THE JUDGES AND THE CONSTITUTION - THE FIRST YEAR

BY NICHOLAS O'NEILL*

I. *Introduction.*

The Constitution of the Independent State of Papua New Guinea** is a very complex document. Spread liberally throughout its 275 sections and 5 schedules are the judicial and other powers of the judges of the National and Supreme Courts. The Constitution gives the judges wide powers to declare and develop the underlying law of Papua New Guinea. These powers were given to the judges in the hope that a common law relevant to conditions in the country would quickly emerge.

II. *Jurisidiction.*

The Chief Justice, Deputy Chief Justice and the Judges of the National Court exercise the jurisdiction of both the Supreme Court and the National Courts.1

A. The National Court.

The National Court is a court of unlimited jurisidction2 which means that it has at least the jurisdiction exercised by the various divisions of the High Court of Justice in England and the Supreme Courts of the States and Territories of Australia.

The Court has continued to exercise the same civil and criminal jurisidiction as the pre-independence Supreme Court. But the Constitution has given it extra jurisdiction to enforce the rights and to require the exercise of powers and duties set out in the Constitution.3 Where a

---

* LLB (Melb.), LLM (Lond.), Secretary to the Law Reform Commission of Papua New Guinea.

** All sections mentioned in this article are sections of the Constitution unless otherwise indicated.

1. See sections 161 and 164. Australia handed over control of the courts and the judges to the Administration of Papua New Guinea on January 1975.

   Section 271 provides that the appointments of the first judges cannot extend beyond 3 years after the above mentioned swearing in dates. The judges will be eligible for re-appointment but by the time their present appointments run out 3 of the judges will be too old for re-appointment.

2. Section 166(1) The meaning of unlimited jurisdiction will become clearer over the years. But already the judges have held that it includes the power to sanction infant settlements, see *Yamba v Geru*, unreported judgement N. 9 (Frost CJ, 21-10-1975).

3. Sections 166(2) and 22.

Constitutional Law prohibits or restricts an act or imposes a duty and no machinery is provided for enforcement, the National Court may make any order it thinks proper for preventing or remedying the breach of the prohibition, restriction or duty.4 The Court has the jurisdiction to enforce the basic rights set out in Part III, Division 3 of the Constitution.5

Under section 42 of the Constitution, a person who is restrained or detained under a warrant or a court order or because he has been arrested for an offence, must be brought before a court without delay. Where a complaint is made that a person is unlawfully or unreasonably detained, then the Court or a Judge, under section 42(5) may enquire into the matter, have the person brought before the Court and shall release the person either unconditionally or with conditions unless it is satisfied that the detention is lawful. The provision has its genesis in *habeas corpus* proceedings, but it is not yet clear whether it is limited only to arrests and detentions covered by section 42.

The Court is also given a wide power to review any exercise of judicial authority, but it loses this jurisdiction where, in particular cases, the Supreme Court either is given this jurisdiction, or assumes it. While the Constitution permits a statute to impinge upon the National Court's inherent power to review any exercise of judicial authority, it gives the Court an overriding power to review, which may be used if the Court considers that there are important public policy reasons for it doing so in a particular case.6

As a normal practice, the judges of the National Court sit alone, although a number of judges may sit together to hear a case if they consider that appropriate.7 In New Guinea, the judges may sit with assessors, but at the moment they do this only in criminal cases in particular court towns.8

B. The Supreme Court

The Supreme Court is the final court of appeal in Papua New Guinea.9 It has inherent power to review all the judicial acts of the National Court10 and may be given any other jurisdiction by a statute.11 It may also be given power, by statute, to review exercises of judicial authority.12

---

4. Section 23.

5. Sections 57 and 58.

6. Section 155(3) (a), (c) and (d) and 155(4).

7. Section 166(3).

8. *Supreme Court Assessors Act* (New Guinea), 1925-1938 and *Supreme Court Assessors Regulation*, 1975.

9. Section 155(2) (a).

10. Section 155(2) (b).

11. Section 155(2) (c).

12. Section 155(2) and (3).

The Supreme Court is the only interpreter and applier of the Constitution.13 Any questions relating to its interpretation or application which arise in any other tribunal must be referred to the Supreme Court.14 On questions involving the interpretation or application of a provision of Constitutional Law or the constitutional validity of any law or proposed law, the Parliament, the Head of State, the Law Officers, the Law Reform Commission, the Ombudsman and the Speaker all have the right to seek a declaratory opinion of the court.15 The Head of State may apply to the Court only at the direction of the National Executive Council, while the Speaker only has the power to refer Acts of Indemnity to the Court.16

The Court must consist of at least three judges, but all the judges may sit if they wish.17

C. Concurrent Jurisdiction of Supreme and National Courts

There are a number of matters set out in the Constitution in which the National Court and Supreme Court have concurrent jurisdiction. The National Parliament has the power to qualify most of the basic human rights set out in the Constitution, but may only do so to an extent that is reasonably justifiable in a democratic society,18 as determined by either the Supreme Court or the National Court.19 The Constitution does not provide for what happens when a repealing declaration made by the National Court is appealed to the Supreme Court.

Under Section 42(6) a person arrested or detained for an offence is entitled to bail at any time before his conviction or acquittal, unless the interests of justice otherwise require. If a person is refused bail under that section he may apply in a summary manner to either the National Court or the Supreme Court to be released on bail.19A

The Public Solicitor has a constitutional responsibility to provide legal aid, advice and assistance to people in need of his help.20 Both the National Court and the Supreme Court may direct him to do so in particular cases and a person aggrieved by the Public Solicitor's refusal to grant him legal aid may apply to either Court for an order directing the Public Solicitor to grant legal aid to him.21

---

13. Section 18(1).

14. Section 18(2).

15. Section 19(3).

16. Sections 19(3) and 137(3).

17. Section 161. In *Reference No. 3 of 1976*, unreported judgement SC98 (21.6.1976), all the judges sat and gave a joint judgement.

18. Section 38(1).

19. Section 39(2).

19A. Section 42(7).

20. Section 177(2).

21. Section 177(2) and (3).

III. *What Law Must the Judges Apply?*

The prime function of judges anywhere is to apply the law. At present the law of Papua New Guinea consists of statute or written law and the underlying law. The statute law is the Constiution, organic laws, Acts of the National Parliament, legislation from Australia and the United Kingdom adopted by Schedule 5 of the Constitution and sub-ordinate legislation made under any of those laws.22 To date no emergency regulations have been made and no provincial legislatures are in existence.23 The underlying law, subject to limitations, comprises custom and the principles and rules of common law and equity that applied in England immediately before Papua New Guinea's independence.24 The *Native Customs (Regognition) Act*, 1963[25] also provided for judicial recognition of custom in certain cases. That Act is rather limiting however, and has in the past discouraged practitioners from seeking to base their cases on customary considerations.

The principles and rules which were adopted and became part of the common law and equity of Papua New Guinea in the pre-Independence period have not been adopted as part of the underlying law of the Independent State of Papua New Guinea.26 Whilst this is inconvenient it is consistent with the

---

22. Section 9.

23. If provincial legislatures are set up, section 9 will have to be amended because it excludes the possibility of laws being made by provincial bodies. Constitutional amendments to establish provincial governments and overcome this problem are before the National Parliament.

24. Sections 9(f), 20 and Schedules 2.1 and 2.2.

25. No. of 1963.

26. It could be argued that because the decisions of the pre-Independence Supreme Court and Full Court of the Supreme Court of Papua New Guinea and the decisions of the High Court of Australia taken on appeal from the Full Court of the Supreme Court are binding on all courts within the National Judicial System except the Supreme Court and the National Court, then pre-Independence common law and equity is part of the post-independence underlying law. The argument is weakened by the fact that neither the National Court nor the Supreme Court are bound by the decisions pre-Independence superior courts and the fact that the decisions of the High Court of Australia taken directly from the pre-Independence Supreme Court, before the Full Court was established, are no longer binding on any courts within the National Judicial system. Papua New Guinea's Constitution is an autochthanous one, and it was intended that there would be a new start in the legal system at Independence. Furthermore, the National and Supreme Courts are intended to play a major part in developing the underlying law so that it will be more suited to Papua New Guinea conditions. These arguments would probably be conclusive of the matter, if it were not for Schedule 2.8 of the Constitution which provides that except to the extent specifically set out, the doctrines of judicial precedent and *res judicata* and the principle of judicial comity are not to be affected. However, it could be argued that Schedule 2.2 of the Constitution was specifically intended to affect those doctrines and principles.

idea that the Constitution intended that a new start be made with the legal system on Independence Day.

The new start also meant a new way of looking for the law. The first step is to look at the written laws, the Constitution being paramount amongst these. If there is no relevant written law, then the next step is to look to the underlying law. If there is no appropriate custom or there is no relevant principle rule of common law or equity in England that is appropriate or applicable, to the circumstances of the country then the judges must formulate a new rule of the underlying law to meet the occasion. In doing so they must have regard to the National Goals and Directive Principles and the Basic Social Obligations, the human rights provisions of the Constitution, analogies drawn from relevant statutes and custom, the legislation and case law of countries with legal systems similar to that of Papua New Guinea, the decisions of the pre-Independence and post-Independence courts of Papua New Guinea and the circumstances of the country at the time the rules is being formulated.27 Only the judges of the National and Supreme Courts have this power. Magistrates and others judicial officers, if they find a gap in the law to be filled by the development of a new rule of the underlying law, must refer the matter to the Supreme Court for decision.28

IV. *Precedent and the Judges.*

The decisions of the Supreme Court are binding on all courts except itself.29 The decisions of the National Court are binding on all courts except the Supreme Court and itself.30

The judges whether sitting in the National Court or the Supreme Court are not bound by the decisions of any of the pre-Independence superior courts, the High Court of Australia, the Full Court of the Supreme Court of Papua New Guinea or the Supreme Court of Papua New Guinea.31 However they may consider those judgements or the judgements of the courts of any other country for their persuasive value.32

The decisions of the pre-Independence Full Court of the Supreme Court of Papua New Guinea and appeals from it to the High Court of Australia, are binding on the lower courts as if they were decisions of the post-

---

27. Schedule 2.3(1).

28. Schedule 2.3(2).

29. Schedule 2.9(1).

30. Schedule 2.9(2). But if the judges of the National Court sit together on a case, their judgements have greater authority than that of a single judge. The weight of the authority is determined by the number of judges.

31. Schedule 2.12(1).

32. Schedule 2.12(2).

Independence Supreme Court.33 Decisions of the pre-Independence Supreme Court are binding as if they were decisions of the National Court.34 Where a lower court is faced with a conflict of binding authority or considers that a binding decision is no longer appropriate to the circumstances of the country or is inconsistent with a custom which is part of the underlying law or is seriously inconsistent with the tend of the adoption and development of the law, the court may state a case on the matter to the Supreme Court or the National Court depending on the status of the binding decisions in question.35

The judges have been given a prospective over-ruling power. Thus when over-ruling a decision, or making a decision which is contrary to previous practice, doctrine or custom, they may in special cases, apply the decision of law only to situations occuring after the decision.36

Except for the limitations and changes set out above, the legal doctrine of judicial precedent *(stare decisis)* by which the decisions on the law by the superior courts are binding on the courts below them, the principles of judicial comity, by which judges of the same court follow each others' decisions, unless they have good reason not to, and the legal doctrine of *res judicata* by which the decision in a dispute remains binding on the parties to it, are all in force here.37 One is left to assume or to speculate that these doctrines or principles are as found in the English common law, but are subject to adoption and development by the judges here.

V. *Judicial Interpretation and Application of Law.*

When interpreting the law, the judges must give paramount consideration to the dispensation of justice.38 In addition, when interpreting the Constitution and the organic laws, the judges must give the provisions their fair and liberal meaning.39 The judges must also interpret the Constitution and organic laws in accordance with the Rules for Shortening and Interpreation of the Constitution found in Schedule 1 of the Constitution. If those rules do not provide an answer to a particular problem of interpretation, then the underlying law is to be applied.40

---

33. Schedule 2.12(1) (a).

34. Schedule 2.12(1) (b).

35. Schedule 2.10. Decisions having the status of Supreme Court decisions must be referred to the Supreme Court whilst decisions having the status of National Court decisions must be referred to the National Court. Status is determined by Schedule 2.12.

36. Schedule 2.11

37. Schedule 2.8.

38. Section 158(2).

39. Schedule 155(2).

40. Section 8. It would seem that it was intended by this section that the English common law rules of statutory interpretation should be applied, but it would be possible for a custom, if one was relevant, to be applied.

As a further aid in interpreting the Constitution and the organic laws, the Constitution provides that judges may consider the debates, votes and proceedings of the House of Assembly when it was considering the Final Report of the Constitutional Planning Committee and the debates, votes and proceedings of the Constituent Assembly. The judges may also consider the Final Report of the Constitutional Planning Committee itself together with any other document or papers tabled during the debates of the House of Assembly or the Constitutent Assembly.41

Organic laws are to be read and construed subject to the Constitution.42 All other legislation is to be read and construed subject to the Constitution and organic laws.43 Adopted laws and sub-ordinate legislation are to be read subject to their head acts.44 Legislation which is in breach of the Constitution or an organic law or its head acts, is to be read down so that it becomes valid.45 The invalid parts of the legislation are to be blue-pencilled, but the rest is to remain.46

It will be interesting to see how the judges exercise this power as blue-pencilling can lead to legislation having a completely different meaning to the one intended or no real meaning at all. In both those situations the appropriate course would be to hold the legislation to be completely invalid, but section 10 of the Constitution may preclude the judges from making such a ruling.

The National Goals and Directive principles are to be taken into account in interpreting any of the written laws but in a rather back-handed way. Any law that can reasonably be understood or applied without failing to give effect to the attention of Parliament or the Constitution and which can also be understood or applied so as to give effect to the National Goals and Directive Principles and Basic Social Obligations, or at least not to derogate from them, shall be understood or applied in that way.47

Finally each law made by the National 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 the spirit,48 and with paramount consideration for the dispensation of justice.49

---

41. Section 24.

42. Section 10(a).

43. Section 10(b).and (c).

44. Section 10(c).

45. Section 10.

46. *Ibid.*

47. Sections 25(3) (National Goals and Directive Principles) and 65(3) (Basic Social Obligations).

48. Section 109(4).

49. Section 158(2).

The Constitution therefore provides a large number of matters to be taken into account in interpreting the Constitution and Organic Laws. For Acts of Parliament interpretation is easier. They must be read subject to the Constitution and the Organic Laws and interpreted in a way that gives paramount consideration to the dispensation of justice but which also gives the Act its fair large and liberal meaning in order to give effect to its objects and spirit. All this must be done, whenever possible, so as to give effect to, or at least not derogate from, the National Goals and Directive Principles and Basic Social Obligations.

To date there has only been one published case in which the judges have given consideration to these constitutional provisions. In *Public Curator of Papua New Guinea v Public Trustee of New Zealand*,50 the Deputy Chief Justice was asked to accept and grand administration of a will which had a number of formal defects. Section 43 of the *Wills Probate and Administration Act*51 provides that a will with formal defects may be given effect to if it is proven that it was the last will of the testator. The Court gave section 43 its fair large and liberal meaning by granting probate of the formally defective will. In doing so His Honour also took note of the National Goals and Directive Principles.

Except for that case the judges have continued the pre-Independence practice of using authorities from foreign jurisdictions to interpret local legislation.52 One can sympathise with the judges for this approach, because so much of Papua New Guinea's legislation is either identical to or based heavily on legislation from other countries, particularly Australia. But while foreign authorities can often throw light on local legislation, the risk is that legislation here will be interpreted according to the perceptions of foreigners in a manner which suits the requirements of foreign societies, but not necessairly those of Papua New Guinea. In this way the development of a common law which reflects the needs of the people of this country can be hampered.

---

50. Unreported judgement No. 60 (Prentice Deputy CJ. 28.9.1976).

51. No. of 19.

52. See for example *The State v Painke*, unreported judgement N 45 (O'Leary AJ, 24.5.1976) a criminal procedure matter. *Jacobs v Jacobs*, unreported judgement N 49 (O'Leary AJ, 15.6.1976) a Deserted Wives and Children's Act matter in which authorities from England and various Australian jurisdictions were discussed. *Re Maclean*, unreported judgement N56 (Williams J. 1.9.1976), a testator's family maintenance maintenance matter. In *Trnka v Trnka*, unreported judgement N3 (Frost C.J. 3.10.1975) a custody application brought under S79(1) of the *Matrimonial Causes Act*, 1964, Frost CJ said - "Both consel accepted the law applicable as laid down by the High Court of Australia in *Anderson v Anderson.*"

To date, the National Parliament has referred three matters to the Supreme Court under Section 19 of the Constitution.53 In these cases the judges have construed the Constitution by reference to its sections and to the final Report of the Constitutional Planning Committee and the debates on it and on the draft Constitution. None of these cases is of lasting importance.

In *Mairi v Tololo,*54 referred up to the Supreme Court by the National Court, the judges took a different approach. They were called upon to determine the constitutional validity of fees imposed on students by the Board of Governors of the Port Moresby High School. The judges held that fees could not be imposed because they represented a form of taxation not authorised by the National Parliament. They based their decision on section 209 of the Constitution which, they said, was similar to the Bill of Rights 1688 of the English Parliament55 and used the well-known English case *Attorney-General v Wilts United Dairies Ltd.*56 in support of their decision.

Mr. C.J. Lynch, who played a major role in drafting the constitution, has criticised the judges strongly for their approach in *Mairi's* case.57 He said they should have been concerned to interpret the plain meaning of section 209 of the Constitution, instead of treating that section as analogous to the *Bill of Rights*. The Court should have considered whether the English common law principle that there should be no taxation without approval of Parliament was adopted as part of the underlying law of Papua New Guinea, consistent with the Constitution and not contrary to custom before they applied it here.

There is little doubt that the Supreme Court's decision in *Mairi* is the correct one, but it is the court's methodology that is liable for criticism. The Court's approach appears to disregard the legal revolution that occurred at Independence, and the need for the post-Independence courts

---

53. (a) reference No. 1 of 1976, unreported judgement SC97, (2.6.1976).
    (b) reference No. 2 of 1976, unreported judgement SC(-1976).
    (c) reference No. 3 of 1976, unreported judgement SC98, (21.6.1976).

54. Unreported judgement SC94, (15.4.1976).

55. *Ibid,* at pp. 5 and 17.

56. (1922) 91 L.J., K.B. 897; (1921-22) 38 TLR 981; [1922] All E.R. Rep. 845.

57. C.J. Lynch, *Mairi v Tololo, Constitutional Interpretation and the Declaration of the Underlying Law.* (Unpublished paper). Mr. Lynch was the Chief Draftsman of the Constitutional Planning Committee. The Chief Justice referred to Mr. Lynch's unpublished paper in *Mileng v Tololo,* unreported judgement SC 106 (6.10.1976) pp. 4 and 6 and put his mind explicitly to the considerations required by Schedule 2.2 of the Constitution.

to be much more careful about the law they apply and to go to each source of law in the order required by the Constitution.58

The fact that the Supreme Court is the only court with jurisdiction to interpret and apply the Constitution has already caused trouble and is likely to cause trouble in the future. In the National Court, the judges have already decided issues in two cases, which on a strict reading of Section 18(1) of the Constitution only the Supreme Court had power to decide. In *The State v Painke*, the accused had been waiting for his trial for eleven months.59 His case had been adjourned a number of times for various reasons. When it was proposed to adjourn the case yet again, O'Leary A.J. took the view that it would deny the accused his constitutional right to be afforded a fair hearing within a reasonable time and refused the adjournment. The prosecutor then tendered a *nolle prosequi* which His Honour accepted on the ground that section 37(3) of the Constitution did not confer "any right on the accused person *before* his trial has commenced to demand a trial to the exclusion of the right of the state to withdraw the charge or not to procede further with it".60 It is difficult to see how these two opinions are anything else but decisions concerning the application of a provision of the Constitution.

These cases do, however, demonstrate the difficulty of having the Supreme Court as the exclusive interpreter and applier of the Constitution. If the Court had referred this case to the Supreme Court for decision, there would have been a further delay and a further denial of the accused's right to a fair hearing within a reasonable time.

Raine J in *Cory v Blyth* managed to interpret the Constitution by use of the escape route in section 18(2) of the Constitution.61 When faced with the argument that the *Defamation Act* (No. of 19) had not been re-enacted at Independence and that it could only be re-enacted by use of the procedure set out in section 38 of the Constitution, because the Act offended against section 46 of the Constitution which guaranteed freedom of expression, His Honour held that the point was 'vexatious' and possibly 'trivial' and refused to refer it to the Supreme Court.62 While His Honour may have precluded a reference of a constitutional issue to the Supreme Court, the value of His Honour's decision as a precedent must be highly questionable.

Another difficulty is that if a case involves only constitutional questions it must be commenced in the Supreme Court. There are no Supreme Court rules at present, and application has to be made to the Court for directions under section 185 of the Constitution. This could cause delays

---

58. See Section 9.

59. Unreported judgement N45 (O'Leary A.J. 24.5.1976).

60. *The State v Painke*, unreported judgement N45, (O'Leary A.J. 24.5.1976) p.5.

61. *Cory v Blyth*, unreported judgement N50 (Raine J. 24.5.1976).

62. *Cory v Blyth*, unreported judgement N50 (Raine J. 24.5.1976) p.7.

and uncertainties in the normal case.63 But where a person requires urgent interlocutory relief, there are no clear procedures and this fact can make it difficult to obtain such relief.

VI. *Applying the underlying Law.*

On Independence Day, custom was adopted as part of the underlying law and must be applied and enforced as such. Customs which are inconsistent with a Constitutional Law or a statute or which are repugnant to the general principles of humanity were not adopted.64 So far the judges appear to have given little consideration to the role custom is intended to play in the legal system since Independence.

The Deputy Chief Justice adverted to the possibility of custom being applied in a custody case, but went on to decide the case under the *Infants Act*.65. In *Kaigo v Kurondo*, an appeal from the Land Titles Commission, Saldanha J applied custom concerning the long standing Siku-Gena land dispute in the Chimbu Province.66 This case was argued before Independence, but decided after it. His Honour did not refer to the Constitution, but to the *Law Repeal and Adopting Act (New Guinea)* 1921-1939 which was itself repealed at Independence, and to the *Native Customs (Recognition) Act*, 1963. The latter Act provides for the recognition of custom in terms very similar to those contained in the Constitution. His Honour decided the case by holding that while acquiring land by conquest before government control was established in the Chimbu Province was not repugnant to the general principles of humanity, acquiring land by conquest after that time was.

The distinction is very difficult to see. Throughout recorded history, men and nations of men have taken land from one another by conquest. English law accepts that the Crown may take complete control of the land in a colony obtained by conquest if it so desired.67

---

63. A technique of proceeding by way of Notice of Motion and Summons for Directions has been adopted for Supreme Court matters. Each time a new or unanticipated procedural point arises, a new Summons for Directions must be taken out.

64. Schedule 2.1 is in the present tense. It is suggested that this is an indication that it was not intended that custom be frozen on Independence Day and adopted as it was then. An important aspect of custom in Papua New Guinea that it constantly varies to suit the needs of the community to which it applies. Schedule 2.1 appears to take the changeability of custom into account.

65. *R v Tongale; Ex parte Tongale*, unreported judgement N5 (Prentice Deputy C.J., 3.10.1976).

66. Unreported judgement N42 (Saldanha J. 13.1.1976).

67. Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, (London: Stevens) 1966, pp. 629 and 635.

The judges have focused their attention on another part of the underlying law - English law. The principles and rules of the common law and equity of England which were in force on 15th September, 1975, were adopted as part of the underlying law of Papua New Guinea, subject to certain conditions.68 In any particular matter they must not be inconsistent with custom. To the extent that they are, they were not adopted at Independence Day. This conditional adoption of the common law implies that custom takes precedence over it. This question has not been considered in any of the decided cases. In addition, while the English law was adopted en masse on Independence Day, the judges can hold at any time in the future, that because it was inconsistent with custom, a particular principle or rule of the common law and equity of England was, in fact, not so adopted.

This problem with this formulation of the rules for the adoption of the English law is hidden, because Schedule 2.2 is phrased in the present tense. However, the problem is highlighted in the next condition for adoption. The principles and rules of the common law and equity of England were adopted "except if, and to the extent that they are inapplicable or inappropriate to the conditions of the country *from time to time*". (Emphasis supplied.) Thus the judges may decide that, because of the nature of society in Papua New Guinea a particular English law rule is inappropriate here, and therefore it was not adopted as part of the underlying law on Independence Day.

The third condition for adoption of the English law was that it must not be inconsistent with a Constitutional Law or a statute. One must assume that Constitutional Laws and statutes enacted or amended in the post-Independence period, impliedly repeal those parts of the adopted English law inconsistent with them.

This method of adopting English law places a considerable burden on the judges. The first time a principle or rule of the English law comes before the courts for consideration, the judges must decide whether it was one of the principles or rules adopted on Independence Day. The issue of adoption is vitally important because the judge is deciding not only whether a legal rule from a foreign country is to be applied in the case before him, but also whether that rule will be treated permanently as part of the law of Papua New Guinea to be applied in all future relevant cases.69

The weight of this burden, however, is not apparent in the cases decided in the early post-Independence period, and it would appear that, with few exceptions, both the judges and counsel appearing before them, were not aware of the implications of this aspect of the Constitution.

In *Johns v Thomason*, Frost C.J., after setting out the facts, said70

> In these circumstances the respondent relies upon the doctrine of ratification. It was not suggested, nor is such a suggestion tenable, that this common law principle is inapplicable or in appropriate to the circumstances of Papua New Guinea (Constitution Sec. 212).

---

68. Schedule 2.2

69. Unless amended or repealed by statute or varied by a court under Part 5 of Schedule 2.

70. Unreported judgement N11 (Frost C.J. 29.10.1975), p.4.

In a subsequent case, *The State v Beng*, His Honour, considering the English law relating to evidence of identification, quoted from a decision of the Court of Criminal Appeal in Victoria, went on to say71

> This decision in my opinion adequately states the common law practice as at Independence Day. It could not be suggested that it was inapplicable or inappropriate to the circumstances of Papua New Guinea for the purposes of criminal proceedings conducted by judicial officers without a jury, or that it did not comply with the other conditions set out in the Constitution, Sch. 2.2(1).

These cases demonstrate how easily the burden can be discharged in most cases.

In *Mairi's* case, after referring the substantive issue to the Supreme Court, Frost CJ took the view that as a judge of the National Court exercising jurisdiction to make an interim order to present prejudice to the claims of the parties to the matter referred to the Supreme Court, he could order an interim injunction. His Honour then went on to make the interim injunction applying the principles laid down in the recent English cases.72 His Honour did not, however, consider whether those principles had been adopted as part of the underlying law of Papua New Guinea. It is respectfully suggested that the Court was wrong in not doing so. The formula used by His Honour in the cases referred to above would have sufficed as there could have been little room for suggesting that the principles were inapplicable. But there have been, and will continued to be, cases where the issue of inappropriateness and inapplicability is highly relevant.

In *W.A. Flick and Co. v Thompson*, 73 Saldanha J simply applied the English common law on restraint of trade without giving any consideration to whether that law had been adopted as part of the underlying law of Papua New Guinea. The case involved an expatriate controlled company suing a former employee who set up business in competition with the company, contrary to a restraint of trade agreement he had entered into. Very great efforts have been made in Papua New Guinea in recent years to encourage Papua New Guineans to start and run their own businesses. Expatriates in business have been encouraged to employ and train Papua New Guineans in business enterprises of all kinds with a view towards Papua New Guineans either taking over the businesses, or setting up similar businesses in competition. The use of restraint of trade agreements could interfere with this process. It is suggested therefore that His Honour should have considered the impact of his decision to hold that the restraint of trade doctrine had been adopted as part of the underlying law, on public policy.

It could be suggested that in *W.A. Flick and Co. Ltd. v Thompson*, the cause of action arose before Independence and that therefore pre-independence law applies. The Chief Justice appears to take the view that (civil) matters

---

71. Unreported judgement N65 (Frost C.J. 14.10.1976), p.7.

72. *Mairi v Tololo*, unreported judgement N29 (Frost C.J., 9.3.1976).

73. Unreported judgement N43 (Saldanha J. 8.4.1976).

decided after Independence should be decided according to post-Independence law.74 In fact, the applicability test was more stringent in the pre-Independence period. In Papua the principles and rules of common law and equity for the time being in force in England as *far as they were applicable to the circumstances of Papua* were in force there.75 In New Guinea, the test was the same except that the English law as of 9th May 1921 was the enforceable law.76

If there is no relevant written law and no relevant underlying law to meet a particular case before them, the judges are required to formulate a new rule for incorporation into the underlying law.77 It is respectfully suggested that because the judges do not follow the correct methodology when carrying out their law development functions, this sometimes causes them to overlook important considerations.

One of the earliest questions considered by the Supreme Court was what the law should be relating to the admissibility of confessions that had been interpreted into a language other than the one in which they were given and recorded in writing in the interpreted version.78 This matter involved consideration of the decision *Gaio v The Queen*, a case appealed to the High Court of Australia from a single judge of the pre-independence Supreme Court of Papua New Guinea.79 Frost CJ said in *Fande Balo's* case - "But as the question whether this court should continue to be bound by *Gaio v The Queen* was fully argued, it is proper to determine it",80 and "For this reason also the rule in *Gaio v The Queen* should not be disturbed."81 With respect, His Honour was wrong in considering whether *Gaio* should *continue* to be a binding authority. It had ceased to be that at Independence, and by operation of Schedule 2.12 of the Constitution was not even binding on the lower courts in Papua New Guinea.

The Chief Justice ruled, in effect, that *Gaio's* case set out a rule which should be incorporated into the underlying law of Papua New Guinea. Both he and Saldanha J considered it appropriate to the circumstances of Papua New Guinea that a confession given in one language, interpreted into another (and perhaps even another), and recorded in writing in that second (or third) language should be admissible if the accused adopted the written document as his own. Their Honours' decision involves the adoption of a rule of convenience, the appropriateness of which may be open to question. But the major criticism to be made here is that their Honours went about formulating a rule of the underlying law, without going through all the

---

74. *Johns v Thomason*, unreported judgement N11 (Frost C.J. 29.10.1975), P.4.

75. *Courts and Laws Adopting Act* (Papua) 1889, section 4.

76. *Laws Repeal and Adopting Act* (New Guinea) 1921-1939, section 16.

77. Schedule 2.3.

78. *Fande Balo v The Queen*, unreported judgement SC90 (12.12.1976).

79. [1960-61] 104 CLR 419.

80. Unreported judgement SC90 (12.12.1975), p.3.

81. *Ibid.*

steps in the process required by the Schedule 2 of the Constitution. It was clear that no written law covered the issue, so the judges turned to the underlying law. The question of whether there was an appropriate custom was not discussed, but this is probably not a matter on which custom had anything to say. The next step was to consider what was the English law on this question. The Chief Justice appears to have taken the view that *Gaio* was an accurate statement of the English law even though it was a decision of the High Court of Australia. His Honour then held that *Gaio's* case was applicable to the circumstances of Papua New Guinea. It is possible, though not stated, that he took the view that if Gaio's case did not state the English law accurately, then the correct view of the English law was inapplicable to Papua New Guinea and Gaio's case contained the appropriate rule to be incorporated into the underlying law.82 Saldanha J took a similar view in stating "Whether Gaio's case is not an infringement of the rule against hearsay or merely an exception to that rule, so far as circumstances in Papua New Guinea are concerned it is good law and makes good sense".83

With due respect, what their Honours should have done was decide, by use of English cases what the England law was on this point, and then decided whether it had been adopted as part of the underlying law of Papua New Guinea. If they considered the English law inapplicable, then they would be required to formulate an appropriate rule as part of the underlying law. In doing this they would have considered the National Goals and Directive Principles and Basic Social Obligations and would have noted National Goal and Directive Principle 2(11) which provides, - relevant to *Gaio's* case, that

> We accordingly call for all persons and governmental bodies in Papua New Guinea to endeavour to achieve universal literacy in *Pisin, Hiri Motu* or English, and in *"tok ples"* or *"ita eda tana gado"*.

They would have also considered the Basic Rights provisions of the constitution and would have noted section 37(1) "Every person has the right to the full protection of the law ..." They may have then considered *Gaio,* but could equally have considered the *Evidence (Statements to Police Officers) Rules* of Uganda and the case interpreting those rules. If they had considered these matters they may have realised that other countries had developed solutions to the problems in this field, solutions which were not simply rules of convenience for the police, but rules which took into account the justice of having the accused's confession taken down in the exact words he gave it or translated only once. They may have also shown a greater appreciation of the problem and perhaps have given consideration to the "compromise" suggested by Raine J, by which the formal parts of the confession were translated and recorded in English, but the critical parts of the confession were recorded in the language spoken (by the accused) in the interview whenever that was possible.84

---

82. *Ibid.*

83. *Ibid,* at p.16.

84. *Ibid,* at p.11.

In the very next published judgement of the Supreme Court, *Aika v Uremany*,85 the Deputy Chief Justice gave the lead in this regard. The issue before the Court was whether an offender seeking bail pending appeal after conviction in the Local Court could approach a second judge if refused bail by a first. His Honour reviewed the authorities from Australia and England and formed the view that, with minor exceptions, this could be done in Australia but not in England. His Honour then took the view that the English rule was not applicable or appropriate to the circumstances of Papua New Guinea because of the way the Supreme and National Courts have to conduct their business, and formulated a new rule of the underlying law similar to the Australian practice. Unfortunately His Honour was in the minority in this case; the majority took the narrow reading of the words of section 45 of the *Local Courts Act* and came to the opposite conclusion.

The approach adopted by the Deputy Chief Justice has not been followed by the other judges. In *Piaro v Kumbamung*, Kearney J chose to develop the underlying law by stating what he considered to be the "essential grounds" an appellant must establish if he is to be granted bail after conviction and sentence, but pending on appeal.86 His Honour laid down four essential grounds, three of which were particular applications of the fourth. This is a field in which there had been some conflict of opinion among the judges before Independence. His Honour referred to the relevant cases but did not explain the conflict; instead he laid down a new set of criteria for the granting of bail.

Having decided that the written law gave him discretion as to whether or not to grant bail, His Honour appears to have jumped the stage of considering whether the English law provided appropriate rules and moved straight to the law development stage. In developing the rules, His Honour appears to have given explicit consideration to only one of the six criteria set down in Schedule 2.3 of the Constitution, and has formulated a rule which reflects the English and Australian authorities - namely that bail will be granted after conviction only on exceptional grounds. If His Honour had given greater consideration to the circumstances of Papua New Guinea, he may well have felt that the principle that a decision of a lower court is prima facie correct should not be given too much prominence, and that the exceptional circumstances test was too severe.

Finally, in a recent case the Supreme Court formulated a new rule of the underlying law without even adverting to the fact. In *The Government of Papua New Guinea v McCleary*,87 the Court laid down the principles to be applied when assessing damages for non-economic loss, i.e., pain and suffering, loss of amenities, and loss of enjoyment of life, and in the process settled the controversy about the proper way to assess damages under this heading.

---

85. Unreported judgement SC91 (9.2.1976).

86. Unreported judgement N51 (Kearney J. 2.7.1976).

87. Unreported judgement SC102 (6.8.1976).

In *The Administration of Papua New Guinea v Carroll*,88 the Full Court of the Supreme Court majority held that damages for non-economic loss should be assessed with moderation in Papua New Guinea. Frost S.P.J. (as he then was) stated that damages of this type for an Australian injured in Papua New Guinea should be 20-25% less than he would receive in Australia. Clarkson J was in substantial agreement with him. Lalor J followed the case in *Diaz v Dillingham Corporation of Papua New Guinea*, but awarded the plaintiff, a paraplegic, $75,000 for loss amenities. His Honour however refused to extend the moderation in damages to the other types of damages.89 On appeal, His Honour's assessment was upheld, but the majority of the post-Independence Supreme Court held that *Carroll's* case should not be followed and that damages should be awarded to each plaintiff based on an assessment of the pain and suffering, loss of amenities and loss of enjoyment of life suffered by him.90 While this decision means that large disparities between awards of damages will continue to occur, it seems to be appropriate to present conditions in Papua New Guinea. There are greatly differing standards of living enjoyed by people in this country and whilst it is laudable to seek equality, it is unjust to an individual, particularly one whose life has been changed by a crippling injury, to have that tragedy compounded by an award of damages insufficient for him to maintain his standard of living.

VII. *Conclusion.*

In the first year since Independence, the judges have shown themselves reluctant to accept the challenge laid down by the Constitution to develop Papua New Guinea's underlying law in a way that suits the conditions of the country. A number of reasons for the slow progress can be suggested. The challenge is announced in muted tones.91 The rules for the adoption of English law allow the judges to state, without detailed consideration, that there is no question of inapplicability or inappropriateness and therefore adopt the relevant rule of English law. These new rules possibly mean more, rather than less, of the English common law is in force here than prior to Independence.

The judges, with the exception of the Deputy Chief Justice, have avoided the steps for the development of the underlying law set down in the Constitution. There is little evidence that members of the profession have taken pains to assist the judges in their law development task. But perhaps most importantly of all, both the bench and the members of the profession have been trained to believe that, despite the wealth of evidence of the countrary, judges do not make the law, they only interpret it. This deeply ingrained notion is based on the separation of powers of doctrine under which the Parliament makes the law and the judges apply it. This doctrine denies the very nature and existence of the English common law, and it has no place in the governmental structure of Papua New Guinea, because the constitution makes it abundantly clear that our judges have significant law-making powers.

---

88. [1974] PNGLR 265. The majority comprised Frost S.P.J. and Clarkon J. Minogue C.J. dissented.

89. Unreported judgement 816 (Lalor J - 1974).

90. Unreported judgement SC 102 (6.8.1976). The majority comprised Prentice Deputy CJ and Raine J. Frost CJ dissented.

91. Schedule 2.4; see also Schedule 2.5.