CODES AND COMMON LAW IN PAPUA AND NEW GUINEA

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In Papua and New Guinea a number of very important branches of the law have been codified. The Queensland *Criminal Code* has been adopted[1] and the English commercial codes relating to bills of exchange, partnership and sale of goods have all been re-enacted.[2] This article considers the relationship between these codes and "the principles and rules of common law"[3] received in Papua by virtue of s. 4 of *The Courts and Laws Adopting Ordinance (Amended) of* 1889 and in New Guinea by virtue of s. 16 of the *Laws Repeal and Adopting Ordinance* 1921-1923.

1. THE CRIMINAL CODE

In construing the Queensland *Criminal Code,* as adopted in Western Australia, Dixon and Evatt JJ. of the High Court said:

> ". . . its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code and then to see if the Code will bear an interpretation which will leave the law unaltered. . . ."[4]

The Supreme Court of the Territory has followed the same approach in interpreting the Code as adopted in Papua and New Guinea.[5] Resort to the common law is permissible in exceptional circumstances, for instance when the Code is silent on a point[6] or when a phrase used therein is ambiguous

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1 In Papua by *The Criminal Code Ordinance of* 1902 and in New Guinea by the *Laws Repeal and Adopting Ordinance* 1921. The Code was later repealed in New Guinea but re-adopted by the *Laws Repeal and Adopting Ordinance* 1924.

2 As the *Bills of Exchange Ordinance* 1951, the *Partnership Ordinance* 1951 and the *Goods Ordinance* 1951.

3 Section 4 of *The Courts and Laws Adopting Ordinance (Amended) of* 1889 provides as follows: "The principles and rules of common law and equity that for the time being shall be in force and prevail in England shall so far as the same shall be applicable to the circumstances of the Possession be likewise the principles and rules of common law and equity that shall for the time being be in force and prevail in British New Guinea."

The British colony of British New Guinea became the Australian territory of Papua with the coming into force of the *Papua Act* 1905 (Cwth.). Section 16 of the *Laws Repeal and Adopting Ordinance* 1921-1923 provides as follows: "The principles and rules of common law and equity that were in force in England on the ninth day of May, One thousand nine hundred and twenty-one, shall be in force in the Territory so far as the same are applicable to the circumstances of the Territory and are not repugnant to or inconsistent with the provisions of any Act, Ordinance, law, regulation, rule, order or proclamation having the force of law that is expressed to extend to or applied to or made or promulgated in the Territory."

These sections continue to govern the reception of common law in Papua and New Guinea respectively.

4 *Brennan* v. *The King* (1936) 55 C.L.R. 253 at p. 263.

5 *R.* v. *Joseph Kure* [1965-1966] P. & N.G.L.R. 161 at p. 166 per Frost J.

6 See e.g. *Mullen* v. *The King* [1938] St.R.Qd., a Queensland appeal to the High Court.

or has a technical common law meaning.[7] However, the Court usually confines its attention to the terms of the Code itself.

There is particularly good reason for so doing in Papua where the Code was adopted by virtue of *The Criminal Code Ordinance of* 1902. Section 4 of that Ordinance stipulates that liability to trial and punishment for indictable offences is to be governed exclusively by the Code and other legislation in the territory. Thus in Papua common law offences or defences not embodied in the Code have no application.

In New Guinea there is no counterpart to s. 4. The Code was adopted by virtue of s. 13 of the *Laws Repeal and Adopting Ordinance* 1921 and s. 16 of the same Ordinance expressly adopted "the principles and rules of common law" as in force in England on 9th May, 1921. Thus in this territory there is some justification for regarding the common law of crime as a complement to the Code and judges administering the law of New Guinea have occasionally applied defences found in the common law but not in the Code. For instance in *R.* v. *Alder*[8] Mann C.J. held that in pursuance of his common law duty to suppress insurrections a Patrol Officer serving in a primitive area of New Guinea was excused from the criminal liability he might otherwise have incurred under the Code in destroying the dwelling houses of a group of villagers who had attacked his patrol. The learned judge took the view that as "the substantive law as to insurrection is not dealt with in the Criminal Code the common law is fully applicable".

More recently in *Timbu Kolian* v. *R.*,[9] an appeal to the High Court of Australia from the Supreme Court, Windeyer J. expressed the view that a homicide excused by any principle or rule of the common law is not unlawful in the Territory, notwithstanding the existence of the Code. His Honour reasoned as follows:

> "The rules and principles of the common law, as modified by statute in England before 9th May, 1921, are in force in the Territory so far as not abrogated by later legislation in force there: *Booth* v. *Booth* (1935) 53 C.L.R. 1 at pp. 29, 30. Therefore as I understand the position any rule or principle of the common law which can stand with and give an actual content to any provision of the Code is to be regarded as construing and applying the Code."[10]

Therefore, he concluded, when the Code stipulated that a killing was unlawful "unless authorised justified or excused by law"[11] the law referred to included the common law as well as the Code itself. It is perhaps significant, however, that Windeyer J. was the only member of the High Court to find excuse in the common law. All other members of the Court held that the accused was exonerated by virtue of s. 23 of the Code.

Likewise the Supreme Court generally looks only to the Code for the definition of the offence and of defences to it. For instance the Court has on several occasions rejected the submission that the common law doctrine

7 See *R* v *Zariai Gavene* [1963] P & N G L R 203 at p 209 per Ollerenshaw J and *R* v. *Lawton and Ors*, n 13 *infra*

8 Unreported, 15th May, 1962

9 (1968) 42 A L J R 295

10 *Ibid* at p 300

11 Code s 291

of excessive force in self-defence reducing murder to manslaughter applied as a defence in New Guinea.[12]

This conservative approach does not, of course, exclude resort to the common law where the words of the Code have settled common law meanings. Thus in *R.* v. *Lawton and Ors.*[13] a former Chief Justice of the Supreme Court, Sir Beaumont Phillips, held that the phrase "enters on land" in s. 70 of the Code had the special meaning ascribed to it in the old common law offence of forcible entry, that is, entering with the intention of assuming or resuming possession of that land. Another instance is *R.* v. *McEachern*[14] where Clarkson J. held that the phrase "intent to defraud" in various sections[15] of the Code bore the same meaning as when used in relation to equivalent common law offences. Such cases illustrate the point that the Code is not a *tabula rasa.* Some of the old common law writing is still discernible.

2. THE COMMERCIAL CODES

The relationship between the commercial codes and the common law is more complicated. Each code contains a saving clause and it is necessary at this stage to set these clauses out in full. The following are the relevant provisions:

Section 7 (2) of the *Bills of Exchange Ordinance* 1951:

> "The rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, shall continue to apply to bills of exchange, cheques and promissory notes."

Section 63 (2) of the *Goods Ordinance* 1951:

> "The rules of the common law including the law merchant save in so far as they are inconsistent with the express provisions of this Part, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion mistake or other invalidating cause continue to apply to contracts for the sale of goods."

Section 49 of the *Partnership Ordinance* 1951:

> "The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Ordinance."

It will be noted that each section provides for the continuance of the common law. If the common law is to continue to apply it must have applied previously and it only applied previously to the extent of its reception in 1889 in Papua and 1923 in New Guinea. Thus "common law" in this context means the received common law, not common law generally. For instance in New Guinea it is only rules of common law as in force in England on 9th May, 1921 and so far as applicable to circumstances in

12 See *R* v *Yambiwato and Apibo* [1967-1968] P & N G L R 222 and *R* v *Andreas Kampagnio* (Cameron Smith A J unreported, 20th August, 1969) On appeal to the Full Court in the latter case Prentice J took the same view The other members of the Full Court, Minogue A C J and Frost J, found it unnecessary to consider the point (unreported, 1st June, 1970)

13 Unreported, 10th December, 1954

14 [1967 1968] P & N G L R 48

15 ss 441, 494

New Guinea and not repugnant to or inconsistent with local legislation which are saved by s. 7 (2) of the *Bills of Exchange Ordinance* 1951. In Papua the corresponding reference must be to the rules of common law for the time being in force in England but subject to the same restrictions.

It will also be noted that each saving clause refers to the rules of common law, not to the principles of the common law. If "rule" here does not mean or include "principle" then a component of the common law received in each Territory is not saved by the commercial codes. However, it is submitted that "rules" in the saving clause should be interpreted to include "principles". The reference to both "principles and rules" in s. 4 of *The Courts and Laws Adopting Ordinance (Amended) of* 1889 was probably made to ensure that the common law was received in its entirety and in using the same formula in s. 16 of the *Laws Repeal and Adopting Ordinance* 1921-1923 the legislature in New Guinea was simply following the Papuan model.

There is, it is submitted, no difference in kind between a "rule" and a "principle" of common law. Parker J. once referred to "these general principles which, quite apart from particular rules or maxims, lie at the root of our legal system".[16]

However, Professor Hughes has recently pointed out that the difference between them is one of degree only.[17] He has described the difference thus:

> ". . . the terms serve to mark differences of degree on the precision of guides to decision-making. Rules are fairly concrete guides for decision geared to narrow categories of behaviour and prescribing narrow patterns of conduct. Principles are vaguer signals which alert us to general considerations that should be kept in mind in deciding disputes under rules. So we decide *under* rules but *in the light* of principles."[18]

The common law relating to bills of exchange, partnership, and the sale of goods had at the time of codification in England been elaborated in considerable detail, and it is not surprising, therefore, that the English legislature then referred to "rules" rather than "principles" in the saving clauses. Perhaps when in 1951 the legislature of the Territory of Papua and New Guinea re-enacted the English commercial codes it did not advert to the fact that the use of the word "rules" instead of the phrase "principles and rules" in the clauses saving the common law did not accord with the terms in which the common law had been originally received. Whatever the explanation for this verbal discrepancy, it is submitted that the word "rules" in the saving clauses may, and should, be interpreted liberally to include any relevant principles of the common law previously received in Papua or New Guinea.

Two of the saving clauses, s. 7 (2) of the *Bills of Exchange Ordinance* 1951, and s. 63 (2) of the *Goods Ordinance* 1951 make no express reference to the rules of equity. It is pertinent to ask, therefore, whether equitable rules continue to apply. The answer to this question depends on the interpretation of the term "common law" as used in the two commercial codes.

16 In *Johnson* v. *Clark* [1908] 1 Ch. 303 at p. 311. Cf. Paton, G. W., *A Textbook of Jurisprudence* (ed. Derham, D. P.), Oxford, 1964, pp. 204, 205.

17 See "Rules, Policy and Decision Making", (1968) 77 *Yale Law Journal* 411.

18 *Ibid* at p. 419.

In *Riddiford* v. *Warren*[19] the New Zealand Court of Appeal expressed the view, *obiter,* that "common law" in the sub-section of the New Zealand *Sale of Goods Act* corresponding to s. 63 (2) of the *Goods Ordinance* 1951 did not include equitable rules. Williams J. said:

> "If 'rules of common law' meant the rules of the existing law other than statute law, but including the rules of equity, the phrase would have been 'the existing rules of law' or words of that kind."[20]

The New Zealand court was impressed by the fact that the sub-section specifically saved the law merchant and argued that if the legislature had intended to save equity also it would have said so in express terms. It is submitted that the specific mention of the law merchant does not necessarily point to this conclusion.

Long before the enactment of the English *Sale of Goods Act* 1893, which is the progenitor of the New Zealand Act, the law merchant had become incorporated into the common law. It did not, however, remain static. As the usages of businessmen changed, so did the content of the law merchant.[21] This was the position in England and in New Zealand when the relevant sale of goods legislation was drafted and passed in each country. It was therefore necessary to single out the law merchant for special mention in order to indicate that the legislature intended to save this fluctuating body of doctrine not as it stood at the date of the enactment but as it changed from time to time with the changing usages of the business community. If the law merchant had not been specified it would have continued to apply only so far as it had been incorporated into the common law at the time the legislation was passed.

The reasoning of the New Zealand Court of Appeal commended itself to the Full Court of Victoria in *Watt* v. *Westhoven.*[22] Mann A.C.J., with whom the other judges agreed, rejected very bluntly the submission that the term "common law" in the corresponding Victorian provision included equity. He said:

> "This language . . . was taken verbatim originally from the English Act of 1893. In my opinion, what the words meant in that Act they mean in the Victorian Acts and it is idle to suggest that Mr. Chalmers, the draughtsman, and the distinguished lawyers, including four Law Lords, who formed the select committee upon the English bill as finally enacted, would in the year 1893 have used the words 'the rules of the common law' in any other than their true and technical sense."[23]

With respect this argument is not very strong when applied to the re-enactment of an English statute overseas. The re-enacting legislature is working in a different legal environment and it is unsafe to assume from the fact of re-enactment that words repeated must have the same meanings as in the parent Act. They may well have suffered a sea change in the course of migration.[24] Moreover, as Professor Fleming has pointed out, the reference

19 (1901) 20 N.Z.L.R. 572.
20 *Ibid* at p. 577.
21 See *Goodwin* v. *Robarts* (1875) L.R. 10 Ex. 337 at p. 346, and *Bank of Baroda Ltd.* v. *Punjab National Bank Ltd.* [1944] A.C. 176 at p. 183.
22 [1933] V.L.R. 458.
23 *Ibid* at p. 462.
24 See Allott, A. N., *Essays in African Law,* London, 1960, pp. 45-51; Bartholomew, G. W., *The Commercial Law of Malaysia,* Singapore, 1965, pp. 122-124; and Roberts-Wray, K., *Commonwealth and Colonial Law,* London, 1966, pp. 569-571.

by Mann A.C.J. to Chalmers is not particularly felicitous "in view of the latter's express commentary that the object of the saving was to fill up any *lacunae* in the Act itself and to emphasise that the law of sale is merely a chapter in the general law of contract".[25]

The English courts have not followed *Watt* v. *Westhoven*.[26] It is settled law in England that the equitable remedy of rescission of a contract of sale of goods on the ground of innocent misrepresentation is still available[27]— a conclusion which is possible only if the term "common law" in the relevant saving clause is given an extended bearing. Moreover, the term "common law" may have various meanings according to its context. It may for instance mean the body of law administered in the Common Law Courts before the *Judicature Acts* 1873-1875 as distinct from the body of law administered by the Court of Chancery; again it may mean unenacted law as distinct from enacted law. However, the context, especially the juxtaposition in the same sub-section of the terms "common law" and "Ordinance", suggests that by "common law" is meant all unenacted law including equity.[28]

For these reasons it is submitted that the term "common law" in s. 63 (2) of the *Goods Ordinance* 1951 should be read to include equity and therefore that the relevant equitable rules continue to apply. It is submitted also that the same interpretation should be placed upon the term "common law" in s. 7 (2) of the *Bills of Exchange Ordinance* 1951. The context in which the term "common law" appears clearly indicates that it should be read as a reference to unenacted law generally and there appears to be no authority contrary to this interpretation.

25 "Misrepresentation and the Sale of Goods", (1951) 25 *Australian Law Journal* 443 at p 446

26 [1933] V L R 458

27 *Leaf* v *International Galleries* [1950] 2 K B 86, *Long* v *Lloyd* [1958] 1 W.L R 753 and *Goldsmith* v. *Rodger* [1962] 2 Lloyd's Rep 249.

28 Cf Williams, G. L , "Language and the Law—Part III", (1945) 61 *Law Quarterly Review* 293 at p 302.