

Common law at bay?

The scope and status of customary law regimes in the Pacific

Guy Powles

At a time when the establishment of the University of the South Pacific LLB programme heralds a new era in legal education for the Pacific Island region, it is appropriate to reflect on one of the justifications for a uniquely Pacific degree, namely the persistence of customary law. This paper will attempt to demonstrate the diversity and extent of the recognition and use of customary law in the context of the introduction of common law, while examining problems associated with customary law's role and dimensions as a sub-system of the law of the state. The undoubted tension between indigenous and introduced spheres of legal activity points to the value of engaging in some measuring of the relative size and importance of each sphere. Factors contributing to the status of customary law include lack of guidance as to its application, the operation of 'repugnancy' provisions and uncertainty as to the manner in which custom should be proved. These are reviewed briefly, and then the paper turns to a specific location on the interface between indigenous and introduced law, namely, where the decisions of customary law institutions may be subjected to reconsideration by non-customary courts or processes.

Customary law regimes draw much of their authority from customary institutions such as village and island councils, meetings of extended family leaders and elders, and chiefs and other men and women of recognised

standing, whether inherited or earned. It is helpful to look at examples of decision-making powers exercised by customary law institutions such as these, and to consider to what extent the status accorded to their decisions may be regarded as an indicator of the significance of customary law itself. Developments over the past two decades seem to indicate a preference on the part of governments and common-law courts to pursue policies designed to render customary law more accountable, and thus, to 'regulate' custom.

Perceptions of the place of customary law

Customary law, together with customary institutions and authorities, contributes to the developing legal systems of most countries in the Pacific Island region. In each, they assume distinctive dimensions and operate in different ways. They are seen by some as the bulwark of cherished traditions, by others as a reactionary obstacle to progress. Customary approaches to dispute resolution are right for some and oppressive to others.

Pacific Island states and territories embrace legal systems that are plural in the sense that each is derived from two or more independent legal traditions. At least one of these traditions is indigenous to the society and one, now dominant in most spheres of activity, has been introduced from common law or civil law origins (or, in the case of Vanuatu, from both common law and civil law). Interposed between indigenous and introduced sources of law, one usually finds a constitution and statutory provisions that will claim precedence over all pre-existing traditions. Some citizens have cherished the hope that the authority of this superior source of law may be used to develop, tentatively and gradually, a distinctive new and evolving legal tradition, drawing on its antecedents and intended to reflect the aspirations of a society that has emerged from the colonial period into a climate of global change.¹

There are two discernible approaches to the role of customary law. One is that it should be preserved in order not only to serve the needs of those who are directly bound by it but also to contribute positively to the development of the law of the state as a whole. The other view, now less often articulated perhaps, is that legal pluralism is an unfortunate condition

giving rise to a sort of split personality that sets introduced law against indigenous, and vice versa. On this view, customary law is a nuisance, the language of conflict and inconsistency appears to predominate, and the intractable issues are left to the courts rather than referred to law reform agencies for ultimate resolution in the legislature.

A complicating factor in some countries is the connection made in the minds of ordinary citizens between the promotion of customary legal institutions and the advancement generally of cultural, even racial, concerns. A dramatic resurgence of interest in origins, cultures, languages and social and political histories has accompanied increased political autonomy. This is sometimes spurred by nationalistic spirit, and is often the consequence of broadening educational systems, which have incorporated new material and adopted fresh interpretations within secondary and tertiary curricula. Slogans and manifestos appealing to pride in one's ethnic origins have occasionally helped transform calls to return to custom (*kastom*) into political movements.²

In other situations, economic planners point to the stifling effect that customary laws in relation to land are perceived to have on agricultural and commercial development. The implication, if not express advice, is that, until land tenure laws are modified so as to permit individual advancement and encourage personal profit, together with the opportunity to pass gains on to one's own children, national economies cannot progress. Again, consideration of the appropriateness of customary law is readily politicised.

In countries where 'white settlers' law' has long predominated, the social climate has, for some time now, been more respectful of cultural difference. This has led to closer examination of customary law and reconsideration of earlier attitudes to it.³ The characterisation of customary law as inferior or second-class is gradually disappearing. It is not difficult for law students in Pacific societies where the 'common law' tradition has been introduced to see the parallel, albeit distorted by time, between the progression from the English 'custom of the realm' to common law on the one hand, and the development of their 'customary law' to the point where it shares in, or at least makes a significant contribution to, the legal system of the modern state on the other.

Dimensions of customary law

The system

Reflecting as they do the social norms and value systems of traditional Pacific societies, customary law systems are very different from those of the common law or civil law. Customary law regulated communal life in group-orientated, largely agricultural societies, which recognised local leadership but no centralised government. As a system, customary law provided more than *substantive rules* (which are necessarily limited in their application). Indeed many would say that its more important contributions lie in *process*, particularly techniques for the maintenance of order and resolution of disputes,⁴ and also in *values*, as community-based principles are applied in decision-making and reflected in attitudes to such fundamentals as interpersonal and group relationships, and ties to land and the physical environment.

Spheres of operation

Consequent upon the introduction of ‘new’ law and displacement of much of the ‘old’, some generalisations may be made as to the circumstances or spheres of activity in which customary law still applies in the Pacific Island region.

1 Land law. Reflecting the central position of land in daily life and the policy of most colonial authorities not to interfere with customary tenure, the constitutions and land legislation of most countries now require that customary law be used for determining rights and interests in customary land (including inland water, lagoons and territorial sea). These countries are keyed ‘A’ in the table below. In order to enable customary law to be applied most effectively in land matters, commissions or courts were established for the purpose, possessing in some cases exclusive jurisdiction in land matters. The status of the decisions of these authorities within their respective jurisdictions is tested from time to time, in ways that often seem haphazard and unsatisfactory—as will be explored below.

2 *Personal law.* Customary laws governing matters such as personal status and name, marriage, adoption, family and children generally, and rights and interests in personal property, were hard hit by the introduction of Christianity and systems of registering the population. Nevertheless, some traditional forms and procedures have survived. Countries where this has occurred are keyed 'B' in the table.

3 *Authority of chiefs and elders.* The titles, functions and traditional authority of chiefs and elders (whether their status was inherited or earned) constituted a substantial body of customary law, which has played a large part in encouraging recognition by the state of the usefulness of traditional institutions in local administration and land matters. Reference may be made to the countries keyed as 'D' in the table.

A significant role of customary law in some societies is governmental in character. In addition to constituting legal relations within and between descent groups in such 'private law' areas as land tenure and succession, and family and children, customary law also empowers chiefs, councils of chiefs and elders, and other customary institutions to carry out functions of a 'public law' nature. In some countries, chiefs employed traditional authority to administer the affairs of clans and extended family groups, and councils of chiefs governed villages and districts. Today, they may still be involved in administration but also in carrying out rule-making ('legislative') and law enforcement and dispute resolution ('judicial') functions.

Generally the state recognises the authority of chiefs within defined structures. Recognition by the formal courts is sometimes a matter of difficulty—as will be discussed later. It should be noted at this point that, far from becoming less significant, chiefs seem to be retaining, or returning to, prominence in a number of countries and different situations.⁵ In others, competition between elected and chiefly offices erodes the status of the latter.⁶ The role of the Great Council of Chiefs of Fiji is of such significance in that country that closer study is warranted.⁷

4 *Order and dispute.* Customary law offences, defences and techniques designed to minimise conflict and restore harmony have been retained in various, but usually limited, contexts. 'Village' (PNG), 'island' (Tuvalu, Vanuatu) and other local court systems (Kiribati, Solomon Islands) apply customary law, which is subject to statute but not, generally, to common

law. Samoa (Western Samoa)⁸ is unique in that it has confirmed by statute the traditional authority of village chiefs to exercise their customary law jurisdiction in relation to village misconduct and dispute resolution.⁹

Dimensions of form, time and place

It is characteristic of customary law that it is not written down, but the written/unwritten distinction has little to do with the relative importance of the law as such. In these literate times, customary law principles and rules are frequently found in print, and what is significant is the context in which they appear. There are many possibilities—beginning with anthropologists' notes and recorded oral histories and testimonies of experts, reported findings of the courts and official codifications of branches of the law, extending to the incorporation of such codes into statute.¹⁰ In another dimension, customary institutions may be included as part of the formal (written) structure of the state. Membership, together with the procedures and powers, of councils or groups of chiefs may be determined by customary law, and such councils or groups may be given statutory functions in local government (Western Samoa)¹¹ or dispute resolution (Solomon Islands).¹² Tonga offers an example of the 'writing' of customary 'public' law into the constitution itself. The Tongan monarch, whose authority is generally unfettered by constitutional conventions, commands respect in the manner of a Polynesian chief. His title and status, as well as that of 30 other chiefs, are protected in the *Constitution* of 1875, which also codifies hereditary rules of succession.¹³

One of the objections raised to the codifying of or legislating for customary law is that an evolving system of law will thereby be frozen at a point in time. The obvious rejoinder is that the statute book is anything but exempt from change. More importantly, the law reform process whereby the content of proposed customary law legislation is discussed and agreed upon should provide valuable opportunities for consideration of competing community interests and other policy issues, particularly where current social or economic factors require that custom should be modified. Proposals for the registration of interests in customary land have frequently been in this category. It also appears that the absence of recorded descent rules in Vanuatu has helped perpetuate the lower status of women.¹⁴ On the

other hand, the formulation of wide-ranging sets of principles and rules in that country in 1983 was a significant contribution by the National Council of Chiefs.¹⁵

Just as a custom must be observed for a period of time in order to become law, so also there must be consistency in its scope—as to the place, type of person and subject matter to which it applies. The pedigree is no longer required to be ‘. . . since time immemorial’.¹⁶ Definitions of custom may require it to be ‘. . . existing in relation to the matter in question at the time when and the place in relation to which the matter in question arises’;¹⁷ ‘. . . in force at the relevant time . . . [which may include] . . . in general and . . . in respect of a particular place or matter’;¹⁸ ‘. . . prevailing in an area’;¹⁹ or merely ‘. . . existing from time to time’.²⁰ The more specific of these strictures inhibit the capacity of courts to extend or modify the law in the name of ‘custom’.

Diversity of types and extent of use

In an exercise designed to quantify reliance on customary law, the table presented in this paper has been compiled to demonstrate, and make some assessment of, the extent to which types of customary law are recognised and used as a sub-system of law.²¹ For example, most Polynesian entities (including Fiji in this category) and many Micronesian entities are keyed as ‘D’ in the table because they give *significant* recognition to the authority of chiefs in government (national and /or local). Most Melanesian societies, however, show ‘B’ and ‘E’ in order to reflect greater recognition of customary personal law and less of chiefly authority.

A crude distinction has also been made in the table between indigenous societies that are broadly homogeneous and those that are multi-custom, comprising distinct cultural communities. The cultural composition of the population in this sense has great bearing on the options available for the handling of customary law.

The idea for this table came as a response to a Melbourne lawyer colleague who observed: ‘Surely, by the turn of the century, no part of the Pacific region will have escaped full penetration and domination by the juggernaut of Western legal culture!’ The table is thus an unashamed attempt to quantify the persistence of customary law.

The recognition, limits and proof of customary law

Lack of guidance as to application of customary law

Perhaps the most difficult situations arise where a minimum of guidance is offered to the formal courts in relation to customary law generally. Such appears to be the case in Cook Islands, Niue and Northern Mariana Islands, where references to custom are found only in legislation specific to the subject area. The constitutions of American and Western Samoa, the FSM, Vanuatu and Solomon Islands make it clear that, subject to the constitution itself, the courts are to apply custom, or at least to have regard to it. The constitution purports to allocate a ranking to customary law in relation to statute and common law, but no further indication is given as to how it should be used. In Tonga and Guam there is no provision at all in the formal law to indicate whether the courts possess any jurisdiction in customary law (apart from the usual sentencing considerations). Accordingly, they tend to assume that they do not.

Serious problems of interpretation seem to arise, such as:

- To what matters should customary law apply? Presumably custom must be pleaded and proved in relation to a factual situation before priority over common law can be established. But can the 'situation' relate to commerce or sophisticated crime, not contemplated by traditional society? A party may seek to show that a customary law principle has been adapted and relied upon in changed circumstances.
- Must customary law be limited to transactions or interactions between people living 'within' the same traditional community or group? What is the scope or reach of customary law across society? The increasing mobility of populations makes this question more difficult to answer. Definitions of custom may restrict the courts (see 'Dimensions of form, time and place', above). In the case of Fiji, where existing statutes already provide for customary law in appropriate situations, a bald constitutional requirement in the 1990 Constitution that customary law '... shall have effect as part of the law of Fiji' was considered difficult to interpret and likely to give the wrong impression.²²

Rules of application

Four countries have adopted rules intended to provide specific guidance. Empirical study of the experiences of Papua New Guinea²³, Nauru²⁴, Tuvalu²⁵ and Kiribati²⁶ is called for in order to determine whether the existence of their rules of application has encouraged and facilitated the use of customary law in the countries concerned.

Repugnancy and fundamental rights

Repugnancy provisions such as those testing customary law against ‘. . . general principles of humanity’ (e.g. Fiji—1990 *Constitution*; PNG) or ‘. . . the public interest’ (PNG; Tuvalu) are seldom the subject of judicial rulings, but they re-enforce any predisposition not to recognise custom. Some commentators consider that bills of fundamental rights have provided a firmer basis for rejecting customary law.²⁷ Every jurisdiction is different, and studies of the experiences of each country should be encouraged.²⁸

Of course, bills of rights may already contain exemptions in favour of customary law. For example, requirements imposed upon individuals (by their chiefs and elders) to provide labour in discharge of communal obligations under custom may be saved. This is explicit in the case of Western Samoa and could well be implied in other constitutions.²⁹

Cognisance and proof of customary law

A consequence of legal pluralism is that a court located within one sub-system of law will treat the law of the other sub-systems as foreign, and require proof of that law as a matter of fact. If the first sub-system is in a dominant position, like the statute/common law-based regimes of most Pacific countries, then legal pluralism is manifested in a weak form, tending ultimately to disappear.³⁰

Of course, if the judges in the dominant system are sufficiently familiar with the other laws, they may be less likely to regard them as foreign or ‘second-class’. Part of the difficulty with customary law is that, to the extent that a custom has only limited applicability, proof of some sort may be necessary.

There seem to be two types of judges. Some have trained and work within a traditional setting where they are fully familiar with the content of the customary law, and others have not. The former should be trusted to take judicial notice of the law. In the more 'homogeneous' countries such as American and Western Samoa, judges dealing with customary law in land and chiefly title matters are clearly in that category. In PNG, land court judges in designated areas are sufficiently familiar not to require proof in many cases. Of course, membership of the relevant community or cultural grouping will not suffice, of itself, and this is particularly so if the judge's training has taken place overseas in a different legal tradition. There is concern that assumptions about a particular custom ' . . . may lead to mistaken or ill-informed decisions'.³¹

While there is much debate as to whether conventionally trained lawyers should be involved in the preparation and/or argument of cases before customary law courts and commissions, questions arise over the role of lawyers appearing in matters involving custom in the formal courts. In this latter context, one has the impression that lawyers too often fail to prepare and pursue customary law arguments, and to adduce adequate evidence of custom. Judges have expressed their frustration on this score.³²

Customary law courts, commissions and other institutions

In those countries where special-purpose institutions are appointed to apply customary law, the question is often asked whether—and if so, to what extent—their decisions should be reviewable in the non-customary law system. Five examples illustrate some of the issues.

1 Finalising the record. In Solomon Islands, traditional chiefs have two types of statutory function in relation to customary land disputes. Where, in the course of recording rights and boundaries, the recording officer is unable to secure agreement as to the boundary between two customary groups, he must refer the dispute, under the *Customary Land Records Act 1994*, to the traditional chiefs whose decision ' . . . shall be final and conclusive'.³³ However, a group who alleges that its claims ' . . . have not been adequately considered' may make representations to the senior officer

in the department, who is required to ‘... finalise’ the record.³⁴ No guidance is offered by the Act as to what matters should properly be considered by this departmental officer.

2 *Appealing the gatekeepers’ decision.* Further, in relation to customary land disputes generally in Solomon Islands, traditional chiefs stand at the gateway to the local courts, which have no jurisdiction to proceed unless satisfied that the dispute has been referred to the chiefs, all traditional means of solving the dispute have been exhausted, and no decision wholly acceptable to both parties has been made by the chiefs.³⁵ A party seeking a determination by the court must obtain the prescribed certificate from the chiefs³⁶ and explain in writing to what extent and why the chiefs’ decision is not acceptable.³⁷ If the parties have accepted the decision it may be recorded by the local court, at which point it is deemed to be a decision of that court.³⁸ These provisions of the *Local Courts (Amendment) Act 1985*, establish the ‘gatekeeping model’, intended to encourage dispute resolution without engaging the courts.

It should be noted, however, that, if the local court in the Solomon Islands situation is satisfied that the statutory requirements as to the non-acceptance of the chiefs’ decision have been met, it may, if it wishes, adopt a process that combines:

- hearing evidence from witnesses who gave evidence before the chiefs, or from other witnesses called by the parties;
- hearing evidence on customary law from one or more of the chiefs; and
- having regard to the decision made by the chiefs.³⁹

The court is empowered to substitute its own decision for that of the chiefs or refer the dispute back to them with directions.⁴⁰

3 *Harnessing the village council.* In accordance with long-standing tradition, the Western Samoan village councils (comprising all chiefly heads of families) administer village affairs, applying customary law to their tasks, which include local rule-making, punishing for breaches and disposing of disputes. In the *Village Fono Act 1990*, the legislature recognised these customary law functions, added further functions and introduced a limited right of appeal to the Land and Titles Court.⁴¹ The Court may set aside the

council's decision; dismiss the appeal; or refer it back for reconsideration. The Court has no power to substitute its own penalty, and reconsideration by the council is final.⁴²

4 *Supervising the customary court.* The fourth example also involves the Land and Titles Court of Western Samoa, no decision of which '... shall be reviewed or questioned in any other court by way of appeal, prerogative writ or otherwise however'.⁴³ It had long been assumed that the Supreme Court of Western Samoa, which possesses inherent common law jurisdiction, could not exercise judicial review in relation to the Land and Titles Court, until recent opinions cast some doubt on the issue.⁴⁴ However, as in most countries, the Supreme Court has jurisdiction to interpret the Constitution.⁴⁵ Also, collateral attack may be mounted against Land and Titles Court orders at the enforcement stage, which, in Western Samoa, must be through the Magistrate's Court. By these means, alleged inconsistencies with fundamental rights can be raised. For example, it was recently held in the landmark *Taamale* case⁴⁶ that the customary law power of banishment, as exercised by the Land and Titles Court in respect of a village member whose conduct prejudiced the good order of the village, was not in breach of the right of freedom of movement and residence protected in art. 13 of the *Constitution*, provided that the purpose of the decision to banish was preventive rather than punitive and that the limitations expressed by the Court of Appeal as to the exercise of the power were observed. This decision is a further example⁴⁷ of the Court of Appeal's approval of a judicial approach that employs great caution in interpreting constitutional freedoms in such a way as to undermine what are perceived to be widely accepted and well-functioning Samoan institutions.⁴⁸ Nevertheless, when read together with the *Constitution* and the *Village Fono Act*, above, the effect of the *Taamale* decision is to demonstrate a willingness by government and courts to impose clear limitations on the exercise of traditional authority under customary law. It is significant that both the Chief Justice and Court of Appeal expressly made no comment on the constitutional validity of the *Village Fono Act* or the exercise by the village council of some of its customary powers, which would now seem to be open to challenge on a broader front. The 'preventive, not punitive' basis of the *Taamale* decision on banishment allows constitutional argument that the punitive functions of village councils may disentitle them to act contrary to articles 9 and 10 of

the *Constitution* relating to fair trial and rights concerning criminal trials. Concern that the customary criminal jurisdiction of the village council was potentially in conflict with articles 9 and 10 was expressed over twenty years ago in the Report of a public inquiry into the powers of customary institutions, the courts and the legislature, respectively, under the constitution.⁴⁹

5 *Opening the door for review.* Prior to 1990, the Fiji Native Lands Commission, which is solely responsible for resolving disputes in relation to the holding of Fijian customary land and succession to chiefly titles, was the final arbiter on the merits, subject to judicial review by the High Court. The 1990 *Constitution*, which provided that the Commission's decisions were to be final and conclusive and '... shall not be challenged in a court of law' (s100(4)), was held by the Court of Appeal to oust such review.⁵⁰ Subsequently, the Fiji Constitution Review Commission recommended that the status of the Lands Commission should be enhanced by making suitable provision for it in the *Constitution*, but also that, after internal appeal on the merits was exhausted, the *Constitution* should allow for judicial review by the High Court.⁵¹ The 1997 *Constitution* now ignores the Lands Commission entirely, thereby leaving the way open for the re-introduction of judicial review. However, the newly formulated constitutional approach to emphasising Fijian dispute resolution processes and regard for the 'customs, traditions, usages, values and aspirations of the Fijian and Rotuman people', which Parliament is now required to reflect in legislation for the application of customary law,⁵² ensures that the status of decisions of the Native Land Commission will be a matter for ongoing consideration.

These examples invite questions about the expertise involved in dealing with vital customary law rights, whether finality is an important consideration and public perceptions of the roles (and cost) of judges and lawyers. As to lawyers, in the case of the above examples, they are not permitted to be engaged as representatives at first instance. The question raised by legal professionals is whether, if the rights and interests at stake in these hearings are as important to the parties as they often say they are, justice requires that lawyers be allowed to appear at the outset, as well as at any later stage. Sceptics are concerned about such issues as: the effects of introducing legally trained advocates into a forum that lacks that training; over-litigation;

and cost. At the review or appellate stage, lawyers are increasingly involved and their role is often to urge that customary decisions be reopened on grounds alien to customary law.

Traditional punishments

Consideration of customary decisions arises frequently when the common-law court system is presented with the fact that action has already been taken under customary law to punish offences and settle disputes arising out of them. Courts in many countries seem uncertain as to what approach to take. If the offence is clearly a minor one, should it be the responsibility of the prosecutor to discontinue the proceedings? In any case that proceeds to sentencing, it appears always difficult to know what weight the common-law court should give to punishment carried out under customary law.⁵³ If the carrying out of such punishment itself has constituted an offence (such as a beating or forcible removal of goods)—and particularly if the court is asked to adjourn sentencing to allow a customary penalty to be imposed—are those who execute customary decisions themselves immune from prosecution or civil suit? In 1982, the Chief Justice of Fiji was prepared to reduce lower court penalties imposed on several defendants who had been caned by their village elder for assaulting a visitor to the village. Having observed that the Magistrate had not given sufficient credit to customary sanctions, the Chief Justice made no mention of the assault committed by the elder.⁵⁴ Appellate judges in the Federated States of Micronesia have not been so sanguine, expressing concern that the court should not be seen to be encouraging people to ‘take the law into their own hands’.⁵⁵ Although a trial court is generally reliant upon the prosecutor in sentencing matters,⁵⁶ lack of clarity as to the respective responsibilities of judge, prosecutor and defendant in relation to evidence of relevant custom seems to have frustrated and inhibited courts in their handling of these issues. When in doubt, judges tend to adhere to familiar pathways and the significance of the customary law elements of the matter is diminished.

A new jurisprudence?

Generally speaking, the courts have been less than successful in developing a jurisprudence that incorporates elements of customary law principles and traditional values.⁵⁷ It is said that this is due partly to the constitutional framework within which they operate—indeed, as ‘guardians of the constitution’⁵⁸—and the carry-over of legislation and rules from the colonial period. It is also acknowledged that judicial training and attitudes have played their part.⁵⁹ The legal profession must assume its share of responsibility.⁶⁰

As indicated by the key ‘C’ in the table, several countries have set themselves the task of developing laws appropriate to both the needs of their communities and the aspirations of the modern state. Legislature and judiciary are charged with the responsibility. In other countries, thought is being given to issues, but the way ahead is not always clear. It must be acknowledged that most Pacific constitutions are notoriously difficult to amend.⁶¹

The major problems in the development of such a jurisdiction may be summarised as:

- the pre-emptive nature of the existing written law;
- the failure to review the adopted colonial legislation for suitability;
- the difficulties involved in developing a ‘new jurisprudence’ on a case-by-case basis;
- the difficulties involved in marshalling evidence as to custom;
- the failure of the legislature to enact comprehensive legislation in the desired areas; and
- the cautious common law approach of the judiciary.⁶²

It is also asserted that, due to the different juristic nature of customary law, it is illusory to expect customary law to be developed through law reform.⁶³

Table Type and use of recognised custom

Country	population	date of independence/ association	relationship with power	type of custom (see KEY)
American Samoa	52,000	1967	Unincorporated, unorganised self-governing US territory	A.D. h.
Cook Islands	18,000	1965	Severable free association with NZ	A.E. h.
Easter Island	2,900	1966	Province of Chile	- h.
Federated States of Micronesia	105,000	1990	UN Strategic Trust Territory administered by the USA; now associated state	A.B.C. (D. Yap) m.
Republic of Fiji	760,000	1970	British Colony	A.D. h.
French Polynesia	203,000	1946/1984	Overseas Territory of France with internal self-government	- m.
Guam	135,000	1950	Unincorporated, organic self-governing US territory	- h.
Republic of Kiribati	75,000	1979	Part of British Colony of Gilbert and Ellice Islands	A.B.F. h.
Republic of the Marshall Islands	52,000	1990	UN Strategic Trust Territory administered by the USA; now associated state	A.B.D. h.
Republic of Nauru	10,000	1968	UN Trust Territory administered by Australia	A.B. h.
New Caledonia	176,000	1958/1988	Overseas Territory of France with internal self-government	B. m.
New Zealand	3,500,000	1907	British Colony, Dominion	B. h.
Niue	3,000	1974	Severable free association with NZ	A. h.
Commonwealth of the Northern Mariana Is	46,000	1978	Self-governing Commonwealth in union with the USA	B. m.
Republic of Palau (Federal)	18,000	1994	UN Strategic Trust Territory administered by the USA; now associated state	A.B.C. (D. some states) m.
Papua New Guinea	4,200,000	1975	New Guinea–UN Trust (Papua–Australian) Territory	A.B.C. E.F. m.
Samoa	165,000	1962	UN Trust Territory administered by NZ	A.D.F. h.
Solomon Islands	375,000	1978	British Solomon Islands Protectorate	A.B.C. E.F. m.

Country	population	date of independence/ association	relationship with power	type of custom (see KEY)
Tokelau	1,600	1948–86	New Zealand territory with local government	A.E.F. h.
Kingdom of Tonga	98,000	1970	British Protected State	D. h.
Torres Strait Islands	9,000	1971–75	Part of Queensland State with local government	E.F. m.
Tuvalu	9,500	1978	Part of British Colony of Gilbert and Ellice Islands	A.B.F. h.
Republic of Vanuatu	155,000	1980	British and French Condominium	A.B.C. E.F. m.
Wallis & Futuna	15,000	1958/ 1961	Overseas Territory of France with limited (strictly internal) self-government	B.D. h.

KEY to the ‘Type of Custom’ that operates as
a sub-system of law within a state or territory

The state or territory:

- A.** recognises a substantial body of unwritten or codified customary law in relation to *most* of the land area
- B.** recognises some unwritten customary personal law in relation to *some* marriages and adoptions **and/or** customary law in relation to *some* land areas and inheritances
- C.** is concerned to examine customary law, and also common law, with a view to the development of a primary or underlying law consistent with the needs of the nation
- D.** gives *significant* recognition to the authority of chiefs in government (national and/or local)
- E.** gives *some* recognition to the authority of customary leaders in government activity
- F.** recognises some customary local law and/or settlement of disputes in criminal courts, local courts or land courts.
- h.** Indigenous society is broadly **homogeneous** in terms of culture and language, with local variations.
- m.** Indigenous society is **multi-custom**, comprising a number of indigenous communities whose customs and languages are distinct.

Regulating custom

This study has offered two contemporary perspectives on customary law in light of the introduction of common law to the Pacific Islands. On the one hand, the spheres of activity governed by customary law and the political and social investment in its retention do not appear to have diminished. The content of customary law has not been significantly altered by statutory intervention, nor has it been incorporated into a new jurisprudence. Courts and governments are unsure how to proceed.

On the other hand, while a sort of 'stand off' may appear to exist, it is not a 'stalemate'. Lack of guidance for the courts as to how to handle customary law, and the increasing number of common-law trained lawyers engaged as judges and practitioners in Pacific Island legal systems, have ensured that the persistent erosion of the vitality of customary law has continued, even increased in tempo. In addition, the forces of the common law have been seen to employ tactics of encirclement—to cast the net and tighten it around customary law institutions and authorities. As has been shown, customary law decisions are made subject to review in non-customary contexts. In the years ahead, there will undoubtedly be further initiatives directed at regulating customary law in ways that will be argued to be in the best interests of society. The Western juggernaut has been stopped in its tracks, but its engine has not stalled.

Notes

1 The National Goals and Directive Principles of the Papua New Guinea *Constitution* 1975 and the Principles of the Tuvalu *Constitution* 1986 are inspirational, as indeed are the Preambles of most Pacific constitutions.

2 R Keesing, 'Creating the past: Custom and identity', *The Contemporary Pacific*, 4(1), 1989, p19; T Ingram, 'The culture of politics and the politicization of culture in the Cook Islands', in *Culture and Democracy in the South Pacific*, eds R Crocombe and others, IPS, USP, Suva, 1992, p153.

3 See, for example, the work of the New Zealand Waitangi Tribunal, the French agency ORSTOM and the Australian Law Reform Commission (ALRC), (Report No. 31, *The Recognition of Aboriginal Customary Laws* 1986). For post-independence thinking in Papua New Guinea, see the publications listed in note 23 below.

4 S Roberts, *Order and Dispute: an Introduction to Legal Anthropology*, Penguin Books, Auckland, 1979.

5 Countries where this is occurring include the Cook Islands, Fiji, Solomon Islands, Vanuatu, PNG (including Bougainville), Palau and the FSM. Studies of this phenomenon will appear this year: *Chiefs Today: Traditional Pacific Leadership and the Post Colonial State*, eds G White and L Lindstrom, Stanford University Press, (forthcoming).

6 D Shuster, 'Custom versus a new elite: Palau's 16 State Constitutions', *Journal of Pacific History*, 29 (2), 1994, p188.

7 For a useful collection of views on this topic see A Ravuvu, 'Culture and traditions'; F Bole, 'Fiji's chiefly system'; I Mataitoga, 'Westminster style democracy and cultural diversity'; and B Lal, 'Rhetoric and reality', all in *Culture and Democracy in the South Pacific*, eds R Crocombe and others, IPS, USP, Suva, 1992.

8 Despite the change of name in 1997, reference is sometimes made here to 'Western Samoa' in order to distinguish it from American Samoa.

9 *Village Fono Act 1990*, Western Samoa.

10 For example, *Native Lands Act*, Tuvalu, (Revised Laws 1990 Cap 22).

11 *Village Fono Act 1990*.

12 *Local Courts (Amendment) Act 1985*, Solomon Islands.

13 G Powles, 'The early accommodation of Tongan and English Law in Tonga', in *Tongan Culture and History*, eds P Herda and others, Research School of Pacific Studies, ANU, Canberra, 1990.

14 D Kenneth and H Silas, 'Vanuatu: Traditional diversity and modern uniformity', in (the jointly authored) *Land Rights of Pacific Women*, IPS, USP, Suva, 1986.

15 'Custom policy of the Malvatumauri', a recent publication of which appears in L Lindstrom and G White, (eds), *Culture, Kastom, Tradition* IPS, USP, Suva, 1994.

16 A phrase removed from the *Native Customs (Recognition) Ordinance 1963* by the *Constitution 1975*, PNG.

17 Schedule 1.2, *Constitution 1975*, PNG.

18 S2, *Land and Titles Act 1981*, Western Samoa.

19 S144, *Constitution 1978*, Solomon Islands.

20 *Laws of Tuvalu Act 1987*, s5, Tuvalu.

- 21 In constructing the table and making the assessments shown, the author has drawn upon a substantial number and wide range of sources, including socioeconomic as well as legal and political studies of contemporary Pacific Island societies.
- 22 S100(3), *Constitution* 1990, Fiji. The Fiji Constitution Review Commission recommended its repeal (*Report* 1996, (see note 51 below) pp610–613). The new *Constitution Amendment Act* 1997, Fiji, no longer applies customary law by constitutional *fiat*, and imposes on Parliament the obligation to ‘make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes’ (s186(1)).
- 23 *Native Customs (Recognition) Ordinance* 1963, now *Customs Recognition Act*, Papua New Guinea. Four collections of studies are recommended for a better understanding of issues in this area: *Law and Social Change in Papua New Guinea*, eds D Weisbrot and others, Butterworths, Sydney, 1982; *Essays on the Constitution of Papua New Guinea*, eds R De Vere and others, Govt of PNG, Port Moresby, 1985; *Legal Issues in a Developing Society*, eds R W James and I Fraser, University of PNG, Port Moresby, 1992; *Custom at the Crossroads*, eds J Aleck and J Rannells, University of PNG, Port Moresby, 1995.
- 24 *Customs and Adopted Laws Act* 1971, Nauru.
- 25 S5 and Schedule, *Laws of Tuvalu Act* 1987, Tuvalu.
- 26 S5 and Schedule, *Laws of Kiribati Act* 1989, Kiribati.
- 27 B Ottley, ‘Custom and introduced criminal justice’ in *Legal Issues in a Developing Society*, see note 23; and R W James, ‘The challenges of equity in developing the underlying law’, in *Custom at the Crossroads*, see note 23.
- 28 See Sir John Muria, Chief Justice, ‘Conflicts in women’s human rights in the South Pacific: The Solomon Islands experience’, *Commonwealth Judicial Journal*, 11(4), 1996, p7.
- 29 Art 8(2)(d), *Constitution* 1962, Western Samoa; s6(3)(e), *Constitution* 1979, Kiribati; s24(2)(d), *Constitution Amendment Act* 1997, Fiji.
- 30 J Griffiths, ‘What is legal pluralism?’, *Journal of Legal Pluralism*, vol. 24, 1986, p1.
- 31 *The Recognition of Aboriginal Customary Laws*, ALRC Report No. 31, 1986, para 614.
- 32 For example, Sir Buri Kidu in *The State v Paul Pokolu* (1983) N.404 of 1983 at p7.
- 33 S13, *Customary Land Records Act* 1994, Solomon Islands.
- 34 S14, *Customary Land Records Act*.
- 35 S8D(1), *Local Courts (Amendment) Act* 1985, Solomon Islands.
- 36 S8D(2) and Schedule Form 1, above.
- 37 S8D(3), above.
- 38 S8F, above.

39 S8E, above.

40 S8E, above.

41 Ss3,5,6 and 11, *Village Fono Act 1990*, Western Samoa.

42 S11(5) and (6), *Village Fono Act 1990*.

43 S71, *Land and Titles Act 1981*, Western Samoa.

44 *Alaelua Vaai v Land and Titles Court* [1980–1993] WSLR 507 (SC) and 531 (CA).

45 Art 73(2), *Constitution 1962*, Western Samoa.

46 *Italia Taamale & Taamale Toelau v Attorney General* 23 January 1995 (SC) and 18 August 1995 (CA). The Court of Appeal upheld, and adopted much of the reasoning of, the judgment of the Chief Justice.

47 See the notable decision upholding matai suffrage (electoral voting by chiefs only), *Attorney-General and Others v Saipa'ia (Olomalua) and Others* [1980–1993] WSLR 41 (CA).

48 For assessments of the resilience of the Samoan matai system and customary law, see G Powles, *The Status of Customary Law in Western Samoa*, Victoria University, Wellington, 1973; and 'Legal systems and political cultures: Competition for dominance in Western Samoa', in *Legal Pluralism*, eds P Sack and E Minchin, Law Dept, Research School of Social Sciences, ANU, Canberra, 1986; and M Meleisea, *The Making of Modern Samoa*, IPS, USP, Suva, 1987, and *Changes and Adaptations in Western Samoa*, Macmillan Brown Centre, University of Canterbury, Christchurch, 1992.

49 *Report on Matai Titles, Customary Land and the Land and Titles Court*, Government of Western Samoa, Apia, 1975, pp83–89.

50 *Ratu N Nava v Native Lands Commission & Native Land Trust Board* 11 November 1994 (CA).

51 *Towards a United Future: Report of the Fiji Constitution Review Commission*, Government of Fiji, Suva, 1996, pp584–596.

52 S186(1) and (2), *Constitution Amendment Act 1997*, Fiji.

53 In the FSM, punishment, even severe, will not be a complete defence (*Tammad v FSM* (1990) 4 FSM Interim Reporter 226); Tuvalu requires customary law to be taken into account (Sch 1 para 3 *Laws of Tuvalu Act 1987*). In Western Samoa, the formal courts are required to take into account 'the punishment imposed' by village councils (s8, *Village Fono Act 1990*).

54 *Regina v N Lati and Others* (Supreme Court of Fiji, Review No 1/1982, 5 January 1982, Suva). For discussion of the Australian 'spearing in the thigh' cases, see note 31 above, ALRC Report No. 31, 1986, pp353–4.

55 *Tammad v FSM*, above note 53.

56 Kapi, J in *Acting Public Solicitor v Uname Aumane* [1980] PNGLR 510 at 544; and ALRC Report No.31 (note 31 above) para 526. In the Federated States of Micronesia, a Justice Ombudsman has this responsibility.

57 For a discussion of the common law / customary law dichotomy in New Zealand, see Chief Judge E Durie, 'Custom Law: Address to the NZ Society for Legal and Social Philosophy', *Victoria Uni. of Wellington Law Review*, vol.24, 1994, p325.

58 A J Regan, 'Constitutionalism, legitimacy and the judiciary', in *Legal Issues in a Developing Society*, see note 23 above.

59 Chief Justice J A Amet 'Severing the umbilical cord from the common law' in *Custom at the Crossroads*, see note 23 above.

60 The indigenous lawyers of PNG are taken to task by T Deklin, 'The future of PNG customary law: Rot wei', in *Custom at the Crossroads*, see note 23 above.

61 G Powles, 'Changing Pacific Island constitutions: Methods and philosophies', *Victoria Uni. of Wellington Law Review*, 22(3), 1992, p63.

62 D Weisbrot, 'Papua New Guinea's indigenous jurisprudence and the legacy of colonialism', *Uni. of Hawaii Law Review*, 10(1), 1988, p1.

63 M Ntummy, 'The dream of a Melanesian jurisprudence', in *Custom at the Crossroads*, see note 23 above.
