It is of more importance in the Local Courts, particularly in family and domestic law matters, and in unofficial courts where the "lo bilong mipela" is still applied. Whether the Village Courts will alter this picture remains to be seen. The one areas where the official courts regularly take account of customs is in relation to sentencing.[70]

The Native Regulations have ceased to play an important role, as most of the discriminatory and paternalistic regulations were repealed in 1968. However, the *Police Offences Act* (Papua), the *Vagrancy Act* (Papua) and the *Police Offences Act* (New Guinea) have replaced the Regulations as the means for keeping order amongst the mass of the population. This body of law is rarely applied to expatriates. It is unlikely then that the average Papua New Guinea perceives the new system as significantly changed.

Social and economic changes have brought a few Papua New Guineans into the cash economy and urban life, and thus into the world where the common law is applied. Their status as motorists and pedestrians attracts the law of negligence, and their role in commerce attracts many aspects of commercial law. However, there still remain large areas of common law principle only marginally applicable to Papua New Guineans.

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69 *Ibid.* 12.

70 In *R v. Kaupa* (1973) Sup. C. 765, Wilson held that the courts should reduce the sentence if a convicted person had paid compensation to the viction or his relatives.

3. The profession

The role of the common law is influenced by the nature of the services provided by the legal profession. The private profession is composed almost entirely of expatriates. The bulk of their work is for the expatriate community, and most of that for overseas companies operating in Papua New Guinea.[71] While they would work for Papua New Guineans, their fees place their services out of reach. In addition only a few practitioners operate outside Port Moresby.

The Public Solicitor's Office represents Papua New Guineans in almost all their civil and criminal cases before the Supreme Court. However, this office has always been overstrained, particularly on its civil side, and the outflux of expatriates from the Law Department in the present period has caused the office to abandon civil litigation almost entirely.

In 1964 Wootten observed, "the great bulk of the legal work of the Territory is not being done at all. The only persons whose legal problems are being adequately attended to area the Administration and the tiny handful of non-indigenous inhabitants.... To a very great extent [the indigenous inhabitants] are touched by the legal system of the Territory only if they are charged with a major criminal offence in which case they will be prosecuted, defended and tried by professional lawyers."[72] Ten years later, the situation has not substantially changed.

C. *Some Conclusions*

If one considers only the formal characteristics of the present system, it is clear that there have been developments since 1963 which have brought it closer to the common law model. There is no longer, officially, a dual system of courts, and more, better-qualified judicial officers are now operating the system.

However, in its actual functioning, the old system persists. There are still too few trained magistrates, and, so

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71 Based on comments by Mr E.A. Francis (a former President of the Papua New Guinea Law Society) in a talk given to a group of Australian lawyers, 29 July 1973. See too J. Goldring, "The Professions in Nuigini" (Mimeo, 1971) 8.

72 Wootten, "The Development of a Native Legal Profession" (Mimeo, 1964) 3-4.

far as Papua New Guineans are concerned, very little legal representation. The Native Regulations, while officially phased out, have been succeeded by the public order laws. One indication of the failure of the post-1963 reforms to answer the needs of Papua New Guinea is the creation of Village Courts. Derham had hoped that reforms would render obsolete the need for such courts, but in this respect the reforms failed.

Considered as a body of principles, the common law is still applied mainly through the Criminal Codes, and most legal relationships between people in Papua New Guinea are governed by customary law. The significance of the common law can be measured using the yardstick of Goodhart's fundamental characteristics. The jury system has not been a distinctive part of Papua New Guinea justice. The writ of *habeas corpus* has been available only recently and only in the Supreme Court. The writ existed only theoretically in the pre-1963 period, as the Native Regulations permitted lawful restraints and the lack of lawyers meant that unlawful excesses went unremedied. The abolition of the Regulations and creation of the Public Solicitor's Office have made slight difference, and the writ has been employed in several cases where sentences imposed by lower courts were illegal.

Although the independence of the judiciary is now accepted as an ideal in Papua New Guinea, progress towards its realisation has been slow, and at the Local Court level much remains to be achieved.[73]

Goodhart's fourth characteristic is that the common law guarantees a "government under law" and protection of the individual's property and person. Many features of the pre-1963 system contradicted the notion of government under law. In the post-1963 period, executive excesses have been curtailed; the House of Assembly has emerged as a critic of government action, and the Public Solicitor's Office provided an avenue for legal redress to educated urban dwellers. However, the institutions of government concerned with the adminis-

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73 There have been allegations that the Stipendary Magistrate who acquitted three Mataungan Leaders in a case with political implication was, as a result, removed from Rabaul. An Australian federal parliamentarian (Mr Beazley) stated in the Australian Parliament that "quite high officers of the Administration" had not denied this allegation when it was put to them: *House of Representatives Debates*, Vol 66, 359, 12 October 1970.

tration of justice have shown themselves still reluctant to accept the obligation to operate under the law.[74]

It must be concluded that the common law has not played a significant role in the legal system in Papua New Guinea. Though elements of the common law have begun to appear in the towns, Papua New Guineans in rural areas still meet it only when they commit a major felony. In the past, it was the decision of the Administration that Papua New Guineans should be denied access to the benefits and protections of the common law. Today, with the creation of Village Courts, the decision to abjure English principles is the choice of Papua New Guineans themselves.

II. *The future of the common law*

Since the common law has in the formal sense been "received" as part of the legal system, drafters and judges look to it as a possible source of rules for the national legal system. However, it should be recognized that most of the common law has not in any meaningul sense been received into the national legal system and its implementation into many areas of life would be as revolutionary as the introduction of any other foreign system of law. The main thrust of the historical analysis in the first part of this essay has been to rebut commonly held assumptions that the common law must by virtue of its reception be the basis for future development. Law is not merely an instrument for regulation of society. It is also intrumental in development. Whatever reforms are made to the legal system must therefore seek to promote the accepted values of the society. The House of Assembly has now accepted the National Goals recommended by the Constitutional Planning Committee. The goals, which are based on and extend the Eight Point Plan, commit the government to social and economic change. The goals envisage equalisation of economic benefits and incomes, localisation of the economy, decentralisation, self-reliance, the promotion of small-scale activity, and equal participation by women in society.

These objectives contemplate a fundamentally different type

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74 See Adams, "Aspects of the Administration of Criminal Justice in Papua New Guinea: A Tentative View" Seventh Waigani Seminar (1973 for a review of police methods. The Minister for the Interior denied an allegation made in the paper that electrict cattle prodders had been used on prisoners at the main prison: (Press release, 6 May 1973).

of society from that of the highly industrialised and urbanised societies of England and Australia. This difference will influence the place of the common law in the legal system. Because the development of the common law in England and Australia over the past 100 years has been directed towards meeting the needs of those societies, much of it is unsuitable to the needs of Papua New Guinea. Papua New Guinea will be a developing country, predominantly agricultural, its values rooted in tribal traditions and in the Third World, whereas the common law reflects the values and goals of industrialized, urban societies.

A. *The institutions for the settlement of disputes*

Until the 1963-1966 reforms the legal system in Papua New Guinea did not on the whole conform to the common law model. These reforms were an attempt to direct the system towards that model. It may be questioned whether this is the only possible path for future development of the legal system, and there are signs that present policy-makers will seek other paths. These other paths will be briefly explored by reviewing two of the basic principles of the common law system -- the independence of a professional judiciary and the adversary system.

Prior to 1963 the independence of the judiciary was not an important principle in the lower courts, nor is it desirable to revert to a system whereby administrative officers exercise judicial functions. However, the 1963-1966 reforms assumed that the independence of an indigenous magistracy could be best achieved by training educated Papua New Guineans as Local and District Court magistrates. For example, Derham characterised one of the arguments against village courts in these terms:

> ... the task of resolving disputes by final enforceable determinations should be carried out by men trained to understand and resolve difficulties of fact, and to apply principles of law and justice under varying social conditions - men who are qualified to draw upon the vast legal experience available in the English Common Law System and who are guided by directions from an appeal system which provides direct access to the highest legal learning.[75]

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75 Derham, "A Native Magistracy" (Mimeo, 1964) 20.

An alternative approach is to build upwards from indigenous systems of adjudication by legitimising the institutions which exist and by incorporating some of the procedures and values of these systems into the centralised system. This approach does not abandon the 1963-1966 reforms, but combines the best of both approaches. The *Village Courts Act* reflects this dual approach, and although it leaves many questions unanswered, it should provide a good basis for the legitimation of unofficial courts within the official system.

In the eyes of a common lawyer this will make the magistrate less independent. He will be drawn from the local community and will not have had formal legal training; as a mediator he will play an active role in the proceedings. However, the common lawyer's thinking on this matter is conditioned by his assumptions, assumptions which are shared by Papua New Guineans. The projections made in the 1950's and 1960's about the likelihood of corruption were based on situations which have now changed. However, some corruption and abuses of power may occur, and links between the Village Courts and the official court structure are necessary to remedy them.

The question for the future is how far the principles of the *Village Courts Act* should be introduced into other areas. Unofficial conciliation and arbitration by community leaders are widely practised in the settlement of village disputes and wider land disputes. Officially, the value of such techniques has been recognised in the industrial field and in the Local Courts. A plan for the use of conciliation and arbitration on a comprehensive scale has been proposed by Lynch,[76] and the Commission of Enquiry into Land Matters proposed the abolition of the Land Titles Commission and its replacement with a system based on mediation and arbitration which would bring the process of dispute settlement closer to the people and involve them more in the settlement of their own disputes. A brief review of these proposals will indicate how a system based on conciliation and arbitration may be implemented.

The Commission recommends a process for the settlement of disputes over customary land that would begin with compulsory mediation between the parties, who would be assisted by a panel of mediators who would be "men of standing in the area."[77]

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76 Lynch, "A Note on Conciliation and Arbitration as a Form of Settlement of Disputes" (Mimeo, 1972.

77 *Report of the Commission of Enquiry into Land Matters* (1973) 116.

If mediation was unsuccessful, the dispute could go to arbitration on the order of a magistrate, who could also make a temporary order in relation to use of the disputed land. The arbitration award would be made by a Local Land Court consisting of a Local consisting of a Local Court Magistrate "supported by assistants with a knowledge of land customs of the area."[78] This court would have far-reaching powers over all kinds of land disputes and power to decide incidental questions, including succession disputes. A limited appeal would lie only to a District Land Court consisting of one magistrate of District Court standard with special training in land law. The Commission recommended that "the Supreme Court should have only a very limited role in disputes over customary land," although it could review fro jurisdictional error, including breach of the rules of natural justice.[79] Lawyers and representatives not connected with the parties would have a right to appear only in the District Land Court, and then only in connection with cases involving national land or disputes in which the government or a company is involved. The only significant body of land disputes that would not come within this system would be those concerned with non-customary rights in leasehold land. In the past, a few of these disputes have reached the Supreme Court, but the Commission recommended that in future "such cases should go to the District Court where procedures and rules of evidence will be more flexible and more suited to Papua New Guinean conditions."[80]

The Commission's recommendations would revolutionise the system for the settlement of land disputes in Papua New Guinea. All of the bills to implement the Commission's Report have not yet been introduced into the House of Assembly, but those that have (some of which have been passed) reflect the principles of the Report.

The *Village Courts Act* and the Land Commission Report show that the use of local people as conciliators and arbitrators is strongly supported by Papua New Guijeans, and it is likely that these principles will influence other areas too.[81]

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78 *Ibid.*

79 Ibid. 118.

80 *Ibid.* 124. The Commission thought that lost titles jurisdiction would peter out by 1974.

81 See *Business Groups Incorporation Act* 1974, sections 39-44, which provide that a registered business group must attempt to settle inter-group disputes by mediation before a court may be involved.

The government is also committed to the introduction of assessors in criminal cases, a reform long overdue. To oppose such movements on the doctrinaire ground that they are contrary to the common law model would be folly, for the promise a more just system than the colonial courts were able to provide.

The introduction of conciliation and arbitration techniques will mean the decline of the adversary system. The major premise of this system is that a magistrate should decide a dispute according to fixed rules after considering those matters of fact and law put to him by the parties or their representatives. Attempts to mediate the dispute are left to the parties. As has been seen, it is only at the level of the Supreme Court over the past fifteen years that this system has really worked, but the 1963-1966 reforms to the lower courts contemplated that this system would also work at these levels.

In a system of conciliation and arbitration, the magistrates would play an active role in the presentation of the facts, perhaps even to the extent of procuring evidence, and they would decide disputes in such a way as to *settle* the dispute rather than apply fixed rules irrespective of the justice of the matter or of future relations between the parties. There is no good reason why the adversary system in the Supreme Court, and the District Courts might not be modified. Obviously, there will be more room for this approach in some areas rather than others, but it should not be assumed than the adversary system has any *a priori* advantage over any other system.[82]

B. <u>The Law to be applied</u>

The proposed Law Reform Commission will have the task of reviewing the whole body of legal rules applied in Papua New Guinean with a view to reform. No attempt will be made here to suggest the kinds of reforms that might be made. My object is only to make three general points about the role of common law principles in the future.

1. <u>The common law is not in common use</u>

The first point is that in general the common law should

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82 It has been suggested that courts dealing with serious criminal matters should also have some responsibility to see that the civil aspects of these cases are settled, even to the extent of adjudicating on these aspects in the same proceedings: Barnett, "Crime, Kin and Compensation" (1972) 1 *M.L.J.* 29, 34-36.

not be regarded as having a firm foothold in the national legal system. This is obviously not true of the Criminal Code, and although there are points where the morality of the Code conflicts with traditional values, the Code will probably be taken as sufficiently accepted to be the starting point for any reform.

It might also be argued that whilst there have be relatively few non-criminal cases involving Papua New Guineans in the courts, the whole commercial system has developed in the mould of the common law and that thereby the common law has been and is a major influence. This argument gains more force as more Papua New Guineans are drawn into the cash economy and live according to its rules. However, there are a number of reasons why this line of argument does not seriously qualify the general point about the place of the common law. It is far from clear that people involved in commercial life (including expatriates) do regulate their commercial dealings in accordance with the law. While they probably attempt to, it is far from certain that they are successful; this is particularly true of Papua New Guinean businessmen.[83] Many businessmen will not insist on their legal rights in a situation where law might be on their side, for to do so would be bad for future business. Moreover, businessmen have a capacity to adapt to major change in commercial law. For example, the introduction of no-fault liability in many common law jurisdictions has not disrupted the insurance business. Finally, Papua New Guineans are involved in commercial life only in respect of certain kinds of transactions. On the whole, Papua New Guineans are primarily involved in the less complex transactions, and there are major areas of the law which have only a marginal application. While some areas of the law, such as negligence, have a significant impact, many Papua New Guineans do not accept the values which underlie these legal principles. Legislation such as the *Motor Vehicles (Third Party Insurance) (Basic Protection Compensation) Act* 1974, which introduces a limited no fault liability scheme, has been necessary to make the law more acceptable.

2. <u>The common law conflicts with Papua New Guinean values</u>

The underlying social values of the common law are not accepted by Papua New Guineans. For example, Papua New Guineans do not believe that only personal guilt deserves punishments

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83 *Report of the Committee Investigating Tribal Fighting in the Highlands* (1973) 5; and generally Blaxter and Fitzpatrick, *Informal Sector Discussion Papers* (Mimeo, 1973).

or that fault is the basis for liability to compensate. English law concepts of ownership and some principles of contract law, such as consideration and *caveat emptor*, are contrary to Papua New Guinean traditional laws. These principles are not accepted both because the folkways of Papua New Guineans are different and also because leaders envisage a kind of society which will be fundamentally different to western society.

3. The reception of law

Pending reform, the national law will continue to be the common law as modified by statute, but the reception provisions provide scope for judicial adaptation of the common law to suit "the circumstances" of Papua New Guinea. It might be though that judges would have had little difficulty in finding situations where a common law rule should be modified, but there are very few cases where the existence of the modification provisions has been acknowledged and fewer still where it has been applied. Only in a few parts of the criminal law are many situations where the judges have uncritically applied common law principles.[84] In most of these cases, it is likely that counsel did not raise the applicability question, but in

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84 The general approach of the courts is to ascertain a common law rule by a detailed analysis of the Australian and English case-law and in cases where there is a divergence, to learn towards the Australian cases (although this would appear to be contrary to the wording of the reception clauses). The judges are very reluctant to examine the suitability of these rules to Papua New Guinean society. This attitude is illustrated by the decision in *R v. Kor Babril and others* (1973) Sup. Ct. 770. Wilson J. held that the common law rule that an accused person could make an unsworn statement applied in New Guinea by virtue of section 16 of the *Laws Repeal and Adopting Ordinance* 1921-1959. He further held that: "It is irrelevant ...whether, from the point of view of the proper administration of justice, any useful purpose would be served by retaining the right of an accused person to make an unsworn statement... my task is to make a ruling as to what the law in New Guinea is at this time, and not to postulate what I think the law ought to be." This attitude overlooks not only the legislative direction to the courts to adopt the common law rules only "so far as the same are applicable to the circumstances of the country," but also the major trends in modern judicial practice and philosophy.

Murray v. Brown River Timber Company, for example, Mann CJ, after deliberate consideration of the matter, held that the rule that contributory negligence operated as a complete defence should apply as the common law of Papua.[85]

The judicial record therefore has not been impressive, but this may be just as well, since it is undesirable that expatriate judges mould the law of an independent Papua New Guinea. Significant judicial adaptation should perhaps come only with localisation of the bench. To facilitate adaptation of the common law, two kinds of reforms might be made.

First, there is the problem of the wording of the reception clause. At present, the clauses provide for the reception of the common law of England, although the English common law differs from that of Australia and other jurisdictions. There have been suggestions that the reception clauses be altered to enable the Papua New Guinea courts to refer to any common law jurisdiction for their source of precedents. These suggestions would allow the courts more freedom in their choice of rules, but the element of uncertainty introduced as to the starting point for development of a Papua New Guinea common law will complicate and obscure the process. The focus should not be on selecting a rule from a common law jurisdiction but on developing a rule suited to Papua New Guinea. To achieve this, it might be better to maintain the provision that the common law of England is received, but to strengthen the applicability clause.

Second, there is the problem of how the courts are to choose more appropriate rules. The House of Assembly has decided that courts should refer to the National Goals for guidance, but there is the additional problem of how the courts may be acquainted with the social and economic facts to enable them to apply these goals meaningfully. It is necessary therefore that procedures be worked out whereby social and economic material could be placed before the courts. Common law courts in the United States have long accepted this kind of evidence, but most English and Australian courts still do not comprehend the necessity for courts to be aware of the social and economic consequences of their judgments.

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85 [1964] *PNGLR* 167, 173-4. His Honour relied on the practice of using contributory negligence as a complete defence. However, there was no suggestion that the question had even been considered by a court.

C. *Conclusion*

The common law has never taken root in Papua New Guinea. After over one hundred years of Australian rule, Australia's legal system is still a foreign hybrid in Papua New Guinea, seldom encountered and scarcely understood by Papua New Guineans. I had intended to argue that, because the common law has been so seldom applied and is in many ways antithetical to the needs of Papua New Guinea, it ought not to be applied in the future. However, events have caught up with this argument. The passage of the National Goals, the operation of the *Village Courts Act* and the statements of many national and local leaders demonstrate that Papua New Guinean legislators and magistrates have never been coerced by the reception statutes into believing that the common law applies in any meaningful sense in Papua New Guinea. Perhaps, then, this paper should be seen not just as an argument for the abandonment of the common law, but as a record in the struggle of Papua New Guineans to find their own law.