

The idea of law

A Pacific perspective

Asiata Vaai

Law as a universal phenomenon is generally perceived as an esoteric institution, prescribed by states with Parliaments and other organs of government such as the Courts and police, and involving judges and lawyers who settle, mediate or adjudicate disputes. Furthermore, law provides constructs that facilitate conformity with norms and may have punitive and restitutive functions, maintaining law and order or generally fostering egalitarianism. For the lawyers, law is for professionals rather than lay persons and can or ought to be ascertained from legal documents, statutes, law reports, books and other documentary sources to answer or solve particular problems. Increasingly, however, law is seen as more than what the lawyers say it is or ought to be: since it is not a discrete part of culture and society, it should therefore be studied ‘in context’ and not confined to the isolationist views of lawyers.

Views of the ‘definition of law’—described by one as a ‘silly word battle’¹—vary from those who say that law can be defined, to those who say that it cannot and those who say it is too complex a system of multiple phenomena to be defined simply. Law was conceived originally as part of philosophy, religion or ethics. It was Montesquieu—the first lawyer to start looking at law as legal theory—who described law in its most general signification as ‘the necessary relations arising from the nature of things’. While declaring the law ‘can never be defined’, Arnold conceded that the

struggle to define law is nevertheless a necessary and continuing exercise to 'upkeep the ideal of law'.² Julius Stone on the other hand sees the definition of law in seven cumulative steps, which entail recognising law as a 'complex whole of many phenomena'. It includes the norms to regulate behaviour and prescribe what it ought to be and what it ought not to be, or to declare what is permissible. These are social norms. As an orderly whole, law ought to be institutionalised with a 'coercive order' sufficiently effective to maintain itself.³

While the rule of law or the ideal of law is projected as the bastion of Western civilisation, it has been described in the context of former colonies as 'the cutting edge of colonialism'.⁴ But while it 'may be the corner stone of many mighty civilisations in human history . . . it has often been used as a sharp sword by the powerful to conquer, and hold subject, the powerless. Law has been used to destroy cultures, civilisations, religions and the entire moral fabric of a people'.⁵ Visualised as a 'multi-dimensional net which stretches beyond the horizon in all directions, wherever we stand',⁶ an institution of which it has been said that it 'must be assimilated to justice and that law without justice is a mockery, if not a contradiction',⁷ the question of 'law' is a worldwide word battle that is not value free.

Jurisprudence has traditionally been concerned with the study of law in Western countries (those of Western Europe and North America), in other words of Western law. Consequently, early discourses and notions of law were conceived and developed in the context of Western history and ideology, with systems of government based on the concept of a state that is ruled by a sovereign, with its central maxim of separation of powers with Courts to administer laws. In fine, law has therefore been perceived Eurocentrically, fostered and grown in a Western context and variously claimed to be either commands of a sovereign, metaphysical concepts, natural phenomena, basic principles, what Courts do or stages in a unilinear theory of historical evolution. Discourse on law continues to be carried on largely by Western philosophers, scientists and academics. However, while it was originally dominated by commentators with legal training, participation in the dialogue is now dominated by a multidisciplinary approach.⁸

Non-Western countries and societies, particularly those that were subjected to colonialism, were stereotyped as primitive and presumed not to possess systems suitable for the administration of law: classified and

assumed as having no laws, they were considered to be governed only by customs. Such societies, because they lacked Courts that interpret and apply rules, were excluded by the outside observers' adherence to such culturally specific definitions of law as 'the formal means of social control that involves the use of rules that are interpreted, and are enforceable, by the courts of a political community'.⁹ Furthermore, such societies were considered justiceless, for justice was seen as having as a prerequisite the existence of a state in a political community with an inherent notion of equality.

The first movement to undertake studies of law in non-Western societies was the anthropological school, which claims to have clear advantages over disciplines such as jurisprudence, political science and sociology because it is empirical and not culture bound, because it studies human culture as a dynamic phenomenon, an interrelated whole of social forces and individuals. Anthropologists sought to show the social purpose of customary rules, and how they fit into the structure of behaviour, and by observing and describing changing situations to understand the implications that follow from change. Although the historical school, through exponents such as Maine, Savigny and Spencer, recognised primitive societies as part of their evolutionary models, it was only in the twentieth century, particularly as a by-product of colonialism, that the anthropological study of law in primitive societies became widespread and the movement was accepted as separate, with a discrete approach that purported to identify concepts of law that apply in non-Western societies.

While anthropologists and sociologists share a common area, the study of mankind, they have tended to operate in different societies and parts of the world. For sociologists the designated territory of operation was Western societies, while for anthropologists, especially the cultural or social anthropologists, non-Western societies have been the focus. The anthropologists, moreover, were Europeans from either Europe or other European-settled areas of the world such as North America. Their theories and careers were built on their observation and analysis of societies not their own. Indeed, the respective international reputations of anthropologists Margaret Mead and Derek Freeman were greatly enhanced by the controversy¹⁰ about Mead's book, *Coming of Age in Samoa*,¹¹ following researches undertaken in Samoa. Anthropologists not only found in non-Western countries a vast area of research in 'the study of the rapidly

vanishing savage races' but also became the eyes and ears of Western colonialism in its quest to 'help the white man to govern, exploit, and "improve" the native with less pernicious results to the latter'.¹²

The influence of the unilineal theory of evolution on the early anthropologists in analysing non-Western societies perpetuated the view that non-Western societies did not have any law and that social control was effected by the power of custom. It was categorically assumed that a society lacking written laws and Western culture had no laws. Absence of law was therefore considered a fundamental characteristic of non-Western societies and primitive man was seen as being 'hemmed in on every side by the customs of his people . . . bound by the chains of immemorial tradition . . . whose fetters are accepted by him as a matter of course; he never seeks to break forth'.¹³ When Westerners 'could not find any brick built courts, any armed, salaried and uniformed constables, nor any paper and ink codes, they concluded that there was neither law nor justice'.¹⁴ Inhabitants of such societies were seen as inferior, members of the lowest races, having nothing that could be called the administration of justice. Jurists' traditional views of law in non-Western societies declared that if:

there are any rules prior to and independent of the state, they may greatly resemble law; they may be primeval substitutes of law; they may be the historical source from which law has developed and proceeds; but they are not in themselves law. There may have been a time in the past when man was not distinguishable from the anthropoid ape but that is no reason for now defining man in such a manner as to include an ape.¹⁵

Not only were non-Western societies theorised to be lawless and justiceless, the absence of institutions of central government was also taken to imply a state of leaderlessness. It was, for instance, said of the Walbiri people of aboriginal Australia that 'the community had no recognised political leaders, no formal hierarchy of government. People's behaviour in joint activities was initiated and guided largely by their own knowledge and acceptance of established norms'.¹⁶ Maintenance of social control, furthermore, was achieved through 'explicit social rules, which, by and large everybody obeys; and the people freely characterize each other's behavior insofar as it conforms to the rules or deviates from them. The totality of the rules expresses the law'.¹⁷

Theory of Western law regarding settlement and occupation of non-Western territories and the rights of settlers and indigenous people to property was also directly influenced by the Western view of the 'new world' beyond the confines of Europe as being populated by backward and uncivilised people. International law, moreover, was also fashioned to support colonialism and Western law, with its application only to civilised nations and having as one of its basic principles 'the principles of law recognised by civilised nations'.¹⁸ Principles of colonial law were presumed to apply and prevailed in these territories and new lands, to an extent that depended on whether occupation was by conquest, cession or settlement. English settlers, for instance, who occupied or moved into an 'uncivilised or barbarous' country took English Law—common law and statutes in force at the time of settlement—with them; such was considered to be the birthright of British subjects.¹⁹ On the other hand, in cases of territories over which sovereignty was acquired by cession or conquest, the law in force at the time of cession or conquest 'remains in force unless and until it is altered by or under the authority of the Sovereign'.²⁰ It was, furthermore, a basic principle of English Law:

that when English law is in force in a colony, either because it is imported by settlers or because it is introduced by legislation, it is to be applied subject to local circumstances; and in consequence, English laws which are to be explained merely by English social or political conditions have no operation in a Colony.²¹

It was also a principle of international law that irrespective of how nations acquired sovereignty over other territories, rights of the inhabitants were to be respected.

However, in colonies of the later colonial period in Africa and the Pacific, the rights of indigenous people were either ignored or made subject to different standards of law. In relation to land, the systems applied by the colonial settlers in land dealings invariably became the law, overriding indigenous systems of communal ownership based on lineages and usufruct. Colonial law was therefore applied, interpreted and dominated by Western law. The irreconcilability of the principles of feudal property law, for instance, with group and communal institutions of indigenous law was

simply swept aside by the approach of colonial law that gave paramountcy to principles of imported law over customary law. As pronounced by the Privy Council:

The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferrable rights of property as we know them.²²

Such an approach gave rise to the theory and a rule of colonial property law that denied 'the indigenous inhabitants of a "settled" colony proprietary interest in the land'. This theoretical basis, which existed, for instance, in Australia, relied on the supremacy of Western law and consequently discriminated and denigrated 'indigenous inhabitants, their social organisation and customs'.²³ The rule, recently in dispute, was overruled by the Australian High Court only recently.²⁴ However, while recognising for the first time the existence of indigenous title to land in Australia, the High Court continued to maintain the supremacy of Western society and law by prescribing a status for indigenous title that is inferior to that which would have been recognised at English common law.

At common law confiscation of property is presumed to require the payment of compensation. Native title is *not* protected by such a presumption. Native title is *not* accorded the 'full respect' which Brennan J asserts as the rationale of the judgment. Native title is subject to extinguishment at common law without the consent of the aboriginal people or the payment of compensation. This limitation upon native title is a fundamental aspect of the compromise of the Aboriginal interest which the common law imposes in order to give paramountcy and validity to the interests of the settler society.²⁵

The legalistic Western traditional jurisprudential school had a strong influence on anthropologists such as Radcliffe-Brown, who in his analysis of non-Western societies agreed with Austin and adopted Pound's definition of law as 'social control through the systematic application of the force of politically organised society'.²⁶ Being unable to ascertain political structures in non-Western societies that he studied, Radcliffe-Brown drew the conclusion that these cultures had no law but only 'customs which are supported by sanctions'.²⁷ Consequently, the non-Western societies he studied—the Yurok of California and Ifugao of Luzon—were according to him without law. A student of Radcliffe-Brown, E E Evans-Pritchard, utilising the same conceptual framework as his mentor in studying the Nuer society in the Sudan, also came to a similar conclusion that the Nuer people had no law because there was no adjudicatory authority to decide and enforce in the case of disputes.²⁸

One analysis of law in non-Western societies firmly distinguished the anthropological approach from the traditional application of legalistic Western theories to non-Western societies. This was Malinowski's study of the Trobriand Islanders of Melanesia in the Western Pacific, in particular the analysis presented in *Crime and Custom in Savage Society* (1926).²⁹ Anthropologists had traditionally relied on field notes and information gathered by ethnographers and officials working or having contact with people from non-Western societies; they applied general theory about primitive culture to the gathered data. Malinowski's work in Melanesia, however, differed not only in that it involved direct observation and gathering of data by the scientist but in that he also claimed to have formulated a functionalist theory with its own 'precise concepts and clear definitions' (px).

Malinowski rejected the approach of defining law in terms of forces such as central authority, codes, courts and constables, for the reason that such 'independent institutions' do not exist in these societies (p59). Law, he asserted, can be ascertained by analysing the behaviour of the inhabitants. In the absence of Western-type institutions of law enforcement, the method of maintaining order in these societies was by 'reciprocity, systematic incidence, publicity and ambition', not by force (p68). Malinowski, however, did not acknowledge or discuss a normative element in Trobriand society; he went so far as to declare that Trobriand society had only a

criminal problem and 'there is no civil law among savages, nor any civil jurisprudence for anthropology to work out' (p56).

Malinowski formulated a consensus-based anthropological definition or notion of law (civil), 'intended to be of universal application',³⁰ as consisting of 'a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society' (p58). Adopting Malinowski's approach, Ian Hogbin in his study of several Polynesian societies—Ontong Java, Samoa, Hawaii and Tonga—demonstrated the inappropriateness of the traditional Western approaches to the study of law in non-Western societies as by doing so one 'is bound to overlook essential elements which only become apparent when the culture is considered as a whole'.³¹ However, reducing legal relations to 'rights and duties', according to Hohfeld, was too simplistic an analysis and therefore responsible for a great deal of confusion and misunderstanding. He advanced instead a framework for investigating legal relations in terms of 'opposites' and 'correlatives' (the relationship between the plaintiff's action and the defendant's conduct) of concepts.³² The confusion, claimed Hohfeld, is caused by the indiscriminate use of the word 'right' to refer to such notions as privilege, power and immunity: whereas the concepts are quite distinct and may be illuminated by examining the relationships of the 'opposites' and 'correlatives' of the four concepts, namely duty, no-right, disability and liability.³³

A different approach from that of Malinowski was evident in Max Gluckman's study of the Barotse nation of Northern Rhodesia (now Zambia)—particularly the dominant tribe Malozi³⁴ (Lozi)—which looked at the work of the Courts. Gluckman, observing the adjudicatory process, says that law is a 'social fact', which is distinguishable from other social facts and influences the behaviour of both 'Lozi judges and the public'.³⁵ Emerging from Gluckman's studies is the concept of law as 'a set of rules accepted by all normal members of the society as defining right and reasonable ways in which persons ought to behave in relation to each other and to things, including ways of obtaining protection of one's rights' (p299). Gluckman also concluded from his investigation that Lozi judges in their decision-making process acted in a similar fashion to their counterparts in Western societies.

Employing a method of identifying law by analysing the disputing process rather than asking the question of what is law or applying a definition of law, a joint research venture in 1935–1936 involving a lawyer, K N Llewellyn, and an anthropologist, E A Hoebel, examined how ‘law jobs’ were handled.³⁶ The study identified three main and interrelated means of exploring ‘the law-stuff of a culture’ (p20). The first, the ‘ideological road’, is through right ways, norms or the ideal patterns of behaviour as a measure of real action. The second method is the practical road, which explores and describes ‘the patterns’ of behaviour as they occurred. Described as the principal gift from law to anthropology was the third or trouble case method, which looked at disputes and inquired into ‘what the trouble was and what was done about it’ (pp20–21). The data produced by this method were found to have been the most revealing in exposing the nature of law in Cheyenne society. Law therefore, concluded the study, has a threefold function: regulation, prevention and ‘cleaning up social messes when they have been made’.

In a separate study, Hoebel described law as ‘but a response to social needs’.³⁷ In primitive—homogeneous—societies, according to Hoebel, there is little need of law—but there is law. As culture becomes more complex homogeneity gives way to heterogeneity, political and civil organisation. With civilisation, conflicts would increase and the more ‘civilized man becomes, the greater is man’s need for law, and the more law he creates’ for people to conform to (p293). For Hoebel, law in primitive societies progresses through three stages (depending on complexity) before urbanisation, when its primitive nature ceases. This development process Hoebel refers to as the ‘trend of the law’, to distinguish it from the straight line unilinear method of the evolutionists, which he rejected (p288).

The most primitive groups, observed Hoebel, were the hunters and gatherers like the Andamanese Islanders, Shoshone Indians, Australian Aborigines and Barama River Carib, characterised as ‘autonomous’ communities ‘consist[ing] of a few related families that constitute a kindred’.³⁸ The next level are the ‘more organised hunters’, exemplified by the Cheyenne, Comanche, Kiowa and Indians of the Northwest Coast of North America, which combined into higher units of organisation, some units even forming a ‘tribal state’.³⁹ The final level are the garden-based societies such as the Samoans, Ashanti, Trobrianders and Iroquois, with larger populations and chiefs forming clans, in which ‘the law of things

begins to rival the law of persons'.⁴⁰ Although progression of law does not evolve through fixed stages, the phases exhibit characteristics found in the three types of primitive societies.

An attempt to formulate an universally applicable concept of law is Leopold Pospisil's 'cross cultural' analytical concept, which combined phenomena designated as law by 'English-speaking people' and those institutionalised as means of social control by 'non-European societies'.⁴¹ Influenced by the *Cheyenne Way*, Hoebel and other Legal Realist analyses of law, Pospisil arrived at an analytical concept grounded on the assumption that there is no 'basic qualitative difference between primitive and civilised law' (p341). Supported by studies of Western and non-Western societies, Pospisil posited an analytical concept having four attributes: 'authority, intention of universal application, *obligatio* (not to be confused with obligation) and sanction' (p41). The question therefore of whether a rule is law or custom, according to Pospisil, depends on how it measures up to the analytical concept, not whether it is from a non-Western society and therefore custom or from a Western society and therefore law. Pospisil also asserted that justice—the other side of law—is universal to all cultures, providing examples based on actual research in non-Western societies that have concepts of justice as part of their social systems (pp233–34). In the case of the Lozi, for instance, the concept of justice is named *tukelo*; furthermore, the Lozi king is looked upon as the symbol of justice.⁴² Other examples include the Koreans, who see justice as synonymous with virtue⁴³ and the Kapauku Papuans, whose conception of justice is called *uta-uta*.⁴⁴ For Samoans, justice is *amiotonu*, which is implicit in the notions of *tofa*, *faautaga ma le moe*.

From the 1960s, the focus of the anthropological study of law around the world began shifting in geographical and contextual emphasis, due to access difficulties inspired by the fervent nationalism that followed decolonisation. Research by cultural anthropologists was no longer confined to the traditional area of non-Western societies, but turned also to rural Western societies. Contextual emphasis, on the other hand, shifted towards the analysis of the disputing process rather than conceptual examinations of law, a move that has been largely responsible for sustaining opposition to the ethnocentric notion, which many anthropologists still subscribe to, of lawless non-Western societies.⁴⁵ On the other hand it is also acknowledged that law could not be properly understood unless an 'understanding of what

is called customary law'⁴⁶ was obtained. This shift was supported by an increasing awareness that studying non-Western societies might in fact lead to better knowledge and deeper understanding of law and organisation in developed Western societies.

Anthropologists are no longer attempting to prove the absence or presence of law in primitive societies by reference to any single definition of law. Rather the question has become: How is the law best conceived of for research purposes? Certainly for cross-cultural purposes, for example, we would have to agree upon an operational definition of law in order to agree upon what is to be compared. Such a working definition might read as follows: All societies have rules governing behaviour; some are preferential and others are prescribed by society. In some situations, when a prescribed rule is violated society will have delegated and agreed upon ways of punishing violator(s).⁴⁷

More recent anthropological studies of law have therefore not only formulated methods that aid analysis and description of custom in legal systems of non-Western societies, they have also defined and prescribed law to include non-Western or customary law. Anthropologists, consequently, have become 'legal' experts on customary and indigenous law, advising on problems and strategies for development and being expert witnesses in legal proceedings.⁴⁸

Traditional jurisprudence and anthropological studies of law conceptualised and described law in terms of Western and non-Western societies; yet a legal pluralism developed from the impact of Western colonialism and its implanted laws in societies where indigenous people had largely continued to function under their own customs and traditions, which comprised the non-Western face of law. Colonial policies were dictated by the theory of the unfitness of indigenous people to rule and the notion of the inevitable extinction of lesser races—the idea, that is, that if the land is not empty now it soon will be. The colonialists by and large therefore either knew very little of or had only superficial and peripheral knowledge of indigenous culture. Consequently, the domination by colonial powers led to the declaration of the supremacy of Western rule and concepts of law, which were to form part, if not the cornerstone, of the new systems of government in colonies.

Non-Western societies and their systems of government were regarded as unsophisticated and unsuitable for the operation of Western-style governments. Indeed, destruction of 'primitive law and the primitive group as a political unit' was required, with the corollary that 'a colony ha[d] to become a state' for the effective functioning of Western law.⁴⁹ Colonialism was therefore directly responsible for the legal pluralism that dominates the legal systems of former colonies of the non-Western world in Africa, Asia and the Pacific, giving rise to the co-existence of ideologically different legal systems. Whole legal systems were transferred across diverse cultural boundaries and imposed to facilitate colonial objectives of domination and to replace and destroy indigenous social patterns, cultural values, traditional trust, traditional authority and economic self-sufficiency, giving rise to 'a plurality of subsystems that represent not merely different historical processes but also fundamental conflicts over values'.⁵⁰ The imposition of law was, furthermore, intended and expected to alter the normative content of indigenous culture. This encompassed situations where 'fundamental changes' were imposed, induced or contemplated, the 'application of external norms' and 'the absence of a democratic consensus from that society'.⁵¹ Legal systems established and imposed by colonial powers were called 'law' and were linked to and derived their authority from metropolitan legal systems. Local legal systems with indigenous authority, on the other hand, were not considered of equal status to law: they were treated as being of inferior status, analogous to English custom, and were labelled customary law.

In establishing the institutions of colonial governments, systems of dual government were set up: a system of central government and Courts, invariably exercising overall control, for colonial nationals; and a system of local government catering for the indigenous people. For the central government system, institutions were manned by public servants, with the senior officials (all of them nationals of metropolitan powers) performing a multiplicity of functions including legislative, executive and judicial. They were, furthermore, given wide discretionary powers, with priority accorded to the maintenance of peace, order and good government. In matters of public law, the institutions and measures established and the authority conferred were primarily designed to facilitate efficiency of government. The expatriate bureaucrats were, moreover, officially and ultimately responsible and accountable in carrying out their duties only to the

metropolitan colonial offices. Moreover, institutions of central government in colonies were merely 'bureaucratic adjuncts' of metropolitan systems and as such, constitutionality of colonial government actions, having regard to separation of powers, representation and accountability, was inconsequential.

Systems of indigenous government were also evolved, linking the indigenous structure of authority to the hierarchy of colonial governments and more importantly, providing a convenient and legitimate means of exercising control over indigenous populations 'to keep the native in his place'.⁵² Apart from criminal matters—usually of a serious nature such as murder and rape and matters that may concern and affect settlers, like land and conflicts with locals—local populations were largely left to govern their own affairs in accordance with their customs and traditions, but under the guidance and supervision of colonial officials. Prohibitions, however, were generally imposed, stipulating that local customs and traditions were not to violate the laws of humanity and Christian principles or be 'repugnant to natural justice, equity and good conscience'.⁵³ Such systems of indigenous government, described as 'native administration' or 'indirect rule', were adopted in British African colonies⁵⁴ and colonies in the Pacific such as Fiji⁵⁵ and Papua New Guinea.⁵⁶ A similar system was also established in (Western) Samoa and operated by the colonial administrations of both Germany and New Zealand. The apartheid system that was recently abolished in South Africa was based on the same principle of cultural separation, in its most extreme form of racism. New institutions set up under the native governments, such as national assemblies, district offices and administrative courts, were responsible primarily to the colonial governments. The new structures also entailed the establishment of new hierarchies and practices of central authority that bypassed and undermined indigenous authority and institutions. The systems were manned by 'loyal' indigenous officials, who became the main instruments of exercising and legitimising colonial authority and facilitated changes that were being introduced or imposed by colonial governments.

The conclusion of the Second World War led to movements for independence under a new international mood of egalitarianism fostered by the Trusteeship system established by the newly formed United Nations Organization. In the Pacific the process began immediately with (Western) Samoa, which became the first Pacific island country to regain its

independence in 1962, followed by Nauru (1968), Fiji (1970), Papua New Guinea (1975), Solomon Islands (1978), Tuvalu (1978), Kiribati (1979) and Vanuatu (1980). Other smaller colonised island countries opted for restricted forms of autonomy, with the Cook Islands and Niue becoming self-governing states in association with New Zealand in 1965 and 1974 respectively. In 1986, the Marshall Islands and the Federated States of Micronesia concluded and implemented a compact of free association with the United States of America, while the remaining island territories continued to be inextricably linked to the metropolitan powers. Free association status allowed internal and external autonomy in the case of the former United States Trusteeship Territories, with the United States being responsible for defence. Cook Islands and Niue, on the other hand, have full internal autonomy, though continuing formal links give New Zealand a measure of control over external affairs and defence. The islanders in both territories, furthermore, remained New Zealand citizens.

The Constitutions of the independent states, as the basis of law in the new era, were progressively copied from Constitutions of other former colonies as the independence of the islands was regained. The (Western) Samoan Constitution, for instance, included parts that are similar to the Nigerian Constitution, and later Pacific island Constitutions bear resemblances to earlier Pacific island Constitutions. Statements of intentions in preambles and declarations of statehood and supremacy of Constitutions are fundamental parts. Formal structures and standards of constitutional government largely based on either a Westminster-type or Washington-type Western government were inserted with various degrees of particularity. Organs of government covering matters such as the Head of State, the Executive, Parliament, Judiciary, Finance and the Public Service were standard elements of these Constitutions. Fundamental Rights provisions were incorporated in all Constitutions and, without exception, came immediately after the declaration of independence in constitutional formatting. Citizenship was also constitutionalised in all Pacific island states' Constitutions except that of (Western) Samoa. Only the three Melanesian states of Papua New Guinea, Solomon Islands and Vanuatu made provisions for a Leadership Code and an Ombudsman, as also did Fiji (which is normally classified under Western Polynesia). Measures for provincial governments were also made only in the Melanesian states' Constitutions. Land was included in the Constitutions of only Solomon Islands, (Western) Samoa and Vanuatu.

Rejection of colonialism and reassertion of independence gave rise to the 'homegrownness' of constitutions and a post-independence constitutional principle of legal autochthony, which has been described as not just 'the principle of autonomy' but 'a principle of something stronger, of self-sufficiency, of constitutional autarky or . . . of being constitutionally rooted in their own native soil'.⁵⁷ Autochthony has been accorded importance as a desirable goal and objective of constitution-makers and legal propriety. It has been considered achievable either by a break in the legal continuity between the colonial order and the new independence order,⁵⁸ or by the acceptance by the people of the new order,⁵⁹ or by considering independence to be irreversible.⁶⁰

In Papua New Guinea, where autochthony as an intrinsic element of constitution-making was most revered, it was the primary resolution of the Constitutional Planning Committee (CPC) to have autochthony as the fundamental principle of the Constitution. It was felt by the CPC 'that autochthony would satisfy their national aspirations, and would give a sense of security that the power they acquired at Independence was their own and not given to them by someone else'.⁶¹ Statements of autochthony were therefore included in the Constitution and confirmed by the Papua New Guinea Supreme Court in its statement that 'the Constitution itself is a truly autochthonous Constitution, as the preamble recites, by the will of the people, to whom "all power belongs". Its authority is thus original and in no way derivative from any other source'.⁶² It is accordingly claimed that 'in constitutional language, the PNG Independence Constitution is autochthonous, meaning it recognizes that power springs from the people in whom it had been residing in a dormant state and that it was not transferred to them by the colonial authority'.⁶³

The 1970 Fiji Constitution did not contain expressions of indigeneity and its preamble recited the cession and other significant events in Fiji's colonial history, espoused the promotion of a society of free men and free institutions and pledged allegiance to the British Crown and the rule of law. The 1990 Fiji Constitution consequently directly attributed the 'events of 1987' (the military coups) to the absence from the 1970 Constitution of provisions safeguarding indigenous interests. The 1990 Decree promulgating the Constitution⁶⁴ and the preamble of the 1990 Constitution itself state that 'the events of 1987 were occasioned by a widespread belief that the 1970 Constitution was inadequate to give protection to the interests of the indigenous Fijian people, their values, traditions, customs, way of life and

economic well being'. Accepted by the Bose Levu Vakaturaga (Great Council of Chiefs), the 1990 Constitution in its preamble alluded to the events leading to the coups, reconfirmed the democratic society of Fiji, reaffirmed the endowment of indigenous Fijians, and reasserted Fijians' respect of other groups and the 'mutual observance of the rule of law'.

This 1990 Fiji Constitution also explicitly recognised the Great Council of Chiefs in article 3 and provided for the protection of economic, social, educational, cultural, traditional and other interests of Fijians and Rotumans under article 21. Under article 100, customary law was recognised as part of the law of Fiji, restricted only by the covenant of repugnance to the Constitution, statute law or the general principles of humanity. Parliament was also authorised to make laws relating to the application of law, 'including customary law'. Decisions of the Native Lands Commission affecting Fijian customs and tradition or the application of customary law and headship disputes were deemed 'final and conclusive and shall not be challenged in a court of law' (article 100(4)). Provisions were also made authorising the establishment of Fijian Courts (article 122) and the terms 'Fijian', 'Rotuman' and 'Indian' were further defined (article 156).

Detailed analysis of the revised Constitution to come into effect in July 1998 is beyond the purview of this paper. It does not upset the basic intention of protecting Fijian interests without damaging the rights of other groups.

The Solomon Islands Constitution in its preamble declared the wisdom of ancestral customs and like the 1990 Fiji Constitution, authorised Parliament to 'make provisions for the application of law, including customary law' and to have regard to Solomon Islands traditional values. Article 76(c) schedule 3.3 proclaimed customary law not inconsistent with an Act of Parliament or the Constitution to be law in Solomon Islands until Parliament legislates otherwise. Solomon Islanders are vested the right to hold or acquire perpetual interest in land (article 110). The compulsory acquisition of customary land 'or any right over or interest in it' is, moreover, limited to a fixed term interest and fair compensation is to be paid, with a right of access to independent legal advice for owners (article 112).

The Tuvaluans have only a brief reference in the preamble of their Constitution to its being 'based on Christian principles, the Rule of Law and Tuvaluan custom and traditions'; and an amendment of the Constitution in 1986 inserted a requirement that Bills be referred to Island Councils for consideration and comment between sessions of Parliament. Kiribati and

Nauru Constitutions, on the other hand, made no references at all to their indigenous customs and traditions.

The preamble of the Vanuatu Constitution proclaimed the establishment of the nation to be founded on 'traditional Melanesian values, faith in God and Christian principles'. A National Council of Chiefs was established under chapter 5 (articles 27–30), with its members elected by other chiefs in District Councils. The Council of Chiefs is declared competent to discuss all matters relating to customs and traditions and may make recommendations affecting ni-Vanuatu language and culture. It may also be consulted on matters relating to customs and traditions. Parliament was authorised to provide for the manner of ascertaining relevant rules of custom, and particularly to make provisions for persons knowledgeable in custom to assist and sit with judges of both the Supreme Court and the Court of Appeal in legal proceedings (article 49). Authority was also conferred on Parliament to establish village and island courts to deal with customary matters, with the chiefs forming a part of such courts (article 50). Local government councils were also to contain representatives of customary chiefs (article 81) and customary law was declared to form part of the existing law of the Republic (article 93 (3)).

Land in Vanuatu is declared by the Constitution to belong to 'indigenous custom owners and their descendants' (article 71) and its ownership and use is based on rules of customary principles (article 72). Even (and only) for indigenous citizens, perpetual ownership of such land is recognised only if it has been acquired in accordance with a recognised system of customary land tenure (article 73). Government performs a major role in the administration of customary land and is required to facilitate the resolution of customary disputes over land (article 76 (2)). Land transactions between owners and non-indigenous citizens or non-citizens require the consent of government, which may be withheld if transactions are considered prejudicial to the interest of the owners, the local community or the Republic (article 77).

In (Western) Samoa aspirations for the homegrownness of its Constitution were encapsulated in the notion of *Samoa mo Samoa*. Constitutional conventions were convened to facilitate the emergence of a Constitution that constituted a free political act of the Samoan people. The Working Committee decided 'that the legal authority in the new state should not derive, directly or indirectly, from the law of a foreign country but from the act of the people's representatives in adopting the Constitution'.⁶⁵

Incorporation of indigenous aspirations in the Constitution was therefore achieved through specific measures relating to the original holders of the office of the Head of State, special general provisions relating to customary land and titles, and the maintenance, for Samoan constituencies, of an election system based on the *matai* system. A general statement of intention of the homegrownness of the Constitution, which was enacted and adopted on 28 October 1960, was incorporated in the preamble, where the Constitutional Convention declared the new state to be 'based on Christian principles and Samoan custom and tradition', and the Constitution to be a document 'wherein the integrity of Western Samoa, its independence and its rights should be safeguarded'.

Achievement of independence did not altogether sever links between the metropolitan powers and the former colonies, which had been entrenched over many years. While the majority of states opted for local Heads of State, Papua New Guinea, Solomon Islands and Tuvalu have maintained their colonial links through the office of a Governor-General. Only Tuvalu, however, still keeps the Privy Council as the final Court of Appeal, although most of the judges of the region's Courts of Appeal are senior or retired judges from Australia and New Zealand. English Common Law and Equity are, moreover, expressly provided to apply in Papua New Guinea, Solomon Islands, Tuvalu, Vanuatu and (Western) Samoa. Qualifications of judges invariably include being a barrister of some standing. Candidates for the judiciary will therefore always be those with Western legal training. With the central role of Supreme Courts as guardians of the Constitution, including powers of review over Acts of Parliament and other interpretive functions, judges have a pivotal and influential role in the future development and evolution of Pacific islands constitutional law.

The advent of colonialism with its imposed systems of law and new Constitutions for Pacific island states has effectively and permanently marginalised customary laws. Dualistic systems of government, which fostered separatism in pluralism, were employed and pursued as being in the best interests of custom and law. Independence, however, saw the establishment of new constitutional systems that were invariably in accordance with Western ideologies and law. Consequently, in the pursuit of the modern rule of law, the new entrenched constitutional structures of Pacific island states are largely Western oriented with only minimal and token recognition of indigenous laws.

Notes

- 1 J Frank, *Law and the Modern Mind*, Stevens, London, 1949, pvi.
- 2 T W Arnold, *Symbols of Government*, Yale University Press, Newhaven, 1935, pp36–37.
- 3 J Stone, *Legal System and Lawyers' Reasonings*, Maitland, Sydney, 1964, pp179–183.
- 4 M Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge University Press, Cambridge, 1985, p4.
- 5 B Narokobi, 'History and movement in law reform in Papua New Guinea', in Weisbrot, D et al. (eds), *Law and Social Change in Papua New Guinea*, Butterworths, Sydney, 1982, p13.
- 6 P G Sack, 'Introduction', in Sack, P G & Aleck, J (eds), *Law and Anthropology*, Dartmouth, Aldershot, 1992, pxxvi.
- 7 D Lloyd, *The Idea of Law*, Billing & Sons, London, 1966, p104.
- 8 See L Pospisil, *Anthropology of Law*, Harper & Row, New York, 1971; A Hunt, *The Sociological Movement in Law*, Macmillan, London, 1978; R B M Cotterrell, *The Sociology of Law: An Introduction*, Butterworths, London, 1984; and R B M Cotterrell, *The Politics of Jurisprudence*, Butterworths, London, 1989.
- 9 F J Davis, H H Davis and E E Davis, *Society and the Law: New Meanings for an Old Profession*, The Free Press, New York, 1962, p41.
- 10 See J D Freeman, *Margaret Mead and Samoa*, Australian National University Press, Canberra, 1983; and L D Holmes, *Samoan Village*, 2nd edn, Holt, Rinehart & Winston, New York, 1974(1992).
- 11 M Mead, *Coming of Age in Samoa*, Penguin, New York, 1928.
- 12 B Malinowski, *Crime and Custom in Savage Society*, Routledge & Kegan Paul, London, 1926, pxi.
- 13 E S Hartland, *Primitive Law*, Methuen & Co, London, 1924, p138.
- 14 Narokobi, 'History and movement in law reform', p13.
- 15 Sir John Salmond, *Jurisprudence*, Sweet & Maxwell, London, 1957, pp54–55.
- 16 M J Meggitt, *Desert People. A Study of the Walbiri Aborigines of Central Australia*, Angus & Robertson, Sydney, 1962, p250.
- 17 *ibid.*, p251.
- 18 Article 38 of the Statute of the International Court of Justice.
- 19 K Roberts-Wray, *Commonwealth and Colonial Law*, Steven, London, 1966, p540.
- 20 *ibid.*, p541.
- 21 *ibid.*, p626.
- 22 *Re Southern Rhodesia* [1919] AC 211, at 233–4.

- 23 R H Bartlett, *The Mabo Decision*, Butterworths, Sydney, 1993, p27 (per Brennan J).
- 24 *Mabo v The State of Queensland* [1992–1993] CLR 1.
- 25 Bartlett, *The Mabo Decision*, pxx.
- 26 A R Radcliffe-Brown, *Structure and Function in Primitive Society: Essays and Addresses*, The Free Press, New York, 1952, p212.
- 27 *ibid.*
- 28 E E Evans-Pritchard, *The Nuer*, Clarendon Press, Oxford, 1940, p162.
- 29 See above, n12. All quotations from Malinowski in this and the following two paragraphs are from this volume.
- 30 D L Lloyd & M D A Freeman, *Lloyd's Introduction to Jurisprudence*, 5th edn, Steven, London, 1985, p874.
- 31 H I P Hogbin, *Law and Order in Polynesia*, Christophers, London, 1972, p290.
- 32 W N Hohfeld, 'Fundamental legal conceptions as applied in judicial reasoning', in Lloyd & Freeman, *Lloyd's Introduction to Jurisprudence*, Steven, London, 1923, pp541–547.
- 33 *ibid.*
- 34 By one of those intriguing coincidences, the Samoan word for dominant is *malosi*.
- 35 M Gluckman, *Judicial Process among the Barotse*, 2nd edn, Manchester University Press, Manchester, 1967, p352.
- 36 K N Llewellyn & E A Hoebel, *The Cheyenne Way*, University of Oklahoma Press, Norman, 1941.
- 37 E A Hoebel, *The Law of Primitive Man*, Harvard University Press, Harvard, 1954, p293.
- 38 Pospisil, *Anthropology of Law*, p188.
- 39 *ibid.*, p189.
- 40 Hoebel, *Law of Primitive Man*, p316.
- 41 Pospisil, *Anthropology of Law*, p40.
- 42 Gluckman, *Judicial Process*, pp166, 177 and 329.
- 43 Hahm, Pyong-Choon, *The Korean Political Tradition and Law*, Hollym Corp, Seoul, 1967, p40.
- 44 Pospisil, *Anthropology of Law*, p233.
- 45 *ibid.*, p341.
- 46 L Fuller, *The Morality of Law*, Yale University Press, New Haven, 1969, p911.
- 47 L Nader, 'The anthropological study of law', in Sack & Aleck (eds), *Law and Anthropology*, p6.

- 48 See L Rosen, 'The anthropologist as expert witness', in Sack & Aleck (eds), *Law and Anthropology*, p499.
- 49 P G Sack, *Land Between Two Laws*, Australian National University Press, Canberra, 1973, p18.
- 50 H W O Okoth-Ogendo, 'The imposition of property law in Kenya', in S B Burman, and B E Harrell-Bond (eds), *The Imposition of Law*, Academic Press, New York, 1979, p165.
- 51 *ibid.*, p147.
- 52 P Fitzpatrick, *Law and State in Papua New Guinea*, Academic Press, London, 1982, p26.
- 53 Okoth-Ogendo, 'Imposition of property law', p160.
- 54 See generally L P Mair, *Native Policies in Africa*, Negro Universities Press, New York, 1936; and H F Morris & J S Read, *Indirect Rule and the Search for Justice*, Clarendon Press, Oxford, 1972.
- 55 Introduced by Sir Arthur Gordon, the first governor of Fiji, after cession to Great Britain in 1874. See R K Nayacakalou, 'Land tenure and social organisation in Western Samoa', *Journal of Polynesian Society*, 1975, Vol. 69, 104 at p83; and J W Davidson, *Samoa mo Samoa*, Oxford University Press, London, 1967, p78.
- 56 Introduced by Sir William MacGregor in the late 1890s. See J D Legge, *Australian Colonial Policy*, Angus & Robertson, Sydney, 1956, p64.
- 57 K C Wheare, *Constitutional Structure of the Commonwealth*, Clarendon Press, Oxford, 1960, p89.
- 58 *ibid.*
- 59 K E Robinson, 'Autochthony and transfer of power', in *Essays in Imperial Government*, Oxford, Blackwell, 1961.
- 60 G Marshall, *Constitutional Theory*, Clarendon Press, Oxford, 1971.
- 61 A P W Deklin, Legal control of the Executive under the Papua New Guinea Constitution, unpublished PhD thesis, Australian National University, 1985, p37.
- 62 *State v John Wonom* [1975]PNGLR, 311 at 314, *per* Frost, CJ.
- 63 A P W Deklin, 'Culture and democracy in Papua New Guinea: Marit tru or giaman marit?', in *Culture and Democracy in the South Pacific*, University of the South Pacific, Suva, 1992, p37.
- 64 Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990.
- 65 J W Davidson, *Induced Cultural Change in Pacific Political Organization: The Transition to Independence*, Australian National University, Canberra, 1961, p34.
-