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3. LOCAL CUSTOM

Throughout the colonial period, there were no courts in which customary law was applied by indigenous adjudicators, and until 1963 the role of custom in the courts was uncertain. In New Guinea, the Laws Repeal and Adopting Ordinance 1921–1923 provided for limited recognition of custom. No similar statute existed for Papua, although the courts did occasionally recognize custom and were required to do so where customary land rights were involved.[1] The enactment of the Native Customs (Recognition) Act 1963 that still applies today made more elaborate provisions for the recognition and application of custom in Papua New Guinea.

III. Sources of Law

Since independence on September 16, 1975, the laws applying in the Independent State of Papua New Guinea are (in order of superiority) the Constitution, the organic laws, acts of the National Parliament, emergency regulations, provincial laws, certain adopted pre-independence laws, and the "underlying law" (the term adopted in Papua New Guinea's constitution which was intended to refer to the indigenous common law, incorporating custom and to the extent not inconsistent with statutes or custom, the adopted English common law).

A. Constitution

The Constitution of the Independent State of Papua New Guinea, adopted on independence, was a product of the work of the Constitutional Planning Committee, which held consultations throughout the country from 1973 to 1975. It is the supreme law. The Constitution itself asserts this superiority under Section 11:

> This Constitution and the Organic Laws are the Supreme Laws of Papua New Guinea . . . [and] all acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency, invalid and ineffective.

Section 10 of the Constitution states that all other laws are to be read and construed subject to the Constitution. However, Section 10 has been held to provide a rule of construction only, rather than a rule of substantive law.[2]

The Constitution begins with a statement of the national goals and directive principles, which are nonjusticiable, followed by provisions for the important organs of government and government instrumentalities; the laws of the country; and the establishment and functions of several constitutional offices including the Ombudsman Commission, the Public Prosecutor, the State Solicitor, the Public Solicitor, the Auditor General, and a Leadership Code. The Constitution makes detailed provision for the three branches of government—the Parliament and its law making powers; the executive, headed by a Governor General and a National Executive Council; and the judiciary, vested with wide powers to develop an indigenous jurisprudence.

Since independence, Parliament has not looked closely at the working of the Constitution. A number of recommendations by the Constitutional Review Committee for the amendment of several provisions of the Constitution have not even been debated. The courts have also come under criticism for failing to develop the constitutional laws as well as the underlying law in accordance with the constitutional mandate.[3] In 1991, however, amendments of provisions relating to no-confidence votes in Parliament have been passed.

B. Organic Laws

Organic laws are laws made by Parliament as specifically authorized by the Constitution. Section 12 of the Constitution defines an organic law as "a law made by Parliament that is . . . for or in respect of a matter provision for which is expressly authorized by this Constitution." Section 12 also provides for the manner of altering organic laws. Organic laws can be altered only by another organic law or by the alteration of the Constitution. However, if an organic law covers a subject or contains provisions that are authorized to be contained in an act of Parliament, the provisions can be altered in the same way as can an act.[4] Further, organic laws, though in a special position as regards prescribed majority votes for their amendment, are, like other legislation, to be read and construed subject to the Constitution. The court has accordingly held that "to the extent that an Organic Law is unauthorized by the Constitution or is inconsistent with it, it is invalid."[5]

Organic laws have been passed on provincial governments, the electoral process, an ombudsman commission, and electoral boundaries. Provincial government constitutions have also been given organic law status by Section 13 of the Organic Law on Provincial Government (Chapter 1). However, the constitutionality of that status is questionable, as the Constitution does not provide for it.

C. Acts of Parliament

Section 100 of the Constitution gives the national Parliament the mandate to "make laws having effect within and outside the Country, for the peace, order and good government of Papua New Guinea and the welfare of the People." The section further states "Acts of Parliament, not inconsistent with the Constitutional Laws, may provide for all matters that are necessary or convenient to be prescribed for carrying out and giving effect to this Constitution." Acts of Parliament are made by Parliament in exercise of these constitutional powers.

D. Provincial Laws

Provincial governments established under Part VIA of the Constitution have power to legislate in areas designated by the Organic Law on Provincial Government (Chapter 1). Section 20(1) of the Organic Law provides that "Within the limits allowed or imposed by this Organic Law and the other National Constitutional Laws, a provincial legislature has full legislative power to make laws for the peace, order and good government of the province."

The legislative power shared by the national Parliament with the provincial legislatures falls into three categories. The first are in the area referred to as "primary provincial competence." These include the licensing of mobile traders (other than banks) and places of public entertainment; control of primary schools and education other than curriculum; regulation of the sale and distribution of alcoholic liquor; construction and operation of housing (other than state-owned housing); libraries, museums, and cultural centers; regulating sporting activities; exercising certain powers in relation to village courts; and, subject to a number of limitations, operating local, community, and village governments and other local governments, excluding taxation.

The organic law provides, under Section 26(d), that "the National Parliament has no power to make an Act of the Parliament on a subject or subjects" under this category. However, Section 26(2) allows the national Parliament to make a law in the area if a provincial government has not made "an exhaustive law on it." It is not clear whether the national Parliament

can make a law in this area under the proviso if some provincial governments have made exhaustive laws and others have not. The subsection refers to "a" provincial government, which could mean that the national Parliament may make laws applying to the provinces that have not made an exhaustive law on the subject. But more importantly, these provisions may offend Section 100 of the Constitution, which states that "Nothing in any Constitutional Law enables or may enable the Parliament to transfer permanently, or divest itself of legislative power."

The second area allowed for provincial legislative activity is described by the organic law as the "concurrent field" where both the national legislature and a provincial legislature can legislate. The areas covered by this provision include community and rural development; primary school curricula; agriculture and stock; fishing and fisheries; health and public works; trade and business; commercial and industrial investment and development; vocational, technical, and high schools; gambling, lotteries, and games of chance; tourism; transportation and transportation facilities; town planning; land and land development; forestry; wildlife protection; parks and reserves; family and marriage laws (laws relating to divorce and other matrimonial proceedings and to custody of children); courts and tribunals (other than village courts and their jurisdiction); communications and mass media; wharves and harbors; aviation; labor and employment; research and training institutions; marketing; and renewable and nonrenewable natural resources. The imposition of taxation is excluded.

In these areas, the national legislature can make laws in matters of national interest only. A provincial legislature can legislate on these areas, but its legislation must not be inconsistent with national legislation.

The third area of legislative activity for provincial governments is described as the "unoccupied legislative field." Section 33 of the organic law states that "If the National Parliament has not made an exhaustive law, applying in a province, on any subject, the provincial legislature may make a law, not inconsistent with any Act of Parliament on that subject." It provides further that if an act of Parliament is later passed that conflicts with the provincial law in the area, the provincial law is ineffective to the extent of the inconsistency.

Provincial laws generally have effect only within the boundaries of the province. However, the organic law declares, under Section 14, that "Full faith and credit shall be given throughout Papua New Guinea to laws, the public acts and records and the judicial proceedings of all provinces." This section says nothing more than that provincial acts are to be respected by persons outside the province.

The provincial constitutions are given the status of organic laws by the Organic Law on Provincial Government. The legal effect of this organic law status given to the provincial Constitutions by another organic law is doubtful, in the light of Section 12 of the national Constitution, which declares that an organic law must specifically be authorized by the national Constitution.

E. Adopted Statutes

On independence the legislative slate was wiped clean, and the Constitution brought into force only a few pre-independence laws. Section 20(3) of the Constitution declares that "Certain pre-Independence statutes are adopted and shall be adopted, as Acts of Parliament and subordinate enactments of Papua New Guinea, as prescribed by schedule 2." The adopted statutes are subject to the same constitutional limitations as acts of Parliament.[6] The adopted enactments fall into two categories: first are the laws passed by the pre-independence House of Assembly, and second are the "adopted" or "received" legislation from Australia and England. Three statutes, one an Australian Commonwealth act, the Papua New Guinea Independence

Act 1975, and two pre-independence House of Assembly acts—the Statute Law Revision (Independence) Act 1975 and the Laws Repeal Act 1975—repealed all pre-independence laws existing immediately prior to independence. The repeal and adoption process during the period immediately preceding independence was not as tidy as expected. There are still difficulties in tracing the applicable law on, for instance, admiralty jurisdiction.[7]

Following the repeal of all pre-independence legislation, the Constitution took effect on independence with provisions adopting several pre-independence laws. The term *pre-independence law* is defined as certain enactments of the pre-independence House of Assembly and a number of statutes (in most cases single sections) from Australia and England.

F. Underlying Law

The underlying law is the term adopted by the framers of the Papua New Guinea Constitution to refer to the indigenous common law, which is to incorporate custom and the adopted English common law. The Constitution specifies that an act of Parliament declares and provides for the development of the underlying law. In the meantime, with Papua New Guinea custom and the principles and rules of common law and equity, to the extent the latter are not inconsistent with statutes or custom, are to be the underlying law.

The Constitution, to create an indigenous jurisprudence, gives both Parliament and the courts responsibility for developing an underlying law for the country. The Constitution authorizes Parliament to enact legislation declaring the underlying law. The Law Reform Commission, which was established to assist in this task, prepared draft legislation in 1975, but Parliament has not yet acted to provide for the underlying law. Until Parliament acts, the temporary rules contained in Schedule 2 apply. These direct the courts to develop the underlying law by looking to custom, the principles and rules of common law and equity, and decisions of the National Court and Supreme Court.

1. CUSTOM

The Constitution declares, under Schedule 2.1, that "custom is adopted, and shall be applied and enforced as part of the underlying law." Custom is given precedence over the common law. Accordingly, some judges have stated that, when one is seeking to apply the underlying law, custom must be considered first.[8] The custom to be applied must, however, meet certain criteria—it must be consistent with statutory law and it must not be repugnant to the general principles of humanity.

Custom is defined by Schedule 1.2 of the Constitution to mean "the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial." An act of Parliament was to make further provision for the pleading and application of custom. The Customs Recognition Act (Chapter 19), a pre-independence act later amended, is now treated as serving the purpose. This act makes further provisions on custom generally and its application to criminal and civil cases in particular. It also addresses the manner in which conflicts of custom are to be resolved.

a. Recognition of Custom

Section 6 of the Customs Recognition Act provides that "native custom shall be recognized and enforced by, and may be pleaded in, all courts" subject to similar qualifications as those stipulated under the Constitution, that the custom to be applied must not be

repugnant to the general principles of humanity; inconsistent with any statutory law, and that their recognition and enforcement would not result in injustice or be against the public interest; [and] in a case involving the welfare of a child under the age of sixteen years, its recognition or enforcement would not be in the best interest of the child.

b. Criminal Cases

The courts are not to take custom into account in criminal cases except to determine the existence of a state of mind of a person; the reasonableness of an act, default, or omission by a person; the reasonableness of an excuse; in accordance with another law, whether to proceed to conviction of a guilty party; the penalty (if any) to be imposed on a guilty party; or whether not taking the custom into account will cause an injustice to be done to a person (Section 7).

c. Civil Cases

The application of custom in civil cases is also restricted. It can be applied to determine the following:

1. the ownership over or in connection with customary land, including rights of hunting or gathering;
2. the ownership or rights in the sea or reef or lake, including rights of fishing;
3. the ownership by custom of rights to water;
4. the devolution of interests in customary land;
5. trespass by animals;
6. marriage, divorce, or the right to the custody or guardianship of infants under a customary marriage;
7. a transaction the parties intend should be (or which justice requires should be) regulated by custom;
8. the reasonableness of an act, default, or omission by a person;
9. the existence of a state of mind of a person; or
10. whether not taking custom into account will do an injustice to a person.

d. Guardianship

In deciding questions relating to guardianship and custody of infants and adoption, the courts are required to take full account of custom.

e. Conflict of Custom

If there is conflict as to which of two or more systems of custom should prevail, and the court is not satisfied as to what evidence to apply, the court is required to consider all the circumstances and may adopt the custom that the justice of the case requires. If the court is unable to do this, it may apply the rules of common law and equity.

f. Recognition in Specific Acts

A number of acts recognize custom for specific purposes. These include the Marriage Act (Chapter 280), recognizing customary marriages; Wills, Probate and Administration Act (Chapter 291), preserving customary succession rules; Local Courts Act (Chapter 41), empowering local courts to certify the dissolution of customary marriages; Village Courts Act (Chapter 44), setting up the village court system to resolve disputes applying custom; Land Dispute Settlements Act (Chapter 45), introducing customary means of resolving land disputes; and Business Groups Incorporation Act (Chapter 144), recognizing customary groups and allowing them to carry on business in accordance with custom.

The express application of custom by the courts has been negligible. The courts have given a number of reasons for not applying custom more frequently. One reason is that in Papua New Guinea there are many customary groups, and therefore it is difficult to decide which custom to apply.[9] The customs of the people are not written rules that the courts can ascertain and apply, lawyers appearing in court do not argue custom, and the courts do not have the resources to carry out research into custom on their own.[10] The argument that the customs of the people are not rules implies that the common law does consist of rules that the court can readily ascertain, which may not be entirely correct. Nevertheless, the Constitution has made custom a part of the laws of the country, and therefore the customary rules are "law." The court's list of practical limitations reveals the limited commitment of the government, the legal profession, and the courts to developing the indigenous jurisprudence that the Constitution calls for.

Other reasons for the court's unwillingness to apply particular customs include their "repugnancy" to the general principles of humanity and their inconsistency with specific statutes.[11]

2. COMMON LAW AND EQUITY

The Constitution adopts the principles and rules of common law and equity, to the extent they are not inconsistent with statutes or custom, as part of the underlying law to "assist" in the development of an indigenous jurisprudence. The applicable rules of common law and equity are to be those existing in England on September 16, 1975, the date of Papua New Guinea's independence (Constitution, Schedule 2.2(3)). The common law and equity principles to the Constitution are adopted as unaffected by statutory modifications in England.[12] A controversial issue relates to the status of a decision of a competent court of England handed down after September 16, 1975, abolishing a common law rule and creating a new one, varying an existing rule, or developing a new rule. One view on the question is that English decisions handed down after independence, whether they vary, abolish, or replace a principle after the independence date, do not form part of the common law received into Papua New Guinea. This view[13] has been supported by academic commentators.[14] The opposing view, urged strongly by Kapi, Dep. C.J., is that excepting those postindependence English decisions that develop new principles, any case from a competent English court correcting an error and declaring what the common law has always been are part of the law of Papua New Guinea.[15] However, considering the spirit of the Constitution as a whole, and more particularly the purpose of Schedule 2, the preferable view is that English decisions made after independence are not binding but only of persuasive value on Papua New Guinea courts. The argument itself demonstrates the artificiality of adopting for Papua New Guinea a foreign law at an arbitrary date and suggests again the need for the development of an indigenous jurisprudence.

3. DEVELOPMENT OF UNDERLYING LAW

The National and the Supreme Courts are vested with the responsibility to develop the underlying law by Schedule 2.3 of the Constitution, which states,

> If in any particular matter before a court there appears to be no rule of law that is applicable and appropriate to the circumstances of the country, it is the duty of the National Judicial System, and in particular of the Supreme Court and the National Court, to formulate an appropriate rule as part of the underlying law.[16]

In this task, the courts are required to consider the national goals and directive principles and the basic social obligations contained in the Constitution; the basic rights provisions of the Constitution; analogies drawn from relevant statutes and custom; legislation and relevant decisions of the courts of any country that in the opinion of the court have legal systems similar

to that of Papua New Guinea; relevant decisions of courts exercising jurisdiction in or concerning all or part of the country at any time; and the circumstances of the country prevailing from time to time. The courts have used the power to develop new principles of the underlying law in a number of cases.[17] If a question arises in another court that would involve the development of a new principle of law, the other court is to refer the matter to the Supreme Court for its decision. The courts are required to ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner appropriate to the circumstances of the country from time to time, except in so far as it would not be proper to do so by judicial act.

IV. Constitutional System

A. Territory

Section 2 of the Constitution declares the territory of Papua New Guinea to consist of the land area, internal waters, and territorial sea that were known as Papua New Guinea before independence.

B. Nationality and Citizenship

The provisions for citizenship under Part IV of the Constitution were taken from the recommendations of the Constitutional Planning Committee. The three ways in which citizenship was conferred on independence continue to apply today as well. The first category of citizens are automatic citizens, the second are citizens by descent, and the third group are citizens by naturalization.

Automatic citizens, who attained citizenship automatically on independence, include persons who were born in Papua New Guinea before independence with two grandparents born in the country or an adjacent area; or persons who were born outside the country before independence but with two grandparents born in the country, and who were registered as citizens within one year of independence. If the person in the latter case held another citizenship, the person was to renounce it and make a declaration of loyalty. The expression "adjacent area" includes the Solomon Islands, Irian Jaya, and the Torres Straits islands. The bulk of the population of Papua New Guinea assumed citizenship under this provision.

Persons who assumed citizenship by descent are those who had one parent who was a citizen or if dead would have become a citizen if living on the date of independence. Acquisition of citizenship in this manner is provided under Section 66 of the Constitution. Where a person in this category is born in the country, the citizenship is automatic. Where the person is born outside the country, he or she is required to be registered on birth in Papua New Guinea to acquire citizenship.

Citizenship by naturalization applies to persons not qualifying under the first two categories as provided under Section 67. They must meet the following qualifications:

1. continuous residence in Papua New Guinea for a period of not less than eight years;
2. good character;
3. intention to reside permanently in the country;
4. ability to speak or understand pidgin, motu, or another vernacular of the country;
5. respect for the customs and cultures of the country;

peace, order and good government of the country to the extent reasonably required for achieving its purpose." These emergency laws can override some of the human rights provisions of the Constitution but not the right to life, the right to freedom from inhuman treatment and freedom of expression, and the right to vote and nominate for public office.

Emergency laws cease to be in force when revoked by Parliament or, in the case of emergency regulations, when the Head of State, acting on the advice of the National Executive Council, revokes them. Emergency laws terminate automatically when the period of emergency ends.

The executive arm of government initiates the declaration of public emergencies. The Constitution, however, provides a number of ways Parliament can supervise a declared emergency. First, Parliament must sanction an emergency if it was not Parliament that declared it. The period within which Parliament is required to give its sanction is fifteen days and at intervals of two months during the currency of an emergency if extended. Second, an emergency committee, consisting of members of Parliament, must be appointed by Parliament to oversee and monitor the operation of emergencies. The minimum membership of the committee is seven. No Cabinet minister can be a member. The committee's specific functions are, as provided under Section 242 of the Constitution, to receive copies of all emergency laws and to be consulted on the emergency by the Prime Minister. The committee is required to report to Parliament on "(a) whether or not the period of declared national emergency should continue; and (b) the justification for and the operation of the emergency laws, and (c) whether or not an emergency law should be altered." Third, Parliament must be kept informed by both the Prime Minister and the emergency committee on the general operation of the emergency.

The Constitution also provides for persons to be detained during periods of emergencies; however, strict safeguards are set for such internment. Internment during an emergency can be done only under an act of Parliament passed by an absolute majority vote. An interned person or his or her next of kin or other close relative must be informed of the reasons for the internment. Excepting an alien enemy, an interned person must be released at the end of two months after the commencement of the internment unless an independent and impartial tribunal determines after a review of the case that sufficient cause has been shown for the internment to continue. However, at the end of six months the person is to be released unless he or she is held under some law other than emergency laws.

A number of national emergencies have been declared to deal with natural disasters and law and order problems. The most significant emergency declared was in the North Solomons Province when the operation of the Bougainville copper mine was sabotaged, leading to an armed secession movement on that island.

E. Human Rights

In addition to the national goals and directive principles and the basic social obligations set out in the preamble to the Constitution, the Constitution declares in Part III certain basic rights for every individual. These rights and freedoms, which have their origin in the American Bill of Rights, were first contained in the pre-independence Human Rights Act of 1971. The Constitutional Planning Committee recommended that these be incorporated in the Constitution.

1. RIGHT TO FREEDOM

Under Section 32 of the Constitution,

> Every person has the right to freedom based on law, and accordingly has a legal right to do anything that (a) does not injure or interfere with the rights and freedoms of others, and (b)

is not prohibited by law, and no person (c) is obliged to do anything that is not required by law; and (d) may be prevented from doing anything that complies with the provisions of paragraph (a) and (b).

2. RIGHT TO LIFE

Except in cases of conviction for offenses specifically carrying the death penalty, such as treason or piracy, Section 35 of the Constitution guarantees every person the right to life. In 1991, Parliament enacted provisions authorizing the death penalty in certain cases of aggravated homicide, rape, and other crimes.

3. FREEDOM FROM INHUMAN TREATMENT

Every person is, under Section 36 of the Constitution, guaranteed the right to freedom from inhuman treatment, such as acts of torture or other forms of cruel or inhuman punishment. In a maximum security section of a prison, the following rules have been held to be inhuman treatment:

1. prohibition on talking;
2. serving food while detainees were holding night-soil buckets;
3. forcing detainees to get drinking water from toilets; and
4. total ban on visitors.[35]

4. RIGHT TO FULL PROTECTION OF LAW

The Constitution contains elaborate provisions aimed at protecting an accused person in the criminal process. Apart from the offense of contempt of court, a person cannot be charged for an offense that is not written. The Constitution also provides for the protection of a person on arrest; his or her rights in court, which include representation by a lawyer or by the Office of the Public Solicitor; and proper treatment of persons on conviction.

5. QUALIFIED RIGHTS

The fundamental rights named above may be altered only by a three-quarters absolute majority vote in Parliament. The other constitutional rights are the right to liberty; the right to freedom of employment; freedom from arbitrary search and entry; the freedom of conscience, thought, and religion; freedom of expression; freedom of assembly and association; freedom of employment; and the right to privacy. These provisions, being qualified rights, can be altered in accordance with Section 38 of the Constitution, which requires that they can be amended by an act of Parliament expressed for that purpose if it is in the public interest for reasons of defense, public safety, public order, public welfare, public health, the protection of children and persons under some disability, and the benefit of underprivileged people. Any such law passed qualifying the rights must be "justifiable in a democratic society." Constitutional amendments enacted in 1991 limit the right to liberty by (a) permitting detention of vagrants and (b) requiring defendants in criminal cases to prove certain elements of a criminal defense on an affirmative basis, rather than requiring the prosecution to prove all elements of its case.

6. CITIZEN-ONLY RIGHTS

The rights and freedoms conferred on citizens only are the right to equality, freedom of information, freedom of movement, and protection of property against unjust deprivation. Citizens also have the right to vote and stand for public office and to acquire freehold land.

is done under the Fauna (Protection and Control) Act (Chapter 154), which prohibits the removal or destruction of or other dealings in animals from protected areas.

XIII. Persons and Entities

Because the common law age of capacity of twenty-one was reduced to eighteen by statute in England before independence, there is disagreement as to the age of contractual capacity in Papua New Guinea.

The Companies Act (Chapter 146) provides for the incorporation of public and private companies. The act closely follows the United Kingdom Companies Act 1948. In England, the 1948 act has been amended in major respects, but the Papua New Guinea Act is in force without these amendments. Once incorporated, a company may sue and be sued.

XIV. Family Law

A. Marriage

The law recognizes two types of marriages in Papua New Guinea. The first is a marriage by custom and the second is a statutory marriage under the Marriage Act (Chapter 280).

The Marriage Act provides that a customary marriage entered into by a "native" in accordance with custom in the tribe or group to which the marriage partners belong "is valid and effective for all purposes." *Native* refers to an automatic citizen. This type of marriage raises a number of legal questions, one of which is whether or not a non-native person can validly enter into a customary marriage. Another is whether there could be a valid marriage if two or more customs on marriage conflict.

The Marriage Act makes elaborate provision for the statutory marriage, laying down the formalities required for a valid marriage, including witnesses and registration. The marriageable age is eighteen years for a male person and sixteen years for a female. The act permits persons within two years of marriageable age to apply to a court for permission to marry a person of marriageable age if there are exceptional or unusual circumstances.

B. Divorce, Separation, and Annulment

Separate rules of divorce apply to the two types of marriage. A divorce of a customary marriage can take place in accordance with custom, and the Local Court is, under the Local Court Act (Chapter 41), empowered to certify such a divorce.

The Matrimonial Causes Act (Chapter 282) provides that a statutory marriage can be dissolved by the National Court. The grounds for divorce in a statutory marriage are adultery, desertion, cruelty, and separation. Divorce in a statutory marriage is barred by condonation, connivance, and collusion. If the court finds that a case for divorce is established, it grants a decree nisi followed later by a decree absolute.

C. Custody

The same legal principles for determining a custody case apply to children born to a customary marriage and to those born to a statutory marriage. The considerations the court is to take into

account are stipulated under Section 4 of the Matrimonial Causes Act: (1) the welfare of the child, (2) the conduct of the parents, and (3) the wishes of each parent.

The appropriate court to hear a custody proceeding depends on the legislation under which custody proceedings are brought. First, if divorce proceedings for dissolution of a statutory marriage are brought in the National Court under the Matrimonial Causes Act, if custody is also in issue, the National Court can decide on custody. This act cannot be used to bring a custody or maintenance claim on its own. Second, custody under customary marriages and custody without petitions for divorce of a statutory marriage can be brought under the Infants Act (Chapter 278). This can be heard in all courts including the Village Courts.

D. Maintenance

Maintenance can be claimed for both the spouse and children in the National Court under the Matrimonial Causes Act, together with a divorce petition in a statutory marriage. The terms of an order in such proceedings are at the discretion of the court. In a subsisting marriage (both customary and statutory), maintenance proceedings may be brought under the Deserted Wives and Children's Act (Chapter 277). The District Court is the proper court for maintenance proceedings under a statutory marriage under this act. In relation to a customary marriage, both the Local Court and District Court have jurisdiction under the act. A complaint for maintenance can be made if a husband has deserted his wife or children or left them without making adequate provision for their support. The court, where the claim is established, can make a reasonable award.

The third law under which a maintenance claim can be made is the Child Welfare Act (Chapter 276), which provides for maintenance for a child or children born out of lawful wedlock. The mother can seek maintenance from the father for the child but not for herself. These proceedings are commonly referred to as "affiliation proceedings," as paternity may also be contested. Jurisdiction under this act is in the Local Court and special Children's Courts.

E. Adoption

A child can be adopted in two ways—by customary adoption and by an adoption order of the National Court on application. A customary adoption, which is allowed by the Adoption of Children Act (Chapter 275), must be in accordance with custom.

The conditions a court must take into account in considering an adoption under the Adoption of Children Act are the welfare and best interest of the child. A person seeking to adopt must be over twenty-one years of age and, if male, eighteen years older than the child to be adopted and sixteen years older if female. A report from the Director of Child Welfare must be available with the court before an adoption order can be made. The consent of the natural parents is necessary, but if the consent is refused, the court has power to dispense with it if the circumstances require.

XV. Personal Property

The English common law principles of personal property law apply, subject to the limitations on the application of that system of law contained in Schedule 2 of the Constitution **(see III, G (2) Common Law and Equity)**.