

No. 13 of 2000.

***Underlying Law Act 2000.***

Certified on: / /20 .



INDEPENDENT STATE OF PAPUA NEW GUINEA.



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*Underlying Law Act 2000.*

ARRANGEMENT OF SECTIONS.

**PART I – PRELIMINARY.**

1. Interpretation.
  - “Chief Justice”
  - “common law”
  - “court”
  - “customary law”
  - “Judge”
  - “law of a foreign country”
  - “National Court”
  - “Supreme Court”
  - “written law”
2. Abolition of Royal Prerogative.

**PART II – SOURCES OF UNDERLYING LAW.**

3. Source of underlying law.
4. Application of sources of underlying law.
5. Duty of courts.

**PART III – FORMULATION OF UNDERLYING LAW.**

6. Order of application of law.
7. Formulation of law.
8. Submission of decision to Chief Justice, etc.

**PART IV – DEVELOPMENT OF UNDERLYING LAW.**

9. Inappropriate underlying law.
10. Remedies.
11. Evidence and information.
12. Review instituted by Chief Justice.
13. Review instituted by Law Reform Commission.
14. Review of same decision.
15. Duty of counsel in relation to customary law.

16. Ascertainment of customary law.
17. Application of different regimes of customary law.
18. *Res judicata*.
19. Rules of precedent.
20. Conflict of precedent.
21. Decisions of foreign and pre-independence court.
22. Prospective over-ruling.
23. Interpretation of written laws.

**PART V – MISCELLANEOUS PROVISIONS.**

24. Transitional provisions.
25. Regulations.

INDEPENDENT STATE OF PAPUA NEW GUINEA.



AN ACT

entitled

***Underlying Law Act 2000,***

Being an Act to implement Section 20 (*underlying law and pre-independence statutes*) of the *Constitution*, to:

- (a) state the source of the underlying law; and
- (b) provide for the formulation of rules of the underlying law; and
- (c) provide for the development of the underlying law,

and for related purposes.

MADE by the National Parliament.

**PART I. – PRELIMINARY.**

**1. INTERPRETATION.**

(1) In this Act, unless the contrary intention appears:

“**Chief Justice**” means the Chief Justice of Papua New Guinea;

“**common law**” means the principles and rules of the common law and equity of England, excluding that part of the common law known as the Royal Prerogative;

“**court**” means a court within the National Judicial System;

“**customary law**” means the customs and usages of the 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;

“**Judge**” means the Chief Justice, the Deputy Chief Justice, a judge or acting judge of the National Court of Justice;

**“law of a foreign country”** includes the principles and rules of common law and equity of England.

**“National Court”** means the National Court of Justice in Papua New Guinea;

**“Supreme Court”** the Supreme Court of Justice of Papua New Guinea;

**“written law”** means the laws as stipulated in Section 9 of the *Constitution*.

(2) For the purposes of this Act, a person:

(a) is a member of a community if:

(i) he adheres to the way of life of the community; or

(ii) he has adopted the way of life of the community; or

(iii) he has been accepted by that community as one of its members,

irrespective of whether the adherence, adoption or acceptance is effective for a general or for a particular purpose; and

(b) ceases to be a member of a community under Paragraph (a) if he adheres or adopts the way of life of another community or is accepted by some other community as a member of that community.

## **2. ABOLITION OF ROYAL PREROGATIVE.**

Notwithstanding the provisions of this Act or any other law, the common law of England known as the Royal Prerogative:

(a) shall not be a source of the underlying law; and

(b) shall not apply for the purposes of this Act.

**PART II. – SOURCES OF UNDERLYING LAW.**

**3. SOURCE OF UNDERLYING LAW.**

(1) The sources of the underlying law shall be:

- (a) the customary law; and
- (b) the common law in force in England immediately before the 16th September, 1975.

(2) The principles and rules of customary law shall be applied with the qualifications and subject to the conditions as set out in this Act.

(3) The principles and rules of common law shall be applied:

- (a) with the qualifications and subject to the conditions as set out in this Act; and
- (b) notwithstanding their modification through an amendment, repeal or alteration by a statute of England unless the modifying statute has been adopted in Papua New Guinea.

**4. APPLICATION OF SOURCES OF UNDERLYING LAW.**

(1) Subject to Subsection (2) or (3):

- (a) the customary law; and
- (b) the common law,

shall be adopted and applied as part of the underlying law.

(2) The customary law shall apply unless:

- (a) it is inconsistent with a written law; or
- (b) its application and enforcement would be contrary to the National Goals and Directive Principles and the Basic Social Obligations established by the *Constitution*; or
- (c) its application and enforcement would be contrary to the basic rights guaranteed by *Division III.3 (Basic Rights)* of the *Constitution*.

(3) The common law shall not be applied unless:

- (a) it is consistent with a written law; or
- (b) it is applicable and appropriate to the circumstance of the country; or
- (c) it is consistent with the customary law as applied under Subsection (2); or
- (d) its application and enforcement would not be contrary to the National Goals and Directive Principles and Basic Social Obligations established by the *Constitution*; or

(e) its application and enforcement would not be contrary to the basic rights guaranteed by *Division III.3 (Basic Rights)* of the *Constitution*.

(4) A court which:

(a) refuses to apply a principle or rule of customary law, shall give reasons for its refusal in terms of Subsection (2)(a), (b) or (c); or

(b) applies a principle rule of common law, shall give its reasons for the application in terms of Subsection (3)(a), (b), (c), (d) or (e).

(5) A principle or rule of customary law or common law applied under Subsection (2) or (3) shall become part of the underlying law.

## **5. DUTY OF COURTS.**

The courts, especially the Supreme Court and the National Court, shall ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country.

**PART III. – FORMULATION OF UNDERLYING LAW.**

**6. ORDER OF APPLICATION OF LAW.**

Subject to this Act, in dealing with the subject matter of a proceeding, the court shall apply the laws in the following order:

- (a) written law; and
- (b) the underlying law; and
- (c) the customary law; and
- (d) the common law.

**7. FORMULATION OF LAW.**

(1) Where the written law does not apply to the subject matter of a proceeding, the court shall apply the underlying law.

(2) If the underlying law does not apply to the subject matter of a proceeding, the court shall apply the customary law unless:

- (a) subject to Subsection (6), the court is satisfied that the parties intended that the customary law shall not apply to the subject matter of the proceeding; or
- (b) the subject matter of the proceedings is unknown to the customary law and cannot be resolved by analogy to a rule of customary law without causing injustice to one or more parties.

(3) If:

- (a) the underlying law; and
- (b) the customary law,

do not apply to the subject matter of a proceeding, the court shall consider applying the common law under the conditions set out in Section 4 (3).

(4) Subject to Subsection (5), if:

- (a) the underlying law; and
- (b) the customary law; and
- (c) the common law,

do not apply to the subject matter of a proceeding, the court shall formulate a rule, appropriate to the circumstances of the country, as part of the underlying law.

(5) The court in formulating a rule under Subsection (4) shall have regard to:

- (a) the National Goals and Directive Principles and Basic Social Obligation established by the *Constitution*; and
- (b) the basic rights guaranteed by *Division III.3 (Basic Rights)* of the *Constitution*; and

- (c) analogies drawn from the relevant written law and customary law; and
- (d) the laws of a foreign country relevant to the subject matter of a proceeding.

(6) The court may apply the customary law, if it is satisfied that a party to the subject matter of a proceeding under Subsection (3)(a) intended to avoid, for an unjust purpose, the consequences of the customary law.

**8. SUBMISSION OF DECISION TO CHIEF JUSTICE, ETC.**

(1) Where a court, other than the Supreme Court or the National Court, makes a decision under Section 7, it shall, forthwith, send a copy of the decision to:

- (a) the Chief Justice; and
- (b) the Chairman of the Law Reform Commission.

(2) A decision under this section may be dealt with under Section 12 or 13.

**PART IV. – DEVELOPMENT OF UNDERLYING LAW.**

**9. INAPPROPRIATE UNDERLYING LAW.**

In a proceeding, if the Supreme Court or the National Court considers that a rule of the underlying law is no longer appropriate to the circumstance of the country, it may formulate a new rule, appropriate to the circumstances of the country, as part of the underlying law, having regard to:

- (a) the National Goals and Directive Principles and Basic Social Obligations established by the *Constitution*; and
- (b) the basic rights guaranteed by *Division III.3 (Basic Rights)* of the *Constitution*; and
- (c) analogies drawn from the relevant written law and customary law; and
- (d) the laws of a foreign country relevant to the subject matter of a proceeding.

**10. REMEDIES.**

In a proceeding before a court, when the remedy sought is based on the underlying law, the court may grant any remedies that are available under:

- (a) a source of the underlying law; or
- (b) a formulated rule of the underlying law.

**11. EVIDENCE AND INFORMATION.**

(1) The parties to a proceeding shall bring evidence or information to assist the court in deciding on whether:

- (a) to apply a principle or rule of customary law; or
- (b) to apply a principle or rule of common law; or
- (c) to formulate a rule of the underlying law,

to resolve the subject matter of a proceeding.

(2) The court, upon receiving the evidence or information under Subsection (1), shall make a decision:

- (a) to apply a principle or rule of customary law; or
- (b) to apply a principle or rule of the common law; or
- (c) to formulate a rule of the underlying law; or
- (d) on the manner in which a rule of the customary law or the underlying law should be formulated,

to resolve the subject matter of a proceeding.

**12. REVIEW INSTITUTED BY CHIEF JUSTICE.**

(1) Subject to Section 14, the Chief Justice, upon the receipt of a decision under Section 8, shall consider that decision and if he is of the opinion that the decision should be reviewed, he may:

- (a) within 40 days of receiving the decision, refer it to the National Court for review; and
- (b) call upon the parties to the proceedings and such other persons as he considers appropriate to present arguments as to the appropriateness of the decision.

(2) If the National Court varies the decision in question, it shall state what it considers to be the appropriate rule of the underlying law to dispose of the case.

(3) Where a person is aggrieved by a decision of the National Court made under Subsection (2), he may appeal to the Supreme Court within 40 days after the decision in question was made or within such further period as is allowed by a judge upon application made to him within that period of 40 days.

(4) An appeal under Subsection (3) shall be heard and conducted as if it was an appeal under the *Supreme Court Act 1975*.

**13. REVIEW INSTITUTED BY LAW REFORM COMMISSION.**

(1) Subject to Section 14, the Chairman of the Law Reform Commission, upon the receipt of a decision under Section 8, shall consider the decision and if he is of the opinion, after consultation with the other members of the Law Reform Commission, that the decision is inconsistent with the proper development of the underlying law, he may:

- (a) within 40 days of receiving the decision, refer it to the National Court for review ; and
- (b) call upon the parties to the proceedings to present arguments as to the appropriateness of the decision.

(2) The Chairman of the Law Reform Commission shall appear or be represented at a review instituted by him under Subsection (1) and with the leave of the court, may call upon other persons to make submissions to the court in relation to the decision.

(3) If the National Court varies the decision in question, it shall state what it considers to be the appropriate rule of the underlying law to dispose of the case.

(4) A person aggrieved by the decision of the National Court made under Subsection (3), may appeal to the Supreme Court within 40 days after the decision in question is made or within such further period as is allowed by a judge upon application made to him within that period of 40 days.

(5) An appeal under Subsection (4) shall be heard and conducted as if it was an appeal under the *Supreme Court Act 1975*.

**14. REVIEW OF SAME DECISION.**

(1) Where the Chief Justice and the Chairman of the Law Reform Commission are considering the same decision submitted under Section 8 for review under Section 12 and 13, the Chairman of the Law Reform Commission, shall have priority in referring the decision to the National Court for review, in accordance with Section 13, after consultation with the Chief Justice.

(2) Notwithstanding Subsection (1), the Chief Justice may refer the same decision to the National Court for review in accordance with Section 12.

**15. DUTY OF COUNSEL IN RELATION TO CUSTOMARY LAW.**

(1) A counsel appearing in a proceeding in which a question of whether the customary law applies in that proceeding, is under a duty to assist the court by calling evidence and obtaining information and opinion that are relevant which would assist the court in determining:

- (a) the nature of the relevant rules of customary law; and
- (b) whether or not to apply those rules in the proceedings.

(2) A counsel in carrying out his duty under Subsection (1) may refer to matters provided for in Section 16(2)(b) (i), (ii) and (iii).

**16. ASCERTAINMENT OF CUSTOMARY LAW.**

(1) A question as to the existence or content of a rule of customary law is a question of law and not a question of fact.

(2) The court, when determining a question under Subsection (1):

- (a) shall consider the submissions made by or on behalf of the parties concerning the customary law relevant to the proceedings; and
- (b) may:
  - (i) refer to cases, books, treaties, reports and other works of reference on the customary law relevant to the proceedings; and
  - (ii) refer to statements and declarations of customary law made by local, provincial and other authorities in accordance with a law empowering them to make such statements and declarations; and
  - (iii) consider evidence and information concerning the customary law relevant to the proceeding presented to it by a person whom the court is satisfied has knowledge of the customary law relevant to the proceedings; and
  - (iv) of its own motion, obtain evidence and information and obtain the opinions of persons as it thinks fit.

(3) Notwithstanding any provision in any other law, when a court is hearing an appeal or conducting a review of a question concerning the customary law, the

court may make further enquiries into the customary law by exercising the powers set out in Subsection (2).

#### **17. APPLICATION OF DIFFERENT REGIMES OF CUSTOMARY LAW.**

(1) Where a question arises, as to which particular customary law should apply to a subject matter of a proceeding, the court shall determine this question in accordance with the following rules:

- (a) where the parties belong to the same community, the customary law of that community; or
- (b) where the parties belong to communities with different customary law rules on the subject matter of the proceeding:
  - (i) the customary law that the parties intend to govern the subject matter; and
  - (ii) if no such intention can be discovered, the customary law that is, in the opinion of the court, most appropriate to the subject matter; or
- (c) where the matter concerns a question of succession, the customary law of the community to which the deceased belonged, except with regard to interests in land, in which case the customary law of the place where the land is situated shall apply; or
- (d) in all other cases the court shall apply the customary law it considers most appropriate to a particular case.

(2) In deciding on which customary law is to apply under Subsection (1)(b) and (d), the court shall have regard to –

- (a) the place and nature of the transaction, act or event; and
- (b) the nature of residence of the parties.

#### **18. RES JUDICATA.**

(1) Subject to Subsection (3), for the avoidance of doubt, the rule of the common law known as *res judicata* is adopted and shall be applied as part of the underlying law.

(2) Except to the extent set out in this Act, nothing in this Act affects the rule of *res judicata* referred to in Subsection (1).

(3) Nothing in this Section precludes the variation or repeal of the rule of *res judicata* by the Supreme Court or the National Court under this Act or by operation of a written law.

#### **19. RULES OF PRECEDENT.**

(1) All decisions of law made by the Supreme Court are binding on all other courts but not on itself.

(2) Subject to Section 20, all decision of law of the National Court are binding on all other courts except the Supreme Court and itself.

(3) All decision of law by a court, other than the Supreme Court or the National Court, are binding on those courts whose decisions may be appealed to it or may be reviewed by it.

## **20. CONFLICT OF PRECEDENT.**

When it appears to the Court, in resolving a subject matter of a proceeding, that:

- (a) there are more than one decision of law binding on it by operation of Section 19; and
- (b) these decisions of law are conflicting,

the court shall apply that decision of law which appears to it to be the most compatible with the National Goals and Directive Principles and Basic Social Obligations established by the *Constitution*.

## **21. DECISIONS OF FOREIGN AND PRE-INDEPENDENCE COURT.**

(1) Nothing in this act prevents a court from considering the decisions of foreign courts or the decisions of any courts exercising jurisdiction in Papua New Guinea before Independence, when dealing with a matter under this Act.

(2) Notwithstanding Subsection (1), the decision of foreign courts or the decision of any courts exercising jurisdiction in Papua New Guinea before Independence are of no binding or persuasive effect.

## **22. PROSPECTIVE OVER-RULING.**

(1) Subject to this Act, when over-ruling a decision of law that is contrary to a previous practice, doctrine or accepted custom, a court may, for a special reason, apply its decision of law only to situations occurring after the new decision.

(2) A court, in over-ruling a decision under Subsection (1), may apply to a situation a decision of law that was over-ruled after the occurrence of the situation, or a practice, doctrine or custom that was current or accepted at the time of the occurrence of any relevant transaction, act or event.

(3) Where a court acts under Subsection (1) or (2), it may make its decision subject to such conditions and restriction as to it seem just.

## **23. INTERPRETATION OF WRITTEN LAWS.**

(1) When interpreting any provision of, or any word, expression or proposition in any written law, the court shall give effect to any relevant customary practice, usage or perception recognised by the people to be affected as a result of the interpretation.

**s. 23.**

*Underlying Law 2000*

(2) Subject to Subsection (1), when interpreting any provision of or any word, expression or proposition in any written law, the courts may consider how the courts in foreign jurisdictions have interpreted similar or identical provisions, words, expressions or propositions.

**PART V. – MISCELLANEOUS PROVISIONS.**

**24. TRANSITIONAL PROVISIONS.**

(1) A principle or rule of customary law or a principle or rule of common law or a formulated rule of the underlying law which was in effect immediately before the coming into operation of this Act, is adopted and applied as part of the underlying law, on the coming into operation of this Act.

(2) The underlying law as prescribed by Schedule 2 (*adoption, etc., of certain laws*) of the *Constitution* which was in effect immediately before the coming into operation of this Act, shall cease to have any effect on the coming into operation of this Act.

**25. REGULATIONS.**

The Head of State, acting on advice, may make regulations, not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Office of Legislative Counsel, PNG