›Law‹ and ›Custom‹ in Papua New Guinea: Separation, Unification or Co-operation?

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I. Introduction

In Papua New Guinea, as in other former colonies, lawyers are searching for a synthesis between ›law‹ and ›custom‹ which would integrate, in their case, the »Melanesian way of life« and the official legal system of the state, inherited at Independence just over ten years ago. So far their attempts have not been spectacularly successful, and the »two spheres approach« to ›law‹ and ›custom‹, adopted at the beginning of the colonial era, towards the end of last century, continues to hold sway.

In this paper I will argue that a unification of ›law‹ and ›custom‹ may be neither a realistic nor a desirable possibility, and that the task facing lawyers in Papua New Guinea – and elsewhere – is not a ›modernisation‹ of ›custom‹ (which would enable it to become ›law‹) but rather a ›modernisation‹ of ›law‹, not in order to turn it into ›custom‹, but with the aim of increasing its presently inadequate capacity to co-operate constructively with ›custom‹ or any other non-›legal‹ form of law.[1]

In other words, we may not be dealing with a ›decolonisation‹ issue at all but with a global problem which will be compounded by misguided unification attempts instead of being brought closer to a satisfactory solution. Nevertheless, it is useful to open our discussion by looking at the reasons why the colonial powers in the Papua New Guinea area, Britain as well as Germany, chose – if this is the appropriate word – a »two spheres approach«. As we are concerned with typification rather than with the unique historical circumstances of this particular case, we will not consider what actually happened but the range of ›choices‹ which could have been made.[2]

1 In my terminology law is a genus concept, whereas ›law‹ and ›custom‹ refer to two, more of less discrete, species of law. Roughly speaking ›law‹ stands in this paper for »modern Western law« and ›custom‹ for »traditional Melanesian law«. However, I am more concerned with general types of law than with their historical origin or ›evolution‹. For me the official legal system of the Independent State of Papua New Guinea remains ›law‹ whereas the unofficial law operating at the village level today remains ›custom‹, despite the various ›modernising‹ influences to which it has been subjected in the course of the last century.

2 For a brief historical survey see Sack, forthcoming (a).

II. The Colonial »Two Spheres Approach«

Colonial powers have basically five choices as regards the law of a newly established colony. They can adopt the law operating in the area as the official legal system of the colony, they can repeal this law and replace it wholesale with their own metropolitan legal system,[3] or they can dispense with an official legal system altogether and rule a colony exclusively on the basis of administrative discretion.[4] If all three of these radical solutions are rejected, colonial powers can choose between two kinds of compromises, one legalistic and the other one pragmatic: they can either combine a limited adoption of ›foreign‹ law with a limited, official recognition of ›indigenous‹ law as part of a unified legal system, or they can simply stop short of officially abolishing or recognising ›indigenous‹ law, treating the imported ›foreign‹ law as the only official legal system, but giving some limited or unlimited *de facto* recognition to continued operation of ›indigenous‹ law or ›custom‹.

Legal history probably provides illustrations of all these possibilities or variants thereof.[5] Yet it seems that few, if indeed more than one, were seriously considered in the case of British or German New Guinea. ›Constitutionalism‹ was sufficiently firmly established by the end of the 19th century to make colonial rule outside the law no more than a theoretical possibility. By the same token, it was taken for granted that Melanesian ›custom‹ was unfit to provide for civilised government and that British or German ›law‹ could not serve immediately as a charter for the lives of uncivilised savages. The prevailing – and, in contrast to now, openly expressed – ideology of Western superiority ruled out even a selective recognition of ›custom‹ as an equal partner in the official legal system of a Western colony.

This did not mean that ›custom‹ had to be officially abolished, or that the colonial government could not bind itself legally to interfere with ›custom‹ only insofar as it was regarded as »repugnant« to Western ideals – it meant, however, that there was really no choice but to adopt the last of the approaches indicated above, namely an adoption of ›foreign‹ law combined with a limited *de facto* recognition of ›custom‹ which was permitted to continue to govern the lives of the indigenous population, unless the colonial state and its legal system decided to intervene.

The ideological reasons for this decision are so overwhelming that special attention must be drawn to the fact that there was therefore no need or room for legal considerations, in particular for a sober, comparative assessment of the respective advantages and disad-

3 We will disregard the possibility of introducing some other ›foreign‹ legal system, for example that already established in another colony of the colonial power in question.

4 A volonial power can, of course, also establish a local law-making authority of one kind or another with the task of enacting a full legal system or specific legislation as the need arisis – but it is unlikely that the resulting ›local‹ law would differ fundamentally from either the ›imported‹ or the ›indigenous‹ law.

5 For example, it is standard practice that the military administration of an occupied (›civilised‹) territory continues to operate the existing legal system, and the British kings, at any rate, were anxious to save the first North American colonies from the legislative authority of the British Parliament.

vantages of indigenous ›custom‹ and introduced ›law‹ in terms of individual or social justice or of any other legally relevant value judgement. It should also be pointed out that administrative necessities by themselves, would probably have led to the same result as ideological preferences. Irrespective of what the colonial powers thought about the superiority of Western ›law‹ and culture and the shortcomings of Melanesian ›custom‹, the mere importation of the *state* into the area required the adoption of an appropriate legal framework which defined, controlled – and protected[6] – the exercise of state power. That is to say, ›foreign‹ law was introduced into Melanesia not for the benefit of its people but for the benefit of state rule – and it was ultimately irrelevant that state rule initially took a colonial form. The position would have been the same if the Papua New Guinea area had been divided into sovereign states under minor British or German princes, or if it had been exclusively inhabited by pigs or angels. Consequently colonial ›law‹ in Papua New Guinea was, from the start, first and foremost *constitutional* law. It was designed to install a rudimentary machinery of state-government which ›custom‹ was patently incapable of providing.

The approach adopted had two further, almost automatic results which are significant for our purposes. On the one hand it reduced ›custom‹, insofar as it remained visible from a state-law perspective, to a body of substantive ›rules‹ regulating individual human behaviour. ›Custom‹ as a way of dealing with disputes, of managing natural resources or of controlling political power was henceforth beyond the pale. On the other hand, it reduced ›law‹ to a body of rules governing the state and its relations with its individual subjects. Colonial ›law‹ was not even intended to become a social charter of the people and to replace ›custom‹ in this respect. The colonial state was satisfied to issue instead »native regulations«, usually coupled with punitive sanctions for those who did not behave themselves. Thus the separation of the two spheres of ›law‹ and ›custom‹, of the state and society, was consolidated. ›Custom‹ was to have no more say in how the country was being gouverned and ›law‹ proclaimed its independence of society. The only remaining meeting ground of ›law‹ and ›custom‹ was the state courts, and the only contact between the state and society was through the individuals who acted on its behalf and through those ›private‹ individuals who were affected by these actions.

Let us now turn to a second set of choices posed by the »two spheres approach«. As mentioned earlier it permitted the co-existence of ›law‹ and ›custom‹ instead of insisting on the latter's immediate destruction. But for how long? Was it to be fore an indefinite period, or did the colonial powers have other plans?

Again the ideological answer was straightforward. The aim was to replace the »two spheres approach« in due course by a single, unified legal system. Moreover, this system would not be based on a synthesis of ›law‹ and ›custom‹, or on a ›modernised‹ form of ›custom‹, or on a fundamentally modified version of ›law‹. Instead, ›custom‹ was ex-

6 From the start individual colonial officials were concerned that their dealings with the indigenous population were ›legalised‹ so that they would not themselves face charges of manslaughter, assault, arson, theft, extortion of wrongful imprisonment when they went about their business of administering the country.

pected to disappear gradually as the indigenous population ›advanced‹ – with the help of the colonial government and other civilising agencies – until it had reached a point where it was fit to live under a modern legal system. In short, the apartheid of ›law‹ and ›custom‹ was to be overcome by an assimilation of the Melanesian people not by a modification of the imported, ›foreign‹ law.

It is again important to appreciate that this decision was arrived at on ideological rather than legal grounds and that the strength of the ideological factors obscured a crucial technical issue, namely the question as to whether it would have been legally possible, if the colonial powers had decided differently, to integrate ›law‹ and ›custom‹; or to turn ›custom‹ into the legal system of a state; or to modify ›law‹ so as to reflect the »Melanesian way of life«.

Although the approach chosen by the colonial powers did not demand a formal abolition of ›custom‹, it required the eventual removal from the official legal system of those provisions which discriminated against the indigenous population, in the form of special native regulations, special native courts and the like. For the »two spheres« approach to ›law‹ and ›custom‹ was initially coupled with a »dual justice« approach by the legal system itself – that is to say with a kind of internal duplication of the »two spheres« approach which was, from the start, only justifiable as a temporary concession to practical administrative difficulties. The indefinite existence of two standards of justice within the legal system, a superior one for the colonisers and an inferior – but equally ›foreign‹ one – for the colonised was obviously indefensible on the accepted ideological grounds. Hence the »dual justice« approach had to be terminated in preparation for self-government and independence so as to complete the full implementation of »the rule of law«. This was meant to be an anticipated decolonisation of Papua New Guinea's legal system which would permit it to survive the end of the colonial era unscathed – and thereby furnish Australia (which had assumed administrative control over British as well as German New Guinea) with a stable and predictable neighbour of kindred legal spirit in the years to come.[7]

In this scenario independence offered no opportunity for a revival of ›custom‹. Instead it was to be the culmination of a self-fulfilling prophecy sealing its demise. Indeed the scheme was, certainly at the level of rhetoric, partly justified by the claim that ›custom‹ had already irretrievable broken down and was, whether people liked it or not, hopelessly beyond repair.

How did the colonial powers envisage the relationship between the two spheres of ›law‹ and ›custom‹ during the time of their co-existence? It hardly needs saying that they settled for a hierarchical arrangement in which ›law‹ was dominant and ›custom‹ subservient, albeit to the colonial state rather than specifically to its legal system. This arrangement had the further advantage that an established legal technique was available which could be employed to deal with the remaining legal relations between ›law‹ and ›custom‹

7 For some discussion of this anti- »dual justice« campaign see Sack, forthcoming (b).

– as opposed to the relations between ›custom‹ and the state in the field of native administration.

The device in question was the ›international private law‹ model which was internalised to meet colonial needs. This meant, first of all, that ›custom‹ was treated as »foreign law« on its own home ground. Moreover, being foreign to the courts of the colonial state, it assumed, according to the model, a conveniently non-legal, factual character. Finally, the model made sure that a recognition of ›custom‹ did not diminish the legal sovereignty of the colonial state: it was free to choose, if and under what conditions ›custom‹ would be taken into account by its courts – naturally to be processed in accordance with their own legal framework. Even insofar as ›custom‹ was recognised in this manner, it therefore did not apply in its own right but by virtue of a concession on the part of the colonial legal system and under its terms – and it only applied in a formal court situation; whether or not ›custom‹ continued to shape people's behaviour in everyday life was of no concern to the ›law‹ of the colonial state.

This was different as far as administrative practice was concerned. Administrative officers in the field had to respond to all aspects of ›custom‹ in action; they had to deal with feuds, sorcery, dispute settlement procedures and ›customary‹ authority structures – and they were not alone but used and were used by indigenous policemen, interpreters, village headmen and traditional big men as well as by European missionaries, planters or traders.

The hierarchical desires on the part of the colonial state notwithstanding, the neat international private law model was plainly insufficient in these circumstances. Instead a multitude of symbiotic or parasitical relations developed between ›custom‹ and the state, usually in an *ad hoc* fashion, and shaped by personality rather than policy. ›Custom‹ was sometimes ignored and at other times tolerated or reinforced – and the aim was, naturally, manipulation rather than understanding or preservation.

The interests, prejudices and priorities of the various groups of European actors were also by no means identical: missionaries had other aims than administrators or planters; the approach of Catholic missionaries differed from that of the Protestants, and that of the Lutherans from that of the Methodists; there were internal differences of opinion or style and countless individual powers games which all had a significant impact on the relationship between ›law‹ and ›custom‹. In addition, the indigenous people who were drawn in a number of ways into the colonial state, became vital parts of its machinery; and while they were unable to change its basic character, they had a considerable influence on its mode of operation, in particular on the interaction between ›law‹ and ›custom‹.

Finally, there were powerful topographical, economic and financial factors at work. It took over fifty years before the densely populated highlands of Papua New Guinea were brought under any form of governmental control, and there are still surprisingly extended areas today where the presence of the state and its ›law‹ remains nominal and where the people and ›custom‹ – as far as everyday life is concerned – are largely left to their own devices. Moreover, even where ›law‹ has become the dominant (and a regularly

exercised) force, ›custom‹ remains a power to be reckoned with – the ›customary‹ tenure of land, the traditional counterpart of constitutional law, providing the outstanding example to which I will return at the end of this paper.

III. ›Law‹, ›Custom‹ and ›Independence‹

At Independence Papua New Guinea had the same theoretical range of choices concerning the law which was to apply in the country as the colonial powers had some eighty years earlier. The political, ideological and intellectual context in which the relevant decisions were being made, however, had changed considerably, at least on the surface. In Papua New Guinea, as in other colonies, ›custom‹ had become a symbol of a distinct cultural identity and of the free, pre-colonial past. Conversly ›law‹ was identified with the colonial state and foreign domination. Papua New Guinea had to discard its entire existing legal system, which was presented as a colonial fraud, and design a fundamentally new one, based on its own Melanesian traditions. This rhetoric was helped by the fact that the new school of thought which depicts ›custom‹ at the end of the colonial era as being as much a creation of the colonial state as the latter's own legal system had not yet emerged, as well as by the fact that ›progressive‹ writers were, in general, less inclined than now to stress that ›custom‹ may have an even greater potential for oppression and corruption than state law.

Nonetheless, the question was simply no longer whether or not the state and its legal system was to be *introduced* into Melanesia: the state had established itself; it was a political and institutional fact, and Papua New Guineans were left in no doubt that its continued existence was essential, if only for external reasons. Independence would not come to the *people* of Papua New Guinea, but would be granted to a state government to which the powers and authority of the colonial state were to be transferred. It was the state in Papua New Guinea which was to become independent; a reassertion of the ›sovereignty‹ of traditional communities was out of the question. Even the indigenous forces opposing an unified state of Papua New Guinea were perceived – and saw themselves – as ›secessionist‹ and as determined to establish smaller, regional *states*.

Furthermore, a dramatic shift had comparatively recently occurred in the way in which the role of the modern Western version of state law in Third World countries was understood and marketed. It was no longer recommended as a champion of Western ideals (such as rationallity, democracy, basic human rights and freedom of contract) but as a value-neutral, but superior, legal technology which could be used to implement any desired form of ›development‹ more effectively than any possible legal alternative, especially ›custom‹.

At the critical time even those who rejected the conventional (modernisation and economic growth-oriented) model of ›development‹ still by and large accepted this instrumental view of ›law‹ and consequently treated ›law‹ as an ally rather than as an enemy of ›alternative development‹. Once the ›right‹ people had assumed control of ›the

legal system‹, so it was thought, its machinery could be used by them for their own purposes, just as it had been previously employed by their colonial masters to achieve their designs.

Under these circumstances it seemed foolish to sacrifice the proven technical advantages of the existing system of ›law‹ to the demands of a romantic populism. The failings of colonial ›law‹ in Papua New Guinea were not the fault of the legal system as such, but of the policies pursued by those in power during the colonial period. Hence, as soon as the executive, the legislature and the judiciary consisted of Melanesians, there would be no problems in making the legal system serve Melanesian interests and aspirations; in particular there would be no difficulty in giving effect to the best aspects of Melanesian ›custom‹ as part of a unified system of law.

The magic of Western legal technique can be clearly seen at work in the »autochthony« debate which ensued at the time.[8] Papua New Guineans felt strongly that the law applying in their country after Independence ought to be »homegrown«. By replacing the policial demand for »homegrownness« with the recently introduced technical term »autochthony« (which means pretty much the same in ancient Greek), it became possible to introduce an increasingly sharp and artificial distinction between form and content and to move the focus gradually towards a search for an appropriate legal procedure which would ensure that the Constitution of the Independent State of Papua New Guinea would not derive its force and validity from a final act of colonial legislation. The aim was to permit Papua New Guineans to assert their own, original sovereignty instead of having it bestowed upon them as a parting gift from their colonial masters – but defining the task in this particular way required the tacit acceptance of a particular legal framework and thus reduced the range of available choices to those which this framework was able to accommodate. However »homegrown« the law of Papua New Guinea was to be, it was now taken for granted – without the need for further consideration – that it would centre on a state and on a written constitution as its basic law.

As a result the question of the »homegrownness« of Papua New Guinea's future legal system was reduced to a formalised act of political choice: whatever form of law the people of Papua New Guinea chose to adopt – in exercise of their original sovereignty – was »homegrown« in this new ›legal‹ sence, even if it was identical in every important respect with the legal system operating at the close of the colonial era. If it was possible to devise a procedure which would effectively cut the umbilical cord linking the new law to the old colonial regime for a mere logical second before it was born, then the act of free choice would perform a miracle of transubstantiation.

It was only during this imaginary timespan that the people of Papua New Guinea were permitted to exercise their sovereignty, and even then they had to act through their »duly elected representatives« (Preamble of the Constitution). Immediately afterwards they had to hand over their powers to the Independent State of Papua New Guinea which was

8 See Deklin, 1985: pp. 27–77.

to be their new master. The jack-in-the-box had done its duty, the lid could again be closed.

Having solved this apparently decisive, technical problem satisfactorily in advance it was possible to settle down to the business of designing a constitution for Papua New Guinea – in the belief that all the important choices still had to be made. In fact, the only remaining task was how best to organise the new state, although it was naturally assumed that the state was to serve the people and not the other way round. However, the state and not the people was the centre of attention. The question was not: what do the people need – not even what form of government is in their best interests – but what has the state to offer to them?

The irony of this approach it that the more ambitious the answer given to this question, the more are the powers of the state increased and the sovereignty of the people diminished: the more humanitarian the more totalitarian – and the more expensive – the state must become.

In the case of the Papua New Guinea Constitution the underlying perception of the purpose of the state is a broad and enlightened as one can wish:

> it is the duty of all governmental bodies to apply and give effect to . . . [the National Goals and Directive Principles] as far as lies within their respective powers (Section 22 [2]).

As the first and overriding of these Goals is »integral human [rather than merely economic] development«, the *raison d'être* for the Independent State of Papua New Guinea is neither the protection of territorial integrity nor the maintenance of internal order, but the all-inclusive task of providing the best opportunities for the integral human development of every Papua New Guinean – and, as far as the Constitution is concerned, this task is the sole responsibility of the state, acting through the National Government which must move within the legal framework provided by the Constitution.[9]

What role is ›custom‹ expected to play within this scheme?

First of all it must be pointed out that the Constitution does not single out the notion of ›custom‹ – as a counterpart of the notion of ›law‹ (or laws) in its Part II (The National Legal System). Instead it uses »the worthy customs . . . of pour people« together with their »traditional wisdoms« or »noble traditions« to indicate the Melanesian components of »our combined heritage« (which also includes Christian principles) since they – like the ›law‹ enshrined in the Constitution – »are ours now« (Preamble). However, the key concept in this context is the notion of »Papua New Guinean Ways«. (Fifth Goal). This notion is indeed in line with the Melanesian perspective which contrasts ›custom‹ as »the people's way of life« with ›law‹ as »the law of the government« – without suggesting in either case that the relevant law consisted (or ought to consist) of laws, norms or rules.

9 To be sure, the National Goals are *national* goals which are addressed to every citizen and not exclusively to the state but Section 99 (1) provides that the »power, authority and jurisdiction of the People shall be exercised by the National Government« – of course »subject to and in accordance with this Constitution«.

The recognition that ›custom‹ is a combination of knowledge and organisation rather than a system of rules is an important step forward compared with the colonial position and crucial in order to understand the place the Constitution gives to ›custom‹ in postcolonial Papua New Guinea.

We will first deal with the organisational aspect.

The Sixth Directive to the First National Goal (Integral Human Development) addresses it squarely by calling for

> development to take place primarily through the use of Papua New Guinean forms of social and political organisation.

Yet there is, from the start, a significant degree of ambiguity. The preceding Fifth Directive singles out one of the »Papua New Guinean forms of social and political organisation«, namely the »Melanesian family«, declaring it to be »the fundamental basis of our society« but denying it in the same breath any kind of political role, calling only for

> every step to be taken to promote the moral, cultural, economic and social standing of the Melanesian family.[10]

The omission of any reference to a political role for the »Melanesian family« is no accident as the same happens in the Fifth Goal which focusses on »Papua New Guinean ways«. Whereas it repeats the Sixth Directive to the First Goal, including the reference to Papua New Guinean forms of political organisation, it treats the »traditional villages and communities« in the Fourth Directive again as purely social institutions, calling for them

> to remain as viable units of Papua New Guinean society, and for active steps to be taken to improve their cultural, social, economic and ethical quality.

An acceptance – perhaps reluctant – of the seemingly inevitable division between the social and the political, between society and the state, between ›custom‹ and ›law‹, which characterises the colonial »two spheres« approach is unmistakable. Even after Independence there is no room for Papua New Guinean forms of *political* organisation as the Constitution sees the position; all that can be done is to oblige the foreign institutions which have established themselves in the political arena to be more responsive to »the needs and attitudes of the People« (First Directive).[11] This is all the more surprising when one discovers how wide the Constitution casts its net in this respect; for what it has in mind are not merely the institutions of government but also those of »commerce, education and religion« (ibid.). While chambers of commerce, universities and churches

10 It is not clear what is meant by this term the nuclear (Christian?) family, some kind of extended family or the (smaller of larger?) traditional kinship groups?

11 The First Directive to the Fifth Goal, on which I am commenting here, reads as follows:
»We accordingly call for
(1) a fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the people«.

are accepted as political actors which play a legally recognised part in state politics, this is regarded as impractical or inappropriate in the case of »the traditional villages and communities« or »the Melanesian family« – presumably because they are felt to be both more central and more alien to the system of state government which the Constitution puts into place. The members of Melanesian families, traditional villages and communities become collectively »the People«, an aggregate of individual citizens to be organised politically by the state along territorial lines. Papua New Guinean forms of political organisation become Papua New Guinean forms of participation and decisionmaking and are, ultimately, reduced to a call for »Melanesian consensus«.

The question is no longer how best to utilise Papua New Guinean forms of political organisation in the governing of the country but how to increase the participation of the people in state government and how to make state government more responsive to their needs. The task of integrating Papua New Guinean forms of political organisation into the system of state government (and the fundamental structural changes this is likely to insolve) is superceded by the quite different and much simpler task of decentralising the powers of the colonial state. State government is – without fundamental changes to its structure – extended to the grassroots level, where it can now compete, more vigorously than ever, with Papua New Guinean forms of socio-political organisation, usurping their political functions and thus, quite contrary to the intentions of the Constitution, also undermining their social viability.

So much for the political role of ›custom‹ in Papua New Guinea. As far as ›custom‹ as body of knowledge about law is concerned, the Constitution is more positive – although rather circumspect.

According to Section 9 of the Constitution the laws – not the law! – of Papua New Guinea consist of a hierarchy of legislation, headed by the Constitution, the »underlying law« – »and none other«. Section 20 (1) provides that

An Act of Parliament shall

(a) declare the underlying law of Papua new Guinea; and

(b) provide for . . . [its] development . . .

adding in (2) than until then these matters were to be governed by its Schedule 2.

There is no need to discuss Schedule 2 in detail, insofar as it relates to the recognition and development of ›custom‹. It is important, however, to appreciate two features of the approach adopted by the Constitution. Firstly, ›custom‹ is understood as consisting exclusively of a body of substantive rules relating to individual human behaviour; Schedule 2 is not concerned with the organisational or procedural aspects of ›custom‹ (for example, it does not recognise ›customary‹ dispute management procedures as part of the law of the country).[12] Secondly, Schedule 2 is only interested in the application of these substantive ›customary‹ rules in a formal court situation. In other words, Schedule 2 is addressed to the courts and not to the people. It does not command the people of Papua New Guinea to follow their respective customs, for instance in relation to exoga-

12 See Section 172 (2).

my or residence, because they have now become part of the country's official legal system; rather it requires the National Judicial System to turn to ›custom‹ if the written law of the country does not provide appropriate rules for deciding a case at hand.
All this is unremarkable and consistent with the approach adopted during the colonial period; what is unusual and fruitful is a *cri de coeur* in Section 21 (1) which defines the purpose of Schedule 2 as giving assistance to »the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea«. This statement, probably unique in the history of constitutional law, is revealing in a number of ways. Firstly, it shows that the constitution-makers were aware that the constitution itself, despite their efforts, was not the expression of an appropriate jurisprudence because such a jurisprudence did not yet exist but needed first to be ›developed‹. Secondly, it indicates that the ›development‹ of the underlying law is not perceived as a marginal, gapfilling exercise but as a means of reforming the entire legal system, so to speak from the inside. Thirdly, it suggests that the Constitution saw the main role of ›custom‹ as a general source of inspiration for this task and not as a reservoir for specific legal rules. And fourthly, it leaves no doubt that the Constitution did not wish to entrust this task primarily to the legislature or the judiciary but to a Law Reform Commission, provided for in Section 21 (2).
It is worth taking a closer look at this key institution and its central function, the development of »our indigenous jurisprudence«, since it offers a starting point a quite different and far more constructive understanding of the relations between ›law‹ and ›custom‹ under the Constitution than so far suggested.
To begin with, there is no question that the Constitution accepts the primacy of ›law‹ over ›custom‹: the Constitution – and not the »worthy customs of our people« – is the supreme law of the country (Section 11). Yet it is also clear that the Constitution regards ›law‹ and not ›custom‹ as the principal target of reform: the Law Reform Commission is a *›law‹* reform commission and not a commission established to reform ›custom‹. The Constitution gives the Law Reform Commission no brief in this latter regard. On the contrary, it is to use the ›jurisprudence‹ underlying ›custom‹ to reform the ›law‹ and to develop it to a point where it can replace the ›jurisprudence‹ underlying the current ›legal‹ system, inlcuding the Constitution itself.
This demonstrates a shrewd appreciation of the peculiar relations between theory and practice in the field of law and of the serious handicap under which the constitutionmakers themselves were labouring in this respect: law – in the form of ›law‹ as well as ›custom‹ – can only achieve in practice what its theoretical (and ideological) framework permits it to attempt. In the field of law nothing can be done until it has been thought of and, conversely, anything that has been thought of can be put into practice, although it may have disastrous results. There are no immutable natural laws in the legal universe which rule out a single possibility. In law – unlike physics – everything is possible, because law consists exclusively of variables – provided that we *know* what we want to do and that we *want* to do it.

These variables do not each exist in isolation but are interdependent, so that any change must involve at least a number of them to a lesser or large degree, but this is not our problem at present. What concern us here and what concerned the makers of the Constitution of Papua New Guinea is

a. that the legal means for legal reform have to be divised before the desirability and feasibility of the ends it sets out to achieve can be assessed; and
b. that in the view of the constitution-makers neither the imported Western jurisprudence nor the traditional indigenous jurisprudence provided them, at their then current respective states of ›development‹, with the technical legal means to achieve the social and political ends they felt Papua New Guinea should work for – without being themselves able to articulate them, because this was possible in terms of the yet unknown, appropriate legal means for their achievement.

Section 21 of the Constitution is thus first and foremost the expression of a sense of fundamental helplessness experienced by the constitution-makers: they were unable, and they knew that they were unable, to formulate the kind of constitution which was ideally required, not because such a constitution would have been unworkable or politically unacceptable but because it was, in view of the ›jurisprudence‹ available, still literally unthinkable – at least for the constitution-makers and their advisers.

This also explains why the Constitution places such an unusual stress on »creativity«. Not only does the Third Directive to the First National Goal call for

> all forms of beneficial creativity, including sciences and cultures, to be actively encouraged –

but the Second Directive to the Second Goal admits, by calling for

> the *creation* of political structures [emphasis added] that will enable effective, meaningful participation by our people in . . . [the political, economic, social, religious and cultural life of the country]

that the political structures which it had itself provided were inadequate for the purpose. To be sure, the immediate aim of this Directive was to stress the need »for substantial decentralisation of all forms of government activity« (ibid.), provided for, in the form of Provincial Government, by Constitutional Amendment No. 1, but its significance as a Directive operating as long as the Constitution remains in force, reaches considerably further. The search for appropriate political structures is a continuing constitutional duty and the central target of law reform in Papua New Guinea. It is firmly linked with the Fifth Goal demanding that development be achieved »primarily through the use of Papua New Guinean forms of social, political and economic organisation«.

This is what the development of »our indigenous jurisprudence« should be primarily about. The purpose of recognising ›custom‹ as part of the underlying law is not to codify ›custom‹ and to integrate it into the country's legal system but rather to assist in changing the whole structure of this system gradually but fundamentally. As already stressed, the Law Reform Commission is charged with reforming the ›law‹ and not with reforming ›custom‹. Indeed, the development of ›custom‹ is recognised – if only implicitly – as one

of the few remaining prerogatives of the people of Papua New Guinea. ›Custom‹ is no more the business of the Independent State of Papua New Guinea than it was of the colonial state. Nor are the Independent State of Papua New Guinea and its legal system the servants of ›custom‹. In this sense the Constitution continues the »two spheres approach«. But the goal has changed dramatically. Instead of trying to change the people until they fit into the given framework of the state and its ›law‹ the aim is now to alter this framework so as to accommodate the (changing) needs and aspirations of the people. The Constitution does not accept that apartheid and eventual assimilation are the only two possible relationships between ›law‹ and ›custom‹, opting instead for what may be called a co-operative pluralism.

In the circumstances it is understandable that the Constitution itself gives little specific guidance as to how this new regime is meant to work. Nonetheless, there is no doubt that it saw the obstacles in its path as arising from the state and its legal system and not from ›custom‹ – which Papua New Cuineans do not perceive as immutable but rather as providing stability through its capacity to adjust.

Another reason for the Constitution's lack of decisiveness in this respect is its fervent optimism – the occasional sign of frustration notwithstanding. It saw itself as a charter for change and the vast majority of Papua New Guineans as being firmly committed to improving all aspects of their society. The future looked bright, and while the constitution-makers did not toy with a Utopian future, without a state or any form of centralised government, they did believe that Independence would be a millenarian event which would by itself obliterate the most important shortcomings of the state and its ›law‹ which were still assumed to be of colonial origin.

Now that this has turned out to be a piece of wishful thinking, it has become all the more pressing to mobilise those parts of the Constitution which permit and indeed demand fundamental change against the new and increasingly powerful supporters of the *status quo*. Perhaps the most hopeful sign is the reluctance of even the most militant among these supporters to interfere with the ›customary‹ tenure of land, the crucial refuge of ›custom‹. Papua New Guineans know that it is ultimately the way in which they hold and use their land – and not the way in which they are governed – which will decide their future and their identity as people. ›Custom‹ still persistently refuses to grant control of this vital area to the state and its ›law‹, adapting itself to changing circumstances in the process in a manner which ›law‹ has so far been unable to emulate. Unless the capacity of the ›law‹ to change itself and the state – instead of regarding itself as an instrument for changing society – can be improved, the unnecessary and insane trench warfare between ›law‹ and ›custom‹ will continue – and not only in Papua New Guinea.

As far as Papua New Guinea is concerned, the co-operation between ›law‹ and ›custom‹, between the state and society, would best be initiated – and must certainly ultimately prove itself – in the field of land tenure. Unless the state stops treating ›custom‹ in this field as an obstacle to ›development‹ and accepts it instead as the only appropriate basis for its own legislative and administrative action, even major constitutional reforms are,

by themselves likely to remain fruitless. The cart will stay before the horse, and it will continue to force the struggling beast in the direction in which its own blind weight is pulling it, while everybody virtuously bemoans the deplorable waste of time, effort and scarce resources which so far appears to be the only certain result of the country's ›progress‹.

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tion agreements with the EEC in January 1976. The leaders of the Maghreb states thoroughly recognize that Maghreb unity meets the modern demands for regional association in order to foster economic development.

Additional Posers in the Provocation Law of Nigeria

By *G. N. Vukor-Quarshie*

In many former colonies the law has remained strongly informed by the legal tradition and colonial legislation of the erstwhile imperial power. After independence the problem of reconciling such imposed legislation or doctrine with native customs, values and beliefs appeared in even sharper focus than under colonial rule, the newly independent state having become the master of its own municipal legal order.
The English-law doctrine of provocation affords a plea to reduce the criminal responsibility of a party who, incited by such provocation, committed a criminal offence. This rule often proved difficult of application in colonial societies where, e.g., the institutions of customary law marriage presented circumstances different from those prevalent in England, thereby complicating recourse to the concept as applied to spouses in England. There also exist in colonial societies practices, such as witchcraft, which in view of the widespread belief in their efficacy could welldramatically affect a person on whom such magical art was exercised. The law of the colonial power, however, refused to take account of such superstition in determining whether a plea of provocation should be allowed.
The article describes specific problem areas in the law of provocation where the colonial judiciary failed to take adequately into account the peculiarities of the native society and identifies related questions which even after independence remain to be resolved in modern Nigerian criminal law.

›Law‹ and ›Custom‹ in Papua New Guinea: Separation, Unification or Co-operation?

By *Peter G. Sack*

It begins with a characterisation of the ›two spheres‹ approach adopted by the colonial powers which separated ›law‹ and ›the state‹ on one hand from ›custom‹ and ›society‹ on the other, combining a limited *de facto* recognition of ›custom‹ by the colonial state with an even more selective, official recognition of ›custom‹ in its courts, using a quasi-private-international-law model for the purpose.

It goes on to argue that this ›two spheres‹ approach continued after independence, despite a strong anti-›law‹ rhetoric at the time, but also draws attention to the fact that the Independence Constitution calls for the development of a new Melanesian *jurisprudence* as a basis for a different type of *pluralistic* legal system, aimed at creating modern, but nonetheless distinctly Melanesian forms of *political organisation.*
In other words, the constitution-makers in Papua New Guinea saw the main task of improving the relations between ›law‹ and ›custom‹ not as an integration of the latter into the former but in a fundamental, and primarily constitutional, reform of the former; in short: law reform rather than a recognition of custom.

Portugal And Africa: The Impossibility of Neo-Colonialism

By *Pedro Assunçao*

Portugal's secular empire in Africa came to an end in the wake of the coup d'état which overthrew the corporatist dictatorship established in 1926.
The article describes the attempts by the metropolitan government before 1974 to strengthen the links with its African possessions even in the face of large-scale decolonisation after the Second World War. Portugal's insufficient economic power required massive infusion of foreign capital for investment in the colonies in order to enhance conditions for further settlement by metropolitan immigrants. This economic weakness led Portugal into regional co-operation with South Africa and, after the beginning of guerilla war in the three colonies of Guinea-Bissau, Angola and Mozambique, to substantial military aid by Portugal's NATO partners.
Confronted with a deteriorating military situation in the colonies, Portugal nevertheless pursued a policy of sweeping integration of the metropolis and the overseas dominions, aiming at an ›ultra-colonial‹, multiracial union. Military dégringolade in Africa and economic impotence eventually forced Portugal to abandon both the rule of her African possessions and any hope for the reestablishment of economically based, neo-colonialist control after the departure of the colonial administration and the vast majority of Portuguese settlers.