

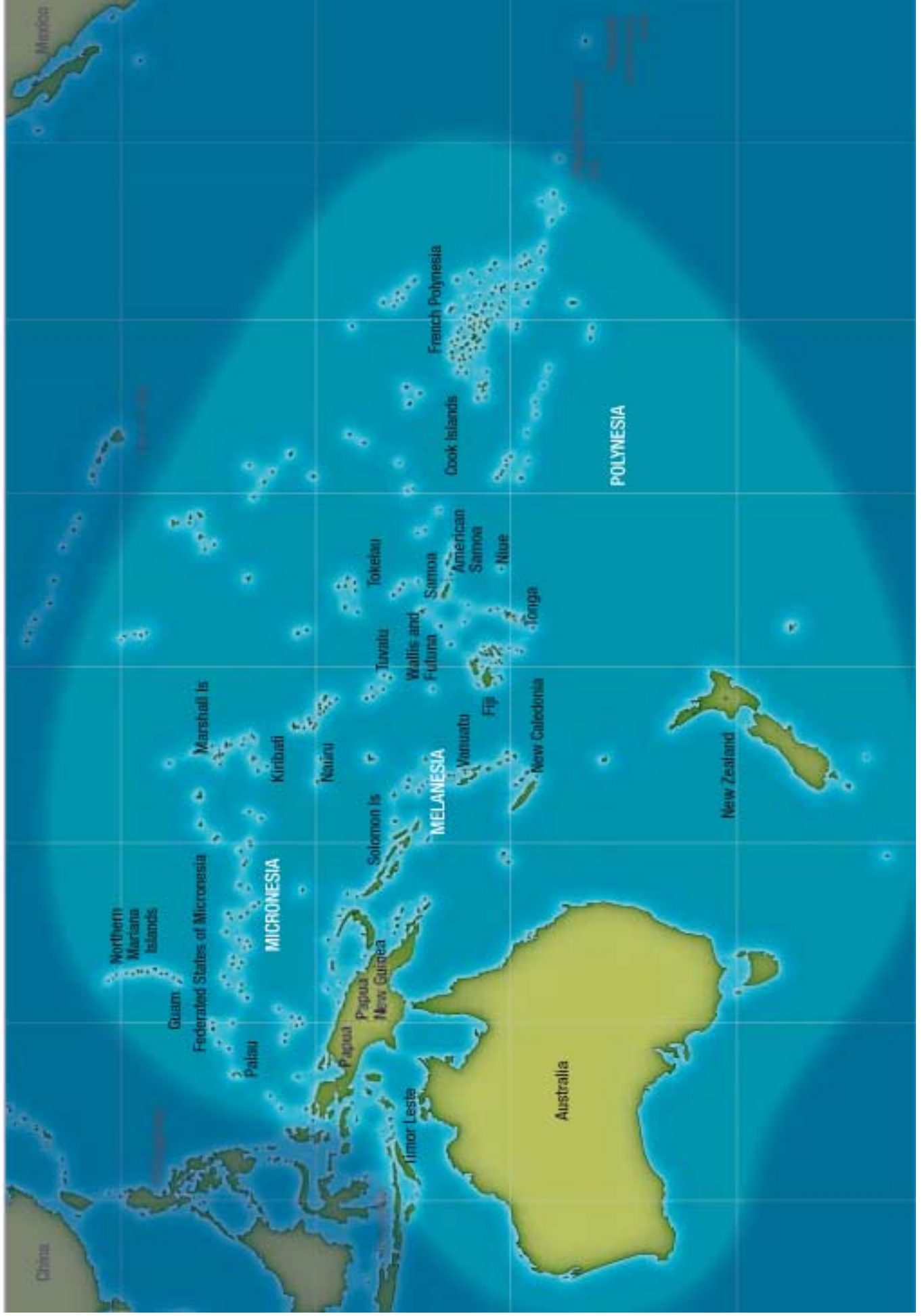


CONVERGING CURRENTS

CUSTOM AND HUMAN RIGHTS IN THE PACIFIC



PACIFIC REGION COVERED IN THIS STUDY PAPER





CONVERGING CURRENTS

CUSTOM AND HUMAN RIGHTS IN THE PACIFIC

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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He Poroporoaki

The New Zealand Law Commission acknowledges with deep regret the passing of two notable Pacific leaders shortly before the printing of this study, the Maori Queen and the King of Tonga. Their personal status in their respective spheres was augmented by the close association between them and their families over many years.

Te Arikinui Dame Te Atairangikaahu (1931-2006)

Dame Te Ata forged links between the peoples and tribes of Aotearoa and with many of the peoples of the Pacific to become a gracious symbol of enduring Maori and Pacific values.


Haere Te Puhi Ariki o Tainui, moe mai i runga i a Taupiri i te urunga o te kahurangi, te papa tongarewa o nga tupuna. Paimarire.

King Taufa'ahau Tupou IV (1918 – 2006)

King Taufa'ahau epitomised calm leadership over many years, encouraging his people to excel in their chosen pursuits and to develop connections with their Pacific neighbours.

Ku o hala 'a e Tama Tu'i 'o e 'Otu Felenite, ka ko 'ene ngaahi maa'imoa 'e ke i nofo pe 'i he loto 'o e Tonga kotoa 'o lauikuonga.





Converging currents

Custom and human rights in the Pacific

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FOREWORD

The Pacific nations included in this study are spread over a quarter of the globe. The distances are immense – from Timor Leste to Rapanui (Easter Island) is the same distance as from Timor Leste to the United Kingdom, and each country has its own unique heritage. The population is sparse – about 33 million people live in the region – and two thirds of these are in Australia and New Zealand.

Yet despite this isolation and their different ethnicities, languages and political structures, these nations exhibit significant commonalities of culture, custom and values across the region. They also face similar economic issues and inherit an historic overlay of Western colonisation, democracy and Christianity. Modern technology and transport is fast shrinking the historic oceanic distances of the Pacific and enabling shared initiatives and strong links to be forged in all areas of life.

Pacific nations are faced with the challenge of ensuring their legal systems draw on the customs and values of their people and also on internationally accepted human rights principles. In many Pacific Island countries, customary methods predominate in determining local disputes. Human rights law, on the other hand, holds sway mainly in the courts. The separation between customary methods and court methods of dispute settlement can foster distorted views, such as that the courts rely on foreign values or that custom is irrelevant.

In the view of the Law Commission, the perceived conflict must not be allowed to become a major impediment to Pacific legal development. The reality is that both custom and human rights are expressly provided for in most domestic constitutions and statutes. While there are conflicting views about the role of custom and human rights in Pacific legal systems, there is at the same time much similarity in the values underlying both. There is also growing recognition that the unique cultural heritage of Pacific peoples must be strengthened and adapted, including by commitment to human rights, in order for that heritage to be a living reality for future generations.

The difficulties mainly arise in applying these two strands of the legal system in practice. That interface – the harmonisation of custom and human rights – is the focus of this Study Paper. We discuss the causes of potential conflict and suggest some practical approaches to assist courts and community justice bodies in finding transformative solutions.

New Zealand shares the indigenous heritage of its Pacific neighbours, has constitutional links to the Cook Islands, Niue and Tokelau, and participates actively in regional organisations, including the Pacific Islands Forum. This project initially arose from a proposal of the New Zealand Maori Council for a Pacific Court of Human Rights.

The Law Commission considered this suggestion to be premature in the absence of a regional call for such a mechanism and that it raised formidable practical obstacles. Over the years, there have also been various calls for closer analysis of the relationship between custom and human rights in the Pacific. We saw our contribution as more usefully being an analytical study of the perceived conflict and of the place of custom in Pacific legal systems. The study would provide the basis for fuller analysis on a country-by-country basis.

Legal infrastructure is important for the effective operation of Governments generally. The variety of legal systems in the Pacific, the legal complexity within each country, and the high cost of enhancing social and legal infrastructures are formidable challenges for development in the region. Two of the most significant elements of legal complexity are the important and continuing role of custom within legal systems and the difficulties for courts in accessing custom. We see an urgent need to devote resources to clarifying custom and to harmonising custom and human rights norms. Everyone involved in the justice system has a role to play in this task, as this study makes clear.

This Study Paper presages the development of a jurisprudence unique to the Pacific. The strength of the Pacific region will stem from its unity, which in turn will rest on its shared values as incorporated into effective legal systems. This paper aims to assist in charting a way forward.

A handwritten signature in cursive script, reading "Geoffrey Palmer". The signature is written in dark ink and is positioned above a horizontal line.

Geoffrey Palmer

President

ACKNOWLEDGEMENTS

Consultation and discussion with Pacific Island people and those with knowledge of Pacific issues was an important part of this project. The individuals and organisations we met with or received submissions from are listed in Appendix 7. Funding from NZAID made it possible for us to hold a workshop in Nadi, Fiji, to consult with people from across the Pacific about the interface between custom and human rights.

We are particularly grateful to the following members of our External Reference Group for sharing their knowledge and insights and for commenting on drafts of the study paper: Andrew Ladley, Caren Fox, Claire Charters, Claire Slatter, Don Paterson, Guy Powles, Imrana Jalal, Kabini Sanga, Lopeti Senituli, Manuka Henare, Marilyn Tahī, Michael Powles, Miranda Forsyth, Shaista Shameem, Teresia Teaiwa, Vijay Naidu, Jone Dakuvula, Morgan Tuimaleali'ifano.

We also had the benefit of very thoughtful peer reviews of our draft study paper from Sue Farran and Suliana Siwatibau.

In acknowledging the important contributions of those mentioned above, we also stress that sole responsibility for the views expressed in this study paper rests with the Law Commission.

The Commissioners responsible for this project are Hon Justice Edward Taihakurei Durie and Helen Aikman QC. Natalie Baird and Ewan Morris were the principal researchers for the project, and Margaret Thompson assisted with writing and project management. Claire Slatter and Iutisone Salevao made important contributions to the drafting of chapters 7 and 9. Background research papers were prepared by Frances Ah Mu, Nicci Coffey, Susan Hall, Charles Kingston and Alexander Schumacher. The paper was edited by Linda Gray.



Summary

- THE CHALLENGE
- 1 Pacific leaders frequently refer to two significant objectives – maintaining local values and custom and implementing universal, human rights. This study is about achieving both objectives.
 - 2 Both custom and specific human rights are embedded in many Pacific constitutions or statutes, yet the two concepts are often perceived as conflicting. From one perspective, human rights are seen as a threat to custom and the Pacific way of life, while from another perspective custom is seen as a threat to individual freedom and justice. Constitutions and court judgments can contribute to this polarisation by proposing that custom should trump human rights or, alternatively, that human rights should trump custom.
 - 3 The focus of our study is the practical operation of justice mechanisms, including both the courts and the wide range of community justice bodies found in the Pacific. We also consider the relationship between custom and the state. How the legislature and courts approach custom is critical in view of their role in determining how custom and human rights are applied. Custom and state-made law coexist within the state, but the state may modify the customary legal system by statute within any limits imposed by the constitution.
 - 4 An underlying but nevertheless critical aspect of our work is that development of a Pacific jurisprudence will only occur as Pacific nations find ways to better integrate these two sources of law. The rule of law can only be effective in each country to the extent that the law is owned by the people. Ownership is difficult to achieve if the legacy of colonial legal systems, whether British, American, French or international legal norms, are seen as alien to custom and customary sources of law.
 - 5 The legal systems of each Pacific Island nation are complex and under strain from a range of political, social and economic problems. The resources for addressing the problems are very limited. Our study convinces us that supporting and building on the legal infrastructures is vital, with implications for the future that go beyond this study of human rights and custom.
 - 6 Custom provides Pacific nations with much of their sense of identity and with vital governance and dispute-resolution mechanisms. Human rights provide Pacific people (especially the most vulnerable) with protection and support for realising their aspirations. A harmonising approach will strengthen legal systems and the development of jurisprudence unique to Pacific states.

OUR APPROACH 7 Our thesis is that custom and human rights can be harmonised by looking to the shared, underlying values of both. Harmonisation will enhance custom by bringing it more into line with changing social conditions and ensuring that it continues to reflect the underlying values of Pacific communities. Far from threatening custom, human rights can help it to develop and therefore survive in a modern world. Harmonisation will also assist the cultural legitimisation of human rights by presenting them in a way that reflects the values of Pacific societies.

Common values in custom law and human rights

- 8 While custom varies from state to state, and within states, many values are common throughout the Pacific. These underlying values remain constant, although practices may vary over time. So long as custom is not codified so that it is removed from the people, it changes as community opinions change. It has changed in response to Christianity and colonialism, and it will continue to change in response to human rights and the forces of modernisation.
- 9 It is important to distinguish between values and practices. Practices do not always match the value that is proclaimed. Christianity, for example, is not judged solely by what Christians do but by the values and beliefs to which they aspire. Nor should custom be judged solely by practices that are inconsistent with its fundamental values.
- 10 Although human rights are sometimes seen as a construct of the West alone, they reflect values found in many cultures, including those of the Pacific. Nor is the international human rights framework confined to individual rights, as is sometimes claimed. The rights of groups and the obligations of individuals to their communities are also provided for in the core human rights instruments.
- 11 Respect for the dignity of all persons is probably the value most emphasised in both custom and human rights. Respect for the inherent dignity of all persons finds expression in the opening words of the Universal Declaration of Human Rights, where such respect is described as contributing to freedom, justice and peace in the world. Identifying this value can open dialogue on how respect may be better achieved in today's world. In this context, the question is not how the value of respect was seen to operate in the past but how, given a changed environment, the value can be given best effect today.
- 12 Other customary values include those relating to sharing, caring for others, hospitality, reciprocity in developing human relations, and community decision-making, all expressed in terms that denote a coherent, underlying philosophy. While the values underlying human rights may be worded differently than Pacific values, both express similar aspirations. Human rights can lead to a social order in which customary ideals are more likely to be realised.
- 13 Harmonisation also requires recognition of the distinctive functions of community justice bodies and courts, the former being known for their capacity to resolve disputes to restore harmony to communities, the latter for their capacity to make findings on guilt or wrongdoing in accordance with settled rules

of due process to protect individual interests. Acknowledgement by courts of the important role of community justice bodies will foster development of a more coherent legal system. At the same time, courts can assist community justice bodies to reach decisions that are compliant with human rights norms.

Exclusions

- 14 We have excluded issues relating to property rights (including rights and succession to land), governance, corruption, self-determination, intellectual property and non-customary restorative justice from in-depth consideration. Custom issues are involved in each case. However, the development of property rights and of adequate standards in national and local governance raises issues of such critical importance in national development as to call for separate study.

THE HARD ISSUES FOR HARMONISATION

- 15 There are limits to a harmonising strategy. We do not suggest that custom and human rights are so compatible that no change is needed. Some customary practices need to be challenged, but the focus should be on the particular wrong and not, as it sometimes is, on custom as a whole. We consider in some detail certain areas where custom and human rights may particularly conflict and suggest ways forward.

Women's rights

- 16 Nothing will test whether custom and human rights can operate together more than the role of women. There is some dispute as to the traditional role of women, but it is clear that colonialism, Christianity and custom together promoted structures that favoured men, including new succession laws with absolute rights that removed customary obligations, new chiefly structures, and in some societies wage labour and new commercial enterprises. Consequently, the roles filled by women lost status.
- 17 Accommodating the rights of women will be a crucible for the survival of custom. If custom has sufficient dynamism to allow women to have equal partnership within society and at the same time to retain its vitality and relevance to the community, other changes to custom will follow more readily. The prospect of change to traditional gender roles is without doubt uncomfortable, possibly threatening, for many; particularly where the changes challenge male-dominated political structures.
- 18 An approach that seeks to harmonise custom and human rights through underlying values can greatly assist this process. Strategies to make courts and community justice bodies more accessible and responsive to women's views and rights are important. Women should be able to choose whether crimes of violence against them are dealt with through custom, through the courts, or through both.

Rights of the child

- 19 Difficult issues also arise in relation to the rights of the child, which are seen by some as challenging customary Pacific ideas about parental authority. These include proper and respectful behaviour by children, concern for the

interests of the wider community, and appropriate methods of disciplining children. At the same time Pacific traditions of respect and care for children can also help to find common ground between custom and the rights of children and young people.

Freedom of religion, speech and movement

- 20 Freedom of religion is sometimes controversial in small and deeply religious societies, where Christianity has become part of custom. The establishment of new religious groups may be seen as disruptive and destructive of community cohesion. Freedom of speech may similarly be seen as threatening community morality or respect protocols. Freedom of movement may be considered to undermine the ability of communities and customary authorities to maintain social order by banishing those who flout the norms of the community. All these issues require careful consideration of the conditions under which it may be appropriate to limit the exercise of individual rights for reasons of custom and culture. A nuanced approach is preferable to an approach that automatically requires either custom or human rights to prevail.

Minority and migrant communities

- 21 In many Pacific states there are significant minority and migrant communities. In a few cases, the indigenous people themselves are the minority, and their custom law is recognised only to a limited extent by legal systems that reflect the dominance of the non-indigenous majority. In other cases there are significant minorities of migrant origin, though the migration may have taken place several generations ago. In all parts of the region increasing numbers are leaving their villages and migrating to urban areas within their own state or overseas.
- 22 Any attempt at harmonising custom and human rights needs to take account of the rights and, in some cases, the customs of minority and migrant communities. They should not be marginalised by the assertion of the rights and customs of the majority. The custom of villages may need to be adapted before application in the towns.

THE COMMISSION'S SUGGESTIONS

- 23 In the last section of the report we explore further how the strategy we have advocated could be given practical effect by courts and community justice bodies. We make detailed suggestions to advance three main propositions:
- that governments, legislatures, courts and communities actively seek ways to harmonise custom and human rights in order to promote the equitable development of custom and the appreciation of human rights in culturally relevant terms;
 - that courts and legislatures develop a more coherent legal system by recognising and respecting the contribution of community justice bodies to dispute resolution, while also promoting the use of human rights norms in community justice; and
 - that the courts develop an indigenous jurisprudence that draws upon both custom and human rights.

- 24 There is recognition of the need for change at a high political level. In a speech this year Ratu Joni Madraiwiwi, Vice-President of Fiji, observed:¹

In the Asia/Pacific region, there is some resentment about the concept of human rights. Some of our leaders are fond of decrying them as a western or alien concept at odds with our values. Human rights are universal in nature. They are about fairness and decency. At its simplest, it is treating others as one would wish to be treated. Interestingly, it is not the downtrodden, the oppressed or the marginalised who make the criticism. It is those of us who are part of established power structures that query the applicability of these rights.

Community justice

- 25 In many Pacific countries, justice is dispensed at the community level by a variety of institutions that maintain local autonomy and traditional responsibility for upholding community standards of conduct. Some are state endorsed or statute established, while others operate without state oversight. They are presided over by customary or state appointed local leaders, and may operate entirely according to custom or by a mixture of custom and standard court processes.
- 26 Community justice bodies are where most routine dispute-resolution takes place. Frequently only a privileged male class is directly involved in decision-making, and the treatment of women and children and other vulnerable groups may be seen as unfair. Punishment may be seen as inconsistent: at times unduly harsh and at other times unduly lenient. In this environment there is room for human rights abuses and the perception of systemic injustice.
- 27 However, community justice bodies also have many strengths and are likely to remain essential to the administration of justice in the Pacific. It is important that they are recognised as part of the state legal system, whether through statutory incorporation or through judicial acknowledgement of their decisions. Community justice bodies would also benefit from recognition of the need for training and assistance with their role in harmonising custom law and human rights. There is a need to ensure that any human rights violations can be addressed. Measures to achieve greater participation by women in such bodies are also needed.

Role of courts

- 28 There are times when the courts might best refer matters to community justice bodies, as where the legal issues before the court do not resolve the issues for the community or the parties. Equally, some matters are best dealt with by the courts to protect individual interests or the interests of the state in deterring particular types of crime. Sometimes both processes have value, as where the courts determine guilt but defer sentencing to await the outcome of traditional discussions or reconciliation processes.
- 29 We suggest that courts adopt a more explicit intention of developing Pacific indigenous law, drawing on the commonality of custom and standard justice

1 Ratu Joni Madraiwiwi "Rights and Rites: A Discourse", New Zealand Law Commission Custom and Human Rights Workshop, Nadi, 1 May 2006.

norms rather than replicating English, American or French law. Respect for, and sometimes deference to community justice bodies would be more constructive than the “us and them” attitude that sometimes appears in appellate judgments.

- 30 Judges could also seek to apply human rights with more regard for the Pacific context, so providing guidance for community justice bodies and giving practical effect to the harmonisation vision. Rather than a balancing approach, which may suggest that either custom or human rights is compromised, a nuanced and contextual approach should be taken.
- 31 We suggest it would be helpful for courts to build closer relations with community justice bodies and perhaps meet with them regularly. In some countries this is already happening, but not everywhere. There may be issues of capacity to do this. For example, building relationships is difficult if judges change regularly or spend little time in the area. In any case we suggest that induction and training for judges should include the relevance and nature of custom law in particular jurisdictions.

Court access to custom

- 32 The courts face some major difficulties in understanding and accessing custom law. A threshold question is whether custom is considered as a matter of law or a matter of fact. At present a variety of approaches are taken, but they squeeze custom into the state legal system with some difficulty. Treating custom as a matter of law is more likely to facilitate access, although the way a particular custom is ascertained will often be the same as if custom were treated as a matter of fact. To avoid freezing custom, a more relaxed approach to precedent than for other sources of law is likely to be appropriate.
- 33 We do not advocate codification of custom generally, although it may be useful to establish strict rules for certain situations. The loss of community involvement in managing custom law that follows from codification must be viewed as a serious issue. A better option would be to codify customary values rather than customary practices. Looking for the underlying value is also useful where customary practices conflict.
- 34 One suggestion we consider a priority is to develop custom law commentaries. The relatively indeterminate nature of custom is a barrier to its use in making court decisions. A written body of learning about local custom would inform judges, officials and others and enable them to more easily integrate custom with their processes.
- 35 In cases involving custom, a less technical approach to the preparation of pleadings and presenting evidence is to be encouraged. Also, more consideration could be given to providing specialist assistance for the court, either by augmenting the bench or using customary assessors. During proceedings, specialist assistance could be supplied by submissions from knowledgeable groups, such as custom authorities, human rights institutions and non-governmental organisations.

Legislative support

- 36 There are a variety of ways in which ideas for harmonising custom and human rights might be reflected in legislation. What is appropriate for each country

depends on the particular constitutional and statutory framework and the people's preferences.

- 37 Statute could direct the courts to look for essential values underlying custom and human rights and the least restrictive means to achieve accommodation between the two. The Underlying Law Act 2000 of Papua New Guinea and a judicial guidance clause in the Federated States of Micronesia provide precedents for this approach. Statutory change to custom requires great care to ensure that local control of customary processes is not extinguished, for process is as much a part of custom as customary norms.
- 38 Augmenting the rights framework itself may provide a way to deepen understanding of human rights. Explicit recognition of the duties of individuals to the group within the human rights framework may help legitimise the rights. Another possibility is explicit recognition that basic rights not only apply between government and the governed but between individuals, including between customary leaders and their people. Explicit state recognition of some group rights may be of assistance or recognition of some economic, social and cultural rights as in other developing nations.

Public review entities

- 39 In addition to community justice bodies and courts, other entities play a constructive role in helping to harmonise custom and human rights. National human rights institutions, ombudsman offices, law reform and leadership code agencies could be encouraged to take account of both custom and human rights and to consider ways in which the two could be harmonised. Where customary authorities perform statutory functions, consideration could be given to making them subject to investigation by ombudsman offices and leadership code bodies.

Regional developments

- 40 The activities of United Nations agencies and aid donors in the Pacific have a strong focus on governance and human rights. We suggest they could also consider ways of building on customary systems and existing Pacific constitutional human rights provisions to support good governance. Civil society organisations are becoming more active in the Pacific and are working to advance human rights while also helping to enhance customary governance. A regional human rights mechanism has been under discussion, but broad consensus across the region would be needed before such a mechanism could be established.
- 41 The lesson of Pacific history is that Pacific people should themselves be in control of change in their societies. The memory still lingers of outside domination prior to independence when Pacific cultures were judged by the mores of others and made to change. A useful starting point in seeking a better understanding of the local culture is to pay respect where respect is due.

Role of New Zealand

- 42 In proposing matters that affect other countries we can do no more than raise matters for consideration. However, we make a suggestion to the New Zealand Government in light of our consultations, especially our regional consultation in Nadi in May 2006.
- 43 There was a plea for the process not to end with this study paper and strong interest in developing a broader understanding of custom law and identifying its central values as a prelude to individual country studies. There was also a call by Maori and Pacific Island New Zealanders for further work, perhaps involving the Human Rights Commission, on Maori and Pacific values within New Zealand.
- 44 We suggest that the New Zealand Government contributes to continuing dialogue and study on the issues raised in this paper in the Pacific region.

Part 1

CONTEXT



Chapter 1

The Challenge

THE STARTING POINT

- 1.1 Over the years there have been various calls for closer analysis of the relationship between custom and human rights in the Pacific. The June 2004 Pacific Islands Human Rights Consultation recommended that an in-depth study of specific rights be undertaken and that on this basis a dialogue be initiated in order to enhance understanding of the interaction between customary and cultural practices and human rights, with the eventual goal of meeting the expectations of the human rights conventions.¹
- 1.2 Subsequently in March 2005, the Regional Workshop on National Human Rights Mechanisms identified “the need to reconcile human rights with traditional and customary rights” as one of the challenges facing Forum Island Countries in the promotion, protection and monitoring of human rights.² More broadly, the issue of interaction between custom law and introduced law has been identified as an area worthy of a regional approach to law reform.³ The significance of this issue was confirmed at our 2006 workshops in Nadi, Auckland and Wellington.
- 1.3 The countries and territories included in the study are shown in the map inside the cover and set out in Appendix 2. When we refer to “the Pacific”, we mean all of the island countries and territories of the region plus Australia and New Zealand. When we refer to “Pacific Island countries and territories”, we are excluding New Zealand and Australia.

Concerns about human rights

- 1.4 Forming the background to this study are the polarised positions in the Pacific between advocates of custom and advocates of human rights. One particular concern is that the human rights discourse places too much emphasis on the individual to the detriment of the well-being of the group as a whole. In this view, custom emphasises collectivity rather than individuality, while human rights has tended to emphasise the individual over the collective.

1 Asia Pacific Forum of National Human Rights Institutions and Asia-Pacific Regional Office, UN Office of the High Commissioner for Human Rights *Pacific Island Human Rights Consultation – Consultation Report* (Suva, Fiji, 1–3 June 2004), 20 [Asia Pacific Forum].

2 Regional Workshop on National Human Rights Mechanisms “Outcomes Statement” (Nadi, Fiji, 28 February–1 March 2005), para 4.

3 Peter MacFarlane and Chaitanya Lakshman “Law Reform in the South Pacific” (2005) 9 *Journal of South Pacific Law* <<http://www.vanuatu.usp.ac.fj>> (accessed 18 January 2006).

The consequence of this difference in emphasis is that decisions in favour of an individual's human rights may be seen as undermining the authority of the group. In his opening address to the 2005 Pacific Island Law Officers' Meeting, Justice Bulu of Vanuatu challenged the law officers to consider whether individual rights have been over-protected at the expense of communal rights.⁴

- 1.5 A related concern is that a human rights approach focuses too much on rights and not enough on duties or responsibilities. The concern here is not the duties of the state to ensure the rights of individuals but the duties of individuals to exercise their rights responsibly and to fulfil their obligations to others and to their communities. An underlying fear is that the human rights discourse is simply another foreign imposition which works to undermine customary ways, to the detriment of both national identity and community identity.
- 1.6 Strong proponents of custom often see human rights as having a negative effect on their societies. In the context of Papua New Guinea, Bernard Narokobi has said:⁵

Human rights without effective social obligations are a curse on our lands. Human rights, at least in PNG, have become 'laik bilong wan-wan' – the 'wish of the individual'. The overall impact of human rights on our societies has become one of self-destruction. We give to ourselves the right to be lazy, steal, rape, commit adultery, disobey legitimate authority, ignore those in need, abuse our elders, debase our cultures, exploit our own people, keep them in perpetual serfdom, blaspheme, commit sacrilege against our ancestors and against God.

Concerns about custom

- 1.7 Proponents of human rights in the Pacific often express concern that customary practices inhibit greater realisation of human rights. For example, although the June 2004 Pacific Islands Human Rights Consultation reaffirmed that some customary and cultural practices and customary rights are unique to the Pacific, it also acknowledged that some may impact negatively on the enjoyment of human rights.⁶
- 1.8 A particular concern of the human rights community is the effect which customary practices can have on women and young people. Custom is seen as conservative and patriarchal.⁷ The lack of a voice for victims of violence in some

4 Hon Justice H Bulu (Opening Address to 24th Pacific Island Law Officers' Meeting, Port Vila, 21–24 September 2005) 4.

5 Bernard Narokobi *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific, Suva, 1989) 137.

6 Asia Pacific Forum, above n 1, 20.

7 Jennifer Corrin Care "Conflict between Customary Law and Human Rights in the South Pacific" (Paper presented to the 12th Commonwealth Law Conference, Kuala Lumpur, September 1999) < www.mlj.com.mj/articles > (accessed 6 May 2005).

traditional reconciliation processes is seen as disempowering. Human rights are seen as a tool of empowerment by which the disadvantaged, the less fortunate and the marginalised may fully participate in society.⁸ Another concern, and the corollary of that expressed above, is that custom sometimes sacrifices the rights of the individual for the good of the group as a whole. For example, while village peace and harmony may be preserved by banishing disruptive members, the custom of banishment also impinges on the individual right of free movement.

The interface between custom and human rights

- 1.9 The interface between custom law and human rights takes place in an increasingly complex environment. Globalisation brings new goods, services and ideas. Market forces are increasingly dominant, and development is a key goal of Pacific governments. Many Pacific Island countries and territories have significant diaspora communities living in New Zealand, Australia, the United States and elsewhere. Urbanisation is taking place all over the Pacific. At the same time, environmental pressures are building and reaching breaking point in some places. Aid donors are active in the Pacific, many with a particular interest in human rights initiatives. Custom, meanwhile, continues to underlie daily life in very real ways, particularly in rural areas. Many of these factors can operate as a challenge to the maintenance of customary values and practices. Some also represent a threat to the protection and promotion of human rights.
- 1.10 A key contextual element relevant to the interface between custom and human rights in the Pacific is the constitutional framework. Many Pacific constitutions indicate both a strong desire to preserve the culture and identity of the people and an intention that human rights should form part of the foundation of the nation. The challenge of synthesising custom and human rights is thus inherent in these constitutions. Recently, many states have reaffirmed their commitment to human rights by signing and ratifying international human rights treaties, most notably the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), but ratification of other international conventions is patchy.
- 1.11 A strained relationship between custom law and human rights, or perhaps more broadly between custom law and state-made law, can result in the marginalisation of particular groups or individuals – whether traditional leaders or women and children. Marginalisation or exclusion from participation in society may lead to conflict and instability. If the tension between custom and human rights is resolved either at the expense of cultural traditions that sustain and enrich people’s lives or at the expense of the needs and interests of vulnerable individuals and groups, the society as a whole is weakened.
- 1.12 All these factors complicate the job of judges, lawyers and policy-makers facing issues with custom and human rights implications. Decisions which prefer human rights over custom or vice versa may have huge and unforeseen social or economic consequences. Judges are sometimes criticised for failing to develop a law that reflects Pacific society and instead mainly applying the Western law of

8 Ratu Joni Madraiwiwi “Human Rights and Pacific Values and Traditions” (Speech to the Sub-Regional Workshop for Pacific Island States on Human Rights Education and the Administration of Justice, Nadi, 26 June 2002) 1.

their training. For some decision-makers, the human rights discourse is a particularly accessible tool. For others, custom law offers clear solutions. Custom law and human rights are often presented and perceived as an “either/or” choice where one will “trump” the other. This paper will suggest that there is an opportunity for Pacific states to seek solutions that accommodate both custom law and human rights perspectives.

- 1.13 Ratu Joni Madraiwiwi of Fiji has described the challenge as finding a course that acknowledges the wisdom of the ages while recognising the universalist values of our times.⁹ In his opening address to our 2006 Workshop in Nadi, he said:¹⁰

What is possible is to distill from the treasure chest of experience, the means and techniques to mediate the perceived divide. We owe it to our forbears, ourselves and those who come after us, to craft an accommodation that enables both to draw strength and inspiration from each other. In a globalised world, I believe we in the Pacific have a perspective to offer that can embrace the future while incorporating all that we have been.

LAW REFORM

- 1.14 The New Zealand Law Commission is a law reform agency. We approach the issue of custom law and human rights with a view to making suggestions that will potentially contribute to the simplification, clarification and adaptation of the law in this area.
- 1.15 This project initially arose from a proposal of the New Zealand Maori Council for a Pacific Court of Human Rights.¹¹ The Law Commission considered this suggestion to be premature in the absence of a regional call for such a mechanism. We saw our contribution as a study of the perceived conflict between custom and human rights and of the place of custom in Pacific legal systems. We hoped this would provide the basis for fuller study on a country-by-country basis.
- 1.16 Two recent Commission projects have contributed to our consideration of this topic. In 2001 the Commission published a Study Paper which examined how Maori custom and values impact on our current law, *Māori Custom and Values in New Zealand Law*.¹² This in turn led to the 2006 report, *Waka Umanga: A Proposed Law for Māori Governance Entities* which proposes a new legal vehicle to give effect to Maori values in corporate structures.¹³ Previous work on treaties was also useful.¹⁴

9 Ratu Joni Madraiwiwi “Human Rights and Tradition” (Speech at the Fifth Annual Pacific Human Rights Awards, 25 February 2005) 1.

10 Ratu Joni Madraiwiwi “Rights and Rites: A Discourse” (Speech to the New Zealand Law Commission Custom and Human Rights Workshop, Nadi, 1 May 2006).

11 New Zealand Maori Council *Reshaping New Zealand’s Appeal Structure* (submission to the Crown Law Office, April 2001).

12 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001). Law Commission publications are available at <<http://www.lawcom.govt.nz>> (accessed 5 September 2006).

13 New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, Wellington, 2006).

14 New Zealand Law Commission *New Zealand Guide to International Law and its Sources* (NZLC R34, Wellington, 1996) and *The Treaty Making Process: Reform and the Role of Parliament* (NZLC R45, Wellington, 1997).

- 1.17 The interface between Maori custom and human rights is, however, an under-explored area in the New Zealand human rights framework, as is the related question of the cultural rights of Maori and Pacific Island communities in New Zealand, in the context of the rights of minorities under the New Zealand Bill of Rights Act 1990.
- 1.18 As a law reform body, we necessarily focus on the legal aspects of the relationship between custom and human rights. But we are well aware that law reform by itself will not change people's thinking and that supporting initiatives are needed to achieve social change.¹⁵ The nature and significance of the customary dimension brings with it certain challenges for long-term policy-making for legal change. Custom law is, at its heart, defined and understood by the communities in which it is practised. Determining the present content of custom law is therefore a challenge for law reformers and is likely to require a multi-disciplinary approach.¹⁶ Another challenge is the fact that it is difficult for legislation to define custom law without depriving it of its customary and dynamic character.¹⁷
- 1.19 These challenges, combined with the regional nature of our study and our distance from most Pacific communities, mean that we focus on structural and big-picture issues rather than country-specific issues.
- 1.20 For individual countries and territories, other law reform priorities often mean that difficult issues of custom law and human rights struggle for the attention of law reformers and politicians. Globalisation has brought to the Pacific a raft of issues requiring urgent law reform. These issues include international terrorism, money laundering, drug smuggling and small arms weaponry.¹⁸ Members of the Pacific Islands Forum are required to establish legislative frameworks for intellectual property rights; for the protection of traditional knowledge, biodiversity and the environment; and for regional trade (customs, tax and quarantine).¹⁹
- 1.21 As we discuss in Chapter 15, there are currently few active law reform agencies in the Pacific to deal with this huge law reform agenda. We anticipate that our study will be a small contribution to supporting law reform in the region – to be picked up and used by individual countries as priorities and resources permit.

OTHER ACTIVITIES AND INITIATIVES

- 1.22 We have undertaken this project mindful of the activities and initiatives of other organisations. There is a huge amount of activity in Pacific Island countries and territories in the general area of human rights. At the regional level, the Pacific Islands Forum is now taking a greater interest in human rights. The April 2004 Vision Statement from Forum leaders envisages:²⁰

15 Guy Powles "The Challenge of Law Reform in Pacific Island States" in Brian Opeskin and David Weisbrot (eds) *The Promise of Law Reform* (The Federation Press, Sydney, 2005) 412.

16 See Powles, above n 15, 410.

17 See Powles, above n 15, 410.

18 Tuiloma Neroni Slade "Law Reform Potential in the Pacific Area" (Paper presented to Australasian Law Reform Agencies Conference on Access to Justice – Rhetoric or Reality, Wellington, 15 April 2004) 9.

19 See Powles, above n 15, 408.

20 "The Auckland Declaration" (Pacific Islands Forum Special Leaders' Retreat, Auckland, 6 April 2004).

[A] Pacific region that is respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values, and for its defence and promotion of human rights.

1.23 Human rights are also referred to in the Pacific Plan, and there are a number of other human rights initiatives in the region, which are outlined in Chapter 16. In view of this sustained attention from others, and in order not to duplicate effort, we have chosen to focus particularly on legal issues arising from the interface between custom law and human rights. We do not attempt a comprehensive study of custom law nor of human rights, but we do discuss the particularities of each where this provides context for understanding their interaction.

EXCLUSIONS

1.24 Bearing in mind that our study is about custom and human rights, to contain its scope we have excluded from in-depth consideration issues relating to property rights (including rights and succession to land), governance, corruption, self-determination, intellectual property and non-customary restorative justice. Custom issues are involved in each case. However, the development of property rights and of adequate standards in national and local governance raises issues of such critical importance in national development as to call for separate study. Self-determination for non-self-governing peoples is more a political than a strictly legal issue and likewise deserves separate consideration. Restorative justice has developed in particular ways in Western society, but for our study there is no need to look beyond the Pacific customary forms of restorative justice, which are those invariably applied.

1.25 There are also some issues that could easily have fallen within the scope of our study but have not been considered for reasons of time and space. Issues relating to witchcraft and sorcery are one example. On the other hand, there are issues that appear throughout this study but are not considered in depth in any particular part of the paper. The role of customary leaders is an example of this type of issue.

METHODOLOGY **Comparative approach**

1.26 Our approach to the subject matter of custom law and human rights is a comparative one. It is particularly justified by the nature of human rights, with its claims to universality.²¹ We have considered the differences and similarities of approach to similar problems in various Pacific countries and territories, with a view to seeing which ideas might usefully be explored further.

1.27 Already there is an increasing tendency for Pacific courts and legislative drafters to look to other Pacific jurisdictions for precedents, rather than to the former colonial power. Such tendencies are reinforced by the growth of regional bodies such as the University of the South Pacific and the Pacific Islands Forum, as well as by bilateral exchanges of personnel between Pacific states. Many Pacific countries and territories have limited access to legal resources, so a comparative study may also be a useful first port of call for judges, lawyers and policy-makers

²¹ Andrew and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) para 4.6.1.

faced with “new” problems arising from the interaction between custom law and human rights.

- 1.28 Comparative studies of Pacific law and practice must, however, acknowledge the cultural diversity within the region.²² Simple comparisons are easy; nuanced and meaningful ones are difficult. A comparative study, particularly one unsupported by empirical research, can mean that conclusions are reached on the basis of insufficient authority.²³ A particular pitfall is the risk of applying preconceptions or stereotypes to new or unknown systems. For example, the Pacific institution of “bride-price” appears on its face to be similar to the institution of dowry, but there are important differences in practice.²⁴ We have attempted to mitigate these risks in our comparative study, where possible.²⁵

Sources

- 1.29 It is important to emphasise that our study is primarily based on existing literature. We have not undertaken any independent empirical research, which was a major limitation on the scope of the study, but we hope our work provides impetus for more detailed research and analysis to be undertaken by students, academics and others within the individual countries.
- 1.30 Our written sources have primarily been English-language, with some access to French-language materials on the three French Pacific territories. Two limitations arise from this reliance. First, we have not been able to use written materials in indigenous languages. This restriction has limited our access to materials from the lower courts, community justice bodies and other sources not formally recorded. The second limitation is that in many of the countries within the scope of the study, the oral tradition is paramount, and we have not had direct access to oral material.
- 1.31 We have sought to overcome the limitations of our reliance on written material in a number of ways. First, we have been greatly assisted by comments on drafts by peer reviewers and members of our External Reference Group and also by submissions on this project from others knowledgeable in this area. Second, in May and June 2006, we held workshops in Nadi, Auckland and Wellington to get feedback on our ideas for harmonising custom law and human rights. These workshops were invaluable in testing out the feasibility of our general approach. Third, we have made use of electronic communication to seek out specific information where there was a gap in the research, or to update information from outdated written sources.

22 See Powles, above n 15, 406.

23 Sue Farran *Teaching Comparative Law: Lessons from Experience* (Occasional Paper No 3, University of the South Pacific, Port Vila) 8.

24 See Farran, above n 23, 9–10.

25 For further discussion of comparative methodology, see generally A Watson *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, Edinburgh, 1972); M Dogan and D Pelassy *How to Compare Nations: Strategies in Comparative Politics* (2 ed, Chatham House, New Jersey, 1990); V Wright (ed) *Comparative Government and Politics* (3 ed, Macmillan Press, London, 1992); Catherine A Rogers “Gulliver’s Troubled Travels, or the Conundrums of Comparative Law” (1998) 67 *George Washington Law Review* 149.

1.32 We have also taken the opportunity to discuss our project in regional meetings, including the February 2005 Nadi Workshop on National Human Rights Mechanisms, the July 2005 16th Pacific Judicial Conference, the April 2006 Australasian Law Reform Agencies Conference, and the June 2006 Australia New Zealand Society of International Law Conference. We have also met with a number of individuals and organisations to discuss our ideas. They are listed in Appendix 7.

Selection of material

1.33 With a comparative study covering 25 countries and territories, we have had to be selective in our use of material. We have generally sought to use court cases that best illustrate the points being made. There is, however, an important limitation in using real cases as examples. In most countries, particularly the smaller jurisdictions, there may be only a handful of cases dealing with custom and human rights issues. The use of one case to illustrate a point should not therefore be taken as representative of that particular country's approach, let alone the approach of the region as a whole. At its narrowest, a case is simply the view of a particular judge in a particular case. Caution should be used in drawing firm conclusions from individual cases.

1.34 We have made more limited use of international material and comparative material from outside the region. Given the vast amount of such external material, we have generally chosen to focus on Pacific cases and materials if available, because by doing so we can make a useful contribution to the literature rather than re-treading beaten paths. Given the international context of human rights, which requires reference to the international human rights framework, we have generally referred to international human rights treaties, declarations and standards developed under United Nations auspices. These currently have, and in the future are also likely to have, most import in the Pacific region. Some useful international comparative material is listed in our bibliography.

TERMINOLOGY

1.35 Because this study uses words from a range of Pacific languages as well as some legal terms and other technical terms potentially unfamiliar to readers, we have included a glossary at the end of the study paper. In some cases we are using terms in a specific way for the purposes of this study. Our usage of "the Pacific" and of "Pacific Island countries and territories" is further elaborated in Chapter 2, "custom law" is defined (and distinguished from "state-made law") in Chapter 4, and we set out in Chapter 5 what we mean by "human rights".

1.36 Our use of two terms to describe different types of court needs elaboration. We use the term "community justice bodies" to describe the various kinds of community dispute resolution processes and entities described in Chapter 11. When we refer simply to "courts", we are describing the state-introduced courts discussed in depth in Chapters 12 and 13. While these terms are not ideal, we find greater inaccuracies in using other terms such as "informal" and "formal" or "non-state" and "state".

OUR CONTRIBUTION

- 1.37 The legal systems of each Pacific Island nation are not only complex but under strain from a range of political, social and economic problems. Our study convinces us that supporting and building on the existing legal infrastructures is vital, with implications for the future that go beyond this study of human rights and custom. Our study is one contribution to that wider picture.
- 1.38 It is an overview directed primarily to judges, lawyers, law teachers, policy-makers and aid donors. It is not a model for future management of custom and human rights across the entire Pacific region. Our aim is far more modest: to prompt discussion of and further study on ways to harmonise custom and human rights, both regionally and in particular countries. We have therefore included an extensive bibliography and full footnotes.
- 1.39 Part 1 provides the general context of the interface between custom and human rights in the Pacific. It describes the Pacific region of our study, as well as the constitutional and legal frameworks of Pacific states. It provides theoretical and factual background on both custom law and human rights. It also introduces our strategy of examining the values underlying custom and human rights to help harmonise the two systems.
- 1.40 Part 2 examines some particular issues which are often considered “flashpoints” for the tension between custom and human rights: the rights of women and children; freedom of religion, speech and movement; and the position of minority and migrant communities. This section does not attempt to resolve the complex problems that these issues raise. However, we do try to show the potential to resolve some apparent conflicts by looking for values such as respect for human dignity that can be found both in custom and in human rights and by taking advantage of custom’s capacity to adapt and absorb new influences.
- 1.41 In Part 3, we offer more substantive suggestions for developing a jurisprudence that draws on the strengths of both custom and human rights. Pacific nations may wish to adapt some of these to suit their own requirements. The roles of community justice bodies, courts and some other public bodies are examined. We also explore ways to build closer relations between courts and community justice bodies. Options for legislative change are considered, and some developments at the regional level are discussed. One suggestion we consider very important for coherent decision-making, and that could be implemented speedily, is for each country to develop non-prescriptive custom law commentaries to give judges, officials and others insight into the custom law(s) operating in its territory.
- 1.42 Specific suggestions are identified in the text in shaded boxes. Many will not be applicable to the situations of particular countries and territories, and all would require further consideration before being applied in individual states. We do not pretend to have definitive solutions, and it is for Pacific states to decide whether our suggestions are useful or not.

OUR VISION

- 1.43 In developing the project, our vision was to make a contribution to developing the relationship between custom law and human rights in the Pacific by:

- Deepening understanding of cultures to provide a more informed context for the human rights debate.
- Exploring the commonalities between custom law and human rights and how the two can inform and complement each other.
- Encouraging the development of the law and a jurisprudence unique to Pacific states by drawing on both ancestral values and contemporary legal principles.
- Promoting a human rights culture grounded in a Pacific world-view.
- Suggesting practical tools and mechanisms to support further harmonisation of custom law and human rights.
- Developing a resource document that will assist judges, lawyers, law teachers, policy makers and aid donors in navigating the interface between custom law and human rights.
- Creating a platform for ongoing dialogue, research and policy development on the relationship between custom law and human rights in the Pacific on which others can build.

Chapter 2

Pacific Context

2.1 This chapter introduces the Pacific region and explains why we consider that the geographical area covered in this study paper can validly be treated as a distinct region. While recognising the diversity of Pacific cultures, we believe that there are significant commonalities of culture, custom and values across the region. We also see commonalities in geography, history, religion, political and legal systems, economies and environments. Regional institutions likewise play an important role in both forming and giving expression to a sense of common Pacific identity. At the same time, significant differences in size, social structure and colonial experience mean that there are problems of generalising about the whole region. We therefore recognise the need for these issues to be studied in more depth at the local level. With this caveat, we have attempted to provide a regional overview of the interface between custom and human rights in this paper.

WHAT DO WE MEAN BY "THE PACIFIC"?

2.2 The countries and territories included in the study are set out in Appendix 2. Most are members of the Pacific Islands Forum (PIF) and/or the Secretariat of the Pacific Community (SPC).¹ We have included the French Pacific territories, which allows us to compare the situations in countries with similar indigenous cultures but different political and legal systems. We have also included the Indonesian province of Papua, which is not a member of either the PIF or the SPC. In addition, we have considered Timor Leste (East Timor), which faces many of the same issues of the interface between custom and human rights as Pacific countries.

2.3 Our study also includes New Zealand and Australia. Both countries are full members of the PIF and SPC, play important roles in the region, have significant indigenous populations with their own custom law, and are home to many recent Pacific Island migrants with strong ties back to their countries of origin. When we refer in this study paper to "the Pacific" or "Pacific countries and territories" we mean all of the island countries

¹ The Pacific Islands Forum represents Heads of Government of independent and self-governing Pacific Island countries, Australia and New Zealand. Through the Forum, member states express their joint political views and cooperate in areas of political and economic concern. It has 16 member countries. The Secretariat of the Pacific Community provides technical assistance, professional support and capacity-building assistance in the areas of land, marine and social resources to its member countries and territories. It has 22 Pacific Island members together with Australia, France, New Zealand and the USA.

and territories plus Australia and New Zealand. When we refer to “Pacific Island countries and territories” we are excluding New Zealand and Australia.²

LAND AND PEOPLE

- 2.4 Appendix 2 shows the political status of Pacific countries and territories and the wide variation in their population sizes and land areas. The larger islands in the southwest Pacific are generally mountainous and volcanic, with rich soils and mineral deposits. Smaller volcanic islands in places such as the Cook Islands, Tonga and Samoa also tend to have good agricultural soil and fresh water. Other Pacific islands, such as those in Kiribati, the Marshall Islands, Tokelau and Tuvalu, are low-lying atolls, only a metre or two above sea level. These atolls have only small amounts of land and limited supplies of fresh water.³
- 2.5 The total population of Pacific Island countries and territories was 10 million in 2000,⁴ while Australia and New Zealand between them comprised another 23 million people.⁵ Three out of four people in the Pacific Islands live in rural areas. However, this overall figure masks high levels of urbanisation in many parts of the Pacific. Three predominantly rural countries (Papua New Guinea, the Solomon Islands and Vanuatu) dominate population figures for the region. A country-by-country analysis shows that, in 11 out of 22 Pacific Island countries and territories, more than half the population lives in urban areas.⁶
- 2.6 The Pacific Islands are commonly divided into three broad culture areas: Polynesia, Melanesia and Micronesia. These divisions are problematic, having their origins in the racial ideologies of European colonisers.⁷ Nevertheless, they are widely used today, not least by Pacific Islanders themselves, and can serve as a useful shorthand as long as their limitations are recognised. Our map indicates broadly the areas covered by these terms, but should not be

2 While we have made every attempt to be careful in our usage of terms such as “country”, “territory” and “state”, no such usage in this study paper should be taken as an expression of the Law Commission’s opinion as to the political status of any individual country, territory or state. We have also used what we understand to be the official names of Pacific countries and territories, while recognising that in a number of cases there are also other names by which these countries and territories are known, particularly to their indigenous peoples.

3 Secretariat of the Pacific Community “Our Pacific Region” in Secretariat of the Pacific Community < <http://www.spc.int> > (accessed 7 February 2006); for more detailed information see Brij V Lal and Kate Fortune (eds) *The Pacific Islands: An Encyclopedia* (University of Hawai’i Press, Honolulu, 2000).

4 The Secretariat of the Pacific Community, above n 3, states that the population of the region was estimated at 7.6 million in 2000. The region as defined by the SPC is very close to the region as defined for the purpose of this study paper, but the SPC figures do not include the Indonesian province of Papua. Papua had a population of some 2.2 million in 2000: Richard Chauvel *Constructing Papuan Nationalism: History, Ethnicity, and Adaptation* (East-West Center, Washington, 2005) 89. For more information on the population of Pacific countries see < <http://www.spc.int/demog/en/index.html> > .

5 Information from < <http://www.stats.govt.nz> > and < <http://www.abs.gov.au> > (accessed 7 February 2006).

6 Gerald Haberkorn *Current Pacific Population Dynamics and Recent Trends* (2004) < <http://www.spc.int> > (accessed 7 February 2006).

7 On the origins of the Polynesia/Melanesia distinction see Nicholas Thomas “Melanesians and Polynesians: Ethnic Typifications Inside and Outside Anthropology” in Nicholas Thomas *In Oceania: Visions, Artifacts, Histories* (Duke University Press, Durham (NC), 1997) 133–155.

taken too literally. For example, Fiji is commonly grouped with Melanesia because of the physical appearance of its indigenous people, but indigenous Fijians have much in common with the cultures of their Polynesian neighbours. There are also Polynesian “outliers”, islands inhabited by Polynesians located within the Melanesian geographical area.⁸ A fourth indigenous culture area, that of Aboriginal Australia, is also included within the region covered in this study paper. The cultures of the Aboriginal peoples of mainland Australia are quite distinct from those of other Pacific peoples.

- 2.7 This study will focus mainly on the indigenous cultures of the Pacific, since it is indigenous peoples who are primarily affected by the interface between custom law and human rights. However, we acknowledge that non-indigenous peoples may have their own custom and custom law. Non-indigenous people comprise more than a quarter of the populations of Fiji, Nauru, Palau and the Indonesian province of Papua. Indigenous peoples are a minority in the Northern Mariana Islands, Guam, New Caledonia, Australia and New Zealand. Issues affecting indigenous and non-indigenous minorities are discussed in Chapter 10. We consider all those who have made the Pacific their home to be Pacific people. Those whose ancestors have lived in the region for thousands of years, those whose forebears arrived as colonists or indentured labourers in the nineteenth century, more recent migrants, and refugees from human rights abuses elsewhere in the world, are all now part of the Pacific family.

COMMONALITY AND DIVERSITY

- 2.8 While recognising the diversity that exists within the Pacific, we believe that it can usefully be treated as a region due to connections and commonalities such as:
- **Culture and language.** There are important similarities among indigenous Pacific cultures, including the central place of the extended family, clan or tribe in social life; a strong attachment to the land; and a preference for decision-making by consensus. Many Pacific languages are related members of the Austronesian language family, and Polynesian languages are particularly closely related.
 - **Custom law.** In most Pacific Island countries and territories custom law predominates in determining local disputes. In many places it is the law that is most relevant to people’s daily lives. Custom is recognised in most Pacific Island constitutions.
 - **Small scale.** Many Pacific Island countries and territories have very small populations, and in all of them (including large countries like Papua New Guinea) small communities continue to be the main social units.
 - **Oceanic nature.** Pacific countries are islands, and most Pacific peoples have a strong sense of being encircled by a vast and bountiful ocean. Epeli Hau’ofa has described the Pacific as a “sea of islands”, making the point that the islands are connected, not separated, by the ocean.⁹

8 Jocelyn Linnekin “Contending Approaches” in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1997) 3, 8–9; Robert C Kiste “Pre-Colonial Times” in K R Howe, Robert C Kiste and Brij V Lal (eds) *Tides of History: The Pacific Islands in the Twentieth Century* (Allen & Unwin, St Leonards (NSW), 1994) 3, 4–6.

9 Epeli Hau’ofa “Our Sea of Islands” in Epeli Hau’ofa, Vijay Naidu and Eric Waddell (eds) *A New Oceania: Rediscovering Our Sea of Islands* (University of the South Pacific, Suva, 1993) 2–16.

- **Colonisation.** All of the Pacific except for Tonga experienced colonisation at some point from the late eighteenth to the twentieth centuries.
 - **Religion.** In all Pacific countries and territories the majority of the population is Christian, and religion plays an important role in community and public life across the region.
 - **Political and legal systems.** All Pacific countries and territories have some sort of parliamentary system, incorporating at least some degree of popular representation. Those colonised by English-speaking countries also have common law legal systems.
 - **Economies.** Agriculture and fisheries form the economic base of most Pacific Island countries and territories, although some also export significant amounts of timber and minerals. They face major economic challenges, including remoteness from key overseas markets, vulnerability to natural disasters and other external shocks, and small internal markets. All depend to some extent on foreign aid, many quite heavily, and remittances from islanders living overseas also play a significant role in the economies of many Pacific Islands.
 - **Environment.** Pacific Island countries and territories are vulnerable to natural disasters like cyclones and face major environmental challenges, such as global climate change and sustainability of fish stocks. Nuclear testing has been a significant issue for some islands, and opposition to such testing has helped to create a sense of common cause in the region.
 - **Rural life.** Despite increasing levels of urbanisation, a substantial proportion of the population continues to live in rural areas across most of the Pacific. Subsistence agriculture is still practised in many places, ties to the land are still strong, and a very high proportion of land is still in customary ownership in many parts of the Pacific.
 - **Regional institutions.** There are important regional institutions which bring people from throughout the Pacific together to discuss issues of common concern. Regional educational and training institutions such as the University of the South Pacific have helped to build a sense of regional identity.
- 2.9 Having identified those features that help to make the Pacific a region, it is also important to acknowledge the differences among Pacific societies:
- **Cultural diversity.** There is a great deal of ethnic and linguistic diversity within the region, particularly in the Melanesian countries in the southwest Pacific. Around 1000 indigenous languages are spoken in the region, although the great bulk of these are spoken in Papua New Guinea and the Indonesian province of Papua. In addition, there are languages introduced through colonisation, particularly English and French, as well as Hindi in Fiji and a variety of “pidgin” languages such as Bislama in Vanuatu.
 - **Colonial experience.** Different parts of the Pacific were colonised by different powers, and a number were colonised by several in succession. This diversity has created differences in political, legal and linguistic traditions across the Pacific.
 - **Reliance on custom.** As we shall explore further in this study paper, there are differences in the contemporary vitality of custom law and in the degree of recognition it receives from the state in different parts of the Pacific.

- **Common and civil law.** Those parts of the Pacific colonised by France and Indonesia have civil law systems, in contrast to the common law systems found across most of the region.
 - **Non-indigenous groups.** In most Pacific countries and territories, indigenous peoples are still overwhelmingly in the majority, but, as discussed above, some have significant numbers of non-indigenous people.
 - **Migration.** Some countries, particularly parts of Polynesia, have experienced significant levels of emigration (mainly to New Zealand, Australia and the United States), while there has been little recent emigration from other countries such as Papua New Guinea, Vanuatu and the Solomon Islands.
 - **Political status.** Some parts of the Pacific are fully independent states, while others continue to be under the jurisdiction of another state or to have some formal ties with their former colonial rulers (see Appendix 2).
- 2.10 These and other differences of history, ethnicity, culture, geography and demography are often used to divide or classify the Pacific into categories, particularly Melanesia, Polynesia and Micronesia. These divisions are reflected in groupings such as the Melanesian Spearhead Group and events such as the Micronesian Games. Other categorisations include Anglophone and Francophone; large and small states; independent states and colonies or territories; and so on. Each of these ways of classifying Pacific countries and territories has some validity and usefulness, but each also has a degree of artificiality and arbitrariness. While such categorisation cannot be entirely avoided, we use it with caution, as we believe that those features that link the countries and territories of the Pacific are more important than those that divide them.

Chapter 3

Legislative Context

- 3.1 This chapter describes the legislative context in which custom and human rights reside. We noted in Chapter 1 that custom affects everyday life in many Pacific communities but that those communities are now more regularly exposed to thinking about human rights. We introduced our view that custom and human rights can work together and support each other, but before that view can be advanced, we need to note how custom and human rights fit into the state legal system. That delineation requires consideration of the constitution and statutes of the particular state and, in those countries that have a common law system, the development of an indigenous common law. It also requires consideration of any treaties which the state has ratified and their effect on domestic law.

CONSTITUTIONS 3.2 A constitution is the primary legal document of a state, which prevails over statutes and other forms of law. Apart from New Zealand, the constitution is contained in a single legal document and is so framed that courts may strike down legislation that is inconsistent with it.

- 3.3 All Pacific countries and territories with written constitutions provide for human rights in those constitutions, except for Australia and Niue.¹ These provisions are usually described as fundamental rights or a bill of rights. How the rights are provided for in constitutions and the way in which particular rights are expressed varies. These rights are enumerated in Appendix 3.

- 3.4 Most constitutions also have provisions protecting custom, but how custom is protected, recognised or provided for, and its place in the legal hierarchy also

1 Tokelau's draft constitution includes human rights provisions. Within Australia, the Australian Capital Territory and the state of Victoria have legislation providing for human rights, and other states have been considering Bills of Rights: < <http://www.nswccl.org.au> > (accessed 29 August 2006). For Niue, see Appendix 3. In 1991, a Constitution Review Committee considered whether a Bill of Rights should be included in the Niue Constitution but concluded that there was not widespread support and that Niue would be well advised to adopt a "wait and see" stance, so as to learn from the experience of other Pacific states: *Constitution Review Committee Report to the Niue Assembly* (Government Printer, Alofi, 1991) 20. However, Niue became bound by a number of international human rights treaties by virtue of New Zealand's ratification of or accession to these treaties before 10 November 1988, and while these treaties are not a source of Niue's domestic law, they set standards for the content and interpretation of the law: see *The Laws of New Zealand Pacific States and Territories: Cook Islands*, para 22 (last updated 21 April 2005) < <http://www.lexisnexis.com> > (accessed 5 September 2006).

vary from country to country.² The provisions for custom in each Pacific country and territory, in constitutions, statutes or the common law, are summarised in Appendix 4.

- 3.5 These provisions range across a spectrum. At one end, Tonga has no formal protection of custom law. In the Cook Islands and Niue, custom law is largely limited to the use and ownership of land. In Fiji the Constitution directs Parliament to make provision for the application of customary laws. The Constitution of Tuvalu, at the other end of the spectrum, provides very significant recognition of custom.
- 3.6 Most Pacific countries gained written constitutions in the 1960s, 1970s or 1980s on becoming independent. Tonga, which alone among the Pacific states was not colonised, adopted its constitution (including a Declaration of Rights) in 1875. Some constitutions have since been revised. For example, the Tuvalu Constitution was rewritten with a more local flavour, according priority to Tuvaluan culture and values. Human rights provisions were added to the Cook Islands Constitution in 1981. The Fiji constitution has been significantly changed twice as a result of political upheaval, with its 1997 Constitution now being one of the most modern and comprehensive in terms of human rights. The Papua New Guinea (PNG) Constitution has been amended many times, most recently to accommodate the Bougainville Autonomous Government.
- 3.7 Constitutions may provide for a constitutional review in future. For example, the constitutions of the Federated States of Micronesia and the Marshall Islands provide for a ten-year review.³ With or without a review provision, many constitutions are in various stages of renewal. Constitutional amendment or renewal exercises are currently being considered in Tonga and Nauru. Amendments to the constitution of Palau were agreed at a constitutional convention in 2005 and are awaiting enactment.
- 3.8 In other cases, a new constitution is envisaged. A new draft Federal Constitution has been prepared for the Solomon Islands, and is currently being reviewed. A new constitution was proposed for Tokelau in the event that self-determination was agreed. A referendum held in February 2006 failed to achieve the two-thirds majority needed for Tokelau to become self-governing in free association with New Zealand, but another referendum may be held in future. In French Polynesia and New Caledonia, the constitutional relationship with France is the subject of ongoing review and discussion.
- 3.9 Constitutional reviews provide an opportunity to reconsider how human rights and custom are accommodated in the national legal system, a topic discussed further in Chapter 14.

2 See D E Paterson “South Pacific Customary Law and Common Law: Their Interrelationship” (1995) 21 Commonwealth Law Bulletin 660. See also J G Zorn *Custom and Customary Law: Coursebook Two* (University of the South Pacific, Suva, 1994).

3 In the Marshall Islands, a constitutional convention must be approved by a two-thirds majority of Parliament. In 2006, the Marshall Islands Government was unable to attain the necessary Parliamentary majority, so planned to put the proposal for a constitutional convention to a referendum: Giff Johnson “Referendum Sought on Marshalls Constitution” in “Pacific Islands Report” in East-West Center (24 April 2006) < <http://pidp.eastwestcenter.org> > (accessed 24 April 2006).

- 3.10 Human rights and custom may also be provided for in statutes. Examples of statutes that further define human rights are the New Zealand Bill of Rights Act 1990 and Human Rights Act 1993 and the Fiji Human Rights Commission Act 1999. Many statutes regulate custom law, like Samoa's Village Fono Act 1990, Tuvalu's Falekaupule Act 1997, and the Fijian Affairs Act. This section describes the special status of some statutes and the way statutes interact with custom, particularly the danger they may alter it; how custom law may influence the application of statutes; and the place of statutes in the hierarchy of laws.
- 3.11 Some statutes have a quasi-constitutional status. For example, statutes may require a special majority of parliament to amend. In Fiji, the Fijian Affairs Act and related Acts are entrenched – any amendment must be read three times in both the House of Representatives and the Senate and must be supported by at least 9 of the 14 members of the Senate who are appointed by the Bose Levu Vakaturaga (Great Council of Chiefs).⁴ Some statutes have special status because the constitution requires that such a statute is enacted. Arguably, such statutes once made cannot be repealed except by the substitution of another or by an amendment to the constitution itself. The Underlying Law Act 2000 of Papua New Guinea, which provides greater recognition for custom law, is an example of an Act made pursuant to a constitutional provision. Consequently, it takes priority over other legislation.⁵
- 3.12 Other statutes, while ordinary statutes, are still constitutionally significant. For example, statutes that give effect to human rights treaties cannot be lightly repealed if the effect is to renege on the state's formal commitments to the international community. Some statutes may also take priority over others. The New Zealand Bill of Rights Act is an example: whenever a statute can be given a meaning which is consistent with the Bill of Rights Act, that meaning is to be preferred.⁶
- 3.13 Statutes adapting custom may inadvertently alter how custom is practised. Some statutes on the use, ownership and alienation of customary land have radically altered traditional land management systems. Customary practices may also be affected by statutes regulating family matters and criminal law. The codification of custom is considered in Chapter 13.
- 3.14 Custom law may also influence how statutory principles are applied. For instance, custom may be relevant to determining whether a defence of provocation is tenable or may help determine the "best interests of the child".
- 3.15 In a case before the courts in which a conflict arises between a statute and custom, the statute usually prevails over custom – unless the statute is inconsistent with any constitutional provision for the protection of custom. The court must also have regard to constitutional human rights to determine a given case, even when the rights are not expressed in the relevant statute. When a conflict arises between the common law and a statute, the statute prevails.

4 Related Acts are the Fijian Development Fund Act, Native Lands Act, Native Lands Trust Act, Rotuman Act, Rotuman Lands Act, Banaban Lands Act and Banaban Settlement Act.

5 This Act is discussed further in Chapter 14.

6 New Zealand Bill of Rights Act 1990, ss 4 and 6.

- COMMON LAW**
- 3.16 Two systems of introduced law exist in the Pacific. The civil law system, found today in countries formerly colonised by France,⁷ usually requires the explicit expression of its law in statutory codes. The more usual system in the Pacific is the common law which developed initially in England. The common law was developed by judges from principles regarded as “common” to the whole of England, in contrast with local or provincial laws or customs unique to a particular area or region.⁸ The common law is represented today in the application of legal principles developed in past cases and applied by judges to similar fact situations.
- 3.17 Pacific countries with an English-speaking heritage adopted the common law of their colonial power at the date of independence. Although following independence these countries have been free to develop their own common law, their courts have usually continued to follow quite closely the common law of the United Kingdom, the United States, Australia or New Zealand. The desirability of developing an indigenous common law that draws on the custom law principles at work in the individual states is explored at greater length in Chapters 6 and 12.
- 3.18 Aspects of custom law are recognised by the courts under the common law doctrine of aboriginal rights. In Canada, the United States, Australia and New Zealand, the property rights of indigenous peoples are recognised under this doctrine.⁹ However, although the doctrine of aboriginal rights is still developing, its application has generally been limited to the topics of tribal autonomy and property rights. This narrow scope limits the doctrine’s usefulness in the Pacific.
- 3.19 The courts operating under the common law system also rely on human rights law – as it is expressed in constitutions, statutes and international treaties, or as recognised at customary international law – to develop legal principles. In this way, human rights become part of the common law as well.

- TREATIES**
- 3.20 International human rights treaties are becoming increasingly important sources of domestic law. While the role of international law generally is considered further in Chapter 5, in this chapter we briefly consider how those treaties are applied in the Pacific. As Appendix 5 indicates, there is a low level of ratification of many of the core international human rights treaties in the Pacific, but almost all Pacific Island countries have signalled their commitment to human rights in their domestic constitutions and/or statutes (Appendix 3).

7 The legal systems of Timor Leste and Indonesia (including Papua) are also largely within the civil law tradition.

8 Morag McDowell and Duncan Webb *The New Zealand Legal System: Structures and Processes* (4th ed, LexisNexis, Wellington, 2006) para 2.3.2. For further detail on the development of the common law from English custom see Carlton Kemp Allen *Law in the Making* (6 ed, Oxford University Press, London, 1958) especially 68–74.

9 **United States:** *Johnson v McIntosh* 21 US (8 Wheat) 543 (1823); *Cherokee Nation v State of Georgia* 30 US (5 Pet) 1 (1831); *Worcester v State of Georgia* 31 US (6 Pet) 515 (1832). **Canada:** *Guerin v The Queen* (1984) 13 DLR (4th) 321; *R v Sparrow* [1990] 4 WLR 410; *Delgamuukw v British Columbia* [1997] 3 SCR 1010. **Australia:** *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *The Wik Peoples v Queensland* (1996) 187 CLR 1. **New Zealand:** *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

- 3.21 Although there is an increasing body of opinion that some human rights norms are so fundamental as to apply to all states whether or not they have signed or ratified a treaty,¹⁰ the conventional legal approach is that a treaty is only binding to the extent it has been adopted by a country. The law relating to domestic adoption of international treaties is however complex and varies significantly depending on the domestic jurisdiction and the nature of the instrument.
- 3.22 While it is beyond the scope of this paper to outline the process in detail, several steps are usually involved in becoming a party to an international treaty. The first is signature of the treaty by a state. Signature denotes general acceptance of the treaty's terms and a good faith commitment to proceed to ratification but does not usually entail direct legal obligations. This step is followed by ratification, in which a country formally agrees to be bound by the treaty. In some cases, however, Pacific states have become parties to a treaty when the treaty was signed on their behalf by the former colonial power or current metropolitan state.
- 3.23 The process of ratification varies. In Pacific countries from the British tradition, ratification does not have direct domestic effect until the treaty has been implemented by statute, which recognises the constitutional principle that the executive arm of government cannot change the law by entering into a treaty.¹¹ Treaties should therefore not be ratified until a state is sure that its domestic law is compliant with the Treaty. It should be noted that Article 27 of the Vienna Convention on the Law of Treaties provides that states cannot excuse non-compliance by reference to inadequate national law.¹²
- 3.24 A statute can implement a treaty in two ways: by incorporating the substance of the treaty without any indication of its origins, or by authorising the making of subordinate legislation to give effect to the treaty.¹³
- 3.25 Courts are, however, increasingly having regard to treaties which have not been formally implemented. There are at least five ways in which courts may take treaties into account: as a foundation of the constitution; as relevant to the determination of the common law; as a declaratory statement of customary international law; as evidence of public policy; and as relevant to interpretation of a statute.¹⁴ Sometimes, a constitution may provide specifically for the courts to have regard to relevant international law. For example, the Fiji Constitution provides that in interpreting the Fiji Bill of Rights, the courts must have regard to relevant public international law.¹⁵

10 See discussion of customary international law and the doctrine of *ius cogens* in Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2 ed, Wellington, 2003) 23–24.

11 *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 (P Co).

12 The relevant part of art 27 provides: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

13 For further discussion of the ways in which treaties may be implemented via domestic legislation, see New Zealand Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, Wellington, 1996) ch 2 [NZ Law Commission].

14 See NZ Law Commission, above n 13, ch 3, on how courts take account of treaties.

15 Constitution of Fiji, s 43(2): “In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.”

- 3.26 Treaties may also be ratified with reservations about particular clauses, indicating that states do not intend to be bound by a particular clause. A number of Pacific countries have entered reservations when ratifying the major human rights treaties. These reservations reflect concerns about resources as well as custom. For instance, Fiji entered a reservation to the requirement of the Convention on the Elimination of Discrimination Against Women (CEDAW) that steps be taken to eliminate customary practices based on inferiority or stereotyped roles for men and women.¹⁶

Customary international law

- 3.27 Customary international law is practice which is consistently followed by states from a sense of obligation, such that the practice becomes a legally binding rule.¹⁷ There is always debate as to whether or not a practice is so widely accepted that it has become customary international law. Where a legal requirement is generally agreed to have become customary international law, a state is bound to comply with that law, irrespective of ratification. In common law countries, customary international law may form part of the common law recognised by domestic courts.
- 3.28 As further described in Chapter 5, the Universal Declaration of Human Rights (UDHR) has evolved into an instrument of such moral and political importance that certain elements of the UDHR are now said to be part of customary international law. Among these elements are the right to life, freedom from slavery, freedom from torture, inhuman and degrading treatment, and the right to a fair trial. Some commentators argue that all of the rights in the UDHR have acquired the status of customary international law. As, however, most of these rights are also reflected in the constitutions of the Pacific, the actual boundaries of customary international law are less significant.

16 It did, however, agree to art 2(f), thereby undertaking to modify or abolish existing laws, customs and practices that discriminate against women.

17 See Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2 ed, Wellington, 2003) 23–24; Rhona K M Smith “Customary International Law” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 79–81.

Chapter 4

Understanding Custom Law

- 4.1 Following a brief introduction to the importance of custom in the Pacific, this chapter falls into two main sections. The first outlines three legal theories that mark out paths to applying custom law, paths that may lead in different directions: positivism, pluralism and realism. Because the path chosen directs the whole approach to custom law, the three theories merit exploration here. The second section explains our understanding of custom law for the purposes of this study. We address four aspects: its definition, its content, modern custom as a historical product, and issues relating to its present use.
- 4.2 It is apparent that the vast majority of disputes in many Pacific countries, especially in Melanesia, are resolved by customary means. Daily life in small island territories like Tokelau and Wallis and Futuna is almost entirely governed by custom and custom law processes. State-made law barely exists in remote parts of Melanesia, and custom is the only operative system of control if, as in Bougainville during the armed conflict there, state-made law breaks down. Many states depend on custom to maintain local peace and order and have not the wherewithal to replace it with state institutions. Even where state institutions do exist at the local level, they coexist with customary processes.
- 4.3 Pacific people also see custom as “law”. That perception was readily apparent in our discussions with Pacific people, in which various indigenous terms for custom law were used. Such terms include the Samoan *agai fanua* (Tongan *anga faka fonua*), “the way of the land”, and New Zealand Maori *tikanga*, “that which is right and proper”.¹ Custom is frequently described as the inherited or ancestral law in contrast with state-made law.² Thus, Bernard Narokobi describes custom as law for Melanesian societies.³

1 See New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP 9, Wellington, 2001) 15 [NZ Law Commission] on the term *tikanga* Maori.

2 Compare Lissant Bolton “Chief Willie Bongmatur Maldo and the Role of Chiefs in Vanuatu” (1998) 33 *Journal of Pacific History* 179: “[Kastom] provides a way of summing up what ni-Vanuatu understand to belong to themselves and to their place, in opposition to all that contact with other people and other places has introduced to their way of life.”

3 Bernard Narokobi *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service and the University of South Pacific, Suva, 1989) 5–6.

- 4.4 However, custom and state-made law are also seen as complementary rather than competing: the one serves traditional communities, while the other manages national interests. They also have different strengths. Courts have specialist expertise in fact-finding to determine responsibility for wrong-doing. Community justice bodies are noted for dispute resolution techniques to maintain local harmony. Chapter 12 considers how judges can capitalise on the strengths of both systems.
- 4.5 The understanding of Pacific custom law has developed as a result of legal anthropology in the second half of the 20th century. Once seen as simply practices undertaken from habit or superstition, custom law is now more frequently recognised as a system of law comprised of values, practices and processes.

POSITIVISM, PLURALISM AND REALISM

- 4.6 Some writers do not treat custom as law but as something that gives way to law, either being replaced by law or taking on the form of law itself.⁴ However, that depends on what is meant by “law”, a matter that is the subject of spirited debate within the discipline of jurisprudence (the philosophy of law). It is not a debate that will be of great practical assistance in the current context, as the question of whether custom is technically designated law is not the main issue. The important question is what position custom should occupy in the settlement of disputes.
- 4.7 The legislature and the courts are the primary state organs in determining how custom law and human rights are applied. A coherent legal system requires that courts apply them in a systematic way, according to a consistent legal theory. Positivism, pluralism and realism define the place of custom within state legal frameworks in different ways.

Positivism and pluralism

- 4.8 Under the theory of legal positivism, custom exists in law only to the extent that it is recognised by the organs of the state through the constitution, statute law and the common law. The theory of legal pluralism, by contrast, is that the law derives from people and state-made law gives expression only to one form of it. The pluralist approach to law developed with the anthropological studies already mentioned. These focused on providing full descriptions of the norms of traditional societies and the processes by which these norms are identified

4 Susan Farran “Custom and Constitutionally Protected Fundamental Rights in the South Pacific Region – The Approach of the Courts to Potential Conflicts” (1997) 21 *Journal of Pacific Studies* 103–104. See also Dorothy Kenneth and Henlyn Silas “Vanuatu: Traditional Diversity and Modern Uniformity” in Institute of Pacific Studies (ed) *Land Rights of Pacific Women* (Institute of Pacific Studies, University of the South Pacific, Suva, 1986) 68–69.

and applied for the resolution of disputes.⁵ Based upon that work, pluralists present custom as law and as constituting a legal system that is not dependent on state recognition for its authority.

- 4.9 Pluralists also contend that custom law has the capacity to change as community opinions change. They warn that once customary norms are fixed by statute or court precedent, then as a matter of law the norms are no longer determined by communities and cease to change in line with changing community opinions. In effect they become frozen. In this view, legal positivism is seen to take the heart out of custom law, compromising community autonomy and the dynamic nature of custom and fulfilling the colonial prophecy that custom will be displaced.
- 4.10 A pluralist approach is now also appearing in international law. Custom law, its institutions and processes, are being increasingly recognised in international instruments.⁶ Custom is treated as law in framing group rights. In addition, articles 5 and 34 of the revised draft Declaration on the Rights of Indigenous Peoples propose recognition of the right of indigenous people to maintain and strengthen their legal systems and juridical customs, in accordance with internationally recognised human rights standards. Under the framework of the draft declaration, custom may be seen as a system of law for customary communities, coexisting with state-made law and drawing its authority from the fact that it is the law that preceded the state.
- 4.11 The differences between these jurisprudential approaches are not merely of academic interest. They have important implications for the relationship between custom and the state in the Pacific. Essentially, positivists envisage a unitary and centralised legal system, while pluralists envisage a state system coexisting with autonomous legal systems operating in communities.

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- 5 Our discussion of pluralism is indebted to a draft chapter of Miranda Forsyth's PhD thesis, which she kindly made available to us. See also AWB Simpson "The Common Law and Legal Theory" in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Salmond Series, Clarendon Press, Oxford, 1973) 77; John Griffiths "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; George D Westermarck "Court is an Arrow: Legal Pluralism in Papua New Guinea" (1986) 25 *Ethnology* 131; Jean G Zorn "Lawyers, Anthropologists, and the Study of Law: Encounters in the New Guinea Highlands" (1990) 15 *Law and Social Inquiry* 271; Sally F Moore "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running 'Their Own' Native Courts" (1992) 26 *Law and Society Review* 11; Brian Z Tamanaha "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20 *Journal of Law and Society* 2, 192; Sally E Merry "Legal Pluralism" (1998) 22 *Law and Society Review* 869; Gordon Woodman "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism" (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 21; Ian Fraser "Legal Theory in Melanesia: Pluralism? Dualism? Pluralism *Long* Dualism?" (1999) 3 *Journal of South Pacific Law* <<http://www.vanuatu.usp.ac.fj>> (accessed 31 May 2005); Jennifer Corrin Care and Jean G Zorn "Legislating Pluralism: Statutory 'Developments' in Melanesian Customary Law" (2001) 46 *Journal of Legal Pluralism and Unofficial Law* 49; J Rivers and H A Amankwah "Sovereignty and Legal Pluralism in Developing Nations: A New Appraisal of the Papua New Guinea Case" (2003) 10 *James Cook University Law Review* 85; Richard Scaglione "Legal Pluralism in Pacific Island Societies" in Victoria Lockwood (ed) *Globalization and Culture Change in the Pacific Islands* (Pearson Prentice Hall, Upper Saddle River, 2003) 86; Bob Hughes *The Politics of Legal Pluralism* (Occasional Paper No 7, University of the South Pacific School of Law, Vanuatu).
- 6 See, for instance, articles 8 and 9 of ILO Convention 169 on Indigenous and Tribal Peoples, which came into force in 1991, although it has not been widely ratified. Fiji is the only country in the Pacific region to have ratified ILO 169: <<http://www.ilo.org>> (accessed 25 August 2006).

- 4.12 In many colonised countries, positivism was a basis for the assertion of authority over indigenous tribes. In his thesis on the state recognition of customary law, Campbell McLachlan states that when countries achieved independence, pluralism provided a more acceptable theoretical base:⁷

The emergence into independence of the island states saw a radical reshaping of the ideological context for custom. The legal system, then, had to be refashioned out of the material of customary law. This was endorsed in the preamble to many Pacific constitutions which pledge the new state to uphold custom and traditions and to work through indigenous social organisation.

- 4.13 McLachlan concludes that the relationship between state-made law and custom is complex and has to be addressed and answered within each separate jurisdiction. It cannot be answered in a general way. He proposes an approach which he terms “cooperative pluralism”.⁸

The extent and form of recognition [of customary law] in the Pacific as elsewhere must be worked out in the context of individual countries, through consultation between Governments and indigenous communities, and in relation to particular subjects.

He adds:⁹

Because it insists on a necessary connection between law, state and territory, legal centralism denies the significance of customary law which is neither generated nor enforced by the state, and furthermore, neither territorial nor unified in operation. Thus, the recognition of customary law involves modification of basic premises of State law in the acceptance of the separate identity of indigenous groups and the personal application of laws.

- 4.14 Cooperative pluralism builds on but goes further than the Australian Law Reform Commission in their groundbreaking 1986 report on Aboriginal customary law.¹⁰ It shares their view that it is possible to take account of customary norms in a wide variety of contexts in the operation of the state law system, without the creation of state-defined customary law. McLachlan concludes in a review of the ALRC report:¹¹

Underpinning all this, and of considerable significance for a developing comparative approach to State recognition of customary law is the 1986 report’s fundamental premise that the continuing separate identity of an indigenous people and of their law positively requires an acknowledgement by the State of the limits of State law and a respect by it of the alternative sphere of indigenous customary law.

7 Campbell McLachlan *State Recognition of Customary Law in the South Pacific* (PhD thesis, University of London, 1988) 336 [*State Recognition of Customary Law*].

8 *State Recognition of Customary Law*, above n 7, 344.

9 *State Recognition of Customary Law*, above n 7, 348.

10 Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (ALRC No 31, Australian Government Publishing Service, Canberra, 1986).

11 Campbell McLachlan “The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm – A Review Article” (1988) 37 *International & Comparative Law Quarterly* 368.

- 4.15 That was also the approach taken by this Commission in its study of Maori custom and values in New Zealand law in referring to the doctrine of aboriginal rights and the associated doctrine of aboriginal title.¹² Thus, custom is a source of legal principle whether or not it is expressed to be a source of law in the constitution, unless its application is limited by the constitution or statute.

Realism

- 4.16 McLachlan’s approach is not dissimilar in outcome to a third jurisprudential approach, that known as “realism”. This approach embodies an investigation of the extent to which custom is observed and provides a means for recognising its existence. If we investigate how disputes are settled in fact, then a realistic understanding of the role of custom in each country can be made. The famous United States Supreme Court Judge, Oliver Wendell Holmes Jnr said: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”¹³
- 4.17 This definition was the foundation of realist jurisprudence. The approach was echoed by Karl Llewellyn in his celebrated book *The Bramble Bush*. He pointed out that what officials do about disputes was to his mind “the law itself”. He observed:¹⁴

The main thing is what officials are going to do. And so to my mind the main thing is seeing what officials do, about disputes, or about anything else; and seeing that there is a certain regularity in their doing – a regularity which makes possible prediction of what they and certain other officials are about to do tomorrow. In many cases that prediction cannot be wholly certain.

- 4.18 Realist jurisprudence is capable of being extended to the situation relating to custom in the Pacific. Examining how disputes are settled and the role of custom in settling those disputes is at the heart of developing a contextual approach to law in the Pacific.

Ongoing challenges

- 4.19 For small or developing countries, adopting simple, bright-line rules, particularly in the law that regulates business, has often been seen as appropriate. This is because small jurisdictions may have limited resources for law-making and enforcement, with the concomitant risk of corruption. However, this approach does not appear useful in addressing the important and continuing role of custom in the Pacific. A simplistic or hard-line approach to the integration of custom and human rights is likely to increase polarisation of views.¹⁵

12 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP 9, Wellington, 2001) 11.

13 Oliver Wendell Holmes “The Path of the Law” (1897) 10 *Harvard Law Review* 457, quoted in Richard A Posner (ed) *The Essential Holmes* (Univ of Chicago, Chicago, 1992) 163.

14 Karl N Llewellyn *The Bramble Bush: On Our Law and Its Study* (Oceania Publications, New York, 1960) 13 (emphasis in original).

15 The appropriateness of the bright-line-rules approach is now also challenged from an economic realism perspective, as neither the most effective nor the most efficient strategy for small and developing countries: Kevin D Davis “Law-Making in Small Jurisdictions” (2006) 56 *University of Toronto Law Journal* 151.

- 4.20 Custom plays a positive role in settling disputes, and it should be permitted to do so where it can be effective. There is little point in debating whether it is technically law or not, if it is broadly recognised by the society to which it is applied. However, the process of synthesising custom and the court system is a complex intellectual task that presents significant challenges.
- 4.21 David Weisbrot, writing about Vanuatu, makes the point that to have a coherent pluralist system requires substantial effort. The difficulty of synthesising custom and Western legal systems lies not merely in inertia or failure to face up to difficult issues. Weisbrot identifies the main challenge as “one of political philosophy: reconciling the conflicting demands of *Kastom* and Christianity; social democracy and traditionalism; Melanesian socialism and international capitalism; and unity and diversity”.¹⁶ The same challenge probably faces other Pacific countries.
- 4.22 Notwithstanding the difficulties, it is up to every state to decide how to advance custom or limit it, whether to synthesise it and the rest of state law, and if so, how. There are no easy answers and no simple prescriptions. Nor will the solutions arrived at be uniform. As already noted in Chapter 3, Pacific countries and territories vary considerably as to the form of recognition accorded to custom and most of their constitutional references to custom are vague. Applying generalisations about the role of custom to any specific country is therefore dangerous.

DEFINING CUSTOM LAW

- 4.23 There is no settled definition of custom law. Some consider that the search for a definition is unhelpful and that custom law, being fluid, cannot be defined but only described.¹⁷ Several have warned against defining custom law in terms of Western law, because the concepts involved are substantially different.¹⁸ However, we must explain the sense we make of custom law for the purposes of this study paper and explain how we use certain terms.
- 4.24 First, we emphasise that Pacific custom law is not like custom at English law, where “custom” describes practices that have continued unchanged from time immemorial. As the Privy Council pointed out in 1919, with regard to New Zealand Maori custom, the custom of a race “is not to be put on a level with the custom of an English borough or other local area which must stand as it has always stood, seeing that there is no quasi-legislative internal authority which can modify it”. The Privy Council observed that a race, by comparison, may have “some internal power of self-government” and its customs or practices may change.¹⁹
- 4.25 Frequently, however, Pacific custom is still so equated with ancient and unmodified practices that use of the term “custom” for the indigenous legal systems of the Pacific can cause confusion. We use “custom law” nonetheless, because there is no single indigenous term for Pacific custom law, and because “custom” or “customary law” is now used universally for traditional legal

16 David Weisbrot “Law and Native Custom in Vanuatu” (1988) 3 *Law and Anthropology* 104, 123.

17 For example, *State Recognition of Customary Law*, above n 7, 70.

18 For example, Guy Powles “Customary Law Systems and the Pacific Island State: The Search for Workable Relationships” (2003) 2 *New Pacific Review* 263, 266.

19 *Arani v Public Trustee* (1919) NZPCC 1, 6.

systems. However, in contrast to the understanding of custom in English law, we use “custom law” to refer to a system of law that is not static but subject to change.

- 4.26 An alternative term that is frequently preferred is “customary law”, but it is used variously: for the rules that govern behaviour;²⁰ for the norms that have been recognised by the state courts;²¹ or, as in most Pacific statutes, for custom as practised (with or without judicial recognition). To distinguish those meanings we instead use “custom law” and define it as the values, principles and norms that members of a cultural community accept as establishing standards for appropriate conduct, and the practices and processes that give effect to community values. While *custom* is what people of a particular cultural community habitually do, *custom law* is what they consider they are bound to do or not do, because of the community’s values or for fear of some unwelcome consequence.
- 4.27 E Adamson Hoebel applies a stricter test to determine when a social norm becomes legal. He argues that a social norm is legal only if its neglect or infraction is regularly met by the threat or application of physical force by a socially recognised individual or group.²² Not all breaches of custom law are met with such penalties, yet customary penalties may be no less effective in deterring offences. For instance, shaming practices have a large deterrent effect in tight-knit communities, and in addition, shame is seen to punish even if the community does nothing. “Ma te whakama e patu” is a New Zealand Maori expression conveying the belief that the guilty are chastised by their internalised sense of shame.²³ Furthermore, traditional belief in supernatural punishment for the commission of offences against spiritual restrictions, sometimes described as tapu or taboo, was a significant regulator of conduct and was associated with such consequences as personal illness or tragedy or some calamity affecting the whole community.²⁴
- 4.28 We would also not minimise the sanction that comes from the internalisation of community values. A comparison may be made with the traditional Chinese legal system. Morag McDowell and Duncan Webb consider that Chinese thinking (in particular, Confucianism) holds that social order is not achieved through strict legal rules and coercion. It is achieved through recognition of the appropriate course of action in the light of social factors and principles of appropriate behaviour.²⁵

20 Jennifer Corrin Care “The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997” (2000) 4 *Journal of South Pacific Law* < <http://www.vanuatu.usp.ac.fj> > (accessed 26 October 2005).

21 For example, Hon Vincent Lunabek “Adjudication of Customary Law in the Pacific” (2004) 15 *Commonwealth Judicial Journal* 25.

22 E Adamson Hoebel *The Law of Primitive Man: A Study of Comparative Legal Dynamics* (Harvard University Press, Cambridge (Mass), 1954). See also K N Llewellyn and E Adamson Hoebel *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, Norman, 1941). For an alternative view, see Richard Benton “Lexicography, Law and the Transformation of New Zealand Jurisprudence” (Paper presented at the Symposium on Concepts in Polynesian Customary Law, University of Auckland, 12 October 2004).

23 Joan Metge *New Growth From Old: The Whanau in the Modern World* (Victoria University Press, Wellington, 1995) 284–285.

24 The NZ Law Commission discusses tapu, above n 1, 36–38.

25 Morag McDowell and Duncan Webb *The New Zealand Legal System: Structures, Processes and Legal Theory* (2 ed, Butterworths, Wellington, 1998) 38.

- 4.29 We distinguish custom law from “state-made law”. State-made law consists of law made by the organs of the state, including constitutions, statutes and (for most Pacific countries and territories) the common law. As we have earlier discussed, state-made law provides for the recognition of custom law. When a distinction is needed, we will refer to custom law as practised, on the one hand, and to custom law as recognised by the courts or as provided for by statute, on the other hand.
- 4.30 “Culture” and “tradition” are related to custom law but are also distinct. We use “culture” for those things that manifest a people’s way of life. Custom law, like all law, is part of culture. “Tradition” is used for practices and beliefs seen as having come from a community’s ancestors.

CONTENT

- 4.31 Most writers refer to custom law in terms of values, practices and processes.²⁶ Some describe custom law primarily in terms of a values system.²⁷ Others emphasise the practices or rules that derive from those values.²⁸ Since rules most fulfil the need for certainty for those trained in Western law, it is unsurprising that custom law is sometimes defined in terms of the rules of a community that govern local behaviour.
- 4.32 However, if law is seen from a Pacific viewpoint, as expressed in Pacific constitutions, official statements and community opinions, more weight is due to values as setting standards.²⁹ “Values” are a community’s underlying beliefs about what is good and right, while “practices” are those things habitually done to give effect to values.³⁰ “Norms” are standards of expected behaviour, arising from a community’s values.
- 4.33 We use “rules” for that which is strictly insisted upon. However, societies may have many rules or codes of behaviour that are not part of law, such as the New Zealand Maori belief that it is improper to sit on a table that is used for eating. We believe that custom law in the Pacific is primarily based not on rules but on values.

Values

- 4.34 The relationship between values and practices is best understood in terms of an underlying belief system. The belief system informs the manner in which respect is paid, for example. For many communities the belief system stems from

26 For example, Forsyth, above n 5, and Elise Huffer “Establishing Parallels: Pacific Political Philosophy and the Ethic of Care” (Paper presented at the 9th Triennial South Pacific Association for Commonwealth Literature and Language (SPACLALS) Conference, National University of Samoa, Apia, 24–26 November 2004).

27 For example, Narokobi, above n 3, 50–74; John Patterson *Exploring Maori Values* (Dunmore Press, Palmerston North, 1992).

28 Corrin Care, above n 20.

29 See “Core Document Forming Part of the Reports of States Parties: Vanuatu” (5 February 1998) HRI/CORE/1/Add.86, para 10: “For ni-Vanuatu, the word ‘custom’ means more than a set of practices; it means beliefs, values, and life itself.” The importance of values in community ideas of governance in a number of Pacific Island countries is discussed in Foundation of the Peoples of the South Pacific International *RETA 6065: Assessing Community Perspectives on Governance in the Pacific* (report to the Asian Development Bank, Suva, 2003) < <http://www.fspi.org.fj> > (accessed 5 September 2006) [FSPI].

30 Huffer, above n 26, 4; NZ Law Commission, above n 1, 28.

opinions about the origin of life, the genealogy of life forms and the spiritual essence of individual human beings.³¹

- 4.35 As values are abstract and their expression depends on the social context in which they reside, they are difficult to define. A New Zealand Maori perception, which may also be significant in other parts of the Pacific, is that it is not the value that changes as society changes, but the practices that give effect to the value.³² Values are also balanced with one another. For example, the primacy given to the group or to inherited leadership may be balanced with the value that is also placed on individual initiative, which is extolled in legends and stories.³³
- 4.36 It is also important to stress that values express ideals or aspirations and are not always lived up to.³⁴ They set standards to which people are expected to aspire, but it is equally expected that people will often fall short of the ideal. Individual lapses do not invalidate the value system.
- 4.37 We are conscious that today, some traditional values are no longer given effect in the former way. We are also conscious that concepts in one society do not always carry over into another and that, like custom law generally, values are best described on a country-by-country basis or by reference to communities within countries. In addition, the scholarly identification and analysis of predominant community values in different states is incomplete, and such work as has been done is open to ongoing debate. However, comparisons may be made of those values that continue to be identified and relied on, at least in the context of this study paper, which aims to promote country studies following a general regional overview.
- 4.38 While customary practices vary considerably between and within states, numerous Pacific scholars have described values from various countries which, while applied in different ways and in different contexts, point to remarkably similar world-views. These studies also highlight the centrality of values in custom law.³⁵ Pacific people we spoke with saw those values as applying in their countries, notwithstanding that they would express them in different ways. Broadly, we see many values as being common throughout the Pacific, while practices frequently differ between Pacific cultures.
- 4.39 Values are typically seen as passed down from ancestors, enforced by the spirit world, and directed to maintaining social cohesion. In a brief work like this, it is not possible to deal comprehensively with Pacific values or the complex world-view from which they derive. However, Elise Huffer and Ropate Qalo, of the University of the South Pacific, have drawn on the current Pacific scholarship to collate those values that appear to predominate in Pacific

31 As considered for example by Narokobi, above n 3, 7– 9.

32 See NZ Law Commission, above n 1, 3–4.

33 NZ Law Commission, above n 1, 33.

34 Patterson, above n 27.

35 The centrality of values in tikanga Maori is considered by the NZ Law Commission, above n 1, 28–30. At 17, the Commission notes: “In tikanga Māori, the real challenge is to understand the values because it is these values which provide the primary guide to behaviour.”

thinking.³⁶ They mainly use indigenous terms from Polynesia and Fiji. We also draw particularly on our own knowledge of New Zealand Maori terms and concepts.

- 4.40 Using Melanesian and Micronesian equivalents presents difficulties due to the variety of distinctive language groups. However, there are considerable similarities with the description of values in the seminal text on Melanesian custom by Narokobi.³⁷ When we consulted him, Sir Arnold Amet and others from Melanesia, they saw the values referred to below as also applying generally to Melanesia. Micronesian participants in our consultation workshop in Nadi also recognised the values described as being consistent with those in their societies.
- 4.41 Huffer makes the point that Pacific values must be seen in the context of a network of social relationships: between persons and groups, and between persons and land. The Hawaiians express this network of relationships in the notion of *malama‘aina*, meaning to care for the land and the family. Others stress that the relationship between people and the spirit world must also be kept in the reckoning, including ancestors and those representing elements of the natural environment.³⁸ Huffer describes the foundational values of Pacific societies as care, respect, balance and reciprocity.³⁹

Individual dignity

- 4.42 From this analysis and other writings, the value of acknowledging individual worth or dignity appears central to most Pacific belief systems. The emphasis on individual dignity arises from the belief that all are imbued with a spiritual essence, as the descendants of primeval beings or a supreme deity, or that all are the children of God, as it is sometimes expressed today. The value of acknowledging individual worth may be reinforced by a practice of maintaining extensive genealogical tables (as with Samoan *gafa* and New Zealand Maori *whakapapa*), suggesting that ultimately all of an ethnic group are related.⁴⁰

36 Huffer, above n 26. The Pacific literature is analysed in Elise Huffer and Ropate Qalo “Have We Been Thinking Upside-Down? The Contemporary Emergence of Pacific Theoretical Thought” (2004) 16 *The Contemporary Pacific* 87. We have also considered the works of various authors in FSPI, above n 29. The authors include Dr Morgan Wairiu and Steward Tabo (on Solomon Islands); Alice Kalontano, Charles Vatu and Jenny Whyte (on Vanuatu); Stewart Tabo with contributions by Tiroia Rabaere (on Kiribati); and Verona Lucas, Setefano Nauqe and Sachin Chandra with contributions by Alisi Daurewa, Himeshwar Chand and Akisi Bolabola (on Fiji). Similar studies are available in relation to Australian Aboriginal people, and the core values are succinctly summarised by Larissa Behrendt *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy* (Federation Press, Annandale, 1995).

37 Narokobi, above n 3, 50–74. Melanesian values referred to by Narokobi include evenhandedness, balance, harmony, doing good, sympathy, sharing, affinity, honour, respect, trusteeship, consent, eldership, work, restraint, control and discipline.

38 Especially Narokobi, above n 3, 8–9, 19, 25, 50, 72; and NZ Law Commission, above n 1, 28–46, with the relationship to land considered at 47–49. Narokobi considers that “any development of Melanesian jurisprudence will have to give full cognizance to the interaction between living persons and the spirits of the dead”, 9. The divine origins of custom law in Samoa are described by Elise Huffer and Asofou So’o in “Beyond Governance in Samoa: Understanding Samoan Political Thought” (2005) 17 *The Contemporary Pacific* 311.

39 Huffer, above n 26, 3.

40 See for example, Narokobi, above n 3, 50; Huffer, above n 26, 28.

4.43 Huffer describes this value in terms of individual dignity and refers to the concepts of mamalu or “dignity” in Samoa and of veidokai or “honouring and respecting others” in Fiji.⁴¹ New Zealand Maori use mauri for the spiritual essence of people and mana for personal power or standing. They consider some persons have more mana than others, through inheritance or achievement, but with obligations to nurture those with less.⁴² Women, warriors, priests and other specialists may be seen to have a separate kind of mana, or a unique way of expressing their dignity and leadership. Mana is “ascribed through whakapapa (genealogy) and acquired through personal accomplishment”, so that it can be diminished or enhanced by performance, conduct and bearing.⁴³ Similar views are recorded for Samoa and Fiji.⁴⁴ The “big men” of Melanesia likewise gain status through individual achievement. Oratorical skill – talking with authority, constraint and wisdom – is just one of many ways in which persons can gain respect, but one deserving special mention, as Pacific traditions give it particular weight.

4.44 Huffer includes respect for others amongst the main values in Pacific philosophy.⁴⁵ Others add respect for the natural environment and respect for ancestors, who may be considered as much a part of the present reality as the living.⁴⁶

4.45 Further values that are consistent with a belief in the individual’s spiritual essence relate to love and care, reciprocity (or mutuality), the manifestation of humility, generosity and wisdom and the search for consensus. Each may be seen separately as a natural expectation in tribal communities of interdependent members. As a set of values, they remind individuals of the importance of group unity and of maintaining relationships with other groups.

Love and care

4.46 Huffer refers to the demonstration of love and care for others as a central Pacific value.⁴⁷ In contrast, Narokobi, in discussions with the Commission, considered that filial and contractual obligations, rather than love, provided the primary glue for Melanesian societies. Care of the elderly and the sharing of resources are expected throughout the Pacific.

41 Huffer, above n 26, 5.

42 NZ Law Commission, above n 1, 34–36. Lopeti Senituli writes: “[Tongans] speak of the human person as having ‘ngeia’, which means ‘awe inspiring’ [and] also means ‘dignity’. When we speak of ‘ngeia ‘o e tangata’ we are referring to ‘the dignity of the human person’ derived from the Creator” (referring to the Christian God): Lopeti Senituli “They Came for Sandalwood. Now the B...s are After our Genes” (Paper presented to the Traditional Knowledge and Research Ethics Conference, Te Papa, Wellington, 10–12 June 2004).

43 See NZ Law Commission, above n 1, 33.

44 See Ilaitia Tuwera *Vanua: Towards a Fijian Theology of Place* (Institute of Pacific Studies, University of the South Pacific, Suva, 2002) cited by Huffer, above n 26. Huffer adds that mamalu also increases or decreases with behaviour or status.

45 Huffer, above n 26, 5. She gives examples by reference to fa’aaloalo (Samoa), veivakarokorokotaki (Fiji), faka’apa’apa (Tonga) and karinerine (Kiribati).

46 Narokobi above n 3, 8; NZ Law Commission, above n 1, 37.

47 Huffer, above n 26. She refers to the significance attached to aloha (Hawai’i), alofa (Samoa), veilomani and veikauwaitaki (Fiji), and tokanga’i (Tonga).

Leadership

4.47 The values of caring and sharing also give rise to particular views about leadership. Huffer considers that a sharing of leadership and responsibility between leaders and the community generally is implicit in values about consensus and listening to the other.⁴⁸ She sees shared leadership as a means of constraining and controlling individual power-holders, similar in function to the doctrine of separation of powers. From her descriptions, it is also important that community leaders should support their communities and work with them. Huffer describes this expectation in terms of an ethic of care and organic reciprocity, where importance is placed on responsibility towards others.⁴⁹

4.48 In line with these perspectives, community participation in decision-making is also an important value in many parts of the Pacific. Where chiefly councils operated, decision-making was often indirectly shared with the community through the participation of family heads who traditionally consulted with their families. Huffer considers:⁵⁰

Power/wisdom is not something that belongs inherently to people/leaders but is acquired through working with others and working the land. For instance Logovae⁵¹ refers to it as ‘both a gift and a burden’ and adds that ‘while it is a privilege, responsibilities are its constant companion’. Tuwere⁵² expresses the same idea in his description of mana which he states is not necessarily inherited through blood-lines but implies an ability to be creative. In the Hawaiian context, Kanahēle⁵³ writes that ‘the power that the leader is called upon to show ... is not his alone, but is joined with that of his followers. His power, therefore, is always relational and conditional.’ And it could be added, reciprocal.

4.49 Huffer discusses the value of equality in similar terms. She considers:⁵⁴

Although political power is linked to status, its main purpose is to ensure distributive equality. Distributive equality (or egalitarianism) is an important value in political philosophy throughout the Pacific and one which confers dignity on everyone. For instance, Logovae states that: ‘The Samoan wisdom presupposes that the person must live well’. This implies that all, however humble, are entitled to dignity from their leaders, and to equal treatment in access to resources necessary for basic livelihood.

48 Huffer, above n 26, describes the concepts of veirogorogoci (Fiji), soalaupule and autasi (Samoa) and feveitokai’aki and ngaue fakataha (Tonga).

49 Huffer, above n 26, 5. See also NZ Law Commission, above n 1, 38: “Mana was not achieved through the acquisition of material wealth but rather by distributing that wealth to others”.

50 Huffer, above n 26, 6. The power of Māori chiefs was also conditional. They were highly accountable and had little executive discretion on significant tribal matters, being compelled to affirm the consensus of the people or risk being abandoned in favour of a contender: see NZ Law Commission, above n 1, 34.

51 Faauuga Logovae *Wisdom in the Samoan Context with Special Reference to the Matai System: A Theological Interpretation* (Bachelor of Divinity Thesis, Pacific Theological College, Suva, 1982) (footnote in original).

52 Tuwere, above n 44 (footnote in original).

53 George Kanahēle *Ku Kanaka – Stand Tall: A Search for Hawaiian Values* (University of Hawaii Press, Hawaii, 1986) 408 (footnote in original).

54 Huffer, above n 26, 6.

Reciprocity

- 4.50 Reciprocity (or mutuality) describes the Pacific approach to life – to maintain harmony and balance in all relationships. In focusing on governance and leadership responsibilities, Huffer discusses reciprocity in terms of the relationship between leaders and their communities.⁵⁵ However, its significance as a value is much larger. For New Zealand Maori, reciprocity compels the view that when a family or community gives or loses something of value, the receiver or taker must present or lose something of value to replace it. Mana frequently compels a generous response or acquiescence in magnanimous compensation.⁵⁶
- 4.51 Gift-exchange illustrates how the value of reciprocity is acted out. Ongoing gift-giving has social benefits in relationship-building and economic benefits in distributing wealth. Inter-tribal gift giving, where an exchange is expected only in time, helped also to insure a tribe against want in times of local famine or other distress.
- 4.52 Another example of the value inherent in reciprocity is in the resolution of transgressions. Where something is taken, be it a life, a limb, or goods, something of worth is expected in return to restore harmony and balance. The value also finds expression in warfare where acts of violence by one group compel a return of violence by the other unless compensation has been offered and accepted. Conceptually, the ultimate goal is the maintenance of balance and harmony, although in warfare that purpose is not always obvious. However, the value of reciprocity is expressed in numerous ways and pervades all aspects of Pacific life. Offences against the deities may be repaid through generous propitiations. The value of mutuality may even determine how thoughts are presented in discussions or ceremonial speaking (as in the New Zealand Maori customary speaking order called tau utuutu, in which speakers from each side of the house alternate).

Humility, generosity and wisdom

- 4.53 Among numerous other values or attributes that are integral to the Pacific world-view are those of humility, generosity and wisdom. Frequently, humility and generosity are seen as the attributes of persons of great mana, persons who may be at once humble but assertive and generous but demanding. Wisdom is also connected with mana, because it is exemplified in a sense of presence, and also because a reputation for wisdom carries heavy responsibilities of service to the community through the judicious and constrained use of knowledge.⁵⁷ Wisdom is frequently associated with age, which contributes to respect for elders as a further Pacific value. However, values are rarely absolute. Younger persons who have learned restraint and diplomacy in talking may also be respected as wise, and some elders are more respected than others.

55 Huffer, above n 26, 6–7.

56 For a fuller discussion of “reciprocity” in relation to New Zealand Maori, see NZ Law Commission, above n 1, 38–40.

57 Wisdom’s characteristics find expression in such terms as tofa, moe and fa’autaga in Samoa, poto in Tonga, yalomatua in Fiji and wanawana in Kiribati. The Samoan perspective is examined by Huffer and Qalo, above n 36, 93.

4.54 These values, and many others, are described in Pacific scholarship. They are also expressed in the opinions of ordinary villagers.⁵⁸ However, there are now serious questions as to whether in today's environment, traditional practices still give adequate effect to the values behind them. We consider the issues at the end of this chapter.

Practices

4.55 How people give effect to such values varies significantly from place to place. What is more significant at a regional level, however, is that these diverse practices still demonstrate a similar world-view. Respect ceremonies may vary considerably for example, but the high value placed on respect remains constant. Similarly, while the value of reciprocity applies throughout most of the region, gift-exchange practices vary. Nor are land succession rules identical. Nonetheless, succession is generally to use-rights in communally-owned land. In a similar fashion, dispute resolution processes are not the same in all places, but the emphasis on resolving disputes in a way that restores relationships and community harmony is common to most Pacific cultures.

Processes

4.56 Custom law processes involve punitive or remedial measures directed or undertaken by community members when the community considers such measures are called for. These measures include punishments, like banishment or beatings, and asset-taking and distribution, as in New Zealand Maori "muru raids".⁵⁹ The matters that give rise to punitive or remedial measures are not limited to offences against persons or property but extend to matters of personal conduct or misfortune.

4.57 However, custom law processes are more regularly associated with consensus development for the resolution of disputes or grievances, between or within communities. No distinction is made between grievances arising from civil and criminal wrongs, and wrongs are treated as simply problems that need to be resolved for harmony to be restored.

4.58 Dispute resolution involves the selection of those norms most appropriate for a case, by the parties, by elders or by any person or council accepted by the community as authoritative. The norm selection process, initially identified in studies of traditional African legal systems, is described in Pacific contexts by Jean Zorn and Jennifer Corrin Care.⁶⁰ The following discussion derives from their work.

4.59 In customary societies, a plethora of norms exist within a network of social relationships, so that norms are hedged with qualifications and applied contextually. As a result custom is generally described by scholars as flexible, fluid and changing – but not as amorphous. Disputants may advance one or other norm to stake out negotiating positions or to contend for a particular procedure,

58 See FSPI, above n 29.

59 See NZ Law Commission, above n 1, 39.

60 Jean G Zorn and Jennifer Corrin Care "Barava Tru': Judicial Approaches to the Pleading and Proof of Custom in the South Pacific" (2002) 51 *International and Comparative Law Quarterly* 611.

but there is room for the parties or mediators to consider those norms that best fit the moment and the parties' needs or the norm that may be adjusted to enable agreement on a position.

- 4.60 Accordingly, norms are rarely absolute. Zorn and Corrin Care describe how norm selection contrasts with the courts' search for a single customary norm to govern all similar situations. They refer to an example from Africa relating to the practice by which a widow might marry her dead husband's brother (a practice not unknown in the Pacific). The magistrate sought to know the rule on the matter. The difficulty for the village elders and others serving as expert witnesses was that there was and there was not a rule. Whether a widow should marry her brother-in-law depended on a range of considerations, such as the aims of the parties, their relative power and status, their relationships and their need for one another.
- 4.61 In such matters, judicial intervention can freeze the operation of custom law and displace community decision-making. Those giving evidence on customary norms in courts may also promote norms that support their own place in chiefly orders conceived by colonial administrators, overlooking other norms that favour women or younger persons. The overlooked norms may in time disappear.
- 4.62 The example above directly raises the question of who should decide custom law issues: state judges or community representatives? Representatives of the community understand the network of community relationships, developing community opinion and the occasions on which it would be right to apply a particular norm. Zorn and Corrin Care consider a critical aspect of custom law is that the process is owned and operated by the community whose law it is and suggest that the key issue is to provide a space for both custom and state-made systems of law to operate in defined spheres.

MODERN CUSTOM

- 4.63 Historically, custom has changed dramatically. Cannibalism, infanticide, wife strangling and slavery have disappeared, and tribal warfare and sorcery are no longer widespread. While traditional values continue to set standards, they are now set in different contexts, or the tendency is to emphasise those values that suit the current environment.
- 4.64 Custom law is no longer a discrete and coherent system. It increasingly exists in plural societies affected by new thoughts, beliefs and practices, and by social and economic changes. Customary mediators must now grapple with different social problems in communities, problems such as domestic violence, drugs and alcohol. Custom leaders may also have lost many of their forebears' customary skills, and with urbanisation and a shift to individual enterprise, many people are less engaged in community decision-making. We have described custom in terms of its functions and elements, but a critical approach is needed to examine the tensions resulting from the changes described.
- 4.65 We touch on some of the effects of social change wrought by outside influences by reference to Christianity and colonisation. However, we are conscious of Joan Metge's caveat that contact with other cultures produces outward change but rarely produces fundamental changes in the value system.⁶¹

61 Joan Metge "Commentary on Judge Durie's 'Custom Law'" (unpublished paper prepared for New Zealand Law Commission "Maori Custom and Values" project, 1996) para 3.3.

Christianity

- 4.66 Religion plays a crucial role in relation to both custom and human rights in the Pacific. One hallmark of most Pacific states today is the importance of Christianity within the societies.⁶² Another is the degree to which the values of custom law and Christianity have been interwoven. A few nations have sizeable non-Christian populations.⁶³ For most states, however, Christianity is regarded as a foundation stone of the nation and is reflected as such in their constitutions, as in the Preamble to Papua New Guinea’s Constitution, which states that the people pledge to “guard and pass on to those who come after us our noble traditions and the Christian principles that are ours now”.⁶⁴
- 4.67 The importance of Christianity does not mean that traditional beliefs have been displaced, for frequently the two sit alongside each other. Custom is still integrally related to the traditional spirit world, and customary beliefs, for example on land and the place of ancestors, remain strong. Unlike the Western concept that religion, law, morality and social habit are separate disciplines, the religions in the Pacific, both traditional and introduced, are part of custom law.⁶⁵
- 4.68 In contrast to colonialism and the products of globalisation, many Pacific Islanders do not see Christianity as a foreign import. Indeed for many nations, their first contact with Christianity was through native missionaries from other parts of the Pacific, who brought aspects of their own culture as well.⁶⁶ The spread of Christianity gave rise to a Pacific regional sense of identity for perhaps the first time.
- 4.69 Just as Christianity was “Europeanised” when it travelled from its birthplace in the Middle East to Europe, Christianity in the Pacific has been largely “indigenised”. As a result, Pacific Christianity has its own character and flavour. It has also altered traditional societies to an extent often not recognised by proponents of custom. This process has been described in Fiji as “lotu vaka vanua” or Christianity according to the way of the land, people and custom.⁶⁷ The process by which this synthesis occurred is worth examining when considering the adoption of human rights values in the Pacific. We have said that Christianity is not usually seen as a foreign import, but unfortunately the same cannot generally be said of human rights.
- 4.70 One possible explanation for the rapid adoption of Christianity in the Pacific is that the Christian value system also had a spiritual dimension, requiring no

62 For instance, Samoa’s motto is “Faavae i le Atua Samoa” (Samoa is founded on God) and Tonga’s is “Ko e ‘Otua mo Tonga ko hoku tofi’a” (God and Tonga are my inheritance).

63 In Fiji 30% of the population are non-Christian, mostly Hindu, Muslim or Sikh; Papua has a significant Muslim population; and there are also growing numbers of Baha’i in many Pacific countries.

64 The Preamble to Vanuatu’s constitution likewise states that Vanuatu is “founded on Melanesian values, faith in God and Christian principles”.

65 Reid Mortensen “A Voyage in God’s Canoe: Law and Religion in Melanesia” in Richard O’Dair and Andrew Lewis (eds) *Law and Religion* (Current Legal Issues 4, Oxford University Press, Oxford, 2001) 509, 513.

66 Akuila Yabaki and Eta Varani Norton “The Impact of Tradition and Religion on Women’s Lives in the South Pacific” (Paper presented at Pacific Women’s Bureau 9th Triennial Conference, Nadi, 16–20 August 2004).

67 Tuwera, above n 44.

adjustment to the process by which Pacific peoples understood the world. In addition, some missionaries conveyed the claimed universal truths of the Bible by building on existing beliefs or by drawing parallels between Christian and Pacific views.⁶⁸ No doubt this alignment was assisted by certain similarities in Pacific and Biblical beliefs and values, as in the account of the Creation and the Gospel's emphasis on love and care. The missionaries also worked with customary leaders. For example, Rev Shirley Baker assisted George Tupou in Tonga in establishing a form of modern governance that resisted outside colonisation.⁶⁹

- 4.71 Like Christianity, human rights may gain greater acceptance and strength in the Pacific if Pacific people see them as compatible with their own aspirations and values. As Konai Helu Thaman and others have pointed out, Christian principles that have already been absorbed into Pacific customs are in line with human rights principles.⁷⁰

Colonialism

- 4.72 Custom also changed as a result of colonial policies. Colonial administrators were also responsible for elevating or creating chiefly systems that modified the former relationship between leaders and their communities. It has been considered, for example, that the concept of chiefs was entirely created in Vanuatu.⁷¹ Colonial administrators effectively ruled through chiefs whose authority might come to depend on their recognition by the administrators rather than by their communities.⁷² Colonial policies also favoured men over women, as we consider further in Chapter 7.
- 4.73 In many societies, colonial administrations radically changed the face of customary land tenures, which had ensured that all of a group had sufficient land for their welfare. In Fiji and the Marshall Islands, altered land tenure rules mean that chiefs now gain a large share of income from the land as a personal right rather than on behalf of their people.⁷³ Land statutes also made strict rules out

68 See, for example, David Hilliard "The God of the Melanesian Mission" in Phyllis Herda, Michael Reilly and David Hilliard (eds) *Vision and Reality in Pacific Religion: Essays in Honour of Neil Gunson* (Macmillan Brown Centre for Pacific Studies/Pandanus Books, Christchurch/ Canberra, 2005) 195–215. Many more parallels have been drawn by Pacific theologians. See, for example, Maori Marsden "God, Man and Universe, a Maori View" in Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (The Estate of Rev Māori Marsden, Otaki, 2003) 2. Several others are mentioned by Huffer and Qalo, above n 36, 87.

69 Ian Campbell *Island Kingdom: Tonga Ancient and Modern* (2 ed, Canterbury University Press, Christchurch, 2001) 98.

70 Konai Helu Thaman "A Pacific Island Perspective of Collective Human Rights" in Nin Tomas (ed) *Collective Human Rights of Pacific Peoples* (International Research Unit for Maori and Indigenous Education, University of Auckland, Auckland, 1998) 1, 8; Lopeti Senituli "Pacific Values and the Universality of Human Rights" (Speech to the Sub-Regional Workshop on the Principal International Human Rights Treaties, Majuro, Marshall Islands, 6–9 March 2001); Ratu Joni Madraiwiwi "Human Rights and Pacific Values and Traditions" (Speech to the Sub-Regional Workshop for Pacific Island States on Human Rights Education and the Administration of Justice, Nadi, 26 June 2002).

71 Miranda Forsyth "Beyond Case Law: Kastom and Courts in Vanuatu" (2004) 35 *Victoria University of Wellington Law Review* 427, 430.

72 See, for example, the discussion of Fiji in Winston Halapua *Tradition, Lotu and Militarism in Fiji* (Fiji Institute of Applied Studies, Lautoka, 2003) 7–13.

73 On Fiji see Halapua, above n 72, 95, citing *Pacific Islands Monthly* (December 1999) 9; and Elizabeth Feizkah "The Money Tree" *Time Pacific* (20–27 August 2001) < <http://www.time.com> > (accessed 31 August 2006).

of norms that were previously applied fluidly. For example, as a result of New Zealand statutes, all issue succeeded absolutely to a person's land interests, resulting in multiple and absentee land ownership, whereas in custom, land rights might depend on use and occupation.⁷⁴

ISSUES

- 4.74 A major issue confronting custom law is how it should be identified and applied. Following large changes after European contact, it is no easy task to reconstruct pre-contact custom law. In the Pacific, much oral tradition has been lost. Many beliefs and practices were abandoned or modified in response to missionary teachings. Early literature from missionaries and colonists may be used to define or authenticate custom, but much of that evidence represents a Eurocentric view.
- 4.75 Another issue in custom law concerns the role of chiefs. New chiefly structures have been created or provided for in independence constitutions or exist informally. Where such structures exist without provisions for election or accountability to the community, new problems abound, not least the reinterpretation of custom to support this new form of chiefly authority. One complaint has been that chiefly councils are now inventing custom, making rules on appropriate conduct, where previously the rules were those understood by the community. Such rule-making in turn gives rise to the possibility that legislative, executive and judicial functions are unduly fused in these new institutions.
- 4.76 On the other hand, provisions for national councils of chiefs may represent a valid extension of custom to accommodate the new concept of a nation state.⁷⁵ Nonetheless, it may be relevant to inquire how national chiefly councils are selected.
- 4.77 There is a need to find new ways of allowing people to express support for the tribal group. Communities also need to decide what level of participation in decision-making is appropriate for people who have left the community but maintain ties to it, and how such participation may be provided for. The tradition that all should contribute to the group to the best of their ability and share, roughly equally, in its product does not fit easily with the modern economy, where wealth is acquired and accumulated personally, according to individual capacity, and frequently at work places away from the traditional village.
- 4.78 Similarly, old practices may no longer give effect to traditional values, like the value of respecting all persons. For example, the traditional division of labour between men and women may have worked in some places where all were respected for their role in contributing to the group, but respect for women may not be apparent today, where the same division of labour is maintained and serves to restrict women from taking on paid work or professional careers. Accordingly, it is necessary to distinguish between values and practices and to ask whether certain practices of today continue to give effect to those values that constitute the traditional wisdom. If not, changes to practice may be needed to ensure that the traditional wisdom is upheld.

74 NZ Law Commission, above n 1, 25–26, 102–119.

75 In many Pacific states, national-level councils representing chiefs or custom leaders play a role in the political process as well as being called on for opinions or decisions on matters of custom. Examples include the Great Council of Chiefs (Fiji), the Malvatumauri or National Council of Chiefs (Vanuatu), the House of Arikis (Cook Islands), the Council of Iroij (Marshall Islands), and the Customary Senate (New Caledonia).

- 4.79 The role for communities in adjusting to social and economic change is another important and difficult issue, and one with particular significance for considering the relationship between custom law and state-made law. We consider that, as far as is practical, Pacific communities should be in control of change themselves and that the autonomy of communities should be respected. When custom law remains under the control of communities, it is capable of adapting to new circumstances. However, if communities are to manage custom law, there are important questions to consider. Who decides what custom law is, the chiefs or the people? If it is the people, are those included who do not keep regular contact with the village and abide by its values?
- 4.80 There is then the larger question of the optimum role of the courts and legislature in determining custom law. For example, if the value of community autonomy and participation in decision-making is to be preserved, should the courts refer particular cases to the relevant community for a decision or an opinion? We return to the question of the role of courts in relation to custom law in Part 3 of this study.

Chapter 5

Understanding Human Rights

- 5.1 In this chapter we describe our use of the term “human rights”. The bulk of the chapter provides background on human rights: how they are defined, the values underlying them, the international human rights framework and the Pacific’s uptake of international treaties. The remainder of the chapter tackles the applicability of human rights across diverse cultures, a theoretical issue with broad implications for our approach to custom and human rights. In this section we briefly describe the debate between universalism and cultural relativism and advocate an approach that moves beyond this polarisation.

DEFINITION

- 5.2 “Rights” are “justified claims to the protection of persons’ important interests”.¹ If a person or group has a right to something, they may claim it as something to which they are entitled, and do not need to prove that it would be good or beneficial (although they may need to prove the existence of the right). “Human rights” are rights considered to be inherent in persons by virtue of their humanity. As such, they do not have to be earned and are not bestowed on people by the grace and favour of governments or other authorities. International human rights treaties and domestic bills of rights are therefore seen as recognising rights that already exist, rather than as creating rights.
- 5.3 Human rights, in turn, give rise to duties and responsibilities: duties on the part of the state to protect those rights, and responsibilities on the part of all people to exercise their rights in ways that do not infringe the rights of others.
- 5.4 We are conscious of the wide range of ways in which the term “human rights” is used. We use it in this paper in two main senses – first in reference to the international human rights framework and secondly in reference to the human rights guarantees in domestic Pacific constitutions.
- 5.5 Therefore, although we have adopted the terminology of “human rights”, it is important for communities to use the terminology which is most likely to aid reception of the actual content of the rights. Seeking acceptance of each right

1 Alan Gewirth “Rights” in Ted Honderich (ed) *The Oxford Companion to Philosophy* (Oxford University Press, Oxford, 1995) 776.

individually may prove more effective than presenting them as a package.² We also suggest a culturally-inclusive understanding of human rights, which incorporates diverse world-views, when interpreting the meaning of human rights in local contexts. Grounding human rights in the local cultural context will broaden and deepen respect for human rights and ultimately enhance protection and promotion of human rights on the ground. We return to this theme in Part 3.

Historical Development

- 5.6 For a deeper understanding of the concept of human rights as it is used today, it is necessary to trace its historical development.

Before the Second World War

- 5.7 The term “human rights” was rarely used before the Second World War. However, when the United Nations declared, in the preamble to its 1945 Charter, that it was determined “to reaffirm faith in fundamental human rights”, it was also asserting the values underlying human rights. The idea of human rights is a transformation of older values. These broader and deeper moral values, such as human dignity and justice, are found in many cultures and in the world’s ancient religions.³

The Universal Declaration of Human Rights

- 5.8 The horrors of the Second World War, with its human rights atrocities, led the member states of the newly-formed United Nations to select the promotion and protection of human rights as one of their key objectives.⁴ On 10 December 1948, the United Nations adopted the Universal Declaration of Human Rights (UDHR) – the founding document of the modern human rights movement. Ever since its adoption, there has been debate about whether the human rights standards in the UDHR are inherently “Western” or whether they have a more universal foundation.
- 5.9 For many, the UDHR represents the search for, and codification of, underlying values common to the entire world’s peoples and cultures.⁵ The Commission on

2 The Commission was told by Imrana Jalal of the Regional Rights Resource Team (RRRT) that frequently, after opposition to human rights is expressed, and the rights are then “unpacked”, opposition to the individual rights disappears (Report of Proceedings at the New Zealand Law Commission Workshop on Custom and Human Rights in the Pacific, Nadi, Fiji, 1–2 May 2006) 4.

3 For further discussion of the history of human rights, see Paul Gordon Lauren *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, Philadelphia, 2003); Michael Freeman “The Historical Roots of Human Rights before the Second World War” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 151–154.

4 The human rights provisions in the United Nations Charter are articles 1(3), 13(1), 55, 56, 62, 68 and 76.

5 Shaista Shameem “Defending the Universality and Timelessness of the Universal Declaration of Human Rights: A View from the ‘Developing’ World” (2002) 2(2) *Human Rights & Human Welfare* 9–14.

Human Rights, which drafted the Declaration, included members from Asia and Latin America as well as the major powers. In addition, in what has been described as “one of the most unusual developments in the entire history of diplomacy”,⁶ UNESCO sought the written views of 150 leading intellectuals from around the world on the philosophical foundations of human rights.⁷ Following receipt of these views, UNESCO convened the Committee on the Philosophic Principles of the Rights of Man to see whether there was sufficient commonality on basic rights and values to draft an international bill. The Committee concluded that human experience had produced a core of certain “common convictions”, and so the United Nations was under an obligation “to declare, not only to all governments, but also to their peoples, the rights which have now become the vital ends of human effort everywhere.”⁸

- 5.10 Despite this input from a wide range of sources, other commentators assert that the key inspiration for the UDHR was eighteenth-century principles of individual freedom and twentieth-century principles of liberal democracy. It is said to have been drafted almost entirely by Westerners or Western-trained representatives from Africa and Asia.⁹ The membership of the UN at the time reflected the fact that most African, Asian and Pacific peoples were still under colonial rule.
- 5.11 These different views are reflected in an ongoing debate between universalism and cultural relativism which is examined later in this chapter. Associated with it are two debates, one on the balance between rights and duties and one on the balance between individual rights and group rights.
- 5.12 What is more important today is that, in the nearly sixty years since its adoption, the UDHR has, by virtue of its use by governments, civil society and individuals throughout the world, become widely accepted as a starting point for human rights. Relevant to our study is the fact that in the Pacific context, many of the domestic human rights guarantees are based on the UDHR,¹⁰ and Pacific states that are members of the United Nations have implicitly signed up to the declaration as a duty of member states.
- 5.13 In 1993, a World Conference on Human Rights (the Vienna Conference) and the resulting Vienna Declaration and Programme of Action cemented international support for human rights. The declaration endorsed the

6 See Lauren, above n 3, 215.

7 UNESCO *Human Rights: Comments and Interpretations* (New York, Greenwood, 1949). Individuals who made contributions included Bengali Muslim poet and philosopher Humayun Kabir, Le Zhongshu from Nanjing University, Gandhi from India and anthropologist AP Elkin of Australia, who stressed the rights of indigenous peoples. Lauren, above n 3, 182, also refers to the influence of Samoan leaders and others in advocating the right of self-determination of colonial peoples.

8 UNESCO “The Grounds of an International Declaration of Human Rights” (31 July 1947), quoted in Lauren, above n 3, 217.

9 The most significant contributors were Nobel Peace Prize laureate René Cassin (France), John Humphrey (Canada) and Eleanor Roosevelt (United States): Hurst Hannum “The Universal Declaration of Human Rights” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 353.

10 The European Convention on Human Rights (1950) was also an important influence for many Pacific constitutions, as were the United States Bill of Rights and latterly the Canadian Charter of Rights 1982.

right to development and declared human rights “universal, indivisible and interdependent and interrelated.” Article 5 went on to state:¹¹

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Duties as well as rights

5.14 In addition to declaring rights, the UDHR refers to individual duties. In the dialogue leading to the United Nations’ first human rights statement, there was widespread agreement that an article on duties was crucial, to differentiate freedom from anarchy and tyranny and to make clear that two balances must be struck, between individual freedom and the rights of others and between individual freedom and the legitimate demands of the community and the state.¹² It was not adequate to proclaim individual rights without regard to the social environment in which they are exercised.¹³ Therefore, Article 29 of UDHR emphasises the duties individuals have to the community and that rights and freedoms may be subject to certain restrictions prescribed by law, including respect for the rights and freedoms of others.

5.15 The same approach has been followed in other international human rights agreements¹⁴ and in regional human rights arrangements.¹⁵ The international human rights system also recognises that particular groups of individuals who are in a position to exercise power over others (such as parents, doctors and lawyers) have special duties.¹⁶

KEY HUMAN RIGHTS VALUES AND PRINCIPLES

5.16 Article 1 of the UDHR describes the core idea behind human rights: “All human beings are born free and equal in dignity and rights.” Article 2 provides that rights are guaranteed without distinction of any kind. The inherent dignity of the individual and equality are central values underlying human rights law. The preamble to the UDHR refers to the “equal and inalienable rights of all members of the human family” and the “equal rights of men and women”. It identifies the goals of human rights as freedom, justice and peace in the world, along with “freedom of speech and belief” and “freedom from fear and want”.

11 UN General Assembly “Vienna Declaration and Programme of Action” (World Conference on Human Rights, Vienna, 14–25 June 1993) A/CONF.157/23 <<http://www.ohchr.ch>> (accessed 14 August 2006).

12 International Council of Human Rights Policy *Taking Duties Seriously: Individual Duties in International Human Rights Law – A Commentary* (Versoix, 1999) 24.

13 International Council of Human Rights Policy, above n 12, 25.

14 See Preamble to the International Covenant on Civil and Political Rights 1966; Preamble to the International Covenant on Economic, Social and Cultural Rights 1966; Declaration on the Right to Development 1986, art 2(2); and Declaration on Human Rights Defenders 1998, art 18.

15 See Preamble to the American Declaration of the Rights and Duties of Man 1948; Article 32(1) of the American Convention on Human Rights 1969, art 32(1); and the African Charter on Human and Peoples’ Rights 1981, preamble and arts 27–29.

16 See, for example, arts 5, 18(1) and 27(2) of the Convention on the Rights of the Child; the 1982 Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the 1990 Basic Principles on the Role of Lawyers.

- 5.17 Although the UDHR codifies explicit “rights”, the preamble also indicates its aspirational nature, referring explicitly to “the highest aspiration of the common people”. It also describes itself as a “common standard of achievement for all peoples and all nations”. The UDHR contains civil and political rights¹⁷ and also economic, social and cultural rights.¹⁸ It recognises that all rights are indivisible and interrelated and that equal importance should be attached to each and every right.
- 5.18 In commenting on the UN human rights treaty system, which gives practical effect to the UDHR, the Office of the High Commissioner for Human Rights (OHCHR) describes a number of basic principles which bind the core treaties together: non-discrimination and equality; effective protection against violations of rights; special protection of the particularly vulnerable; and an understanding of human beings as active and informed participants in the public life of their States and in decisions affecting them, rather than as passive objects of authorities’ decisions.¹⁹

THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

- 5.19 The international human rights framework includes the seven core international treaties and a number of more specific instruments. There are also a number of emerging human rights. This framework is briefly examined.

The UN human rights treaty system²⁰

- 5.20 The UDHR, together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), is often described as the International Bill of Human Rights. ICCPR and ICESCR were both adopted by the UN General Assembly in 1966 and came into force in 1976. These two conventions are legally binding instruments to give effect to the UDHR. They have a very similar structure, referring in Part I to self-determination, in Part II to non-discrimination and equality, and in Part III to the substantive provisions for protection of rights.²¹
- 5.21 The distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, relates in part to the politics of the Cold War era. States of the Western bloc favoured civil and political rights, while those of the Eastern bloc gave greater emphasis to economic, social and cultural rights. These rights are sometimes also referred to as “first” and “second” generation rights, with first generation rights being rights of liberty or rights that require the state to refrain from certain actions against individuals. They include the right to life; to freedom from torture; to freedom of expression, belief and association; and the right to vote in free and fair elections.

17 UDHR, arts 3–21.

18 UDHR, arts 22–28.

19 Office of the United Nations High Commissioner for Human Rights “The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies” (Fact Sheet No 30) 20 < <http://www.ohchr.org> > (accessed 31 August 2006).

20 For useful summaries of the UN treaty system, see < <http://www.ohchr.org> > and < <http://www.bayefsky.com> > (accessed 6 September 2006).

21 156 states are party to the ICCPR and 153 states are party to the ICESCR, but few Pacific states have signed or ratified either (see Appendix 5).

Second generation rights require positive action by the state to ensure the provision of goods and services necessary for the enjoyment of these rights. They include rights to housing, education, health, food and social security.

- 5.22 While there is some sense in this classification of rights, it is important to stress that within the international human rights framework, all are considered to be equally important, and the enjoyment of one type of right depends on the protection of others. For example, it is difficult for poor people to improve their position and secure their economic rights if they are unable to organise and publicise their case through freedom of assembly and speech. Equally, guarantees of political rights have little meaning if poor health or malnutrition effectively prevent people from exercising those rights.
- 5.23 Since the adoption of the UDHR in 1948, there has been a process of continuous clarification of the content of human rights. Seven core human rights treaties now elaborate a comprehensive legal framework for the promotion and protection of human rights.²² In addition to ICCPR and ICESCR these are:
- The International Convention on the Elimination of All forms of Racial Discrimination 1965 (CERD);
 - The Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW);
 - The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT);
 - The Convention on the Rights of the Child 1989 (CRC);
 - The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (CMW).
- 5.24 Appendix 6 considers the role of treaty bodies and the new UN Human Rights Council in monitoring implementation of human rights.

Emerging human rights

- 5.25 The seven human rights treaties are not a definitive catalogue of internationally recognised human rights obligations, nor are the rights defined static. Like custom, human rights are continually developing and evolving. Within the framework established by the UDHR, human rights are responding to new challenges and taking account of issues and groups that have previously been neglected. A number of these emerging rights are also described as “third generation” or collective rights, which require cooperation among states to improve the lives of their entire populations.²³
- 5.26 Although in the Pacific there is sometimes concern about the proliferation of new rights while Pacific people are still coming to terms with the existing ones, some of the emerging human rights are potentially relevant and useful for the Pacific. In particular, some of these emerging rights are more group-focused and thus arguably more in line with Pacific cultures and values.

22 The texts of the treaties and other relevant documents are contained in the Pacific Regional Rights Resource Team (RRRT) booklet *The Big Seven: Human Rights Conventions & Judicial Declarations* (RRRT/United Nations Development programme, Suva, 2005).

23 Carl Wellman “Solidarity, the Individual and Human Rights” (2000) 22 *Human Rights Quarterly* 639–657.

Right to a healthy environment

- 5.27 The developing right to a healthy environment has significance for the Pacific, whose peoples look to the land and sea not merely for their physical survival but for spiritual sustenance. In line with their traditional world-view, they also tend to see environmental degradation as a spiritual contamination. Rivers, seas and reefs are as important as the land for many communities. However, the Pacific has faced, and continues to face, significant environmental threats from nuclear testing, land and sea pollution, mining, logging, over-fishing and global climate change.²⁴ In many cases, these threats are due to the actions of larger and more powerful countries. Pacific Island countries and territories are likely to be particularly affected by sea-level rise, more frequent drought, more severe cyclones and increasingly unpredictable weather patterns.²⁵ Some communities may be unable to remain on their ancestral lands as a result.²⁶
- 5.28 The constitutions of Timor Leste and the Northern Mariana Islands explicitly guarantee the right to a healthy environment, and a number of other Pacific constitutions also provide for environmental protection.²⁷ Three key regional agreements promoting a healthy environment are the Treaty of Rarotonga, which established the South Pacific Nuclear Free Zone; the Convention for the Protection of the Natural Resources and Environment of the South Pacific, which was created to control pollution; and the Waigani Convention on the transboundary movement of hazardous and radioactive wastes.²⁸ In addition, the South Pacific Regional Environment Programme (SPREP) plays an important role in environmental protection in the region.²⁹
- 5.29 No international human rights instruments explicitly guarantee the right to a healthy environment, but this right can be seen as implicit in the rights to an adequate standard of living and health. The international community also recognised that all people are entitled to a healthy environment in the Stockholm and Rio declarations (1972 and 1992).³⁰ Environmental rights can assist states

24 Bert Jenkins “Environmental Security” in John Henderson and Greg Watson (eds) *Securing a Peaceful Pacific* (Canterbury University Press, Christchurch, 2005) 321–329.

25 World Bank *Not If But When: Adapting to Natural Hazards in the Pacific Islands Region. A Policy Note* (World Bank, Washington DC, 2006) 1–7; Graham Sem “Climate Change and Development in Pacific Island Countries” in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, 2006) 164–181.

26 Tuvalu and Kiribati are often cited as countries whose continued existence is threatened by sea-level rise. However, there is some debate about the impact of climate change on Tuvalu: Samir S Patel “A Sinking Feeling” (6 April 2006) *Nature* 734–736; Mark Hayes “High Tides and Hype” (May/June 2006) *Pacific Magazine* 49–51.

27 Timor Leste Constitution, s 61; Constitution of the Commonwealth of the Northern Mariana Islands, s 9. See also Palau Constitution, art VI; preamble to the Papua New Guinea Constitution; Vanuatu Constitution, s 7; Meg Taylor “The Constitution and the Environment” in Anthony J Regan, Owen Jessep and Eric L Kwa (eds) *Twenty Years of the Papua New Guinea Constitution* (Lawbook Co, Sydney, 2001) 333–342.

28 Dave Peebles *Pacific Regional Order* (ANU E Press/Asia Pacific Press, Canberra, 2005) 223.

29 The Forum Fisheries Agency (FFA) also has an important role in promoting the sustainability of fisheries stocks in the region.

30 Center for Economic and Social Rights “International Instruments on the Right to a Healthy Environment” < <http://cesr.org> > (accessed 1 June 2006); People’s Movement for Human Rights Education “Human Rights and the Environment” < <http://www.pdhre.org> > (accessed 1 June 2006); International Human Rights Internship Program & Forum-Asia “Module 15” in “Circle of Rights – Economic, Social and Cultural Rights Activism: A Training Resource” in Human Rights Resource Center < <http://hrusa.org> > (accessed 1 June 2006).

in holding other countries to account for environmental damage or assist citizens in holding their own governments to account.³¹

Right to development

- 5.30 The right to development describes the right of all people to participate in the improvement of individual and collective well-being. It is the subject of the non-binding Declaration on the Right to Development, with its ambit as a right still being developed through a UN working group.³²
- 5.31 Most Pacific Island countries and territories are classified as developing countries, and five are classified as Least Developed Countries. The countries of Melanesia, in particular, face serious problems of poverty and underdevelopment.³³ The Pacific region is second only to sub-Saharan Africa in its lack of progress towards meeting the United Nations Millennium Development Goals, a series of targets for substantially reducing global poverty by 2015.³⁴ Recognition of the right to development may serve as a useful tool in maintaining the support of aid donors, promoting fairer trade rules, and holding governments to account if their policies and practices are inconsistent with that right.

Rights of indigenous peoples

- 5.32 As discussed further in Chapter 10, a UN draft declaration on the rights of indigenous peoples is currently under consideration. The principles that are being developed may have an important bearing on how human rights are seen or applied to indigenous peoples, particularly those who are minorities in their own countries. Potentially relevant topics in this discussion include group rights; cultural maintenance; and property rights, including intellectual property rights, rights affecting marine areas, and the protection of those rights from adverse development policies of state or non-state actors.³⁵

31 For example, the Inuit people of the Arctic Circle have brought a case against the United States to the Inter-American Commission on Human Rights, seeking relief from the impact of climate change allegedly resulting from United States' greenhouse gas emissions: Earthjustice "Inuit Human Rights and Climate Change" in Earthjustice < <http://www.earthjustice.org> > (accessed 2 June 2006). The Prime Minister of Tuvalu has proposed taking legal action against the United States for its greenhouse gas emissions: "Situation in Sinking Nation Scary, Says PM" in Islands Business (26 May 2006) < <http://www.islandsbusiness.com> > (accessed 26 May 2006).

32 Rebecca Shah "Development, the Right to" in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 91–93; Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2 ed, MFAT Wellington, 2003) 88–89; United Nations Development Programme *Human Development Report 2000: Human Rights and Human Development* (Oxford University Press, New York, 2000).

33 In the 2005 Human Development Index produced by the United Nations Development Programme, Papua New Guinea was ranked 137 out of 177 countries (down from 133 in 2004); the Solomon Islands 128 (down from 124); and Vanuatu 118 (up from 129). Fiji had also fallen from 81 to 92. The Human Development Index measures achievements in terms of life expectancy, educational attainment and adjusted real income: < <http://hdr.undp.org> > (accessed 2 June 2006).

34 UN Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (New York, 2005) 21. See also Secretariat of the Pacific Community *Pacific Islands Regional Millennium Development Goals Report 2004* (Noumea, 2004); and David Abbott and Steve Pollard *Hardship and Poverty in the Pacific* (Asian Development Bank, Manila, 2004).

35 Jérémie Gilbert "Indigenous Peoples' Rights" in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 175–178; Ministry of Foreign Affairs and Trade, above n 32, 120–124.

Rights of people with disabilities

- 5.33 The rights of people with disabilities to be free from barriers to their full participation in society are specifically recognised in a range of international human rights instruments, and work is under way on drafting a Convention on the Rights of Disabled People.³⁶ A plan for government action to bring about “an inclusive, barrier-free and rights-based society for persons with disabilities in Asia and the Pacific” has been set by the Biwako Millennium Framework.³⁷ There are provisions protecting the rights of disabled people in some Pacific constitutions, and international recognition of these rights may aid Pacific people with disabilities in overcoming disadvantage and discrimination.³⁸

Pacific participation in shaping emerging rights

- 5.34 Pacific peoples are not new to the task of engaging internationally and domestically in the development of rights. For example, Pacific countries were instrumental in challenging the legality of the threat or use of nuclear weapons before the International Court of Justice.³⁹ Similarly, the Cook Islands has become the first Pacific Island country to develop a rights-based disability policy and action plan.⁴⁰ Some Pacific peoples have also been active in seeking international recognition of the rights of indigenous peoples. By engaging actively with the process of defining such rights, Pacific Island states can help to ensure that the international human rights discourse is representative of a wider range of world-views and is relevant to the Pacific.

PACIFIC
UPTAKE OF
INTERNATIONAL
TREATIES

- 5.35 The level of ratification of international human rights treaties by Pacific countries is comparatively low, as shown in Appendix 5. One reason is the perception by many legislators of a conflict between human rights and customary practices. Another reason lies in a lack of the economic, technical, human and institutional capacity to participate in international standard-setting, pursue ratification and fulfil the resulting commitments at the national level. Other reasons include lack of information about the benefits of ratification, competing priorities for scarce government funds, and in some cases, a desire to avoid international scrutiny of domestic practices.⁴¹
- 5.36 Even when treaties have been ratified, Pacific Island countries often struggle to meet requirements for regular reporting, because of the significant commitment

36 Ministry of Foreign Affairs and Trade, above n 32, 125–128.

37 “Biwako Millennium Framework” (2002) in United Nations Economic and Social Commission for Asia and the Pacific <<http://www.unescap.org>> (accessed 3 June 2006).

38 Fiji Constitution, ss 38(2)(a), 38(5); Timor Leste Constitution, s 21; Constitution of the Autonomous Region of Bougainville, s 30; Draft Federal Constitution of the Solomon Islands, s 56. See also Graham McKinstry and Penelope Price “Review of Policy and Legislation on Disability in Pacific Island Countries” (Pacific Islands Forum Secretariat, Suva, 2004); Pacific Disability Forum “Submission [on the Pacific Plan] to the Pacific Islands Forum” (2005) <<http://www.pacificplan.org>> (accessed 6 July 2006); Jan Rensel and Alan Howard “The Place of Persons with Disabilities in Rotuman Society” (1997) 20(3) Pacific Studies 19–50.

39 Tuiloma Neroni Slade “Responding to Contemporary Forces Transforming the Pacific” in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, 2006) 228–229.

40 McKinstry and Price, above n 38, 59–63; “Cook Islands National Policy on Disability and Action Plan 2003–2008” <<http://www.worldenable.net>> (accessed 4 June 2006).

41 New Zealand Ministry of Foreign Affairs and Trade and New Zealand Agency for International Development, submission to the Law Commission, 20 June 2006.

of resources required.⁴² When they do report, there sometimes appears to be a lack of appreciation by treaty bodies of the realities of life in small Pacific Island states. Discussing these issues in depth is beyond the scope of this paper and many are currently being considered by other agencies, as mentioned in Chapter 16.

- 5.37 However, all independent Pacific countries have ratified the Convention on the Rights of the Child (CRC), and many have ratified CEDAW, both of which have major implications for custom in the Pacific. A major reason for the high ratification of these two conventions is the significant work of civil society and United Nations agencies.
- 5.38 There is already a strong constitutional base for protection of human rights in the Pacific, so this paper has focused on domestic human rights guarantees as the touchstone for considering custom and human rights issues. From a strategic point of view, there appears to be much benefit in focusing on existing human rights guarantees to further the cause of human rights in the Pacific.⁴³ First, constitutions can be seen as locally owned rather than imposed from outside, particularly if there has been widespread public discussion prior to the adoption of a constitution.⁴⁴ Second, constitutional rights are already part of the law of the country without further expenditure of resources on the adoption of international standards. Third, local confidence and capacity in engaging with human rights provisions can be built to provide a sound platform for subsequent engagement with the international framework.
- 5.39 This is not to suggest that Pacific nations should not ratify and implement the international human rights treaties, as ratification would help strengthen their existing commitment to those rights. However, debate regarding the adoption of human rights *or* custom is misdirected, as both are already part of the domestic law of most countries, as discussed in Chapter 3. The vital issue is how to ensure both can be applied in practice.

APPLICATION OF HUMAN RIGHTS ACROSS DIVERSE CULTURES

- 5.40 The second part of this chapter explores whether human rights apply across diverse cultures and how this debate has been reflected in the Pacific. One of the most long-running and, at times, heated debates about human rights concerns two competing views, commonly characterised as “universalism” and “cultural relativism”. Because the position taken in this debate lays the foundation of the entire approach to human rights, the debate itself warrants discussion. The literature on this subject is vast. Here we simply describe the nature of the debate and explore three aspects: an approach beyond polarisation, giving human rights cultural legitimacy, and the implications of the debate for the Pacific.

42 For example, Samoa ratified CEDAW in 1992 but produced its first CEDAW report in 2003.

43 For example, Samoa’s report on its obligations under the Convention on the Rights of the Child stated that there was a perception that human rights were a new subject introduced into the education system as a result of the ratification of CRC and CEDAW. “However, once they get the information on their human rights as stated in the Constitution, they then find it easier to accept the rights that are being taught in the context of CEDAW and CRC.” Committee on the Rights of the Child “Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Initial Report of States Parties Due in 1996: Samoa” (16 February 2006) CRC/C/WSM/1, para 191(b).

44 For instance, the Samoan Constitution was adopted after a plebiscite in 1961. For some in the Pacific, there is a preference for the phrase “constitutional rights” or “fundamental rights” instead of “human rights”, as “constitutional rights” emphasises that rights have a domestic source in the local constitution.

- 5.41 Although the terms can be used in different ways, we are concerned here with universalism and relativism as claims about the moral or ethical validity of human rights norms. Universalists maintain that human rights represent moral values that are absolute and applicable to all societies. Cultural relativists hold that it is not possible to make moral value judgements that are true for all cultures. They tend to see human rights (at least as currently reflected in the international human rights system) as based on Western liberal values which may not apply to non-Western societies. Characterised in this way, the debate is a polarised one between two forms of absolutism, but there is in practice an extensive middle ground. In recent years, there has been an increasing effort to move beyond absolutist positions.
- 5.42 Much of the focus of the universalism/relativism debate is on the application of human rights to non-Western countries and peoples. It is worth noting that both universalism and cultural relativism played roles in helping to end colonialism. Cultural relativism attacked the idea that certain societies had “primitive” cultures that were inferior to those of the West. Universalism showed up the double standards of empires that did not allow colonised peoples to enjoy the same rights and freedoms as the colonisers. Both began as essentially Western discourses, but there is now much non-Western literature on the subject, and Pacific peoples have an opportunity to find their own way of thinking about rights and moral values in a Pacific context.

Beyond polarisation

- 5.43 Both universalism and cultural relativism have a number of weaknesses, at least in their absolutist forms.⁴⁵ Relativists tend to ignore the fact that cultures and societies are not homogeneous and self-contained. All cultures have internal tensions, divisions, contradictions and power struggles. Cultures are also able to learn from each other. Furthermore, as human beings we have many things in common across all cultures.
- 5.44 By contrast, universalists tend to ignore the fact that, even when there is cross-cultural acceptance of particular rights or moral values, these need to be interpreted. Such interpretation occurs in a cultural context. For example, there may be agreement to abolish “cruel, inhuman or degrading treatment or punishment”, but the meaning of these terms is not self-evident and will be understood differently by different cultures.⁴⁶ Different societies will also give different priorities to particular rights and values and will deal differently with situations in which they conflict.
- 5.45 Another limitation of the universalism/relativism debate is a tendency on both sides to see culture, custom and rights as unchanging. In fact, however, culture continually changes. As Sally Engle Merry points out, “Culture is now understood as a process, developing and changing through actions and struggles

45 This analysis is based on Bhikhu Parekh “Pluralist Universalism and Human Rights” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 284–286.

46 Abdullahi Ahmed An-Na’im “Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment” in Abdullahi Ahmed An-Na’im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992) 19–43 [“Toward a Cross-Cultural Approach”].

over meaning”.⁴⁷ The international human rights framework has also been changing. There has been an increasing focus on economic, social and cultural rights; growing recognition of group rights; and the elaboration of “emerging” rights not specifically addressed in the UDHR. For instance, the notion of violence against women as a human rights violation entered the international human rights framework only in the 1990s.⁴⁸

5.46 We agree with Sally Engle Merry that:⁴⁹

Considering cultures as changing and interconnected, and rights as historically created and transnationally redefined by national and local actors, better describes the contemporary situation. It also reveals the impossibility of drawing sharp distinctions between culture and rights or seeing relativism and universalism as diametrically opposed and incompatible positions.

5.47 As rights and culture develop, the potential exists for tensions between them to be resolved. It then becomes a question of what type of approach is most likely to be successful in resolving such tensions in a way that maintains the integrity both of cultural systems and of the international human rights framework.

Human rights and cultural legitimacy

5.48 One potentially helpful way forward in the universalism/relativism debate comes from the Sudanese Muslim scholar Abdullahi An-Na‘im. He argues that for human rights to be effective, they must be seen as legitimate in terms of the norms and values of particular cultures. An-Na‘im suggests that, where there are tensions between culture and human rights:⁵⁰

[I]t is probable that an internal value or norm can be used to develop or supplement the cultural legitimacy of any given human right. The goal is to adopt an approach that realistically identifies the lack of cultural support for some human rights and then seeks ways to support and legitimize the particular human right in terms of the values, norms, and processes of change belonging to the relevant cultural tradition.

An example of this approach is the creation by Muslim women’s rights activists of a human rights education manual that relates human rights to Islamic scriptures and law, and to the experiences of Muslim women.⁵¹

5.49 An-Na‘im does not believe that cultural diversity makes universal human rights standards impossible. He argues for a process of internal dialogue, so that human rights can develop legitimacy within each cultural tradition, followed by cross-cultural dialogue “so that peoples of diverse cultural traditions can agree

47 Sally Engle Merry “Changing Rights, Changing Culture” in Jane K Cowan, Marie-Bénédicte Dembour and Richard A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, Cambridge, 2001) 31, 39.

48 Merry, above n 47, 38.

49 Merry, above n 47, 43.

50 Abdullahi Ahmed An-Na‘im “Problems of Universal Cultural Legitimacy for Human Rights” in Abdullahi Ahmed An-Na‘im and Francis M Deng (eds) *Human Rights in Africa: Cross-Cultural Perspectives* (The Brookings Institution, Washington, DC, 1990) 331, 339.

51 Celestine Nyamu-Musembi *Towards an Actor-Oriented Perspective on Human Rights* (Working Paper 169, Institute of Development Studies, Brighton, 2002) 9.

on the meaning, scope, and methods of implementing these rights”.⁵² He does not underestimate the difficulty of such a process, nor does he suggest that total agreement on the interpretation and application of standards can be achieved, but he believes that such dialogue can enhance the status of human rights and thereby aid their protection.⁵³

- 5.50 Since the drafting of the UDHR, a much wider range of countries and cultures have contributed to the evolution of human rights. As the Kenyan scholar Makau Mutua argues, the experiences of different cultures should be seen as contributing to a greater whole:⁵⁴

The process of the construction of universal human rights is analogous to the proverbial description of the elephant by blind people: each, based on their sense of feeling, offers a differing account. However, all the accounts paint a complete picture when put together. As a dynamic process, the creation of a valid conception of human rights must be universal. That is, the cultures and traditions of the world must, in effect, compare notes, negotiate positions and come to agreement over what constitutes human rights. Even after agreement, the doors must remain open for further inquiry, reformulation and revision.

- 5.51 A somewhat similar idea was expressed in the Bangkok Declaration produced by the Asian preparatory meeting for the World Conference on Human Rights in 1993. The Bangkok Declaration stated that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”⁵⁵ This statement was controversial at the time, being seen in the West as part of an attempt by some Asian states to weaken human rights in the name of protecting “Asian values”. However, a recognition that universal human rights are evolving and that this evolution must take account of cultural diversity need not involve a weakening of human rights. On the contrary, cross-cultural dialogue and enhanced cultural legitimacy are likely to strengthen commitment to human rights in the long run.
- 5.52 Despite the concerns about universalism reflected in the Bangkok Declaration, and the equally strong concerns of Western states about cultural relativism, 172 states at the World Conference on Human Rights held in Vienna in 1993 were able to achieve consensus. They affirmed that the universal nature of human rights and fundamental freedoms was beyond question. The Vienna Declaration also agreed that the international community should treat all human rights equally, meaning that the individual rights, and civil and political rights,

52 “Toward a Cross-Cultural Approach”, above n 46, 21.

53 “Toward a Cross-Cultural Approach”, above n 46, 38–39.

54 Makau Mutua *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, Philadelphia, 2002) 74, quoted in Elise Huffer “Baseline Survey on the Status of Pacific Island Countries’ Ratification of Main Human Rights Instruments and Their Possible Reservations, Traditional Governance Practices That Could Support Human Rights, and the Work of Other Agencies and Organisations in Promoting Human Rights in the Pacific” (report for the Governance and Sustainable Livelihoods Program, United Nations Development Programme, Suva, Fiji, August–September 2003) 32.

55 “Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok, 29 March–2 April 1993)”, quoted in Christina M Cerna “Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts” (1994) 16 *Human Rights Quarterly* 740, 743.

more favoured in the Western liberal tradition should not be given priority over economic, social and cultural rights, and collective rights, to which other traditions attach greater importance. It also recognised that national and regional particularities and cultural backgrounds needed to be borne in mind.⁵⁶

- 5.53 The Vienna Declaration can therefore be seen as a key achievement in the search for cross-cultural consensus on human rights, though it has certainly not removed the need for continued cross-cultural dialogue.

Universalism and relativism in the Pacific

- 5.54 Like other parts of the world, the Pacific has also seen debates over universalism and cultural relativism. Human rights advocates express concern that “cultural relativism, under the guise of ‘Pacific values’, is used as an argument against human rights”.⁵⁷ On the other hand, Konai Helu Thaman sees value in human rights but believes that Pacific Island countries may have been deterred from entering international discussions on human rights by the portrayal of these rights as “self-evident, universal, culture-free and gender neutral”.⁵⁸ In fact, she argues, “most international covenants are based on Western, liberal beliefs and values, and ... are embedded in a particular cultural agenda, where indigenous peoples and their assumptions and values have been disregarded and marginalised.”

- 5.55 The polarised debate between universalism and relativism can be avoided by looking for common ground between Pacific customs and traditions and human rights and by applying a contextual approach to the application of human rights. Rather than abstract arguments, it is more productive to look for context-specific accommodations to suit particular cases or circumstances.

- 5.56 Thaman writes that the issue for Pacific peoples:⁵⁹

[M]ay not lie entirely in the suggestion that universal human rights and standards are alien to Pacific cultural traditions but rather in the need to recognise and value different cultural perspectives of human rights and to accept that Pacific cultures are, like all cultures, complex. Pacific cultures change over time as a result of both internal and external forces. Pacific peoples have been learning, adopting and adapting new knowledge, skills and values for over a hundred years, so they cannot consistently reject something claiming that it is not part of their cultural heritage. If Christianity can be adopted as a Pacific religion, why not human rights?

- 5.57 As discussed in Chapter 4, the integration of Christianity into Pacific cultures suggests that the Pacific need not go through a divisive debate on the universality versus the cultural specificity of human rights. Ratu Joni Madraiwiwi has noted

56 UN General Assembly, note above n 11.

57 P Imrana Jalal “Using Rights-Based Programming Principles to Claim Rights: The Regional Rights Resource Team (RRRT) Project in the Pacific Islands” (2005) 5 in Pacific Regional Rights Resource Team < <http://www.rrrt.org> > (accessed 25 August 2006).

58 Konai Helu Thaman “A Pacific Island Perspective of Collective Human Rights” in Nin Tomas (ed) *Collective Human Rights of Pacific Peoples* (International Research Unit for Maori and Indigenous Education, University of Auckland, Auckland, 1998) 1, 2–3.

59 Thaman, above 58, 8.

that an approach that forces people to take sides between human rights and tradition will be counterproductive, as it will only cause resentment.⁶⁰ It is surely better to trust to the Pacific genius for harmonisation and synthesis, while accepting that this process will take time.

60 Ratu Joni Madraiwiwi “Human Rights and Tradition” (Speech to the Fifth Annual Pacific Human Rights Awards, Suva, Fiji, 25 February 2005).

Chapter 6

Harmonisation

6.1 In this chapter we explore values shared by custom law and human rights, perceived conceptual conflicts between them, and ways to achieve harmonisation. In particular, we endorse harmonising strategies already initiated in the Pacific. Harmonisation draws on the values of custom and human rights to enhance custom, advance the application of human rights, and promote a Pacific jurisprudence.¹

COMMON VALUES

6.2 Custom law and human rights have much in common in terms of their basic values or beliefs, which provide common ground on which the debate on human rights can be built. Human rights have the capacity to speak to all people in their own cultural terms, while custom law is able to accommodate alternative perspectives.²

6.3 The Pacific concept of all persons as having some divine essence and dignity, as discussed in Chapter 4, is probably the most central Pacific value, since many other values appear to flow on from that view. The concept of the dignity of all persons is also central to human rights law.

6.4 As with all societies, there is room to question how well the value of respecting the dignity of all persons is maintained in the Pacific, but the point for the present is that it is seen as a value or ideal to be aspired to. This value is reinforced by others mentioned in Chapter 4, values of respect, love, care and sharing, co-operation, mutuality, humility, generosity and community decision-making.

1 The importance and practicality of integrating custom and other sources of law has been considered by many scholars: Elise Huffer and Ropate Qalo “Have We Been Thinking Upside-Down? The Contemporary Emergence of Pacific Theoretical Thought” (2004) 16 *The Contemporary Pacific* 87; Jennifer Corrin Care “Cultures in Conflict: The Role of the Common Law in the South Pacific” (2002) 6 *Journal of South Pacific Law* < <http://law.usp.ac.fj/jspl> > (accessed 31 May 2005) [“Cultures in Conflict”]; Jennifer Corrin Care “Conflict between Customary Law and Human Rights in the South Pacific” (Paper presented to the 12th Commonwealth Law Conference, Kuala Lumpur, September 1999); Alexander P Danne “Customary and Indigenous Law in Transitional Post-Conflict States: A South Sudanese Case Study” (2004) 30 *Monash University Law Review* 199; Sinclair Dinnen “Restorative Justice in the Pacific Islands: An Introduction” in Sinclair Dinnen with Anita Jowitt and Tess Newton Cain (eds) *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, Canberra, 2003) 1; Miranda Forsyth “Beyond Case Law: Kastom and Courts in Vanuatu” (2004) 35 *Victoria University of Wellington Law Review* 427; Guy Powles “Customary Legal Systems and the Pacific Island State: The Search for Workable Relationships” (2003) 2 *New Pacific* 263.

2 Jean G Zorn “Common Law Jurisprudence and Customary Law” in R W James and I Fraser (eds) *Legal Issues in a Developing Society* (Faculty of Law, University of PNG, Hong Kong, 1992) 111, referring to the approach taken by the National Court in *PNG Ready Mixed Concrete Pty Ltd v The State* [1981] PNGLR 396.

- 6.5 Although status is very important in many Pacific societies, distributive equality or egalitarianism is also important.³ As an ideal, everyone should contribute to the community and everyone should benefit. In practice, some may benefit more than others, especially today, but the values that all should benefit and that all should be cared for are part of Pacific beliefs.
- 6.6 The preamble of the UDHR refers to the “equal rights” of all people. “Equal rights” and the “equal outcomes” of distributive equality are obviously different, but both express a caring concern for all persons, whether those persons are all the members of the human family, as in the UDHR, or all persons of a particular tribe or community, as in custom law.
- 6.7 Other values set out in the UDHR also have Pacific counterparts. For instance, “freedom of speech and belief” (discussed further in Chapter 9) was evident in robust debate and community participation in decision-making in the Pacific. However, in parts of Polynesia at least, constraints governed the following aspects of debate: who might speak; the manner of speech, which was to be respectful; and the acceptance of authority, of family heads for example. While the extent to which the value of free speech is maintained in Pacific societies is open to debate, the fact that other societies also maintain constraints on free speech must be borne in mind. These constraints restrict what can be said, when, and by whom, as with laws relating to defamation, sedition and contempt. There are also restrictions on who can speak at certain places. For example, there are age and residency limits for parliamentary candidates and limits as to who is protected by parliamentary privilege.
- 6.8 Historically, Pacific respect for other beliefs was evident from the ready adoption of Christianity in the 19th century, but problems exist now as modern policies limit the introduction of new religious groups or faiths in the interests of communal unity and integrity. Pacific peoples also sought freedom from fear and want, a goal expressed in the UDHR. As discussed in Chapter 4, protocols for gift-exchange between kin-groups and sharing within communities are consistent with those values.
- 6.9 The dignity of all persons, caring concern for all persons, robust debate, respect for other beliefs and the desire to free people from fear and want point to aspirations shared by custom law and human rights law. These areas of commonality provide a basis on which custom and human rights can work together.

PERCEIVED
CONCEPTUAL
CONFLICTS

- 6.10 We think any conceptual conflict between custom law and human rights is exaggerated. Most prominently, the human rights framework’s focus on individual rights is said to conflict with the customary focus on the individual’s duties to the group. However, human rights are also concerned with groups. In addition, with every right there is a duty and with every duty a right. Whether more stress is given to one or the other depends on the problem in question.

3 Elise Huffer “Establishing Parallels: Pacific Political Philosophy and the Ethic of Care” (Paper presented to 9th Triennial South Pacific Association for Commonwealth Literature and Language (SPACLALS) Conference, National University of Samoa, Apia, 24–26 November 2004).

- 6.11 Individual rights are raised in human rights law substantially in the context of protecting the individual from an overbearing state, but there is no denying that individuals also have certain duties to the state and community, as reflected in article 29(1) of the UDHR. While some constitutions emphasising duties are seen as anti-democratic, few would dispute the following duties in a democratic society: a duty of loyalty to the state, a duty to recognise its just claims, and a duty to observe constitutionally-valid laws.⁴ Custom law stresses duties to the group in an environment where unity was necessary for survival, but there is no denying that each member had rights to share in the benefits of group membership. Rights and duties represent two sides of the same coin: an individual's relationship to society encompasses both.
- 6.12 In addition, group rights are acknowledged in human rights law, for example in article 27 of the International Covenant on Civil and Political Rights. The problem is rather that group rights are still developing, as evidenced by the debates surrounding the Draft Declaration on the Rights of Indigenous Peoples. Accordingly, the issues are about the scope of group rights rather than their existence.⁵ It is also increasingly recognised that human rights must meet the needs of different groups according to their diverse situations. On the fiftieth anniversary of the UDHR, United Nations Secretary-General Kofi Annan affirmed that human rights allow scope for diversity, stating that:⁶
- “There is no single model of democracy or of human rights or of cultural expression for all the world.”
 - “The Universal Declaration of Human Rights, far from insisting on uniformity, is the basic condition for global diversity.”
 - “Diversity no less than dignity is essential to the human condition.”
- 6.13 Many Pacific Island constitutions or statutes make special provision for customary groups. There are also general provisions, as in Fiji, where the Constitution states that “the rights of all individuals, communities *and groups* are fully respected”.⁷ As we discuss further in Chapter 10, the Fiji Constitution embodies a delicate balance between guaranteeing the human rights of all individuals and communities and addressing the particular concerns of the indigenous people.

4 See International Council on Human Rights Policy *Taking Duties Seriously: Individual Duties in Human Rights Law. A Commentary* (Versoix, Switzerland, 1999).

5 The scope of group cultural rights is considered by Rodolfo Stavenhagen in “Cultural Rights: A Social Science Perspective” in Halina Nie'c (ed) *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* (UNESCO Publishing, Paris, 1998). For the growing recognition of indigenous groups, see Jeremy Firestone, Jonathon Lilley and Isabel Torres de Noronha “Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International Law and Comparative Environmental Law” (2005) 20 *American University International Law Review* 219.

6 United Nations Secretary-General “Statement on the 50th Anniversary Year of the Universal Declaration of Human Rights – Universal Declaration of Human Rights Illuminates Global Pluralism and Diversity” (10 December 1997) Press Release, SG/SM/6419 OBV/34.

7 Fiji Constitution, s 6 (emphasis added). The Fiji Constitutional Review Commission described ethnic groups as “groups of people within the state who by reason of their descent, religion, place of origin or other shared attributes or beliefs, regard themselves as having a common identity”. Fiji Constitution Review Commission *Towards a United Future* (Parliamentary Paper No 34/96, Government Printer, Suva, 1996) 32.

- 6.14 An emphasis on individual rights might at times overshadow the existence of a group interest. We nevertheless contend that a legitimate group interest is still protected. For example, focus on the equal rights of all persons can readily overshadow (but does not deny) the right of a group to enjoy and so maintain its tradition of respect for authority.

ACHIEVING HARMONISATION

- 6.15 We describe three approaches that advance harmonisation: identifying customary values (as opposed to practices), relating customary values to other relevant values and reviewing customary practices in the light of those values. We consider how these endeavours serve also to develop an indigenous jurisprudence.

Identifying values

- 6.16 A starting point for harmonisation is to identify the key values of particular customary communities. There are precedents for this identification in the Pacific. In a schoolbook on civic education, Transparency International Vanuatu proposes that students discover custom, Christian and civic (or human rights) values to determine the values on which Vanuatu is founded.⁸ In research for the Foundation of the Peoples of the South Pacific International (FSPI), villagers were canvassed on customary values in developing an understanding of good governance and leadership principles.⁹ A search for customary values was also undertaken by the International Committee of the Red Cross (ICRC) Regional Delegation for the Pacific in order to connect international humanitarian law with Pacific peoples.¹⁰
- 6.17 In the foreword to the resulting document, Dr Langi Kavaliku states:

Pacific societies, like all societies, have over the centuries developed norms of behaviour and rituals for trying to avoid conflict, regulate conflict and settle disputes peacefully. Across the Pacific there are many traditions dealing with human rights and communal rights. The ICRC needs to understand that any dialogue in this area must not be done within the framework of ‘charity’ – pushing well meaning laws and concepts with standards seemingly designed beyond our shores. Rather this work should be done with respect between cultures and peoples. ICRC and Pacific societies need to understand each other and must work together. ICRC might like to consider working with us in ‘The Pacific Way’ a concept which is based on the acceptance of differences, but with an underlying awareness of the need to find unity in consensus.

- 6.18 Carolyn Graydon, writing about Timor Leste, suggests that the best way forward for sustainable human rights protection is to use entrenched human rights values already existing in the culture as a basis for human rights campaigns and to influence change in community justice bodies.¹¹

8 Transparency International Vanuatu *Civic Education Year 7, 8 & 9*.

9 Foundation of the Peoples of the South Pacific International *RETA 6065: Assessing Community Perspectives on Governance in the Pacific* (report to the Asian Development Bank, Suva, 2003) < <http://www.fspi.org.fj> > (accessed 5 September 2006).

10 ICRC Regional Delegation for the Pacific *Even Wars Have Limits: Connecting IHL with the Pacific Way* (draft paper, June 2005).

11 Carolyn Graydon “Local Justice Systems in Timor-Leste: Washed up, or watch this space?” (2005) 68 *Development Bulletin* 66–70.

- 6.19 Adopting a similar approach, Dame Carol Kidu of Papua New Guinea recently proposed that customary ways of governing formed a firm foundation for a modern democracy. The challenge, as she sees it, is to find the similarities between customary systems and democracy and from there develop a modern Melanesian democracy, using the principles of the British-derived Westminster democratic tradition as guidelines.¹²
- 6.20 Values so discerned provide a foundation not only for educational strategies but also for political and legal strategies. For example, values may be written into statutes. In illustration, New Zealand’s Resource Management Act 1991 states that the relationship that Maori have to their ancestral lands is a matter of national importance and that a number of customary concepts must also play a role in any planning decisions.¹³ “Aloha-spirit”, which describes a fundamental value for native Hawai’ians, is now recognised in statutes that direct the legislature, executive and judiciary in performing their functions.¹⁴
- 6.21 It is to be noted that the values that are written into statutes or constitutions do not necessarily derive from pre-European custom. For example, in Papua New Guinea, the Constitution describes Christian principles as foundational. The court therefore used Christian perceptions of human dignity as a standard for deciding whether the minimum punishments established by proposed legislation were inhuman.¹⁵
- 6.22 In addition, whether or not customary values are spelled out in statutes, judges may draw on them. For example in Samoa, the court evoked the value of maintaining peace and harmony in villages and the duties of leaders in that regard to remind leaders of the need for religious tolerance.¹⁶

Relating values

- 6.23 After identifying customary values, a second step in achieving harmonisation is to relate those values to common law principles and, where appropriate, to the values of human rights. Court decisions that illustrate points by relating customary values to other relevant values and principles gain popular legitimacy. Relating values also enables human rights to be introduced in ways that are relevant to Pacific peoples and legitimate in terms of the peoples’ own norms.

12 UNDP Solomon Islands Office “Women Not Represented in Pacific Parliaments: Says Carol Kidu” (2 June 2006) Press Release < <http://lyris.spc.int> > (accessed 31 August 2006).

13 Resource Management Act 1991, ss 6(e), 7(a), 8.

14 Hawaiian Revised Statutes, ss 5 – 7.5.

15 See *Re Minimum Penalties Legislation* [1984] PNGLR 314 (2 November 1984) < www.paclii.org > (accessed 11 July 2005). In 1983, three acts were passed imposing minimum sentences. It was argued that these minimum punishments were disproportionate to the crimes (causing disturbance on a licensed premises; rape). In examining the effect of section 36(1) of the Constitution, which prohibited punishment of a cruel or inhuman nature or one that was “inconsistent with the inherent dignity of the human person”, Kapi DCJ aligned dignity with the Christian values that were incorporated in the Preamble to the Constitution as they “are a foundation upon which our nation has been built”.

16 *Lafaialii v Attorney-General* [2003] WSSC 8 (24 April 2003 Sapolu CJ) < www.paclii.org > (accessed 18 October 2005).

6.24 For example, ubuntu is used in Africa to explain the concept of human dignity and associated human rights values.¹⁷ Ubuntu describes an African world view and code of ethics that seeks to capture the essence of what it means to be human. The term is used to educate people about human rights and to legitimise them. As the FSPI's research among villagers shows, the strategy of aligning customary values with other norms, like those for good governance, has also been adopted in the Pacific. We also considered in Chapter 4 how a leaf may be taken from the record of Christian missions: their success has been attributed in part to the parallels they drew between customary and Christian teachings.

Reviewing practices

6.25 A third harmonising undertaking is to review customary practices in light of ancient values and social changes, as well as human rights. Some practices no longer fit with the underlying values or goals. Reviewing practices also provides a way to manage conflicts with human rights and enhance custom law at the same time. For example, reference to a customary value of respecting women and a comparison of women's customary status and their often-diminished status today provide a test for the usefulness of some modern practices.

6.26 Human rights values assist in making change, not to displace custom but to help perfect the match between customary values and customary practices. We see potential for human rights to enhance custom, just as customary values enable communities to internalise human rights.

Developing an indigenous jurisprudence

6.27 Finally, the harmonisation of customary values and human rights enables the courts to develop a jurisprudence that reflects Pacific society. As we have said, human rights and custom are both sources of law in most Pacific constitutions. In Chapter 12, we will establish that custom is a source of legal principle even if it is not expressly provided for and that it can be adapted to meet modern needs.¹⁸ It has been a useful tool to promote development, constrain corruption and maintain social equity.¹⁹

6.28 An opportunity to develop a Pacific jurisprudence would arise when, for example, a judge finds that a particular lapse in managing community or national funds is inconsistent with fiduciary obligations. The judge could note that the lapse is also inconsistent with customary stewardship values and how such lapses weaken community cohesion. Oral traditions may also be invoked to describe, for example, the responsibilities of those with children in their care. When a judge invokes customary values, the law takes on a larger dimension, one that communities can more readily understand and identify with.

17 Tim Murithi "Ubuntu and Human Rights" in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 341–342. Among other values, ubuntu emphasises the importance of hospitality, generosity and respect for all members of the community.

18 See, for example, Kenneth Brown "Customary Law in the Pacific: An Endangered Species" (1999) 3 *Journal of South Pacific Law* < <http://www.vanuatu.usp.ac.fj> > (accessed 21 February 2005).

19 For example, Huffer and Qalo, above n 1, 87.

- 6.29 The general castigation of nepotism, or the use of public funds to favour family members, can needlessly put down the customary value that persons should provide for their extended families. In a harmonising approach, a judge would note the role of the customary value, while setting out the reasons why those who hold public office must promote the national interest instead.
- 6.30 Criminal proceedings in the Tongan Magistrates' Court illustrate the evocation of customary values, notwithstanding that the Tongan constitution does not provide for custom. While the proceedings began and ended in standard Western form, during the hearing, the charges and issues were framed and discussed in terms of Tongan custom and the obligations arising from significant village relationships.²⁰
- 6.31 Similarly, judges may develop principles to ensure fair process in community justice bodies. They may note the specialist skills of these bodies and the advantages when communities take responsibility to keep local order, while proposing procedures to ensure that parties are properly heard. Where fair process or deterrence are not in issue, judges may also support customary outcomes that provide better for victims than state imprisonment. Supporting customary outcomes ties in with international concerns to respect the outcomes of restorative justice and mediation or arbitration and recognises the Pacific experience in community dispute resolution.
- 6.32 Courts must also consider the extent to which imported common law should apply to local circumstances. Local circumstances may call for a different approach to the duties of trustees, the assessment of reasonableness or the best interests of a child, for example.²¹

The approach to harmonisation

- 6.33 Harmonising requires respect for customary values and processes. Memories may remain of outside domination prior to independence, when Pacific cultures were judged by the mores of others and made to change. The lesson is that societies must be in control of change themselves. We suggest a useful starting point is to seek a better understanding of the local culture and to pay respect where respect is due.
- 6.34 In developing the principles that determine when the courts or legislatures intervene in customary decisions, it should be remembered that changes to custom law come best from the people whose law it is, a view discussed in Chapter 4. Courts should be wary of intervening where communities are able to handle matters in a manner which is consistent both with custom and human rights. Where intervention is necessary to protect human rights, the court should strive to align those human rights with any consistent customary values to encourage greater expression of those values.

20 Susan U Philips "The Organization of Ideological Diversity in Discourse: Modern and Neo-Traditional Visions of the Tongan State" (2004) 31 *American Ethnologist* 231.

21 See "Cultures in Conflict", above n 1.

6.35 However, we recognise the limits to a harmonising approach and that judgement is required. We do not underestimate the difficulties of harmonising custom and human rights, and in the next part of this study paper we examine some of the “hard issues” that involve significant challenges for a harmonising approach.

Part 2

THE HARD ISSUES



Chapter 7

Women's Rights

- 7.1 We explore the rights of women because modern custom and human rights conspicuously diverge over the position of women. In this chapter we outline our view of the issues, summarise women's rights in international and domestic law, and consider briefly the historical forces that have shaped the position of Pacific women. Discussion follows on particular issues concerning the interface between custom and human rights, the role of courts, and the potential that custom might change to accommodate women's rights.

OUR VIEW

- 7.2 It is clear that Pacific women have real cause to consider their treatment under custom law to be unjust. It is frequently claimed that respect for women is built into Pacific custom, which may once have been true, but proper respect for women is often not apparent in customary practices today. The result is an emerging conflict. While some Pacific people regard human rights as a threat to their traditional way of life, growing numbers of women look to human rights for relief. To portray this as an inherent conflict between custom and human rights is unhelpful to either view. Human rights can enhance customary views about women, just as customary values can provide a foundation on which communities can internalise the importance of equality for women.
- 7.3 As we discussed in Chapter 4, custom has already changed enormously in the modern era and is no less capable of changing than Western law. Women in all societies face a battle for equality, and in many societies the acknowledgement of women's rights is very recent. Different societies will also find their own "paths to substantive equality" between men and women.¹ The main obstacle to gender equality is not law, custom law or otherwise, but people.² Where the law creates injustice, the law can be changed, provided there is the will to acknowledge injustice and admit the need for change. However, throughout the world, the gender debate has exposed the resistance to change from those who most benefit from the status quo. That resistance and the perception at times that human rights are "women's business" appear to be major factors inhibiting the development of both custom law and human rights in the Pacific.

1 Sian Elias, Chief Justice of New Zealand "Vindicating the Rights of Women" (paper presented at the Pacific Judges' Conference, Port Vila, Vanuatu, July 2005).

2 The term "gender" refers to the social roles of men and women, as distinct from their biological sex.

International human rights instruments

- 7.4 Starting with the Universal Declaration on Human Rights, the international human rights framework has always been clear that discrimination on the basis of sex is contrary to human rights.³ The preamble to the UDHR speaks of “the equal rights of men and women”, and this guarantee of equality of rights can be found also in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴
- 7.5 The key international instrument relating to the rights of women is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which entered into force in 1981. CEDAW goes beyond simply guaranteeing non-discrimination, and requires states to take positive steps “to ensure the full development and advancement of women”, so as to guarantee them the exercise of their rights on a basis of equality with men.⁵ It requires that states “take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*”.⁶
- 7.6 CEDAW also requires states to take measures to modify or abolish discriminatory “laws, regulations, *customs and practices*” and to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.⁷ The far-reaching nature of such provisions has seen CEDAW described as “revolutionary” and “ambitious”.⁸
- 7.7 There has been a major focus on ratification of CEDAW by Pacific Island states, with Pacific women’s groups, external aid donors and United Nations agencies all encouraging its ratification (see Appendix 5).

Specific rights of women protected in international instruments

- 7.8 In addition to general provisions for equality of rights with men and freedom from discrimination, CEDAW and other international human rights instruments

3 For a general discussion on the international framework for the protection of women’s rights, see Rebecca Cook and Simone Cusack “Women’s Rights” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 366–369; Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2 ed, Wellington, 2003) 98–103.

4 UDHR, preamble and art 2; ICCPR, arts 2(1), 3; ICESCR, arts 2(2), 3.

5 CEDAW, art 3.

6 CEDAW, art 2(e) (emphasis added).

7 CEDAW, arts 2(f) (emphasis added) and 5(a).

8 Feride Acar “The Convention on the Elimination of All Forms of Discrimination against Women” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 58–59.

guarantee specific rights to women. These rights include equal participation in political and public life,⁹ equality before the law and the equal protection of the law.¹⁰

- 7.9 Violence against women is not specifically addressed in CEDAW, but the United Nations Committee on the Elimination of Discrimination Against Women considers that such violence is included in the general prohibition on discrimination against women. The UN General Assembly has also adopted a non-binding Declaration on the Elimination of Violence Against Women. Recognition of domestic violence against women as a human rights violation takes human rights into the domestic sphere and requires the state to take action against abuses by private individuals and groups.¹¹
- 7.10 Another area in which the protection of women's rights takes human rights into what is often considered to be the private sphere, and may bring human rights into conflict with custom, is marriage and the family. International human rights instruments guarantee the rights of women and men to:
- enter into marriage only by the free and full consent of both parties;¹²
 - the same rights and responsibilities during marriage and at its dissolution;¹³
 - the same rights and responsibilities as parents;¹⁴ and
 - the same rights for both spouses in respect of property.¹⁵

In addition, the betrothal and marriage of children is prohibited, and states are required to specify a minimum age for marriage.¹⁶

Women's rights in Pacific constitutions

- 7.11 Many Pacific constitutions prohibit discrimination on the grounds of sex. However, some constitutions do not include sex or gender as a prohibited ground of discrimination, although international obligations under CEDAW may still be applied to temper such discrimination.¹⁷ The Constitution of the Solomon Islands, while generally prohibiting the passing of any law that discriminates on the basis of sex, exempts any law that provides for the application of customary law or personal law (such as that regarding adoption, marriage, divorce, burial or devolution of property upon death).¹⁸ Such provisions allow for the

9 CEDAW, art 7.

10 ICCPR, art 26; CEDAW, art 15.

11 Audrey Guichon "Violence Against Women: Domestic Violence" in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 358–360; Ministry of Foreign Affairs and Trade, above n 3, 103.

12 ICESCR, art 10(1); ICCPR, art 23(3); CEDAW, art 16(b).

13 ICCPR, art 23(4); CEDAW, art 16(c).

14 CEDAW, art 16(d).

15 CEDAW, art 16(h).

16 CEDAW, art 16(2).

17 Kiribati Constitution, s 15(3); Tuvalu Constitution, s 27(1). Kiribati and Tuvalu do specify sex in constitutional provisions guaranteeing certain fundamental rights and freedoms to all persons: Kiribati Constitution, s 3; Tuvalu Constitution, s 11(1).

18 Solomon Islands Constitution, art 15(4), 15(5)(c) and (d). Some other constitutions also provide exemptions from anti-discrimination provisions for certain personal law matters: Fiji Constitution, s 38(7)(e); Palau Constitution, art IV, s 5.

application of custom law that discriminates against women. Some constitutions provide that government action for the benefit of women and other disadvantaged groups will not be deemed discriminatory.¹⁹ Some recent constitutional documents also contain positive provisions in relation to the role and rights of women, gender equality and women's representation.²⁰

HISTORICAL ANALYSIS

Pre-contact custom

- 7.12 The diversity of traditional roles for women and men across the Pacific makes it impossible to generalise about the position of women before contact with Europeans. Substantial changes to the practice of custom law also make it difficult to determine its pre-contact application, as we considered in Chapter 4. The problem is compounded by the loss of knowledge and the resulting reliance on the literature of early missionaries, colonists and ethnographers, whose works reflect a European male interpretation of traditional practices. These writings, which are used today to justify the male domination of customary leadership roles, usually ignored women's perspectives and the importance of women's roles.²¹ Jocelyn Linnekin contends, for example, that the significance of women's manufacture of valuables for ceremonial exchange in Polynesian cultures was poorly appreciated or was ignored.²² Similar inattention was paid to women's "unique and important roles in their own politics and ceremonies" in other parts of the Pacific.²³
- 7.13 Linnekin suggests that complementary roles "in economics, cultural symbolism and ritual status" were characteristic of Polynesian societies and may be a feature common to the gender division of labour in all Pacific societies.²⁴ The maintenance of distinct gender roles is not in itself indicative of disrespect for women in a society where all persons played a role in contributing to the collective welfare in a communal or tribal unit. As a result, it is sometimes contended that traditionally men and women were separate but equal, each having an authority of their own and each being equally valued and respected.
- 7.14 Linnekin concludes that "there is no consensus on women's 'status' either before or after contact" and that "there is and was tremendous diversity in gender roles and ideologies".²⁵ What is clear, however, is that important changes to gender

19 Vanuatu Constitution, s 5(1)(k); Papua New Guinea Constitution, s 55(2).

20 Constitution of the Autonomous Region of Bougainville, arts 19, 28; Republic of Indonesia, Law No 21 of 2001 on Special Autonomy for the Papua Province, art 47; Timor Leste Constitution, s 17; Draft Federal Constitution of Solomon Islands, art 54.

21 Jean G Zorn *Women, Custom and International Law in the Pacific* (Occasional Paper 5, University of the South Pacific, Port Vila, 2000) 11–12 [*Women, Custom and International Law in the Pacific*]; Catherine Wohlan "Aboriginal Women's Interest in Customary Law Recognition" in Law Reform Commission of Western Australia *Aboriginal Customary Laws: Background Papers* (LRCWA No 94, Perth, 2006) 507, 515–516.

22 Jocelyn Linnekin "Gender Division of Labour" in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1997) 105, 109–111 ["Gender Division of Labour"].

23 *Women, Custom and International Law in the Pacific*, above n 21, 12.

24 "Gender Division of Labour", above n 22, 112.

25 Jocelyn Linnekin "The Ideological World Remade" in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1997) 397, 425; see also "Gender Division of Labour", above n 22, 105–113.

relations took place following contact with Europeans, and that much that is today considered customary was shaped by the influences of Christianity and colonialism.

The impact of Christianity

- 7.15 As already noted, the acceptance of Christianity in the Pacific and its integration with Pacific culture and custom is strong evidence of the capacity of custom to adopt and adapt. Some brutal practices were rapidly abandoned, including some practices affecting women, and Christian ideas and values, such as the equality of all in the sight of God, have provided a strong foundation for women's human rights claims. On the other hand, missionaries taught that wives should submit to their husbands, and Biblical texts are cited today to justify gender inequality as divinely ordained.²⁶ Instruction at Christian missions domesticated women and diminished their role, although the missions also provided education, which was valued by many women as well as men.²⁷
- 7.16 Even the introduction of surnames affected women, since they had to take the name of their father or husband, while "Christian" names deprived women of the multiple identities and names that traditionally expressed their authority or rank.²⁸ In Melanesia, missionary pressure led to the abandonment of separate "men's houses", so that families could live together, creating conditions where domestic violence could flourish.²⁹ Christian morality also deprived women of their earlier autonomy in sexuality and reproduction.³⁰ However, the effects of Christianity varied from place to place. For example, Christianity is credited with according women recognition as ariki (chiefs) and as landowners in the Cook Islands.³¹
- 7.17 More recently, some churches have produced passionate advocates for women's equality, and their theological writings reflect a strong association with the women's movement.³² Nevertheless, women's absence from authority positions in most churches today, and their confinement to subordinate roles are telling indicators of the missionaries' legacy for women.

The impact of colonialism

- 7.18 In contrast to Christianity, which is widely venerated in the Pacific and accepted as intrinsic to current cultural identity, colonialism is commonly viewed as

26 See Roselyn Tor and Anthea Toka *Gender, Kastom and Domestic Violence: A Research on the Historical Trend, Extent and Impact of Domestic Violence in Vanuatu* (Department of Women's Affairs Vanuatu, Port Vila, 2005) 38, 39.

27 Penelope Schoeffel "The Origins and Development of Women's Associations in Western Samoa 1830-1977" (1977) 3 *Journal of Pacific Studies* 1; 'Atu 'o Hakautapu Emberson-Bain *Women in Tonga* (Asian Development Bank, Manila, 1998) 27 [*Women in Tonga*]; Margaret Jolly "Beyond the Horizon? Nationalism, Feminisms, and Globalisation in the Pacific" (2005) 52 *Ethnohistory* 137, 158 ["Beyond the Horizon?"].

28 Tor and Toka, above n 26, 37.

29 *Women, Custom and International Law in the Pacific*, above n 21, 13.

30 *Women in Tonga*, above n 27, 66.

31 Margaret James "The Cook Islands: Approaching Equality" in Institute of Pacific Studies (ed) *Land Rights of Pacific Women* (Institute of Pacific Studies, University of the South Pacific, Suva, 1986) 111, 113-114.

32 Keiti Ann Kanongata'a "Pacific Women and Theology" (1995) 13 *Pacific Journal of Theology* 17-33.

foreign exploitation. Under colonialism, men's status and power increased in some respects relative to that of women. In some places, men became income-earners through wage labour and cash-cropping, while women managed family responsibilities and unpaid, low-status subsistence food production.

- 7.19 For their own political ends, as noted previously in Chapter 4, colonial administrations also modified, institutionalised or created chiefly systems. Lissant Bolton observes that under colonial rule, only men could be chiefs or assessors. She notes that before then, men had to discuss issues with women, since they depended on them for resources.³³ Men no longer needed to do so in their new roles.
- 7.20 In parts of the Pacific, colonialism also changed land laws to favour men, introducing or institutionalising forms of restricted patrilineal succession, and thereby disinheriting women or increasing their dependence.³⁴ Gender discrimination also featured in colonial family laws and in labour laws that limited women's work or provided for lower wages for women. Some labour laws still discriminate today.³⁵ Similarly, colonial education trained women for lower-paid service roles, such as teaching, typing and nursing. Colonialism also created the current regime of male domination of political leadership, establishing pre-independence councils to which few, if any, women were appointed.
- 7.21 It is important not to oversimplify the complex impact of colonialism on gender relations, however. While it did entrench male dominance in many respects, it also undermined men in some ways. The experience of plantation labour and colonial racial hierarchies often demeaned male "natives".³⁶ This may have led indigenous men to assert their authority all the more strongly in the village and the home, where they still had some control.³⁷ For some women, on the other hand, colonialism opened up new opportunities.

The impact of urbanisation and globalisation

- 7.22 In many parts of the Pacific, the period since the gaining of independence or self-government has seen increasing urbanisation and integration with the wider world. Women who have found work in towns and cities have been freed from some customary controls through acquiring a measure of financial independence. For women on low pay, however, there have been few other benefits.

33 Bob Makin "Lissant Bolton on Women in Trade in Vanuatu" (27 November 2005) *The Independent* < <http://www.news.vu> > (accessed 15 August 2006).

34 Atu' 'o Hakautapu Emberson-Bain *Women in Development: Kiribati* (Asian Development Bank, Manila, 1995) 27, 46 [*Women in Development*].

35 P Imrana Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva, 1998) 508 [*Law for Pacific Women*].

36 Donald Denoon "New Economic Orders: Land, Labour and Dependency" and Stewart Firth "Colonial Administration and the Invention of the Native" in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1997) 218–252, 253–288.

37 Dewe Gorodey, Vice-President of New Caledonia, makes the point in relation to contemporary New Caledonia that Kanak men have lost power to Europeans through colonisation and therefore see demands for women's political participation as threatening to the power that Kanak men still retain in the customary sphere: Alan Berman "The Law on Gender Parity in Politics in France and New Caledonia: A Window into the Future or More of the Same?" [2005] Oxford University Comparative Law Forum appendix 1.10 < <http://ouclf.iuscomp.org> > (accessed 15 August 2006).

Meanwhile, they have lost the advantages of communal living: some security through access to communal land, the safety net of strong kinship relationships, an ethic of sharing and caring, and, where it is not abused, collective governance.

- 7.23 While some women are looking to human rights to help improve their status, human rights are themselves at risk from globalisation according to some critics. It has been suggested that some of the core ideals of human rights, like equality and fairness, are being eroded by globalisation, and that economic rights may assume greater significance in promoting gender equality.³⁸

SPECIFIC ISSUES 7.24 Having considered briefly some historical influences on the contemporary position of Pacific women, we now look at some specific issues concerning the interface between custom and women's rights today.

Leadership

- 7.25 Across the Pacific, attitudes that are said to be based in custom serve to exclude women from positions of leadership in national and local government, the public service and customary bodies. This exclusion, in turn, makes it difficult to institute changes, including changes to custom, to accommodate the rights of women. For so long as one section only of an adult community dominates decisions on the community's values and norms, a well-founded sense of injustice is sure to follow.

Political leadership

- 7.26 Throughout the Pacific, women are under-represented in national and local government bodies. The representation of women in Pacific parliaments is shown in the table below:³⁹

Representation of Women in Pacific Legislatures

(Lower or Single House)

Country	Elections	Seats	Women	% Women
New Zealand	Sep 2005	121	39	32.2
Timor Leste	Aug 2001	87	22	25.3
Australia	Oct 2004	150	37	24.7
Fiji	May 2006	71	8	11.3
Samoa	Mar 2006	49	2	4.1
Vanuatu	Jul 2004	52	2	3.8
Tonga	Mar 2005	30	1	3.3

38 Vanessa Griffen "Local and Global Women's Rights in the Pacific" (2006) 49(1) *Development* 108, 110-111.

39 Information sourced from "Women in National Parliaments" (situation as of 31 July 2006) in Inter-Parliamentary Union <<http://www.ipu.org>> (accessed 16 August 2006); "Tuvalu Election Result Heralds Change" (Radio New Zealand International, 4 August 2006) <<http://www.rnzi.com>> (accessed 16 August 2006).

Country	Elections	Seats	Women	% Women
Marshall Islands	Nov 2003	33	1	3.0
Papua New Guinea	Jun 2002	109	1	0.9
Federated States of Micronesia	Mar 2005	14	0	0.0
Nauru	Oct 2004	18	0	0.0
Palau	Nov 2004	16	0	0.0
Solomon Islands	Apr 2006	50	0	0.0
Tuvalu	Aug 2006	15	0	0.0

- 7.27 There are no express legal restrictions on women seeking parliamentary office, but a belief that political leadership is the preserve of men is deeply ingrained and regularly expressed. There can, however, be indirect restrictions. In Samoa, parliamentary candidates must be customary leaders (matai), who are overwhelmingly male.⁴⁰ Some village customs prevent women from being matai.⁴¹
- 7.28 Custom is frequently invoked in support of male-only leadership, as when a council of chiefs in Northern Efate sought to bar women as candidates in Vanuatu's first national elections. As some indication of how Christian values are variously seen, a female member of the Vanua'aku Party, which led the independence movement, relied on both Christian and human rights views in replying.⁴² Bullying tactics are also used to discourage women from seeking electoral office.⁴³
- 7.29 Despite male resistance, more women are now seeking election in many countries. In 2006 there were record numbers of female candidates in Samoa and the Solomon Islands, although no women were elected in the Solomons.⁴⁴ To improve representation, the Pacific Islands Forum Secretariat is currently investigating cultural barriers to women's election in the region.⁴⁵

40 Committee on the Elimination of Discrimination against Women "Consideration of Reports Submitted by States Parties under Article 18 on the Convention on the Elimination of All Forms of Discrimination Against Women. Combined Initial, Second and Third Periodic Report of States Parties: Samoa" (10 June 2003) CEDAW/C/WSM/1-3, 50 ["Combined Reports: Samoa"]. The situation was raised as a matter of concern by the Committee on the Elimination of Discrimination against Women "Concluding Comments: Samoa" (15 February 2005) CEDAW/C/WSM/CC/1-3, para 26.

41 "NGO Shadow Report on the Status of Women in Samoa December 2004" 5-6 in Intl Wms Rights Action Watch Asia Pacific < <http://www.iwraw-ap.org> > (accessed 28 August 2006).

42 Bronwen Douglas "Christian Citizens: Women and Negotiations of Modernity in Vanuatu" (2002) 14 *The Contemporary Pacific* 1, 17-18 ["Christian Citizens"].

43 Robyn Slarke "*Meri Kirap*, Women Arise! Promoting Women's Rights in Papua New Guinea" (2006) 49 *Development* 116-119; see also Robyn Slarke's Film "It is Not an Easy Road".

44 Cherelle Jackson "Samoan Women Come out of the Kitchen, into Politics" (28 March 2006) *New Zealand Herald* Auckland < <http://www.nzherald.co.nz> > (accessed 28 March 2006); Alison Ofotalau "A Week of Records: And More Than Half of Solomons MPs Lose Their Seats" (May 2006) *Pacific Magazine* < <http://www.pacificislands.cc> > (accessed 16 August 2006).

45 Robert Aisi, Permanent Representative of Papua New Guinea to the United Nations "Report on Behalf of the Pacific Islands Forum Group to the 50th Session of the Commission on the Status of Women" (1 March 2006).

- 7.30 Periodically, a women's quota, or some other kind of electoral reform to increase women's representation, has been advocated.⁴⁶ In Bougainville three seats have been reserved for women, with the unintended result that in the 2005 election, all the female candidates contested only for the reserved seats, leaving the constituency seats to the men.⁴⁷ The 1999 French gender parity law, which applies also in the French overseas territories, has had a significant effect in New Caledonia. The law requires that 50 per cent of candidates on electoral lists must be women. The application of this law to New Caledonia was opposed by some Kanak men, in part on the grounds that there were insufficient qualified women candidates and that it would undermine Kanak custom. However, New Caledonian women united across ethnic divisions in support of the law, and in the 2004 provincial elections the representation of women rose from around 17 per cent to 46 per cent.⁴⁸
- 7.31 In some cases, systemic bias is apparent in local government, particularly where this is in the hands of traditional leaders who are overwhelmingly male. In the Solomon Islands, the Court of Appeal found that the Provincial Government Act 1996 discriminated against women by reserving 50 per cent of the seats for the appointees of chiefs and elders, since only males can be "traditional chiefs", but that there was no conflict with the Constitution, as it sanctioned "traditional chiefs" playing a role in provincial government.⁴⁹

Women in official positions

- 7.32 Similar attitudes sometimes prevail over the appointment of women to official positions. In 1997, a Vanuatu government Minister (and future Prime Minister) demanded the repeal of the Ombudsman Act, on the grounds that the female incumbent in the office of Ombudsman could thereby criticise male leaders, while "men could not be criticised by women" on his island.⁵⁰ In many countries, however, women are better represented in the senior public service than they are in Parliament.⁵¹

Customary leadership

- 7.33 Customary rules and attitudes also affect women's participation in customary councils. In some places, women may actually be prohibited from participating,

46 For example, "Fiji's Vice President Calls for Parliamentary Quotas" (Radio New Zealand International, 9 April 2006) < <http://www.rnzi.com> > (accessed 16 August 2006); Rae Nicholl "Electing Women to Parliament: Fiji and the Alternative Vote Electoral System" (2006) 12(1) *Pacific Journalism Review* 87–107 < <http://www.pjreview.info> > .

47 Francesca Semoso, Deputy Speaker of the Bougainville Autonomous Government, "Young Parliamentarians a Hit at WIP Meeting in Cooks" (posted to Pacific Women's Information Network, 21 April 2006) < <http://lyris.spc.int> > (accessed 16 August 2006).

48 Berman, above n 37.

49 *Minister for the Provincial Government v Guadalcanal Provincial Assembly* [1997] SBCA 1; CA-CAC 003 of 1997 (11 July 1997) < www.paclii.org > (accessed 17 August 2006); Kenneth Brown and Jennifer Corrin Care "More on Democratic Fundamentals in Solomon Islands: *Minister for Provincial Government v Guadalcanal Provincial Assembly*" (2001) 32 *Victoria University of Wellington Law Review* 653–671.

50 "Christian Citizens", above n 42, 1, 18; Bronwen Douglas *Weak States And Other Nationalisms: Emerging Melanesian Paradigms?* (State, Society and Governance in Melanesia Discussion Paper 00/3, Research School of Pacific and Asian Studies, Australian National University, Canberra, 2003).

51 For the position in Samoa, see "Combined Reports: Samoa", above n 40, 52.

as is the case with village fono in some Samoan villages. In other places, women's participation is inhibited by customary expectations but not banned altogether. In the traditional maneaba in Kiribati, for example, "a woman's place is assigned to the back of the gathering, behind her husband, and she is expected to be silent", but today women visiting the village in a professional capacity are given speaking rights.⁵² In Fiji, it has been suggested that men's assumed status is not immutable, but that in traditional settings discussions are "usually conducted by a few senior males" and women "tend to be reticent" when men are around. Fijian women may have to voice their concerns through their husbands or male relatives of appropriate seniority.⁵³

- 7.34 Strong resistance to women's leadership is voiced in some states by custom leaders. Vanuatu's Malvatumauri (National Council of Chiefs) considers that women cannot be chiefs and that their election as chiefs in the north is a distortion of custom. In turn, the custom leaders are accused of "custom invention".⁵⁴ In the Marshall Islands, some women have been angered by a Bill that would, if enacted, mean that only men could assume the position of clan head (alab) and hold the associated rights to land on behalf of the clan.⁵⁵ Although it could be viewed as breaching the constitutional guarantee of non-discrimination on the grounds of gender,⁵⁶ the Bill has been defended as simply clarifying and memorialising existing Marshallese custom law.⁵⁷

Legal protection

Violence

- 7.35 Violence against women is a major concern in the Pacific. Amnesty International has described the abuse of women as endemic in Papua New Guinea.⁵⁸ Public awareness of the problem owes much to the advocacy, campaigns and training programmes of national and regional women's organisations. Nonetheless, abuse of women may be covered up, because it is claimed to be part of the culture, and cases may also go unreported due to pressure to protect the family name.⁵⁹ In Tonga, women's complaints of domestic violence have increased, but there is still a shroud of silence around abuse for reasons of shame, particularly where men of higher rank are involved.⁶⁰

52 *Women in Development: Kiribati*, above n 34, 48.

53 "Rights are Communal in Nature: Ratu Joni" (9 December 2005) in Fiji Government Online Portal < <http://www.fiji.gov.fj> > (accessed 16 August 2006).

54 Law Commission consultation in Port Vila, Vanuatu, 24 August–3 September 2005.

55 "Marshall Is: Women Angered by Chiefly Gender Bill" (Radio Australia Pacific Beat, 9 February 2006) < <http://www.radioaustralia.net.au/pacbeat> > (accessed 6 September 2006).

56 Marshall Islands Constitution, art II, s 12(2).

57 "Marshall Islands: Legislation for 'Alab' or Clan-Head Title Introduced" Yowke Online (6 February 2006) < <http://www.yowke.net> > (accessed 14 July 2006).

58 "Abuse of Women Endemic in Papua New Guinea" (March–April 2006) *Freedom Letter* Amnesty International Aotearoa New Zealand 1.

59 A World Health Organisation study of domestic violence found that 85 % of women surveyed in Samoa who had been physically abused by their partner had never asked any formal agency for help: WHO Multi-Country Study on Women's Health and Domestic Violence Against Women *Country Fact Sheet: Samoa* (2005).

60 *Women in Tonga*, above n 27, 41.

- 7.36 In Vanuatu, the alleged customary basis for domestic violence is disputed. Chiefs interviewed in all six provinces of Vanuatu told researchers that kastom does not promote violence but “peace, harmony and justice”, that kastom chiefs were responsible for restoring peace to the family or community, and that harsh penalties were traditionally imposed for adultery, incest and wife-beating.⁶¹ Sanctions against abuse of women reportedly existed in other Pacific societies as well but have been weakened by factors such as urbanisation, changing family structures, and the outbreak of civil conflict.⁶²
- 7.37 Despite the existence of traditional protections for women in some societies, modern customary institutions have been blamed for the implicit toleration of violence against women.⁶³ Modern customary practices may also indirectly support wife-beating because of language suggesting that women are property. This is particularly true of the term “bride-price”, introduced by Europeans to describe their perception of customary exchange practices on betrothal and marriage. While it seems clear that the old practice was seriously misconstrued, the new meaning now has popular currency. Many men now see “bride price” as a licence to treat their wives as property because “mi pem hem” (I have paid for her), and this has made it harder for women to leave violent marriages.⁶⁴
- 7.38 Fiji and Vanuatu have draft legislation on domestic violence due to be introduced into Parliament this year.⁶⁵ The Vanuatu Family Protection Bill has already been submitted to Parliament eight times since 1997. While women’s organisations have strongly supported the Bill, some chiefs and church groups have expressed concern that the Bill could lead to the break-up of families if it does not take account of Vanuatu’s religious and cultural traditions. There have also been calls for the role of chiefs in custom courts to be recognised in the Bill.⁶⁶ Because of the delays in passing this Bill, the Chief Justice’s Rules Committee approved provisions for Domestic Violence Protection Court Orders, as part of the new Rules of Civil Procedure which came into force in 2003.

61 Tor and Toka, above n 26, 41–42.

62 United States Department of State “Country Report on Human Rights Practices 2005: Federated States of Micronesia” (8 March 2006) < <http://www.state.gov> > (accessed 11 March 2006); Helen Leslie and Selina Boso “Gender-Related Violence in the Solomon Islands: The Work of Local Women’s Organisations” (2003) 44 *Asia Pacific Viewpoint* 325, 328.

63 Penny Martin “Implementing Women’s and Children’s Rights: The Case of Domestic Violence in Samoa” (2002) 27 *Alternative Law Journal* 227, 230.

64 Jennifer Corrin Care and Kenneth Brown “Marit Long Kastom: Marriage in the Solomon Islands” (2004) 18 *International Journal of Law, Policy and the Family* 52, 63–64 [“Marit Long Kastom”]; Alice Aruheeta Pollard “‘Bride Price’ and Christianity” (Paper presented at the Women, Christians, Citizens: Being Female in Melanesia Today Workshop, Australian National University, Canberra, 11–13 November 1998) < <http://rspas.anu.edu.au> > (accessed 7 September 2006); Makin, above n 33; Miriam Midure, National Programme Manager, United Nations Population Fund, Papua New Guinea, in “Issues – Case Studies: Gender and Family” in *Carving Out: Development in the Pacific* < <http://www.abc.net.au/ra/carvingout> > (accessed 29 August 2006).

65 The Fiji legislation follows a report on domestic violence by the Fiji Law Reform Commission: Fiji Law Reform Commission (30 November 2005) Press Release.

66 “Pacific Report to the UN Special Rapporteur on Violence Against Women – APWLD Regional Consultations” (24 August 2005) in Fiji Women’s Crisis Centre < <http://www.fijiwomen.com> > (accessed 31 October 2005) [“Pacific Report”]; Tony Ligo “Vanuatu Family Protection Bill Re-Submission” (28 March 2006) *Vanuatu Independent* < <http://www.news.vu> > (accessed 17 August 2006).

These rules, which were intended as an interim measure, provide protection for all victims of domestic violence, not only women.⁶⁷

- 7.39 As well as working to end gender-based violence, women's organisations have often been at the forefront of striving for peace in societies affected by armed conflict. Women are often targeted for rape and other violence as a form of "payback" in such conflicts. In places such as the Solomon Islands, Bougainville and the highlands of Papua New Guinea, women have played a vital role in ending or curbing armed conflict.⁶⁸

Sexual offences

- 7.40 Custom may play a role in denying the full protection of the law to women who have been the victims of sexual offences. A rising incidence of sexual violence may reflect a breakdown in enforcing earlier observed cultural norms and sanctions, although it may also result from increased reporting. Levels of reporting of sexual offences have historically been low, largely due to cultural factors such as intense shame when rape trials are heard in open court.⁶⁹ In addition, marital rape is often not viewed as a crime in the region.⁷⁰ Victims are also blamed, as when unmarried women are seen to invite sexual attacks by living or travelling alone or wearing "improper" clothes.⁷¹
- 7.41 Defence counsel in rape cases involving Aboriginal people in Australia have argued, sometimes successfully, that rape does not constitute a serious offence under Aboriginal custom law.⁷² Aboriginal women have strongly disputed this claim, asserting that under earlier custom law, women were treated with respect, and sexual assault was punished with great severity. Present-day abuse of women is attributed to a lowering of women's status during colonisation and to community dysfunction resulting from the breakdown of traditional governance mechanisms.⁷³
- 7.42 Customary practices of seeking and receiving forgiveness through symbolic presentations and apologies between the families of the wrongdoer and the

67 Vanuatu Civil Procedure Rules 2002, part 16, division 4; Shirley Randall *Awareness Raising on Court Rules Relating to Domestic Violence in Vanuatu* (Blackstone Publishing, Port Vila, 2003) 11–12 < <http://www.sria.com.vu> > (accessed 7 September 2006).

68 Leslie and Boso, above n 62; Sarah Garap *Kup Women for Peace: Women Taking Action to Build Peace and Influence Community Decision-Making* (Discussion Paper 2004/4, State, Society and Governance in Melanesia Project, Australian National University, Canberra, 2004); Josephine Tankunani Sirivi and Marilyn Taleo Havini *As Mothers of the Land: The Birth of the Bougainville Women for Peace and Freedom* (Pandanus Books, Canberra, 2004).

69 *Law for Pacific Women*, above n 35, 86–88; *Women in Development: Kiribati*, above n 34, 29.

70 *Law for Pacific Women*, above n 35, 82.

71 United States Department of State, above n 62; Pacific Foundation for the Advancement of Women *Cook Islands Status of Women 2003* (Suva, April 2004) 54; *Law for Pacific Women*, above n 35, 76.

72 Megan Davis and Hannah McGlade "International Human Rights Law and the Recognition of Aboriginal Customary Law" in Law Reform Commission of Western Australia *Aboriginal Customary Laws: Background Papers* (LRCWA No 94, Perth, 2006) 381, 404; Wohlan, above n 21, 507, 527–528; Law Reform Commission of Western Australia *Aboriginal Customary Law: Discussion Paper* (LRCWA No 94, Perth, 2005) 216–217.

73 Davis and McGlade, above n 72, 381, 389, 403–404; Larissa Behrendt "Human Rights Trump Customary Law Every Time" (26 January 2006) *National Indigenous Times* < <http://www.nit.com.au> > (accessed 4 August 2006).

wronged are important for restoring relationships within communities. In some communities, the focus is not on gift-giving but on paying compensation. However, family resolutions can leave women without a voice, and they may feel pressured not to bring charges or to drop them. Customary reconciliation ceremonies may also lead to unduly light sentences in the event of a trial and conviction. Lenient sentences in community justice bodies likewise raise questions about the need for deterrence in criminal justice systems.⁷⁴

- 7.43 The Pacific Islands Forum Secretariat has drafted model sexual offences legislation which provides that traditional forms of reconciliation are not to be taken into account by judges in sentencing an offender for a sexual offence.⁷⁵ Such removal of judicial discretion may be overly prescriptive, as customary processes which fully involve the victim may do more to promote her welfare than long prison sentences or other forms of state sanction.

Family law

Marriage

- 7.44 Custom may constrain free choice in marriage, particularly for women. Many Pacific cultures traditionally had strict rules concerning appropriate marriage partners. Arranged marriages were once common among Polynesian chiefly classes, to reinforce rank, keep control of resources, maintain military or political alliances, or re-establish kinship connections. Such marriages still occur among some Pacific families, including those now living abroad.⁷⁶ In some societies, girls may be betrothed when very young, even before birth, leaving them with little or no say on their marriage partners. Considerable pressure to comply with the families' wishes is often applied.⁷⁷
- 7.45 The giving of a woman as a bride in partial compensation for a death, in order to settle an inter-tribal dispute, was condemned by the Papua New Guinea Supreme Court in 1997 as a "bad custom". The Court said that this was not what the framers of the Constitution had in mind for the purposes of maintaining and promoting custom.⁷⁸
- 7.46 "Bride price" in Melanesia has become part of modern custom law. Alice Pollard, who has described the original custom as practised by the AreAre in the Solomon Islands, regrets the erosion and debasement of a practice that traditionally bound people together and reinforced community solidarity, encouraged reciprocity in

74 *Law for Pacific Women*, above n 35, 104–108; submissions to the Law Commission from the Regional Rights Resource Team (31 May 2006) and UNICEF Pacific (31 July 2006).

75 Pacific Islands Forum Secretariat, *Sex Offences Model Provisions* (November 2005), cl 85.

76 AnneMarie Tupuola "Learning Sexuality: Young Samoan Women" in Alison Jones, Phyllis Herda and Tamasailau M Suaalii (eds) *Bittersweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin, 2000) 61, 64, 68–69.

77 Jean Tarisesei "Today Is Not the Same as Yesterday, and Tomorrow It Will Be Different Again: *Kastom* in Ambae" (2000) 51 *Development Bulletin* 42–45 < <http://www.devnet.anu.edu.au> > (accessed 7 September 2006); Pollard, above n 64; Tupuola, above n 76, 68.

78 *In Re Miriam Willingal* [1997] PGNC 7; N1506 (10 February 1997 Injia J) < www.pacii.org > (accessed 3 August 2006); Cyndi Banks "Women, Justice and Custom: The Discourse of 'Good Custom' and 'Bad Custom' in Papua New Guinea and Canada" (2001) 42 *International Journal of Comparative Sociology* 101–122.

gift-giving and equitable redistribution of wealth, ensured security for the children born of the union, and underscored the value of the girl child.⁷⁹ Notwithstanding that the price to be paid is almost exclusively settled by men, some women claim that “bride price” is meaningful to them, and insist on their right to continue the practice.⁸⁰

- 7.47 Polygyny (the practice of one man having several wives) is still found in some Melanesian cultures. Human rights advocates are generally opposed to polygyny on the grounds that it is discriminatory, since women are not allowed multiple husbands.⁸¹ Papua New Guinea women’s groups also see links between polygyny and violence against women.⁸² However, Jean Zorn observes that polygyny may have changed. In the past, it was probably limited to wealthy and influential men who could provide their wives with goods and status, whereas today young men may use this supposed custom to justify having “wives” in different places whom they are unable to support and to whom they may not be legally married under either custom or statute.⁸³

Inheritance and custody

- 7.48 For reasons given in Chapter 1, this paper does not deal with land and succession issues, but it is important to note that these are also areas in which women may be disadvantaged by custom. Tongan land laws currently prevent women from holding town and country allotments or enjoying full inheritance rights, although a limited review of these laws has recently been announced.⁸⁴ In other parts of the Pacific, too, women do not enjoy equal inheritance rights with men in respect to property.⁸⁵ In some places, customs relating to land ownership may have been so prescribed or redefined by statutes that the issue is no longer one of custom but of whether the statute is discriminatory. However, there is no doubt that custom is reflected in the drafting of many statutes or that custom continues to reinforce land succession that is often unfair to women.
- 7.49 In addition, land rights based on custom may affect custody of children. For example, in Tuvalu it was ruled that custody of a child should be awarded to the father as against the mother, substantially on the ground that only in that way would the child inherit land.⁸⁶ Similarly, Melanesian courts may take

79 Pollard, above n 64; Sue Farran details similar customary marriage practices in different islands in Vanuatu in “Pigs, Mats and Feathers: Customary Marriage in Vanuatu” (2004) 27 *Journal of Pacific Studies* 245 [“Pigs, Mats and Feathers”].

80 “Marit Long Kastom”, above n 64, 64–65, 73; “Pigs, Mats and Feathers”, above n 79, 245, 265; Pollard, above n 64.

81 Rebecca Probert “Marriage and a Family, the Right to” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 244, 245.

82 “Pacific Report”, above n 66.

83 *Women, Custom and International Law in the Pacific*, above n 21, 12–13.

84 *Law for Pacific Women*, above n 35, 34, 56; *Women in Tonga*, above n 27, 38; “Tonga to Consider Allowing Women to Inherit Land” (Radio New Zealand International, 16 August 2006) < <http://www.rnzi.com> > (accessed 17 August 2006). The proposed reforms would still only allow women to inherit where there is no direct male heir.

85 Sue Farran “Land Rights and Gender Equality in the Pacific Region” (2005) 11 *Australian Property Law Journal* 131–140.

86 *Tepulolo v Pou* [2005] TVHC 1; Case No 17 of 2003 (24 January 2005 Ward CJ) < www.pacii.org > (accessed 17 April 2005); Sue Farran “A Mother’s Care or Land, But Not Both: *Tepulolo v Pou*” (2005) 9 *Journal of South Pacific Law* < <http://law.usp.ac.fj/jspl> > (accessed 7 August 2006).

account of the modern custom of “bride price” in awarding custody to fathers, since children may be considered to belong to the father’s family once bride price is paid.⁸⁷

- 7.50 Women are also disadvantaged in custody cases where modern custom reflects Christian morality. A wife may lose custody in Tonga through being in a relationship with another man. The same rule rarely applies to men.⁸⁸ Imrana Jalal cites the Resident Magistrate of Tuvalu as saying that he “never gives custody to a parent who has committed adultery” and contends that women “rarely dispute custody once their adultery is proven”.⁸⁹ In Vanuatu, a claim for child maintenance is said to be disallowed where there is evidence “that during the normal period of conception the mother was of a notorious loose behaviour.”⁹⁰

CUSTOM LAW AND THE COURTS

- 7.51 The roles of community justice bodies and courts are examined in later chapters but are considered here in relation to women’s rights. Advocates of women’s rights argue for the substantial reform of both systems. Male domination of community justice bodies is discussed in Chapter 11. Lawyers and judges in the courts, and other personnel in the state law and justice sector, are also overwhelmingly male.⁹¹ Both systems deal with custom and may favour a male-centred interpretation or prefer custom over women’s rights. Jalal observes that women are “almost never” called as expert witnesses to testify on custom, resulting in custom being applied as male village leaders perceive it.⁹²
- 7.52 Both community justice bodies and courts are criticised for their handling of cases of domestic and sexual violence.⁹³ Many of the criticisms of community justice bodies relate to the fairness or otherwise of the processes they employ, as is considered further in Chapter 11. We consider that it may be appropriate to give complainants a choice as to which system they want to use, subject to the constraints of state penal policy, and to examine the necessary conditions for the choice to be truly free. While having a choice does not resolve the primary problem that men dominate both systems, it may provide a better option in the event that gender equity is achieved in either forum.

87 P Imrana Jalal “Ethnic and Cultural Issues in Determining Family Disputes in Pacific Island Courts” (Paper presented at the 17th LAWASIA Biennial Conference and New Zealand Law Conference, Christchurch, 8 October 2001) 15 [“Ethnic and Cultural Issues”].

88 *Women in Tonga*, above n 27, 40.

89 “Ethnic and Cultural Issues”, above n 87, 10.

90 Vanuatu Maintenance of Children Act, s 4(a) quoted in Sue Farran “Gender Discrimination: A Review of Legislation in Vanuatu” (2000) 51 Development Bulletin 10, 11.

91 AusAID and NZAID “Pacific Judicial Development Program: Program Design Document” (20 November 2005) iv, 50 [“Pacific Judicial Development Program”]; Regional Rights Resource Team “Narrow the Gender Gap: RRR’s Jalal Calls for Affirmative Action in the Legal Sector” (21 June 2006) Press Release < <http://www.rrrt.org> > (accessed 17 August 2006); Abby McLeod “Women, Peace and Security in Melanesia” (paper presented to the Fourth Australasian Women and Policing Conference, Darwin, Australia, 21–24 August 2005) < <http://www.aic.gov.au> > (accessed 7 September 2006).

92 “Ethnic and Cultural Issues”, above n 87, 4.

93 Margaret Jolly “Epilogue: Some Thoughts on Restorative Justice and Gender” in Sinclair Dinnen (ed) *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, Canberra, 2003) 265, 272; Merrin Mason “Domestic Violence in Vanuatu” and Sarah Garap “Struggles of Women and Girls – Simbu Province, Papua New Guinea” in Sinclair Dinnen and Allison Ley (eds) *Reflections on Violence in Melanesia* (Hawkins Press and Asia Pacific Press, Sydney, 2000) 119–138, 159–171.

7.53 Another option to explore could be giving greater status and recognition to women’s customary institutions, such as the women’s councils in Samoan villages.⁹⁴ Such bodies may also provide a resource of female expert witnesses on custom for the state courts.

7.54 There is clearly a need for both community justice bodies and courts to become more accessible to women, to take account of women’s perspectives, and to deal with women in a way that is fair and equitable.⁹⁵ Strategies to achieve such change could include:

- education of personnel in the justice system about women’s rights;
- encouragement for women to enter the legal profession and their appointment as judges and magistrates;
- creation of opportunities for Pacific women in the justice sector to meet together to share experiences and consider ways of overcoming obstacles to women’s participation; and
- greater consultation of women as expert witnesses about custom.

The above list is by no means exhaustive. In undertaking reform of courts and other parts of justice systems, it is important to act sensitively and to engage both women and men in the process of change, an issue to which we return shortly.⁹⁶

CUSTOM AND CHANGE

7.55 For many women, the main problem with custom is that currently men usually decide what it is. In this section, we consider the potential for custom to change to accommodate the views of women, and for common ground between custom and women’s rights to be explored.

7.56 The evidence is compelling that custom law is substantially controlled by men and is often used to subordinate women. A common response is that custom is ancestral and therefore authoritative, and that women’s rights advocates are corrupted by Western thinking and alienated from their societies. However, many Pacific advocates of women’s rights express respect and support for custom and tradition. Their challenge is to the representation of custom as absolute and unchanging.

7.57 In her poem “Custom”, the late Grace Mera Molisa of Vanuatu censures those who misappropriate custom to intimidate women. It is not custom itself that she criticises but the abuse of it:⁹⁷

*Theoretical
“Custom”
more honoured
in omission
than commission.*

94 These councils are described in “Combined Reports: Samoa”, above n 40, 46.

95 It is intended that the Pacific Judicial Development Program will help to address some of these issues: “Pacific Judicial Development Program”, above n 91, 50–51.

96 McLeod, above n 91, 5.

97 Grace Mera Molisa *Black Stone: Poems* (Mana Publications, Suva, 1983).

Molisa supported indigenous values but opposed the use of custom by the powerful against the powerless. She recognised that it was not only men who abused custom, since some women of rank also used custom to defend their status.⁹⁸ She believed that cultural excuses for the mistreatment of women disadvantage the whole nation, not just women, and saw such excuses as symptoms of the fear of change. For Molisa, however, “the whole of life is about change”.⁹⁹

- 7.58 While men in the Pacific have often taken a static or fixed view of custom and resisted the language of rights, those Pacific women who speak out on custom are generally comfortable with adapting it to reflect human rights. Their main concern is to amend the male monopoly on custom's interpretation and application.¹⁰⁰ In challenging male interpretations, they may draw on the idea that traditionally women had their own separate but equal status, with their own forms of ceremony and social organisation.¹⁰¹ Such arguments, when linked to struggles for gender equality, may be strategically valuable, not least in providing a way of engaging with, interrogating, and re-making custom “from the inside”.
- 7.59 We note, for example, an innovative project by the Vanuatu Cultural Centre to encourage women to provide “new perspectives on their custom”. This project provides a possible model for “unfixing” custom and building new social agreements on basic social values. It engages the Centre's fieldworkers annually in a workshop to discuss custom research and constitutes a conscious effort to insert women into what has been a male-dominated discourse. Some fieldworkers promote new approaches to custom in their own communities and in some places have been given roles as assistants to chiefs.¹⁰²
- 7.60 In reassessing custom from the perspective of women, the customary value of respect, and customary practices that give expression to respect for women, are likely to be of great assistance in finding common ground with human rights. Ema Tagicakibau of Fiji has argued that:¹⁰³

[I]f you really look at the empowering parts of the bible and ... culture, when a woman is married off, the final right is the ... whales tooth being offered to the husband's relatives from the woman's relatives asking them to look after her... That means when you talk about respect it means respect for this person, the dignity of this individual, the woman. So really violence against women has no place in culture itself. But when they say no, women need to submit,

98 “Beyond the Horizon?”, above n 27, 137, 146–150.

99 Grace Molisa in “Human Rights and Gender Equity” in *Time to Talk* Isabelle Genoux, Barry Clarke and Pearson Vetuna (prods) (Program 12 Transcript, ABC Radio Australia, 2002) < <http://www.abc.net.au/timetotalk> > (accessed 29 August 2006).

100 See contributions by participants at the first Pacific Women's Conference: Vanessa Griffen (ed) *Women Speak Out! A Report of the Pacific Women's Conference, October 27–November 2* (Pacific Women's Conference, Suva, 1975).

101 Makin, above n 33; *Women, Custom and International Law in the Pacific*, above n 21, 12; “Combined Reports: Samoa”, above n 40, 47; Semoso, above n 48.

102 Makin, above n 33.

103 “Women and Men, Girls and Boys” in *Carving Out: Development in the Pacific* Heather Jarvis (prod) (Program 8 Transcript, ABC Radio Australia, 23 October 2001) < <http://www.abc.net.au/ra/carvingout> > (accessed 29 August 2006).

they need to be disciplined, that is a very wrong interpretation of both culture and religion because we're talking about dignity and respect for another human being which God created and not man.

- 7.61 Marie-Paul Tourte, a New Caledonian lawyer of Kanak and French heritage, likewise takes issue with claims that the assertion of women's rights is destabilising for Kanak society:¹⁰⁴

Custom is used to defend positions of power. For me custom is a matter of values which exist also in other societies; the values of respect, unity, community may be universal. I'm more attached to the spirit of custom rather than to the rules made by men in specific contexts ... In New Caledonia the term 'custom' is ... used in a sense which is too concrete. The sense of the values which underpin the rules is lost. If we base our ideas on the customary values such as respect, we can go very far in changing things, taking account of the fact that things today are no longer like the situation 200 years ago.

- 7.62 As Tourte suggests, custom may be used by traditional leaders, and by men more generally, to hold on to positions of relative power and privilege. When women have tried to assert their rights, they have sometimes been accused of wanting to reverse the position and have power over men.¹⁰⁵ A sense that the position of men may be under threat seems to lie behind much of the resistance to human rights, and this sense of insecurity may lead men to assert their position as the custodians of a custom presented as unchanging and unchallengeable. We believe, therefore, that the issue of women's rights may be the key to greater acceptance of human rights generally in the Pacific. If custom and women's rights can be harmonised, through finding common ground between the two and through change to some customary practices, we believe that this evolution will open the door to change in other areas.

- 7.63 At the same time, it is important to avoid creating the impression that human rights are "women's business", or that women's rights are "anti-men".¹⁰⁶ There is a need to engage men, too, in the process of change, and to work with men to increase their understanding of women's rights and other human rights. Fiji currently has a male Minister for Women, but he has stated that gender equality is not a matter for women alone to pursue and has called on men to take responsibility for actions that perpetuate male domination and violence against women.¹⁰⁷ In a number of Pacific countries, training courses for men about gender issues are now being run, including courses for the security forces in Fiji

104 Berman, above n 37, appendix 1.12.

105 Marilyn Tahī, Coordinator of the Vanuatu Women's Centre, and Susan Setae, President of the Papua New Guinea National Council of Women, in "Human Rights and Gender Equity", above n 99.

106 Sue Farran "Human Rights in the Pacific Region – Challenges and Solutions" [2005] LAWASIA Journal 39, 63.

107 George Shiu Raj, Minister for Women, Social Welfare and Housing, response to the President's Address, 14 June 2006 < <http://www.fiji.gov.fj> > (accessed 17 August 2006).

and Vanuatu.¹⁰⁸ We suggest that such education and awareness-raising programmes will be most effective if human rights principles can be related to local customary values.¹⁰⁹

- 7.64 Ultimately, there will be greater acceptance of human rights if both men and women can see them not as destabilising or threatening custom but as enhancing it. As Ema Tagicakibau observes, greater equality and respect between men and women within families can increase family stability rather than undermining it.¹¹⁰
- 7.65 When custom is reassessed through processes that include both women and men, it is likely that some customary practices will be found to be inconsistent both with the customary value of respect for women and with human rights. Any practice that promotes or condones a culture of violence against women is certain to be in this category. We believe it is integral to custom that it changes as new attitudes take hold. Harmful practices can be abandoned without weakening custom, so they should be. Where a practice like wife-beating is asserted as part of traditional culture, “it may be politically necessary to criticize tradition in order to change contemporary behaviour”.¹¹¹ However, it may not always be tradition that is the problem; rather, current practice may be out of kilter with the traditional value system.
- 7.66 In this chapter, we have examined some serious conflicts between modern custom and the rights guaranteed to women in international human rights instruments and Pacific constitutions. We suggest that modern custom will need to change if it is to give expression both to the customary value of respect and to the human rights of women. One of the strengths of custom is its ability to change and adapt, so it is not the nature of custom that is holding back progress for women but rather the resistance to change from those who feel that their social position may be threatened. In working to overcome that resistance, the advancement of women may be assisted by drawing on arguments both from custom and tradition and from human rights.

COMMISSION SUGGESTIONS

> Continued next Page

- 7.1 **On women's access to justice:** Strategies should be developed to make community justice bodies and courts more accessible to women and more responsive to their views and rights. This would include greater recognition of women's customary institutions and of women as experts on custom.

108 United Nations Population Fund (Pacific Office) *ICPD + 10: Progress in the Pacific* (Suva, 2004) 41–42 < <http://pacific.unfpa.org> > (accessed 7 September 2006); Evelyn Toa “Men Train to Combat Violence Against Women” (11 September 2005) *The Independent* < <http://www.news.vu> > (accessed 5 September 2006).

109 Abby McLeod refers to a process in which police trainers in Papua New Guinea spent two weeks discussing similarities and differences between human rights concepts and customary beliefs: above n 91, 6.

110 “Women and Men, Girls and Boys”, above n 103.

111 Jean G Zorn “Women's Rights are Human Rights: International Law and the Culture of Domestic Violence” in Dorothy Ayers Counts, Judith K Brown and Jacquelyn C Campbell (eds) *To Have and to Hit: Cultural Perspectives on Wife Beating* (University of Illinois Press, Urbana, 1999) 286, 293.

COMMISSION SUGGESTIONS

- 7.2 **On women's choice of process:** Women should have a genuine choice as to whether crimes of violence against them are dealt with through custom, through the court system, or through both.
- 7.3 **On the evolution of custom:** Reassessment of customary practices to see whether they accord with the customary value of respect can be undertaken, taking full account of women's perspectives on these practices. Men as well as women should be engaged in the process of achieving equity for women.

Chapter 8

Children's and Young People's Rights

- 8.1 All independent Pacific states have ratified the Convention on the Rights of the Child, but the notion that children and young people have rights is still controversial and is often seen as being at odds with Pacific custom and culture. In this chapter we first survey the rights of the child, as recognised internationally and domestically, then examine some specific issues for children and young people in the Pacific. We conclude by considering how social change may be affecting the position of children and young people in Pacific societies and the potential to recognise children's rights in ways that are consistent with custom.

THE RIGHTS OF THE CHILD

International human rights instruments

- 8.2 International human rights law recognises children as possessing many of the same human rights as adults, as well as specific rights that reflect their inherent vulnerability.¹ The Convention on the Rights of the Child (CRC), which entered into force in 1990, defines “child” as a person “below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”² The CRC recognises the individual child as the possessor of rights, but within the context of the family.³ States that are parties to the CRC are to respect the rights, responsibilities and duties of parents, legal guardians “or, where applicable, the members of the extended family or community as provided for by local custom” to provide “appropriate direction and guidance” in the child's exercise of rights.⁴ The preamble also refers to the need to take due

1 Rhona K M Smith “Children's Rights” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 42–44; Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2 ed, Wellington, 2003) 104–110. Children's need for special care, assistance and protection is recognised in the Universal Declaration of Human Rights, art 25(2); in the International Covenant on Civil and Political Rights, art 24; and in the International Covenant on Economic, Social and Cultural Rights, art 10.

2 CRC, art 1. The age of majority is the age at which a person takes on the full legal rights and responsibilities of an adult, such as the right to vote and to enter into binding contracts.

3 Marília Sardenberg “The Convention on the Rights of the Child (CRC)” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 64, 65.

4 CRC, art 5.

account of “the traditions and cultural values of each people for the protection and harmonious development of the child”.

- 8.3 The CRC is generally considered to have four key principles:⁵
- non-discrimination;
 - “the best interests of the child” are to be given priority;
 - children have the right to life, survival and development; and
 - children have the right to express their views freely and have those views taken into account.
- 8.4 Among other provisions, the Convention provides that children are to be protected from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”.⁶ As discussed in the previous chapter, international human rights instruments also prohibit child marriage.
- 8.5 The CRC is the most ratified core international human rights convention in the Pacific.⁷ Some Pacific states have entered reservations to the CRC. Of particular note is the reservation of Kiribati, which states:⁸

The Republic of Kiribati considers that a child’s rights as defined in the Convention shall be exercised with respect for parental authority, in accordance with the Kiribati customs and traditions regarding the place of the child within and outside the family.

- 8.6 Two Optional Protocols to the CRC, which protect children from involvement in armed conflict, being sold, prostitution and child pornography, have not been widely ratified in the region.⁹

Children’s rights in Pacific constitutions

- 8.7 Most rights in Pacific constitutions are guaranteed to “persons” or “citizens” rather than adults, but few of them expressly protect the rights of children. The Fijian Constitution is unusual in prohibiting discrimination on the basis of age.¹⁰ A number of constitutions, however, provide for an exemption from equal treatment or non-discrimination provisions to allow the government to take

5 Sardenberg, above n 3, 65. The principles are contained in CRC, arts 2, 3, 6 and 12.

6 CRC, art 19.

7 The United States is one of only two states in the world that have not ratified the CRC, so US Pacific territories are not covered by the CRC. New Zealand’s ratification of the CRC has not yet been extended to Tokelau.

8 < <http://www.bayefsky.com> > (accessed 20 July 2006). This reservation has been objected to by several European countries.

9 New Zealand, Vanuatu, Fiji, Nauru and the Federated States of Micronesia have signed the optional protocol on the sale of children, child prostitution and child pornography, but no country in the region has yet ratified it.

10 Fiji Constitution, s 38(2)(a).

positive action for the benefit of children.¹¹ Some recent constitutions include specific provisions concerning children's rights and the position of children in society.¹² The constitutions of Vanuatu and Papua New Guinea include non-justiciable duties of parents to support, assist and educate their children, and of children to respect their parents.¹³ Finally, as noted in Chapter 7, several constitutions exempt certain personal or family law matters from anti-discrimination provisions, thus affecting the rights of women and children.

SPECIFIC ISSUES 8.8 Practices relating to children and child-rearing vary across the Pacific and have been subject to considerable change over time. Nevertheless, there are some issues concerning the relationship between custom and the rights of children and young people that are common to many contemporary Pacific societies. These issues are all the more challenging and important for the Pacific region given that around 40 per cent of the total population of the Pacific Islands is under 15 years of age.¹⁴

Definition of "child"

- 8.9 All societies recognise that at some point children are no longer directly under the authority and protection of their parents and take their place in society as women and men. However, the age at which this transition occurs varies between cultures. Traditionally, many Pacific cultures marked the stages of a child's development with ceremonies through which children were made to feel valued and were incorporated as members of a group. Ceremonies marking the passage into adulthood were particularly important. The end of childhood might be linked to reaching marriageable age (often soon after puberty) or actually getting married.
- 8.10 In part because of such traditional influences, the idea that a person is a child until the age of 18 or some other single "age of majority" does not currently apply under either custom or statute in many Pacific Island countries and territories. Instead, there may be a range of ages for different purposes. For example, in Samoa, the age of majority under a number of statutes is 21, but different ages are applicable in relation to such matters as marriage, sexual consent, criminal liability and employment.¹⁵ In traditional Papua New Guinea society, there was no such thing as chronological age, and many of the country's customs are reported to be incompatible with the definition of a child under the CRC.¹⁶

11 For example, Vanuatu Constitution, art 5(1)(k).

12 Constitution of the Autonomous Region of Bougainville, ss 20, 29; Timor Leste Constitution, s 18; Draft Federal Constitution of the Solomon Islands, s 52.

13 Basic Social Obligations (h) and (i) in the Preamble to the PNG Constitution; Vanuatu Constitution, s 7(h), (i).

14 Eminent Persons' Group *Pacific Cooperation: Voices of the Region* (Review of the Pacific Islands Forum, 2004) 31.

15 Committee on the Rights of the Child "Consideration of Reports Submitted by States Parties Under Article 44 of the Convention. Initial Report of States Parties Due in 1996: Samoa" (16 February 2006) CRC/C/WSM/1, paras 122–132, 197 ["Consideration of Reports: Samoa"].

16 Committee on the Rights of the Child "Consideration of Reports Submitted by States Parties Under Article 44 of the Convention. Initial Reports of States Parties Due in 2000: Papua New Guinea" (21 July 2003) CRC/C/28/Add.20, paras 74–80 ["Consideration of Reports: Papua New Guinea"].

The right to participate and freely express views

- 8.11 One of the most challenging aspects of the rights of children and young people for many Pacific societies is the idea that children have the right to express views on matters affecting them and have those views taken into account. Former UNICEF Pacific representative Nancy Terreri has said that as Pacific countries ratified CRC “the first reaction was well we don’t want children telling us what to do, and we can’t allow our children to take over our schools and run them”.¹⁷
- 8.12 In many parts of the Pacific, it is considered inappropriate for young people to speak out and participate in decision-making. Such restrictions do not apply only to those under the age of 18 and may be reflected in restrictions on participation in both statutory and customary bodies. For example, in PNG and Vanuatu, only those aged 25 and over may stand for Parliament.¹⁸ According to a 32-year-old Tuvaluan, “the youth don’t have a voice. You’re not allowed to speak in the *fale kaupule* [village council] until you’re 40. You can vote when you’re 18, but you can’t express your opinions.”¹⁹ In many Pacific societies, learning proper respect protocols, including when to remain silent and listen to others, is seen as essential to achieving the maturity required of decision-makers.
- 8.13 Many Pacific people are concerned at what they see as a growing lack of respect among younger people, with children talking back to their parents and using bad language.²⁰ There may be a perception that the right to free expression is adding to this problem. At the same time, attitudes may be slowly changing. A survey in Vanuatu showed strong support for the right of children to have their opinions heard, although people also believed that children should obey their parents and should be taught that adults always know best.²¹

The best interests of the child

- 8.14 While CRC and some domestic statutes provide that the best interests of the child shall be paramount, in many Pacific societies the child’s welfare may be viewed in the wider context of the interests of the extended family or the community as a whole. A positive aspect of this focus on the child as a member of a community is that responsibility for caring for children extends well beyond their biological parents. Thus, parents are not left to struggle on their own, and it is unlikely that a child would suffer neglect or deprivation under a well-functioning customary system.

17 “A Good Start in Life” in *Carving Out: Development in the Pacific* Heather Jarvis (prod) (Program 9 Transcript, ABC Radio Australia, 30 October 2001) < <http://www.abc.net.au/ra/carvingout> > (accessed 29 August 2006).

18 PNG Constitution, s 103(1); Vanuatu Constitution, s 17(2).

19 Kennedy Warne “That Sinking Feeling” (November/December 2004) *New Zealand Geographic* 50.

20 Charles G Kick “The Changing Pacific Island Family and Children’s Welfare” (Paper presented at the International Community Development Conference, Rotorua, April 2001) 3; Pacific Children’s Program “Child Protection in Vanuatu: A Report of a Baseline Study on Knowledge, Attitudes, Behaviours and Practices” (2003) 49–50.

21 Pacific Children’s Program, above n 20, 39–40.

- 8.15 In customary systems, it may be considered that the welfare of the individual child is indistinguishable from the interests of the group. In Palau, for example, the law states that court decisions with respect to annulment, divorce, child custody and child maintenance must be in accordance with “justice and the best interests of all concerned”. Moreover, most family law matters in Palau are handled by the family and clan, not by the courts. The Palauan Government notes that to many Palauans there is no contradiction between the two standards, “for the best interests of the child can only be safeguarded in the context of the best interests of the larger family to which he/she belongs.”²²
- 8.16 In other parts of the Pacific, the courts have recognised the best interests of the child as the primary consideration in custody cases,²³ although many such cases continue to be decided in family or customary settings where the child's interests may be subordinated to those of the family or community.²⁴ Where custody cases do come before the courts, judges may consider the best interests of the child in terms of reasonable customary practices. In some cases involving patrilineal societies, courts have ruled that the “best interests of the child” principle means that custody should be awarded to the father, so that inheritance rights will be preserved.²⁵ In other cases, courts have found that the best interests of the child mean that custom cannot be followed.²⁶ In the Solomon Islands case of *Sukutaona v Houanihou*, the High Court ruled that the best interests of the child were the primary consideration, but that:²⁷

the custom background may well be an important factor in deciding where that interest lies in the sense that custom Rules may well be designed to protect the children from an unsatisfactory family life where, for example, a husband or a wife has gone off with another partner and the custom Rule says that that parent should not have custody. A thorough consideration of the custom rules will often reveal that they too are founded on the sort of common sense that all courts look for in their laws and the application of them.

Physical punishment of children

- 8.17 Another particularly sensitive issue in the Pacific concerns the use of physical punishment in disciplining children. Corporal punishment is now prohibited in schools in a number of Pacific states, although it may persist in practice despite

22 Committee on the Rights of the Child “Consideration of Reports Submitted by States Parties Under Article 44 of the Convention. Initial Reports of States Parties Due in 1997. Addendum: Palau” (23 March 2000) CRC/C/51/Add.3, paras 50–51.

23 See, for example, the Papua New Guinea cases of *K and K v Director of Child Welfare* [1981] PNGLR 333 (28 August 1981) < www.paclii.org > (accessed 12 July 2005); *WP v DP* [1981] PGLAWREP 63; [1982] PNGLR 1 (16 December 1981 Andrew J) < www.paclii.org > (accessed 26 July 2005); *RG v MG* [1984] PGLAWREP 56; [1984] PNGLR 413 (14 December 1984 McDermott J) < www.paclii.org > (accessed 26 July 2005); *Tom v Mazion Kayik* [1982] PNGLR 171 (2 July 1992 Los J) < www.paclii.org > (accessed 13 August 2006).

24 “Consideration of Reports: Papua New Guinea”, above n 22, para 126.

25 For example, *Nauka v Kaurua* [1998] VUSC 53; Matrimonial Case 6/96 (11 September 1998 Saksak J) < www.paclii.org > (accessed 16 November 2005).

26 For example, *G v L* [1990] VUSC 4; [1980–1994] Van LR 486 (18 December 1990 Goldsbrough Acting CJ) < www.paclii.org > (accessed 9 November 2005).

27 *Sukutaona v Houanihou* [1981] SBHC 1; [1982] SILR (9 December 1981 Daly CJ) < www.paclii.org > (accessed 1 August 2005).

such prohibitions.²⁸ The use of physical punishment in the home still has wide acceptance. Many parents consider that physical punishment is the most effective way of disciplining children and teaching them proper behaviour. It is therefore seen as an expression of love, rather than a form of abuse.²⁹ There is some evidence that physical punishment became part of Pacific disciplinary strategies under the influences of Christianity and colonialism.³⁰ Today a common justification for such punishment is a “spare the rod and spoil the child” philosophy that is seen as Biblically ordained, although we note that other interpretations of the Bible do not support this philosophy. However, attitudes are slowly changing, in part due to the efforts of non-government organisations to promote alternative disciplinary strategies.³¹

Sexual abuse

- 8.18 Sexual abuse of children is becoming more apparent in many parts of the Pacific. Urbanisation and the breakdown of family structures may be contributing to an increase in the incidence of sexual abuse. In addition, cultural taboos on speaking openly about sex have been a major obstacle to confronting sexual abuse and may have helped to keep it hidden in the past.³² Increased willingness to discuss the problem may be leading to higher rates of complaints and convictions in some countries.³³
- 8.19 As with violence against women, there are concerns that sexual abuse of children may be dealt with through customary processes that are focused on re-establishing relationships between families, rather than addressing the needs of the victim.³⁴ In some cases, girls who are raped or become pregnant due to under-age sexual activity may be forced to marry the men involved.³⁵ At the same time, special protection for victims is also often lacking in the court system, where the adversarial process can further victimise the complainant, and where support structures such as counselling are usually unavailable.
- 8.20 A particularly difficult issue for some Pacific countries and territories is the customary practice of girls being married at below the legal age under state-made

28 Countries where corporal punishment is now prohibited in schools include Fiji, Tonga, Samoa and Vanuatu.

29 Kate Marshall “Cultural Issues” in Anne B Smith, Megan M Gollop, Nicola J Taylor and Kate A Marshall (eds) *The Discipline and Guidance of Children: Messages from Research* (Office of the Children’s Commissioner, Wellington, 2005) 53, 70.

30 Marshall, above n 29, 53, 69–73.

31 See, for example, “Consideration of Reports: Samoa”, above n 15, para 165(d).

32 Government of Tonga, “Response to United Nations Secretary-General’s Questionnaire on Violence Against Children” (2005), question 35 <<http://www.ohchr.org>>; Samuel Tuaveku and Bridget Costello, Solomon Islands Division of Social Welfare, in “A Good Start in Life” in *Carving Out* Heather Jarvis (prod) (Program 9 Transcript, ABC Radio Australia, 30 October 2001) <<http://www.abc.net.au/ra/carvingout>> (accessed 29 August 2006).

33 “Consideration of Reports: Samoa”, above n 15, para 165(g); “Call in Samoa for All of the Country to Fight Sexual Abuse Problems” (Radio New Zealand International, 16 May 2006) <<http://www.rnzi.com>> (accessed 30 July 2006).

34 Hannah Harborow “The Pacific’s Hidden Trade” (October 2005) *Islands Business*, available at <<http://www.rrrt.org>> (accessed 19 July 2006).

35 UNICEF Pacific, to the Law Commission (31 July 2006) Submission; Pacific Children’s Program, above n 20, 56.

law. In many Pacific states, the legal ages for marriage are lower for girls than for boys (commonly 16 for girls and 18 for boys). However, girls may be married at an even younger age under custom in some societies, and this may mean that girls who are still children in the eyes of the state are forced to have sex with their customary husbands (usually older men). It is reported that in Vanuatu:³⁶

Traditionally, and still in kastom areas, girls become available for marriage/sex soon after the start of menstruation. Early sexual activity, pregnancy and marriage can be regarded as sexual abuse and underage sex according to modern and Christian standards but may not be so regarded according to kastom.

- 8.21 In recent years, this issue has come to public attention in Australia, where some Aboriginal men have been charged with carnal knowledge of a child, and the defence has argued that the child was a “promised wife” under custom law.³⁷ The use of such arguments in defence or mitigation of sentence has been condemned by Aboriginal lawyer Larissa Behrendt, who states:³⁸

[I]f it is a matter of balancing the cultural rights of an old man to take a child bride against a child's right to be free from physical, sexual, mental and emotional abuse, I think the latter has to win, every time. If we are to ensure the continuation of our nations and our cultures, we need to make sure that the rights of our children are protected first and foremost. Our elders should know better.

Whatever the ‘cultural way’ to treat 14-year-old girls in our communities was centuries before, it is not part of our cultural practice to physically and sexually mistreat them now ... [P]art of our cultural values must be to respect the human rights of our fellow Aboriginals (especially children) that we continually ask non-Aboriginal people to recognise and respect.

- 8.22 There is also a growing problem of child prostitution in some parts of the Pacific.³⁹ In the main, this exploitation is due to the breakdown of social and cultural protections as a result of urbanisation and poverty. However, in some cases custom can be abused to disguise the reality of commercial sexual exploitation. In the Solomon Islands, UNICEF researchers have found that foreign loggers are paying “bride price” to the families of young girls, using the girls for sex, and then abandoning their “wives” and children when they leave for another job.⁴⁰

CHILDREN AND YOUNG PEOPLE IN CHANGING SOCIETIES

- 8.23 Today Pacific children and youth face many problems that are due to rapid social change, including inadequate education, unemployment, poverty, substance abuse, sexual health issues, crime and suicide.⁴¹ Social change may also lead to the breakdown of customary protections for children.

36 Pacific Children's Program, above n 20, 17.

37 Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper* (LRCWA No 94, Perth, 2005) 359–360.

38 Larissa Behrendt “Human Rights Trump Customary Law Every Time” (26 January 2006) *National Indigenous Times* Canberra < <http://www.nit.com.au> > (accessed 30 July 2006).

39 Harborow, above n 34.

40 Rory Callinan “Generation Exploited” (19 March 2006) *Time South Pacific* < <http://www.time.com> > (accessed 12 August 2006).

41 See UNICEF Pacific, *The State of Pacific Youth Report 2005* (Suva).

- 8.24 Traditionally, children and young people were regarded as treasures or, in Christian terminology, as gifts from God. In common with human rights principles, their individual dignity and uniqueness were respected, but they were also seen as part of a line of descent from the ancestors, and as part of a wider family and community network. Such beliefs were communicated to children through the ceremonies accompanying their upbringing.⁴² Many of these ceremonies are no longer widely practised, however, and for many Pacific families living away from their villages it is too expensive to return to the village to perform the ceremonies.
- 8.25 Young people growing up in urban areas may therefore be isolated from their wider family networks. Furthermore, parents may be absent much of the time due to work or may have their own problems, such as substance abuse or domestic violence. As a result, increasing numbers of Pacific young people may grow up without the strong sense of being valued and supported that came from some customary child-rearing practices.⁴³
- 8.26 At the same time, customs that required children to remain silent and obey their parents may no longer serve their original purpose, which was to ensure that children learned through observation the skills and knowledge essential for their survival. Today, children still need the guidance and wisdom of their elders, but in a rapidly-changing world they also need to form and express their own opinions. Young people who feel that they have no say in their lives may turn to anti-social or self-destructive behaviour, especially when voicelessness is combined with unemployment and the decline of traditions that inculcated a feeling of self-worth. A sense of alienation may be contributing to youth crime, involvement in civil unrest, drug and alcohol abuse, premature sexual activity and suicide. Traditions that require children to obey adults unquestioningly may also leave them vulnerable to sexual and other forms of abuse.

LOOKING FOR
COMMON
GROUND

- 8.27 The issue of children's rights is particularly sensitive in any culture, as most adults are concerned with children's welfare, even when acting in ways that could be considered abusive. The bond between adults and children is also essential for the transmission and maintenance of culture. Strategies for advancing children's rights need to take account of such sensitivities and ensure that the rights and responsibilities of families and communities are protected along with the best interests of the child.
- 8.28 We suggest that in addressing human rights concerns about the position of children and young people, it may be helpful to draw on what is most nurturing in custom while also recognising that some customary practices will need to change. Traditions of respect, of valuing children and honouring the sacredness of their bodies and spirits provide a strong basis for recognising their rights. Traditional stories and passages from the Bible can be used to illustrate the importance of respecting children and treating them with kindness.⁴⁴

42 Suliana Siwatibau, to the Law Commission (10 August 2006) Communication; Joan Metge *New Growth from Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 140.

43 Siwatibau, above n 42.

44 ECPAT NZ (End Child Prostitution, Child Pornography, Child Sex Tourism and Trafficking in Children for Sexual Purposes), to the Law Commission (20 June 2006) Submission; Pacific Children's Program, above n 20, 58, 84–85.

8.29 At the same time, education can help communities to see that some practices may be harmful to children. Education in relation to controversial issues such as physical punishment may be more effective than prohibition.⁴⁵ While education may need to challenge deeply held beliefs about what is good for children, it should do so in a way that is culturally appropriate and respectful of custom. Chiefs and other custom leaders can be important sources of guidance for families, and if they gain a greater understanding of children's rights, they can play a significant role in helping to change attitudes and behaviours.⁴⁶ It may also help to make clear that, within the human rights framework, children have responsibilities as well as rights, just as they do in custom.⁴⁷ We suggest that looking for such areas of common ground between custom and human rights, even when advocating for particular aspects of custom to change, will assist with protecting the best interests of children and of their communities.

COMMISSION SUGGESTIONS

8.1 **On protection of children and young people:** Common ground between Pacific traditions of caring for children and the protections contained in the Convention on the Rights of the Child should be explored to enable children and young people to grow up feeling valued and safe from abuse.

45 "Consideration of Reports: Samoa", above n 15, para 165(n).

46 Pacific Children's Program, above n 20, 17, 18, 53, 60.

47 UNICEF raises awareness of both the rights and the responsibilities of children: UNICEF Pacific, above n 35.

Chapter 9

Freedom of Religion, Speech and Movement

9.1 This chapter examines three rights or fundamental freedoms guaranteed in international human rights treaties and in most Pacific constitutions: freedom of religion, freedom of speech or expression, and freedom of movement. These are rights which often come into conflict with custom in the Pacific. In this chapter we consider the nature of these conflicts and how they have been dealt with by the courts in various Pacific countries and territories.

FREEDOM OF RELIGION

9.2 All Pacific countries that have written bills of rights guarantee freedom of religion or belief, although in most cases such freedoms are also subject to reasonable restrictions. Most limitations are similar to those in the International Covenant on Civil and Political Rights (ICCPR), article 18(3). It provides that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.¹

9.3 It is the scope of these limitations and attempts by both legislatures and communities to place curbs on the exercise of new faiths, usually new denominations of Christian churches, that has proven controversial in many Pacific societies.

Christianity today

9.4 As discussed in Chapter 4, Christianity plays a profound role in Pacific societies, affecting both the exercise of custom and human rights. In many villages, the local pastor is as influential as, and sometimes more influential than, the chiefs. The role of some church leaders in dispute resolution and reconciliation, particularly at the local level, also needs to be acknowledged, although at other times churches may be the cause of conflicts. As Rt Rev Jabez Bryce,

¹ See Appendix 3 for a summary of the rights and their limitations in Pacific constitutions.

Anglican Bishop of Polynesia, has noted, “[t]he church is the one institution that touches the grassroots people in rural communities on a day-to-day basis.”²

- 9.5 At a national level, churches are often involved in party politics and may be staunch supporters or opponents of the ruling government. Their influence extends well beyond questions of morality to most spheres of political endeavour.³ Churches also form an indispensable part of the education system of most countries and of the health system of others, but church-building and related activities can claim a large share of a community’s wealth, at the expense of education and other needs.⁴ In addition to Christianity’s prominence in these spheres, it influences the law of many countries, although it is not officially recognised as the established religion by any Pacific state. For example, certain activities may be banned on a Sunday.⁵
- 9.6 Churches also have a great impact on human rights. Often the churches have been vocal and consistent proponents of human rights, but in certain areas, such as reproductive rights, sexual identity and control of HIV/AIDS,⁶ the influence of some church bodies has been largely negative in human rights terms. In particular, church views on morality are often seen by human rights advocates as presenting outmoded and discriminatory ideas. As Rev Bryce states:⁷

Churches have to understand present trends and evaluate the socio-political changes that are happening in the region. They need to develop a critical sense of what is right and what is wrong for their people. They need to be relevant and have a vision of their goals and objectives in this life and not just faith for the life to come. They can start now by making issues of justice, peace and integrity of creation just as important as the energy and time devoted to worship, teaching from the Bible and moral and ethical issues.

Religious views on sexuality

- 9.7 An area where church doctrine, custom, law and human rights norms often clash is in relation to sexuality. For instance, while there is evidence of considerable acceptance in many traditional Pacific communities of people of different sexual orientations,⁸ the overlay of Christian teachings has meant that many Pacific societies now regard homosexuality as unacceptable in their culture and have laws against consensual homosexual acts.

2 Jabez Bryce “Towards a Pacific Community” in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, 2006) 232.

3 A recent example has been the decision by a number of Pacific states to ban the film *The Da Vinci Code* because of a perceived threat to Christian values.

4 Akuila Yabaki and E Varani Norton “The Impact of Tradition and Religion on Women’s Lives in the South Pacific” (Paper presented at the Pacific Women’s Bureau 9th Triennial Conference, August 2004) 16.

5 For instance, Tonga and previously in Fiji.

6 See, for instance, Sarah Barnett “Pain in Paradise” (20 May 2006) *Listener New Zealand* <<http://www.listener.co.nz>> (accessed 16 May 2006).

7 Bryce, above n 2.

8 See Anita Jowitt “Reconstructing Custom: The Politics of Homophobia in Vanuatu” (2005) 30 *Alternative Law Journal* 10; Sue Farran and Alexander Su’a “Discriminating on the Grounds of Status: Criminal Law and the Fa’afafine and Fakaleiti in the South Pacific” (2005) 9 *Journal of South Pacific Law* <<http://law.usp.ac.fj/jspl>> (accessed 5 September 2006).

- 9.8 In *Nadan v State*,⁹ two men convicted of gross indecency and carnal knowledge challenged the Penal Code provision as unconstitutional on the grounds that the Fiji constitution guarantees rights of privacy,¹⁰ equality¹¹ and freedom from degrading treatment. The High Court recognised the strong opposition from most of the churches and much of the community to decriminalisation of homosexuality but held there must be serious reasons before the State or community could interfere with individual rights of privacy, including sexual conduct by consenting adults.¹² In striking down the Penal Code provisions to the extent they covered consensual acts between adults, the judge held that the constitution required that “the law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are”. He added that the acceptance of difference celebrates diversity and that individual dignity offers respect and vitality to the whole of society.¹³
- 9.9 As a result of this decision, there were calls by the Methodist Church of Fiji for a constitutional amendment to reintroduce a ban on consensual homosexual acts.

Restrictions on religious practice

- 9.10 Reflecting the importance of religion to Pacific societies and the churches’ strong connections with the power elite in some countries, limitations on religious freedom have often been part of political rhetoric, and a number of cases and statutes have upheld limits on the practice of religion.

Legislative restrictions

- 9.11 A number of countries have statutes that limit the introduction of new religions or denominations. For instance the Religious Organisations Restrictions Act 1975 of the Cook Islands provides that any faiths other than the four authorised by the Act must obtain the approval of the Minister of Justice before they can be established in the country.¹⁴ Other churches and religions have been given approval,¹⁵ and it appears that the Act has yet to be challenged as contrary to the guarantee of freedom of religion in the Cook Islands Constitution.¹⁶

9 *Nadan v State* [2005] FJHC 1 (26 August 2005) < www.paclii.org > (accessed 30 June 2006).

10 The Fiji Constitution of 1997 (s 37) is unusual among Pacific constitutions in recognising a right to privacy, although such a right is contained in the UDHR, art 12; in the European Convention on Human Rights, art 8; and in the ICCPR, art 17. See Don Paterson “Legal Challenges for Small Jurisdictions in Relation to Privacy, Freedom of Information and Access to Justice” (2000) 4 *Journal of South Pacific Law* < <http://law.usp.ac.fj/jspl> > (accessed 13 June 2006).

11 Equality is defined as including “sexual orientation”, which again is unusual in Pacific constitutions: Fiji Constitution, s 38(2)(a).

12 The Judge also noted that Fiji was a signatory to the ICCPR and that the Human Rights Committee had recently found a similar provision in Tasmanian law to be contrary to article 17 of the Convention.

13 *Nadan v State*, above n 9, 13.

14 Religious Organisations Restrictions Act 1975, No 3.

15 F Syme-Buchanan “Freedom of Religion Restricted to Four Churches in the Cooks” (October 1998) *Pacific Islands Monthly* 49.

16 Constitution of the Cook Islands, s 64 guarantees freedom of religion and other fundamental rights, subject to limitations imposed by law “for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, *the general welfare*, or the security of the Cook Islands” (emphasis added).

- 9.12 Similar legislation exists in several other countries and is frequently encouraged by customary bodies.¹⁷ For instance, Vanuatu's Malvatamauri (Council of Chiefs) Kastom Polisi recommends care in admitting new religions, because "we are a small population and they divide the people."¹⁸ Other legislation requires registration without limiting which religions or denominations can register.¹⁹ In Fiji, the Law Reform Commission is currently reviewing existing legislation that requires any religious organisation owning land to register.²⁰
- 9.13 Some indigenous Fijian politicians and church leaders have called from time to time for Fiji to become a Christian state.²¹ These calls ignore the constitutional guarantees of freedom of religion and the fact that most of the Indo-Fijian population are either Hindu or Muslim (about 30 per cent of the total population). Such calls have been strongly rejected by other leaders.²²

The courts and restrictions on religion

- 9.14 The courts in the Pacific have also been called upon to consider the limits to freedom of religion, particularly in village settings. In some cases, people belonging to a different church have been banished from their villages, raising significant issues as to their rights to freedom of religion, expression and movement.
- 9.15 A recent example is *Teonea v Pule o Kaupule*,²³ in which the applicant, a Tuvaluan resident in Fiji, returned to Tuvalu as a pastor for the Brethren church, which was registered under the Religious Bodies Registration Act in 2002 and had established a presence in Funafuti. The church then sought to expand to the outer islands, including Nanumaga. In Nanumaga, the falekaupule (village council) had resolved that religions other than the established Ekalesia Kelisiano Tuvalu (EKT) would not be permitted, although in fact three other Christian faiths already existed on the island.

17 For example, Vanuatu Religious Bodies (Registration) Act 1995, repealed in 1997 by the Religious Bodies (Repeal) Act 1997; Kiribati Religious Bodies Registration Act [Cap 89] and Religious Bodies Registration (Amendment) Act 1985.

18 "Custom Policy of the Malvatamauri (National Council of Chiefs)" (1983) in Lamont Lindstrom and Geoffrey M White (eds) *Culture Kastom Tradition: Developing Cultural Policy in Melanesia* (Institute of Pacific Studies, Univ of South Pacific, Suva, 1994), 241.

19 For example Kiribati Religious Bodies Registration Act Ordinance (Cap 89). The Vanuatu Religious Bodies Registration Act 1995 was repealed in 1997. The Government has announced that it is considering reintroducing requirements for registration: "Vanuatu Considers Registering Religions and Religious Groups" (Radio New Zealand International, 22 January 2006) <<http://www.rnzi.com>> (accessed 28 August 2006).

20 Fiji Law Reform Commission (April 2006) *Qolilawa Darpan* 3 notes there are 1482 registered religious bodies, but there are currently no requirements other than having land and at least three trustees with police clearance. It calls for submissions on the degree of additional regulation desirable consistent with constitutional guarantees of freedom of religion.

21 This was a call by some leaders of the Methodist church and Taukei movement members in 2000: Reid Mortensen "A Voyage in God's Canoe: Law and Religion in Melanesia" in Richard O'Dair and Andrew Lewis (eds) *Law and Religion* (Current Legal Issues 4, Oxford University Press, Oxford, 2001) 509.

22 See, for example, the comments of Ratu Joni Madraiwiwi quoted in Fiji Human Rights Commission "Respect of Religions to Foster Unity" (16 June 2005) Press Release <<http://www.humanrights.org.fj>> (accessed 6 September 2006).

23 Reported as *Teonea v Pule o Kaupule* [2005] TVHC 2; HC CC No 23/03 (11 October 2005 Ward CJ) <www.pacii.org> (accessed 6 September 2006).

- 9.16 The applicant began conducting Bible classes on the island despite the falekaupule again refusing him permission. When these classes became very popular, opponents of the church stoned their building, and in the interests of safety, the applicant left the island. No action was taken by the local police to identify and charge the perpetrators of the stoning. The applicant sought declarations that the falekaupule's decision was contrary to the constitutional guarantees of freedom of belief, expression, association and freedom from discrimination.
- 9.17 The Court heard the falekaupule's concern that new faiths tended to break up the communal spirit, especially when adherents of the new religion did not perform community obligations. In particular, the new church had opposed contributions being made to the pastor of the EKT. There was also concern that orders of the falekaupule were being defied.
- 9.18 The Court began by examining the complex interplay of human rights and custom in the Tuvalu Constitution of 1986. The Preamble, which is not justiciable but with which interpretations of the constitution must be consistent,²⁴ places strong emphasis on the maintenance of Tuvaluan values and culture.²⁵
- 9.19 The Bill of Rights within the Constitution also states that freedom of belief, expression and assembly are subject to the protection of Tuvaluan values, and laws reasonably required in the interests of public safety, public order and for the purpose of protecting the rights and freedoms of others.²⁶ Such restrictions are also not contrary to freedom from discrimination, and no reasonable act that is in accordance with Tuvaluan custom is considered discriminatory.²⁷ Laws and actions taken under law must, however, be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity. In determining whether a restriction is reasonably justifiable, the court must have regard to the traditional practices, laws and judicial decisions of Tuvalu and other democratic countries and to international human rights law.²⁸
- 9.20 In turn, Tuvaluan values and rights, including the right to worship, can only be exercised having regard to the rights and feelings of others. Restrictions can be placed on the exercise of rights which are divisive, unsettling or offensive or which may directly threaten Tuvaluan values or culture.²⁹

24 Constitution of Tuvalu, s 4.

25 The Preamble sets out principles 3, 5 and 7, among others, of the Constitution of Tuvalu:

(3) [T]he stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of island communities and the attitudes of co-operation, self-help and unity within and amongst those communities

(5) [T]he guiding principles of Tuvalu are – agreement courtesy and the search for consensus, in accordance with traditional Tuvaluan procedures, rather than alien ideas of confrontation and divisiveness; ... [and] the need for mutual respect and co-operation between the different kinds of authorities concerned, including ... the traditional authorities ... and the religious authorities.

(7) [T]he people of Tuvalu recognise that in a changing world ... these principles and values, and the manner and form of their expression (especially in legal and administrative matters), will gradually change, and the Constitution ... must not unnecessarily hamper their expression and development.

26 Constitution of Tuvalu, ss 23–25.

27 Constitution of Tuvalu, s 27.

28 Constitution of Tuvalu, s 15.

29 Constitution of Tuvalu, s 29.

- 9.21 The High Court held that the Constitution expressed the desire of the Tuvaluan people to hold to their traditions even if some individual rights are consequently curtailed. Although in this case the applicant had been discriminated against, there was a legitimate concern that the presence of new religions had caused erosion of the communal spirit on the island. The Chief Justice was satisfied that the decision to restrict new religions had been taken as a result of a reasonable belief that the island's values were under threat. Therefore, while the Court was not ruling on the merits of the falekaupule's decision, the falekaupule had the power to make this decision.
- 9.22 A trenchant criticism of this decision has been made by 'Dejo Olowu,³⁰ arguing it is a denial of religious plurality, the dynamic and evolving nature of custom and the inevitable incursions of globalisation. He argues that freedom from discrimination is a self-executing right, and that "the duty of all States, regardless of their political, economic and cultural systems, is to promote and protect all fundamental rights and freedoms."³¹ Olowu, however, recognises that rights and custom are delicately balanced in the Tuvalu constitution and concludes by calling for further debate on these issues, as well as an appeal.³²
- 9.23 An issue not discussed in the above critique is that the applicant, having failed to get the blessing of the falekaupule, deliberately flouted its ruling. A decision banning his church, which may well have been an unreasonable restriction on the freedom of religion, instead became an issue of law and order, whether the customary authority could exercise control and keep the peace in the local community. Any scope for dialogue within the community and balancing of rights of the different interests was therefore pre-empted by his actions.
- 9.24 The Director of the Fiji Human Rights Commission, Dr Shaista Shameem, has noted that:³³
- [T]he case is not about freedom of religion but about the implications of the practice of a religion that could have a negative impact on the survival of a community – the community's right to life itself . . .*
- 9.25 She adds that the right to practise religion is not absolute – articles 18 and 19 of ICCPR must be read alongside article 29, which states that everyone has duties to the community and that rights may be limited to meet the just requirements of morality, public order and general welfare in a democratic society. She regards the decision in *Teonea* as "within the parameters of international law in terms of both rights and their limitations."³⁴

30 'Dejo Olowu "When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A Critical Review of the Tuvaluan Decision on *Mase Teonea v Pule O Kaupule & Another*" (2005) 9 *Journal of South Pacific Law* < <http://law.usp.ac.fj/jspl> > (accessed 6 September 2006).

31 UN General Assembly "Vienna Declaration and Programme of Action" (World Conference on Human Rights, Vienna, 14–25 June 1993) A/CONF.157/23.

32 An appeal is likely to be heard in early 2007: Seve Paeniu, Tuvalu High Commissioner to Fiji (Tuvalu statement at the 11th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Suva, Fiji, 31 July–3 August 2006).

33 Shaista Shameem, Director of the Fiji Human Rights Commission (Speech to the Australia New Zealand Society of International Law 14th Annual Conference, Wellington, 29 June–1 July 2006) 6.

34 Shameem, above n 33, 7.

- 9.26 Focusing only on individual freedoms in such debates can be misleading – the right to the maintenance of a culture or community may also be involved. What, for example, is a church’s policy in relation to community obligations? Does the policy risk undermining the community as a whole? A decision that might be quite unreasonable in an urban setting, where individuals may live quite independent lives, might be justifiable in a village setting, where everyone is interdependent.
- 9.27 Similar concerns have arisen in other countries but with differing results. These in part reflect the different constitutional positions of custom in those societies.³⁵ Although the reason consistently given for such restrictions across a range of countries is that they are necessary in order to preserve social harmony and avoid division,³⁶ in 2000 the Supreme Court of Samoa described limitations imposed by fono on the number of churches in a village as “a form of religious intolerance or discrimination on the grounds of religion”.³⁷ In earlier cases, courts have, however, been more willing to uphold banishment.³⁸ This change perhaps reflects a growing awareness that banishment on the grounds of religion may have become unacceptable in Samoan society.
- 9.28 In a case from New Caledonia,³⁹ two women were banished because as Jehovah’s Witnesses they refused to perform certain customary tasks and participate in certain ceremonies. When they refused to leave, members of the tribe whipped them and, on learning that the women had laid a complaint, punished them again. The Cour de Cassation upheld conviction of the tribal members, rejecting the argument that whipping was a form of customary justice, on the basis that:⁴⁰
- No text recognises any competence of customary authorities to pronounce sanctions of a punitive character, even in relation to people of customary status. The state remains competent in matters of justice, public order and the guarantee of public liberties.*
- 9.29 The cases therefore reveal that, while the courts have given some latitude to local communities to impose restrictions on the exercise of religious beliefs, this latitude depends to a large degree on the legal framework of the country and the likelihood of an adverse impact on a particular community.
- 9.30 Disruption in small communities cannot be easily dismissed, and the proliferation of religious groups *may* also reduce the financial and human resources available

35 In *Teonea*, above n 23, Ward CJ discusses the Samoan cases of banishment arising from religious expression but finds the Samoan constitution contains no parallel to the overriding concern for custom in the Tuvalu constitution.

36 This justification was, for example, argued by the defendants in *Sefo v Attorney-General* [2000] WSSC 18 (12 July 2000 Wilson J) < www.paclii.org > (accessed 19 March 2006). See also Don Paterson “New Impulses in the Interaction of Law and Religion: A South Pacific Perspective” [2003] Brigham Young University Law Review 593, 619; Mortensen, above n 21, 520.

37 *Sefo v Attorney-General* (12 July 2000 Wilson J), above n 36.

38 See for example *Italia Taamale & Others v The Attorney-General* [1995] WSCA 1; CA 02 1995B (18 August 1995) < www.paclii.org > (accessed 7 April 2005).

39 *Waehnyya et autres* (10 Octobre 2000) Cour de Cassation Ch Crim 5871.

40 This case was apparently appealed to the European Court of Human Rights, but we have been unable to find a record of any decision.

to the village and to existing churches that play an important role in social cohesion. The proliferation of religious groups can also lead people who believe that their individual religious calling is more important than the rules and customs of the village to question customary authority.

- 9.31 At the same time, the right of individuals and minority religious groups to freely express and practise their religious beliefs cannot be disregarded. It would be difficult, if not impossible, to justify a restriction based on simple religious intolerance. Custom cannot be taken as a licence for religious discrimination, but the requirement in most constitutions that religious freedom needs be exercised with due regard to the rights and duties of others is also important. The likelihood of disruption must be real rather than simply an excuse to limit new views, but may be more likely in small, customary communities or where the new faith seeks to challenge the existing civil order.

Growing practice of other religions

- 9.32 Although the focus of most discussion in the Pacific is on the role of Christianity, the impact of new faiths, including Islam, is growing in many countries. Australia, New Zealand, Papua and Papua New Guinea, as well as Fiji, now have significant Muslim populations who are demanding some recognition of their religion and customs. Recently in New Zealand, a court was required to consider whether a woman could give evidence wearing a burqa which covered her face.⁴¹ The court found that requiring her to give evidence without the burqa but behind a screen, whereby only the judge, counsel and court staff could see her face, would be a reasonable limitation on her religious observance.⁴² In addition to Islam, the Baha'i faith has grown quickly in the Pacific.⁴³ Despite opposition by colonial officials, they “quickly indigenised their institutions” and by 2000 had over 110,000 adherents throughout the region.

FREEDOM OF EXPRESSION

- 9.33 Another fundamental freedom that has been controversial in the Pacific is freedom of expression, which is guaranteed in most of the countries' constitutions and in international conventions.⁴⁴ While the ICCPR affirms freedom of expression, article 19(3) states that the right carries with it special duties and responsibilities and may be subject to restrictions. Restrictions may be provided by law in order to protect the rights or reputations of others, national security

41 *Police v Razamjoo* [2005] DCR 408; and David Griffiths “Pluralism and the Law: New Zealand Accommodates the Burqa” (2006) 11 Otago University Law Review 281.

42 See also the growing British and European jurisprudence on the rights to wear Muslim dress at school: for example, *R (on application of Begum) v Denbigh High School* [2006] UKHL 15, where the House of Lords held a school rule forbidding a pupil to wear a hijab was not an infringement of her religious rights.

43 Graham Hassall “The Baha'i Faith in the Pacific” in Phyllis Herda, Micheal Reilly and David Hilliard (eds) *Vision and Reality in Pacific Religion* (Pandanus Books, Canberra, 2005) 266–286.

44 See UDHR, art 19 and ICCPR, art 19. Niue's constitution does not contain any fundamental rights provisions, and in New Zealand the right to freedom of expression is reflected in the New Zealand Bill of Rights Act 1990.

or public order (ordre public),⁴⁵ or public health or morals. Similar restrictions are echoed in a number of Pacific constitutions.⁴⁶

- 9.34 Media freedom and censorship on moral grounds have particularly raised issues relating to freedom of expression, but they also emerge in the context of elections and race relations. Debates about freedom of expression often overlap with issues surrounding religion. For instance, recent debates in Fiji about the publication of cartoons seen as ridiculing Islam⁴⁷ and debates in other parts of the Pacific over bans on the film *The Da Vinci Code*⁴⁸ have indicated strong governmental and community support for some restriction on freedom of expression on religious grounds.
- 9.35 These debates have not been confined to the Pacific but do indicate that where questions of religion and morality are involved, there will often be calls for some restraint on freedom of expression in order to respect community values. This restraint is in line with a respect for custom and reciprocal respect for others. As the voluntary Fiji Media Code of Ethics states, the media should avoid giving offence by “casual, gratuitous and expletive references to deities which are unnecessary or unjustified by the context.”⁴⁹
- 9.36 There have also been a number of moves by Pacific legislatures to limit media freedom by statute. For instance, the Fiji Government has recently introduced a Broadcast Licensing Bill establishing a government-appointed Broadcast Licensing Authority that would have a say on programming and content. It would effectively take over from the voluntary Fiji Media Council.⁵⁰

Political free speech

- 9.37 Attempts to restrict the media’s freedom to comment on political and related matters are far more problematic than restrictions on moral grounds. Legitimate political criticism may be suppressed by claims that such criticism is contrary to custom or by legislation restricting media freedom.

45 The French phrase “ordre public” is often used in international documents as it seen as having a broader meaning than the English public order: “ordre public” encapsulates the fundamental social, moral and economic principles that underpin the state’s legal systems – values that can change. As a number of the Pacific bills of rights derive from the European Convention on Human Rights, this broader meaning is relevant.

46 For example, Samoa Constitution, s 13(2); Solomon Islands Constitution, s 12(2); Marshall Islands Constitution, art II, s 1(2).

47 Fiji’s *Daily Post* was widely criticised by Muslims and others, including the Fiji Media Council and the Prime Minister, for publishing these cartoons in early 2006: see Ashley Gopal and Dhanjay Deo “Media Council, *Daily Post* Differ Over Cartoons” (April 2006) *Wansolwara* Suva 12 < <http://www.usp.ac.fj/journ> > (accessed 13 July 2006).

48 Bans were imposed by Samoa, the Solomon Islands and by Fiji after an initial release of the film. In American Samoa, however, the Attorney-General advised that any ban would be unconstitutional under both the local and the US constitution: Fili Sagapolutele “American Samoa: Banning *The Da Vinci Code* Would Be ‘Unconstitutional’” (18 June 2006) *Pacific Magazine* Honolulu < <http://www.pacificislands.cc> > (accessed 6 September 2006).

49 Gopal and Deo, above n 47, 12.

50 See Sushil Patel “Fiji Media Mounts Campaign Against Broadcast Bill” (26 August 2006) *Pacific Media Watch* Auckland < <http://www.pmw.c2o.org> > (accessed 28 August 2006).

- 9.38 A recent case involving custom and freedom of expression was *Taione v Kingdom of Tonga*.⁵¹ The publishers of *Taimi 'o Tonga* newspaper challenged the constitutionality of legislation restricting media freedom. This legislation, discussed below, was passed after the newspaper published a number of articles seen as critical of the government and the Royal family. These articles were published after court orders were issued declaring the newspaper seditious and a prohibited import (it was printed in New Zealand).⁵²
- 9.39 Clause 7 of the 1875 Constitution gave generous protections to the writing and printing of opinions and provided that:
- [N]o law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of defamation, official secrets or the laws for the protection of the King and the Royal Family.*
- 9.40 A constitutional amendment in 2003 added additional powers to enact laws that were considered “necessary or expedient in the public interest, national security, public order, morality, *cultural traditions of the Kingdom*, privileges of the Legislative Assembly and to provide for contempt of court and the commission of any offence”. Parliament subsequently passed the Media Operators Act and Newspapers Act 2003, regulating media on the basis of this amendment.
- 9.41 In *Taione*, the Crown argued that the concept of freedom of speech in Tonga was governed by codes of appropriate behaviour (*poto*) and that the Constitution was underpinned by fundamental Tongan values of maintaining and enhancing group cohesion. It also argued that restrictions on media were intended to preserve a balance between the right of fair comment and ethical journalism.
- 9.42 The Court, however, found that the Constitution developed by King George Tupou I did not mention Tongan culture, and that the King had specifically sought to give Tonga a modern Western-style constitution. It found that some of the purported amendments to the Constitution went beyond what was reasonable in a democratic society. To that extent, the amendments were held to be inconsistent with other provisions of the Constitution outlining how amendments could be made.
- 9.43 While the decision on the scope of the constitutional amendment is not questioned, the Supreme Court’s outright rejection of the relevance of Tongan culture, because it was not mentioned in the original constitution, is unfortunate. We suggest that present day culture and custom are relevant to any discussion of what is acceptable in a free and democratic society. This test will therefore vary considerably according to individual societies and the context in which comments are made. As discussed in Chapter 4, custom may on occasion limit how or when comments can be made. It cannot, however,

51 *Taione v Kingdom of Tonga* [2004] TOSC 47; CV 374/2004 (15 October 2004 Webster CJ) < www.paclii.org > (accessed 6 September 2006). See also A Rosevear “*Taione v Kingdom of Tonga*” (2005) 11 *Auckland University Law Review* 209.

52 *Utoikamanu v Lali Media Group Ltd* [2003] TOCA 6; CA 4/03 & 10/03 (25 July 2003) < www.paclii.org > (accessed 6 September 2006).

be allowed to squash criticism of leaders or dissent within a community or to protect privilege for its own sake.⁵³

- 9.44 That political speech can be restricted is evident from two cases involving a fiery Fijian politician, Sakeasi Butadroka. Courts upheld his suspension from Parliament for breaching Standing Orders in a sustained attack on another politician⁵⁴ and an earlier conviction for racially inflammatory speech threatening public order.⁵⁵ Freedom of speech also does not necessarily protect media and others from defamation actions,⁵⁶ sedition trials,⁵⁷ or contempt proceedings.⁵⁸
- 9.45 In line with our earlier discussion of harmonisation of values, we suggest that courts consider custom and culture when dealing with freedom of expression cases. It should be permissible to expect and allow for some restrictions to take account of local sensibilities and sense of propriety, provided these restrictions do not go so far as to prevent the expression of opinion in an appropriate manner.

FREEDOM OF MOVEMENT

The right to freedom of movement and residence

- 9.46 The right of all people to freedom of movement and residence within the territory of a state is guaranteed in the Universal Declaration of Human Rights and the ICCPR, although once again it may be qualified by justifiable restrictions provided by law, including restrictions to respect the rights and freedoms of others and restrictions consistent with the other rights recognised in the Covenant.⁵⁹
- 9.47 This right, with similar accompanying restrictions, is found in most Pacific constitutions.⁶⁰ The right affirms a person's freedom to move around and to choose where to live, which in turn allows a choice of community and associates. It can therefore be seen as critical to the exercise and protection of individual economic, social and cultural aspirations.

53 See, for instance, *Efi v Attorney-General of Samoa* [2000] WSSC 22 (1 August 2000 Wilson J) < www.paclii.org > (accessed 18 January 2006), in which restrictions on the leader of the opposition's access to government-owned media were held to be unconstitutional.

54 *Butadroka v Attorney General of Fiji* [1993] FJHC 55 < www.paclii.org > (accessed 13 June 2006).

55 *R v Butadroka* (unreported 1977 Supreme Court). See Helen Aikman "R v Butadroka: Public Order and the Bill of Rights in Fiji" (1981) 11 Victoria University of Wellington Law Review 169.

56 For instance, *Alesana v Samoa Observer Co Ltd* [1998] WSSC 1 (6 July 1998 Bisson J) < www.paclii.org > (accessed 28 August 2006); and *Teannaki v Tito* (2 October 2000) High Court of Kiribati CivC 23/94. See also David James "Kiribati Politics and Defamation: The Case of *Teatao Teannaki v Teburoro Tito*, 1994 to 2000" (2002) 6 Journal of South Pacific Law < http://law.usp.ac.fj/jspl > (accessed 28 August 2006). The law in New Zealand in relation to criticism of politicians is extensively discussed in *Lange v Atkinson* [2000] 3 NZLR 385 and in earlier cases referred to therein.

57 For example, *State v Riogi* [2001] FJHC 61; Haa60j/01s (20 August 2001 Shameem J) < www.paclii.org > (accessed 6 September 2006).

58 *Chaudhary v Attorney-General* [1999] FJCA 27; Aau9u/98s (4 May 1999) < www.paclii.org > (accessed 6 September 2006), in which a conviction for common law contempt after statements alleging judicial corruption was upheld as constitutional.

59 UDHR, art 13(1); ICCPR, art 12, especially 12(3).

60 Constitution of Samoa, art 13(1)(d) states: "All citizens of Samoa shall have the right to move freely throughout Samoa and to reside in any part thereof." The Samoan Constitution is typical in allowing the state to impose reasonable restrictions on the exercise of the right "in the interests of national security, the economic well-being of Samoa, or public order, health or morals, for detaining persons of unsound mind, for preventing any offence, for the arrest and trial of persons charged with offences, or for punishing offenders."

- 9.48 The inclusion of the right to freedom of movement in Pacific constitutions imposes obligations on the state to protect this right. These obligations include protecting the right from restrictions that might be imposed by non-state actors. Like all rights, however, the right to freedom of movement and residence is subject to limitations.

Customary restrictions on freedom of movement

- 9.49 Some customary practices in the Pacific involve restrictions on freedom of movement and residence. We focus here on the custom of banishment, but customary bodies also impose other restrictions on freedom of movement on the grounds of preserving social order and harmony. For example, chiefs in Vanuatu have criticised freedom of movement, saying that this right undermines social control and allows people to drift into town, where they become involved in crime and other anti-social activities.⁶¹
- 9.50 While banishment involves excluding persons from a particular area, in some Pacific communities persons may also be confined to a particular area or, more likely, made to return to a place they have left. In the Vanuatu case of *Public Prosecutor v Kota*, a number of men were convicted of kidnapping after a woman was forced to return to Tanna Island, because a meeting of chiefs decided she should reconcile with her husband.⁶² There have been reports of other similar cases in Vanuatu where police have been enlisted to return women who have had extra-marital affairs to their home islands.⁶³

The custom of banishment

- 9.51 Banishment is a customary mechanism of social control, applied within a number of Pacific societies to maintain peace, harmony and order and as a form of village punishment. It usually prevents people from residing on customary land in the village and requires them to stay away for a period of time. The use of banishment to maintain public order or to punish has a long history in many cultures and is by no means unique to the Pacific.⁶⁴ It was also used by some colonial officials in the Pacific to get rid of “trouble-makers”.⁶⁵
- 9.52 The type of behaviour for which banishment may be imposed will vary depending on local custom. The behaviour may violate the community’s moral code (for example, insulting or disorderly behaviour such as swearing, drinking,

61 Benedicta Rousseau (ed) *The Report of the Juvenile Justice Project: A Resource on Juvenile Justice and Kastom Law in Vanuatu* (Vanuatu Cultural Centre, Port Vila, 2003) 8, 10–11; Benedicta Rousseau *The Achievement of Simultaneity: Kastom in Contemporary Vanuatu* (PhD thesis, University of Cambridge, 2004) 111.

62 *Public Prosecutor v Kota* [1993] VUSC 8; [1980–1994] Van LR 661 (31 August 1993 Downing J) < www.paclii.org > (accessed 18 November 2005).

63 Miranda Forsyth “The Kastom Road Between Peace and Justice in Vanuatu” (Paper presented to the Australasian Law Teachers’ Association Conference, Darwin, Australia, 8–11 July 2004) 8.

64 For example, the Banishment Act 1778 of the State of Massachusetts prohibited certain citizens from returning home on the ground that they had deserted the state and consorted with the enemy during the war. The English Banishment Act 1697 decreed the banishment of all Roman Catholic bishops from England and Wales in order to protect the Church of England from “popish” influences.

65 For instance, leaders of the Mau movement in Samoa were sent to New Zealand, and, previous Samoan nationalists had been sent to other German colonies in the Pacific: Michael Field *Black Saturday: New Zealand’s Tragic Blunders in Samoa* (Reed, Auckland, 2006) 27, 100–108.

fighting and shouting in the village confines) or may be limited to more serious offences. Minor misconduct or disobedience could, however, lead to an individual being ostracised from some of the affairs of the village.⁶⁶

- 9.53 In Samoa, banishment from the village altogether would arise from more serious misconduct or failure to pay lesser penalties such as fines imposed for misbehaviour. The term of banishment is not usually specified, as it would end with remorse being expressed or demonstrated and with the ending of displeasure on the part of the village authorities. While it is a serious punishment, it should be noted that in Samoa a banished individual or family will always find relatives elsewhere in the country to live with, thanks to the extended family system.⁶⁷
- 9.54 The decision to banish is usually made by the village council of chiefs or elders who have authority to administer the affairs of the village, including law and order. The absence of police or other law-and-order authorities in rural villages means that the village council is usually the only practical mechanism for resolving community disputes. In Samoa, banishment was traditionally imposed by fono or village councils, but in 2005 the Court of Appeal held in *Mauga v Leituala* that fono did not have the power under the Village Fono Act 1990 to issue banishment orders. Consequently, now only the Land and Titles Court may validly issue banishment orders in Samoa.⁶⁸
- 9.55 There is a link between banishment and collective land-tenure systems in Samoa and possibly elsewhere in the Pacific. An individual or family residing on customary land may only have the right to use and enjoy the land, while the wider collective retains an ultimate reversionary interest in it. It is partly on this basis that the wider group (represented by the chiefs or village council) may claim the right to exclude someone from village lands.

Case law

- 9.56 Banishment remains a significant practice in a number of Pacific Island countries and territories. We rely here on cases of banishment that have come to light through the courts, but it is likely that there are other incidents in which banishment is imposed by customary authorities and the matter never reaches the courts. The bulk of cases come from Samoa because in that country banishment has been brought within the purview of the courts by giving the Land and Titles Court the authority to issue banishment orders.

66 In Pukapuka in the Cook Islands, an adult might be ostracised by being treated by all, including children, as if he or she were a child: Tingika Elikana, Crown Law Office of the Cook Islands, to the Law Commission (May 2006) Communication.

67 See the discussion of banishment in Western Samoa by Sapolu CJ, quoted in *Italia Taamale & Others v The Attorney-General*, above n 38.

68 *Mauga v Leituala* (March 2005) Court of Appeal of Samoa, reprinted in Malia Sio "Village Pays for Banning: Appeal Fails, Family to Get \$150,000" (13 March 2005) *Samoa Observer* < <http://www.samoaoberver.ws> > (accessed 11 July 2006). The Court of Appeal had earlier held that the Land and Titles Court had the power to issue banishment orders in *Italia Taamale & Others v The Attorney-General*, above n 38. The Court held that, while the Land and Titles Act 1981 makes no express reference to banishment, ss 34 and 37 of that Act (giving the Court exclusive jurisdiction in matters relating to customary land and directing the court to apply Samoan custom and usage) are wide enough to provide authority to the Court to order banishment.

*Samoa*⁶⁹

- 9.57 The legality of banishment was one of the issues in the 1995 Samoa Court of Appeal case of *Italia Taamale*, described by the Court as “a test case which the appellants were justified in pursuing.”⁷⁰ The issue was whether banishment violated Samoa’s constitutional protection of freedom of movement. The facts included a petition by the council of matai (title-holders) of a village to have the appellants and their families banished because of their insulting behaviour and refusal to comply with village obligations.
- 9.58 The Land and Titles Court granted a banishment order and ordered the appellants to leave the village. The Appeal Division of the Court suspended the banishment order and reserved for the opinion of the Supreme Court the question of whether the banishment order violated constitutional rights. The Supreme Court held that the banishment order was not in breach of the Constitution and that the Land and Titles Court has jurisdiction to issue banishment orders. The Court of Appeal upheld this decision and found the order to be “a reasonable restriction imposed by existing law, in the interests of public order, on the exercise of the rights of freedom of movement and residence”.
- 9.59 A recent Court of Appeal case is *Leituala v Mauga*, which concerned the banishment of a man and twenty other members of his family from their village because of alleged misbehaviour by the children. The Supreme Court held that “banishment from a village by a village council is not a reasonable restriction on the exercise of the right of freedom of movement and residence” conferred by the Constitution.⁷¹
- 9.60 The Court of Appeal upheld the Supreme Court’s decision and held that village fono do not have any power to issue banishment orders on their own initiative.⁷² Banishment orders can only be made by the Land and Titles Court, and nothing in the existing law as to the powers of a fono limited the right of all Samoan citizens to move freely throughout the country. Reconciliation of human rights and custom had already been made by the legislature giving a carefully circumscribed power of banishment to the Land and Titles Court. This case can be distinguished from the Court’s earlier decision in *Taamale* in that the banishment order in *Taamale* had been issued by the Land and Titles Court, not by the fono alone.
- 9.61 In *Seuseu v Pemila* in 2005 the Land and Titles Court held that banishment should only be used in serious cases where the village’s safety and peace are at stake or a serious crime has been committed.⁷³ Banishment cannot be ordered by a village fono but must be approved by the Court.
- 9.62 There have also been some Samoan cases in which the imposition of a banishment order for an offence has been taken into account by the courts in mitigation of

69 For further discussion of banishment in Samoa, see Iutisone Salevao *Rule of Law, Legitimate Governance & Development in the Pacific* (Asia Pacific Press/ANU E Press, Canberra, 2005) 131–145.

70 *Italia Taamale & Others v The Attorney-General*, above n 38.

71 *Leituala v Mauga* [2004] WSSC 9 (13 August 2004 Vaai J) < www.pacii.org > (accessed 7 April 2005).

72 *Mauga v Leituala*, above n 68.

73 Malia Sio “Land and Titles Court Warning to Village Councils: You Can’t Just Ban People” (4 February 2005) *Samoa Observer* < <http://www.samoaoobserver.ws> > (accessed 11 July 2006).

sentence for the same offence.⁷⁴ The issue of the courts taking customary penalties into account in sentencing is discussed in Chapter 12.

- 9.63 The Samoan approach to banishment as a legal issue is thus becoming more clearly defined, both procedurally and substantively. The courts have held that banishment is a “drastic” punishment (in the words of the Court of Appeal in *Leituala*) that should be imposed only for serious offences and under an order from the Land and Titles Court. We note particularly the Court of Appeal’s comment in *Leituala* that this approach is not a case of human rights trumping custom, since a “marriage” of human rights and custom had been effected by giving the Land and Titles Court a carefully circumscribed power of banishment.

Kiribati

- 9.64 In the 1986 Kiribati case of *Teitinnang v Ariong*, the plaintiff claimed that his constitutional right to freedom of movement had been violated because he had been denied access to his land and his children had been denied access to the village primary school.⁷⁵ The defendants (village elders) counterclaimed that the restriction was imposed as a result of the plaintiff breaking an agreement regarding the sale of pandanus thatches.
- 9.65 On the facts, the High Court held that the defendants had “committed the tort of unlawful interference with the exercise of the plaintiff’s legal rights, notwithstanding any alleged breach of an agreement or the rules of the villagers.” The Court concluded that the plaintiff was not a party to that agreement and furthermore any such agreement could only be enforced through the courts; the village elders could not take the law into their own hands. The defendants, therefore, were not entitled to prevent the plaintiff and his family from enjoying their legal rights in the community. While rejecting an argument based on custom, the Court also declined to grant relief on the basis of the contravention of constitutional rights, in part because the constitutional protection was held not to apply to alleged breaches by private individuals.⁷⁶

Solomon Islands

- 9.66 The 1995 Solomon Islands case of *Remisio Pusi* also involved the alleged violation of the applicant’s freedom of movement, guaranteed by the Constitution.⁷⁷ The applicant was allegedly banned from entering a village on the grounds that he had insulted the village elders by using offensive language. The Court held that the applicant was never banned from the village by the chiefs, so the alleged violation of his constitutional right had no factual basis. He had not been able

74 See, for example, *Police v Pe’a* [1999] WSSC 7 (12 July 1999 Wilson J) < www.pacii.org > (accessed 21 February 2006).

75 *Teitinnang v Ariong* [1986] KIHC 1; [1987] LRC (Const) 517 (7 April 1986 Maxwell CJ) < www.pacii.org > (accessed 21 June 2005).

76 The treatment of custom in this case would be unlikely to be followed today as a result of the recognition of custom law in the Kiribati Act 1989: Jennifer Corrin Care “Conflict between Customary Law and Human Rights in the South Pacific” (Paper presented at the 12th Commonwealth Law Conference, Kuala Lumpur, September 1999) < <http://www.lexisnexis.com.my> > (accessed 11 July 2006).

77 *Remisio Pusi v James Leni and Others* (14 February 1997) HC Solomon Islands Civil Case 218/1995, Muria CJ. For a note on this case, see Jennifer Corrin Care “Customary Law and Human Rights in Solomon Islands: A Commentary on *Remisio Pusi v James Leni and Others*” (1999) 43 *Journal of Legal Pluralism* 135–144.

to go to the village because he had failed to properly atone for his breach of custom. While he “may very well feel isolated and unwelcomed” as a result of his offence, the applicant was not the subject of a banning order. The Court noted that “swearing at and publicly insulting the Chiefs or elders of a community is a very serious matter in custom.”

- 9.67 The Court’s finding that there was no banning order meant that it did not strictly need to consider the alleged breach of constitutional rights. However, the Court did observe that the Constitution recognised customary law as part of the law of the Solomon Islands and that it was a fallacy to view a constitutional or statutory principle as better than the principles of customary law. The case appeared to the Court to be “a classic example of an attempt to use the Constitution to circumvent the lawful application of custom, a course of action that may well engender disharmony in society. Such a course must not be allowed to flourish in this country.”

Australia

- 9.68 Banishment has been used as a punishment by some Australian Aboriginal communities, and there have been a number of cases in which the courts have taken banishment into account as a mitigating factor in sentencing. The question of whether such banishment might be in breach of the right to freedom of movement does not seem to have been explored in these cases. As part of its review of the place of Aboriginal customary laws in the legal system, the Law Reform Commission of Western Australia is proposing that community councils of discrete Aboriginal communities should have the power to order a community member to leave the community for a specified period of time, with failure to comply being treated as trespass. This power would effectively allow such communities to banish individuals, although it is considered that this would happen only rarely.⁷⁸

Other human rights concerns in relation to banishment

- 9.69 In addition to the issues concerning freedom of movement and residence, cases involving banishment may also raise other human rights issues. For example, in the Samoan case of *Lafaialii v Attorney General*, the plaintiffs successfully argued that their banishment for continuing a Bible class in defiance of an order by the village fono and the Land and Titles Court violated freedom of religion.⁷⁹
- 9.70 Because banishment often affects whole families, it may be possible to argue in some cases that the effect of banishment on innocent people like elderly relatives, wives and children, is so traumatic as to be unconscionable or unreasonable. In *Aloimaina Ulisese*,⁸⁰ the Samoa Supreme Court introduced a note of caution

78 Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper* (LRCWA 94, Perth, 2005) 90, 122–123; Victoria Williams “The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law” in Law Reform Commission of Western Australia *Aboriginal Customary Laws: Background Papers* (LRCWA 94, Perth, 2006) 11.

79 *Lafaialii v Attorney General* [2003] WSSC 8 (24 April 2003 Sapolu CJ) < www.paclii.org > (accessed 18 October 2005).

80 *Aloimaina Ulisese & Others v Lands and Titles Court* (4 November 1998) Supreme Court of Samoa.

where “innocent people such as children” are adversely affected, and the Supreme Court in *Leituala* also referred to the effect of banishment on innocent children, which the Court said was in conflict with the Convention on the Rights of the Child.

- 9.71 Another issue concerns the processes by which the decision to banish is made by customary authorities. In *Ulise*, the Court found that most of the plaintiffs were neither informed of the charges nor given the opportunity to defend themselves. In *Seuseu v Pemila*, the Land and Titles Court criticised the hearing processes of the fono, as the defendant was given no chance to be heard.⁸¹ Issues of natural justice in community justice bodies such as Samoan fono are discussed further in Chapter 11.

Balancing the issues

- 9.72 Banishment cases usually involve the courts in a balancing exercise between competing interests – the individual right of freedom of movement and residence on the one hand, and collective interests such as peace and public order on the other. Both have strong constitutional and practical validity in Pacific countries, which the courts have acknowledged.
- 9.73 The Solomon Islands High Court’s caution in *Remisio Pusi* about the potential hazards of using constitutional principle to circumvent custom is an important one. An over-zealous application of human rights is likely to be unhelpful in managing the interface between custom and human rights, in light of the reality that many Pacific constitutions contain the twin aims of both remaining true to customary values and giving effect to human rights norms. Human rights and custom law need to be considered in the circumstances of each case. The Samoan cases, in particular, include consideration of the particular history and social structure of Samoa, and the courts have carefully weighed the demands of fundamental rights and liberties against custom, traditions and usages.

Remedies

- 9.74 It is generally open to a banished person to either avoid or end banishment by customary remedies. In Samoa, the banished person can seek reconciliation through a public display of remorse and by appeasing the displeasure of the village council with a lavish presentation of foodstuffs and fine mats. This appeasement is in keeping with Samoa’s traditional means of dispute resolution, based on restorative justice. In *Remisio Pusi*, the applicant’s lack of respect for the elders and custom, and his failure to atone for his breach of custom, was, from a Pacific perspective, very provocative. However, there may be a fine line between failing to honour the customary reconciliation process, and so being unable to return, and formal banishment.
- 9.75 At present, it appears that customary remedies are not used to redress wrongful banishment. The use of huge monetary penalties against village elders found to have wrongly ordered banishment, as in *Leituala*, where the Court of Appeal ordered damages of \$150,000, raises questions about who should pay the compensation, who should benefit, and the wider purpose of providing a remedy.

⁸¹ Sio, above n 73.

Large monetary compensation will not necessarily foster peace and harmony in the village; indeed it may be regarded as very unfair for some to have to pay, so prolonging the dispute. The risk of incurring liability for monetary compensation may also inhibit the legitimate customary use of banishment as a means of keeping the peace.

- 9.76 Given that banishment is a customary punishment, remedies such as a public reconciliation and other customary restorative justice actions may generally be more appropriate than monetary compensation in cases of wrongful banishment. The traditional remedies provide ways of restoring relationships. This does not mean that serious and unreasonable breaches of a person’s rights should go unpunished. Rather, the question of remedies needs careful consideration in each case.

Safeguards

- 9.77 The approach taken in the Samoan courts, of balancing individual interests – as expressed in the constitutional right to freedom of movement – with collective interests such as peace and public order provides a way of reconciling them. However there is still a problem if people are banished for what may be considered relatively minor offences. In *Taamale*, the Court of Appeal identified “principles and safeguards” to limit the Land and Titles Court’s exercise of the power to issue banishment orders. The Court of Appeal stated that banishment is an extreme measure of social control and that an order to that effect must never be lightly made. It can only be justified where it is truly essential to preserve public order and the stability of village life. On the other hand, banishment is not to be used for serious criminal offences such as rape and murder, which should be dealt with by criminal law processes. A further safeguard mentioned by the Court is that it must always be open to the banished person to petition the Land and Titles Court to rescind or vary the order.⁸²
- 9.78 The Samoan Court of Appeal in *Taamale* also noted that “the practical content of a constitutional right may evolve over the years”. Therefore, while finding that banishment was at that time a reasonable restriction on the exercise of freedom of movement, the Court did not exclude “the prospect that as Western Samoan society continues to develop the time may come when banishment will no longer be justifiable.”⁸³

COMMISSION SUGGESTIONS

- 9.1 **On the evolution of custom and rights:** Courts can assist with the implementation of fundamental freedoms in customary settings (including freedom of religion, speech and movement) by considering whether customary practices that limit those freedoms are reasonable in the context of rights to culture. Courts can also examine the customary values underlying customary practices and consider whether the practices could be modified to better reflect both those values and fundamental human rights.

⁸² *Italia Taamale & Others v The Attorney-General*, above n 38.

⁸³ *Italia Taamale & Others v The Attorney-General*, above n 38.

Chapter 10

Minority and Migrant Communities

- 10.1 The focus of much of this paper has been on the customs of indigenous peoples in Pacific countries and territories where they are in the majority. However, to varying degrees, all countries within the region contain minority peoples, be they citizens or short-term migrants.¹ This poses several challenges to legal systems that incorporate custom. Questions arise as to the ability of minorities to enjoy their own language, culture and religion, and whether respect for indigenous custom overly constrains the rights of minorities. In relation to internal migrants into the towns, questions arise as to the place of custom in non-traditional and often multi-ethnic communities.
- 10.2 The vulnerability of minorities and migrants calls for sustained attention to their human rights and respect for their customs. In this chapter we can only touch on the interaction of human rights and custom for these groups. The issues are much larger than this brief sketch and require further research and attention by decision-makers in each country.

RIGHTS OF MINORITIES

- 10.3 For all minority cultures in the Pacific, there is a concern to preserve their own unique customs and traditions within a dominant society and at the same time to ensure that they are treated equally and have equal ability to participate in the life of the state. For all these groups, the observance by the state of constitutional and international human rights protections of equality, freedom from discrimination, freedom of religion and the right to culture are crucial.

International instruments

- 10.4 The Universal Declaration of Human Rights declares that all human beings are born free and equal in dignity and rights and should act towards one another in a spirit of brotherhood without distinction as to race, national or social origin or other status (articles 1 and 2). Certain conventions make more specific

1 A 1979 United Nations study of minorities by Francesco Caportorti defined minorities as groups that are numerically inferior, in a non-dominant position within the state, and that possess ethnic or other differences from the rest of the population: Joshua Castellino "Minority Rights" in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 260.

mention of the rights of minorities, for instance article 27 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees minorities the right to enjoy their own culture, practise their own religion and use their own language.² The Convention on the Elimination of Racial Discrimination (CERD),³ while not making specific mention of minorities, emphasises that all persons are entitled to equal protection against discrimination and that governments have obligations to protect these rights and not to encourage any form of racial superiority. CERD supports “special and concrete measures” to guarantee human rights to groups of disadvantaged individuals, provided no special rights are maintained once their objectives have been achieved.⁴

- 10.5 The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ states that everyone has a right to take part in culture,⁶ as well as rights of work, education, health, housing and so on. States that are parties to the treaty undertake to work progressively to achieve full realisation of these rights for all, without discrimination as to race, religion or other forms of status.⁷ There is also a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992).
- 10.6 In addition, the draft Declaration on the Rights of Indigenous Peoples (DDRIP) seeks to provide particular protections to indigenous peoples. It emphasises that indigenous peoples have rights equal to those of other peoples. While not addressing the rights of minorities in general, the DDRIP has particular relevance to indigenous minorities and their cultures.⁸ The latest draft is likely to be presented to the General Assembly this year but is still the subject of considerable debate.⁹

2 Within the region, only Australia, France, Indonesia, New Zealand (including the Cook Islands and Niue), Timor Leste and the United States have ratified this covenant, but Nauru has signed it (see Appendix 5).

3 In addition to the countries listed in n 2, Fiji, Papua New Guinea, the Solomon Islands and Tonga have ratified, acceded to or succeeded to the convention (Nauru has signed only) (see Appendix 5).

4 CERD, art 2(2).

5 Signed or ratified by Australia, France, Indonesia, New Zealand (including the Cook Islands and Niue), the Solomon Islands, Timor Leste and the United States (see Appendix 5).

6 ICESCR, art 15(1).

7 ICESCR, art 2.

8 A revised draft declaration was recently passed by a majority of the new United Nations Human Rights Council and is likely to go before the General Assembly for a vote this year.

9 New Zealand, Australia and the United States (which are not members of the Human Rights Council) supported the opposition to the new draft by Canada, which is a member of the Council. No Pacific nations are members. Particular concerns of these countries related to the absence of a definition of self-determination or of indigenous people. The text also implied the creation of different classes of citizenship and indigenous rights over land now owned by non-indigenous people. They also expressed concern that states would be committing themselves to obligations they could not fulfil and questioned the lack of consultation leading up to the adoption of the revised draft: Australia, New Zealand and the United States of America *Joint Statement to the UN Human Rights Council* (June 2006).

- 10.7 A number of other international instruments, such as the Convention on Migrant Workers¹⁰ and the Refugee Convention,¹¹ are also relevant to certain minority groups in the Pacific but have not yet been ratified by many states in the region.

National constitutions

- 10.8 The rights of ethnic minorities are protected in a number of ways in the constitutions of the region. Most include provisions for equality before the law, although there are some relevant omissions in a number of constitutions. For instance, the Solomon Islands Constitution guarantees freedom from discrimination except for any rules made by Parliament providing for the application of customary law.¹² As discussed below, the Fiji Constitution upholds equality for all but at the same time makes specific provision for certain communities. A number of countries have special voting constituencies for minorities in their constitutions or statutes.¹³

INDIGENOUS MINORITIES

- 10.9 The experience of indigenous minorities in New Zealand and Australia is very different from that of indigenous majorities in most of the Pacific. For these minorities, the pressing issue is to ensure their cultures are respected and fostered alongside the dominant imported cultures.
- 10.10 In Australia, New Zealand and New Caledonia, the non-indigenous settlers have long outnumbered the indigenous people. In the Northern Mariana Islands and Guam, the indigenous people are also now outnumbered. This swamping by settlers has had a profound effect on the cultures of those people and the legal systems that prevail. While each country has to a limited degree had to recognise the custom of its indigenous people, in general the laws have closely reflected those of the coloniser and the cultures of settlers. This coloniser-centred perspective is changing as a result of demands by indigenous groups for greater recognition of their status within the country.
- 10.11 In seeking such recognition by the state, indigenous minorities have relied heavily on international instruments, which guarantee them both equality with other citizens and a right to their own culture, within a single legal system. They have been strong advocates at international and regional fora for greater recognition of these rights.
- 10.12 Each country has also had to accommodate the needs of increasing numbers of immigrants from non-European countries, including the Pacific, bringing with

10 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) (1990). Timor Leste has acceded to CMW, and Indonesia has signed it.

11 The Convention Relating to the Status of Refugees (1951) and its 1967 Protocol. Australia, France, New Zealand, Papua New Guinea, Samoa, the Solomon Islands and Timor Leste have acceded to or ratified the Convention and Protocol; Fiji and Tuvalu have signed both; and the US has acceded to the 1967 Protocol only.

12 Constitution of Solomon Islands, section 15. See *Tanavalu v Tanavalu* [1998] SBHC 4; HC-CC 185/95 (12 January 1998 Lungole-Awich J) < www.paclii.org > (accessed 3 August 2005) where discrimination against women was held valid under this provision.

13 For example, the New Zealand Parliament has special seats for Maori who elect to be on the Maori roll, Samoa has two reserved seats in which people with some non-indigenous ancestry may choose to vote and stand for election, and Fiji has a complex system of communal and cross-voting constituencies for various ethnic groups.

them distinctive customs of their own. This diversity has presented a challenge for those countries of recognising the special rights of their indigenous minorities, while at the same time acknowledging the customs and human rights of other minorities within a multicultural setting.

New Zealand

- 10.13 In New Zealand, Maori comprise one in seven of the population, while those from the Pacific islands comprise one in 16, half of whom are of Samoan descent.¹⁴ New Zealand Maori retain a strong sense of belonging to the Pacific, a regional identity fostered by a common mythology and ongoing links, particularly with Polynesia.
- 10.14 Maori rights as an indigenous people are recognised by the state to a limited extent. The Treaty of Waitangi, signed by Maori and the British Crown in 1840, guaranteed to Maori the retention of their lands, forests and fisheries for as long as they wished to retain them and gave them the rights of British subjects. These guarantees were widely ignored by successive New Zealand governments in subsequent years. In 1975, however, the Waitangi Tribunal was formed by Government to hear claims by Maori of breach of the Treaty and the process of redressing those breaches began.¹⁵ In addition to the Treaty of Waitangi, there are many provisions specific to Maori in legislation, especially concerning Maori land and management of the environment.¹⁶
- 10.15 Also, while New Zealand has no single constitutional document, the New Zealand Bill of Rights Act 1990 recognises the rights of minorities to enjoy their own culture, religion and language, in community with other members of that minority.¹⁷ There has been some recognition of Maori custom in general statutes as well, including legislation concerning sentencing,¹⁸ care of children and young persons,¹⁹ fishing rights,²⁰ and potentially rights over parts of the foreshore and seabed.²¹ Furthermore, the general courts can, where appropriate, seek advice on custom from a specialist Maori court.²² Except for these areas, statute law does not recognise any distinct rights of Maori,

14 Statistics New Zealand *Census Snapshot: Pacific Peoples* and *Census Snapshot: Cultural Diversity* (2002), based on 2001 census figures < <http://www.stats.govt.nz> > (accessed 29 August 2006).

15 Treaty of Waitangi Act 1975.

16 See Mason Durie “Maori-Specific Provisions in Legislation” (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, 15 April 2004) < <http://www.lawcom.govt.nz> > (accessed 5 September 2006). The Maori Land Court was formed in 1865 to deal with Maori land. There is now virtually no customary land left, and only 6% of land is still held as Maori freehold land. Although much Maori freehold land is multiply owned and there are restrictions on its alienability, in most respects it is held in the same manner as non-Maori land: Te Ture Whenua Maori Act 1993, also known as Maori Land Act 1993.

17 NZ Bill of Rights Act 1990, s 20. This is subject to s 5, which makes the rights and freedoms contained in the Bill of Rights subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” As NZ is a signatory to the Optional Protocol to the ICCPR, the equivalent to s 20 (art 27) has also been the basis of claims to the Human Rights Committee.

18 Sentencing Act 2002, ss 10 and 27.

19 Children, Young Persons and their Families Act 1989, s 7(2)(c)(ii).

20 Fisheries Act 1996, ss 2, 6(3)(e) and 121(2)(a); Maori Fisheries Act 2004, ss 2, 44(2)(f) and sch 7(6); Maori Commercial Aquaculture Claims Act 2004, ss 4 and 6(2)(a)(i).

21 Foreshore and Seabed Act 2004.

22 Te Ture Whenua Maori Act 1993, s 61.

although some statutes require the Crown to take account of Treaty of Waitangi principles to varying degrees.²³ Nonetheless, the courts are increasingly requiring decision-makers to take account of the Treaty of Waitangi and Maori issues, even where the statute is silent.²⁴

- 10.16 In 2001, the Law Commission published a study paper on Maori custom and values in New Zealand law,²⁵ and the New Zealand Human Rights Commission is also calling for greater discussion of the Treaty of Waitangi and human rights.²⁶ Another area of long-standing concern for Maori has been the historic undermining of their tribal institutions. Although various forms of state recognition have been given to tribes in the past, the Law Commission has recently proposed new structures based on principles of tribal autonomy and accountability to the tribe.²⁷

Australia

- 10.17 The Aboriginal and Torres Strait Islander population of Australia comprises only 2 per cent of the total population. The indigenous people of the Torres Strait Islands have much in common with the neighbouring people of Papua New Guinea.
- 10.18 There was little formal recognition of native land title until the watershed decision of the High Court of Australia in *Mabo (No 2)* in 1992.²⁸ The Native Title Act 1993 (Commonwealth) sought to codify native title rights to land. However, broader recognition of custom law, as advocated by the Australian Law Reform Commission and several state law reform commissions,²⁹ has generally not materialised, except in relation to some family matters. The current Commonwealth Government position is that:³⁰

[A]ll Australians are equally subject to a common set of laws Neither the government nor the general community ... is prepared to support any action which would entrench additional, special or different rights for one part of the community.

23 For instance, the Resource Management Act 1991, Conservation Act 1989 and State Owned Enterprises Act 1986.

24 For example, *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).

25 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001).

26 Human Rights Commission *The New Zealand Action Plan for Human Rights/ Mana ki te Tangata: Priorities for Action 2005–2010* (Human Rights Commission, Auckland, 2004) < <http://www.hrc.co.nz> > (accessed 5 September 2006).

27 New Zealand Law Commission *Waka Umanga: A Proposed Law for Maori Governance Entities* (NZLC R92, Wellington, 2006).

28 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA).

29 Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (ALRC No 31, Australian Government Publishing Service, Canberra, 1986). See also New South Wales Law Reform Commission *Sentencing: Aboriginal Offenders* (NSWLRC No 96, Sydney, 2000); Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper* (LRCWA No 94, Perth, 2005), a precursor to a report expected to be published in late 2006 on the same issue; Northern Territory Law Reform Committee *Report on Aboriginal Customary Law* (Darwin, 2003).

30 *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia’s Challenge* (September 2002) 10, 17 < <http://www.atsia.gov.au> > (accessed 5 September 2006).

- 10.19 A recent development in some Australian states is special sentencing courts for Aboriginal offenders. These are known in South Australia as Nunga Courts, in Victoria as Koori Courts and in New South Wales as circle sentencing.³¹ These operate after conviction, with the consent of prosecution and offender, and involve the judge and the offender's community designing appropriate sentences. Custom (including customary punishment) has also been taken into account by the general courts in some sentencing matters,³² but they have also recognised limits on traditional punishments.³³
- 10.20 There has, however, been considerable concern about the application of Aboriginal custom, particularly as it affects women, and claims that underage sex or domestic violence is sanctioned by custom have been rejected.³⁴ These and other issues concerning the interface between custom and human rights have been considered by Australian law reform bodies in their inquiries into recognition of Aboriginal custom law.³⁵

New Caledonia

- 10.21 In New Caledonia, the indigenous Kanak people comprise 44 per cent of the population. Those of European origin make up 34 per cent, while Wallisians represent nine per cent. The remaining 13 per cent includes people from Vietnam and other countries in Asia and the Pacific. New Caledonia is an overseas territory of France. A period of unrest and Kanak demands for independence in the 1980s led to the signing of the Matignon Accord in 1988. This accord promised a referendum on sovereignty after 10 years of development assistance for the Kanak people. However, by 1998, it was felt that New Caledonia was not ready for independence. Instead the Noumea Accord was signed, postponing the referendum until 2014 at the earliest. The Accord also devolved aspects of sovereignty to New Caledonia and gave considerable recognition to Kanak customary law and cultural status. This Accord departs from the traditional French approach that did not recognise the concept of minorities on the grounds that the republic comprised

31 *Aboriginal Customary Laws: Discussion Paper*, above n 29, 146–152.

32 For example *R v Minor* (1992) 59 A Crim R 227, 228 per Asche CJ, where a traditional punishment was taken into account to avoid double jeopardy and to reflect the benefit of community healing; *Munugurr v R* (1994) 4 NTLR 63, where traditional punishment was part of the court order (although the traditional punishment in question was simply a requirement to attend a public meeting to seal the peace); and *R v Wilson Jagamara Walker* (1994) 68(3) *Aboriginal Law Bulletin* 26, where the offender was returned to his community to serve his sentence.

33 For instance, that the defendant needed to be protected from traditional punishment or “payback” where the punishment was likely to be so severe that it would be an unlawful act: *Barnes v R* (1997) 96 A Crim R 593 (NTSC); *Unchango & Ors v R* [1998] WASC 186.

34 For example, New South Wales Law Reform Commission, above n 29, 105; Megan Davis and Hannah McGlade “International Human Rights Law and the Recognition of Aboriginal Customary Law” in Western Australia Law Reform Commission *Aboriginal Customary Laws: Background Papers* (LRCWA No 94, Perth, 2006) 381, 389.

35 See, for example, Law Reform Commission of Western Australia *Aboriginal Customary Laws: Background Papers* (LRCWA No 94, Perth, 2006), in particular Davis and McGlade, above n 34, 381–428, and Chris Cunneen and Melanie Schwartz “Customary Law, Human Rights and International Law: Some Conceptual Issues”, 429–450. See also *The Queen v GJ* [2005] NTCCA 20 < <http://www.nt.gov.au> > (accessed 31 July 2006).

only “citizens”.³⁶ There is, however, no special provision for the recognition of minority cultures other than Kanak.

- 10.22 The Organic Law 1999 (Loi Organique 99-209), which implemented the Noumea Accord, provides for a Customary Senate with elected representatives from each customary area. This body advises government on matters relating to custom and land. There is also provision for customary assessors in civil courts to advise the judge on matters of custom, but in fact customary matters rarely get to court.³⁷ Law 99-209 also recognises a register of people who are subject to “customary civil status” and therefore subject to custom law. This status can be changed to common law civil status, but not vice versa, suggesting a possible diminishing role for custom law over the years to come.

NON-INDIGENOUS MINORITIES

- 10.23 In most other parts of the Pacific, while indigenous people constitute the majority of the population, there are some significant minority populations. Some have lived in the islands for many centuries, including some Polynesian communities living in parts of Melanesia. Others postdate colonisation, including immigrants from Europe and Asia. Many people, especially from India and China, came to the Pacific as indentured labourers or migrants in the nineteenth century, and their descendants have become Pacific Islanders.

- 10.24 Minorities also include islanders taken from one island to another (including Australia), as part of the “black-birding” labour trade of the 19th century, and islanders who were moved during the 20th century as a result of war or degradation of their traditional lands, for instance by nuclear testing or phosphate mining.³⁸ There has also been a large-scale migration of Pacific Islanders to New Zealand, Australia and North America in the past 40 or so years.

- 10.25 In recent years, there has been increasing migration between Pacific Islands, and migration into the region from Asia, particularly China. In addition, a number of Pacific countries, particularly those in the northern Pacific, have a significant number of short-term migrants, particularly from Asia. These people are often contracted to perform menial work, do not have residence rights and have little knowledge of the host culture. Many are therefore very vulnerable to exploitation.³⁹

36 Norbert Rouland “Custom and the Law” in Paul de Deckker and Jean-Yves Faberon (eds) *Custom and the Law* (Asia Pacific Press, Canberra, 2001) 25, n 2 and 3.

37 Guy Agniel “Legal Adaptations to Local Sociological Particularities” in Paul de Deckker and Jean-Yves Faberon (eds) *Custom and the Law* (Asia Pacific Press, Canberra, 2001) 48. A “proces-verbal de palabre”, a record made by the local customary body, can also be introduced into court. This record can be contested or not applied by the court but is said to have moral or political force. The customary council in the area can also be asked to rule if the proces-verbal de palabre is disputed.

38 On the 19th century Melanesian labour trade, see Donald Denoon “Land, Labour and Independent Development” in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1997) 152, 179–181; on resettlement of communities in the 20th century see Karen Nero “The End of Insularity” in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1997) 439, 451–456.

39 The conviction of a factory owner in American Samoa for enslaving, starving and beating some 200 Vietnamese and Chinese is an example of this exploitation: Fili Sagapolutele “Lee Appeals Human Trafficking Conviction” (August 2005) *Pacific Magazine* Honolulu 9–10.

- 10.26 Another expanding group of “migrants” in the Pacific is refugees. There are significant populations of refugees in Australia and New Zealand, as well as refugees from the Indonesian province of Papua in Papua New Guinea. In recent years, the Australian Government has sent asylum-seekers intercepted at sea to Nauru and Papua New Guinea to have their claims for refugee status processed. There have also been refugees from political turmoil in Fiji, the Solomon Islands, Timor Leste and Bougainville. The treatment of refugees gives rise to very vexed human rights issues which cannot be explored in this paper. The United Nations High Commissioner for Refugees (UNHCR) and the Convention Relating to the Status of Refugees have a major role to play in protecting the rights of refugees.⁴⁰
- 10.27 Because of the wide variety of circumstances and times in which these people have come to the Pacific, and the varying degrees to which they have blended with the local communities, it is impossible to make generalisations as to how their customs and culture should be accommodated, other than to say that it is a matter each country must take into account in its national laws and policies. In providing for recognition of any indigenous custom, the rights of others to their customs and cultures must also be recognised.
- 10.28 In this section we consider briefly the complex situations in Fiji and Papua, where non-indigenous people are significant minorities. We give particular consideration to the position of Fiji’s large Indo-Fijian minority. There is not scope in this paper to discuss the position of other minorities throughout the Pacific, but it is an area which warrants further study to ensure that their needs are not overlooked.⁴¹

Fiji

- 10.29 Fiji is examined as a particular case study, because it is there that issues surrounding indigenous and non-indigenous cultures are most starkly evident. Fiji is also unique within the Pacific in that the population balance has shifted markedly in recent years. Although indigenous Fijians now constitute a majority of the population,⁴² from the mid 1940s to the mid 1980s, Indo-Fijians were the majority.⁴³
- 10.30 As well as a large Indo-Fijian population and significant Chinese, European and Part-European populations, Fiji is also home to a number of discrete communities from other parts of the Pacific: Rotumans whose island has been part of Fiji since 1881, Banabans who have lived on Rabi since 1945, and Tuvaluans who have

40 For UNHCR’s activities in Asia and the Pacific see UNHCR *The Global Report 2005* (Geneva, 2006) 336–342 <<http://www.unhcr.org>> (accessed 5 September 2005).

41 See, for example, Nacanieli S Tuivalalagi “Study on Descendants of Indentured Melanesian Labourers in Samoa” (UNESCO Office for the Pacific, Apia, 2003).

42 According to 2004 Fiji Government figures, 54.3% of the population were indigenous Fijian, 38.16% Indo-Fijian, and 7.54% other ethnic communities <<http://www.fiji.gov.fj>> (accessed 4 August 2006).

43 Jon Fraenkel “The Communal System” (22 July 2006) *Fiji Times*. In 1970, Indo-Fijians were 50.76% of the Population, indigenous Fijians 42.92% and others 6.32%: information from Fiji Islands Bureau of Statistics.

lived on Kioa since 1947.⁴⁴ Whereas Rotumans are included in many of the laws that relate to Fijians and have their own representative in Parliament, and Banabans also have some special constitutional recognition, other Pacific Islanders in Fiji are not separately recognised. These include groups such as descendants of Solomon Islanders or ni-Vanuatu taken as part of the black-birding trade, as well as many voluntary migrants in more recent times.⁴⁵

10.31 Fijian concerns that they were being outnumbered in their own country, fostered by colonial European elites, had profound effects on pre-independence land tenure laws and the structure of the 1970 Constitution. Subsequent constitutions and the structure of the land-holding and national voting systems, as well as the degree to which formal recognition is given to custom, have also reflected these concerns. Fijian nationalists have continued to play on these fears, leading in part to coups in 1987 and 2000.

10.32 The 1997 constitution is carefully balanced between recognition of the rights of all citizens and the special rights accorded to the indigenous Fijian, Rotuman and Banaban peoples. This is reflected in its Preamble and principles, which note that when the interests of different communities conflict, parties must negotiate in good faith but that “the paramountcy of Fijian interests as a protective principle continues to apply”.⁴⁶

10.33 The rights and freedoms set out in the Bill of Rights are comprehensive.⁴⁷ In addition, the rights are not to be construed as limiting other rights and freedoms recognised by the common law, customary law or legislation, as long as those other rights are not inconsistent with the constitutional rights. The courts must have regard to the values that underlie a democratic society and, if relevant, public international law applicable to the protection of the rights.⁴⁸

10.34 The courts and the Constitution are essential bulwarks for Indo-Fijians and other minority communities in ensuring their human rights are protected. For instance, in the landmark case of *Republic of Fiji v Chandrika Prasad*⁴⁹ in 2001, the Court found that the Fiji Constitution had been unlawfully abrogated in the 2000 coup. The 1997 Constitution and the protections it contained for all citizens of Fiji were thus reinstated.

44 On the Banabans see Jennifer Shennan and Makin Corrie Tekenimatang (eds) *One & a Half Pacific Islands: Stories the Banabans Tell of Themselves* (Victoria University Press, Wellington, 2005).

45 See, for example, Morgan Tuimaleali’ifano *Samoans in Fiji: Migration, Identity and Communication* (Institute of Pacific Studies, University of the South Pacific, Suva, 1990).

46 Constitution of Fiji, s 6(i) and (j).

47 In *Fiji Human Rights Commission v Commissioner of Police* [2003] FJHC 48; HBC 93D/02S (8 April 2003 Jitoko J) < www.pacii.org > (accessed 26 September 2005), the Bill of Rights was described as “one of the most extensive and inclusive a collection of individual rights to be found anywhere.”

48 Constitution of Fiji, s 43(1) and (2). In at least one case, the court has had regard to a convention that has not been ratified: *Rarasea v State* [2000] FJHC 146; HAA 27/00 (12 May 2000 Madraiwiwi J) < www.pacii.org > (accessed 2 September 2006). See also *Nadan v State* [2005] FJHC 252; HAA 85 & 86/05 (26 August 2005 Winter J) < www.pacii.org > (accessed 2 September 2006) (also cited as *McCoskar v State* [2006] NZAR 404); and *Lyndon v Legal Aid Commission* [2003] FJHC 323; HAM 38/02S (21 February 2003 Singh J) < www.pacii.org > (accessed 31 July 2006).

49 *Republic of Fiji Islands v Prasad* [2001] FJCA 2; ABU 78/00S (1 March 2001) < www.pacii.org > (accessed 2 September 2006).

10.35 The Constitution entrenches Acts dealing with Fijian, Rotuman and Banaban lands and certain customs⁵⁰ and states that Parliament must make provision for the application of customary laws and for dispute resolution in accordance with Fijian processes.⁵¹ Custom is, however, no longer referred to as a source of law, as it was under the 1990 constitution.⁵² Further the Constitution does not provide a clear hierarchy as to custom, common law and human rights.⁵³ The Reeves Commission, whose recommendations formed the basis of the 1997 Constitution, noted that many laws were based on race, rather than residence. Thus the Fijian Affairs Board and its Rotuman and Banaban counterparts have the power to make regulations for peace, order and good governance, but these regulations do not apply to members of other ethnic groups living in the same area.⁵⁴

The position of Indo-Fijians under custom

10.36 There has been much written about Fijian custom and customary law, but there appear to have been relatively few studies as to the extent to which Indo-Fijian communities retain aspects of custom law. There may be a number of reasons for this. In part, it may be a consequence of the extent to which Indo-Fijians have been politically marginalised in Fiji, both pre- and post-independence. The system of indenture under which most Indo-Fijians came to and settled in Fiji in the late 19th and early 20th centuries also caused a dramatic wrench from the customs and livelihood they had in India. Many former distinctions of caste, religion, language and custom disappeared in the cramped journey out and in the hardships of the plantation lines.

10.37 Although some differences of religion and custom still remain, a distinctly new Indo-Fijian culture emerged. As Fiji historian Brij Lal notes, many of the cultural issues that exercise contemporary India have no meaning in Fiji. He states:⁵⁵

My grandfather's country is not mine. Curiously it is in India that I discover the depth of my Fijian roots, the influence of an oceanic culture on my being: a deep commitment to egalitarianism, a certain impatience with protocol and ritual, a zest for living here and now, humility and tolerance, and compassionate concern for fellow human beings as kindred travellers in the same canoe of life.

50 Fiji Constitution, s 185, refers to the Fijian Affairs Act, Native Lands Act and similar legislation for the Rotuman and Banaban communities.

51 Fiji Constitution, s 186. The Reconciliation and Unity Bill before the last Parliament was described by the Government as implementing Fijian customary law, but this has been widely disputed. See, for example, Jone Dakuvula "Pardon Me: What is Fijian Reconciliation and Restorative Justice?" (5 November 2005) in Citizens' Constitutional Forum < <http://www.ccf.org.fj> > (accessed 31 July 2006).

52 Article 100 of the 1990 Constitution allowed customary law except where it was repugnant to the laws of humanity.

53 Jennifer Corrin Care "The Status of Customary Law in Fiji Islands after the Constitution Amendment Act 1997" (2000) 4 *Journal of South Pacific Law* < <http://www.vanuatu.usp.ac.fj> > (accessed 2 September 2006).

54 It also noted that Fiji is a party to CERD, article 5 of which guarantees everyone equal treatment before tribunals and other organs administering justice: Fiji Constitution Review Commission *Towards a United Future* (Parliamentary Paper No 34/96, Government Printer, Suva, 1996) 606.

55 Brij V Lal *Chalo Jahaji: On a Journey through Indenture in Fiji* (Fiji Museum, Suva, 2000) 32–33.

- 10.38 It is therefore in the experience of Indo-Fijians that one must look for the values that underlie their customary practices. As with indigenous customary practices in the Pacific, Indo-Fijian customary practices do not always reflect the underlying values. Human rights norms, therefore, have a valuable role to play, not only in ensuring that vulnerable groups, such as women and children,⁵⁶ are not discriminated against within the Indo-Fijian community and that cultural practices can reflect those norms but also to ensure the culture as a whole can survive.
- 10.39 As this paper has explored the role of community justice bodies in relation to both custom and human rights, it is important to consider their role in minority communities. In the case of Indo-Fijians, it appears that while religious and family sanctions on behaviour are strong, customary methods of dispute resolution are less widely used than in the past.⁵⁷ In colonial times, a Graam Sudhaar Samiti (GSS), comprising elected community members, was responsible for liaison between the community and the colonial administration, and there was an arbitrator (mukhiya) who dealt with conflicts.⁵⁸
- 10.40 There is some evidence of a continuation of informal mechanisms, especially in the rural areas, including referring a dispute to a religious leader, teacher, local Justice of the Peace, the sardar or leader of a cane-cutting gang, or other influential person in the community.⁵⁹ However, it appears that for the most part, Indo-Fijians use the courts to settle disputes outside the immediate family. Nevertheless, if a new informal dispute resolution system were developed with state backing, it could easily be adapted to the needs of Indo-Fijian and other minority communities in Fiji.

Community justice bodies

- 10.41 A question of current concern in Fiji is the proposal to re-establish community justice bodies. In the past, most of the emphasis has been on Fijian courts, but it is recognised that any community justice system must also provide for Indo-Fijians and other minority cultures.
- 10.42 Provision for Fijian courts still exists under the Fijian Affairs Act and regulations, but the courts were abolished in 1967 in favour of a mainstream court system. The Beattie Commission on the Courts in 1994 gave qualified support to a revival, despite strong opposition from women's groups.⁶⁰ The Reeves Constitution Review Commission, however, had considerable reservation about Fijian-only courts, stating that it was undesirable to duplicate offences under the Penal Code and that Fijians before such courts may not

56 See, for example, Shireen Lateef "Wife Abuse among Indo-Fijians" in Dorothy Ayers Counts, Judith K Brown and Jacquelyn C Campbell (eds) *To Have and to Hit: Cultural Perspectives on Wife Beating* (University of Illinois Press, Urbana, 1999) 216–233.

57 One customary dispute resolution process was the pancayat: see Donald Brenneis "Dramatic Gestures: The Fiji Indian *Pancayat* as Therapeutic Event" in Karen Ann Watson-Gegeo and Geoffrey M White (eds) *Disentangling: Conflict Discourse in Pacific Societies* (Stanford University Press, Stanford, 1990) 214–238.

58 Foundation of the Peoples of the South Pacific International *RETA 6065: Assessing Community Perspectives on Governance in the Pacific* (report to the Asian Development Bank, Suva, 2003) 317–321.

59 Vijay Naidu, Victoria University of Wellington, to the Law Commission (13 June 2006) Email.

60 David Beattie *Commission of Inquiry on the Courts* (Government Printer, Suva, 1994) 160–178.

receive the protection of the Bill of Rights. In place of Fijian courts, the Reeves Commission recommended widening the operation of the Magistrates' Courts in rural areas and creating a new system of voluntary dispute resolution for certain "reconcilable" offences, including minor assaults and property offences, but not domestic violence. It recommended that the system of dispute resolution begin with the indigenous Fijian community but be extended to other communities if they agreed.⁶¹

- 10.43 A 2002 report by the Ministry of Fijian Affairs agreed that the establishment of a court solely for Fijians would be a retrograde step and noted that in fact very little customary law was still extant.⁶² What remained was mostly in the form of by-laws for keeping order in the villages, which could be administered by the Magistrates' courts. Despite these disadvantages, both the current Government and the Bose Levu Vakaturaga (Great Council of Chiefs) have recently expressed support for the re-establishment of Fijian courts, because of the large number of indigenous Fijians involved in crime.⁶³
- 10.44 The Fiji Law Reform Commission is currently reviewing options for merging court procedures with traditional and community justice processes in the context of the Penal Code and the Criminal Procedure Code.⁶⁴ A recent report to the Bose Levu Vakaturaga suggested a form of "problem-solving courts" like those used in South Australia for Aboriginal offenders. Such a court could involve a roving magistrate sitting with "significant elders" of the relevant community, but its decisions would be subject to appeal in the normal manner. Principles of restorative justice would apply and would be consistent with the traditional Fijian approach to resolution of disputes⁶⁵ but would be available to all communities.⁶⁶

Papua

- 10.45 Papua,⁶⁷ a province of Indonesia since 1963, is another part of the Pacific that requires special attention. Indigenous Papuans are a majority within Papua itself, but a small Melanesian minority within Indonesia. In 2000, 35 per cent of those living in Papua were from other parts of Indonesia.⁶⁸ These migrants bring with them a different custom law and religion, and they

61 Fiji Constitution Review Commission, above n 54, 617–621.

62 Ministry of Fijian Affairs, Culture & Heritage *Review of the Fijian Administration Report* (vol 1, Parliamentary Paper No 70/02, Suva) 112.

63 See "Fijian Court will Stop Crime, Says Senator" (30 October 2005) *Fiji Sun*; "Proposed Traditional Court System Not Needed" (21 October 2005) *Pacific Magazine* Honolulu < <http://www.pacificislands.cc> > (accessed 8 November 2005)

64 *Qolilawa Darpan* (Fiji Law Reform Commission Newsletter, April 2006) Suva 1–3.

65 See Asesela Ravuvu *Vaka i Taukei: The Fijian Way of Life* (Institute of Pacific Studies, University of the South Pacific, Suva 1995) 110.

66 Ratu Filimone Ralogaivau *Problem-Solving Courts: Blending Traditional Approaches to Dispute Resolution in Fiji with Rule of Law – the Best of Both Worlds* (report to the Great Council of Chiefs, May 2006). This report is part of a Fiji Ministry of Justice/AusAID project and is also informing the work of the Fiji Law Reform Commission in this area: Janet Maughan, Justice Agencies Adviser, Australia Fiji Law and Justice Sector Program, to the Law Commission (23 and 26 May 2006) Email.

67 Also called West Papua or Irian Jaya.

68 Richard Chauvel and Ikrar Nusa Bhakti *The Papua Conflict: Jakarta's Perceptions and Policies* (East-West Center, Washington, 2004) 2–3.

are more likely to favour ongoing links with Indonesia. Many indigenous Papuans, by contrast, do not feel Indonesian and identify more with other Melanesians.⁶⁹

10.46 In 2001, Indonesia passed a law giving special autonomy to the province, but it was not until 2005 that a representative assembly was established, and some commentators argue that meaningful autonomy has yet to be achieved.⁷⁰ The move towards autonomy may give greater recognition to the customary and human rights of indigenous Papuans, who have previously been largely marginalised in their own country. At the same time, the rights of the non-indigenous minority will also need to be respected.

10.47 Consistent with the Indonesian Constitution,⁷¹ the special autonomy law recognises indigenous Papuan culture and custom and provides for the establishment of courts applying Papuan custom.⁷² The autonomy law represents a significant change from past policies that gave no recognition to Papuan custom law, but it appears that there has been limited progress so far in giving effect to the recognition of custom under the special autonomy law.⁷³ There have also been many reports of human rights violations in Papua.⁷⁴

Migrants from other Pacific Islands

10.48 In many of the countries in our study, there are very significant populations of Pacific Islanders (including Indo-Fijians and other non-indigenous groups) living in countries other than their own, either permanently or for work or study.⁷⁵ It is difficult to generalise regarding their experience, but as this is a New Zealand study, we discuss briefly the position of Pacific Islanders living in New Zealand.

New Zealand

10.49 Apart from the general provision in the New Zealand Bill of Rights Act 1990 for the rights of minorities, there is no specific provision in law recognising the

69 Richard Chauvel *Constructing Papuan Nationalism: History, Ethnicity, and Adaptation* (East-West Center, Washington, 2005).

70 For general background on Papuan autonomy see Richard Chauvel and Ikrar Nusa Bhakti *The Papua Conflict: Jakarta's Perceptions and Policies* (East-West Center, Washington, 2004); Rodd McGibbon *Secessionist Challenges in Aceh and Papua: Is Special Autonomy the Solution?* (East-West Center, Washington, 2004); Richard Chauvel *Constructing Papuan Nationalism: History, Ethnicity, and Adaptation* (East-West Center, Washington, 2005); International Crisis Group *Papua: The Dangers of Shutting Down Dialogue* (Asia Briefing 47, Jakarta/Brussels, 2006).

71 Constitution of Indonesia, arts 18B and 28I(3).

72 Law 21/2001 on Special Autonomy for Papua Province, especially preamble and arts 43, 51.

73 Totok Hari Wibowo "The Emergence of Papuan Tribal Governance: A Case Study of Societal Knowledge Creation" (PhD Thesis, Japan Advanced Institute of Science and Technology, 2005) 113–114, 127.

74 Elizabeth Brunidge, Winter King, Priyeha Vahali, Stephen Vladeck and Xiang Yuan *Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control* (Yale Law School, New Haven, 2004); John Wing with Peter King *Genocide in West Papua? The Role of the Indonesian State Apparatus and a Current Needs Assessment of the Papuan People* (Centre for Peace and Conflict Studies, University of Sydney, Sydney, 2005); Human Rights Watch *World Report 2006* (New York, 2006) 270–271.

75 For an overview see Karen Nero "The End of Insularity" in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1997) 439–467.

customs of the many Pacific Island New Zealanders or other ethnic groups.⁷⁶ Courts are increasingly being called upon to consider such issues. In the area of the criminal law, courts have taken account of traditional apologies or ifoga⁷⁷ and of the effect a husband's adultery might have on a woman from a particular Pacific atoll.⁷⁸ Custom and religion have on occasion been unsuccessfully argued as a defence to charges of assault on children,⁷⁹ and the legislative provision allowing for domestic discipline is currently a matter of widespread debate in New Zealand.⁸⁰ In addition, access to one's culture is increasingly being recognised as an issue in adoption cases, despite there being no express reference in statute.⁸¹

- 10.50 In our consultations with New Zealand-based Pacific Islanders, they stressed the duality of their lives in New Zealand: they were part of New Zealand culture but often felt they did not fully belong. But they also noted a shift has occurred over time, with many Pacific Islanders born in New Zealand rejecting the customs of their parents. A factor which may contribute to this is the risk that custom, when transplanted to a new country, is frozen at the time of migration, rather than being allowed to evolve and modernise, as it does in the home islands.⁸²

Other Pacific Island minorities

- 10.51 New Zealand is not the only place where the custom of migrants is being recognised in the courts. The Solomon Islands is but one example, where a custom marriage between an i-Kiribati couple was recognised. The court held that customary law as defined in the constitution was subject only to the qualification that it "prevailed in an area of Solomon Islands". That qualification was met in the case of the custom law of the i-Kiribati community.⁸³ On the other

76 In 2000, the Ministries of Justice and Pacific Island Affairs produced the *Pacific People's Constitution Report*, which looks at the New Zealand Government's obligations towards Pacific Island communities living in New Zealand, with a focus on those having constitutional links with NZ, including Samoa, and on Fiji and Tonga: < <http://www.justice.govt.nz> > (accessed 5 September 2006).

77 See *R v Talataina* (1991) 7 CRNZ 33 and *R v Maposua* (3 September 2004) CA 131/04. See also Sentencing Act, s 10(1), which provides that the court must take account of any measures taken by the offender or his or her family to compensate or apologise to the victim; and s 27 which provides that an offender may request the court to hear any person(s) on the offender's cultural background and its relationship to the offence.

78 *R v Fate* (1998) 16 CRNZ 88.

79 Crimes Act 1961, s 59, allows parents to use physical force by way of correction of a child if the force is reasonable in the circumstances. See *R v Matafeo* (1996) 14 CRNZ 176, in which the Court of Appeal did not accept the submission that it should have regard to Samoan cultural practice on the disciplining of children by the application of force.

80 See, for example, Children's Commissioner "Children's Commissioner Looking for Action on Child Abuse" (27 June 2006) Press Release < <http://www.occ.org.nz> > (accessed 4 August 2006); Families Commission "Families Commission Supports Repeal of Section 59" (7 July 2005) Press Release < <http://www.familiescommission.govt.nz> > (accessed 4 August 2006); Jarrod Brooker "Church Warns of Law Clash" *NZ Herald* (4 August 2006) Auckland < <http://www.nzherald.co.nz> > (accessed 4 August 2006).

81 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).

82 On Pacific people's culture and identity in New Zealand, see Cluny Macpherson, Paul Spoonley and Melani Anae (eds) *Tangata o te Moana Nui: The Evolving Identities of Pacific Peoples in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 2001).

83 *Edwards v Edwards* (12 January 1996) HC Solomon Islands Civ Cas 312/1995, referred to in Jennifer Corrin Care and Kenneth Brown "Marit Long Kastom: Marriage in the Solomon Islands" (2004) 18 *International Journal of Law, Policy and the Family* 52, 56.

hand, an i-Kiribati community in the Solomon Islands also recently sought to introduce whipping with a coconut branch as a penalty for social misbehaviour. The Public Solicitor noted that corporal punishment was illegal and sought a police investigation.⁸⁴

INTERNAL MIGRANTS - URBANISATION

- 10.52 Another challenge to a legal system that incorporates a large measure of custom is the increase in the number of Pacific Islanders migrating to urban and peri-urban areas away from their home villages. While they bring many aspects of their culture with them when they move to town, they are faced with new problems, and many of the traditional controls on behaviour are absent. In particular, there is a growing prevalence of crime with which both state and customary authorities struggle to cope.⁸⁵
- 10.53 A recent report on urbanisation notes that already 40 per cent of Pacific islanders live in towns, and the proportion is likely to increase to 50 per cent by 2020.⁸⁶ There is a lack of institutional frameworks and deteriorating living conditions for many urban dwellers. Eighty to ninety per cent of housing is estimated to be informal or illegal, and there are increasing levels of poverty. Growing numbers of young people have never been “home” to their village. Many also lack jobs and adequate formal education. Basic economic and social rights are a priority for these recent migrants.
- 10.54 While some urban communities have sought to recreate the customary structures that existed in the rural areas, and while migrants from the same area continue to congregate and address problems communally, young people in particular may no longer feel bound by the strictures still recognised by their elders. They feel that they have left those customs behind in coming to towns and can behave as they wish. Many are more aware of their individual rights to associate and express views as they please. While much of this change is legitimate, the casting off of restraints may contribute, along with poverty, to a rising crime rate.
- 10.55 In response to the increasing crime rate in these urban areas, there have been calls for young people to be returned to the villages. However, usually there are inadequate structures there to supervise them or to prevent further trouble, and many young people no longer respect the right of chiefs or elders to impose sanctions on them. At the same time, the formal justice system is unable to cope and to provide adequate forms of non-custodial sentence for minor crime.
- 10.56 Another issue for a number of Pacific towns is growing conflict between recent migrants and the original inhabitants of the area, as occurred with the migration of Malaitans to Honiara and recently with the attacks on Chinese migrants. Other areas have seen hostility between migrants from different areas or different countries.

84 George Herming “Gilbertese Community in Solomons Brings Back the Whip” (7 March 2006) “Pacific Islands Report” in East-West Center: < <http://pidp.eastwestcenter.org> > (accessed 4 August 2006). The practice has since been discontinued: “Solomons’ Wagina Islanders Stop Whipping” (19 June 2006) “Pacific Islands Report”, above.

85 There is anecdotal evidence of courts accepting a family decision to send a young offender to the village (or in the case of Pacific Islanders living in New Zealand to the island their parents came from), but little evidence of the efficacy of such action.

86 Donovan Storey “Urbanisation in the Pacific” (research paper, State, Society and Governance in Melanesia Project, Canberra, 2006) < <http://www.rspas.anu.edu.au> > (accessed 4 August 2006).

- 10.57 There are therefore particular challenges for both law makers and traditional leaders in dealing with issues of urbanisation. For instance, in Vanuatu there have been recent initiatives by the Malvatumauri (National Council of Chiefs) to form an urban council of chiefs and institute training to upskill them in issues such as governance.⁸⁷
- 10.58 The courts must be cognisant that the custom of the villages may well no longer be the custom of the towns. At the same time, the state-run legal system may be struggling to deal with increasing lawlessness and lack of viable sentencing options. This situation defies simplistic solutions. As more and more of the Pacific is urbanised, this is an area which requires urgent attention from policy-makers.

COMMISSION SUGGESTIONS

- 10.1 **On human rights protections for migrant and minority communities:** Human rights protections are of vital importance to the many migrant and minority populations in the Pacific to safeguard both their rights as citizens and their cultural identities. The role of custom in urban and other multi-ethnic areas also creates special challenges. States have a responsibility to ensure these communities are able to exercise their cultures in a manner consistent with human rights norms.

⁸⁷ Douglas Ngwele, Lakalakabulu Council of Chiefs, Comments at New Zealand Law Commission Consultation Workshop, Nadi, Fiji, 1–2 May 2006; Storey, above n 86, 20.

Part 3

A PACIFIC JURISPRUDENCE



Chapter 11

Community Justice

- 11.1 Community justice bodies can provide ready, affordable and familiar structures, in substantial accordance with custom, for the maintenance of peace and harmony in Pacific communities. But they may also be oppressive and fail to meet people’s growing expectations of respect for individual human rights. In view of their popular cultural legitimacy and because they reflect the constitutional objectives of many Pacific Island countries, the maintenance of these mechanisms is important. However, respect for human rights is also an important constitutional objective. This chapter considers how conflicts between custom and human rights may be better managed within community justice bodies. It considers that there could be greater protection for human rights by strengthening the links between community justice bodies and the state system.
- 11.2 “Community justice bodies” are bodies for maintaining order and resolving disputes at the community level. The institutions are either customary authorities or they incorporate elements of custom law processes and values. Some are part of the state legal system and are governed by statute, while others are not. Some exhibit greater formality in their rules and processes than others. We think it is best to see these mechanisms as sitting alongside the higher-level state courts on a continuum. Both courts and community justice bodies use custom and human rights values in resolving disputes.
- 11.3 We begin by describing the different types of community justice bodies, with examples from different countries. We then examine their advantages before considering issues from the interface between custom and human rights. The suggestions that follow for more formal links with the state legal system are necessarily tentative, and in some cases we can do no more than identify issues that require further examination. The sheer diversity of these mechanisms makes generalisation difficult and research on the ground imperative.

TYPES OF MECHANISMS

- 11.4 We discuss four categories of community justice bodies:
- community courts that are part of the state court hierarchy;
 - local governance bodies that also have a judicial function;
 - non-state customary systems; and
 - alternative dispute resolution.



Community courts

- 11.5 State community courts operate at the local (village, district or island) level and at the bottom of the judicial hierarchy. Examples include the village courts in Papua New Guinea, local courts in the Solomon Islands, and island courts in Vanuatu.¹ Although their operation varies between and also within countries, they have common features:
- The mode of operation is comparatively informal.
 - Judicial officers are not qualified in state-made law but are chosen for their standing in the community and their knowledge of custom.
 - Custom law is applied as appropriate or as the statute directs.
 - Proceedings are non-adversarial, and lawyers may be excluded.
 - The court employs both customary and non-customary alternative dispute resolution processes.
- 11.6 It is important to emphasise that, while these courts apply custom law and employ custom processes as appropriate, they are not customary courts. They are creatures of statute and operate within their statutory parameters. They have been described as a hybrid as they borrow from both customary and Western legal practices and norms. This enables them to be flexible and to employ different techniques depending on both the local context and the nature of the particular matter before them. They can also represent an important bridge between non-state customary systems and the higher levels of the state legal system. To illustrate more clearly how they work in practice, we look now at the largest of these community court systems, the village courts of Papua New Guinea.

Papua New Guinea village courts

- 11.7 The village courts were established shortly before independence, and their primary function, as stated in the Village Courts Act 1989, is “to ensure peace and harmony”. To that end, they are to attempt to reach settlements through mediation before exercising their powers of criminal and civil adjudication. Their criminal jurisdiction extends to certain offences prescribed by statute or regulation, while their civil jurisdiction covers disputes over land; matters relating to compensation, damages and debt; bride price; and custody of children.² The courts are to apply relevant custom, whether or not this is inconsistent with any Act. However, the courts are also bound by the Constitution and required to act in accordance with “substantial justice” and “principles of natural justice”.³

1 On the Vanuatu island courts, see Anita Jowitt “Island Courts in Vanuatu” (1999) 3 *Journal of South Pacific Law Working Paper* < www.pacii.org > (accessed 15 March 2006); Benedicta Rousseau *The Achievement of Simultaneity: Kastom in Contemporary Vanuatu* (PhD thesis, University of Cambridge, 2004) 168–173 [*The Achievement of Simultaneity*]. In a number of Pacific countries and territories, there are also specialist courts that deal with customary land ownership.

2 Village Courts Act 1989, ss 41, 43–48; Village Courts Regulations 1974.

3 Village Courts Act 1989, ss 52–59. The PNG Constitution, s 37(21(b), 22), provides that the Constitutional provisions regarding the equal protection of the law do not affect the powers and procedures of village courts but that village courts are to exercise their powers in accordance with the principles of natural justice.

- 11.8 Village courts determine their own procedures but are not to apply technical rules of evidence.⁴ In general, they are not to proceed in the absence of a party, but a party may be represented by any person other than a lawyer, in which case the party is deemed to be present.⁵ Village courts may impose fines, orders to perform work, and orders for compensation, damages or repayment of debts.⁶ Where village court orders are not complied with, the court may order imprisonment, but orders for imprisonment have no force or effect unless endorsed by a District Court magistrate. Magistrates are to endorse such orders except where they have reason to believe that the village court has acted without jurisdiction or in excess of its powers or where the convicted person is under 17 years.⁷ Village court decisions are subject to appeal and review by a District Court magistrate and to further review by a provincial supervising magistrate.⁸
- 11.9 In 2004, there were more than 1200 village courts in operation, dealing with more than 600,000 cases per year.⁹ While the name “village courts” might suggest that they exist only in rural areas, there are also many village courts operating in urban communities.¹⁰ It is one of the strengths of the village courts that they are not bound by rigid rules and are able to adapt to the local context. As a result, however, it is difficult to generalise about them. The variation in practice can also lead to inconsistency, raising questions of equitable access to justice.
- 11.10 From quite early in their existence the village courts showed signs of formalism and legalism that the framers of the legislation had seemingly not intended – for example, courts sat at regular times in purpose-built court houses, rather than on an ad hoc basis. Some of the perceived drift towards formal legalism was imposed by the legislative rules by which they operated. Research suggests that village court officials see themselves as part of the state legal system rather than as a customary institution and that they tend to hear cases in which customary processes have failed or are inappropriate.¹¹ Occupying a position in between customary processes and the higher courts, village courts provide an accessible and public forum for settling disputes within communities, thereby preventing the escalation of disputes into larger and more violent confrontations.¹²

4 Village Courts Act 1989, ss 59(1), 77.

5 Village Courts Act 1989, ss 79–80. If the village court is satisfied that a party is deliberately absent it may proceed, but in that case the court’s power to make orders is restricted: s 79(3).

6 Village Courts Act 1989, ss 42, 44–46.

7 Village Courts Act 1989, ss 68–69.

8 Village Courts Act 1989, ss 86–95.

9 PNG Justice Advisory Group “Village Court System of Papua New Guinea” (2004) 7 in Village Courts < <http://www.justice.gov.pg/vc> > (accessed 18 March 2006).

10 See for example Michael Goddard “Three Urban Village Courts in Papua New Guinea: Comparative Observations on Dispute Settlement” in Sinclair Dinnen and Allison Ley (eds) *Reflections on Violence in Melanesia* (Hawkins Press and Asia Pacific Press, Sydney, 2000) 241–253 [“Three Urban Village Courts”].

11 PNG Justice Advisory Group, above n 9, 17. Village court magistrates’ perceptions of themselves as doing government work are also discussed in Melissa Demian “Custom in the Courtroom, Law in the Village: Legal Transformations in Papua New Guinea” (2003) 9 *Journal of the Royal Anthropological Institute* (NS) 97, 99–100.

12 “Three Urban Village Courts”, above n 10, 243.

- 11.11 In terms of the Act, village court magistrates are chosen by the communities they serve, and are formally appointed by the Minister of Justice.¹³ They are chosen for their understanding of their community's customs rather than for their knowledge of state-made law but operate as part of the state legal system. The state therefore has a responsibility to provide training suited to their role and other forms of support. Increasingly, village court officers are being trained in mediation and human rights.¹⁴
- 11.12 Critical to the assistance given to the village courts is the *Village Courts Manual*, a handbook for village court officials. A new edition was produced in 2003 in English, Tok Pisin and Hiri Motu. It includes sections on custom law, the rights and freedoms in the Constitution, natural justice and the fair treatment of women and children. The English text states that custom can change in order to remain relevant to modern life but also says that some customs (such as "bride price" payments) have changed for the worse, moving away from their original purpose. It states clearly that it is unacceptable under the Constitution to treat women as subordinate to men or to beat women and that wife-beating should be treated as assault. According to the manual, "It is the new custom of all people in Papua New Guinea that women have the same rights as men. No one can argue with this." Village courts are also told that "When dealing with disputes involving children such as a custody matter, custom cannot be applied if the result will not be [in] the best interests of the child."¹⁵

Local governance bodies

- 11.13 Another means of implementing justice at a local level is to use existing local government structures. Several types can be distinguished:
- Customary councils incorporated by statute, such as the fono (Samoa), the falekaupule (Tuvalu) and the taupulega (Tokelau).
 - Customary councils not provided for by statute, such as the unimwane (village council of elders) in Kiribati.
 - Bodies created by statute which may reflect custom in their practices and decisions. Examples include island councils (Kiribati and Cook Islands) and Aboriginal community councils (Western Australia).¹⁶ In some cases (as in Kiribati), these bodies may coexist with customary bodies.¹⁷
- 11.14 The customary councils in the first category exercised local governance before they were recognised by legislation. Indeed, legislative recognition has been a relatively

13 Village Courts Act 1989, ss 16–17.

14 PNG Justice Advisory Group, above n 9, 16–20; Sarah Garap "Human Rights in Village Courts: The Challenges and Opportunities of Working with Village Courts" (Paper presented at the CEDAW conference, Port Moresby, 24–25 November 2005) ["Human Rights in Village Courts"]; "Bid to Curb Rights Violation" (10 October 2005) *Post-Courier* Port Moresby < <http://www.justice.gov.pg/vc> > (accessed 18 March 2006).

15 Community Courts Advisory Unit *Village Courts Manual* (English version) (2003) 27–28, 60–68, in *Village Courts* < <http://www.justice.gov.pg/vc> > (accessed 18 March 2006).

16 Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper* (LRCWA No 94, Perth, 2005) 115–121, 430–431.

17 Stewart Tabo with contributions by Tiroia Rabaere "Assessing Community Perspectives on Governance in Kiribati" in Foundation of the Peoples of the South Pacific International *RETA 6065: Assessing Community Perspectives on Governance in the Pacific* (report to the Asian Development Bank, Suva, 2003) < <http://www.fsfi.org.fj> > (accessed 5 September 2006).

recent development.¹⁸ A distinctive feature of these bodies is that they exercise both a governmental or administrative role and a judicial role. They make rules or bylaws for the communities they govern but are also responsible for dealing with breaches of those rules and for other types of local dispute resolution. As an example of this type of body, we will describe the Samoan fono.

Samoan fono

- 11.15 Outside observers of Samoa have long noted the important role played by fono or village councils, but it was not until the Village Fono Act 1990 that fono gained legislative recognition. The Act defines the fono of any village as the assembly of the Ali'i ma Faipule (chiefs and orators) of that village “meeting in accordance with the custom and usage of such village”. It validates and empowers the “past and future exercise of power and authority” by village fono acting in accordance with the custom and usage of the village. The jurisdiction of the fono does not extend to persons who do not ordinarily reside in the village or to certain persons who reside in the village but not on communal village land. The fono may impose punishments for “village misconduct”, which is conduct that has traditionally been punished by the fono in accordance with village custom. Such punishments may include, but are not limited to, the imposition of fines and orders to undertake work on village land. Fono are not required to keep written records of any inquiry into alleged village misconduct or any penalty imposed.¹⁹
- 11.16 Any punishment imposed on a person by a fono must be taken into account by a court in mitigation of sentence, if that person is subsequently convicted of an offence in respect of the same matter. Decisions of the fono may be appealed to the Land and Titles Court, which may allow the appeal, dismiss the appeal, or refer the decision back to the fono for reconsideration.²⁰ In the latter case, there is no further right of appeal once the fono has reconsidered the matter. Decisions of the Land and Titles Court are not normally reviewable by other courts,²¹ but the Supreme Court has held that it may review decisions of the Land and Titles Court in relation to alleged infringement of the fundamental rights guaranteed under the Constitution.²² In this way, decisions of village fono do sometimes come before the Supreme Court on human rights grounds.
- 11.17 Despite being formally brought within the governmental and legal system in 1990, fono retain a high degree of autonomy. The Act provides little guidance to fono and contains few limitations on their powers. There is no reference in the Act to human rights, although, as noted above, decisions of the fono can be challenged before the courts on human rights grounds. Fono remain, as they have always been, powerful expressions of matai authority. Only matai are represented on the fono, and matai are overwhelmingly male. However, matai are said to represent the collective interests of their extended family, and the fono as a whole is said to represent the village families.

18 Taupulega were given legislative recognition in 1986, fono in 1990, and falekaupule in 1997.

19 Village Fono Act 1990, ss 2–4, 6, 9.

20 Village Fono Act 1990, ss 8, 11.

21 Land and Titles Act 1981, s 71.

22 *Sefo v Attorney-General* [2000] WSSC 18 (12 July 2000 Wilson J) < www.pacii.org > (accessed 19 March 2006).

11.18 Fono operate on the basis of consensus, but how this consensus is achieved will vary not only between villages but also depending on the circumstances of the case. The achievement of consensus does not necessarily denote a full and free agreement. For example, junior title-holders may feel obliged to defer to their seniors. The emphasis on achieving consensus is consistent with the role of the fono, which above all is to preserve the harmony and order of the village by resolving disputes and punishing actions that are perceived to conflict with the village collective will.²³ However, this emphasis on the collective can create tensions with the protection given to individual rights in human rights law.

Non-state customary systems

11.19 Customary processes operate throughout the Pacific to resolve disputes and maintain order without any formal state sanction. While these systems may have changed radically over time (particularly in response to the introduction of state-made law during the colonial period) they also display a significant degree of continuity with past practices. The nature of these systems varies greatly, but they are invariably concerned with establishing and maintaining relationships and with restoring relationships that have been disrupted by a dispute or a perceived offence. By way of illustration, we will discuss the kastom (custom) system of Vanuatu.

Kastom system of Vanuatu

11.20 The kastom system deals with the majority of disputes throughout Vanuatu, but focuses on disputes relating to land, marriage, child custody and offences against the person.²⁴ The system is administered primarily by chiefs, and on most islands issues may progress from the village to area councils (composed of chiefs from different villages) and even to island level by way of appeal or if a fine is not paid. More serious cases or conflicts between persons of different villages may proceed in the first instance before area or island councils.

11.21 The seriousness of the disputes dealt with by the kastom system and the type of process involved vary from place to place. In some places, the chief (or chiefly council) acts more like a mediator, while in others the chief or council makes a binding decision. Other matters that vary include the punishments imposed and speaking rights in the village meeting place or nakamal (whether women are allowed to speak and whether parties speak on their own behalf or have someone represent them). The great majority of chiefs are male.²⁵

23 Elise Huffer and Asofou So’o “Consensus Versus Dissent: Democracy, Pluralism and Governance in Sāmoa” (2003) 44 *Asia Pacific Viewpoint* 281–304; Unasa L F Va’a “Local Governance in Samoa and the Search for Balance” and Morgan Tuimaleali’ifano “*Talofa e ’Aiga, ua ’ai e lagoon le tofa!* Village Governance and Development in Falelatai” in Elise Huffer and Asofou So’o (eds) *Governance in Samoa: Pulega i Sāmoa* (Asia Pacific Press and Institute of Pacific Studies, USP, Canberra and Suva, 2000) 151–169, 171–187.

24 Miranda Forsyth “The Kastom Road between Peace and Justice in Vanuatu” (Paper presented to the Australasian Law Teachers’ Association Conference, Darwin, Australia, 8–11 July 2004) 2–3 [“The Kastom Road between Peace and Justice in Vanuatu”]. We are indebted to the published and unpublished work of Miranda Forsyth, undertaken for her PhD thesis, for our description of the kastom system.

25 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 3–5.

11.22 It appears that there has been considerable innovation within the kastom system, including the development of the modern concept of “chiefs” and “chiefly councils”. Miranda Forsyth suggests that the modern chiefly system may have been a product both of colonisation and of post-independence decentralisation. Other innovations include written by-laws, taking statements before the meeting, and keeping minutes. In addition, the understanding of the purpose of the system appears to be changing. The traditional purpose of dispute resolution, the restoration of harmony in the community, is still the reason most commonly given for nakamal meetings, but increasingly the purpose is also said to be the achievement of justice or the apprehension and punishment of people who commit offences.²⁶

11.23 While processes within the kastom system vary, and are changing over time, Forsyth reports that:²⁷

[W]hat commonly occurs when parties go to a chief to resolve a dispute is that the chief holds a meeting to which the disputing parties, other interested parties and some village elders are invited. The parties are then given a chance to explain their actions and there is a general discussion about what has happened and the causes of the problem. At the end of the meeting the chief generally imposes a fine on one, or often both, of the parties. If a party is dissatisfied, he or she can ‘appeal’ up the chiefly structure.

11.24 This system of dispute resolution receives no formal recognition from the state. It is, however, the one that is most accessible and relevant to the vast majority of ordinary ni-Vanuatu. Indeed, some 25 years after independence, the state system is still referred to as “loa blong waetman” (white man’s law), a clear indication that it is commonly seen as standing apart from indigenous Vanuatu kastom. The kastom and state systems do not operate entirely independently of each other, however. For example, chiefs sometimes use the police to help enforce their decisions or to get people to attend meetings. Equally, the state system relies on the kastom system to do much of the work of maintaining law and order, particularly in rural areas. There appears to be a policy of encouraging people to resolve disputes by going to their chief before turning to the state system.²⁸ In general, matters only make their way from the kastom to the state system if a kastom fine is not paid, if one party is dissatisfied with the outcome of a kastom process, or if the victim makes a complaint to the police and then either forgets or is unable to withdraw the complaint following a kastom settlement.²⁹

26 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 5–6.

27 Miranda Forsyth “Beyond Case Law: *Kastom* and Courts in Vanuatu” (2004) 35 *Victoria University of Wellington Law Review* 427, 434 [“Beyond Case Law”]. For more detailed accounts of customary dispute resolution processes in particular locations, see Lamont Lindstrom “Straight Talk on Tanna” in Karen Ann Watson-Gegeo and Geoffrey M White (eds) *Disentangling: Conflict Discourse in Pacific Societies* (Stanford University Press, Stanford, 1990) 373–411; Paul Vuhu “The Lakalakabulu Area Council of Chiefs in Vanuatu” in Sinclair Dinnen with Anita Jowitt and Tess Newton Cain (eds) *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, Canberra, 2003) 145–148; *The Achievement of Simultaneity*, above n 1, 130–140.

28 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 7–8, 10–11.

29 “Beyond Case Law”, above n 27, 434. Forsyth notes that the police sometimes enforce a policy of not dropping charges for sexual offences and certain other categories of offences.

11.25 While the two systems are able to coexist and even support each other in some respects, there are problems with the informal nature of the relationship between them. Much is left to individual discretion: chiefs exercise discretion about which cases to refer to police and police must decide when to interfere with the chiefs' work and when to support it. The coexistence of two systems can also undermine the authority of each system.³⁰

Alternative dispute resolution

11.26 In addition to the systems and institutions discussed above, there is a wide range of other dispute resolution processes employed in Pacific countries and territories. These processes for resolving disputes without a formal court hearing are commonly referred to as alternative dispute resolution (ADR).³¹ ADR includes the processes of mediation and arbitration, but we are here only concerned with the problem-solving processes of mediation. While ADR is generally associated with civil disputes, we use the term to include as well the restorative justice processes employed in criminal cases. Pacific custom law does not generally distinguish between civil and criminal cases but sees both as matters that cause tension between persons and that call for the alleviation of individual and community stress.

11.27 ADR processes may be formally acknowledged, recognised or provided for in the state legal system. They may be directed by courts as an alternative to a formal hearing. As noted above, Papua New Guinea's village courts are required to attempt mediation before adjudicating cases, and the courts in Vanuatu have been directed to encourage and facilitate the use of ADR procedures by parties where appropriate.³²

11.28 ADR processes may also be initiated by the parties themselves. They may be carried out by a variety of community leaders, although such people may not have any formal leadership position in either the state or customary systems.³³ In particular, churches often play an important role in helping to resolve disputes. Non-government organisations are also involved in promoting and facilitating ADR in some places.

11.29 One type of approach to dispute resolution that is widely used in the Pacific is restorative justice. According to Sinclair Dinnen:³⁴

Restorative justice is often conceived as a process that brings together all the stakeholders that have been affected by a particular harm to discuss the effects of that harm and how they might best be remedied. It is an inclusive and

30 "The Kastom Road between Peace and Justice in Vanuatu", above n 24, 8–10.

31 For a survey of ADR in the Pacific, see Graham Hassall "Alternative Dispute Resolution in Pacific Island Countries" (2005) 9 *Journal of South Pacific Law* <<http://law.usp.ac.fj/jspl>> (accessed 8 March 2006).

32 Ted Hill "Custom, Crime and Restorative Justice in Vanuatu" in John Henderson and Greg Watson (eds) *Securing a Peaceful Pacific* (Canterbury University Press, Christchurch, 2005) 310, 311. The requirement to encourage ADR was only introduced in 2002, and Hill notes that "This alternative to the adversarial process has yet to be utilised."

33 "Three Urban Village Courts", above n 10, 244–245.

34 Sinclair Dinnen "Restorative Justice in the Pacific Islands: An Introduction" in Sinclair Dinnen with Anita Jowitt and Tess Newton Cain (eds) *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, Canberra, 2003) 1, 4.

participatory approach to dispute settlement, in contrast to the exclusionary character of formal court proceedings under state justice. Restorative justice also emphasises the need to heal the damage caused by conflict or infraction.

It is difficult to draw a clear distinction between “customary” and “non-customary” restorative justice practices. For example, non-customary restorative justice processes such as family group conferences in New Zealand are strongly influenced by Maori cultural practices, while customary processes such as the Fijian talanoa and the Samoan ifoga and fa’aleleiga can be adapted for use in new contexts.³⁵

- 11.30 Because restorative justice fits so well with the aims and methods of indigenous dispute resolution processes, Pacific countries and territories have been pioneers in the creative use of such approaches.³⁶ Andrew Tonang of the Restorative Justice Programme in Northern Buka, Bougainville, explains that:³⁷

[T]he main purpose for this Restorative Justice system working in the village is to get the wrongdoers come back [sic] to the community. So we see him as a brother or a sister in our community, that’s why we do not want to throw these wrongdoers to jail or to prison. After he has been to prison he will still see himself as a rascal or a wrongdoer.

This philosophy, which is about restoring relationships and continuing to treat people as part of the community regardless of the wrongs they may have committed, is one with which most Pacific peoples would identify.

- 11.31 An important aspect of ADR is that it is also available to non-indigenous persons, enabling them to resolve disputes outside the courtroom in ways that are consistent with their own cultures, as among Indo-Fijians.³⁸
- 11.32 Another important aspect of ADR is the recognition that is given to it by the courts, with or without statutory directions. The courts will rarely intervene on a decision reached by arbitration, on the basis that the parties agreed to be bound by the outcome. In the case of a mediation, a settlement by nature is an agreement that can rarely be litigated later for the same reason.

35 Unaisi Nabobo-Baba “Talanoa: From Traditional to Modern Conflict Resolution” in John Henderson and Greg Watson (eds) *Securing a Peaceful Pacific* (Canterbury University Press, Christchurch, 2005) 392–397; Pa’u Tafaogalupe Mulitalo-Lauta “Restorative Justice in the Samoan Context” (2 May 2005) *LawTalk* 16; Leilani Tuala-Warren *A Study into the Ifoga: Samoa’s Answer to Dispute Healing* (Occasional Paper 4, Te Mātāhauariki Institute, Hamilton, 2002).

36 For further information on restorative justice in the Pacific, see Sinclair Dinnen with Anita Jowitt and Tess Newton Cain (eds) *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, Canberra, 2003); Gabrielle Maxwell and Hennessey Hayes “Restorative Justice Developments in the Pacific Region: A Comprehensive Survey” (2006) 9(2) *Contemporary Justice Review* 127–154; and Cyndi Banks “Victims in the Village: Aspects of Restorative Justice in Papua New Guinea” (1999) 6 *International Review of Victimology* 377–405.

37 “Justice, Law and Order” in *Time to Talk* Isabelle Genoux, Barry Clarke and Pearson Vetuna (prods) (Program 8 Transcript, ABC Radio Australia, first broadcast in 2002) < <http://www.abc.net.au/timetotalk> > (accessed 29 August 2006). The Constitution of the Autonomous Region of Bougainville provides for restorative justice and mediation in ss 13(4) and 15(1).

38 See, for example, the description of the Indo-Fijian pancayat in Donald Brenneis “Dramatic Gestures: The Fiji Indian *Pancayat* as Therapeutic Event” in Karen Ann Watson-Gegeo and Geoffrey M White (eds) *Disentangling: Conflict Discourse in Pacific Societies* (Stanford University Press, Stanford, 1990) 214–238.

The courts' approach to ADR, and to arbitration and mediation in particular, compares with the approach to community justice bodies that stand outside the formal justice system, like custom courts.

STRENGTHS OF COMMUNITY JUSTICE BODIES

11.33 The different types of community justice bodies discussed above have many strengths, including:

- **Accessibility.** These bodies are accessible in a number of ways: they operate at the local level, so people do not have to travel great distances to reach them; they are free or impose only minimal costs for participation; and they conduct their business in vernacular languages common to all participants.
- **Informality.** The informal mode of operation that characterises these bodies is more comfortable and culturally appropriate for most Pacific people than a formal courtroom setting.
- **Adaptability.** These bodies are able to adapt and respond to the local context and the needs of the communities they serve.
- **Familiarity with custom.** Whether or not the bodies themselves are customary in nature, the people facilitating the dispute resolution process are familiar with local custom and are able to apply it as appropriate.
- **Timeliness.** Although the process of achieving consensus in these bodies can be time-intensive, people do not have to wait a long time for a hearing or a decision.
- **Community focus.** These bodies are by, of and for the community. They are made up of people who are generally known and respected by their communities and who are seen as representing the collective interests of the community. When penalties such as fines or compulsory work are imposed, these will usually benefit either the family of the victim or the community, rather than the state.
- **Non-adversarial approach.** The overriding goal of community justice bodies is generally to achieve harmony, promote reconciliation and restore relationships disrupted by conflict. They therefore try to achieve resolutions that all parties can agree to, rather than accentuating divisions with decisions that create winners and losers.
- **Closure.** Community justice bodies are well structured to bring closure to parties and the community following conflict. By contrast, formal legal proceedings are structured to fit with recognised forms of claims, so that some issues, including those that complainants see as their primary concern, may not be even aired. Similarly, a court sentence of imprisonment may do little to assuage the concerns of those who have been offended against, and family hostilities may continue long after the sentence has been passed. The courts are primarily concerned with the punishment of the offender and have only recently begun to consider what is necessary to bring closure for the victim. Closure for the wider family or the community is not generally a consideration at all in the courts.
- **Economy.** Community justice bodies are much more affordable for Pacific Island countries and territories as they tend to utilise existing infrastructures at little or no cost to the state.
- **Autonomy.** Community justice bodies give effect to the customary value of local autonomy.

COMMUNITY
JUSTICE
BODIES AND
HUMAN RIGHTS

11.34 Because of their great strengths, community justice bodies are likely to remain very relevant to the daily lives of most people in Pacific Island countries and territories. Other countries, including New Zealand and Australia, may be able to learn from these strengths in considering proposals to establish new community justice bodies.³⁹ However, there are also a number of respects in which community justice bodies may fail to meet the people's growing expectations of respect for individual human rights.

11.35 We consider some of the tensions between custom and human rights that arise in community justice bodies, examining fair process, punishment and vulnerable groups. We focus again on the examples of the Papua New Guinea village courts, the Samoan fono and Vanuatu's kastom system. In using these systems as examples we do not mean to suggest that they are especially afflicted by conflicts between custom and human rights. Rather, we use them as examples because they are vital systems that have proved their ability to survive and adapt over many years. The examples chosen also have broad relevance to other parts of the Pacific.

Fair process

11.36 Processes in community justice bodies are quite different from those in the higher-level court system. Some of these differences of process reflect the informality, adaptability and non-adversarial approach that can be strengths of community justice bodies. However, these processes also raise issues of natural justice and the right to a fair trial. We will divide questions concerning natural justice into those that relate to particular aspects of process and those that relate to problems of bias, partiality or conflict of interest on the part of decision-makers.

Particular process issues

11.37 In 1948, questions of fair process were raised in Samoa in *Mose v Masame*. That case involved an untitled man who struck a matai and consequently had goods seized and livestock slaughtered and consumed at the direction of the fono. He had not been summoned to the meeting, heard, or informed of the penalty before it was enforced. The High Court found on the evidence:⁴⁰

[T]hat by traditional Samoan custom handed down through the ages, it is only in comparatively trivial cases that the offender is haled before the fono and asked to explain his conduct. Where the offence is serious, it is customary for the chiefs and orators to meet and decide the matter in the absence of the alleged delinquent, and to impose and enforce a penalty without notifying him of their decision.

In evidence, the matai acknowledged that they knew the government's requirement that people should be able to be heard in their own defence but

39 See, for example, New Zealand Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 117–171; Law Reform Commission of Western Australia, above n 16, 107–157; New South Wales Law Reform Commission *Community Justice Centres* (NSWLRC No 106, Sydney, 2005); and proposals for community-based courts in Fiji, discussed in Chapter 10.

40 *Mose v Masame* [1948] WSHC 1; [1930–1949] WSLR 140 (12 February 1948 Marsack CJ) < www.paclii.org > (accessed 8 April 2005).

contended that that was not the law of the village. They said that untitled people were not allowed to state their case before the fono, but that the matai were obliged to act fairly and justly towards them so long as they rendered good service to the matai and the village. The High Court held that the actions of the fono constituted a “gross violation of the elementary principles of justice”.

- 11.38 More recently, and subsequent to the passage of the Village Fono Act 1990, the question of natural justice in the village fono was considered by the Supreme Court in *Leituala v Mauga*.⁴¹ The Court rejected the argument for the defendants that the Act required the rules of natural justice to be read in terms of local custom and usage. It found that fono, by traditional custom and usage, do not give notice, allow accused persons to be present to question witnesses and present their defence, or guarantee to accused persons a fair trial as provided by article 9 of the Constitution. Nonetheless, the Court held that, to the extent that fono are by law given power, authority and mandate, they must also comply with the requirements of the law, including the rules of natural justice.
- 11.39 The alternative approach, where the constitution permits, is to allow for custom bearing in mind that in some cases it is culturally inappropriate for parties to appear in person. Relevant customary factors include restrictions on speaking rights, speech taboos, respect protocols, deference, shyness and rules for the preservation of the peace. To accommodate such factors, the Papua New Guinea Village Courts Act 1989 provides that parties to proceedings may be represented by any person other than a lawyer, in which case they are deemed to be present before the village court.⁴²
- 11.40 However, such a provision may still not resolve the issue in Samoa, where only matai may speak in the fono. Although they speak for their families, some family members may see this representation as inadequate today. For example, the banishment complained of in *Leituala* was supported in the fono by the complainant’s matai brothers, so the complainant was given no effective voice in the hearing.

Bias, partiality and conflict of interest

- 11.41 Article 14 of the International Covenant on Civil and Political Rights provides that, in the determination of any criminal charge or of rights and obligations in a suit at law, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. Similar provisions exist in Pacific constitutions.⁴³ The rules of natural justice, which underpin a fair hearing, require that persons exercising judicial powers should be and be seen to be impartial and without a personal interest in the outcome. Some features of community justice bodies, while positive for other reasons, may compromise this impartiality.

41 *Leituala v Mauga* [2004] WSSC 9 (13 August 2004 Vaai J) < www.paclii.org > (accessed 7 April 2005).

42 Village Courts Act 1989, ss 79–80.

43 For example, Samoa Constitution, s 9.

- 11.42 The very essence of community justice bodies is that decision-makers understand local customs and personalities as members of the community in question. However, community leaders appointed to local judicial offices are more likely than most judges to be seen as partial. They may be thought to share community prejudices about particular individuals or categories of people or their kinship ties, age, sex and hereditary status may be thought to influence their decisions. On the other hand, their leadership role may be seen to dispose them to outcomes that will benefit the community as a whole or contribute to community harmony.⁴⁴
- 11.43 The principles of natural justice may be maintained, however, through adequate appeal rights, in the case of those community justice bodies now provided for by statute, including rights of appeal on fair process issues. In the case of customary bodies not provided for by statute, the principles are maintained by the assurance of access to the state courts for matters to be heard afresh.
- 11.44 A particular issue in relation to local governance bodies is that the mix of legislative, administrative and judicial functions conflicts with the doctrine of separation of powers. The doctrine recognises that the aggregation of all such powers in a single body can lead to conflicts of interest, corruption and power abuse. This issue has particular relevance to the control of state power, but power abuse may occur as well at local community levels.
- 11.45 More research is needed to assess the extent to which the concentration of powers within community justice bodies leads to abuses. In examining whether the local circumstances provide a justified limitation on the application of natural justice at a village level, it would be helpful to know the extent to which the aggregation of power in fact creates problems for the people of the community. It is also important to assess the extent to which all families are represented or proceedings are open to the whole community, as abuses may also be constrained by open and transparent proceedings. A further relevant factor is the extent to which the community justice bodies in fact determine guilt.
- 11.46 The natural justice requirement of impartiality has then to be weighed with the universal appreciation of the role of community courts or “people’s courts” in legal systems⁴⁵ and with widespread concerns that frequently, judges are not representative of communities or adequately in touch with them. The need for special mechanisms for the maintenance of local law and order has been recognised since at least the appointment of justices in England, from persons of local standing, in 1361. Their value today in providing for community involvement is apparent in many countries where Justices of the Peace, or other lay representatives of communities, continue to sit in courts. Where abuses occur, the independent courts of the state may provide a sufficient check through appeal or review proceedings, as we discuss at the end of this chapter.

44 See the Law Commission’s discussion of the issue of bias in relation to dispute resolution in New Zealand Maori governance entities: New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, Wellington, 2006) 113–114.

45 See *Crime and Justice International* (July/August 2006), special issue on Community Justice Around the Globe; and Center for Court Innovation <<http://www.courtinnovation.org>> (accessed 4 July 2006).

Punishment

- 11.47 Certain punishments associated with community justice bodies may be seen as too severe when measured against constitutional rights that guarantee freedom from cruel, unusual or degrading treatment or punishment. Others may be seen as too lenient when measured against other rights, such as women's right to freedom from discrimination, including violence. Punishments may also be seen as inconsistent with state penal policies.
- 11.48 There is no simple view on what constitutes cruel, inhuman, or degrading treatment, and competing opinions may reflect different cultural experiences. In some Australian Aboriginal communities, spearing of offenders may be seen as more humane than imprisonment.⁴⁶ Others in the Pacific have also seen imprisonment as harmful to individuals and communities.⁴⁷
- 11.49 Some people may see shaming practices as degrading punishments and therefore too severe. In some parts of the world shaming may now barely count as an effective form of punishment, but in many small Pacific communities, where everyone knows each other, its impact can be huge. The positive value of shaming is that it can bring home to offenders the extent of community disapproval so that they will feel remorseful for what they have done and mend their ways. However, shaming also has a negative side and has been thought to contribute to the formerly disproportionately high suicide rate in Samoa.⁴⁸ In much of the Pacific, shaming is in no sense a soft option; indeed, it has been suggested that East Timorese see imprisonment as a soft option compared to customary penalties of shaming and compensation.⁴⁹
- 11.50 Some shaming practices call for separate examination. At one end of the scale is oral denunciation in parts of Papua New Guinea where offenders' misdeeds are loudly proclaimed to the village.⁵⁰ At the other end of the scale are reports from Vanuatu of adulterers being required to parade naked and of women being required to sing and dance before the village as punishment for wearing trousers.⁵¹ Such reports raise questions about how these practices fit with respect for human dignity.

46 Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (vol 1, ALRC No 31, Australian Government Publishing Service, Canberra, 1986) 135 (see also 360–364); Law Reform Commission of Western Australia, above n 16, 170 (see also 167–172); see also Northern Territory Law Reform Committee *Report on Aboriginal Customary Law* (Darwin, 2003) 25–27.

47 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 13; Chief Tom Numake, President of the Malvatumauri, Vanuatu, in “Justice, Law and Order”, above n 37.

48 Donald H Rubinstein “Suicide in Micronesia and Samoa: A Critique of Explanations” (1992) 15(1) *Pacific Studies* 51, 60, citing Cluny Macpherson and La'avasa Macpherson “Towards an Explanation of Recent Trends in Suicide in Western Samoa” (1987) 22 *Man* 305, 311. In 1981, Samoa was reported to have the highest suicide rate in the Pacific and the third-highest in the world. However, more recent figures suggest that Samoa's suicide rate has fallen to one-fifth of the previous figure and is now below the world average: “Samoa: Suicide Rate Drops to One Fifth of Previous Rate” *Pacific Beat* (Radio Australia), 5 June 2006 < <http://www.abc.net.au/ra/pacbeat> > (accessed 8 September 2006).

49 Tanja Hohe and Rod Nixon *Reconciling Justice: “Traditional” Law and State Judiciary in East Timor* (United States Institute for Peace, Washington DC, 2003) 60, 64.

50 Simon Roberts *Order and Dispute: An Introduction to Legal Anthropology* (Penguin, Harmondsworth, 1979) 62.

51 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 8.

Women, young people and other vulnerable groups

11.51 Human rights issues arise particularly in relation to the treatment meted out by community justice bodies to women and to vulnerable groups such as young people, the disabled and people living with HIV/AIDS. “Commoners” or untitled people may also be vulnerable in highly stratified Pacific societies.⁵²

Women in community justice bodies

11.52 It is not only processes and punishments that may need questioning in the protection of women’s rights, but also the representation of women on community justice institutions which are plainly dominated by men. In Papua New Guinea, even in the National Capital District, only 22 out of 265 village court officials are women, a few of whom are magistrates.⁵³ In Samoa, female matai may participate in the fono, but only one in nineteen matai titles is held by a woman. Some villages prohibit women from holding titles.⁵⁴ In Vanuatu, there are only a few female chiefs in the kastom system.⁵⁵

11.53 Aside from decision-making, even participation may not be open to women. No formal barriers to women’s participation exist in Papua New Guinea village courts, but there may be strong cultural and structural constraints.⁵⁶ Samoan women are not able to share in the deliberation of the fono unless they are among the small number of female title-holders. Although Samoan women have their own forums which also play a role in decision-making and dispute resolution, these forums lack the legislative recognition accorded to the fono.⁵⁷ Whether or not women are able to speak in the nakamal varies from place to place in Vanuatu.⁵⁸

11.54 Much has been written about the treatment of women in Papua New Guinea’s village courts, but there are differing views on this issue.⁵⁹ It is clear, however, that abuses of women’s rights have occurred in village courts, and the PNG Government is currently trying to address such abuses through human rights training.⁶⁰

52 Edward C King “Custom and Constitutionalism in the Federated States of Micronesia” (2002) 3 Asian-Pacific Law and Policy Journal 249, 260–261.

53 PNG Justice Advisory Group, above n 9, 24; “Human Rights in Village Courts”, above n 14, 6.

54 CEDAW Committee “Consideration of Reports Submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women. Combined Initial, Second and Third Periodic Report of States Parties: Samoa” (10 June 2003) CEDAW/C/WSM/1–3, 50; “NGO Shadow Report on the Status of Women in Samoa December 2004” 5–6 < <http://www.iwraw-ap.org> > (accessed 28 August 2006).

55 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 5.

56 Community Courts Advisory Unit, above n 15, 27.

57 At the village level in Samoa, women belong to one of three groups: widowed and unmarried women, the wives of matai and the wives of untitled men. The unmarried women are an influential group within the village and have their own meeting house. CEDAW Committee, above n 54, 46.

58 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 4.

59 Cyndi Banks *Women in Transition: Social Control in Papua New Guinea* (Australian Institute of Criminology, Canberra, 1993) 32–37; Sarah Garap “Struggles of Women and Girls – Simbu Province, Papua New Guinea” in Sinclair Dinnen and Allison Ley (eds) *Reflections on Violence in Melanesia* (Hawkins Press and Asia Pacific Press, Sydney, 2000) 159, 163–165; PNG Justice Advisory Group, above n 9, 25–26; Michael Goddard *Women in Papua New Guinea’s Village Courts* (Discussion Paper 2004/3, State, Society and Governance in Melanesia Project, Australian National University, Canberra, 2004); Richard Scaglione “Legal Pluralism in Pacific Island Societies” in Victoria S Lockwood (ed) *Globalization and Culture Change in the Pacific Islands* (Pearse Prentice Hall, Upper Saddle River, 2004) 86, 97.

60 “Human Rights in Village Courts”, above n 14; “Bid to Curb Rights Violation”, above n 14.

Violence against women and young people

- 11.55 Claims of excessive leniency for crimes of sexual and other violence affecting women and young people have caused particular concerns.⁶¹ In Samoa, fono have treated spousal assault as “village misconduct”, and the fact that it is not treated as a crime of violence may be seen to downgrade the seriousness of the offence. Further, the fono may not punish the perpetrator but may seek a marital reconciliation. It is claimed that women are discouraged from reporting spousal assault to the police and that cases rarely go to court.⁶²
- 11.56 Customary conciliation may also be seen as compromising the seriousness of the violation of women and as diminishing the rights of women to be heard on the effect of the offending on them and on questions of penalty. For example, Samoan fono have supervised customary reconciliation ceremonies (ifoga) in rape cases. Adopting Pacific notions of corporate responsibility, it is the family of the offender, not the offender himself, who seeks forgiveness and offers compensation; and the response is in the hands of the family of the woman and not the woman herself. She may have little say. Further, formal charges may not be laid if that is the wish of the woman’s family. Where a case proceeds, the performance of ifoga may be considered in mitigation in sentencing. The New Zealand courts have also taken ifoga into account in sentencing, but have considered that the custom would have little weight in reducing sentences for sexual violation (see Chapters 10 and 12).
- 11.57 Whether a custom process is seen as good or bad may depend on the particular case. For example, a woman may feel degraded by the reconciliation process, especially if the effect of the crime on her is made secondary to the task of maintaining good relations between families. Another woman may take strength from the fact that forgiveness is sought by the whole of the offender’s family or from the fact that she has the whole of her family about her. The ultimate question may be whether the process is in fact effective in curbing rape and relieving those who have directly suffered from it. It is important that any customary reconciliation process should not be carried out in such a way as to cover up the offence or to leave women or children exposed to the risk of further violence from the offender.
- 11.58 Another issue arises from the customary view that is said to have applied in relation to sexual offences in Vanuatu. It has been suggested that the offence recognised in local custom law was not rape but “stealing women”, which has been described as more akin to adultery. The issue was not that of consent but of the propriety of the sexual relationship.⁶³ This view of sexual offences may contribute to a less severe approach to rape in the custom courts than in those of the state.⁶⁴

61 For a useful overview, see P Imrana Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women’s Rights Movement, Suva, 1998) 104–108, 163–165.

62 Jalal, above n 61, 164; Penny Martin “Implementing Women’s and Children’s Rights: The Case of Domestic Violence in Samoa” (2002) 27 *Alternative Law Journal* 227, 230.

63 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 11; *The Achievement of Simultaneity*, above n 1, 186–192.

64 “The Kastom Road between Peace and Justice in Vanuatu”, above n 24, 9.

- 11.59 However, there are also concerns about the treatment of women and young people in the courts and the state justice system. Police and judges are also predominantly male, and they too may be seen as treating offences against women and young people with insufficient seriousness.⁶⁵ Women and young people in some countries also suffer violence and human rights abuses at the hands of the police.⁶⁶ More than three quarters of young people surveyed in Vanuatu said that they would prefer to be dealt with by their chief rather than by the police if they got into trouble. Fear of mistreatment by the police, including physical violence, was the main reason given.⁶⁷
- 11.60 Forsyth's research in Vanuatu has also shown that women and youth generally support the kastom system, while recognising that it needs to change to be fairer towards them.⁶⁸ Such change does not require turning away from custom or from community-based institutions, but it may require a re-examination of customary practices to ensure that they "support rather than victimize women" and other vulnerable groups.⁶⁹

DEALING WITH HUMAN RIGHTS ISSUES

- 11.61 We have considered a number of respects in which the workings of community justice bodies may be at odds with human rights. But how can such changes as are necessary be introduced into or enforced in community justice regimes?
- 11.62 Training and handbooks for officers of the community justice bodies concerned are clearly important. They are particularly important in that human rights are best introduced in community justice bodies, where local people may be engaged in human rights discussions. Positive measures will also be needed to ensure greater participation by women in discussions, in judicial roles and in serving as lay advocates for parties or as custom law advisers.
- 11.63 Ultimately however, the issues of human rights compliance are for the courts to decide and their decisions will most affect how community justice bodies operate in the future. Where a right of appeal or review exists and is exercised, a superior court will decide whether the community justice body's decision or the process by which it was reached complies with the constitution or represents a justified limitation on constitutional rights. The principles by which rights may

65 See the Vanuatu Court of Appeal's discussion of the importance of consistency in sentencing, with particular reference to offences against women and the use of the Presidential pardon to free prisoners sentenced for such offences, in *Public Prosecutor v Atis Willie* [2004] VUCA 4; Criminal Appeal Case 2/04 (9 June 2004) < www.pacii.org > (accessed 29 March 2006). See also the discussion of the state system's treatment of domestic violence in Merrin Mason "Domestic Violence in Vanuatu" in Sinclair Dinnen and Allison Ley (eds) *Reflections on Violence in Melanesia* (Hawkins Press and Asia Pacific Press, Sydney, 2000) 119–138. However, it should be noted that Mason's data was gathered before the introduction of Domestic Violence Protection Court Orders and new provisions relating to domestic violence in the Rules of Civil Procedure.

66 Mason, above n 65, 122, discusses police who assault their spouses; on violence against young people see Jean Mitchell "Violence as Continuity: Violence as Rupture – Narratives from an Urban Settlement in Vanuatu" in Sinclair Dinnen and Allison Ley (eds) *Reflections on Violence in Melanesia* (Hawkins Press and Asia Pacific Press, Sydney, 2000) 189, 196–197, 199; Human Rights Watch "Making Their Own Rules": *Police Beatings, Rape and Torture of Children in Papua New Guinea* (New York, 2005).

67 Benedicta Rousseau (ed) *The Report of the Juvenile Justice Project: A Resource on Juvenile Justice and Kastom Law in Vanuatu* (Vanuatu Cultural Centre, Port Vila, 2003) 38–42.

68 Draft chapter on the operation of the kastom system in Miranda Forsyth's PhD thesis.

69 Pacific Regional Workshop "Outcome Statement" in *Strengthening Pacific Partnerships for Eliminating Violence Against Women: A Pacific Regional Workshop Report, Suva, Fiji Islands, 17–19 February 2003* (Commonwealth Secretariat, London, 2003) 8.

be justifiably limited or selectively applied in cultural contexts are considered in the next chapter on the role of the courts.

- 11.64 For law to be popular, coherent and consistent, it appears desirable that community justice bodies should be recognised as forming part of the state legal system, rather than as a system outside the state and possibly in conflict or competition with it. Ultimately, the recognition of community justice bodies may best advance the constitutional objectives of respecting both human rights and the inherited wisdom of the Pacific. Such recognition would also acknowledge the valuable role of community justice bodies in maintaining village order.
- 11.65 Recognition may be given through statutory or judicial acknowledgement. If by statutory means, then statutory mention rather than statutory incorporation is likely to be appropriate. There is statutory mention, for example, when a statute directs a court to have regard to the conclusions reached by community justice bodies or by customary process, and when it defines these bodies and processes as simply those that from time to time exist. Statutory incorporation might take the form of legislation that prescribes custom court operations. But this gives rise to the risk that customary bodies will then be bureaucratised and lose their traditional shape and flexibility.
- 11.66 An effective relationship between courts and community justice bodies requires a policy of judicial deference to the community bodies. Presently, court decisions may be seen to trump the community justice bodies by reference to human rights. The effect may be to distance the courts from the people or build in their minds a perception of “theirs” and “ours” when talking of the two legal systems. An alternative is a policy developed by the courts, or set by legislation, that community justice outcomes will not be departed from without good reasons. Where good reasons exist, through lack of fair process or breach of other human rights, for example, the courts might go further. They may, for example, suggest guidelines to prevent a further prejudice in future. In some instances, it may be appropriate that the matter is referred back to the community justice body for reconsideration.
- 11.67 The courts may also consider, or statutes may provide, for some matters to be referred directly to community justice bodies, as is further discussed in Chapter 12. As already discussed, a court may also refer a matter for mediation. The question is likely to be whether the issues at the heart of a matter are best dealt with by custom law processes or by other means. After a case is referred to a custom process, the proceedings would be revived in the event that no customary solution is reached. Such measures may help develop a sounder relationship between community justice bodies and the courts based on mutual respect and support. Similarly, police laws or manuals may formalise the discretion of police in referring matters to community justice bodies or in enforcing their decisions, with particular regard to ensuring matters such as domestic violence are dealt with properly. Developing stronger links between community and central state systems may also require training for judges, police and others so that they can gain greater understanding of, and respect for, community justice bodies.
- 11.68 We believe that community justice bodies play a vital role in dispute resolution and governance at the local level. We recognise that they possess significant

strengths which have made them remarkably resilient in the face of social change. One key to this resilience is their adaptability, and we believe they are capable of adapting to human rights norms without losing their essential character. Their standing in the community can only be enhanced if they can be seen by all to operate in a way that is fair and just but is also in accordance with underlying customary values.

COMMISSION SUGGESTIONS

- 11.1 **On strengthening community justice:** Non-state community justice bodies could be recognised in legislation. Training appropriate to the role and purpose of these bodies, including human rights training and handbooks, is a priority.
- 11.2 **On increasing the participation of women:** Positive measures should be taken to encourage the greater participation of women in community justice decision-making, including as advocates and expert witnesses.

Chapter 12

The Role of Courts

- 12.1 This chapter examines how courts can support harmonisation by cultivating an indigenous common law, taking a contextual approach to human rights, and building relations with community justice bodies.

DEVELOPING A PACIFIC LAW

Cultivating an indigenous common law

- 12.2 Common law courts play a fundamental role in cultivating an indigenous law, also called an autochthonous law or a local jurisprudence. The courts may follow the precedent of English judges in developing the common law from principles regarded as “common” to all England, as discussed in Chapter 3. As noted by Coventry J in Vanuatu:¹

Custom and common law have many features in common. One of those features is their flexibility to meet change and development, yet still retain their inherent qualities and value. Neither works on the basis of saying, this is how it was always done in the past and must always be done in the future.

In Chapter 6, we showed that customary values can be used to set appropriate legal standards for the state generally and to express established legal principles in terms culturally relevant to local communities.

- 12.3 Customary values need not be proven in the same way as customary practices, which require formal evidence.² Courts may refer to reputable legal texts or articles on local customary values to discover or elucidate a principle or to understand the customary social order. An analogy may be made with *Pita v Attorney-General* where the Samoan Court of Appeal considered that the Samoan Constitution must be read in terms of its traditional setting. The Court then cited extensively from *The Making of Modern Samoa* to gain insights into the matai system of control.³

1 *Tenene v Nmak* [2003] VUSC 2; Civil Case 203/2002 (25 June 2003 Coventry J) < www.pacii.org > (accessed 16 November 2005). Note, however, that this decision was successfully appealed on the ground that there were fundamental flaws in the hearing process: *Nmak v Tenene* [2003] VUCA 25; Civil Appeal Case 16/2003 (7 November 2003) < www.pacii.org > (accessed 16 November 2005). The appellate judgment does not comment on the matters cited here.

2 The proof of customary practices is discussed in Chapter 13.

3 *Pita v Attorney-General* [1995] WSCA 6; CA 7/1995 (18 December 1995) < www.pacii.org > (accessed 7 April 2005).

- 12.4 Custom law can also be enhanced by modifying accepted principles of foreign law to fit with local norms. Taking this approach, the PNG National Court has modified the common law doctrine of proprietary estoppel to reflect two customary concepts: balancing the rights of the landowner and the occupiers; and granting a temporary, rather than permanent, right of occupation.⁴ This is the approach now advocated by Papua New Guinea's Underlying Law Act 2000, which is discussed in Chapter 13.
- 12.5 In Chapter 13, we examine how making custom more readily accessible can help courts develop an indigenous common law, and in Chapter 14, we explore how the statutory framework can assist the harmonisation of custom law and human rights.

COMMISSION SUGGESTIONS

12.1 **On indigenous common law:** Subject to any particular enactments of the Pacific Island state, judges should develop an indigenous common law rooted in the values underlying human rights, custom law, and the common law derived from other sources. The starting point is to consider the values underlying custom, and whether these are consistent with or can be made to align with human rights. Judges should also consider how customary values can be used to explain human rights and general legal principles.

THE CONTEXTUAL APPLICATION OF HUMAN RIGHTS

- 12.6 The courts can advance a Pacific law by taking a contextual and nuanced approach to human rights. A contextual approach aids judges both in applying human rights and in resolving conflicts between one human right and another.
- 12.7 Human rights are frequently expressed in broad and absolute terms but are variously applied by courts according to the local context, where the cultural, social, religious and political heritage is a key factor. In the process, the courts develop a community's appreciation of what human rights mean and how they are applied.
- 12.8 This contextualisation does not mean that human rights are compromised to accommodate cultural difference. On the contrary, specific cultural practices must frequently change to accommodate human rights. In a statement widely cited in Pacific courts, Lord Wilberforce emphasised the broad scope of constitutional rights, which call for:⁵

[A] generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give individuals the full measure of the fundamental rights and freedoms referred to.

- 12.9 A similarly ample appreciation of the facts of each case is required. As the Human Rights Committee noted in considering minority rights to culture under Article 27 of the International Covenant on Civil and Political Rights

4 For a discussion of this case, see Jean G Zorn "Common Law Jurisprudence and Customary Law" in R W James and I Fraser (eds) *Legal Issues in a Developing Society* (Faculty of Law, University of PNG, Hong Kong, 1992) 111, referring to the approach taken by the National Court in *PNG Ready Mixed Concrete Pty Ltd v The State* [1981] PNGLR 396.

5 *Minister of Home Affairs v Fisher* [1980] AC 319, 328 (PC).

(ICCPR), an individual's right to enjoy a minority culture "cannot be determined in abstracto but has to be placed in context."⁶ The question for the Committee was whether a settlement of Maori fishing claims violated Article 27. Some Maori opposed the settlement contending that it restricted their right to enjoy their culture, but most appeared to be in support. The Committee acknowledged that the settlement limited the cultural rights of some Maori but weighed that limitation against the evidence of broad consultation, adequate inquiry and the payment of a substantial sum. It concluded that in the circumstances the settlement was compatible with the article.

12.10 We prefer to speak of "the contextual application of human rights" rather than a balancing of rights and social factors. "Balancing" suggests that human rights may be compromised. In fact, they are simply applied according to the circumstances. We reserve the term "balancing" for resolving a conflict between one human right and another, because one right must be limited to permit the exercise of the other. The phrase "the contextual application of human rights" also conveys that human rights strengthen cultures rather than weaken them.

12.11 Judging in social context is also necessary to achieve substantive justice. As former Canadian Supreme Court Judge, Claire L'Heureux-Dubé observes:⁷

There is no doubt that equality is a component of justice, just as independence and impartiality are. All three require that judges take into account the social context of facts and law in order to render justice since people are contextual as much as law is ... without social context, there is no justice.

12.12 It should be noted that human rights themselves are expressed differently in different countries. Various shades of emphasis or detail may reflect different histories. For example, the United States describes freedom of expression simply as "freedom of speech, or of the press."⁸ In Papua New Guinea, freedom of expression and publication is defined as including freedom to hold opinions, to receive and communicate ideas and information, and freedom of the press and other mass communications media.⁹ In Tonga, freedom of the press is defined as the liberty for all people to speak, write and print their opinions.¹⁰

12.13 The application of the right of free expression also varies. In the United States, the First Amendment guaranteeing freedom of expression is regarded as "the matrix, the indispensable condition of nearly every other form of freedom."¹¹ Other societies, including some Pacific societies, have a narrower approach and give more weight to traditional morality and talking with respect, while upholding the basic right. Leaders may be criticised, for example, but unreasonable criticism on an inappropriate occasion is not tolerated. As the New Zealand Court of Appeal has noted, the balancing of rights and interests where free

6 Human Rights Committee "Apirana Mahuika et al v New Zealand, Communication No. 547/1993" (27 October 2000) CCPR/C/70/D/547/1993, para 9.6 ["Apirana Mahuika et al v New Zealand"].

7 Hon Claire L'Heureux-Dubé "Social Context: Is It Not Law?" (Address to the National Judicial Institute, Montreal, Canada, 2003).

8 United States Constitution, First Amendment.

9 Constitution of Papua New Guinea, art 46(2).

10 Constitution of Tonga, cl 7.

11 *Palko v Connecticut* (1937) 302 US 319, 327 per Cardozo J.

expression is in issue “will be influenced by the culture and values of the particular community.”¹²

- 12.14 The claim that human rights are universal is strengthened by the contextual application of rights. As discussed in Chapter 6, rights are also strengthened when they are seen as culturally legitimate. Abdullahi An-Na'im, a leading African scholar on human rights, maintains that lack of cultural legitimacy contributes significantly to violation of human rights standards, as people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions.¹³
- 12.15 Seeking cultural legitimacy for human rights standards is not without its challenges, as An-Na'im observes. Not everyone will agree on the content and primacy of particular cultural norms, especially in times of social change. For example, An-Na'im notes, as we have also, that dominant groups can be expected to maintain interpretations of cultural values that support their own interests and proclaim them to be the only valid cultural view.¹⁴ The courts must be alert to this danger when dealing with custom law issues.
- 12.16 Custom and culture so change over time that courts must also be conscious of the state of the social order at the relevant time and apply values accordingly. Thus in Samoa, the law has evolved in relation to the franchise in general elections, but not yet to the stage that non-title holders can stand as candidates.¹⁵ Similarly, banishment has become increasingly unacceptable as a punishment, reflecting changes in social mores and awareness of human rights.¹⁶
- 12.17 Pacific courts have sought the contextual application of human rights and English common law in only a small number of cases. *Waiwo v Waiwo and Banga* is one.¹⁷ On proceedings for divorce, the Senior Magistrate in Vanuatu essentially interpreted the meaning of “adultery” in accordance with customary norms, which regarded adultery as a serious transgression (and so justified punitive damages). He was, however, reversed on appeal. Another example, although not one involving human rights, comes from the Tongan Court of Appeal, which held that the common law on fixtures and accretions was not wholly appropriate to Tonga.¹⁸ In reaching its decision, the Court had regard, among other things, to Tongan tradition. On the other hand, a court in Kiribati preferred to judge an implied customary banishment in terms of the common law tort of

12 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 573 (CA).

13 Abdullahi Ahmed An-Na'im “Toward a Cross-Cultural Approach to Defining International Standards of Human Rights” in Abdullahi Ahmed An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992) 20.

14 An-Na'im, above n 13.

15 Respectively, *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1; CA MISC 5895, 5896, 5897, 5946, 5951 (26 August 1982) < www.paclii.org > (accessed 7 April 2005); *Pita v Attorney General* [1995] WSSC 1; SC MISC 14033 (22 August 1995 Casey J) < www.paclii.org > (accessed 7 April 2005); *Pita v Attorney-General*, above n 3.

16 See discussion in Chapter 9.

17 *Waiwo v Waiwo and Banga* [1996] VUMC 1 Civil Case 324/1995 (28 February 1996 Lunabek SM); *Banga v Waiwo* [1996] VUSC 5; Civil Case 1/1996 (17 June 1996 D'Imecourt CJ) < www.paclii.org > (accessed 14 June 2006).

18 *Mangisi v Koloamatangi* [1999] TOCA 9; CA 11/98 (23 July 1999) < www.paclii.org > (accessed 2 September 2006).

unreasonable interference rather than in terms of punishment for social transgressions.¹⁹ In general, custom should not be invalidated simply because it is contrary to tenets of English common law. The true question is whether a particular tenet of English common law is appropriate to the circumstances of the Pacific state.²⁰

- 12.18 We think it important that a particular custom is placed in its larger custom law context. For example, a closer analysis of a custom may show that what is thought to be discriminatory is not in fact or that the discrimination is less than it first appears to be. In illustration, at first sight limiting customary succession of land to men discriminates against women. When measured with associated duties, like the duty of the heir to support family members, the custom may be seen to be less discriminatory, in that women must still benefit from the land. The real issue may be whether the duty has been honoured in the particular case and whether society as a whole still acknowledges the duty imposed on the male heir. If it does not, the current customary practice will be discriminatory.

Limitations on rights

- 12.19 The application of human rights in local contexts rights may be restricted but only in limited circumstances. Notwithstanding that they are described as “fundamental” and “absolute”, the enjoyment of human rights is necessarily qualified by the need to respect the human rights of others and the interests of the community as a whole. It is part of the role of courts to decide whether the application of a right has been legitimately constrained by a particular statute or in a particular case.
- 12.20 State constitutions or statutes, like international conventions, may prescribe how particular rights may be limited. The prescriptions may be broadly expressed, as with the New Zealand Bill of Rights Act 1990, where rights may be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In several Pacific constitutions, specific rights have been expressly limited in a particular respect.²¹ Even without specific provisions, however, courts have interpreted constitutions as intending that the application of certain rights may be limited in necessary cases. This approach is taken in the United States and most countries whose legal systems derive from the American tradition.²²
- 12.21 Some constitutions, like that of Tuvalu, expressly limit human rights in order to maintain customary or cultural practices.²³ These include particular limitations

19 *Teitinnang v Ariong* [1986] KIH 1; [1987] LRC (const) 517 (7 April 1986 Maxwell CJ) < www.pacii.org > (accessed 14 June 2006).

20 See Sally Engle Merry “Changing Rights, Changing Culture” in Jane Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, London, 2001) 31–56.

21 See Appendix 3.

22 For example, in *Pohnpei v Weilbacher* [1992] FMPSC 1; 5 FSM Intrm 431 (Pon S Ct Tr 1992) (4 December 1992 Santos CJ) < www.pacii.org > (accessed 2 September 2006), the Pohnpei Supreme Court held that the right to a speedy trial was not violated if the delay was due to the defendant choosing to take part in the customary practice of pacifying hostilities arising from the alleged conduct. The right would be violated if delay was employed by the prosecution to subject the defendant to undue oppression.

23 Tuvalu Constitution, ss 29(3) and (4). The place of custom in the Tuvalu Constitution is discussed further in James Duckworth “Custom, Law and Practice in Tuvalu: The Relationship Between Law and Custom in Tuvalu” (report for the International Center for Not-for-Profit Law, 2002). See also the Draft Federal Constitution of Solomon Islands, cl 21(2).

on specific rights and general provisions enabling constraints where the exercise of rights directly threatens Tuvaluan values or culture.²⁴ The provisions for limitations on rights in Tuvalu and other parts of the Pacific are set out in Appendix 3.

12.22 The application of rights may be limited even when the permitted limitations are narrowly expressed, as in a series of cases on the Samoan custom of banishment, a custom sometimes held to be a reasonable restriction on freedom of movement in the interests of “public order”.²⁵ Nonetheless, rights are not readily restricted. In Tonga, a proposed constitutional amendment to limit free speech on cultural grounds was held to be invalid.²⁶

12.23 We turn then to the principles involved. First, the approach taken depends on the constitution and statutes of the particular state. However, they in turn must be interpreted in light of international law, bearing in mind that even if a limitation is justified by state law, the restriction of a right may place the state in breach of its international obligations.

12.24 Then, any limitation provision must be strictly construed. The limitation of a right must be fully justified, and it must be limited no more than is necessary for the purposes of the case. In particular, no limitation should be applied so as to “jeopardise the essence” of the right, for that would not limit the right but deny its general validity.²⁷

12.25 International law experts have developed a series of principles, called the Siracusa Principles, on the limitation of rights under the ICCPR. These principles have been adopted by the United Nations Commission on Human Rights.²⁸ They provide the basis for the following tests on limitations:

- The limitation of a right must be for a legitimate and significant purpose, or one that is sufficiently important to justify the limitation. For example, the purpose might be to meet a pressing public or social concern.
- The limitation is to be assessed in terms of the state’s social, political and cultural environment or the environment as specified in the constitution. For example, in the Fiji Constitution and in the New Zealand Bill of Rights Act, the environment to be considered is one that is “free and democratic”. In South Africa, the environment is said to be one that is “open and democratic” and “based on human dignity, equality and freedom”.²⁹

24 As illustrated in *Teonea v Pule o Kaupule* [2005] TVHC 2; HC CC 23/2003 (11 October 2005 Ward CJ), discussed in Chapter 9.

25 See cases discussed in section on freedom of movement in Chapter 9.

26 See discussion of *Taione v Kingdom of Tonga* [2004] TOSC 48 in section on freedom of speech in Chapter 9.

27 See *Railumu v Commander, Republic of Fiji Military Forces* [2002] FJHC 1; HBM 81J/2002s (24 February 2002 Jitoko J) < www.paclii.org > (accessed 22 March 2006). The Court held that the High Court (Constitutional Redress) Rules imposing a 30-day limitation period within which to bring an application that is intended to assert basic rights would fetter an applicant’s right of redress, was neither reasonable nor justifiable, and was therefore unconstitutional and invalid.

28 UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities “Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex” (E/CN.4/1984/4) [“Siracusa Principles”].

29 Constitution of South Africa, art 36(1).

- The criterion that permits or mandates the limitation must have some legal basis and must be publicly known and capable of precise identification. If it is accepted that custom is a source of law, then like other laws, it must in theory be capable of limiting rights, provided that the other requirements are met.
- The limitation must be proportionate to the importance of the goal it seeks to achieve. That would require, for example, a fair balance between the interests of the community that a limitation seeks to uphold and what is necessary to protect an individual's fundamental rights. Similarly, the measures designed to implement the limitation must be rationally connected to the intended purpose of the limitation; must not be arbitrary, unfair or irrational; and must not be applied in a discriminatory manner.
- The means used to limit or restrict the right must be the minimum necessary to achieve the purpose, so that the right is minimally impaired.
- The burden of justifying a limitation on a right lies with the party, usually the state, seeking to limit the right.

As has been said in the Canadian context, one advantage of requiring a reasoned justification for encroaching on rights is that it “improves the debate about how society is to live.”³⁰

- 12.26 The primary rationale for limiting an individual's right on account of Pacific custom is to respect the community interest, in that custom provides the basis for peace and good order. In other words, in those cases, it is not custom as such but the prospective threat to peace that is critical.³¹
- 12.27 The ostensible purpose of the limitation is important. For example, to restrict how people express themselves may be justified in the context of the critical role of Pacific respect protocols in maintaining community order, but such a restriction may not be justified if it could suppress opinions which, no matter how radical, are respectfully expressed. It may be necessary for public order to outlaw seditious statements, but the limitation would not be justified if sedition were defined to constrain the free expression of alternative political opinions. Similarly, a restriction on establishing a church may be justified if the church would cause extensive dissension, but the limitation may not be sustainable if it is so expressed as to deny to individuals the right to worship privately according to the beliefs and practices of that church, if those beliefs and practices do not represent a challenge to the peace and good order of the village.
- 12.28 References to “public order” in limitation clauses in constitutions must, like constitutions generally, be read in the context of the society to which the constitution speaks. For example, “public order” in a limitation clause of the Samoan Constitution has been read to include peace and harmony in a customary village.³² Consistent with this contextualisation, the Siracusa

30 Julie Debeljak “Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights” (2002) 26 Melbourne University Law Review 285, 316.

31 For example, *Teonea v Pule o Kaupule* [2005] TVHC 2; HC CC 23/2003 (11 October 2005 Ward CJ); and *State v Riogi* [2001] FJHC 81; HAA60j/2001s (20 August 2001 Shameem J) < www.pacii.org > (accessed 22 March 2006), both discussed in Chapter 9.

32 See the discussion of Samoan banishment cases in Chapter 9.

Principles on the ICCPR define “public order” as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.”³³ The need to read the constitution in the context of the local social order is self-evident in many constitutions, as with that of Tuvalu, which includes “the protection and development of Tuvaluan values and culture” in the definition of matters of “national interest”.³⁴

- 12.29 Similarly, the effect of the Siracusa Principles is to require that references to “public morals” in limitation clauses be read according to local moral standards. The Principles provide that since public morality varies over time and from one culture to another, a state that invokes public morality as a ground for restricting human rights must show that the limitation in question is essential to the maintenance of respect for the fundamental values of the community.³⁵ So as not to unduly constrain rights the test must be an exacting one. The decision by the High Court of Fiji in *State v Nadan* shows how high the bar is set. The State claimed moral concerns with homosexuality as justification for the limitation on the right of privacy. That argument was rejected, and the Court decided that “this right to privacy [is] so important in an open and democratic society that the morals argument cannot be allowed to trump the constitutional invalidity.”³⁶

Margin of appreciation

- 12.30 Another prospective tool in the contextual application of human rights is the doctrine of the “margin of appreciation” as adopted by the European Court of Human Rights (ECHR). This doctrine (sometimes called the margin of discretion) derives in part from the notion of margin of appreciation in the French law on administrative action and discretion.³⁷ The doctrine was first developed by the ECHR in considering the application of rights to emergency situations. Although it is not prescribed in the European Convention on Human Rights, the ECHR has applied it in over 700 cases.³⁸
- 12.31 The doctrine allows a margin of discretion to domestic decision-makers in giving local effect to rights. The doctrine essentially recognises that among nation states, opinions may reasonably differ on social, economic and political issues, so each society must have some latitude in resolving the conflicts between individual rights and national interests or among different moral convictions.³⁹ The margin of appreciation varies according to the level of consensus on a right or a limitation.

33 “Siracusa Principles”, above n 28, para I(B)(iii)(22).

34 Constitution of Tuvalu 1986, s 9(2).

35 “Siracusa Principles”, above n 28, para I(B)(v)(27).

36 *Nadan v State* [2005] FJHC 1; HAA85/2005 and HA86/2005 (26 August 2005 Winter J) < www.pacilii.org > (accessed 8 September 2005).

37 Howard Charles Yourow *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer Academic Publishers, Dordrecht, 1996) 14.

38 Jeffrey A Brauch “The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law” (2004) 11 *Columbia Journal of European Law* 113, 119.

39 Eyal Benvenisti “Margin of Appreciation, Consensus, and Universal Standards” (1999) 31 *New York University Journal of International Law and Politics* 843, 843.

- 12.32 Margin of appreciation has been applied to accommodate diversity, national sovereignty and the will of domestic majorities among member states of the European Union.⁴⁰ States have particularly applied it to moral issues such as homosexuality, abortion, art and divorce. Margin of appreciation has limited many rights: the right to privacy; the right to family life; and the freedoms of thought, conscience, religion, expression, assembly and association.⁴¹ The doctrine, however, has many critics.⁴² A particular concern is its application to conflicts between majorities and minorities, in which arguably the rights of minorities are diminished.⁴³ As a result, it has not been widely adopted outside the ECHR.⁴⁴
- 12.33 Margin of appreciation, like the Siracusa Principles, recognises that public morality varies over time and from one culture to another.⁴⁵ The difference between the Siracusa Principles and the margin of appreciation is that the Principles establish tests that any limitations to a right must meet. The margin of appreciation allows states to curtail rights with less attention to the justification for a limitation.
- 12.34 Of relevance to our study is whether the doctrine has use in domestic rather than international courts. As developed by the ECHR, part of the justification for the doctrine is that domestic institutions are better placed than a regional body to assess local conditions. It has been suggested that the doctrine should not apply in domestic courts which can and should engage in deeper analysis of the issues at hand.⁴⁶ It may, however, be useful where a domestic court is faced with a rule of international human rights law that conflicts with or would substantially alter the operation of existing domestic law.⁴⁷ In addition, if in future a Pacific regional human rights mechanism becomes a reality, a margin of appreciation will be an important issue for its consideration.
- 12.35 To date, the doctrine has been applied or considered in Australia, Fiji⁴⁸ and New Zealand.⁴⁹ It is also relevant to the French Pacific territories,

40 Douglas Lee Donoho “Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights” (2001) 15 *Emory International Law Review* 391, 451.

41 European Convention for the Protection of Human Rights and Fundamental Freedoms, arts 8–11.

42 See, for example, Timothy H Jones “The Devaluation of Human Rights under the European Convention” (1995) *Public Law* 430; Benvenisti, above n 39; Michael R Hutchinson “The Margin of Appreciation Doctrine in the European Court of Human Rights” (1999) 48 *International and Comparative Law Quarterly* 638; Brauch, above n 38.

43 Benvenisti, above n 39, 847.

44 See, for example, Inter-American Court of Human Rights “Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica” (19 January 1984) OC-4/84, para 62; Human Rights Committee “*Hertzberg et al v Finland*, Communication No 61/1979” (2 April 1982) CCPR/C/15/D/61/1979, para 10.3.

45 “Siracusa Principles”, above n 28, para IB(v).

46 Yash Ghai “Derogations and Limitations in the Hong Kong Bill of Rights” in Johannes Chan and Yash Ghai (eds) *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths, Singapore, 1993), 181–182.

47 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690, para 135 (CA) Glazebrook J, where in relation to the meaning of the phrase “danger to the security of the state” used in the Refugee Convention, the Court concluded that the travaux préparatoires (records of preparation of a treaty) showed that the treaty intended a margin of appreciation to apply to interpreting that phrase.

48 The doctrine was considered but rejected in *Nadan v State*, above n 36.

49 For discussion of the Australian cases, see Christopher Ward “The Margin of Appreciation in Australian Jurisprudence” (2003) 23 *Australian Bar Review* 189.

both as part of their domestic law and also because France is a member of the European Union.

12.36 The doctrine may also have relevance in other parts of the Pacific, as it may help assuage concerns that subscribing to international human rights treaties might undermine culture and custom. However, this needs to be balanced with the risk that its indiscriminate application may limit the relevance of international law to the domestic legal system.⁵⁰ Given the very real risk that use of the doctrine may significantly undermine human rights standards, the Commission suggests that the limitations analysis based on the Siracusa Principles is to be preferred. It brings with it a stronger culture of justification as to why human rights are limited in a particular case.

Conflicting human rights

12.37 In most cases, human rights are described as indivisible, meaning that no one right is superior to another. The courts must therefore balance the relative importance of conflicting human rights according to the context. Two human rights which are particularly relevant in harmonising custom and human rights – the right to culture and group rights – will potentially conflict with other human rights. Before addressing the potential conflicts raised by these particular rights, we explore how constitutions can affect conflicts and two ways of addressing them: “definitional balancing” and “ad hoc balancing”.

12.38 Some state constitutions give priority to certain human rights. The PNG constitution, for example, distinguishes fundamental and qualified human rights.⁵¹ Alternatively, the constitution may provide for some but not all human rights to be limited to the extent necessary to respect others’ interests. Provisions along those lines may be found in the constitutions of Fiji, Kiribati, Nauru, the Solomon Islands and Tuvalu.⁵² Even in those cases, however, the courts may be called upon to balance human rights – either two constitutional rights or a human right recognised in the constitution and another human right.⁵³ Some Pacific constitutions explicitly recognise that there may be human rights additional to those specified in the constitution.⁵⁴

50 Ward, above n 49, 192.

51 Constitution of Papua New Guinea, Part III, Division 3, separates rights into two types – Fundamental Rights (ss 35–37) and Qualified Rights (ss 38–56).

52 These provisions reflect the UDHR, art 29(2): “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

53 The Siracusa Principles note that the rights and freedoms of others which may act as a limitation on rights include rights beyond those recognised in the Covenant: “Siracusa Principles”, above n 28, para IA(viii)(35).

54 For example, s 28 of the Tuvalu Constitution provides: “The fact that certain rights and freedoms are referred to in this Constitution does not mean that there may not be other rights and freedoms retained by the people or conferred by law.” Section 43(1) of the Fiji Constitution provides: “The specification in this Chapter of rights and freedoms is not to be construed as denying or limiting other rights and freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.”

Definitional or ad hoc balancing

- 12.39 There are two competing approaches to how human rights are balanced – “definitional balancing” and “ad hoc balancing.” Definitional balancing means defining a human right so that it does not impact on another. That approach was taken in New Zealand when, for religious reasons, parents refused a life-saving blood transfusion for their child. The exercise of their right to religion potentially impacted on the child’s right to life. The Court held the parents’ right to religion did not extend to situations where the manifestation of their religious belief placed the lives of other people in danger.⁵⁵ This interpretation became a precedent in the sense that it became part of the “definition” of the right to religion in future cases.
- 12.40 “Ad hoc balancing” means asking whether the limit imposed by one human right on another is reasonably justified in the particular circumstances. In the example above, the court may have considered that an order authorising the blood transfusion for the purpose of saving a child’s life was a reasonable limit on the parents’ right to practise their religion.⁵⁶ The PNG Constitution promotes the ad hoc approach by providing that a human right may be limited by law if, because of a conflict with another human right, the limitation is necessary and reasonably justifiable in a democratic society that has proper respect for the rights and dignity of mankind.⁵⁷
- 12.41 The distinction between definitional balancing and ad hoc balancing may not make any practical difference in many cases. However, one advantage of ad hoc balancing is that it enables each case to be assessed according to its circumstances. This creates a “culture of justification” to ensure that where a right is limited, the reasons for doing so are explained.⁵⁸ In contrast, once a definitional balancing exercise has been undertaken, a “permanent answer” to questions of conflict between two rights is then provided for future cases, precluding justification according to the circumstances.

Right to culture

- 12.42 The enjoyment of customs has been treated as falling within the “right to culture” as recognised in some national laws and international treaties.⁵⁹ As we discussed in Chapter 10, the right finds expression in Article 27 of the ICCPR, which recognises that persons belonging to minorities should not be denied the right, in community with the other members of their group, to enjoy their culture, religion and language. In addition, the recognition of the right of all persons to take part in cultural life, under Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), arguably includes ethnic customs.

55 *Re J (An infant): Director-General of Social Welfare v B and B* [1996] 2 NZLR 134 (CA).

56 For a New Zealand example that applied the ad hoc balancing approach in the case of conflicting rights, see *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570 (CA).

57 Constitution of Papua New Guinea, s 38(1)(b).

58 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) para 6.6.25.

59 As to national laws, see, for example, New Zealand Bill of Rights Act, s 20; Timor Leste Constitution, s 59; and Constitution of the Autonomous Region of Bougainville, s 37.

12.43 The right to culture, including the right to enjoy customary rights, potentially conflicts with the right to equality and the right to be free from discrimination, particularly on the grounds of gender. The balance between these rights under the ICCPR has been the subject of consideration by the Human Rights Committee.⁶⁰

Group rights

12.44 Group rights are also relevant in those states where custom is recognised as a general source of law, but these may also conflict with individual rights. Some Pacific constitutions and statutes explicitly recognise customary group rights.⁶¹

12.45 The balancing of individual and group rights, in the context of the right of individuals of minorities to enjoy their culture under the ICCPR, was considered by the Human Rights Committee in relation to the Maori fisheries settlement in New Zealand. The Committee considered that where the rights of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group or by the minority group as a whole, the Committee may need to consider whether the limitation on the rights of a few is in the interests of all members of the minority and whether there is reasonable and objective justification for applying the limitation to the few individuals who claim to be adversely affected.⁶²

12.46 Conflict may also arise between the individual right to belong and the right of a group to determine its own membership. In addition, the right of an individual to belong to a customary group may conflict with legal provisions to protect the interests of the group as a whole. In a Swedish case, the law provided that members of the indigenous Sami minority were liable to lose their village membership and other rights if they engaged in any profession other than reindeer husbandry for a period of three years. An affected individual who was thereby deprived of village membership contended that the law breached Article 27 of the ICCPR. The Human Rights Committee found that the exclusion was not a violation of Article 27 as the legal provision was legitimately aimed at the continued viability and wellbeing of the Sami minority as a whole. The restriction on the right of the individual member of the minority had a reasonable and objective justification and was necessary for the continued viability and welfare of the minority as a whole.⁶³

60 For example “*Sandra Lovelace v Canada*, Communication No R6/24” (29 December 1977) UN Doc Supp No 40 (A/36/40) at 166 (1981).

61 PNG Land Groups Incorporation Act 1974; Fiji Constitution, ss 185, 186; Draft Federal Constitution of Solomon Islands, cl 50.

62 “*Apirana Mahuika et al v New Zealand*”, above n 6, para 9.6.

63 Human Rights Committee “*Ivan Kitok v Sweden*, Communication No 197/1985” (27 July 1988) CCPR/C/33/D/197/1985.

COMMISSION SUGGESTIONS

12.2 **On a contextual approach to human rights:** Human rights can be applied contextually to give better recognition to custom law and human rights, respecting both the value underlying the right and the values of custom. As matters of general principle, however, human rights should not be readily restricted, and constitutional limitation clauses should be strictly construed. The doctrine of margin of appreciation may be relevant but should not be used to undermine fundamental rights. When human rights conflict, an ad hoc balancing best facilitates full consideration of the particular circumstances of each case.

BUILDING RELATIONS WITH COMMUNITY JUSTICE BODIES

12.47 In addition to developing and applying a Pacific law within the courts, courts can support harmonisation by strengthening relations with community justice bodies. We examine two areas central to laying a strong foundation for these relations: a policy of judicial deference and methods of incorporating customary remedies into court procedures.

12.48 We suggested in Chapter 11 that appeals could be made from the judgments delivered by community justice bodies where these are provided for by statute. We also proposed that the courts may re-try cases previously dealt with by community bodies where these bodies are not recognised by statute. We further showed that these bodies can be given an esteemed place in the legal system by a policy of judicial deference – judges respect and defer to the specialist skills and local knowledge of community justice bodies. We see judicial deference as critical in developing good relations between communities and courts and in bringing community and centralist justice systems into closer communion.

12.49 However, the traffic of cases need not be all one way. Sometimes courts should refer matters to community justice bodies to resolve. There are times when courts can deal only with strictly legal issues and cannot touch on the real issues of concern at the local level. Bernard Narokobi gave an example from his own experience in Papua New Guinea, when neighbouring villages were in a near state of open war.⁶⁴ Charges were brought in court against certain individuals who had destroyed property in the neighbouring village, in retaliation for a murder by people from that village. The murderers could not be identified, but those who damaged the property were known. A finding one way or the other would not relieve the prospect of ongoing warfare and in fact could worsen the situation; the greater prospect for peace lay in the court deferring proceedings to await the outcome of a customary resolution process, a process that the court encouraged.

12.50 There is no difference in principle between referring matters for customary consideration and referring matters to mediation or other restorative justice exercises. The courts may adjourn proceedings to await the outcome. Relevant considerations for the Court are whether the parties agree to refer the matter, whether victims consent and whether individual rights and interests are likely to be protected in the process. For instance, particular care needs to be

64 Bernard Narokobi, Meeting with New Zealand Law Commission, 7 June 2006.

taken in any cases involving sexual or domestic violence or children to make sure that the victims' consent is genuine and that they are given a voice in any community resolution, instead of being heard only through family spokespeople.

Remedies

- 12.51 Another significant policy issue is how to incorporate customary remedies into court procedures. The topic could constitute a study on its own and we can only touch on some of the issues below.⁶⁵
- 12.52 In Chapter 11, we noted that customary processes were concerned to reconcile offenders and victims in order to keep harmony in the community. The courts, on the other hand, are concerned with punishing offenders, denouncing crime, deterring others, providing for rehabilitation and sentencing consistently as part of a policy of controlling crime as a matter of national interest.
- 12.53 To provide for both community and national interests, it is not enough to favour customary processes for offences in traditional communities and the national or state system for those in urban areas, as there must be some parity between them. In some cases, traditional standards and processes may apply even in urban areas, as considered in Chapter 10, and the state is concerned with law and order nationwide. We consider the challenges of incorporating customary remedies first and then some of the statutory policies for dealing with those challenges in particular states.

Incorporating customary remedies into court procedures

- 12.54 The issues centre on two areas: prosecuting and sentencing. We first address the potential impact of customary remedies on decisions to prosecute.
- 12.55 Prosecutors have to decide whether charges should be laid or continued when matters have been dealt with by customary means. Usually, the courts will not intervene on prosecution decisions as a matter of legal policy. For example, in a case from the Federated States of Micronesia, the court refused the defendants' requests to dismiss assault charges, requests based on the fact of a customary settlement.⁶⁶ The Court of Appeal of Vanuatu likewise rejected the suggestion of a customary chief that a customary settlement should somehow influence the charges that were laid, noting that a customary settlement could not be used as a "bargaining chip".⁶⁷
- 12.56 The courts have, however, expressed concern that sometimes a prosecutor decides not to bring charges, solely based on a previous customary penalty.

65 For more in-depth discussion of traditional remedies and sentencing in the Australian context, see Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (vol 1, ALRC No 31, Australian Government Publishing Service, Canberra, 1986) 351–398; Law Reform Commission of Western Australia *Aboriginal Customary Laws: Discussion Paper* (LRCWA No 94, Perth, 2005) 167–172, 202–230.

66 *FSM v Mudong* [1982] FMSC 6; 1 FSM Intrm 136 (Pon 1982); [1981–1984] 1 FSMLR 136 (28 April 1982 King CJ) < www.pacii.org > (accessed 3 September 2006).

67 *Public Prosecutor v Gideon* [2002] VUCA 7; Criminal Appeal Case 3/2001 (26 April 2002) < www.pacii.org > (accessed 22 April 2005).

For example, it appears that the Attorney-General of Yap state in the FSM had a policy of not prosecuting for a crime under Yap state law if a punishment had already been imposed by Yapese custom. The FSM Supreme Court concluded that this policy treated customary punishments like state punishments and turned customary councils into de facto government agents.⁶⁸

12.57 On the whole, taking customary remedies into account when deciding whether to prosecute is problematic. Ignoring customary remedies, however, raises another issue, the prospect of “double jeopardy”, where a person may be punished twice for the same offence if a proper allowance for the customary outcome is not made. This takes us into the area of sentencing.

12.58 In making allowance for a customary outcome in sentencing, the courts may need to consider whether the customary process was or is likely to be fair or acceptable to those concerned. As considered in Chapters 7 and 11, some people are aggrieved by customary processes that do not take proper account of their interests. In some cases, the process may amount to a denial of the victim’s human rights.⁶⁹

12.59 Courts must also consider whether customary processes are being used by offenders as a soft option. Offenders may see engaging in a customary process as a way to “buy their way out of trouble”, as the Solomon Islands High Court considered was the case in *R v Asuana*.⁷⁰ In that case, on unlawful wounding, the court rejected the allowance made in the lower court for a customary resolution, increasing the penalty from a fine of some \$750 to two-and-a-half years’ imprisonment. In other cases, however, monetary penalties or other penalties that assist the victim and can shame the offender may be more appropriate than imprisonment, which does nothing to restore relations between the parties.

12.60 On the other hand, sometimes customary remedies are more severe than those a court would issue. Without statutory backing, some customary punishments constitute offences in themselves, for instance where they involve the destruction of property or a beating. The Australian Law Reform Commission has considered the issues in the context of the Aboriginal custom of spearing as “payback”.⁷¹ In the FSM, a trial judge refused to take beatings into account in sentencing offenders for sexual assaults because to do so would encourage people to take the law into their own hands. It was not clear, however, that the beatings were in fact administered according to a customary decision. The Supreme Court directed that the sentence be reheard on the ground that the trial judge should

68 *Tammed v FSM* [1990] FMSC 13; 4 FSM Intrm 266 (App 1990) (17 July 1990) < www.pacii.org > (accessed 27 June 2006).

69 See P Imrana Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women’s Rights Movement, Suva, 1998) 108, 163.

70 *Regina v Asuana* [1990] SBHC 52; HC-CRC 34/1990 (12 October 1990 Ward CJ) < www.pacii.org > (accessed 27 June 2006). For similar comments in Vanuatu, see *Noel v Public Prosecutor* [1996] VUCA 5; Criminal Appeal Case 1/1996 (1 November 1996) < www.pacii.org > (accessed 16 November 2005).

71 Australian Law Reform Commission, above n 65, vol 1, 360–364; Northern Territory Law Reform Committee *Report on Aboriginal Customary Law* (Darwin, 2003) 25–27; Law Reform Commission of Western Australia, above n 65, 167–172.

have considered the beatings in mitigation of sentence, but was instead mainly concerned to influence the conduct of people who were not before the Court.⁷²

- 12.61 A fourth issue is whether customary settlements should be taken into account for all types of offences or only for lesser ones. In illustration, the Samoan ifoga (apology) ceremony following a sexual offence was given little weight by the New Zealand Court of Appeal because of the impact of sexual offending on victims and the public interest in preventing sexual crimes. The Court considered that such offences “cannot be expunged even by the most sincere acts of reconciliation.”⁷³ The value of ifoga is, however, generally respected by the New Zealand courts. For example, the courts have acknowledged that a collective sharing of guilt and shame is a highly beneficial process for families to undergo if they are capable of doing so.⁷⁴
- 12.62 A strict approach to customary settlements in sexual cases has been taken in the Pacific Islands Forum Draft Sex Offences Model Provisions. These provide that traditional methods of reconciliation are not to be taken into account in sentencing sex offenders.⁷⁵ However, rather than excluding customary settlements altogether from sentencing in cases of sexual offending, the Commission suggests that the court consider closely the settlement. Where there has been genuine consent by the victim and the settlement has been for the benefit of the victim, it may be quite appropriate to take that settlement into account in mitigation of sentence.
- 12.63 Courts must also consider whether customary remedies are effective for certain cases, especially where customary standards have slipped. During our consultations, concerns were expressed that customary processes do not deal adequately with drug and alcohol problems and the like.⁷⁶ Michael Goddard observes that shaming practices in PNG are ineffective in controlling the consumption of alcoholic home-brew by youths in a peri-urban village of Port Moresby.⁷⁷ In similar vein, Leilani Tuala-Warren notes that the power of ifoga is waning due to modernisation and because young people today might not appreciate the ceremony’s intricacies.⁷⁸ Also, while offenders may take responsibility as part of an apology by their families, they do not always individually acknowledge the wrong committed.⁷⁹
- 12.64 A purely practical issue in sentencing is the capacity of the state to provide adequate prison and rehabilitation facilities. Any lack of such facilities

72 *Tammed v FSM*, above n 68.

73 *R v Talataina* (1991) 7 CRNZ 33, 36 (CA).

74 See first instance decision in *R v Maposua* (23 March 2004) CRI-2003-004-44211 Hansen J.

75 Draft Sex Offences Model Provisions (Version 3, November 2005), cl 85.

76 “Report of Proceedings at New Zealand Law Commission Regional Consultation Workshop, Nadi, Fiji (1–2 May 2006)” 8; “Summary of Discussion at New Zealand Law Commission Wellington Consultation Workshop” (13 June 2006) 2.

77 Michael Goddard “The Age of Steam: Constructed Identity and Recalcitrant Youth in a Papua New Guinea Village” in Sinclair Dinnen with Anita Jowitt and Tess Newton Cain (eds) *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, Canberra, 2003) 45.

78 Leilani Tuala-Warren *A Study in Ifoga: Samoa’s Answer to Dispute Healing* (Occasional Paper Series 4, Te Mātāhauariki Institute, Hamilton, 2002) 24.

79 In a New Zealand case concerning an ifoga involving the offender’s family, the Court of Appeal noted that since the offender was estranged from his family, participation by the offender’s family in an ifoga ceremony could not carry great weight in mitigation of sentence: *R v Talataina*, above n 74, 36.

may compel courts to defer to customary processes or to take a creative approach to punishment, which may be more effective than imprisonment in many situations.

Statutory guidance

12.65 Statutory guidance on how to incorporate customary remedies into sentencing is sometimes available. For example:

- The FSM courts are directed, whenever appropriate, to impose a sentence of “appropriate restitution, reparation, or service to the victim of the crime or to his or her family” and “otherwise [to] give due recognition to the generally accepted customs prevailing in the ... States”⁸⁰
- The New Zealand Sentencing Act 2002 requires the court to take into account offers, agreements, or actions by the offender to make amends to the victim (including apologies, compensation, or the performance of work); whether the offer is genuine and capable of fulfilment; and whether the offer has been accepted by the victim as expiating or mitigating the wrong.⁸¹ Under this provision, the Court of Appeal has held that participation by the offender’s family in a Samoan ifoga ceremony may be taken into account as a mitigating feature in sentencing for manslaughter.⁸²
- In Samoa, a sentencing court must take account of punishments imposed by the village fono.⁸³
- In Vanuatu, the sentencing court may take account of a customary settlement.⁸⁴

12.66 Other statutory provisions actively encourage the courts to seek customary remedies and promote customary settlements. In Vanuatu for example, for offences of a personal or private nature punishable by a fine or imprisonment of less than seven years, the court may promote reconciliation and facilitate settlement in an amicable way, according to custom or otherwise.⁸⁵

12.67 A separate type of provision is one that sets parameters on customary remedies. For example, Samoa’s Village Fono Act provides that the punishments that the fono may impose for village misconduct include a fine in money, fine mats, animals or food or an order to undertake work on village land.⁸⁶ This provision is permissive rather than prescriptive but has been subsequently interpreted as not including a power to banish persons unless authorised by the

80 FSM Code, title 12, s 1203.

81 Sentencing Act 2002, s 10. The previous provision was s 12 of the Criminal Justice Act 1985. Section 10 is considerably broader than its predecessor, most notably by broadening references from the individual offender and victim to include the family of each.

82 *R v Maposua* (3 September 2004) CA 131/04.

83 Village Fono Act 1990, s 8. See, for example, *Attorney-General v Ioane* [1994] WSCA 20; CA 07/1993 (31 March 1994) < www.paclii.org > (accessed 13 April 2005).

84 Criminal Procedure Code (Cap 136), s 119. For examples of cases where customary settlements have been taken into account, see *Noel v Public Prosecutor*, above n 70; *Public Prosecutor v Sarperei* [1998] VUSC 49; Criminal Judgment 20/1996 (3 September 1998 Kalkot Mataskelekele J); *Public Prosecutor v Frank* [2004] VUSC 67; Criminal Case 4/2004 (11 August 2004 Lunabek CJ). All available at < www.paclii.org > (accessed 16 November 2005).

85 Criminal Procedure Code, s 118.

86 Village Fono Act 1990, s 6.

Land and Titles Court.⁸⁷ Affirmation of a proposed customary penalty by a court may resolve the problem that occurs when the solution proposed by a customary process constitutes an offence without an official sanction.

A coherent legal system

12.68 The courts must consider many matters in deciding whether a case should be referred to a customary body before sentence is imposed or in deciding the weight to be given to customary outcomes. As we have said, the conclusion will depend on the statutory provisions of each state, the particular circumstances of each case, and the nature of the society in question. It is important, however, that courts and community justice bodies work in harmony to control crime. Respect for community processes encourages community members to take an interest in maintaining standards and watching over offenders, while court remedies that contain a cultural element may also work to strengthen people's faith in the court system. For example, it has been argued that the courts should hold ifoga in high esteem as that would elevate both the ifoga and the court in Samoan eyes.⁸⁸

COMMISSION SUGGESTIONS

12.3 **On building relations with community justice bodies:** Courts can build relations with community justice bodies by recognising their importance and referring matters to them. Special care is needed in referring criminal cases, to protect the interests of victims and offenders. Statutory guidance is also useful in defining the role of courts and community justice bodies.

⁸⁷ See discussion in Chapter 9.

⁸⁸ Tuala-Warren, above n 79, 24, citing Asofou So'o (interviewee).

Chapter 13

Court Access to Custom Law

- 13.1 Although the primary focus of our study is on the interaction between custom law and human rights, this takes place within the broader context of the interaction between custom law and state-made law generally. One of the major features of this context is the various institutional, structural and attitudinal difficulties faced by the courts and other participants in accessing custom law. We are primarily concerned with ways in which the higher courts might understand and access custom better – lower courts and community justice mechanisms are more likely to be custom-oriented.¹

CUSTOM AS A MATTER OF LAW OR A MATTER OF FACT

- 13.2 A threshold question on the use of custom in the courts is whether it is required to be established as a matter of law or as a matter of fact.² We consider the different approaches here in order to assess whether one better facilitates improved access to, and application of, custom law by the courts.
- 13.3 Although a majority of Pacific Island constitutions recognise custom as a source of law, various approaches are taken as to “proof” or establishment of that law. Some constitutions or statutes make it clear whether custom is to be established as a matter of fact or a matter of law. In others, the way in which custom is to be established is left to the courts to decide – either by way of a guideline judgment issued by a higher court or by individual courts on a case-by-case basis.

1 In the PNG context, it has been noted that while village courts take custom for granted and therefore must “discover” law, higher courts take law for granted and must “discover” custom. See Melissa Demian “Custom in the Courtroom, Law in the Village: Legal Transformations in Papua New Guinea” (2003) 9 *Journal of the Royal Anthropological Institute* 97.

2 See, generally, Jean Zorn and Jennifer Corrin Care “‘Barava Tru’: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific” (2002) 51 *International and Comparative Law Quarterly* 611 [“Barava Tru”]; Jean Zorn and Jennifer Corrin Care *Proving Customary Law in the Common Law Courts of the South Pacific* (Occasional Paper 2, British Institute of International and Comparative Law, London, 2002) [*Proving Customary Law*].

Treating custom as a matter of law

- 13.4 Vanuatu³ and Papua New Guinea⁴ establish custom as a matter of law. In Niue, custom has the force of law only in relation to land.⁵ Tuvalu and Kiribati also treat custom as law but limit the matters to which custom law applies. They also allow the court to decide whether to invoke custom law at all.⁶ This approach accords custom a lower status than other kinds of law and partly undermines the advantages of treating custom as law.
- 13.5 Two advantages emerge when custom is established as a matter of law:
- Logically, treating custom as a matter of law seems consistent with its formal status in many Pacific constitutions as a source of “law”.
 - A court is not restricted to the parties’ evidence or submissions. Even if a matter of custom has not been raised by one of the parties, the court can raise it on its own initiative. Indeed, if custom is treated in the same way as other “laws”, the court is under a duty to ascertain the law.
- 13.6 Offsetting its advantages, however, treating custom as law carries with it three pitfalls. First, given some judges’ lack of familiarity with particular aspects of custom law and the unwritten and fluid nature of custom, it will still need to be ascertained. Frequently, the tools and techniques for doing this will be the same as if custom were a matter of fact. However, there is one important difference – where custom is treated as law, the tools and techniques are simply suggestions to courts as to how to find law rather than technical rules about how courts must find facts.⁷
- 13.7 Second, there are few cases where the courts have applied uncodified custom as the only applicable law. One example is a Vanuatu case concerning the ability to take the nagol-jumping rite from Pentecost to Santo to capitalise on tourists. The Supreme Court held that since there was no applicable rule of law, the case had to be decided in accordance with custom. The nagol-jump had to be returned to Pentecost and only exported with the majority consent of the custom owners and particularly of the chiefs representing them.⁸

The doctrine of precedent and custom law

- 13.8 A third difficulty when treating custom as law is that the doctrine of precedent then applies. The doctrine of precedent (also known as *stare decisis*) is one of

3 *Vanuatu Magistrates’ Bench Book* (July 2004), ch 2, para 1.3.

4 Underlying Law Act 2000, s 16(1) provides: “A question as to the existence or content of a rule of customary law is a question of law and not a question of fact.”

5 For a useful discussion of the doctrine of judicial notice, see New Zealand Law Commission *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, Wellington, 1994) 81–93.

6 Laws of Tuvalu Act 1987, s 5(3) and sch 1, para 1(1); Laws of Kiribati Act 1989, s 5(3) and sch 1, para 1(1).

7 *Proving Customary Law*, above n 2, 16.

8 *In re the Nagol Jump, Assal & Vatu v Council of Chiefs of Santo* [1992] VUSC 5; [1980–1994] Van LR 545 (10 July 1992 D’Imecourt CJ) < www.paclii.org > (accessed 16 November 2005). For more on nagol jumping, see Margaret Jolly “Kastom as Commodity: The Land Dive as Indigenous Rite and Tourist Spectacle in Vanuatu” in Lamont Lindstrom and Geoffrey White (eds) *Culture Kastom Tradition: Developing Cultural Policy in Melanesia* (Institute of Pacific Studies, University of the South Pacific, Suva, 1994) 131; Anthony H Angelo “Nagol Jumping Should Return to Pentecost: A Conspectus of the French, English and Custom Law of Vanuatu” in Institute of Comparative Law in Japan *Toward Comparative Law in the 21st Century* (Chuo University Press, Tokyo, 1998) 1011.

the fundamental underpinnings of the common law. The doctrine requires a court to follow a decision of another court which is above it in the same court hierarchy when the same legal points arise again. The advantages of a system of judicial precedent include certainty, consistency, predictability, stability and uniformity. Precedent also facilitates the leadership role of higher courts in developing national jurisprudence by requiring adherence to their decisions by lower courts. Disadvantages of the doctrine include that it reinforces the conservatism of the law by keeping the law backward-looking rather than forward-looking and that it lacks flexibility. It may be slow to adapt to new circumstances and the complexity of modern societies.

- 13.9 Application of precedent in cases involving custom law may be particularly problematic. Strict adherence to precedent is contrary to the very nature of custom law, as flexibility and fluidity are the trademarks of custom. In finding what the current custom law is, the use of prior cases may be the least certain method.⁹
- 13.10 The issue is most problematic where a court pronounces on a customary practice, as distinct from a customary value, as constituting a rule. Rules derived from custom law, at least as they are practised in communities, are rarely absolute, as we discussed in Chapter 4. However, when applied by a court and subsequently re-applied following adherence to the doctrine of precedent, they become absolute.
- 13.11 On the other hand, we note the concern expressed during our consultations at the lack of consistency in community justice decision-making, a shortcoming flowing from the absence of a system of precedent in such systems, the lack of a written record, and reliance on oral tradition and memory.¹⁰ Consistency in decision-making is relevant where community justice bodies judge competing merits or impose sentences. The issue of consistency does not arise to the same extent where community justice bodies are primarily concerned to resolve issues between parties, whether in civil or criminal matters. In dispute resolution cases, rules are variously applied according to the parties' particular circumstances and needs.
- 13.12 In an American Samoan case concerning individual use of communal land, the Court noted:¹¹

Unhappily, fa'a Samoa and stare decisis are often irreconcilable. Establishing a binding precedent based on the shifting sands of custom and tradition handed down though the centuries by word of mouth is a chancy undertaking. Thus, in all candor, prior decisions of the High Court are of precise [sic] little value as precedent in land and [title] cases

- 13.13 Instead, the Court preferred what it called “the Law of Convenience”, by which each case stands on its own feet as the court simply arrives at an equitable disposition of the case. Perhaps recognising the need for a similar approach in its village courts, the Constitution of Papua New Guinea provides

9 *Proving Customary Law*, above n 2, 67.

10 “Report of Proceedings at New Zealand Law Commission Regional Consultation Workshop, Nadi, Fiji” (1–2 May 2006) 10–11.

11 *Kaliopa v Silao* [1981] ASHC 1; HC-LT NO (1 January 1981) < www.pacii.org > (accessed 9 March 2006).

that its rules on judicial precedent do not apply to or in respect of village courts.¹² In relation to general courts, a more flexible approach is now mandated for overruling past precedent in order to ensure that the law is appropriate to the circumstances of the country.¹³

- 13.14 We agree that a more relaxed approach to precedent may be useful in relation to custom law. While the doctrine of precedent may be of some use in terms of recognising customary values, strict adherence to precedent in terms of customary rules and practices is not helpful. Instead, it may be appropriate to recognise that even though a custom has been established as a precedent, it is open to a party to show, and a court to find, that it is no longer supported by current usage.¹⁴ It may also not be in line with the underlying values. A relaxed approach to precedent should not, however, be at the total expense of consistency in dealing with customary matters.

COMMISSION SUGGESTIONS

- 13.1 **On relaxation of the doctrine of judicial precedent:** It may be appropriate to recognise that even though a custom has been established as a precedent, it is open to a party to show, and to a court to find, that the custom is no longer supported by current usage or underlying values.

Treating custom as a matter of fact

- 13.15 Countries and territories that treat custom as a matter of fact include New Caledonia,¹⁵ the Solomon Islands,¹⁶ New Zealand,¹⁷ Fiji and Tonga. In Fiji, the 1997 Constitution provides that Parliament must make provision for the application of customary laws.¹⁸ While waiting for Parliament to act, it seems that customary law is treated as fact by calling evidence.¹⁹ In Tonga, the Evidence Act provides for custom to be proved by the calling

12 Constitution of Papua New Guinea, sch 2.8(2).

13 See Underlying Law Act 2000, ss 9, 19, 20, 21 and 22.

14 A N Allott “The Judicial Ascertainment of Customary Law in British Africa” (1957) 20 *The Modern Law Review* 244, 258.

15 Guy Agniel “Legal Adaptations to Local Sociological Particularities” in Paul de Deckker and Jean-Yves Faberon (eds) *Custom and the Law* (Canberra, Asia Pacific Press, 2001) 48.

16 Customs Recognition Act 2000, s 3(1) provides: “Subject to the provisions of section 5 [relating to proof of custom], questions as to the existence of any customary law and the nature of such customary law in relation to a matter, and its application in or relevance to any particular circumstances, shall be ascertained as though they were matters of fact.” See also *Proving Customary Law*, above n 2, 14; Jennifer Corrin Care and Jean G Zorn “Legislating for the Application of Customary Law in Solomon Islands” (2005) 34 *Common Law World Review* 144, 159 and 167 [“Legislating for the Application of Customary Law”].

17 Richard Boast et al *Maori Land Law* (Butterworths, Wellington, 1999) 22.

18 Constitution of Fiji, s 186(2).

19 *Proving Customary Law*, above n 2, 9.

of evidence.²⁰ The provisions seem to have been intended to deal with introduced customs, particularly of trade, rather than indigenous customary law. Nonetheless, were a question of indigenous custom to arise, this provision would probably apply.

- 13.16 The key theoretical disadvantage of treating custom as fact is that this approach automatically demotes it from its constitutional status as formal law. The main practical disadvantage is that because of the rules of procedure and evidence, custom is more difficult to establish than if it were treated as law. The costs of proving custom as fact may also be high, particularly if expert witnesses are required to be called. Another practical disadvantage is that treating custom as fact arguably precludes judges from applying custom law of which they are aware or calling for independent research.²¹ They are therefore much more dependent on counsel adequately pleading and establishing custom.
- 13.17 One advantage of treating custom as fact is that the doctrine of precedent does not apply to matters of fact, and so a court decision does not “freeze” the customary practice at that particular point in time. Instead, the content of the custom can continue to evolve as it is practised in the community, and evidence of the current understanding of the custom is provided to the court as cases arise. Over time, this may mean that the content of custom remains controlled by the relevant customary community rather than by the court.

Conclusion

- 13.18 Both approaches, treating custom as a matter of law and as a matter of fact, squeeze custom into the narrow confines of the formal legal system, resulting in an imperfect fit. Even where custom is accorded the “higher” status of law, the way in which the court ascertains that law will often require use of the same methods as if it were a matter of fact – suggesting there may be little practical difference between the two.
- 13.19 The Law Commission suggests, however, that treating custom as a matter of law is more likely to facilitate access and understanding by the courts. Because court understanding of custom law needs deepening, and also to avoid freezing custom, a more relaxed approach to the doctrine of precedent than for other sources of law is likely to be appropriate.

20 Evidence Act (Cap 15), s 5 provides: “Where in any proceeding a question arises as to the existence of any right or custom evidence may be given of (a) any transaction by which the right or custom in question was created, modified, recognised, asserted or denied or which was inconsistent with its existence; (b) particular instances in which the right or custom was claimed, recognised, or asserted, or in which its exercise was disputed, asserted, or departed from.” (For a similarly worded provision, see Customs Recognition Act 2000 (Solomon Islands), s 4.) Section 27 also provides: “Existence of general custom. (1) When the Court has to form an opinion as to the existence of any general custom or right, evidence may be given of general reputation with reference to such custom or right among persons who would be likely to know of its existence. (2) The expression ‘general custom or right’ in this section includes any custom or right common to any considerable class of persons.”

21 “Legislating for the Application of Customary Law”, above n 16, 160.

COMMISSION SUGGESTIONS

13.2 **On treating custom as a matter of law or fact:** Requiring proof or establishment of custom as matter of law is consistent with its status as “law”. However, the way in which the court ascertains that law will often require the same methods as if custom were treated as a matter of fact.

- CODIFICATION** 13.20 This section considers codification as a tool for improving court access to custom law. “Codification” means stating the custom law on a topic in a written form, and includes statutory, informal and judicial codification. In “statutory codification”, custom law is stated in a statute and then determined and applied as the statute dictates. The statute may declare the custom or modify it, for example to comply with human rights, to adapt it to modern circumstances, or to bring the customs of diverse groups into line. Customary practices may also be incorporated into regulations made under statute, which may be easier to amend and update than the statute itself. “Informal codification” refers to local initiatives to record customs for the community’s own edification.²² Informal codes have no force as formal law, but if the community continues to demonstrably accept them, a court may treat the code as the settled custom. “Judicial codification” refers to a court’s compilation of custom on the basis of its findings over time. Multiple versions of a given code, whether statutory or judicial, may be needed where there are many kin-groups with distinct practices.
- 13.21 In some Pacific Island states, statutory codification may be implicitly mandated by constitutional requirements to make specific provision for custom law.²³ In the Marshall Islands, a Customary Law Commission examines and codifies customary law and traditional practices.²⁴ In four other Pacific Island states, law reform commissions are directed to consider the reform of custom law.²⁵ Even without such directions, however, a reforming code may be required, as where certainty of land titles is critical for economic development or to reflect changes in social norms.
- 13.22 The question is whether codifying custom is useful in developing Pacific legal systems. There are polarised opinions. While we think it is useful in some instances, codifying relevant customary values may be more useful than codifying

22 An example is the “Custom Policy of the Malvatumauri (National Council of Chiefs)”, published in 1983, with the English translation available in Lamont Lindstrom and Geoffrey M White (eds) *Culture Kastom Tradition: Developing Cultural Policy in Melanesia* (Institute of Pacific Studies, Suva, 1994), 229–247. Another example is the “Tanna Island Kastom Law” of the Tanna Island Council of Chiefs Committee, written in 1981–1983, which contains detailed discussion of rules for daily life. For further discussion of legal innovation in small-scale societies, see William Rodman “A Law unto Themselves: Legal Innovation in Ambae, Vanuatu” (1985) 12 *American Ethnologist* 603.

23 See, for example, Cook Islands Constitution Act 1964, art 66A(1); and Constitution of Fiji, s 186.

24 Customary Law Commission Act 1989 (Marshall Islands), title 39, cap 5. The Customary Law Commission was apparently established in 2002: “People Briefs” (May 2002) *Pacific Magazine* Honolulu <<http://www.pacificislands.cc>> (accessed 29 June 2006).

25 Guy Powles “The Challenge of Law Reform in Pacific Island States” in Brian Opeskin and David Weisbrot (eds) *The Promise of Law Reform* (The Federation Press, Sydney, 2005) 415. The four states are PNG, Samoa, the Solomon Islands and Vanuatu, but Samoa and Vanuatu have not yet established their commissions: see Chapter 15.

customary practices. Such a code could also record some associated practices as standards or guidelines that may be altered or departed from if a particular case so requires.

- 13.23 Codifying custom means that everyone can know the rules, from community members to entrepreneurs, officials and judges. It assists those returning from a life abroad and helps others, as well, to participate confidently in community affairs. It also lessens the prospect of unwitting breaches of the law, reduces the chances of misinterpretation by persons from outside the affected kin-groups, and may help to maintain a threatened culture. Codification may reduce internal arguments on what the law is, may constrain ad hoc inventions or manipulations of custom, and may enable practices to be changed or abandoned by incorporating new rules. Codification has the primary advantage of certainty.
- 13.24 Codification also overcomes the difficulties of proving custom. In adversarial jurisdictions, a further difficulty is that custom law issues cannot always be raised by the Court if they have not been raised in the pleadings. To overcome this gap in application, a codifying statute may require that judges give full weight to the code where relevant in any proceedings.
- 13.25 On the other hand, codification is regularly challenged on two grounds. First, it tends to freeze custom law while, as we have said, custom law evolves as society changes and is usually flexible and dynamic in responding to social change. In particular, codification might freeze the capacity of custom law to adapt to accommodate human rights standards. Second, statutory or judicial codification shifts the people's own management of the law to the organs of the state, where different processes apply. The usual object of customary proceedings is negotiation leading to compromise and reconciliation rather than the rigid application of rules to the facts.²⁶ In addition, the people may alter the proceedings in a necessary case to produce a sensible or just result.
- 13.26 The prospective loss of community involvement in managing custom law must be seriously viewed. Community engagement in dispute resolution and decision-making is integral to maintaining the network of social relations in Pacific cultures, so that any diminution of the community role could put the culture at risk.
- 13.27 Codification also entails other disadvantages. While it allows the less informed to know the rules, their knowledge of custom is still not deep. The purposes of the custom law that determine how the rules are applied may not be understood. There may be a rigid observance of the letter of the law that is not in keeping with the customary spirit. Informal codification may also result in customary chiefs becoming "judges" of an often rigid custom rather than peacemakers able to apply custom with flexibility. A code is no guarantee against the misapplication of custom law. The code may also be inadequate, insufficiently comprehensive or fail to capture customary nuances. Such defects can lead to popular rejection of the code, bringing the law into disrepute through a mismatch between the code and what the communities continue to do in practice.

²⁶ As considered by Allott, above n 14, 245.

- 13.28 The ill effects of judicial codification are evident in relation to the transformation of land titles in many parts of the Pacific. For example, in New Zealand, the Native Land Court held that all of a deceased's issue were absolutely entitled to succession to Maori land. In custom, that was only the first of many norms, but the succession rule was rigidly applied, whether or not the successors married out or otherwise left the group. As a result, most Maori land is now held by a multitude of owners with the vast majority being absentees, an uneconomic result that could not have happened under custom law. In such circumstances, the scope for uncertainty in oral tradition can be far less threatening than the capacity of the written word to entrench error.
- 13.29 Codification clearly has certain benefits, and codes establishing strict rules based on customary practices may be suitable or necessary in limited cases. It also assists judges from other areas to understand custom. However, codification of practices represents only one approach, not necessarily the most efficacious, to applying custom law. We identify two other ways in which the problems identified may be managed. Both recognise that while codes have tended to focus on customary practices, custom law focuses on values. These alternative approaches also acknowledge the concern to protect an island's traditional values that features in most Pacific Island constitutions.
- 13.30 The first option for improving court access to custom law is developing a custom law commentary. Such a commentary would be non-prescriptive, seeking to inform rather than codify. It might describe the philosophy of the custom law and its underlying values. It might discuss various customary practices, any modern developments, and some of the external factors that could affect the development of practices in the future. In particular, it should note where particular customs may be contrary to human rights and explain the constitutional effect of such inconsistency. It might discuss the processes by which custom law is applied by the community. There might be discussion of customary values in the context of human rights and other legal principles. Such commentaries could be developed in close consultation with the affected community. A key feature would be regular review. While such a custom law text could be recognised by statute as admissible in evidence or otherwise given some endorsement for use by judges and lawyers, it would not finally determine the status of any customary practice for the purposes of judicial proceedings.
- 13.31 We suggest that the development of custom law commentaries for the different countries or areas is a priority. The relatively indeterminate nature of custom and customary processes, together with difficulties for "outsiders" in becoming properly informed, forms a barrier to increased use of custom in the courts. A written body of learning about local custom would inform judges, officials and others and enable them to more easily integrate custom with their processes in ways that are essential for the good governance of the Pacific states.
- 13.32 As part of the Pacific Judicial Development Program, judicial benchbooks that set out the legal context of each area have been provided for many Pacific Island countries. What we are suggesting would complement these by providing the

custom context. The Aboriginal Benchbook for Western Australian Courts is a useful example, although designed for a different legal and social situation.²⁷

13.33 We see this as a practical task for individual writers working with local people and describing custom and custom processes, not for a committee aiming to produce the definitive encyclopaedia of custom. These commentaries would not have official status but rather would depend for their status on the degree to which they were generally accepted by the community as being representative of custom.²⁸

13.34 Other writers may add to, update or dispute such commentaries, so that any description of custom is not set in stone. This is a role in which both universities and civil society groups in the region could continue to make a valuable contribution.

COMMISSION SUGGESTIONS

13.3 **On custom law commentaries:** One option, which we see as a priority, is for each country to develop non-prescriptive custom law commentaries to give judges, officials and others insight into the nature of the custom law(s) operating in its territory.

13.35 A second option for improving court access to custom law is a statutory codification of customary values rather than practices. A code of customary values could record relevant values of the custom law and their purposes.²⁹ Alternatively, as discussed in Chapter 14, customary values could be incorporated in relevant general statutes. In this way custom law can take account of human rights in developing modern customary practices.

27 Stephanie Fryer-Smith *Aboriginal Benchbook for Western Australian Courts* (Model Indigenous Benchbook Project, Australian Institute of Judicial Administration Incorporated, Carlton, 2002).

28 An example of a commentary written by an individual that, through its excellence, became influential in the early development of the common law is William Blackstone *Commentaries on the Laws of England: In Four Books* (Clarendon Press, Oxford, 1770), available online at < <http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm> > (accessed 2 September 2006).

29 For example, s 5–7.5 of the Hawaiian Revised Statutes sets out a definition of the “Aloha Spirit” and other core customary values: “(a) ‘Aloha Spirit’ is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, ‘Aloha’, the following unuhi laula loa [free translation] may be used: ‘Akahai’, meaning kindness to be expressed with tenderness; ‘Lokahi’, meaning unity, to be expressed with harmony; ‘Oluolu’, meaning agreeable, to be expressed with pleasantness; ‘Haahaa’, meaning humility, to be expressed with modesty; ‘Ahonui’, meaning patience, to be expressed with perseverance. These are traits of character that express the charm, warmth and sincerity of Hawaii’s people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawaii. ‘Aloha’ is more than a word of greeting or farewell or a salutation. ‘Aloha’ means mutual regard and affection and extends warmth in caring with no obligation in return. ‘Aloha’ is the essence of relationships in which each person is important to every other person for collective existence. ‘Aloha’ means to hear what is not said, to see what cannot be seen and to know the unknowable. (b) In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and give consideration to the ‘Aloha Spirit.’”

- 13.36 A statutory code of customary values could even go so far as to set out associated practices but present them as simply standards or guidelines that could be departed from if the customary value could be better achieved by other means. Recognising the fluidity of practice would enable account to be taken of changing social expectations. A code of customary values could also require that the values be taken into account by a court and given full weight in any case where custom law is relevant, whether or not it is pleaded. It could further provide that in a suitable case, a matter of custom may be referred to the community for its opinion.

COMMISSION SUGGESTIONS

- 13.4 **On codification of custom law:** While codification may be useful in some cases, the key aims of codification (certainty and access to custom law) may be better achieved in other ways. A preferable option is the codification of underlying customary values rather than customary practices.

EVIDENCE AND PROCEDURE

- 13.37 If recognition is accorded to custom law, whether as a matter of fact or as a matter of law, many basic issues arise as to how this recognition operates in practice. These issues include what kind of evidence to accept, what kind of specialist assistance to seek, and how to resolve a conflict between customs.
- 13.38 In the absence of meaningful constitutional or statutory guidance on these issues, the courts have tended to follow their common law instincts and to marginalise the role of custom by requiring strict proof of its existence, following the structures of Western rules of evidence and procedures.³⁰ This makes it difficult for custom law to develop coherently and comprehensively.³¹ The challenges in recognising custom in practice can effectively undermine its status as formal law. When a question of custom is being considered alongside human rights, the temptation for a court to rely solely on the more easily accessible human rights law is obvious. In this section, we consider tools and techniques that might assist a court in better accessing custom.

Inquisitorial and adversarial processes

- 13.39 In part because of the diverse colonial heritage in the Pacific, there is a mix of inquisitorial and adversarial approaches adopted in Pacific courts. While most countries and territories use an adversarial approach consistent with their common law heritage, some adopt a more inquisitorial approach.³² The inquisitorial approach of metropolitan France underpins the legal systems of the three French Pacific territories. In Wallis and Futuna, when this inquisitorial approach is combined with the absence of local

30 “Legislating for the Application of Customary Law”, above n 16, 150.

31 Vincent Lunabek “Adjudication of Customary Law in the Pacific” (2004) 15 Commonwealth Judicial Journal 25, 28.

32 In Tokelau, where lay Law Commissioners are responsible for keeping civil law and order, the process followed in the Law Commissioner’s Court is expressly said to be inquisitorial: Crimes, Procedure and Evidence Rules 2003, s 132.

lawyers, the process followed by the judge is described as conciliatory.³³ The new Vanuatu Civil Procedure Rules contain a number of provisions enabling the judge to take a more proactive role in case management.³⁴ In Samoa, the procedures of the Land and Titles Court are a combination of Samoan custom and court convention. Although parties submit written summaries, lawyers are not permitted to appear, and witnesses may not be cross-examined except by members of the court.³⁵

- 13.40 Although there is increasing commonality and convergence between adversarial and inquisitorial approaches, it is helpful to consider whether there are features of either approach which might be better suited to cases involving custom law. In an adversarial system, the conduct of the proceeding is left largely in the hands of the parties, with judges taking a reactive role, essentially supervising the contest between the two parties and ultimately deciding which of the competing parties and arguments “wins”. Evidence is adduced by the parties, and judges have limited ability to seek extra evidence or witnesses.³⁶ In an inquisitorial system, judges take a more proactive role, there is less emphasis on the role of lawyers and less room for the parties to direct their own case. Rules relating to courtroom practice are minimal and uncomplicated.³⁷
- 13.41 If the parties before the Court do not have an equal opportunity to present their case, the adversarial system tends to break down. Where there is not a good cultural match between the system and the society in which it operates, or where one party is of a different cultural background from the other or from the judge, both the evidence and submissions may be distorted because of cultural misunderstanding. Failure by the court to assist in ensuring that a party is equipped and able to present its case may raise human rights issues such as the right to a fair trial and access to justice.³⁸ It appears to the Commission that there may be certain evidentiary and procedural aspects of the inquisitorial system that are more suited to proceedings raising issues of custom law. Some of these are discussed further below.

COMMISSION SUGGESTIONS

13.5 **On adversarial and inquisitorial processes:** In the custom law context, it may be useful for policy makers and courts themselves (where appropriate) to consider whether evidentiary and procedural aspects of the inquisitorial system are useful in dealing with disputes that raise custom law issues.

- 33 Guy Powles and Mere Pulea (eds) *Pacific Courts and Legal Systems* (University of the South Pacific, Suva, 1988) 361.
- 34 See, for example, Civil Procedure Rules 2002, Part 6 Conferences.
- 35 Michael A Ntummy (ed) *South Pacific Islands Legal Systems* (University of Hawaii Press, Honolulu, 1993) 417.
- 36 See, generally, Australian Law Reform Commission *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System* (ALRC Issues Paper 20, April 1997) para 2.6; Jennifer Corrin Care, Tess Newton, and Don Paterson *Introduction to South Pacific Law* (Cavendish Publishing, London, 1999) 330.
- 37 See, generally, Australian Law Reform Commission, above n 36, para 2.7.
- 38 For some comments on this issue in the Australian context, see Foreword by Hon David Malcolm, in Fryer-Smith, above n 27. See also “Report of Proceedings at New Zealand Law Commission Regional Consultation Workshop, Nadi, Fiji” (1–2 May 2006), 3–4.

Pleadings

- 13.42 In civil disputes, where parties must make formal pleadings, the pleadings may limit a judge’s access to custom law. The High Court (Civil Procedure) Rules 1964 which apply in Kiribati, the Solomon Islands and Tuvalu provide that a party who is relying on a “native law or custom” must state that law in the pleading with sufficient particularity to show the nature and effect of it and the geographical area and the line or group of persons to which it relates.³⁹ It should be noted that these provisions were drafted prior to the independence constitutions which give prominence to custom. If these rules are not inconsistent with those constitutions, the strict criteria for explaining custom law may pose a stumbling block. If a party fails to particularise the custom sufficiently in the pleadings, the court may decline to hear evidence or submissions on custom law and cannot pursue questions of custom law on its own initiative without notice to parties.
- 13.43 Vanuatu’s Civil Procedure Rules 2002 suggest a slightly more relaxed approach in providing that a “party relying on custom law” must “state the custom law” without specifying what happens if parties do not do so.⁴⁰ In contrast, the Vanuatu Magistrates’ Bench Book provides that a Magistrate may raise questions of customary law even if no party has raised them.⁴¹ The Federated States of Micronesia (FSM) judicial guidance clause has been interpreted as requiring the courts to consider custom and tradition, even when the parties have not pleaded it.⁴²
- 13.44 The Pohnpei State Supreme Court viewed rigid pleadings in civil disputes as inconsistent with local customary practice. The applicant sought to eject the respondent from land on the basis that the respondent had not pleaded a defence in accordance with court rules. The Court denied the application, noting that rigid application of court rules would mean that the truth would not be ascertained and that the Pohnpei concept of justice would not be promoted.⁴³
- 13.45 Where, however, matters of custom are not expressly pleaded, and a court introduces custom or allows parties to do so during the hearing, the court must ensure that the rules of natural justice are complied with and that both parties have sufficient opportunity to call their own evidence or make submissions as to the custom.

COMMISSION SUGGESTIONS

13.6 **On pleadings:** Particularly in cases raising custom law issues, there can be a more relaxed approach to pleadings than that imposed by several state statutes.

39 High Court (Civil Procedure) Rules 1964, order 21, r 30.

40 Civil Procedure Rules 2002, r 4.2(1)(d).

41 *Vanuatu Magistrates’ Bench Book*, above n 3, chapter 2, para 1.3.

42 *Semens v Continental Airlines Inc* [1985] FMSC 3; 2 FSM 131 (Pon 1985) (10 December 1985 King CJ) 140 < www.paclii.org > (accessed 17 August 2005).

43 *Hadley v Board of Trustees* 3 FSM Intrm 14 (Pon S Ct Tr 1985) (16 December 1985 Santos CJ) < <http://www.fsmlaw.org> > (accessed 25 August 2005).

Relaxed and permissive approach to evidence

13.46 Even where custom is treated as a matter of law, courts tend to require counsel to present evidence of its existence.⁴⁴ This requirement recognises the practical reality that, unlike other sources of law, custom law may be difficult to ascertain otherwise.

13.47 Where formal provisions on custom law exist, they tend to permit a more relaxed approach to questions of evidence. For example:

- In New Zealand, the Evidence Amendment Act (No 2) 1980 enables hearsay evidence on Maori custom to be admitted in criminal proceedings.⁴⁵
- The Laws of Tuvalu Act 1987, Laws of Kiribati Act 1989 and Solomon Islands Custom Recognition Act 2000 (not yet brought into force) provide that courts are not bound to observe strict legal procedure or apply technical rules of evidence when inquiring into custom.⁴⁶
- The Papua New Guinea (PNG) Underlying Law Act 2000 provides that in ascertaining customary law, a court may on its own motion obtain any evidence and opinions it thinks fit.⁴⁷ Similar instructions are issued in the Vanuatu Magistrates' Bench Book.⁴⁸

COMMISSION SUGGESTIONS

13.7 **On evidence:** Strict evidential requirements for the proof of Pacific custom law should not be imposed, unless the court is specifically required by statute to impose these requirements.

Specialist assistance for the court in ascertaining custom

13.48 Unless a custom is particularly well-known, a court may require specialist assistance in accessing and understanding the particular custom at issue. Even where the judge is personally familiar with the custom, it is important that the judge raise the issue in open court with sufficient opportunity for submissions by, and possibly evidence from, the parties, in case they have a different view of the custom. We examine five ways of providing specialist assistance: multi-judge panels, customary assessors, expert witnesses, referral to specialist bodies and submission of amicus briefs.

Multi-judge panels at first instance

13.49 In Pacific common law jurisdictions, the bench in the lower levels of the formal court system almost always consists of one judge, although at the appellate level, there may be a panel of three or more judges. Placing decision-making authority on one person alone for finally determining a matter of custom disregards custom

44 *Proving Customary Law*, above n 2, 51; “Barava Tru”, above n 2, 621.

45 Evidence Amendment Act (No 2) 1980, s 13.

46 Laws of Tuvalu Act 1987, sch 1, para 1; Laws of Kiribati Act 1989, sch 1, para 1; Customs Recognition Act 2000 (Solomon Islands), s 5.

47 Underlying Law Act 2000, s 16.

48 *Vanuatu Magistrates' Bench Book*, above n 3, ch 2, para 1.3.

law processes of decision-making by consensus and places a considerable burden on a single judge, particularly if the judge is unfamiliar with matters of custom law.

- 13.50 In the French territories, more serious criminal cases are heard by panels of three judges.⁴⁹ In American Samoa, every High Court (trial division) case is heard by a three judge panel comprised of a judge and two Samoan associate judges. Associate judges make sure that the court does not steamroll over Samoan custom when it makes decisions or interprets laws.⁵⁰
- 13.51 Having a panel of judges at first instance provides multiple perspectives on the custom law question. The major disadvantage of a panel at first instance is the cost of resourcing such a system, given that many courts are already under pressure. Nevertheless, where there is a desire for a legal system more responsive to custom, it may be appropriate to allow for first instance panels of more than one judge when the proceedings raise a significant matter of custom.

Customary assessors

- 13.52 Another option to enhance the ability of the bench to grapple with matters of custom is the use of customary assessors. There are currently two types of assessor used in the Pacific – those who act as fact-finders in a similar role to a jury⁵¹ and those who assist the judge in accessing and understanding custom law. It is the second of these with which we are concerned here. Countries that currently use this type of customary assessor include Australia,⁵² the Marshall Islands,⁵³ Tonga⁵⁴ and New Caledonia.⁵⁵ In the latter, the custom of each of the parties must be represented by at least one assessor.⁵⁶
- 13.53 When assessors are used, the precise nature of their role requires consideration – should it include the assessment of testimony and other evidence or be limited to giving advice as to the customary norms relevant to the case?⁵⁷ If the judge is from another culture, assessors may be better qualified to assess witnesses and appraise their demeanour.⁵⁸ When assessors advise the judge in private rather than in open court, however, the parties do not have an opportunity to challenge

49 Ntummy, above n 35, 607, 625–626, 643.

50 Ntummy, above n 35, 440; Randall Nicholson, Law Clerk, High Court of American Samoa, to the Law Commission (18 March 2006) Email.

51 Fiji, Samoa and the Solomon Islands use assessors in this way. See *Proving Customary Law*, above n 2, 20–21.

52 See Native Title Act 1993; Federal Court of Australia Act 1976, s 37A.

53 Ntummy, above n 35, 113.

54 Land Act (Cap 132), ss 146 and 147(1); *Proving Customary Law*, above n 2, 22. For a recent example of the role of an assessor, see *Tukuafu v Latu* [2005] TOSC 7; L 5/2002 (31 January 2004 Ford J) < www.paclii.org > (accessed 27 February 2006), in which the Assessor advised that certain provisions of the Land Act 1927 were never part of the customary land law of the Kingdom. See also *Fie'eiki v 'Ilavalu* [1995] TOLC 1; [1995] Tonga LR 190 (25 March 1995 Hampton CJ) < www.paclii.org > (accessed 27 February 2006).

55 See Ordinance 82-877 (15 October 1982), Law 89-376 (13 June 1989), art 19 Law 99-209, and art 806 New Caledonia Code of Civil Procedure.

56 Article 5 Ordinance 82-877.

57 Allott, above n 14, 250.

58 Allott, above n 14, 250.

the views of the assessor, raising issues of natural justice. Whichever role is decided for assessors, clear guidelines may be useful in establishing it.⁵⁹

- 13.54 Customary assessors may be particularly valuable where there are a large number of different customs within a country. Assessors are also likely to assist where custom law has not been codified or otherwise written down. Even when it has been recorded, if values rather than concrete rules are identified, assessors can help express those values in an appropriate modern practice. The use of customary assessors may also add credibility to a court's decision.⁶⁰ Especially when assessors include community elders and customary chiefs who know the customary law of the community, they provide an efficient and cost-effective way to access custom law.⁶¹ If the parties are not legally represented, an assessor may be of huge assistance to the court.
- 13.55 On the other hand, assessors, who are often elders of their community, may interpret custom law to suit their own interests or those of their community or age group. This potential bias may be particularly problematic in periods of rapid cultural change, when traditional leaders might promote one version of custom law while younger members of the society might be living by other rules.⁶² In many societies, the pool from which assessors are drawn is predominantly male and may have gender-biased views and perpetuate any discrimination against women.
- 13.56 Assessors may fill an important gap, particularly in those countries where judges are cultural outsiders seeking a more in-depth understanding of custom law. On the other hand, assessors may be less relevant in those jurisdictions where there is a growth in the indigenous bar, a decline in the use of outside judges, and development of more indigenous institutions and processes.

Expert witnesses

- 13.57 Expert witnesses, to be called either by the parties themselves or by the court, provide a third way to access custom law. Experts might be technically qualified anthropologists,⁶³ linguists or historians. Experts might also be customary elders or chiefs knowledgeable in custom. In Palau, a party wishing to rely on custom often calls an expert witness, usually a rubak (male chief or elder) or a mechase (respected older woman) who is a member of the Palau Society of Historians or who has otherwise been trained in Palauan history, custom, and tradition through his/her clan. If experts disagree about the precise details of what a custom requires, how it has evolved over the years, and how it should be applied

59 For a discussion of a case in which the lack of clear guidelines has resulted in an undue restriction of assessors' roles, see "Barava Tru", above n 2, 626–627; and *Proving Customary Law*, above n 2, 39–41.

60 In *Attorney-General v Namoa* [2000] TOSC 14; CR 1154 1999 (11 April 2000 Ward CJ) < www.pacii.org > (accessed 8 July 2005), the defendants in contempt proceedings had criticised the decision of an expatriate judge in a land matter because the judge had considered the matter without the assistance of an assessor.

61 "Barava Tru", above n 2, 625.

62 "Barava Tru", above n 2, 626.

63 For a discussion of the disadvantages in drawing on the expertise of anthropologists, see "Barava Tru", above n 2, 622–624.

in the dispute, the court weighs the conflicting testimony to determine the aspects of custom law that have been clearly established.⁶⁴

- 13.58 Some rules of procedure define “expert” widely so as to include not only the formally qualified “expert” but also those qualified by experience. For example, the Marshall Islands Civil Procedure Act defines expert broadly as a person who would be likely to know of the existence of the custom.⁶⁵ Some rules of procedure also enable the court to appoint an expert.⁶⁶
- 13.59 There are potential disadvantages in relying on only one expert. Seeking the view of only one person is itself perhaps contrary to the consensus nature of custom. In the Australian context, it has been noted that it is preferable to have evidence from a representative group rather than just one person.⁶⁷ In the context of the effect on women of custom law, Imrana Jalal has noted that even though women are considered the carriers and sustainers of custom from one generation to the next, they are very rarely called as experts on customary law.⁶⁸ Courts could consider seeking the opinion of a respected female elder when seeking assistance on the meaning of custom – she might have examples of a more positive interpretation of custom.⁶⁹

Reference to a specialist court or customary body

- 13.60 In some countries, statutes or court rules provide that questions of custom may be referred by the general courts to specialist courts with expertise in custom or to customary bodies. For example:
- In the Cook Islands, the Constitution provides that the opinion or decision of the Aronga Mana (traditional leaders) of the island or vaka to which a custom, tradition, usage or value relates, on matters relating to that custom, is to be final and conclusive and shall not be questioned in any court of law.⁷⁰ It appears, however, that this provision has not yet been used by the courts.⁷¹
 - In New Zealand, the High Court may state a case for the opinion of the Maori Appellate Court on any question of tikanga Maori, and the opinion of the Maori Appellate Court shall be binding on the High Court.⁷²
 - In the Solomon Islands, the Wills, Probate and Administration Act 1991 provides that the probate court may refer the question of custom to the appropriate local court or to the Customary Land Appeal Court. The referring court then has the option to accept the certificate of that court as conclusive proof of the custom in question or merely to accept it as part of the evidence.⁷³

64 Office of Court Counsel, Supreme Court of Palau *The Wisdom of the Past, A Vision for the Future* (Koror, 2001) 3.

65 Ntummy, above n 35, 124.

66 See, for example, Civil Procedure Rules 2002 (Vanuatu), r 11.13.

67 *R v Wilson* (1995) 81 A Crim R 270.

68 P Imrana Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women’s Rights Movement, Suva, 1998) 41.

69 Jalal, above n 68, 164.

70 Cook Islands Constitution, art 66A(4).

71 Nooapii Tearea, Registrar of the High Court, to Law Commission (16 June 2006) Email.

72 Te Ture Whenua Maori Act 1993, s 61.

73 Wills, Probate and Administration Act 1991 (Cap 33), s 104.

- In Tokelau, the Custom As a Source of Law Rules 2004 provide that where any case before the High Court raises a matter of Tokelau custom, the Court shall seek the advice of the General Fono (the supreme national body of Tokelau). The General Fono is then required to refer the matter to the three taupulega (village councils from each of the three atolls) and, on the basis of their responses, to tender a formal response to the High Court.⁷⁴

13.61 Occasionally, the courts have, on their own initiative, and apparently without explicit statutory direction, sought the views of specialist customary bodies. For example, in a Vanuatu case concerning the adoption of a child, the Supreme Court, apparently on its own initiative, sought the views of the Malvatumauri (Council of Chiefs) on the custom at hand.⁷⁵

13.62 The advantage of using specialist courts or customary bodies to aid a court in understanding custom is that the court is able to obtain a formal opinion on the relevant custom. In most cases, this will be a representative opinion rather than the views of simply one expert.

Amicus briefs

13.63 A third option for specialist assistance for the courts on matters of custom law is for customary authorities to present amicus briefs to the court. An amicus curiae, or “friend of the court”, refers to a non-party to the proceedings who is granted a limited right to be heard on an issue. The amicus is not a full party and does not present evidence but simply makes submissions on the issues. Sometimes the court may invite or order an amicus brief from a particular individual or organisation. In other instances, an intending amicus might apply to the court for permission to be heard. Either way, the purpose of the amicus brief is either to provide submissions where the parties are unable or unwilling to adequately present their case, or to assist the court in getting a fuller picture of the implications of any decision. Sometimes the Attorney-General will appear as amicus to ensure that the public interest aspects of proceedings are adequately addressed.

13.64 Potential disadvantages of amicus briefs are unfairness to the actual parties to a dispute – particularly if the amicus has considerable status and funding to support its intervention. The admission of an amicus also has the capacity to expand the range of issues in dispute, lengthen the hearing and impose greater costs. It may also diminish the perception that all are equal before the law if some special interest groups can be heard. The main advantage, however, is that the court is adequately informed about the matters before it.⁷⁶

⁷⁴ Custom as a Source of Law Rules 2004, r 2.

⁷⁵ *M v P, Re the child G* [1988] VUSC; [1980–1994] Van LR 333 (1 January 1988 Cooke CJ) < www.pacilii.org > (accessed 9 November 2005).

⁷⁶ For a discussion of the advantages of amicus briefs in the Australian context, see Hon Susan Kenny “Interveners and Amici Curiae in the High Court” (1998) 20 *Adelaide Law Review* 159, 167–169.

- 13.65 In the Pacific, there is occasional use of amicus briefs – most notably in Australia, the Federated States of Micronesia,⁷⁷ Fiji, the Marshall Islands⁷⁸ and New Zealand. In Fiji, the Human Rights Commission is frequently joined as an amicus to present submissions on the human rights aspects of cases.⁷⁹
- 13.66 It appears to the Commission that there may be some scope for greater use of amicus briefs in the custom law context. In order to ensure that the court is fully informed about the custom at issue, it may be appropriate for a body such as a national or district council of chiefs, a village council or a women’s customary group to make submissions to the court on the meaning of the custom at issue. Equally, although human rights law is more readily accessible to a court than custom law, amicus briefs from national human rights institutions such as the Fiji Human Rights Commission or human rights NGOs may also assist the court to get a full picture of the human rights implications of a particular decision.

COMMISSION SUGGESTIONS

13.8 **On specialist assistance for the court:** Subject to available resources and funding, more consideration should be given to specialist assistance for the courts in cases involving custom law. One option is for the bench itself to be augmented – either by using multi-judge panels at first instance or by using customary assessors. Another option is to draw on specialist assistance in the context of a proceeding. Such assistance could take the form of expert witnesses, referrals by general courts to customary courts, or submission of amicus briefs from customary authorities. Amicus briefs from human rights institutions and NGOs could also be useful.

Conflicting customs

- 13.67 One difficulty that may arise, particularly in Melanesian countries, is cases to which conflicting customs apply. In the Fijian context, as stated by the Fiji Women’s Rights Movement and the Fiji Women’s Crisis Centre to the Beattie Commission:⁸⁰

[T]here is a mistaken assumption that Fijian culture is a homogenous, monolithic culture universally agreed upon by all regions, provinces and villages. In fact we know that not only are there provincial and regional variations but variations exist from village to village. Further, we know that not only is culture not uniform and monolithic but two ‘experts’ from the same village may not

77 On the role and function of an amicus in the Federated States of Micronesia, see *McIlrath v Amaraich* [2003] FMSC 24; 11 FSM Intrm 502 (App 2003) (29 April 2003 Yinug AJ and Yamase AJ); *Kitti Municipal Government v Pohnpei* [2003] FMSC 19; 11 FSM Intrm 622 (App 2003) (30 June 2003 Yinug AJ) < www.pacii.org > (accessed 25 June 2006).

78 On the role and function of an amicus in the Marshall Islands, see *Clanton v Riklon (No 2)* [1989] MHSC 5; 1 MILR 111 (2 August 1989) < www.pacii.org > (accessed 25 June 2006).

79 See, for example, *Naba v State* [2001] FJSC 66; [2001] FJHC 165; HAC 12/2000L (4 July 2001 Prakash J) < www.pacii.org > (accessed 25 June 2006); *Railumu v Commander, Republic of Fiji Military Forces* [2002] FJHC 1; HBM 81J/2002s (24 February 2002 Jitoko J) < www.pacii.org > (accessed 22 March 2006); *Nadan v State* [2005] FJHC 1; HAA 85/2005 and HAA 86/2005 (26 August 2005 Winter J) < www.pacii.org > (accessed 8 September 2005).

80 David Beattie *Commission of Inquiry on the Courts* (Government Printer, Suva, 1994) 173.

necessarily agree on eg whether in custom the custody of children goes to the father or mother or, whether 'bulubulu' is acceptable in rape cases...

- 13.68 In cases of conflicting customs or conflicting views on what the particular custom is, it can be even more challenging for the judge to determine application of custom in the case at hand. The fact that custom law is not a homogeneous body of law has often been the justification for restricting its role in the legal system.⁸¹ It has also been noted that if judges are cultural insiders, they may prefer to look for national unity and national values rather than local custom and local values.⁸² The issue of potentially conflicting customs is likely to become more relevant as mobility and urbanisation within Pacific islands increases.
- 13.69 In some countries, statutes provide guidance on how to deal with conflicting customs. In the FSM, “the court shall determine the weight to be accorded to each” custom in criminal cases.⁸³ PNG’s Underlying Law Act directs the court to use the particular customary law that the parties intended to govern the matter. If that cannot be determined, then the court must apply the customary law “most appropriate to the subject matter.”⁸⁴ In the Solomon Islands, the court “shall consider all the circumstances and may adopt the system that it is satisfied the justice of the case requires.”⁸⁵ This provision has been criticised as giving too much discretion, with too little guidance, to the courts in deciding conflicts between different customary regimes.⁸⁶ In both Tuvalu and Kiribati, statutes outline a three-stage approach for dealing with conflicts of custom:⁸⁷ first, the court is to “consider all the circumstances and may adopt those rules that it is satisfied the justice of the case requires”; second, if the court is not satisfied as to which rules of customary law apply, it can apply common law with any necessary modifications; third, the above two principles can be varied or departed from in any particular case as the justice of the case requires.
- 13.70 In the absence of statutory guidance in other countries, judges have grappled with how to deal with conflicting customs. Some judges in Vanuatu have applied a test laid down by the Privy Council in the West African context for resolution of conflicts between traditional evidence.⁸⁸ This test provides that “where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is more probable.”⁸⁹

81 “Legislating for the Application of Customary Law”, above n 16, 164.

82 “Summary of Discussion at New Zealand Law Commission Auckland Consultation Workshop” (16 June 2006) 2.

83 FSM Code, s 108, ch 1, title 11.

84 Underlying Law Act 2000, s 17.

85 Customs Recognition Act 2000, s 10.

86 “Legislating for the Application of Customary Law”, above n 16, 165 and 167.

87 Laws of Tuvalu Act 1987, sch 1, para 6; Laws of Kiribati Act 1989, sch 1 para 6.

88 See for example *Malas Family v Songoriki Family* [1986] VUSC 12; [1980-1994] Van LR 235 (8 October 1986 Cooke CJ) < www.paclii.org > (accessed 9 November 2005); *Regenvanu Family v Ross* [1987] VUSC 5; Land Appeal Case L8/1985 (21 March 1987 Coakley ACJ) < www.paclii.org > (accessed 9 November 2005). For a recent citation of the *Adjeibi* approach, see *Family Sope Imere v Family Nikara* [2003] VUSC 70; Land Case 1/1994 (19 December 2003 Treston J) < www.paclii.org > (accessed 16 November 2005).

89 *Adjeibi Kojo II v Bonsie* [1957] 1 WLR 1223, 1226–1227.

- 13.71 In the Vanuatu case of *Waiwo v Waiwo and Banga*, Senior Magistrate Lunabek (as he then was) took a different approach and suggested that where the parties come from different islands or from the same island but are subject to different customary law regimes, the court should look for a common basis or shared foundation in the customary law applicable.⁹⁰
- 13.72 In the Commission's view, a useful approach is one that looks for the shared foundation or underlying value of two conflicting customs and then seeks to derive an appropriate customary rule from that shared foundation. As we considered in Chapter 12, this approach is similar to the way in which the many and various customs of England were once made common.

COMMISSION SUGGESTIONS

13.9 **On conflicting customs:** Where there appear to be two or more conflicting customs or there are different views on the meaning of one custom, a useful approach is one that looks for the shared foundation or underlying value and then seeks to derive an appropriate customary rule from that shared foundation.

THE BENCH

- 13.73 Finally in this chapter, we consider whether there are any general suggestions for the bench that may enhance its access to and understanding of custom law. The role of judges in developing principles and guidelines concerning the use of custom in the courts is an important one, especially in the absence of legislative guidelines. The lower courts are likely to grapple with custom and human rights issues at the coalface, often with few resources. The higher courts may be in a position to set precedents for lower courts to follow and fill any gaps in the common law. It is therefore important that the bench be as well-equipped as possible to access, understand and apply custom law in its decision-making.
- 13.74 In this context, a key feature of the region is the diverse range of judiciaries: from Papua New Guinea with 5.5 million people served by 21 National Court judges, 105 magistrates (91 legally qualified) and 3600 village courts hearing officers; to Tonga with 101,000 people, two full-time resident expatriate judges and eight magistrates (with one legally qualified); to the Cook Islands with 19,000 people, a New Zealand based chief justice who visits twice a year and about 16 non-legally qualified magistrates regularly hearing cases in criminal and civil jurisdictions of the High Court with power to imprison.⁹¹
- 13.75 A second notable feature is that many countries and territories rely on expatriate or outside judges, both as full-time appointees and as part-time members of superior courts.⁹² Judges are drawn from Australia, New Zealand and the United Kingdom, as well as from around the Pacific region. Some countries also still

90 *Waiwo v Waiwo* [1996] VUMC 1; Civil Case 324/1995 (28 February 1996 SM Lunabek) < www.paclii.org > (accessed 26 June 2006). Note, however, that this decision was reversed on appeal: *Banga v Waiwo* [1996] VUSC 5; Civil Appeal Case 1/1996 (17 June 1996 d'Imecourt CJ) < www.paclii.org > (accessed 22 April 2005). The appellate judgment does not deal with the issue of potentially conflicting customs.

91 AusAID and NZAID "Pacific Judicial Development Program: Program Design Document" (20 November 2005) 13.

92 For example, the Chief Justices of the Cook Islands, Kiribati, the Marshall Islands, Nauru, Niue, Tonga and Tuvalu are all expatriates. Many courts of appeal comprise largely expatriate judges.

retain an overseas court as their final court of appeal.⁹³ There are differing views on the advantages and disadvantages of these arrangements. Using expatriate judges is a practical necessity in small jurisdictions. Expatriate judges overcome the limitations of a small pool of local judicial talent and may be a cost effective way of resourcing higher courts. On the other hand, use of expatriate judges may undermine a sense of national identity and independence, particularly a sense of “ownership” of the judicial system, and may delay the development of jurisprudence unique to Pacific states.⁹⁴

- 13.76 In terms of applying custom law, much will depend on the capacity and skill of individual judges. Although expatriate judges are “cultural outsiders”, which may make this task more challenging, some national judges may be cultural outsiders too. In countries with a multiplicity of different customs, it may be just as difficult for a local judge from a different part of the country to rule on matters of local custom as it is for an expatriate judge. In addition, local judges, particularly those trained outside the region, may also be affected by negative attitudes towards custom. Jean Zorn suggests that “one reason may be that the colonisers’ disdain for custom has carried over to inform the beliefs and values of judges in the post-colonial period.”⁹⁵
- 13.77 These realities highlight the importance of capacity-building and training for all judges, no matter their origin, on the significance and importance of custom law in the particular jurisdiction, and the ways in which judges can seek to access and understand custom law.

COMMISSION SUGGESTIONS

13.10 **On capacity-building for judges:** Induction and training for judges should include training on the importance of custom law in the particular jurisdiction and tools to assist the judge in accessing and understanding custom law.

93 The High Court of Australia is the final court of appeal for Nauru; the Privy Council for the Cook Islands, Kiribati, Niue, and Tuvalu; and various divisions of the Metropolitan French appellate system for French Polynesia, New Caledonia, and Wallis and Futuna. Tokelau currently uses the High Court and Court of Appeal of New Zealand as its superior courts.

94 For further discussion of the advantages and disadvantages of expatriate judges in the Pacific context, see Susan Boyd “Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development” (2003) 77 Australian Law Journal 303; Peter MacFarlane “Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States” (draft paper, February 2006). For case law on expatriate judges, see *SCR No 1/1977; Re Rights of Person Arrested or Detained* [1977] PNGLR 362 (26 October 1977, per Prentice DCJ); *SCR No 1/1977; Re Constitution Sch 2.3; Poisi Tatut v Chris Cassimus* [1978] PNGLR 295 (4 August 1978, per Saldanha J); *Public Prosecutor v Nahau Rooney (No 2)* [1979] PNGLR 448 (11 September 1979); *The Ship “Federal Huron” v OK Tedi Mining Ltd* [1986] PNGLR 5 (20 January 1986, per curiam); and *Attorney-General v Namoa* [2000] TOSC 14; CR 1154 1999 (11 April 2000 Ward CJ), all available at < www.paclii.org > (accessed 16 February 2006).

95 Jean G Zorn “Custom Then and Now: The Changing Melanesian Family” in Anita Jowitt and Tess Newton Cain (eds) *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, Canberra, 2003) 97.

Chapter 14

Legislative Support

- 14.1 In this chapter, we discuss how the harmonisation of custom and human rights can be supported by constitutions or statutes through constitutional and statutory reform. Detailed discussion is beyond the scope of this paper, as what is appropriate for each country will depend on the existing constitutional and statutory framework, the political climate, preferences of the people concerned, and what method is the best cultural match.
- 14.2 As described in Chapter 3, current and future constitutional amendment or renewal exercises provide opportunities for the issues to be discussed. In particular, consideration can be given to whether the entrenchment of certain rights in a constitution is advantageous in terms of the additional status that constitutional entrenchment gives to rights. Constitutional renewal also gives increased opportunities for community involvement in the debate.¹
- 14.3 Constitutions and statutes can provide explicit direction on how to harmonise custom and human rights. They can establish a framework within which particular issues and conflicts can be considered by chiefs, communities, individuals, the courts, the executive and the legislature.
- 14.4 In the first part of this chapter, we examine some of the different legislative approaches to applying human rights and customary values and consider the optimum measures for the harmonising approach recommended in Chapter 12. In the second part, we consider that constitutions might specifically provide for particular types of rights.
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- 14.5 To help resolve potential conflicts between custom and human rights, some states give statutory directions or guidance to the courts. Most constitutions provide for some sort of synthesis between custom and human rights rather than a strict priority of one over the other. In some, however, one may trump the other. In others, custom may be exempted from the application of specified human rights or certain human rights that may conflict with custom do not receive constitutional protection.²

SOME LEGISLATIVE APPROACHES

1 Guy Powles “Options for Constitutional Change in the South Pacific: Some Thoughts on Approach and Method” (Paper presented at the Pacific Islands Law Officers’ Meeting (PILOM), Port Vila, 2005).

2 For example, the Solomon Islands Constitution, s15(5)(d), exempts customary law from anti-discrimination provisions. The constitutions of Kiribati, s15(3), and Tuvalu, s 27(1), do not include sex as a prohibited ground of discrimination.

- 14.6 Two particular approaches to resolving potential conflict are a judicial guidance clause and a statute defining the underlying law. A judicial guidance clause in the constitution can require the reconciliation of custom and human rights. In Papua New Guinea, provision is made for an underlying law – the thrust is to develop a common law that has regard for both custom and other sources of law.

A judicial guidance clause

- 14.7 The Constitution of the Federated States of Micronesia (FSM) and the four state constitutions contain a “judicial guidance clause”, which explicitly requires that court decisions be consistent with Micronesian customs and traditions and with the constitution, including the Declaration of Rights.³
- 14.8 The clause envisages a change from former court practices in which frequently custom was not invoked. The courts have considered the purpose of the clause to be that future decisions would be based not on what had been done in the past but on a new basis that would allow consideration of pertinent aspects of Micronesian society and culture. The courts have also seen the clause as intending that the new Constitution itself would be interpreted in light of Micronesian customs and traditions.⁴ Bruce Turcott observes that although the FSM Constitution mirrors some of United States constitutional law, the purpose of the clause was to “cast off the moorings to set its course into the future.”⁵
- 14.9 Under the guidance clause, the FSM courts consider whether any particular foreign law is entirely applicable or must be modified having regard to local customs and traditions.⁶ They have held:
- Application of the judicial guidance clause may mean that it is not appropriate to adopt certain common law concepts. For example, under the Chuuk State judicial guidance clause, it has been held that the common law defences of

3 Article XI (11) of the FSM Constitution provides: “Court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia. In rendering a decision, a court shall consult and apply sources of the Federated States of Micronesia.” The second sentence of Article XI(11) was added in 1991, possibly because of a concern that the original intention was not being achieved. Although it appears as though there may be words missing in the second sentence (“sources [of law?] of the Federated States of Micronesia”), this seems to be the intended wording. In practice, the courts have interpreted the second sentence as meaning that the courts must look to sources of law and circumstances within FSM: *Etscheit v Santos* [1991] FMSC 7 (25 March 1991) < www.paclii.org > (accessed 3 September 2006). The sources of law have been described as including the FSM Code and rules of the court in reaching decisions: *Alfons v FSM* [1992] FMSC 29; 5 FSM Intrm 402 (App 1992) (9 December 1992) 404–405 < www.paclii.org > (accessed 3 September 2006).

4 See *Alaphonso v FSM* [1982] FMSC 22; 1 FSM Intrm 209 (App 1982) (20 December 1982 King CJ), 212 < www.paclii.org > (accessed 18 August 2005), citing the Constitutional Convention’s Committee on General Provisions.

5 Bruce Turcott “Constitutional Jurisprudence of the Federated States of Micronesia Supreme Court” (1989) 6 Pacific Basin Law Journal 103, 108.

6 For a New Zealand example of assessing the applicability of a foreign law, see *Baldick v Jackson* (1910) 30 NZLR 343 (Stout CJ), where the Court held that the English colonial whaling laws were not applicable to the circumstances of New Zealand – in part because they would need to take account of the Maori custom of whaling.

assumption of risk and contributory negligence in tort are not available in Chuuk, in part because they are contrary to traditional concepts of responsibility.⁷

- Even where the parties have not asserted that any principle of custom or tradition applies, the Court has an obligation of its own to consider custom and tradition.⁸
 - The courts may look to the law of other nations, especially other nations of the Pacific community, to determine whether approaches employed there may prove useful in determining the meaning of particular provisions in the Constitution.⁹
- 14.10 Taking a different approach, the Chief Justice has held that while interpretations by US courts of similar constitutional provisions are not binding on FSM courts, those interpretations may be an appropriate source of guidance if the provisions in the two constitutions are substantially similar and if the US decisions that predated the adoption of the FSM Constitution are in accord with Micronesian customs and traditions.¹⁰ He has also held that where the subject matter of the dispute is not of a local or traditional nature, the Court need not search for applicable customary laws and traditional rules.¹¹ In some areas of law, such as extradition, there may be no applicable counterpart in Micronesian custom.¹²
- 14.11 Writing extra-judicially, former FSM Chief Justice King considered that legal reliance on outside sources could be beneficial to the aspirations of FSM for economic development – investors may be more likely to trust a legal system that they believe will provide predictable results based upon generally accepted legal principles.¹³ There is much in this, but as we have said, generally accepted legal principles can frequently be expressed in terms of Pacific values as well. Predictability is more likely to be achieved where there is local acceptance of the norms.
- 14.12 On the other hand, Brian Tamanaha has argued that the clause has not been applied as the Constitution drafters intended, and that their fear – that the courts would simply follow US case law – has become a reality. He contends that although many decisions appear to celebrate the special position of custom and tradition under the Constitution, in reality there has been no substantive change from pre-independence practice in which custom was subordinated.¹⁴

7 *Epiti v Chuuk* [1991] FMSC 3; 5 FSM Intrm 162 (Chk S Ct Tr 1991) (23 July 1991 Petewon J) < www.paclii.org > (accessed 8 April 2006).

8 *Semens v Continental Airlines Inc* [1985] FMSC 3; 2 FSM 131 (Pon 1985) (10 December 1985 King CJ) 140 < www.paclii.org > (accessed 17 August 2005).

9 *Lonno v Trust Territory of the Pacific Islands (I)* [1982] FMSC 2; 1 FSM Intrm 53 (Kos 1982) (28 January 1982 King CJ) 71 < www.paclii.org > (accessed 8 April 2006).

10 *Semens v Continental Airlines Inc*, above n 8, 142. See also Michael A Ntummy (ed) *South Pacific Islands Legal Systems* (University of Hawaii Press, Honolulu, 1993) 466–467.

11 *Semens v Continental Airlines Inc*, above n 8, 133 King CJ.

12 *Re Extradition of Jano* [1993] FMSC 7; 6 FSM Intrm 23 (App 1993) (19 February 1993) < www.paclii.org > (accessed 8 April 2006).

13 Edward C King “Custom and Constitutionalism in the Federated States of Micronesia” (2002) 3 *Asian-Pacific Law & Policy Journal* 249, 260.

14 Brian Z Tamanaha “A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia” (1989) 13 *Hastings International and Comparative Law Review* 71.

An underlying law

- 14.13 The Underlying Law Act 2000 of Papua New Guinea presents a comprehensive code for the development of custom law. It provides that “the customary law shall apply unless ... its application and enforcement would be contrary to the basic rights guaranteed by ... the Constitution.”¹⁵ The Act is an innovative undertaking to reconcile and develop the country’s dual heritage of custom law and English common law. It has been described as integrating the “forces of modernity and tradition.”¹⁶
- 14.14 The PNG Constitution parallels the vision of the Act and calls for traditional ways and culture to be applied dynamically and creatively in the task of development.¹⁷ In addition, it seeks to promote PNG forms of social, political and economic organisation. Reading the Act and the Constitution together, it appears the courts should apply custom and customary values to the fullest extent that they are not inconsistent with constitutional rights. In that way, the Courts may develop and enhance custom law.
- 14.15 The Underlying Law Act also gives practical effect to two sentiments in the Constitution’s preamble: to “pay homage to the memory of our ancestors – the source of our strength and origin of our combined heritage”; and to “acknowledge the worthy customs and traditional wisdoms of our people – which have come down to us from generation to generation”.
- 14.16 The principle behind the development of the underlying law was originally provided for in the Constitution.¹⁸ It called for an Act of Parliament to provide greater specificity and “to assist in the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea”. The Underlying Law Act did not in fact follow until 25 years later, and in the interim, not much was done to develop custom law in the way the constitution envisaged. Although not organic or entrenched law, the Act does have a special constitutional status in that, being expressly contemplated by the constitution, it can probably only be repealed if it is substituted by an alternative.
- 14.17 The courts now have a positive duty to develop the underlying law.¹⁹ To facilitate that development, the existence and content of custom law is now made a question of law and not fact,²⁰ so counsel and judges must be familiar with it.²¹ Likewise, delegated legislation, such as court rules of procedure, are subject to the Act. There are also provisions for the Chief Justice and the Law Reform Commission to review lower court decisions on their application of the underlying law.²²

15 Underlying Law Act 2000, s 4(2).

16 Bruce L Ottley “Reconciling Modernity and Tradition: PNG’s Underlying Law Act” (2002) 80 Reform 22.

17 Constitution of Papua New Guinea, Preamble, national goal 5.

18 Constitution of Papua New Guinea, ss 20 and 21. Pending enactment of a statute for the underlying law, schedule 2 set out the process and rules for ascertaining the underlying law.

19 Underlying Law Act 2000, s 5.

20 Underlying Law Act 2000, s 16.

21 See Chapter 13 for further discussion on the determination of custom as a question of fact or of law.

22 Underlying Law Act 2000, ss 8, 12 and 13.

- 14.18 To help resolve conflicting customary practices, the Act asserts that there is a common set of PNG values.²³ The court is to determine any conflicts according to the most appropriate law for the subject matter.²⁴ Local practices may be approached in much the same way the various customs of England were made common, leading to the English common law.
- 14.19 Three processes for developing custom law are accommodated under the Underlying Law regime: direct application of custom law, modification to meet changed circumstances, and evolution to implement human rights. For example, applying custom law regarding succession to land-use rights is an instance of direct application. Modification might occur when developing corporate structures for the commercial use of customary lands, structures that have regard for customary representation and decision-making systems.²⁵ An example of custom law evolving to implement human rights would be courts supporting decisions made by customary processes in which care had been taken to ensure the full participation of women.
- 14.20 There has been some debate on whether the Underlying Law Act will in fact promote an indigenous jurisprudence for PNG.²⁶ It appears to us, however, that the legal policy in the Act is clear, to create a law grounded in Melanesian traditions and values in which society feels a sense of “ownership”.²⁷ Any failure to develop an indigenous law could only result from the unwillingness of judges and lawyers to implement the Act.

Conclusions

- 14.21 Presently, custom prevails over human rights only where constitutions exempt particular customs from the application of certain human rights or where constitutions omit certain rights that may conflict with custom. More usually, however, constitutions give guidance to courts on how any conflicts between custom and rights are to be managed.
- 14.22 The FSM judicial guidance clause is an example. This requires that all decisions (including those concerned with application of statute law and those concerned with application of common law) be consistent with Micronesian customs and traditions, but since the decisions must also be consistent with the human rights in the constitution, the courts must effectively seek to synthesise the two. PNG’s Underlying Law Act, while adopting a similar approach, affects decisions applying the underlying (common) law but not decisions applying specific statutes. The Act thus addresses a narrower range of decisions than FSM’s judicial guidance clause. However, the Act is unique in setting out a process for how custom law is to be developed – providing specific directions for counsel and judges. Both are models worth considering.

23 As to the common philosophy, as expressed in terms of values and beliefs, see Bernard Narokobi *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific, Suva, 1989).

24 Underlying Law Act 2000, s 17.

25 Land Groups Incorporation Act 1974 (PNG).

26 Ottley, above n 16; Jean G Zorn and Jennifer Corrin Care “Everything Old is New Again: The Underlying Law Act of Papua New Guinea” [2002] *LAWASIA Journal* 61.

27 Jean G Zorn “Common Law Jurisprudence and Customary Law” in R W James and I Fraser (eds) *Legal Issues in a Developing Society* (Faculty of Law, University of Papua New Guinea, Hong Kong, 1992) 104.

- 14.23 Trumping – whether by human rights over custom or custom over human rights – has the advantage of providing a definitive formula by which to approach questions of conflict. But it also has defects. The most serious defect of the trumping approach is that it reinforces the view that custom and human rights are inherently in conflict. Another major disadvantage is that it tends to preclude a more contextual and nuanced treatment of conflicts between custom and human rights. Nuanced treatment permits a search for values common to both custom and human rights that may enable a mutually accommodating solution to be reached. The process of inquiring into the management of conflicts may also encourage a compromise by the parties that is consistent with both custom and human rights norms.
- 14.24 Moreover, “definitional” answers to questions of conflict prevent cases from being approached on their merits and preclude solutions that consider the particular circumstances of the case. They also potentially freeze custom and preclude ongoing questioning and development of both custom and human rights norms. Definitional answers also negate the opportunity for the courts to contribute to ongoing local dialogue about the meaning of human rights and custom or about the culture, of which custom is part. As discussed in Chapters 4 and 5, neither human rights nor custom is fixed and abstract. Rather, local adoption of the universal concept of human rights implies both transformation of underlying cultural categories and practices and transformation of human rights.²⁸
- 14.25 The Commission considers unhelpful any approach that creates a contest between custom and human rights when both are plainly important and bring satisfaction to large numbers of people. As we have said, the better approach is one that acknowledges that cultures and legal systems throughout the world have had to adapt to universal human rights standards – Pacific culture and custom law no more than many others – and that encourages and enables a more nuanced and contextual approach to questions of conflict between custom and human rights. To that end we prefer a general guidance clause to trumping.
- 14.26 The clause could provide the approach, one that directs the court to first look for the essential values of each system. It would then require the court to maintain as far as practical the values and purposes of the custom law, while modifying it to the extent necessary to give effect to the relevant human right.
- 14.27 A relevant statute that could be extended to encompass custom is section 6 of the New Zealand Bill of Rights Act 1990, which provides that whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning is to be preferred to any other meaning. The adapted provision would require judges and other decision-makers to strive to give any legislation or subsidiary rules a meaning that is consistent with both human rights and custom.

28 Sally Engle Merry “Changing Rights, Changing Culture” in Jane Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds) *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, London, 2001) 31–56.

- 14.28 Such a provision might further specify that the court may develop rules of the indigenous common law by taking account of the nature and importance of the human right, the nature and importance of the custom, the underlying values with which the custom and the right are concerned, and the least restrictive means to achieve accommodation between the two. Both the FSM judicial guidance clause and the PNG Underlying Law Act provide useful precedents in this regard.

COMMISSION SUGGESTIONS

- 14.1 **On statutory guidance clauses:** Judicial guidance clauses that direct courts to harmonise custom and human rights are preferable to trumping provisions, enabling the contextual application of human rights and avoiding the need to omit certain rights from constitutions.

PARTICULAR CONSTITUTIONAL RIGHTS

- 14.29 Augmenting the national human rights framework can deepen the resonance between custom and human rights. In this section, we examine four types of constitutional or statutory provisions that may be useful: the horizontal application of rights; the inclusion of economic, social, and cultural rights; the inclusion of group rights; and the recognition of duties.

Horizontal application of rights

- 14.30 Human rights protect individuals from the abuse of state power. The application of rights to protect the individual from political abuse is said to involve the vertical application of rights. But people also have rights in relation to one another. The recognition of these rights is said to engage a horizontal application of rights.

- 14.31 Human rights have traditionally focused on the relationship between the state and the individual. The orthodox view, consistent with the distinction in Western legal culture between public and private spheres, is that rights are not about relationships between private persons. So, in interpreting the application of the rights and freedoms chapter in the Constitution of Trinidad and Tobago, the Privy Council has said:²⁹

[T]he protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms ...

- 14.32 Increasingly though, and consistent with the development of a “rights culture”, there are arguments that human rights standards should apply to aspects of relations between private parties. That is, they should have “horizontal effect”.

29 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385. Followed in *Thornhill v Attorney-General of Trinidad and Tobago* [1981] AC 61 and *Attorney-General of Trinidad and Tobago v Whiteman* [1991] 2 AC 241.

Academics have identified many different types of horizontal effect which can range along a spectrum from full direct horizontal effect at one end to no horizontal effect (vertical application only) at the other.³⁰ The vertical approach restricts the application of human rights to legal relations between the state and individuals. At the other end of the spectrum, the horizontal approach argues that individuals are not only the beneficiaries of rights, but they are also the guarantors (along with the state) of other individuals' rights.

14.33 The approach each country takes depends both on the provisions of the constitution and on subsequent judicial interpretation. At one end of the spectrum, the United States, which requires "state action" in order for the constitutional protections in its Bill of Rights to apply, is an example of the vertical approach. In the middle of the spectrum, examples of an indirectly horizontal approach are Canada, New Zealand and the United Kingdom.³¹

14.34 Rights are accorded a more directly horizontal effect in South Africa. The Bill of Rights applies to actions of the legislature, executive and judiciary,³² but the Constitution also provides that direct horizontal effect between private persons is to be considered in the context of each specific constitutional right rather than according to a general principle.³³ The Court is required to develop the common law if legislation does not give effect to the right in question and may also develop rules of the common law to limit the right, provided the limitation is reasonable and justifiable.³⁴ Finally, at the other end of the spectrum, allowing for direct horizontal effect is Ireland, where an independent cause of action against private parties for breach of certain constitutionally protected rights is possible.³⁵

14.35 Direct horizontal effect also arises in relation to the right to be free from discrimination. Some countries enact anti-discrimination legislation requiring individuals not to discriminate in the provision of goods or services or in employment.³⁶

30 See, for example, Ian Leigh "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?" (1999) 48 *International and Comparative Law Quarterly* 57; Murray Hunt "The 'Horizontal Effect' of the Human Rights Act" [1998] *Public Law* 423, 426; Hon Aharon Barak "Constitutional Human Rights and Private Law" (1996) 3 *Review of Constitutional Studies* 218.

31 See, for example, H W R Wade "Horizons of Horizontality" (2000) 116 *Law Quarterly Review* 217; Gavin Phillipson "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62 *Modern Law Review* 824; Hunt, above n 30; Lord Richard Buxton "The Human Rights Act and Private Law" (2000) 116 *Law Quarterly Review* 48. See Alison Young "Remedial and Substantive Horizontality: The Common Law and *Douglas v Hello!*" [2002] *Public Law* 232, who argues that *Douglas v Hello!* signals that the courts are amenable to a strong form of indirect horizontality.

32 Constitution of South Africa, s 8(1) provides: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

33 Constitution of South Africa, s 8(2): "A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."

34 Constitution of South Africa, s 8(3).

35 Hunt, above n 30, 428.

36 For instance, New Zealand's Human Rights Act 1993.

- 14.36 In the Pacific there are a range of approaches. At the horizontal end of the spectrum, the constitutional provisions in Papua New Guinea³⁷ and Tuvalu³⁸ both clearly state that private individuals are required to observe fundamental rights and freedoms.³⁹
- 14.37 In New Zealand, the Bill of Rights applies to the legislative, executive and judicial branches of government and any person or body performing a public function.⁴⁰ It is also clear that the Bill of Rights does not apply to “wholly private conduct”, although the contours of “wholly private” remain unexplored.⁴¹ Fiji takes a similar approach to New Zealand: the judicial branch and “all persons performing the functions of any public office” are expressly bound by the Bill of Rights.⁴² The fact that the Bill of Rights binds any person performing a public function may mean, over time, that the courts develop the concept of some type of indirect horizontal effect.
- 14.38 The majority of other Pacific constitutions are silent as to who is bound to give effect to fundamental rights and freedoms.⁴³ Different courts have interpreted this “silence” differently. In a 1986 case in the Solomon Islands, the minority view of Kapi JA supported operation of the rights provisions in the Constitution in both the public and private spheres.⁴⁴ More recently, the Solomon Islands Court of Appeal noted, without deciding the point:⁴⁵

37 Section 34 of the Papua New Guinea Constitution provides: “Subject to this Constitution, each provision of this Division applies, as far as may be – (a) as between individuals as well as between governmental bodies and individuals; and (b) to and in relation to corporations and associations (other than governmental bodies) in the same way as it applies to and in relation to individuals, except where, or to the extent that, the contrary intention appears in this Constitution.”

38 Article 12(1) of the Tuvalu Constitution provides: “Each provision of this Part applies, as far as may be – (a) between individuals as well as between governmental bodies and individuals; and (b) to and in relation to corporations and associations (other than governmental bodies) in the same way as it applies to and in relation to individuals, except where, or to the extent that, the context requires otherwise.”

39 As discussed in Chapter 9, in the Tuvalu case of *Teonea v Pule o Kaupule*, the High Court accepted it had jurisdiction to consider a claim of breach of freedom of religion by a falekaupule (island council). On the facts it did not uphold the claim, on the basis that the falekaupule was entitled to take the decision it had.

40 Section 3 of the Bill of Rights Act 1990 provides: “This Bill of Rights applies only to acts done – (a) By the legislative, executive, or judicial branches of the government of New Zealand; or (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.” See *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC) and *R v N* [1999] 1 NZLR 713, 721 (CA) in relation to criteria to be applied.

41 Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 102. See also Andrew Geddis “The Horizontal Effects of the New Zealand Bill of Rights Act, as applied in *Hosking v Runting*” [2004] New Zealand Law Review 681. Also, Andrew & Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) 102–109.

42 Fiji Constitution, s 21(1) provides: “This Chapter binds: (a) the legislative, executive and judicial branches of government at all levels: central, divisional and local; and (b) all persons performing the functions of any public office.”

43 The constitutions of the Cook Islands, the Federated States of Micronesia, Kiribati, the Marshall Islands, Nauru, Samoa, the Solomon Islands, Tonga and Vanuatu are all silent as to who is bound to give effect to rights.

44 *Loumia v Director of Public Prosecutions* [1986] SBCA 1; [1985/86] SILR 158 (24 February 1986) < www.pacii.org > (accessed 4 September 2006) per Kapi JA, who noted that the guarantee of right to life prohibited deprivation of that right by a private person. For comment on this case, see Jennifer Corrin Care “Customary Law in Conflict: The Status of Customary Law and Introduced Law in Post-Colonial Solomon Islands” (2001) 27 Commonwealth Law Bulletin 1290, 1294; and D E Paterson “Human Rights in Island Countries of the South Pacific” (Paper presented at the 16th Pacific Judicial Conference, 26–30 July 2005, Port Vila, Vanuatu).

45 *Ulufa’alu v Attorney-General* [2004] SBCA 1; CA-CAC 15 of 2001 (2 August 2004) para 31 < www.pacii.org > (accessed 29 July 2005).

Prima facie this Court accepts the view of the majority of the Court in Loumia as applicable in this case but this is a developing area as to how far citizens can rely on fundamental rights inter se. It is necessary to consider the precise rights sought to be relied on and the context in which they are relied on. This Court does not think that it can be said as an absolute principle ‘always horizontal’ or ‘never horizontal’.

14.39 In Tonga, the Supreme Court has noted, apparently without close consideration, that the right to freedom of expression imposes “a duty on every person to permit exercise of that right”, suggesting some degree of horizontal effect.⁴⁶ In Samoa, the courts in the banishment cases appear to accept that at the village level, the fono must take account of an individual’s rights. In Kiribati, however, the High Court has held that rights have vertical effect only and are “owed by the government to the governed.”⁴⁷

14.40 What does all this mean for the interface between custom and human rights? Western legal culture is based on the distinction between public law and private law. This distinction does not necessarily sit easily when applied to societies previously governed solely by custom law, which does not distinguish between the public and private spheres. Horizontal application of rights overcomes the distinction between the public and private spheres. It would mean that both rights and custom would operate in the customary sphere. Traditional leaders in making decisions based on custom would also be obliged to accommodate human rights, and this could be enforced in the courts.

14.41 A similar result could be reached if custom chiefs, by virtue of their role in regulating village affairs, were regarded as performing a “public function” and so in that way were obliged to apply rights provisions.⁴⁸ Rights provisions might apply to bodies such as the Samoan fono that are recognised by statute or even to traditional bodies without statutory recognition that nevertheless have a public function.⁴⁹ Another gloss on horizontal or indirect rights is to hold the state responsible for failing to act to stem human rights abuses by non-state actors.

14.42 Requiring some degree of horizontal effect or recognising customary chiefs as “public authorities” acknowledges that threats to human rights come not only from governments but also from other individuals or groups. Government action alone may not be sufficient to protect human rights. Broader responsibility for human rights also helps promote a strong human rights culture. Human rights come to flavour relations between individuals, rather than only applying to relations between individuals and the state. In many ways,

46 *Pohiva v Prime Minister and Kingdom of Tonga* [1988] LRC (Const) 949 (Martin ACJ). At issue in the case was whether the Prime Minister (himself a member of the executive) had a duty to permit the exercise of constitutionally protected rights of free speech. The Court held that the Prime Minister did have a duty to permit the exercise of constitutionally protected rights of free speech and noted that interference with the right to free speech is a tort and that a remedy may be sought in damages.

47 *Tetinnang v Ariong* [1986] KHC 1; [1987] LRC (Const) 517 (7 April 1986 Maxwell CJ) < www.paclii.org > (accessed 21 June 2005).

48 For a discussion of how this obligation might apply in the New Zealand context, see Claire Charters “Maori, Beware the Bill of Rights Act!” [2003] New Zealand Law Journal 401.

49 In the context of judicial review, industry bodies such as the stock exchange and churches have been found to be carrying out public functions.

making constitutional provision for horizontal application of rights would simply reflect the common perception that rights do apply between individuals.⁵⁰ Horizontal effect also incorporates the notion of corresponding duties, as individuals have responsibilities to ensure the rights of others are respected.

- 14.43 Under horizontal effect, where custom is incompatible with human rights, community justice bodies would have to modify custom. A potential disadvantage of giving horizontal effect to human rights is that customary “person-to-person” disputes might be taken to court instead of being resolved in a customary way. This shift need not occur, however, if traditional decision-makers receive proper training in human rights.

COMMISSION SUGGESTIONS

- 14.2 **On horizontal application of rights:** Custom and human rights can be better synthesised by constitutional or statutory provisions for the horizontal application of human rights, so that they come to apply between individuals, including between customary leaders and their people.

Economic, social and cultural rights

- 14.44 Another strategy that at first may seem counter-intuitive is the inclusion of economic, social and cultural rights in a constitution. Currently, the fundamental rights provisions of most Pacific Island constitutions focus on civil and political rights.⁵¹
- 14.45 The Universal Declaration of Human Rights (UDHR) does not distinguish between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. As noted in Chapter 5, the subsequent separation of the two sets of rights reflected various political and ideological differences. However, this separation is not reflected in more recent international conventions such as the Convention on the Rights of the Child. Since the World Conference on Human Rights in 1993, it is now generally accepted that all human rights should be classified as universal, indivisible and interdependent.⁵²

50 For a discussion of this perception, see Paterson, above n 44, 4–5.

51 Examples of inclusion of economic, social and cultural rights in Pacific constitutional documents include: American Samoa Constitution (art I, s 15 – education); Fiji Constitution (ss 39, 44 – education; affirmative action to provide equality of access to education, land, housing, participation in commerce and government employment); Guam Organic Act (1421b(r) – education); Marshall Islands Constitution (art II, s 15 – health, education and legal services); Papua Special Autonomy Law (arts 56–66 – education, culture, health, employment, environment, social welfare). The Draft Federal Solomon Islands Constitution contains many economic, social and cultural rights including the rights to basic necessities of life, health, housing, education, cultural traditions, and protection of the family. Sections 50–61 of the Timor Leste Constitution also provide for a range of economic, social and cultural rights and duties. Article VI of the Palau Constitution says that the national government shall take action to attain objectives such as a healthy environment, promotion of health and social welfare, and free public education, although these objectives are not expressed as rights.

52 See UN General Assembly “Vienna Declaration and Programme of Action” (World Conference on Human Rights, Vienna, 14–25 June 1993) A/CONF.157/23, para 1/10 < <http://www.unhcr.ch> > (accessed 14 August 2006).

14.46 Taking economic, social and cultural rights seriously implies a commitment to social integration, solidarity and equality.⁵³ Rather than simply protecting members of society from state intrusion, the idea of economic and social rights is that the state is obliged to do whatever it reasonably can to secure for all members of society a basic set of social goods – education, food, water, shelter, land, housing and health care.

14.47 Around the world, the trend is for increasing constitutional recognition of economic, social and cultural rights.⁵⁴ One of the older constitutions recognising economic and social rights is the 1950 Constitution of India. This contains a constitutionally entrenched chapter on “directive principles for state policy”. The directive principles include socialist principles which require the state to make provision for the rights to work, education, and social security.⁵⁵ In practice, the directive principles operate as aspirational goals.⁵⁶ A more recent example is the 1996 South African Constitution, which recognises the rights to adequate housing, health care, food, water, social security, education, language and culture.

14.48 If economic, social and cultural rights are included in a constitution, a key decision to be made is the extent to which they should be justiciable in the courts. Under Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), states undertake to take steps, to the maximum of their available resources, with a view to “achieving progressively” the full realization of the rights in the Covenant. India’s directive principles are not directly justiciable, although they have been used creatively by the courts. In South Africa, the rights are enforceable in the courts,⁵⁷ although the Constitution acknowledges that the state may not be able to provide them immediately – “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” The Draft Federal Solomon Islands Constitution takes a similar approach and acknowledges that the economic, social and cultural rights will be “progressively realised”.

14.49 In view of the high policy content of economic, social and cultural rights and of the potential fiscal cost to governments, the appeal of a “non-justiciable” or “progressive realisation” approach is obvious. Concerns at the weakness of such an approach can be mitigated by the inclusion of other mechanisms such as requiring a yearly report to Parliament, so that progress in “realisation” can be regularly monitored. Even if they are non-justiciable or are only to be progressively realised, including economic, social and cultural rights in a constitution strengthens their normative force. They also provide the context within which civil and political rights are to be interpreted and understood, and they will be available to the courts as an aid to interpretation.

53 Asbjorn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights* (2 ed, Kluwer Law International, The Hague, 2001) 5.

54 See, for example, the constitutions of Denmark, Norway, Mongolia and Peru.

55 The directive principles also include Gandhian principles, international principles, general welfare principles and nature conservation principles.

56 Bertus de Villiers “Directive Principles of State Policy and Fundamental Rights: The Indian Experience” (1992) 2 *South African Journal on Human Rights* 29, 32.

57 See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

- 14.50 How will more rights assist in harmonising custom and human rights? First, economic, social and cultural rights are exercised collectively. Individual claims to rights are then seen in a broader community and societal context. Collective exercising of rights can be explicit. For example, the Draft Federal Constitution of Solomon Islands provides not only that every person has the right of access to education but also that every community has the right, at its own expense, to establish and maintain educational institutions.⁵⁸ Collective rights can also be more implicit, in the sense that a claim against the state may be framed as an individual right, even though in practice it is exercised collectively.
- 14.51 A second advantage of recognising economic, social and cultural rights is the potential for cultural rights to be used to support custom and traditional practices within an overall human rights framework. In orthodox human rights terms, the right to culture has been expressed as the right of an individual exercised communally.⁵⁹ The right of individuals to enjoy their culture cannot meaningfully be exercised alone. Enjoyment of culture and use of language presupposes the existence of a community of individuals with similar rights. An individual's right of participation in cultural life will be impugned if some harm comes to that individual's cultural community.⁶⁰ In practice therefore, the right to culture is a hybrid of individual and collective rights.⁶¹
- 14.52 The Draft Federal Constitution of Solomon Islands recognises both the individual and collective elements of the right to culture by stating:⁶²
- All clans and tribal groups and persons have the right to practise and maintain their cultural traditions, languages and customs.*
- 14.53 Recognition of the right to culture could provide an additional support for constitutional recognition of custom as a source of law. In the event of a conflict between a particular custom and a particular human right, constitutional recognition of the right to culture may encourage the courts to consider the particular custom in its cultural context and to try to find an accommodation between the two. More strongly, the right to culture could also potentially be used as a "shield" to protect certain customs from unreasonable interference, in the same manner as other human rights.
- 14.54 A disadvantage of including economic, social and cultural rights in a constitution is that, although the ICESCR and most constitutions recognise that achievement of the goals set out is dependent on resources, full realisation of economic and social rights is a potentially unrealistic fiscal burden on many states.

58 Draft Federal Constitution of Solomon Islands, cl 49.

59 See, for example, ICCPR, art 27: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

60 See Human Rights Committee "General Comment No 23: The Rights of Minorities (Art 27)" (8 April 1994) CCPR/C/21/Rev.1/Add.5.

61 The collective nature of the right to culture, and indeed all rights as they relate to groups of people, is reflected in the Draft Declaration on the Rights of Indigenous Peoples.

62 Draft Federal Constitution of the Solomon Islands, cl 50. See our discussion of group rights in subsequent paragraphs.

A further risk is that including a right to culture might unintentionally marginalise customary law and traditional practices, so that they only fall to be considered under the “right to culture”. There is also potentially the ignominy of seeking to protect custom – the organic and autochthonous foundation of the nation – by including it as simply one of a long list of rights.

COMMISSION SUGGESTIONS

14.3 **On economic, social and cultural rights:** Custom and human rights can also be better synthesised through greater state recognition of economic, social and cultural rights, so that individual rights are seen in a broader social context.

Group rights

14.55 One way of dealing with the concern of subsuming custom or culture as simply one of a long list of rights is to explicitly recognise group rights, that is, the rights of collectives as distinct from the rights of individuals. At the moment, even where particularly vulnerable classes of individuals are singled out for special protection (eg women, children, migrant workers), the basis of most human rights protections is as an individual. Recently, there has, however, been recognition that protection of individual human rights may not be sufficient to guarantee legitimate values of group identity and autonomy.⁶³

14.56 The Draft Federal Constitution of Solomon Islands contains a number of provisions that expressly recognise the rights of clans and tribal village communities. These include the rights of clans and communities to maintain and develop their laws and customary practices and to pursue their economic, social and cultural development.⁶⁴

14.57 Including group rights accords formal constitutional recognition to customary communities, their autonomy and their predominantly kin-group character. Such recognition can be advantageous, particularly if customary communities are not homogeneous. On the other hand, a disadvantage with group rights is the risk that collective rights could be used to override the rights of individuals. Recognising separate group rights within a state would raise complex issues requiring careful consideration: how to ensure adequate protection of the individual and how to avoid undermining the unity of the state. In some ways though, if the constitution recognises custom, these conflicts may already arise. Express recognition of group rights arguably deepens the context in which such conflicts can be considered.

63 See, for example, ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992; and Draft Declaration on the Rights of Indigenous Peoples.

64 See Draft Federal Constitution of Solomon Islands, cls 21(1)(b), 41, 49 and 50.

COMMISSION SUGGESTIONS

14.4 **On group rights:** Explicit state recognition of group rights could assist in recognising the autonomy and status of customary communities and in balancing individual and group rights.

Duties and responsibilities

14.58 As discussed in Chapter 5, duties and human rights inhabit the same space.⁶⁵ The state has duties to respect, promote and protect human rights.⁶⁶ In the exercise of rights, individuals have duties to respect the rights of others and the interests of the community as a whole, as we discussed in Chapter 12.⁶⁷ Duties also arise independently of any particular human rights claim (“independent duties”). Article 29(1) of the UDHR provides an example: “Everyone has duties to the community in which alone the free and full development of his personality is possible.”

14.59 Not many domestic constitutions recognise independent duties for individuals. In part they may omit duties because other parts of domestic law regulate duties and obligations – through the criminal law, the law of contract, and the law of tort (such as the duty of care). In part, they are omitted because the ethical and policy content of independent duties makes them generally non-justiciable. India is one example of a domestic constitution that makes provision for non-justiciable duties.⁶⁸

14.60 Some Pacific constitutions, like those of Papua New Guinea and Vanuatu, make specific provision for duties.⁶⁹ The Papua New Guinea text provides that all persons have basic obligations to themselves and their descendants, to each other, and to the Nation:⁷⁰

(a) to respect, and to act in the spirit of, this Constitution; and (b) to recognize that they can fully develop their capabilities and advance their true interests only by active participation in the development of the national community as a whole; and (c) to exercise the rights guaranteed or conferred by this Constitution, and to use the opportunities made available to them under it to participate fully in the government of the Nation; and (d) to protect Papua New Guinea and to safeguard the national wealth, resources and environment in the interests not only of the present generation but also of future generations; and (e) to work according to their talents in socially useful employment, and if necessary to create for themselves legitimate opportunities for such employment; and (f) to respect

65 See Chapter 5, “Definition” and “Duties as well as rights”.

66 For a discussion of some aspects of the duties of the state, see Sandra Freedman “Human Rights Transformed: Positive Duties and Positive Rights” [2006] Public Law 498-520.

67 See Chapter 12, “Developing a Pacific Law”, “The Contextual Application of Human Rights”, and “Limitations on rights”.

68 See Constitution of India, art 51A.

69 Section 64(2) of the Cook Islands Constitution recognises the duties that everyone has to others in the context of limitations on fundamental rights and freedoms. Clause 11 of the Draft Federal Constitution of Solomon Islands also contains a duties provision.

70 Preamble to the Papua New Guinea Constitution. See also Vanuatu Constitution, s 7.

the rights and freedoms of others, and to co-operate fully with others in the interests of interdependence and solidarity; and (g) to contribute, as required by law, according to their means to the revenues required for the advancement of the Nation and the purposes of Papua New Guinea; and (h) in the case of parents, to support, assist and educate their children (whether born in or out of wedlock), and in particular to give them a true understanding of their basic rights and obligations and of the National Goals and Directive Principles; and (i) in the case of the children, to respect their parents.

- 14.61 In Papua New Guinea, these basic social obligations are non-justiciable, but “it is the duty of all governmental bodies to encourage compliance with them”, and laws and powers are to be enforced in such a way as to encourage compliance with the basic social obligations.⁷¹ In Vanuatu, the fundamental duties are non-justiciable, but public authorities are to encourage compliance.⁷²
- 14.62 What are the advantages of recognising duties in the legislative framework? One advantage of including duties in a constitution is that individual rights are then seen in their broader context and not in isolation. This broader context arises from the nature of a constitutional document as reflecting national identity and common values in addition to defining the framework for government. In the customary context, duties and obligations underpin daily life. The inclusion of rights without acknowledgement of traditional duties perhaps misrepresents national identity by focussing too much on the individual and ignoring the collectivity.
- 14.63 A second advantage of recognising duties is that even if they are expressed to be non-justiciable and so cannot form the basis of a claim in the courts, they can influence the law in other ways. In the courts themselves, they are an aid to interpretation of statutes and development of the common law. In particular, they are a relevant consideration in any balancing exercise between a particular right and custom. More broadly, a reporting mechanism could be included, so that they are regularly monitored.⁷³
- 14.64 One of the risks of according legislative recognition to duties is that they could be used to suppress human rights. The language of “duty” and “obligation” may be used by some states to justify the silencing of dissent. Those who peacefully challenge corrupt and autocratic policies may be portrayed as promoting instability, disturbing social order, and breaching their duties to the community and the state. In general, however, the courts are able to balance conflicting interests having regard to their relative importance in the context of the case, as discussed in Chapter 12.⁷⁴

71 Papua New Guinea Constitution, s 63. See also Underlying Law Act 2000, s 4, for the impact of basic social obligations on the customary law and the common law.

72 Vanuatu Constitution, s 7.

73 See, for example, the Draft Federal Constitution of Solomon Islands, cl 12(2).

74 See Chapter 12, “Developing a Pacific Law”, “The Contextual Application of Human Rights”, and “Conflicting rights”.

COMMISSION SUGGESTIONS

14.5 **On duties and responsibilities:** Custom and human rights can be better synthesised, and greater recognition can be given to Pacific values, by constitutional recognition of the duties and responsibilities of individuals, including duties and responsibilities to customary communities.

Chapter 15

Public Review Entities

15.1 In this chapter, we discuss a number of institutions and mechanisms other than courts that could assist in harmonising custom and human rights: national human rights institutions, ombudsman offices, leadership codes and law reform commissions. Although these are quite distinct types of mechanism, there are links among them: human rights institutions have some of the roles of an ombudsman, leadership codes are the responsibility of ombudsman offices in some countries, and investigations by human rights, ombudsman and leadership code bodies can identify needs for law reform. Furthermore, all of these mechanisms have, or should have, a degree of independence from government.

NATIONAL HUMAN RIGHTS INSTITUTIONS

15.2 National human rights institutions (NHRIs) are “independent authorities established by law to protect human rights within their country”.¹ Typical functions of NHRIs include resolving complaints of human rights breaches through conciliation where possible, or otherwise through court action; advising governments on human rights issues; and promoting awareness and understanding of human rights in the wider community.² There are human rights commissions in Australia, Fiji, New Zealand and Timor Leste and there is an office of the Indonesian human rights commission in the province of Papua. The New Zealand Human Rights Commission, the Fiji Human Rights Commission and the Pacific Islands Forum Secretariat are currently investigating possible forms of NHRI for consideration by other small Pacific states.

15.3 NHRIs are in a good position to consider what human rights standards mean in a local context and how they might be harmonised with custom. Concern is sometimes expressed that the role of an NHRI may bring it into conflict with custom law.³ However, we note that the Fiji Human Rights Commission has not found there to be irreconcilable tensions between protection of custom and protection of human rights in the cases it has handled.⁴

1 Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2 ed, Wellington, 2003).

2 International standards for NHRIs were established by the Paris Principles, adopted by the UN General Assembly in 1993: see Rhona K M Smith “National Institutions on Human Rights” in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 266–69.

3 Asia Pacific Forum of National Human Rights Institutions “APF Mission to the Solomon Islands” (July 2005) 6.

4 Shaista Shameem, Director, Fiji Human Rights Commission to the Law Commission, (21 February 2006) Email.

OMBUDSMAN OFFICES

- 15.4 An ombudsman office is an independent body established by law to investigate and report on citizens' complaints against the government and its officials. Such offices may also have other functions, including investigating alleged breaches of human rights by government agencies. There are ombudsman offices in Australia, the Cook Islands, Fiji, Indonesia (Papua), New Zealand, Papua New Guinea, Samoa, the Solomon Islands, Timor Leste and Tonga.⁵
- 15.5 There are a number of ways in which the work of ombudsman offices is, or could be, relevant to issues of custom:
- Ombudsmen may report on matters of public administration involving custom.⁶
 - Ombudsmen may adapt their mode of investigation and reporting to take account of local custom and culture.⁷
 - Ombudsmen could be empowered to inquire into the actions of councils of chiefs or other customary bodies that receive statutory recognition.⁸
 - As discussed below, the responsibilities of some ombudsmen in relation to leadership codes and corruption may include addressing the tensions between the obligations of leaders in the customary and state systems.

5 Tonga's Ombudsman is known as the Commissioner for Public Relations. The Federated States of Micronesia has an officer called an ombudsman attached to the court system, but this officer does not perform the "classical" functions of an ombudsman. For more information on ombudsman offices in the Pacific, see Mareva Betham Annandale "A Comparison and Contrast of the Role of the Ombudsman in Vanuatu and Samoa: Who, What and How Can They Investigate?" (1997) Working Paper 1 Journal of South Pacific Law <<http://law.usp.ac.fj/jspl>> (accessed 21 June 2006); Alice de Jonge "The Pacific Ombudsman's Complaints Function: Comparative Perspectives on Fiji, Papua New Guinea and Vanuatu" (Paper presented at conference on Accountability and Corruption in the Pacific: Evaluating the Role of Ombudsmen and Leadership Codes, Australian National University, Canberra, 6-7, 9-10 November 1998) <<http://rspas.anu.edu.au>> (accessed 27 June 2006); Anand Satyanand "Growth of the Ombudsman Concept" (1999) 3 Journal of South Pacific Law <<http://law.usp.ac.fj/jspl>> (accessed 14 February 2006); K J Crossland *The Ombudsman Role: Vanuatu's Experiment* (Discussion Paper 00/5, State, Society and Governance in Melanesia Project, Australian National University, Canberra, 2000); David Cannings "The Ombudsman Commission: Jurisdiction, Functions and Performance" in Anthony J Regan, Owen Jessep and Eric L Kwa (eds) *Twenty Years of the Papua New Guinea Constitution* (Lawbook Company, Pyrmont, NSW, 2001) 196-212; "Issues - Program 9 (Justice, Law and Order): What Does an Ombudsman Do?" in Time to Talk <<http://www.abc.net.au/timetotalk/english/issues>> (accessed 8 September 2006); Edward R Hill "The Vanuatu Ombudsman" in Anita Jowitt and Tess Newton Cain (eds) *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, Canberra, 2003) 71-91; Kenneth Keith "Development of the Role of the Ombudsman with Reference to the Pacific" and Ila Geno Obe, Chief Ombudsman, Papua New Guinea "Developing Investigative Methods That Work: The Papua New Guinea Experience" (Papers presented to the 22nd Australasian and Pacific Ombudsman Regional Conference, Wellington, 9-11 February 2005) <<http://www.ombudsmen.govt.nz>> (accessed 27 June 2006); and the various national integrity systems studies of Pacific Island countries at <<http://www.transparency.org.au>> (accessed 27 June 2006).

6 For example, the Vanuatu Ombudsman investigated delayed action by the police in intervening in unrest arising from a chiefly title dispute in 1997: Crossland, above n 5, 3-4.

7 For example, the first Vanuatu Ombudsman included Biblical texts in the preambles to public reports in recognition of the important place of religion in Vanuatu culture; however, the condemnatory tone of the Old Testament passages used could be seen as contrary to the more conciliatory approach favoured in custom: Crossland, above n 5, 3-5; Hill, above n 5, 77.

8 For the most part, it appears that ombudsman offices in the Pacific are not empowered to investigate customary authorities, although the Vanuatu Ombudsman can investigate members of the National Council of Chiefs under the Leadership Code Act 1998. The Fiji Constitution, s 165(1)(f), specifically excludes the Great Council of Chiefs from the jurisdiction of the Ombudsman.

- 15.6 All ombudsman offices perform functions that have a bearing on human rights, in that they may investigate claims of breaches by government agencies of fundamental rights of citizens such as natural justice or non-discrimination. Some ombudsman offices may perform some of the functions of a human rights commission, including education and promotion of human rights.⁹ The Papua New Guinea Ombudsman Commission is able to investigate claims of discrimination, and its jurisdiction in relation to discrimination is not restricted to government agencies. The PNG Ombudsman is directed to take into account in investigations not only the basic rights in the Constitution but also the Constitution's basic social obligations and national goals and principles.¹⁰ While there are serious resource constraints on the operation of ombudsman offices in the Pacific, we believe the potential for development of their roles in relation to both custom and human rights deserves further exploration.
- 15.7 Ombudsman offices may also play an important role in relation to freedom of information, which is essential for sustaining human rights and custom. At present, Australia and New Zealand are the only member countries of the Pacific Islands Forum that have freedom of information legislation, although some other Pacific countries and territories have constitutional provisions protecting freedom of information. In New Zealand and at the Federal level in Australia, ombudsman offices are responsible for determining disputes about whether particular pieces of information are required by law to be disclosed.¹¹ Access to official information is essential to human rights, as it allows citizens to know about government actions that may impinge on their rights and to participate effectively in local and national governance. Access to information can also strengthen local customary institutions, allowing them to make informed decisions about matters affecting their communities.¹²

LEADERSHIP CODES

- 15.8 In traditional Pacific societies, the closeness of the relationship between leaders and their people acted as a restraint on the exercise of power. The actions of leaders were transparent and open to scrutiny by their communities, and people could withdraw support from leaders whose actions displeased them. Such checks on traditional leaders still exist in parts of the Pacific. However, the modern world has brought new demands on leaders, new temptations and new governance structures that require new ways of ensuring that leaders are accountable to their people. Although Pacific Island countries and territories face particular issues concerning the role of leaders,

9 On the educational activities of the Vanuatu Ombudsman in the late 1990s see Crossland, above n 5, 8–9.

10 Papua New Guinea Constitution, s 219. The PNG Ombudsman is considered to have an implied power under s 57 of the Constitution to enforce the basic rights by applying to the courts, although this power has never been exercised. In 2005, an Anti-Discrimination and Human Rights Unit was established in the PNG Ombudsman Commission. Cannings, above n 5, 196, 197–98; Human Rights Watch *“Making Their Own Rules”: Police Beatings, Rape, and Torture of Children in Papua New Guinea* (Human Rights Watch, New York, 2005) 94–95.

11 Don Paterson “Legal Challenges for Small Jurisdictions in Relation to Privacy, Freedom of Information and Access to Justice” (2000) 4 *Journal of South Pacific Law* <<http://law.usp.ac.fj/jspl>> (accessed 10 August 2006); “Pacific Nations Need Freedom of Information Legislation – Maiava” (4 August 2006) in *Islands Business* <<http://www.islandsbusiness.com>> (accessed 4 August 2006).

12 This point is made in relation to resource development in Centre for Environmental Law and Community Rights (PNG) and Australian Conservation Foundation *Bulldozing Progress: Human Rights Abuses and Corruption in Papua New Guinea’s Large Scale Logging Industry* (2006) 29 <<http://www.acfonline.org.au>> (accessed 8 September 2006).

it is important to note that all societies, including New Zealand and Australia, require means of regulating the conduct of leaders.¹³

- 15.9 Several Pacific Island countries have specific legislation providing for codes of conduct for leaders.¹⁴ The definition of “leaders” varies somewhat between countries, but in general these codes apply to members of parliament and government officials. The mechanism for investigating alleged breaches is also different in each country.¹⁵
- 15.10 The leadership codes that are currently in force in the Pacific are concerned primarily with punishing misconduct rather than encouraging good conduct. It has been suggested by some that a less punitive approach of working with leaders to help them better understand their duties may be more appropriate in the Pacific.¹⁶ Another view is that top-down leadership codes may not be effective in relatively weak states, and that codes may be more effective if they set out widely-accepted standards and use peer pressure to punish or exclude those who break the codes.¹⁷ It may be helpful to draw on customary leadership standards. For example, the leadership-code provisions of the Bougainville constitution require leaders “to comply with the long-established standards of customary leadership in Bougainville, including trustworthiness, transparency, and acting in the interests of, and as custodians of wealth for, the People, and not for personal gain.”¹⁸
- 15.11 The Pacific Islands Forum has agreed on nine Principles of Good Leadership, which include protection of fundamental human rights and respect for cultural values, customs and traditions. These principles have been reflected in a Model

13 See, for example, the section on Public Duty and Private Interests of Ministers and Parliamentary Under-Secretaries in New Zealand Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) paras 2.46–2.77 < <http://www.dPMC.govt.nz> > (accessed 28 June 2006). New Zealand does not currently have a code of conduct for members of Parliament: Ruth Berry “Field Fiasco Sparks Call for Ethics Code” (3 August 2006) *New Zealand Herald* Auckland < <http://www.nzherald.co.nz> > (accessed 10 August 2006). The Law Commission has discussed codes of conduct for the governing bodies of Maori governance entities in *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, Wellington, 2006) 231–32.

14 Papua New Guinea Constitution ss 26–31 and Organic Law on the Duties and Responsibilities of Leadership; Vanuatu Constitution ss 66–68 and Leadership Code Act 1998; Solomon Islands Constitution ss 93–95 and Leadership Code (Further Provisions) Act 1999; Palau Code of Ethics Act. The Fiji Constitution includes a Code of Conduct for leaders and officials (s 156) and requires Parliament to make a law to implement this code, but no such law has yet been passed. The Office of the Ombudsman in Vanuatu has produced a guide to the Vanuatu leadership code in the country’s three official languages: *Leadership Code Manual for Leaders* (Office of the Ombudsman, Port Vila, 2002).

15 In Papua New Guinea, the initial investigation is by the Ombudsman Commission, and if an apparent case of misconduct in office is found, the matter is referred to the Public Prosecutor for prosecution before an independent leadership tribunal. See Gregory Toop “The Leadership Code” in Anthony J Regan, Owen Jessep and Eric L Kwa (eds) *Twenty Years of the Papua New Guinea Constitution* (Lawbook Company, Pyrmont, NSW, 2001) 213–32. In Vanuatu, the initial investigation is conducted by the Ombudsman, and the Ombudsman’s report is considered by the Public Prosecutor, who may decide whether or not to prosecute in the ordinary courts. In the Solomon Islands, alleged misconduct is investigated by a Leadership Code Commission, which has the power to impose a fine or may, for more serious cases, refer the matter to the High Court.

16 Ila Geno, Chief Ombudsman of Papua New Guinea, and Noel Levi, former Secretary General of the Pacific Islands Forum Secretariat, in “What Does an Ombudsman Do?”, above n 5.

17 Peter Larmour and Manuhua Barcham *National Integrity Systems Pacific Islands Overview Report* (Transparency International Australia, Blackburn South (Vic), 2004) 18.

18 Constitution of the Autonomous Region of Bougainville, s 170.

Leadership Code, which several Pacific Island countries are planning to adapt in drafting their own leadership-code legislation.¹⁹

- 15.12 The Forum's Model Leadership Code may point to a way forward that combines working with leaders to promote good conduct and penalising leaders for misconduct. The code sets out in positive terms the obligations of leaders as well as setting out various types of abuse of office. It also provides for an Ethics Adviser to give advice, when requested by leaders, on possible breaches of the code. This provision allows an opportunity to work with leaders to ensure that they do not breach the code. However, investigation and prosecution of alleged breaches are also provided for.
- 15.13 There are two main ways in which leadership codes are relevant to the interface between custom and human rights. First, issues arise in most Pacific countries and territories concerning the interaction between customary expectations and the conduct required of leaders in modern governance systems. Examples include issues concerning the giving and receiving of customary gifts (including allegations that customary gift-giving at election time may amount to "treating" or illegally attempting to influence voters) and obligations to family or clan members that may lead to allegations of nepotism and favouritism.²⁰ These are significant and difficult issues which are beyond the scope of this study paper. As we suggested in our discussion of developing a local jurisprudence in Chapter 6, in some cases it may be helpful to explain the modern responsibilities of leaders in terms of customary values, while in other cases it will be necessary to distinguish between conduct that is appropriate for a leader in his or her own community and conduct that is appropriate on taking up a role within the state structure.
- 15.14 Second, leadership codes could be made to apply to chiefs or other traditional leaders who perform statutory functions at either local or national level. At present, the only example of this appears to be the Vanuatu Leadership Code, which applies to members of the National Council of Chiefs, although not to other chiefs.²¹ Where customary authorities operate entirely outside the state

19 "Forum Principles of Good Leadership" – Annex 2, Pacific Islands Forum Communique 2003 < <http://www.mfat.govt.nz> > (accessed 20 June 2006); Pacific Islands Forum Secretariat "Tuvalu Leadership Code" (21 July 2005) Press Release < <http://www.forumsec.org.fj> > (accessed 14 February 2006); Mose Saitala "The Model Leadership Code for Pacific Countries" (Annotated version of the model code presented to the 22nd Australasian and Pacific Regional Ombudsman Conference, Wellington, 9–11 February 2005) < <http://www.ombudsmen.govt.nz> > (accessed 28 June 2006).

20 See Larmour and Barcham, above n 17, 11–12, and the country papers in Transparency International Australia < <http://www.transparency.org.au/nispac.php> > (accessed 27 June 2006). For an example of "treating" allegations in relation to customary gift-giving, see "Samoa: Minister's Letter of Resignation Backfires" (4 August 2006) in Pacific Beat < <http://www.abc.net.au/pacbeat> > (accessed 7 August 2006). Issues have recently arisen in New Zealand regarding the Samoan customary practice of gift-giving or *lafo*, in relation to a Cabinet Minister of Samoan origin: see N W Ingram QC "Report to the Prime Minister upon Inquiry into Matters Relating to Taito Phillip Field" (2006) paras 445–53; Angela Gregory "Cultural Expert Slams Field for Gifts Tradition" (19 July 2006) *New Zealand Herald* Auckland < <http://www.nzherald.co.nz> > (accessed 10 August 2006); Michael Field "Corruption Is Not a Samoan Custom" (23 July 2006) *Sunday Star Times* < <http://www.stuff.co.nz> > (accessed 11 August 2006). See also the provisions regarding the giving of gifts in accordance with custom in Vanuatu Leadership Code Act 1998, s 10.

21 Vanuatu Leadership Code Act 1998, s 5(a). The Pacific Islands Forum Model Leadership Code, cl 26.37.12, defines "leader" as including "chief, where chiefs have *ex officio* legal powers, functions or recognition".

structure, the code would not be directly enforceable but could be a guide to good conduct. Making traditional leaders subject to leadership codes could help to encourage such leaders to be accountable to their people and to have greater regard for human rights.

LAW REFORM COMMISSIONS

- 15.15 Law reform commissions are independent agencies established by law to ensure that the law continues to meet the needs of changing societies. They review aspects of the law and make recommendations to government. There are active law reform commissions in Australia, Fiji and New Zealand; commissions in Papua New Guinea and the Solomon Islands have gone through a period of inactivity but are currently being reactivated; and in Samoa and Vanuatu, legislation for such commissions exists, but they have never in fact been constituted.²² In addition, the Federated States of Micronesia, the Marshall Islands and Palau have code commissions that carry out statute revision work, while a number of Pacific Island countries and territories have undergone or are currently undergoing constitutional review processes (see Chapter 3).²³ The Pacific Islands Forum Secretariat and other regional organisations are also becoming increasingly involved in law reform, including drafting model legislation that can be adapted to local conditions by Pacific states.²⁴
- 15.16 A possible option for the future could be the establishment of a regional law reform commission which countries can opt into or contract with if they wish. This would help to ensure that smaller states, in particular, have access to a wider range of experience and expertise.
- 15.17 The place of custom in legal systems is clearly a key issue for law reform commissions in the Pacific, and four of the five statutes providing for the establishment of such commissions in Pacific Island countries specifically refer to custom and customary law.²⁵ There are a number of current and past inquiries by Pacific law reform commissions that relate directly to matters of custom, and in most cases these inquiries address issues of the interface between custom and human rights. We also note the important work that the South African Law Reform Commission has done on the recognition of custom law in a way that is consistent with constitutional protections of human rights.²⁶ One obstacle to law

22 For general introductions to law reform in the Pacific, see Tuiloma Neroni Slade, Judge of the International Criminal Court “Law Reform Potential in the Pacific Area” and Alipate Qetaki, Executive Chairman, Fiji Law Reform Commission “Commentary on ‘Law Reform Potential in the Pacific Area’” (Speeches to the Australasian Law Reform Agencies Conference, Wellington, 13–16 April 2004) < <http://www.lawcom.govt.nz> > (accessed 8 September 2006); Peter MacFarlane and Chaitanya Lakshman “Law Reform in the South Pacific” (2005) 9 *Journal of South Pacific Law* < <http://law.usp.ac.fj/jspl> > (accessed 18 January 2006); Guy Powles “The Challenge of Law Reform in Pacific Island States” in Brian Opeskin and David Weisbrot (eds) *The Promise of Law Reform* (Federation Press, Leichhardt (NSW), 2005) 404–421 [“The Challenge of Law Reform”]; Blaise Kuemlangan “Law Reform and Development for Nation-Building in the Pacific” in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, 2006) 53–60.

23 “The Challenge of Law Reform”, above n 22, 414–19.

24 Slade, above n 22, 4–5.

25 “The Challenge of Law Reform”, above n 22, 415. The New Zealand Law Commission is also required by statute to “take into account te ao Maori (the Maori dimension)” in its recommendations: Law Commission Act 1985, s 5(2)(a).

26 See, for example, South African Law Reform Commission *Report on Traditional Courts and the Judicial Function of Traditional Leaders* (SALRC 90, Pretoria, 2003), and other reports for SALRC Project 90 on customary law < <http://www.doj.gov.za> > (accessed 29 August 2006).

reform in some parts of the Pacific has been a feeling on the part of ordinary people that the state legal system is not their concern.²⁷ Consideration of custom by law reform commissions may help to overcome this impression.

CONSTRAINTS OF SIZE AND RESOURCES

- 15.18 Constraints of size and resources in many Pacific Island countries and territories mean that some of the mechanisms discussed in this chapter may be a luxury they cannot afford. There may, however, be options for creating mechanisms appropriate to small island states, a topic currently being explored in relation to NHRIs. There may also be opportunities for regional cooperation, whether that takes the form of resource-sharing, joint projects, capacity-building or the creation of regional institutions.²⁸
- 15.19 Where NHRIs, ombudsman offices, leadership codes and law reform commissions already exist, we believe they can make important contributions to the dialogue on harmonising custom and human rights. To this end, it may be helpful to consider appointing people with knowledge of both custom and human rights to these bodies. At the same time, we acknowledge the constraints under which these bodies operate and suggest that this is an issue which may merit regional attention, as addressed in the following chapter.

COMMISSION SUGGESTIONS

- 15.1 **On the contribution of other national bodies:** National human rights institutions, ombudsman offices and leadership code bodies could be directed to take account of both custom and human rights and to consider ways in which the two could be harmonised.
- 15.2 **On guidance for customary authorities:** Where customary authorities perform some statutory functions, it may be appropriate to empower ombudsman or leadership code bodies to investigate complaints against such authorities. Where customary authorities operate entirely outside the state system, leadership codes could still act as a guide to good conduct for such authorities.
- 15.3 **On the contribution of law reform commissions:** National law reform commissions may be able to make a greater contribution to the development of custom and human rights law in the Pacific. Consideration could also be given to the establishment of a regional law reform commission, which countries could opt into or contract with as they wish and which would help smaller states have access to a wider range of experience and expertise.

27 Law Reform Commission of Solomon Islands *1996 Annual Report* (Honiara, 1996), cited in Jennifer Corrin Care and Jean G Zorn “Legislating for the Application of Customary Law in Solomon Islands” (2005) 34(2) *Common Law World Review* 144, 167.

28 Regional support for ombudsman offices, leadership codes and human rights mechanisms is identified as a priority in the Pacific Plan.

Chapter 16

Regional Developments

- 16.1 In this chapter, we consider some current and possible future developments in the region that are relevant to the interface between custom and human rights. They are also relevant to any attempt to harmonise the two. We begin by outlining the policies of United Nations agencies and donor governments and the possible implications our approach to custom and human rights holds for them. Next we turn to the growing role of civil society organisations. We then discuss the Pacific Plan and other regional initiatives. These initiatives provide some of the context within which the dialogue on custom and human rights takes place, and they may be able to assist in harmonising custom and human rights. This topic leads on to a brief consideration of a possible Pacific regional human rights mechanism. Finally, we address the increasing integration of Pacific countries and territories with the wider world, another development that will shape the future of the Pacific. However, the implications of globalisation for custom and human rights require further investigation.

UNITED NATIONS AND DONOR GOVERNMENT POLICIES

United Nations agencies

- 16.2 United Nations agencies are active within the Pacific region. The United Nations Development Programme (UNDP) Pacific office has democratic governance as one of its focus areas, and within this area, it seeks to promote increased commitment to rights-based development and human rights.¹ The Office of the United Nations High Commissioner for Human Rights recently opened an office in the Pacific, and other UN agencies operating in the Pacific also have a strong human rights focus. A Pacific regional centre has been established to oversee the UN's programmes in the region, and a "UN Pacific Framework for Action 2008–2012" was launched in 2006, with good governance and human rights as one of its major themes.²
- 16.3 In our consultations, we heard concerns from some UN agencies about inconsistencies between Pacific custom and human rights. While acknowledging

1 < <http://regionalcentre.pacific.undp.org.fj> > (accessed 5 June 2006).

2 "Fiji: United Nations Opens New Regional Centre" (26 July 2006) in Pacific Beat < <http://www.abc.net.au/pacbeat> > (accessed 21 August 2006); United Nations Development Programme "White Paper Outlines Joint UN Approach for 2008–2012" < <http://www.undp.org.fj> > (accessed 21 August 2006).

these concerns, we also note that some UN agencies have recently recognised the positive role that custom can play and the importance of taking account of culture in ways that do not compromise international human rights standards. For example, the United Nations Population Fund (UNFPA) has adopted a policy of using culturally-sensitive approaches to achieve universal goals.³ The UN Special Rapporteur on the rights of indigenous people has also noted that the argument that custom law does not adequately protect individual human rights “should not be used to write off indigenous customary law altogether, but rather as a challenge to bring both approaches closer together by making them more effective in the protection of human rights – both individual and collective.”⁴ This assessment appears to be consistent with the approach we have suggested in this study paper.

Donor governments

New Zealand

16.4 New Zealand is known as a strong advocate for human rights globally and in the Pacific and also seeks to be sensitive to Pacific cultures and values. At times, there may be tensions between these objectives. Part of New Zealand’s policy in engaging with the Pacific is to focus on:⁵

- “mediation of ethnic/local tensions through government structures that are effective in local contexts, taking into account human rights, the participation of civil society and good governance practices”; and
- “preservation of community identity, culture and values”.

The policy further states that such engagement should “reach out also to elements of local administration, traditional and modern”.

16.5 With the establishment of the New Zealand Agency for International Development (NZ Aid) in 2002, human rights have become an integral part of

3 See Kate Molesworth “Negotiating Sexual and Reproductive Health: Culture Matters” (2006) 100 Bulletin von Medicus Mundi Schweiz < <http://www.medicusmundi.ch> > (accessed 5 July 2006); UNFPA *Culture Matters – Working with Communities and Faith-Based Organizations: Case Studies* (2004) < <http://www.unfpa.org/publications> > (accessed 8 September 2006). A UNFPA survey of 146 countries found that the Pacific was the only region in which cultural constraints on gender equality were counterbalanced by positive contributions of culture; in all other regions, cultural factors were considered to play more of a negative than a positive role: *Culture in the Context of UNFPA Programming: ICPD + 10 Survey Results on Culture and Religion* (UNFPA, New York, 2005) 9.

4 UN Commission on Human Rights “Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen” (26 January 2004) E/CN.4/2004/80, para 68. See also the discussion of customary law and traditional justice systems in UN Development Programme *Programming for Justice: Access for All. A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (Bangkok, 2005) 44–45, 57, 100–105.

5 Ministry of Foreign Affairs and Trade “Pacific Policy” (endorsed by Cabinet 6 August 2001) < <http://www.mfat.govt.nz> > (accessed 30 May 2006).

New Zealand's overseas aid programme.⁶ Sixty per cent of New Zealand's aid goes to the Pacific.⁷ NZAID's draft Pacific strategy supports "strengthening governance and nurturing human rights" and proposes "reconciling traditional and imported forms of governance in a form appropriate to the Pacific context". It also supports human rights implementation, capacity-building, training, education and advocacy.⁸

Other Pacific donors

- 16.6 Australia and the European Union are large, long-term aid donors in the region.⁹ The Australian Government's 2006 White Paper on overseas aid has a major focus on Pacific governance, and a recent Australian Government report considers the merit of integrating "formal local governance structures with local traditional leadership systems by, for example, integrating local courts with traditional village justice systems".¹⁰ The European Union's Pacific strategy, released in 2006, also identifies governance as a priority area while noting the need to take the cultural dimension into account in its dialogue and development cooperation programmes.¹¹ The Asian Development Bank's Pacific strategy likewise discusses governance as a key issue in the Pacific and notes the tensions between "traditional" and "modern" institutions and values.¹² In addition to such governmental and intergovernmental donors, international non-government aid organisations play an important role in the region, especially in supporting the promotion of human rights and gender equality.

Implications for donor policies

- 16.7 Donor policies appear increasingly to recognise that the better integration of traditional or customary systems and modern state governance presents both challenges and opportunities. However, there may be more room to build on customary systems in order to improve governance.¹³ Not all practices said to be

6 Cabinet Minute (10 September 2001) CM 28/8-01, summarised in Marilyn Waring *Ministerial Review of Progress in Implementing 2001 Cabinet Recommendations Establishing NZAID* (2005) 3; NZAID *Policy Statement: Towards a Safe and Just World Free of Poverty* (2002); NZAID *Human Rights Policy Statement* (2002); NZAID "Human Rights Policy Implementation Plan of Action 2004–2009".

7 Waring, above n 6, 20.

8 NZAID "Pacific Strategy 2006–2015 – Draft for External Consultation" (2006) 11–12.

9 For an overview of development assistance in the region, see Vijay Naidu "Development Assistance Challenges" in Michael Powles (ed) *Pacific Futures* (Pandanus Books, Canberra, 2006) 142–63.

10 Australian Government *Australian Aid: Promoting Growth and Stability. A White Paper on the Australian Government's Overseas Aid Program* (2006) 29–30, 42–46 [*Australian Aid*]; AusAID *Pacific 2020: Challenges and Opportunities for Growth* (2006) 98.

11 European Commission "EU Relations with the Pacific Islands – A Strategy for a Strengthened Partnership" (2006) 6, 17 < <http://www.eu.org.fj> > (accessed 31 May 2006).

12 Asian Development Bank "Responding to the Priorities of the Poor: A Pacific Strategy for the Asian Development Bank 2005–2009" (2004), 11–14; Thuy Mellor and Jak Jabes *Governance in the Pacific: Focus for Action 2005–2009* (Asian Development Bank, Manila, 2004) 13, 15–17, 20, 37–38, 53–57.

13 For example, NZAID is to work with traditional leaders in Vanuatu in reforming the corrections system: "NZAID to Work with Chiefs in Vanuatu Corrections Project" (Radio New Zealand International, 7 June 2006) < <http://www.rnzi.com> > (accessed 9 June 2006). The aid agency Oxfam has recently suggested the strengthening of customary dispute resolution systems in the Solomon Islands: Oxfam Australia and Oxfam New Zealand *Bridging the Gap Between State and Society: New Directions for the Solomon Islands* (2006) 26. The United Kingdom Department for International Development has produced a briefing paper that considers strategies for engagement with non-state justice systems (including customary systems): *Non-State Justice and Security Systems* (2004) < <http://www.gsdc.org> > (accessed 8 September 2006).

customary should be accepted uncritically. Nonetheless, it is important that donor policies recognise the continued strength of custom in the Pacific, the positive role that custom can play in governance, and the opportunities that exist for drawing on values underlying both custom and human rights to develop a distinctively Pacific human rights culture.

- 16.8 We emphasise the importance of donor policies that support existing systems, laws and institutions that can contribute to the development of a Pacific human rights culture. It is important to recognise the human rights provisions (and the provisions regarding custom) that already exist in the constitutions of Pacific Island countries and territories and to build a human rights culture upon them. We believe that human rights will gain greater acceptance if they are seen as coming from within the society rather than from outside and if they are seen as consistent with its values.

COMMISSION SUGGESTIONS

- 16.1 **On the potential contribution of United Nations and donor agencies:** United Nations agencies and government and non-government donors could consider ways of supporting good governance and human rights by building on both customary systems and existing human rights provisions in Pacific Island countries and territories.

CIVIL SOCIETY ORGANISATIONS

- 16.9 Another development that has implications for custom and human rights in the Pacific is the growing role of civil society organisations (CSOs). The term “civil society” is commonly used to refer to those sectors of society that are not part of government or business. Civil society includes non-government organisations (NGOs), trade unions and churches. Many of the customary institutions we have discussed in this paper could also be considered to be a distinctively Pacific form of civil society if they have not been incorporated into state structures. However, in this section we are concerned primarily with non-customary organisations.

- 16.10 CSOs play a number of roles. They provide welfare and other services; engage in advocacy on social, political and economic issues; and act as a voice for the interests of communities and interest groups. Effective CSOs draw their strength from being in touch with the needs and aspirations of people in communities and can act as a link between governments and communities. The legal frameworks for CSOs in most Pacific Island countries have been inherited from the colonial era, and a need has been identified for these laws to be updated.¹⁴ The International Center for Not-for-Profit-Law, in collaboration with the University of the South Pacific Law School, is reviewing the legal and customary environment affecting civil society in the Pacific Islands, with the aim of developing a framework for legal reform.¹⁵ The Fiji Law Reform Commission

14 “Community Governance” in *Time to Talk* (Program 10 Transcript, ABC Radio Australia, 2002) < <http://www.abc.net.au/timetotalk> > (accessed 2 February 2006); Peggy Fairbairn-Dunlop “Civil Society Participation in the Pacific” in *Time to Talk* (Program 10 Opinion, ABC Radio Australia, 2002) < <http://www.abc.net.au> > (accessed 21 August 2006); International Center for Not-for-Profit Law “Pacific Civil Society Programme” (August 2006). Useful documents on civil society in the Pacific are available in the South Pacific Civil Society Library at < <http://www.vanuatu.usp.ac.fj> > (accessed 22 August 2006).

15 International Center for Not-for-Profit Law “Pacific Civil Society Programme” (August 2006).

is also currently reviewing laws covering religious bodies and charitable trusts in Fiji.¹⁶

- 16.11 The role of CSOs is relevant to custom and human rights in a number of ways. CSOs are themselves an expression of the right of people to participate in the governance of their communities and societies. Their effective operation depends on the recognition of other rights, such as rights to freedom of speech, assembly, association and religion. Many CSOs are also involved in advocacy, education, protection and promotion of human rights. At times this may lead them to challenge customary practices, such as practices that are seen as breaching the rights of women or children. In addition, CSOs may play a role in monitoring governments' human rights performance, a role that can create tensions in their relationship with the state. CSOs sometimes produce "shadow reports" on states' compliance with international human rights treaties, providing an alternative perspective to that found in official government reports.
- 16.12 CSOs provide an important avenue for expression, particularly for groups such as women, young people and the disabled who are often marginalised in customary processes. This role may be seen as threatening the position of customary authorities as representatives of their communities. However, many CSOs see the value of customary governance mechanisms, and seek to build on these mechanisms rather than to replace them. We believe that CSOs have a significant role to play in making human rights culturally meaningful for Pacific communities and in helping to enhance customary governance by harmonising it with human rights principles.

THE PACIFIC PLAN AND OTHER REGIONAL INITIATIVES

- 16.13 The need to harmonise custom and human rights is implicit in the Pacific Plan, endorsed by the member governments of the Pacific Islands Forum as a framework for strengthening regional cooperation and integration. The Vision adopted by Forum leaders refers to a future in which the "cultures, traditions and religious beliefs [of the Pacific] are valued, honoured and developed" and the region is respected "for its defence and promotion of human rights".¹⁷
- 16.14 Although the Plan has received a mixed reception, it represents a significant recognition of human rights by the region's leaders. The Plan contains a number of positive initiatives relevant to custom and human rights which may be pursued by member states in the next few years. These initiatives include judicial training and education, investigation of harmonising traditional and modern governance values and structures, strengthening of traditional courts, establishing a regional ombudsman and other human rights mechanisms, ratification and implementation of international and regional human rights agreements, and support for human rights reporting.¹⁸

16 *Qolilawa Darpan* (Fiji Law Reform Commission Newsletter, April 2006) 3–6.

17 Pacific Islands Forum "The Auckland Declaration" (Pacific Islands Forum Special Leaders' Retreat, Auckland, 6 April 2004) < <http://www.pacificplan.org> > (accessed 22 February 2006); see also Eminent Persons' Group *Pacific Cooperation: Voices of the Region* (review of the Pacific Islands' Forum, April 2004) 29, 30, 34.

18 *The Pacific Plan for Strengthening Regional Cooperation and Integration* (2005) 17–18. Also relevant are initiatives in the areas of poverty reduction; improved health and education; improved gender equality; enhanced involvement of youth; protection of cultural values, identities and traditional knowledge; participatory democracy and consultative decision-making; and law enforcement training (including gender issues and human rights).

16.15 Other current regional developments are also relevant to the issues discussed in this study paper:

- The Asia-Pacific Forum of National Human Rights Institutions (APF), a network of national human rights institutions (NHRIs) from Asia and the Pacific, was formed in 1996 to promote regional cooperation in advancing human rights protection. The NHRIs of Australia, Fiji, New Zealand, Timor Leste and Indonesia are members. The Forum also promotes and supports the establishment of new NHRIs.¹⁹
- The New Zealand Human Rights Commission, Fiji Human Rights Commission and Pacific Islands Forum Secretariat are considering appropriate forms of NHRI for small Pacific states.
- The Office of the United Nations High Commissioner for Human Rights is promoting the ratification of international human rights instruments by Pacific Island states.
- A draft Pacific Charter of Human Rights, prepared under the auspices of the Law Association for Asia and the Pacific (LAWASIA) in the 1980s, is being revised.²⁰
- In line with the Pacific Plan, the Australian Government is to fund the establishment and operation of a regional ombudsman's office for implementing the Pacific Islands Forum's principles of good leadership and accountability.²¹ The establishment of a regional law reform commission has also been suggested.²²
- The Pacific Regional Rights Resource Team (RRRT), a project of the United Nations Development Programme with primary funding from NZAID, is providing training, advocacy, technical support and policy advice on human rights in Pacific Island countries.²³
- A Pacific Judicial Development Program, supported by AusAID and NZAID, is to provide professional development to judicial and court officers, including coverage of custom law and human rights. This follows on from previous judicial training programmes in the region.²⁴

16.16 In recent years, there has been a growth of institutions within the Pacific studying both custom and human rights. In particular, the University of the South Pacific (USP) has provided a forum for much teaching and research on

19 Asia-Pacific Forum < <http://www.asiapacificforum.net> > (accessed 4 June 2006). The 11th annual meeting of the APF in 2006 was held in Fiji, and papers from the meeting are available on the APF website.

20 "Appendix 1: Report on a Proposed Pacific Charter of Human Rights Prepared Under the Auspices of LAWASIA, May 1989" (1992) 22 Victoria University of Wellington Law Review Monograph 4 99–174; "Human Rights Activities" < <http://www.lawasia.asn.au> > (accessed 7 June 2006).

21 *Australian Aid*, above n 10, 56. The case for a regional ombudsman's office is made in Asian Development Bank and Commonwealth Secretariat *Towards a New Pacific Regionalism: An Asian Development Bank-Commonwealth Secretariat Joint Report to the Pacific Islands Forum Secretariat* (Asian Development Bank, Manila, 2005) 95–97 [ADB and Cmnlwth Sec].

22 Peter MacFarlane and Chaitanya Lakshman "Law Reform in the South Pacific" (2005) 9 Journal of South Pacific Law < <http://law.usp.ac.fj/jspl> > (accessed 18 January 2006).

23 < <http://www.rrrt.org> > (accessed 5 June 2006).

24 AusAID and NZAID "Pacific Judicial Development Program: Program Design Document" (20 November 2005).

these topics in the Pacific.²⁵ Most universities in New Zealand and a number in Australia also offer Pacific Studies courses. In our consultations on this project, there have been frequent calls for more research to be conducted on the actual interface of custom and human rights within individual Pacific societies. While this paper has relied largely on secondary sources, there is a real need for concrete data, especially from within informal or village-court settings.

A REGIONAL HUMAN RIGHTS MECHANISM?

- 16.17 The idea of a Pacific regional human rights mechanism has been under discussion for some time, but no consensus has yet emerged on this issue. Such a development also relates to the wider discussion of Pacific regionalism.²⁶

Regional mechanisms elsewhere

- 16.18 Regional human rights mechanisms now exist throughout the world except for Asia and the Pacific. Their formation was urged by the UN General Assembly in 1977 to sit alongside the human rights treaty bodies in giving effect to international instruments. Regional human rights mechanisms are seen as more accessible and more closely attuned to local values and conditions.²⁷
- 16.19 An example of a regional human rights mechanism is the African Commission on Human and Peoples' Rights. This commission was established in 1987, following the adoption of the African Charter on Human and Peoples' Rights (also known as the Banjul Charter), which has now been ratified by all 53 African states. The Charter reflects African values and traditions by, for example, recognising group rights and individual duties. The Commission hears complaints in relation to the Charter, monitors states' compliance and adopts human rights resolutions. In 2004, the African Court on Human and Peoples' Rights was established to hear cases of claimed Charter violations, and in 2006 judges for the new court were sworn in.²⁸
- 16.20 Another regional institution, although one not focused on human rights, is the Caribbean Court of Justice (CCJ), inaugurated in 2005. The CCJ is unique in having both an original and an appellate jurisdiction. Its original jurisdiction is

25 See for example K J Anderson "Strengthening Human Rights Education in the Pacific Island Region: An Overview of the Efforts Made by the Political Science Staff at the University of the South Pacific" (forthcoming) Directions; K J Anderson "Young Pacific Island People's Views and Awareness of Human Rights" (forthcoming) Australian Journal of Human Rights (the latter article is based on a survey of USP students).

26 Dave Peebles *Pacific Regional Order* (ANU E Press/Asia Pacific Press, Canberra, 2005) reviews proposals for greater regional integration and makes a case for moving towards a much more politically and economically integrated Pacific region. As part of this concept, he argues for the creation of an Oceania Human Rights Charter, an Oceania Human Rights Commission, and an Oceania Court with a human rights chamber. See also ADB and Cmnwlth Sec, above n 21; papers from the Otago Foreign Policy School 2004 "Redefining the Pacific: Regionalism – Past, Present, and Future" < <http://www.otago.ac.nz/OtagoFPS> > (accessed 4 June 2006); and articles in Part III of Michael Powles (ed) *Pacific Futures* (Pandanus Press, Canberra, 2006) 184–223.

27 Rhona K M Smith "Regional Systems: An Overview" in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 307–309; Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2 ed, Wellington, 2003) 69–80.

28 Christof Heyns "The African Charter on Human and Peoples' Rights" and Rachel Murray "The African Commission and the Court on Human and Peoples' Rights" in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 3–6, 6–9.

based on the treaty which governs the Caribbean Single Market and Economy. The CCJ is also intended to be the final municipal court of appeal for member states, to replace appeals to the Judicial Committee of the Privy Council for the majority of Commonwealth Caribbean states. However, only Barbados and Guyana have so far signed up to the CCJ's appellate jurisdiction.²⁹ A key argument in support of the CCJ is that it will assist with the development of a Caribbean jurisprudence "giving its own flavour to the common law",³⁰ but concern has been expressed that as an appellate court it may be less effective in protecting human rights than the Privy Council.³¹

Possible Pacific regional mechanisms

- 16.21 The possibility of including the Pacific in an Asia-Pacific human rights mechanism has been suggested, but it has also been recognised that a major obstacle to the creation of such a mechanism is the enormous diversity of cultures in a vast "region" stretching all the way from the Middle East to the Pacific.³² If there were to be a regional mechanism, it might be preferable to limit its coverage to the Pacific, which, as we explained in Chapter 2, constitutes a coherent region.³³ Even the Pacific region as defined in this study paper could be too large and diverse for a regional mechanism, at least initially. One possibility could be to start with sub-regional mechanisms covering countries that share particular cultural and historical affinities.
- 16.22 A regional or sub-regional mechanism could take a number of forms, including a human rights desk within the Pacific Islands Forum Secretariat or other regional body,³⁴ a technical cooperation fund, a regional ombudsman's office, a charter (providing the basis for a commission's or court's jurisdiction), a commission (possibly with investigatory, educative and monitoring functions), a human rights court, or a court of appeal. The reports or opinions of a Pacific human rights commission or court could be non-binding or advisory in nature,

29 Derek O'Brien "The Caribbean Court of Justice and Its Appellate Jurisdiction: A Difficult Birth" [2006] Public Law 344–63.

30 David Simmons "Based on a Paper Presented by the Hon Sir David Simmons as Leo Goodwin Distinguished Visiting Professor at the Shepard Broad Law Center of Nova Southeastern University, 13–15 October 2004" (2005) 31(1) Commonwealth Law Bulletin 71, 76.

31 Dominic Bascombe "The Introduction of the Caribbean Court of Justice and the Likely Impact on Human Rights Standards in the Caribbean Commonwealth" (2005) 31(2) Commonwealth Law Bulletin 117–25. On the possibility of a regional human rights charter for the Caribbean and its possible link to the CCJ, see Sheldon A McDonald "Consultancy to Conduct and Formulate the Most Suitable Arrangements to Provide for the Protection of Human Rights in the Caribbean (CARICOM)" (2005) < <http://www.caricomlaw.org> > (accessed 7 June 2006).

32 David K Malcolm "Development of Human Rights throughout the Asia-Pacific Region" (2006) 80 Australian Law Journal 178, 182–83; Joshua Castellino "The Asian Regional Human Rights System" in Rhona K M Smith and Christien van den Anker (eds) *The Essentials of Human Rights* (Hodder Arnold, London, 2005) 16–18.

33 The "Sub-Regional Workshop for Pacific Island States on Human Rights Education and the Administration of Justice, Nadi, Fiji, 25 to 27 June 2002: Statement of Conclusions" states (para 5): "The workshop agrees that it would be more appropriate to characterize the Pacific as a distinct region, rather than as a sub-region of Asia and the Pacific. Its designation as a distinct region would facilitate the design of culturally and socially appropriate responses to its needs, including in the context of human rights."

34 The New Zealand Government is promoting the establishment of a human rights desk within the Pacific Islands Forum Secretariat: "Strengthening the Rule of Law in the Pacific" (31 July 2006) *Law Talk* 18.

and it is likely that approaches based on mediation would be preferred, in line with Pacific customary approaches to dispute resolution.

16.23 A regional court could start out with jurisdiction only over trade disputes but gradually and by agreement acquire jurisdiction in other areas, including human rights.³⁵ To some extent, a regional court of appeal, for those countries that chose to subscribe to it, would be an extension of existing practices, whereby expatriate judges (including judges from other Pacific Island jurisdictions) sit on several national appellate bodies. Among the major considerations in relation to regional courts is their capacity to develop a Pacific jurisprudence informed by Pacific values and conditions and to draw upon American, British and French legal traditions and international law as well as the customary law of each country.³⁶ Regional courts may also provide a neutral forum removed from domestic politics. On the other hand, they may be seen to detract from national sovereignty and from the development of a distinctive national legal system.

16.24 The Law Commission takes no view on whether or not it is desirable to create a regional human rights mechanism for the Pacific. That is a matter for Pacific states collectively to decide. We suggest that there would need to be very broad consensus across the Pacific about the value of such a mechanism before any attempt was made to establish it. A necessary first step for achieving such consensus, in our view, would be a common accord on fundamental Pacific values and an agreed approach to resolving the perceived tension between custom and human rights. We hope that this study paper may contribute to the development of greater consensus on the harmonisation of custom and human rights. This consensus may, in turn, contribute to the development of a regional human rights mechanism, but such a regional mechanism is only one way forward and should not take attention away from the need for continued work at the national level.

GLOBALISATION 16.25 While globalisation, in the sense of increasing integration with the wider world, is not a new phenomenon in the Pacific, it has been gathering pace and is likely to have significant implications for both custom and human rights. Integration with the wider world takes a number of forms, including the introduction of new forms of governance, social organisation and economics; migration of Pacific people to other parts of the region and the wider world; and the importation of goods and cultural products such as movies and television into Pacific Island countries and territories. At the same time, people from elsewhere in the world are more readily able to visit the Pacific and to explore elements of Pacific culture such as art, music and dance, albeit removed from their original cultural contexts. At its best, this process could lead to exciting cultural fusions, with Pacific peoples remaining in control of their evolving cultures and making informed choices about what to adopt or adapt from elsewhere and what to reject. At its worst, globalisation could lead to exploitation and powerlessness, with Pacific peoples losing control of their cultural products,

35 A regional criminal court has recently been proposed to deal with complex international crimes, such as drug smuggling: Jarrod Booker “Call for Regional Court to Help Tiny Pacific Nations Fight Drugs” (21 August 2006) *New Zealand Herald* Auckland < <http://www.nzherald.co.nz> > (accessed 21 August 2006).

36 Mere Pulea “A Regional Court of Appeal for the Pacific” (1980) 9(2) *Pacific Perspective* 1, 7–9.

their land, their right to make choices about their economic futures, and the customs and traditions that enrich their lives.

- 16.26 In particular, economic liberalisation – Pacific Island countries being encouraged or pressured to open their markets to greater competition – may have an impact on custom and human rights.³⁷ Critics of economic liberalisation argue that it will destroy local industries, leading to increased poverty, and that it will unfairly restrict the range of policy choices open to governments.³⁸ Advocates say that opening markets will promote healthy competition, increasing prosperity and choice.³⁹ Whichever view is correct, the outcome of economic liberalisation has important implications for the realisation of economic, social and cultural rights in the Pacific.
- 16.27 The increasing integration of Pacific Island countries and territories into the global economy is also likely to have significant effects on custom. The transition from subsistence production to a market economy has been under way for some time in the Pacific, and the move to a money-based economy has had a role in changing custom.⁴⁰ For example, as discussed in Chapter 7, the use of cash in so-called “bride price” payments appears to have significantly changed the nature of this custom. Another concern about the interface between economic globalisation and custom is that traditional knowledge and other forms of intellectual and cultural property may be acquired and used for commercial gain by people from outside the communities to which that knowledge belongs.
- 16.28 The impact of globalisation on Pacific cultures is an important area for further examination in any future work on the interface between custom and human rights. While it is frequently assumed that custom will be subsumed by outside forces, history in fact testifies to the resilience of custom, and we suspect that for the foreseeable future the areas of potential conflict with human rights will still have to be addressed.

37 The recent history of the promotion of economic liberalisation in the Pacific is traced in Claire Slatter “Neo-Liberalism and the Disciplining of Pacific Island States – The Dual Challenges of a Global Economic Creed and a Changed Geopolitical Order” in Michael Powles (ed) *Pacific Futures* (Pandanus Press, Canberra, 2006) 91–110.

38 See, for example, Claire Slatter “Will Trade Liberalisation Lead to the Eradication or the Exacerbation of Poverty?” (2003) <<http://www.cid.org.nz>> (accessed 8 June 2006).

39 See, for example, Paul Holden, Malcolm Bale and Sarah Holden *Swimming Against the Tide? An Assessment of the Private Sector in the Pacific* (Asian Development Bank, Manila, 2004) especially 121–26.

40 For an account of the impact of money in the Solomon Islands, see Ross McDonald *Money Makes You Crazy: Custom and Change in the Solomon Islands* (University of Otago Press, Dunedin, 2003); on the impact of money on custom in Vanuatu, see Lisa Clausen “Turning Back the Clock” (1 August 2005) *Time* Sydney 43, 46.

Chapter 17

Conclusion

THE THREE MAIN PROPOSITIONS 17.1 This paper advances three broad propositions that we consider would improve the operational alignment between custom and human rights in the legal systems of the Pacific region:

- that governments, legislatures, courts and communities actively seek ways to harmonise custom and human rights in order to promote the equitable development of custom and the appreciation of human rights in culturally relevant terms;
- that courts and legislatures develop a more coherent legal system by recognising and respecting the contribution of community justice bodies to dispute resolution, while also promoting the use of human rights norms in community justice; and
- that the courts develop an indigenous jurisprudence that draws upon both custom and human rights.

PRACTICAL SUGGESTIONS 17.2 Parts 2 and 3 of the paper include practical suggestions for consideration by people working in the legal systems of each country or territory. Because there are many suggestions it is important to keep the three broad outcome propositions above uppermost in mind.

17.3 We list the specific suggestions below before turning to our final suggestions about a possible future role for New Zealand. We would prioritise the option of each country developing non-prescriptive custom law commentaries for the custom law(s) operating in its territory. These would provide a starting point for judges, officials and others to better integrate custom with their processes.

WOMEN'S RIGHTS (CHAPTER 7)

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- 7.1 **On women's access to justice:** Strategies should be developed to make community justice bodies and courts more accessible to women and more responsive to their views and rights. This would include greater recognition of women's customary institutions and of women as experts on custom.
- 7.2 **On women's choice of process:** Women should have a genuine choice as to whether crimes of violence against them are dealt with through custom, through the court system, or through both.

WOMEN'S RIGHTS (CHAPTER 7)

- 7.3 **On the evolution of custom:** Reassessment of customary practices to see whether they accord with the customary value of respect can be undertaken, taking full account of women's perspectives on these practices. Men as well as women should be engaged in the process of achieving equity for women.

CHILDREN AND YOUNG PERSONS' RIGHTS (CHAPTER 8)

- 8.1 **On protection of children and young people:** Common ground between Pacific traditions of caring for children and the protections contained in the Convention on the Rights of the Child should be explored to enable children and young people to grow up feeling valued and safe from abuse.

FREEDOM OF RELIGION, SPEECH AND MOVEMENT (CHAPTER 9)

- 9.1 **On the evolution of custom and rights:** Courts can assist with the implementation of fundamental freedoms in customary settings (including freedom of religion, speech and movement) by considering whether customary practices that limit those freedoms are reasonable in the context of rights to culture. Courts can also examine the customary values underlying customary practices and consider whether the practices could be modified to better reflect both those values and fundamental human rights.

MINORITY AND MIGRANT COMMUNITIES (CHAPTER 10)

- 10.1 **On human rights protections for migrant and minority communities:** Human rights protections are of vital importance to the many migrant and minority populations in the Pacific to safeguard both their rights as citizens and their cultural identities. The role of custom in urban and other multi-ethnic areas also creates special challenges. States have a responsibility to ensure these communities are able to exercise their cultures in a manner consistent with human rights norms.

COMMUNITY JUSTICE (CHAPTER 11)

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- 11.1 **On strengthening community justice:** Non-state community justice bodies could be recognised in legislation. Training appropriate to the role and purpose of these bodies, including human rights training and handbooks, is a priority.

COMMUNITY JUSTICE (CHAPTER 11)

- 11.2 **On increasing the participation of women:** Positive measures should be taken to encourage the greater participation of women in community justice decision-making, including as advocates and expert witnesses.

ROLE OF COURTS (CHAPTER 12)

- 12.1 **On indigenous common law:** Subject to any particular enactments of the Pacific Island state, judges should develop an indigenous common law rooted in the values underlying human rights, custom law, and the common law derived from other sources. The starting point is to consider the values underlying custom and whether these are consistent with or can be made to align with human rights. Judges should also consider how customary values can be used to explain human rights and general legal principles.
- 12.2 **On a contextual approach to human rights:** Human rights can be applied contextually to give better recognition to custom law and human rights, respecting both the value underlying the right and the values of custom. As matters of general principle, however, human rights should not be readily restricted, and constitutional limitation clauses should be strictly construed. The doctrine of margin of appreciation may be relevant but should not be used to undermine fundamental rights. When human rights conflict, an ad hoc balancing best facilitates full consideration of the particular circumstances of each case.
- 12.3 **On building relations with community justice bodies:** Courts can build relations with community justice bodies by recognising their importance and referring matters to them. Special care is needed in referring criminal cases, to protect the interests of victims and offenders. Statutory guidance is also useful in defining the role of courts and community justice bodies.

COURT ACCESS TO CUSTOM LAW (CHAPTER 13)

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- 13.1 **On relaxation of the doctrine of judicial precedent:** It may be appropriate to recognise that even though a custom has been established as a precedent, it is open to a party to show, and to a court to find, that the custom is no longer supported by current usage or underlying values.
- 13.2 **On treating custom as a matter of law or fact:** Requiring proof or establishment of custom as matter of law is consistent with its status as "law". However, the way in which the court ascertains that law will often require the same methods as if custom were treated as a matter of fact.
- 13.3 **On custom law commentaries:** One option, which we see as a priority, is for each country to develop non-prescriptive custom law commentaries to give judges, officials and others insight into the nature of the custom law(s) operating in its territory.

COURT ACCESS TO CUSTOM LAW (CHAPTER 13)

- 13.4 **On codification of custom law:** While codification may be useful in some cases, the key aims of codification (certainty and access to custom law) may be better achieved in other ways. A preferable option is the codification of underlying customary values rather than customary practices.
- 13.5 **On adversarial and inquisitorial processes:** In the custom law context, it may be useful for policy makers and courts themselves (where appropriate) to consider whether evidentiary and procedural aspects of the inquisitorial system are useful in dealing with disputes that raise custom law issues.
- 13.6 **On pleadings:** Particularly in cases raising custom law issues, there can be a more relaxed approach to pleadings than that imposed by several state statutes.
- 13.7 **On evidence:** Strict evidential requirements for the proof of Pacific custom law should not be imposed, unless the court is specifically required by statute to impose these requirements.
- 13.8 **On specialist assistance for the court:** Subject to available resources and funding, more consideration should be given to specialist assistance for the courts in cases involving custom law. One option is for the bench itself to be augmented – either by using multi-judge panels at first instance, or by using customary assessors. Another option is to draw on specialist assistance in the context of a proceeding. Such assistance could take the form of expert witnesses, referrals by general courts to customary courts, or submission of amicus briefs from customary authorities. Amicus briefs from human rights institutions and NGOs could also be useful.
- 13.9 **On conflicting customs:** Where there appear to be two or more conflicting customs or there are different views on the meaning of one custom, a useful approach is one that looks for the shared foundation or underlying value and then seeks to derive an appropriate customary rule from that shared foundation.
- 13.10 **On capacity-building for judges:** Induction and training for judges should include training on the importance of custom law in the particular jurisdiction and tools to assist the judge in accessing and understanding custom law.

LEGISLATIVE SUPPORT (CHAPTER 14)

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- 14.1 **On statutory guidance clauses:** Judicial guidance clauses that direct courts to harmonise custom and human rights are preferable to trumping provisions, enabling the contextual application of human rights and avoiding the need to omit certain rights from constitutions.
- 14.2 **On horizontal application of rights:** Custom and human rights can be better synthesised by constitutional or statutory provisions for the horizontal application of human rights, so that they come to apply between individuals, including between customary leaders and their people.

LEGISLATIVE SUPPORT (CHAPTER 14)

- 14.3 **On economic, social and cultural rights:** Custom and human rights can also be better synthesised through greater state recognition of economic, social and cultural rights, so that individual rights are seen in a broader social context.
- 14.4 **On group rights:** Explicit state recognition of group rights could assist in recognising the autonomy and status of customary communities and in balancing individual and group rights.
- 14.5 **On duties and responsibilities:** Custom and human rights can be better synthesised, and greater recognition can be given to Pacific values, by constitutional recognition of the duties and responsibilities of individuals, including duties and responsibilities to customary communities.

PUBLIC REVIEW BODIES (CHAPTER 15)

- 15.1 **On the contribution of other national bodies:** National human rights institutions, ombudsman offices and leadership code bodies could be directed to take account of both custom and human rights and to consider ways in which the two could be harmonised.
- 15.2 **On guidance for customary authorities:** Where customary authorities perform some statutory functions, it may be appropriate to empower ombudsman or leadership code bodies to investigate complaints against such authorities. Where customary authorities operate entirely outside the state system, leadership codes could still act as a guide to good conduct for such authorities.
- 15.3 **On the contribution of law reform commissions:** National law reform commissions may be able to make a greater contribution to the development of custom and human rights law in the Pacific. Consideration could also be given to the establishment of a regional law reform commission, which countries could opt into or contract with as they wish and which would help smaller states have access to a wider range of experience and expertise.

REGIONAL DEVELOPMENTS (CHAPTER 16)

- 16.1 **On the potential contribution of United Nations and donor agencies:** United Nations agencies and government and non-government donors could consider ways of supporting good governance and human rights by building on both customary systems and existing human rights provisions in Pacific Island countries and territories.

ROLE OF NEW ZEALAND

- 17.4 We also put forward a suggestion for consideration by the New Zealand Government in light of our consultations, especially our regional consultation in Nadi in May 2006.
- 17.5 There was a plea for the process not to end with this study paper and strong interest in developing a broader understanding of custom law and identifying its core values. Participants in our consultation workshops were keen to see ongoing dialogue on the issues raised in this paper under the management of a team based in the Pacific Islands. There was a particular interest in developing the understanding of Pacific custom law and in identifying its central values as a prelude to, or accompanying, individual country studies. The Pacific Islands Forum Secretariat or another regional organisation could play a role in facilitating further dialogue.
- 17.6 In New Zealand-based consultations, there was also a strong call by Maori and Pacific Island New Zealanders for further work looking at Maori and Pacific values within New Zealand. This might involve the Human Rights Commission.

COMMISSION SUGGESTIONS

- 17.1 **On further work in the Pacific:** We suggest that the New Zealand Government contributes to continuing dialogue among Pacific people on the issues raised in this paper through its bilateral and regional aid policies and at regional fora. This dialogue is best co-ordinated through a team based in the Pacific, perhaps in association with a regional organisation, with a view to the development of individual country studies and strategies, including study of Pacific peoples in New Zealand.



Appendices



Appendix 1

Terms of Reference

The Commission will review and analyse the interface between custom and human rights in the Pacific,¹ having regard to Pacific values and comparative experience, with a view to a deeper understanding of this aspect of human rights in New Zealand and further development of a Pacific human rights culture.

In particular the Commission will consider:

- The existing human rights landscape in the Pacific. This will involve reviewing existing statutory and other domestic requirements for human rights and custom, international human rights conventions, and domestic case law that has custom and human rights implications.
- The arguments for and against universal human rights and a cultural relativist approach in the Pacific. This will include the relationship between culture, cultural values and human rights, the relationship between group and individual rights, and the concept of duties as a corollary to rights. Ways of harmonising custom and human rights, and the capacity of traditional institutions to do this will be examined through a Pacific lens.
- Potential future developments in terms of human rights in the Pacific. This may include enhancement of traditional institutions and the development of regional mechanisms.

¹ For the purposes of the project, “the Pacific” includes the 16 Members of the Pacific Islands Forum (Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand [including Tokelau], Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu), the three French territories (French Polynesia, New Caledonia, Wallis and Futuna), the three United States territories (American Samoa, Guam, Northern Mariana Islands), Timor Leste and West Papua. It does not include Easter Island Rapa Nui (Chile), Hawai’i (United States) or Pitcairn Island (United Kingdom).

Appendix 2

Pacific Countries and Territories

Country/territory	Political status	Population ^a	Land area (km ²)
American Samoa	United States territory	65,500	199
Australia	Independent	20,090,437	7,617,930
Cook Islands	Self-governing in free association with New Zealand	21,388	240
Federated States of Micronesia	Self-governing in free association with the United States	108,105	705
Fiji Islands	Independent	840,201 ^b	18,333
French Polynesia	Overseas territory of France	270,485	3,660
Guam	United States territory	168,564	549
Kiribati	Independent	103,092	811
Marshall Islands	Self-governing in free association with the United States	56,000	181
Nauru	Independent	13,048	21
New Caledonia	Overseas territory of France	230,268 ^b	18,575
New Zealand	Independent	4,035,461	268,021
Niue	Self-governing in free association with New Zealand	1,761 ^b	261
Northern Mariana Islands	Self-governing in political union with the United States	80,362	459
Palau	Self-governing in free association with the United States	20,600 ^b	458

a Except where indicated otherwise, population figures are July 2005 estimates.

b 2004 figures.

Country/territory	Political status	Population ^a	Land area (km ²)
Papua	Province of Indonesia with special autonomous status	2,233,530 ^c	421,980 ^d
Papua New Guinea	Independent	5,620,000	452,860
Samoa	Independent	180,900 ^b	2,850
Solomon Islands	Independent	521,000 ^b	27,540
Tokelau	New Zealand territory ^e	1,515 ^f	12
Tonga	Independent	101,800 ^b	747
Tuvalu	Independent	11,190 ^b	26
Vanuatu	Independent	213,000 ^b	12,200
Wallis and Futuna	Overseas territory of France	16,025	274
Timor Leste ^g	Independent	1,040,880	15,007

Information on Pacific Island countries and territories (apart from the Indonesian province of Papua) is from “Pacific Almanac” (January–February 2006) *Pacific Magazine* 28–51. It is difficult to get reliable population information for Pacific Island countries and territories – for further information on Pacific Island populations see < <http://www.spc.int/demog/en/index.html> > .

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- a Except where indicated otherwise, population figures are July 2005 estimates.
- b 2004 figures.
- c 2000 census figure: Richard Chauvel *Constructing Papuan Nationalism: History, Ethnicity, and Adaptation* (East-West Center, Washington, 2005) 89, n 2.
- d Brij V Lal and Kate Fortune *The Pacific Islands: An Encyclopedia* (University of Hawai‘i Press, Honolulu, 2000) 580.
- e In February 2006, the people of Tokelau voted in a referendum on whether to become a self-governing territory in free association with New Zealand. Although 60% voted in favour, the two-thirds majority needed to change Tokelau’s political status was not achieved.
- f 2001 census figures.
- g Included for comparative purposes.

Appendix 3

Domestic Human Rights Provisions

The rights provisions below have been abbreviated. For full descriptions of the rights, consult the relevant constitution or statute.

AMERICAN SAMOA

Constitution 1967

Article I – Bill of Rights:

- Freedom of religion, speech, press, assembly, petition s 1
- No deprivation of life, liberty or property without due process s 2
- Protection of Samoan way of life s 3
- Dignity of the individual s 4
- Protection against unreasonable search and seizure s 5
- Rights of an accused s 6
- Habeas corpus s 7
- No obligation to quarter militia s 8
- No imprisonment for debt s 9
- Slavery prohibited s 10
- Protection from retroactive laws and bills of attainder s 13
- Health, safety, morals and general welfare s 14
- Education s 14

Limitations: There are no limitations provisions in the Constitution.

AUSTRALIA

No explicit bill of rights, but some constitutional and statutory provisions. Bill of rights legislation in the Australian Capital Territory and Victoria.

COOK ISLANDS

Cook Islands Constitution Act 1964*Part IVA – Fundamental Human Rights and Freedoms:*

- Non-discrimination s 64(1)
- Right to life, liberty and security of person s 64(1)(a)
- Equality before the law s 64(1)(b)
- Property rights s 64(1)(c)
- Freedom of thought, conscience and religion s 64(1)(d)
- Freedom of speech and expression s 64(1)(e)
- Freedom of peaceful assembly and association s 64(1)(f)
- Due process and fair trial s 65

Limitations: Section 64(2) Cook Islands Constitution Act 1964: “It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands.”

FEDERATED STATES OF MICRONESIA

Constitution 1978*Article IV – Declaration of Rights:*

- Freedom of expression, peaceful assembly, association or petition s 1
- Freedom of religion s 2
- Right to life, liberty and security of person s 3
- Equality before the law and non-discrimination s 4
- Right to privacy and security of the person s 5
- Due process and fair trial ss 6, 7, 8, 11, 13
- Prohibition of capital punishment s 9
- Prohibition of slavery and involuntary servitude s 10
- Right to free movement s 12

Article V – Traditional Rights:

- Preservation of the role of a traditional leader as recognised by custom s 1

Limitations: No general limitations clause, except for Article V(2):

“The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV [the declaration of rights], protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action.”

Constitution 1997*Chapter 4 – Bill of Rights:*

- Application of rights s 21
- Right to life s 22
- Right to liberty s 23
- Freedom from servitude and forced labour s 24
- Freedom from cruel or degrading treatment s 25
- Freedom from unreasonable search and seizure s 26
- Due process and fair trial ss 27, 28 and 29
- Freedom of expression s 30
- Freedom of assembly s 31
- Freedom of association s 32
- Workers' and employers' rights s 33
- Freedom of movement s 34
- Freedom of religion and belief s 35
- Universal suffrage s 36
- Right to privacy s 37
- Equality before the law and non-discrimination s 38
- Right to education s 39
- Protection from unjust deprivation of property, and just compensation s 40
- Enforcement provisions s 41
- Establishment of Human Rights Commission s 42
- Interpretation, including having regard to public international law s 43

Chapter 5 – Social Justice:

- Affirmative action/special measures programs for disadvantaged groups s 44

Limitations: No general limitations clause, but many of the individual rights contain a common generic limitation as follows:

"A law may limit, or may authorise the limitation of, the right to XX: (a) in the interests of national security, public safety, public order, public morality or public health; (b) for the purpose of protecting the rights and freedoms of others; or (c) for the purpose of imposing reasonable restrictions on the holders of public offices in order to secure their impartial service; but only to the extent that the limitation is reasonable and justifiable in a free and democratic society."

The right to equality (s 38) may be limited for certain purposes relating to the application of Fijian, Rotuman or Banaban custom.

FRANCE (applicable in French Polynesia, New Caledonia and Wallis and Futuna)

No explicit Bill of Rights. Protections drawn from **Declaration of the Rights of Man and the Citizen 1789, Preamble to Constitution 1946 and Constitution 1958:**

- Liberty, property, security and resistance to oppression (art 2, 1789 Declaration)
- The right not to be accused, arrested, or imprisoned except as prescribed by law (art 7, 1789 Declaration)
- Innocence until declared guilty (art 9, 1789 Declaration)
- Free communication of ideas and opinions (art 11, 1789 Declaration)
- No distinction on the grounds of race, religion or belief (preamble, 1946 Constitution)
- Equal rights between men and women (preamble, 1946 Constitution)
- Right to work and find employment (preamble, 1946 Constitution)
- Right to belong to a trade union (preamble, 1946 Constitution)
- Right to strike according to the law (preamble, 1946 Constitution)
- Right to development (preamble, 1946 Constitution)
- Protection of health and security (preamble, 1946 Constitution)
- Access to education (preamble, 1946 Constitution)
- Universal, equal and confidential suffrage (art 3, 1958 Constitution)

Some rights are provided for in the codes:

- Respect for private life (art 9, Civil Code)
- Presumption of innocence (art 9-1, Civil Code)
- Inviolability of the person (art 16-1, Civil Code)
- Presumption of innocence (Preliminary article, Code of Criminal Procedure)
- General fair trial rights (Preliminary article, Code of Criminal Procedure)
- Right to be interrogated in front of a lawyer (art 114, Code of Criminal Procedure)

Limitations: There is no standard limitations provision in constitutional documents, but the 1789 Declaration states that the exercise of rights is limited to the extent necessary to preserve the rights of others, with such limits to be determined by law (art 4).

Organic Act 1950

Subchapter 1, 1421b – Bill of Rights:

- Freedom of religion, speech, press, assembly, petition (a)
- No obligation to quarter militia (b)
- Protection from unreasonable search and seizure (c)
- Protection from double jeopardy (d)
- No deprivation of life, liberty or property without due process (e)
- Compensation for taking of private property (f)
- Rights of an accused (g)
- Protection from cruel and unusual punishment (h)
- Slavery prohibited (i)
- Protection from retroactive laws and bills of attainder (j)
- No imprisonment for debt (k)
- Habeas corpus (l)
- Voting rights (m)
- Equality before the law and non-discrimination (n)
- No child labour (q)
- Right to education (r)

Limitations: There are no limitations provisions in the Guam Bill of Rights.

US Bill of Rights

Rights are located in individual amendments to the US Constitution. The rights listed are those applicable in Guam:

- Freedom of religion, speech, press, assembly, petition (1st)
- Right to bear arms (2nd)
- No obligation to house soldiers (3rd)
- Warrant required for search or arrest (4th)
- Rights in criminal cases (5th)
- Rights to a fair trial (6th)
- Rights in civil cases (7th)
- Bails, fines and punishments (8th)
- Rights retained by the people (9th)
- Abolition of slavery (13th)
- Protection of privileges and immunities of citizens from abridgement by an individual state (14th, s 1)
- No deprivation of life, liberty or property without due process (14th, s 1)
- Equal protection of the law (14th, s 1)
- Suffrage regardless of race, colour or previous condition of servitude (15th)
- Suffrage regardless of sex (19th)

KIRIBATI

Constitution 1979*Chapter II – Protection of Fundamental Rights and Freedoms of the Individual:*

- Right to life s 4
- Right to liberty s 5
- Protection from slavery and forced labour s 6
- Protection from inhuman treatment s 7
- Protection from deprivation of property s 8
- Protection for privacy of home and other property s 9
- Due process and fair trial s 10
- Freedom of conscience s 11
- Freedom of expression s 12
- Freedom of assembly and association s 13
- Freedom of movement s 14
- Non-discrimination s 15

Limitations: Section 3 of the Kiribati Constitution provides that the fundamental rights and freedoms are “subject to respect for the rights and freedoms of others and for the public interest” and “subject to such limitations on that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.” Individual rights contain specific limitations, and any laws made in accordance with these limitations must be “reasonably justifiable in a democratic society”.

MARSHALL ISLANDS

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Constitution 1978*Article II – Bill of Rights:*

- Freedom of thought, speech, press, religion, assembly, association and petition s 1
- Freedom from slavery and involuntary servitude s 2
- Freedom from unreasonable search and seizure s 3
- Due process and fair trial s 4
- Just compensation s 5
- Freedom from cruel and unusual punishment s 6
- Habeas corpus s 7
- Protection from retroactive laws and bills of attainder s 8
- No obligation to quarter soldiers s 9
- No imprisonment for debts s 10
- Conscription and conscientious objection s 11
- Equality before the law and non-discrimination s 12

- Personal autonomy and privacy s 13
- Access to judicial and electoral processes s 14
- Health, education and legal services s 15
- Ethical government s 16
- Enforcement provisions s 18

Limitations: No general limitations clause. Reasonable restrictions may be imposed by law on freedom of thought, speech, press, religion, assembly, association and petition as to the time, place or manner of conduct, providing: “(a) the restrictions are necessary to preserve public peace, order, health, or security or the rights or freedoms of others; (b) there exist no less restrictive means of doing so; and (c) the restrictions do not penalize conduct on the basis of disagreement with the ideas or beliefs expressed”, art II, s 1(2).

Article X, s 1, provides that the rights guaranteed in Article II do not invalidate customary law or traditional practice concerning land tenure.

NAURU

Constitution 1968

Part II – Protection of Fundamental Rights and Freedoms:

- Right to life s 4
- Personal liberty s 5
- Protection from forced labour s 6
- Protection from inhuman treatment s 7
- Protection from deprivation of property s 8
- Protection of person and property s 9
- Due process and fair trial s 10
- Freedom of conscience s 11
- Freedom of expression s 12
- Freedom of assembly and association s 13
- Enforcement provisions s 14

Limitations: Section 3 of the Nauru Constitution provides that the fundamental rights and freedoms are “subject to respect for the rights and freedoms of others and for the public interest” and “subject to such limitations on that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.” Individual rights contain specific limitations.

NEW ZEALAND

No constitutional provisions.

New Zealand Bill of Rights Act 1990

- Right not to be deprived of life s 8
- Right not to be subjected to torture or cruel treatment s 9
- Right not to be subjected to medical or scientific experimentation s 10
- Right to refuse to undergo medical treatment s 11
- Electoral rights s 12
- Freedom of thought, conscience and religion s 13
- Freedom of expression s 14
- Manifestation of religion and belief s 15
- Freedom of peaceful assembly s 16
- Freedom of association s 17
- Freedom of movement s 18
- Freedom from discrimination s 19
- Rights of minorities s 20
- Security against unreasonable search and seizure s 21
- Liberty of the person s 22
- Rights of persons arrested or detained s 23
- Rights of persons charged s 24
- Minimum standards of criminal procedure s 25
- Protection from retroactive penalties and double jeopardy s 26
- Right to natural justice s 27

Limitations: Section 5 of the New Zealand Bill of Rights Act 1990 provides that “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

NIUE

No constitutional bill of rights, but the law of Niue includes several United Kingdom statutes which were part of New Zealand law when the Niue Act 1966 was passed. These include the Magna Carta, the Bill of Rights 1688 and Habeus Corpus Acts.

NORTHERN MARIANA ISLANDS

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Constitution 1977

Article I – Personal Rights:

- Protection from retroactive laws and bills of attainder s 1
- Traditional art of healing s 1
- Freedom of religion, speech, press and assembly s 2

- Security against unreasonable search and seizure s 3
- Rights of an accused s 4
- Due process s 5
- Equal protection of the law s 6
- No obligation to quarter soldiers s 7
- Trial by jury s 8
- Clean and healthful environment s 9
- Privacy s 10
- Rights of victims of crime s 11
- Prohibition of abortion s 12

Limitations: There are no limitations provisions in the Northern Mariana Islands Constitution

US Bill of Rights

Rights are located in individual amendments to the US Constitution. The rights listed are those applicable in the Northern Mariana Islands:

- Freedom of religion, speech, press, assembly, petition (1st)
- Right to bear arms (2nd)
- No obligation to house soldiers (3rd)
- Warrant required for search or arrest (4th)
- Rights in criminal cases (5th)
- Rights to a fair trial (6th)
- Rights in civil cases (7th)
- Bails, fines and punishments (8th)
- Rights retained by the people (9th)
- Abolition of slavery (13th)
- Protection of privileges and immunities of citizens from abridgement by an individual state (14th, s 1)
- No deprivation of life, liberty or property without due process (14th, s 1)
- Equal protection of the law (14th, s 1)
- Suffrage regardless of race, colour or previous condition of servitude (15th)
- Suffrage regardless of sex (19th)
- Suffrage starting at age 18 (26th)

Constitution 1979

Article IV – Fundamental Rights:

- Freedom of conscience and religion s 1
- Freedom of expression s 2
- Freedom of assembly and petition s 3
- Security of person and property s 4
- Equality before the law and freedom from discrimination s 5

- Right to life, liberty and property s 6
- Just compensation s 6
- Protection from retroactive penalties and double jeopardy s 6
- No imprisonment for debt s 6
- Warrant required for search or seizure s 6
- Right to a fair trial s 7
- Compensation for victims of criminal offences s 8
- Freedom of movement s 9
- Freedom from torture, cruel, inhuman or degrading treatment or punishment and from excessive fines s 10
- Prohibition of slavery and protection of children s 11
- Right to examine any government document s 12
- Marital and parental rights and responsibilities on the basis of equality between the sexes s 13

Article V – Traditional Rights:

- Protection of the role of a traditional leader as recognised by custom s 1
- Statutes and traditional law equally authoritative; statutes to prevail only to the extent that they are not in conflict with underlying principles of traditional law s 2

Article VII – Suffrage:

- Citizens aged 18 or over may vote

Limitations: There are no limitations provisions in the Constitution.

PAPUA

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Constitution of Indonesia 1945

Chapter X – Citizens and Inhabitants:

- Equality before the law arts 27(1) and 28D(1)
- Right to work and right to dignity art 27(2)
- Right and duty to participate in the defence of the nation art 27(3)
- Right to life art 28A
- Right to family and marriage art 28B(1)
- Children’s rights art 28B(2)
- Right to education and development art 28C
- Right to work art 28D(2)
- Right to citizenship art 28D(4)
- Freedom of religion, belief, expression and association art 28E
- Right to information art 28F
- Freedom from torture art 28G(2)
- Right to physical and spiritual welfare, access to health services, social security and private property art 28H

- Freedom from discrimination art 28I(2)
- Right to cultural identity art 28I(3)
- Right to education art 31

Special Autonomy Law for Papua (OTSUS)

- Rights of the adat community art 43
- Intellectual property rights art 44
- Human rights art 45
- Rights of women art 47
- Freedom of religion arts 53 and 54
- Right to education art 56
- Right to health art 59
- Right to choose occupation art 62

Limitations: The Indonesian Constitution (art 28J) provides that each person is obliged to respect the human rights of others, and that the enjoyment of rights and freedoms is subject to the limits determined by law to protect the rights of others and fulfil the requirements of justice, taking into consideration morality, religious values, security and public order in a democratic community.

PAPUA NEW GUINEA

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Constitution 1975

Part III, Division 3 – Basic Rights:

- Right to freedom s 32
- Right to life s 35
- Freedom from inhuman treatment s 36
- Due process and fair trial s 37
- Liberty of the person s 42
- Freedom from forced labour s 43
- Freedom from arbitrary search and entry s 44
- Freedom of conscience, thought and religion s 45
- Freedom of expression s 46
- Freedom of assembly and association s 47
- Freedom of employment s 48
- Right to privacy s 49
- Right to vote s 50
- Freedom of information s 51
- Freedom of movement s 52
- Protection from unjust deprivation of property s 53
- Equality s 55
- Enforcement provisions s 57

Limitations: Sections 38 and 39 of the PNG Constitution provide that the qualified rights (those in ss 42-56 of the Constitution) may be limited by a law that is necessary to give effect to the public interest in defence, public safety, public order, public welfare, public health, the protection of children and persons under disability, or the development of under-privileged or less advanced groups or areas; or to protect the exercise of the rights and freedoms of others; or to make “reasonable provision for cases where the exercise of one such right may conflict with the exercise of another”, to the extent that such a law is “reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.” The rights in ss 50-56 apply only to citizens.

SAMOA

Constitution 1962*Part II – Fundamental Rights:*

- Enforcement provisions s 4
- Right to life s 5
- Freedom from inhuman treatment s 7
- Freedom from forced labour s 8
- Due process and fair trial ss 9, 10
- Freedom of religion ss 11, 12
- Freedom of speech, assembly, association, movement and residence s 13
- Rights regarding property s 14
- Equality before the law and non-discrimination s 15

Limitations: No general limitations clause, but individual rights contain specific limitations.

SOLOMON ISLANDS

> Continued next Page

Constitution 1978*Chapter II – Protection of Fundamental Rights and Freedoms of the Individual:*

- Right to life s 4
- Right to personal liberty s 5
- Protection from slavery and forced labour s 6
- Protection from inhuman treatment s 7
- Protection from deprivation of property s 8
- Protection for privacy of home and property s 9
- Due process and fair trial s 10
- Freedom of thought and religion s 11
- Freedom of expression s 12
- Freedom of assembly and association s 13
- Freedom of movement s 14

- Non-discrimination s 15
- Enforcement provisions s 18

Limitations: Section 3 of the Solomon Islands Constitution provides that the fundamental rights and freedoms are “subject to respect for the rights and freedoms of others and for the public interest” and “subject to such limitations on that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.” Individual rights contain specific limitations, and any laws made in accordance with these limitations must be “reasonably justifiable in a democratic society”.

TIMOR LESTE

> Continued next Page

Constitution 2002

Part II, Title I – General Principles:

- Universality and equality s 16
- Equality between women and men s 17
- Child protection s 18
- Youth s 19
- Senior citizens s 20
- Disabled citizens s 21
- East Timorese citizens overseas s 22
- Interpretation of fundamental rights s 23
- Access to courts s 26
- Right to resistance and self-defence s 28

Part II, Title II – Personal Rights, Liberties and Guarantees:

- Right to life s 29
- Right to personal freedom, security and integrity s 30
- Right to fair trial s 31
- Limits on sentences and security measures s 32
- Habeas corpus s 33
- Guarantees in criminal proceedings – due process s 34
- Guarantees relating to extradition and expulsion s 35
- Right to honour and privacy s 36
- Inviolability of home and correspondence s 37
- Protection of personal data s 38
- Protection of the family and rights relating to marriage and maternity s 39
- Freedom of speech and information s 40
- Freedom of the press and mass media s 41
- Freedom to assemble and demonstrate s 42
- Freedom of association s 43
- Freedom of movement s 44

- Freedom of conscience, religion and worship s 45
- Right to political participation s 46
- Right to vote s 47
- Right to petition s 48
- Right and duty to contribute to the defence of the country s 49

Part II, Title III – Economic, Social and Cultural Rights and Duties:

- Right to work s 50
- Right to strike and prohibition of lock-out s 51
- Trade union freedom s 52
- Consumer rights s 53
- Right to private property s 54
- Obligations of the taxpayer s 55
- Social security and assistance s 56
- Health s 57
- Housing s 58
- Education and culture s 59
- Intellectual property s 60
- Healthy environment s 61

Limitations: The Constitution provides (s 24) that rights can only be restricted by law in order to safeguard other constitutionally-protected rights or interests, and in cases clearly provided for by the Constitution. Furthermore, such restrictions may not reduce the extent and scope of the essential content of constitutional provisions, and shall not have a retroactive effect. Rights may be suspended during a state of emergency (s 25).

TOKELAU

No constitutional bill of rights, but some statutory provisions.

Draft Constitution of Tokelau (November 2005)

- Individual human rights for all people are those stated in the Universal Declaration of Human Rights, and reflected in the International Covenant on Civil and Political Rights s 16(1)

TONGA

> Continued next Page

Constitution 1875

Part 1 – Declaration of Rights:

- Prohibition of slavery s 2
- Equality before the law s 4
- Freedom of religion s 5
- Freedom of expression s 7
- Freedom of petition s 8

- Habeas Corpus s 9
- Due process and fair trial ss 10, 11, 12, 13, 14, 15

Limitations: No general limitations clause, but some individual rights contain specific limitations.

TUVALU

> Continued next Page

Constitution 1986

Part II – Bill of Rights:

- Right to life s 16
- Personal liberty s 17
- Freedom from slavery and forced labour s 18
- Freedom from inhuman treatment s 19
- Privacy and property rights ss 20, 21
- Due process and fair trial s 22
- Freedom of belief s 23
- Freedom of expression s 24
- Freedom of assembly and association s 25
- Freedom of movement s 26
- Non-discrimination s 27
- Enforcement provisions s 38

Limitations: Individual rights contain particular limitations.

In addition, s 11(2) of the Constitution provides that fundamental rights and freedoms “can, in Tuvaluan society, be exercised only – (a) with respect for the rights and freedoms of others and for the national interest; and (b) in acceptance of Tuvaluan values and culture, and with respect for them.”

Section 15 provides that all laws “must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity.”

Section 29 provides:

“(3) Within Tuvalu, the freedoms of the individual can only be exercised having regard to the rights or feelings of other people, and to the effect on society.

(4) It may therefore be necessary in certain circumstances to regulate or place some restrictions on the exercise of those rights, if their exercise – (a) may be divisive, unsettling or offensive to the people; or (b) may directly threaten Tuvaluan values or culture.”

VANUATU

> Continued next Page

Constitution 1980

Chapter 2 – Fundamental Rights and Duties:

- Right to life s 5(1)(a)
- Right to liberty s 5(1)(b)
- Security of the person s 5(1)(c)

- Protection of the law s 5(1)(d)
- Freedom from inhuman treatment and forced labour s 5(1)(e)
- Freedom of conscience and worship s 5(1)(f)
- Freedom of expression s 5(1)(g)
- Freedom of assembly and association s 5(1)(h)
- Freedom of movement s 5(1)(i)
- Privacy and property rights s 5(1)(j)
- Equality and non-discrimination s 5(1)(k)
- Enforcement provisions s 6

Limitations: Rights are “subject to any restrictions imposed by law on non-citizens” and to “respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health”, Constitution, s 5(1).

Appendix 4

Provisions According General Recognition to Custom Law

AMERICAN SAMOA

Constitution 1967, art I (3): "Policy protective legislation: It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against ... the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry."

American Samoa Code, 1.0202 "The customs of the Samoan people not in conflict with the laws of American Samoa or the laws of the United States concerning American Samoa shall be preserved. The village, country and district councils consisting of the hereditary chiefs and talking chiefs shall retain their own form or forms of meeting together to discuss affairs of the village, county, or district according to their own Samoan customs."

AUSTRALIA

Common law recognition of native title. Some statutory recognition, eg Native Title Act 1993.

COOK ISLANDS

Constitution Act 1964, s 66A(3): "Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any enactment."

Cook Islands Act 1915 (NZ), s 422: "Every title to and interest in customary land shall be determined according to the ancient custom and usage of the natives of the Cook Islands."

FEDERATED STATES OF MICRONESIA

Constitution 1978, art V (2): “The traditions of the people of the Federated States of Micronesia may be protected by statute.”

FSM Code, s 114 “Due recognition shall be given to local customs in providing a system of law, and nothing in this chapter shall be construed to limit or invalidate any part of the existing customary law, except as otherwise provided by law.”

FIJI

Constitution 1997, s 195(2)(e): Preserves all written laws which are not expressly repealed and “all other law”. **Section 186:** “(1) The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with Fijian processes. (2) In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.”

Native Lands Act, s 3: “Native lands shall be held by native Fijians according to native custom as evidenced by usage.”

FRENCH POLYNESIA

Virtually no formal recognition of custom as an independent source of law.

KIRIBATI

Constitution 1979, Preamble; Laws of Kiribati Act 1989, s 4(2): “In addition to the Constitution, the Laws of Kiribati comprise – ... (b) customary law”.

Laws of Kiribati Act 1989, sch 1, para 2: “Customary law shall be recognised and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest.”

MARSHALL ISLANDS

Constitution 1978, art X, ss 1 and 2: “Nothing in Article II shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter”; “it shall be the responsibility of the Nitijela ... to declare, by Act, the customary law in the Marshall Islands.”

NAURU

Custom and Adopted Laws Act 1971, s 3: “The institutions, customs and usages of the Nauruans ... shall be accorded recognition by every court, and have full force and effect of law” to regulate the matters specified in the Act.

NEW CALEDONIA

Constitution 1958 (France), art 75: Indigenous Kanak people who do not have common law civil status can retain their customary status as long as they do not renounce it. Instead of being subject to French law, people of customary status are subject to local or customary rules for matters such as birth, adoption, marriage, death and succession.

Ordinance 82-877 and 85-1185: Recognition that the basis of ownership of reserve lands is customary.

NEW ZEALAND

Common law recognition of aboriginal title and rights. Some statutory recognition, eg Te Ture Whenua Maori Act 1993.

NIUE

Niue Act 1966, s 23: “Every title to and estate or interest in Niuean land shall be determined according to Niuean custom and any Ordinance or other enactment affecting Niuean custom.”

PALAU

Constitution, art V (2): “Statutes and traditional law shall be equally authoritative. In cases of conflict between a statute and a traditional law, the statute shall prevail only to the extent that it is not in conflict with the underlying principles of the traditional law.”

Palau National Code, Title 1, s 302: “The customs of the people of Palau not in conflict with the legal authority set out in section 301 shall be preserved. The recognized customary law of the Republic shall have the full force and effect of law so far as such customary law is not in conflict with such legal authority.”

PAPUA

Special Autonomy Law for Papua (OTSUS), art 43: The government of Papua shall “acknowledge, respect, protect, empower and develop the rights of the adat* community.” Rights to land, where they still exist, are to be exercised “according to the provisions of the local adat* law.”

*“Adat” has a similar meaning to the English term “custom.”

PAPUA NEW GUINEA

Constitution 1975, sch 1.2: “Custom is adopted, and shall be applied and enforced as part of the underlying law.”

Underlying Law Act 2000: Custom is given precedence over the common law. Order of application of laws: Written law, underlying law, customary law, common law.

SAMOA

Constitution 1962, art III (1): “‘Law’ ... includes ... any custom or usage which has acquired the force of law in Samoa ... under the provisions of any Act or under a judgment of a court of competent jurisdiction.”

SOLOMON ISLANDS

Constitution 1978, s 76 and sch 3, para 3: “Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.”

TIMOR LESTE

Constitution, s 2(4): “The State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.”

TOKELAU

Tokelau Amendment Act 1996 (NZ), Preamble, para 4: “Traditional authority in Tokelau is vested in its villages, and the needs of Tokelau at a local level are generally met through the administration of customary practices by elders.”

Tokelau Amendment Act 1967 (NZ), s 20: “The beneficial ownership of Tokelauan land shall be determined in accordance with the customs and usages of the Tokelauan inhabitants of Tokelau.”

TONGA

Although there is some codification of custom in the Tongan Constitution of 1875, there is no express recognition of custom as an independent source of law. There is the possibility of recognition under the common law.

TUVALU

Constitution 1986, Preamble; Laws of Tuvalu Act 1987, s 4(2): "In addition to the Constitution, the Laws of Tuvalu comprise – ... (b) customary law".

Laws of Tuvalu Act 1987, sch 1, para 2: "customary law shall be recognised and enforced by, and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest."

VANUATU

Constitution 1980, art 47(1): "If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom."

Article 93(3): "Customary law shall continue to have effect as a part of the law of the Republic."

WALLIS AND FUTUNA

Territorial Statute 1961 (law 61-814), cl 2: The indigenous people of Wallis and Futuna who have not expressly renounced their particular civil law status (that is, customary status) are allowed to retain it. Instead of being subject to French law, people of customary status are subject to local or customary rules for matters such as birth, adoption, marriage, death and succession.

Virtually all land is owned on a customary basis.

Sources: Jennifer Corrin Care "Conflict between Customary Law and Human Rights in the South Pacific" < <http://www.lexisnexis.com.my> > ; Michael A Ntuny (ed) *South Pacific Islands Legal Systems* (University of Hawaii Press, Honolulu, 1993).

Appendix 5

Ratification of International Human Rights Treaties in the Pacific

Country	ICESCR	ICCPR	CERD	CEDAW	CAT	CRC	CMW
Australia	10 Dec 75	13 Aug 80	30 Sep 75	28 Jul 83	8 Aug 89	17 Dec 90	
Cook Islands	28 Dec 78 (5)	28 Dec 78 (5)	22 Nov 72 (5)	11 Aug 06 a		6 Jun 97 a	
Federated States of Micronesia				1 Sep 04		5 May 93 a	
Fiji			11 Jan 73 d	28 Aug 95 a		13 Aug 93	
France (1)	4 Nov 80	4 Nov 80	28 Jul 71	14 Dec 83	18 Feb 86	7 Aug 90	
Indonesia (2)	23 Feb 06	23 Feb 06	25 Jun 99	13 Sep 84	28 Oct 98	5 Sep 90	22 Sep 04 s
Kiribati				17 Mar 04 a		11 Dec 95 a	
Marshall Islands				2 Mar 06		4 Oct 93	
Nauru		12 Nov 01 s	12 Nov 01 s		12 Nov 01 s	27 Jul 94 a	
New Zealand (3)	28 Dec 78	28 Dec 78	22 Nov 72	10 Jan 85	10 Dec 89	06 Apr 93	
Niue	28 Dec 78 (5)	28 Dec 78 (5)	22 Nov 72 (5)	10 Jan 85 (6)		20 Dec 95 a	
Palau						4 Aug 95 a	
Papua New Guinea			27 Jan 82 a	12 Jan 95 a		1 Mar 93	
Samoa				25 Sep 92 a		29 Nov 94	
Solomon Islands	17 Mar 82 d		17 Mar 82 d	06 May 02 a		10 Apr 95 a	
Timor Leste	16 Apr 03 a	18 Sep 03 a	16 Apr 03 a	16 Apr 03 a	16 Apr 03 a	16 Apr 03 a	30 Jan 04 a
Tonga			16 Feb 72 a			6 Nov 95 a	
Tuvalu				6 Oct 99 a		22 Sep 95 a	
United States of America (4)	5 Oct 77 s	8 Jun 92	21 Oct 94	17 Jul 80 s	21 Oct 94	16 Feb 95 s	
Vanuatu				8 Sep 95 a		7 Jul 93	

ICESCR International Covenant on Economic, Social and Cultural Rights
ICCPR International Covenant on Civil and Political Rights
CERD Convention on the Elimination of All Forms of Racial Discrimination
CEDAW Convention on the Elimination of All Forms of Discrimination against Women
CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC Convention on the Rights of the Child
CMW Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Key: a – accession d – succession s – signature only

Notes:

- (1) France includes the territories of French Polynesia, New Caledonia and Wallis and Futuna.
- (2) Indonesia includes the province of Papua.
- (3) New Zealand ratification of all of these treaties, except CRC, extends to the territory of Tokelau.
- (4) The United States includes the territories of American Samoa, Guam and the Northern Mariana Islands.
- (5) The Cook Islands and Niue are parties to these treaties by virtue of New Zealand's ratification.
- (6) The instrument of ratification indicates that it is extended to the Cook Islands and Niue in accordance with their special relationship with New Zealand.

Sources: < <http://untreaty.un.org> > < <http://www.bayefsky.com> > and New Zealand Ministry of Foreign Affairs and Trade advice.

Appendix 6

Monitoring Human Rights

TREATY BODIES 1 The seven major human rights treaties are each associated with a treaty body of independent experts who have the task of monitoring the implementation of treaty obligations.¹ The treaty bodies meet periodically throughout the year, and fulfil their monitoring function through one or more of the following methods:

- State reporting: All states that are parties to a treaty are required to produce reports on the compliance of domestic standards and practices with treaty rights. These reports are reviewed by the treaty bodies, normally in the presence of state representatives. Concluding observations, commenting on the adequacy of state compliance with treaty obligations, are issued by the treaty bodies following the review.
- Individual complaints: Four of the seven treaties (ICCPR, CERD, CAT and CEDAW) have a procedure whereby individuals may complain of violations of their rights under the treaty, provided the state concerned has agreed that this procedure applies to it. An example of such a complaint is *Hopu and Bessert v France*,² in which the Tahitian traditional land owners contested the grant of land to a hotel company on the basis that the land comprised their fishing grounds and a pre-European burial site. The Human Rights Committee upheld the complaint on the grounds that there was an arbitrary interference with the landowners' privacy and family life, in that their relationship to their ancestors was an important part of their identity. There have also been complaints against New Zealand in relation to Maori fishing rights and against Australia regarding consideration of Aboriginality in awarding child custody.³

1 The treaty bodies are the Human Rights Committee (ICCPR); the Committee on Economic, Social and Cultural Rights (ICESCR); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination against Women (CEDAW); the Committee against Torture (CAT); the Committee on the Rights of the Child (CRC); and the Committee on Migrant Workers (CMW).

2 Human Rights Committee "*Francis Hopu and Tepoaitu Bessert v France*, Communication No 549/1993" (29 December 1997) CCPR/C/60/D/549/1993/Rev.1.

3 Human Rights Committee "*Apirana Mahuika et al v New Zealand*, Communication No 547/1993" (27 October 2000) CCPR/C/70/D/547/1993; Human Rights Committee "*X' v Australia*, Communication No 557/1993" (16 July 1996) CCPR/C/57/D/557/1993.

- Inquiry procedure: CAT and CEDAW provide for an inquiry procedure whereby missions may be sent to states that are parties to the treaties to investigate concerns about systemic violations of treaty rights, provided the state concerned has recognised the competence of the relevant committee in this regard.
- State-to-State complaints: Four of the seven treaties (ICCPR, CERD, CAT and CMW) contain provisions allowing one state to complain to the treaty body about alleged violations by another. This procedure has never been used.
- General comments or recommendations: Each treaty body contributes to the development and understanding of international human rights standards through the process of writing general comments or recommendations.

NEW UN HUMAN RIGHTS COUNCIL

- 2 In April 2006, a new Human Rights Council was formed to replace the Commission on Human Rights.⁴ The UN General Assembly, in establishing the Council, reaffirmed the Vienna Declaration:⁵

[W]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.

- 3 The Council is responsible for promoting universal respect for the protection of human rights, and alongside existing treaty bodies, it will periodically review each state's fulfilment of human rights.

⁴ The Council has 47 member states, including 13 from the Asian bloc, but no Pacific state is represented. Non-member states and national human rights organisations may have observer status. For more information on the Human Rights Council and how it differs from the Commission on Human Rights see Paula Gerber "Human Rights Reform in the United Nations: The Good, the Bad and the Ugly" (2006) 31 *Alternative Law Journal* 88–92; Nazila Ghanea "From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?" (2006) 55 *International Comparative Law Quarterly* 695–705.

⁵ UNGA Resolution 60/251 (15 March 2006).

Appendix 7

List of Consultees

The following list includes people the Law Commission had meetings with in the course of this project (including people who attended consultation workshops in Nadi, Wellington and Auckland), as well as people and organisations who made submissions to the Commission. It has not been possible to also include all those with whom the Commission has had email contact.

Edward Ablett-Hampson (New Zealand)	Chief Justice Barry Connell (Nauru)
Fleur Adcock (New Zealand)	Justice Roger Coventry (Fiji)
Kilali Alailima (Samoa)	Prof Ron Crocombe (Cook Islands)
Sandra Alofivae (New Zealand)	Jone Dakuvula (Fiji)
Alex Amankwah (Australia)	Mark Devereux (New Zealand)
Chief Justice Andon Amaraich (FSM)	Pat Downey (New Zealand)
Sir Arnold Amet (Papua New Guinea)	ECPAT New Zealand (End Child Prostitution, Child Pornography, Child Sex Tourism and Trafficking in Children for Sexual Purposes)
Rev Asora Aмоса (New Zealand)	Tingika Elikana (Cook Islands)
Kylie Anderson (Fiji)	Judge A'e'au Semi Epati (New Zealand)
Prof Tony Angelo (New Zealand)	Sue Farran (United Kingdom)
Chief Magistrate David Balram (Fiji)	Chief Justice Daniel Fatiaki (Fiji)
Kahungunu Barron-Afeaki (New Zealand)	Ranmali Fernando (New Zealand)
Suki Beavers (UNDP, Fiji)	Marie-Noelle Ferrieux-Patterson (Vanuatu)
Sandra Bernklau (Fiji)	Magistrate Vaha'i Foliaki (Tonga)
Carmen Bigler (Marshall Islands)	Andie Fong Toy (Fiji)
Betty Blake (Tonga)	Jolyon Ford (United Kingdom)
Jeannette Bolenga (Vanuatu/Fiji)	Chief Justice Anthony Ford (Tonga)
Judge Peter Boshier (New Zealand)	Miranda Forsyth (Vanuatu)
Petra Butler (New Zealand)	Joel Fotu (New Zealand)
Iain Byrne (United Kingdom)	Joseph Foukona (Solomon Islands/Vanuatu)
Shane Cave (New Zealand)	Judge Caren Fox (New Zealand)
Leonard Chan (Fiji/New Zealand)	Prof Alex Frame (New Zealand)
Claire Charters (New Zealand)	
Commonwealth Secretariat (United Kingdom)	

Selwyn Garu (Vanuatu)

David Gegeo (New Zealand)

Lionel Gibson (Fiji)

Michael Goldsmith (New Zealand)

Angela Gris (New Zealand)

Amon Gwero (Vanuatu)

Anthony Haas (New Zealand)

Terry Hagan (Cook Islands)

Donna Hall (New Zealand)

Bill Hamilton (New Zealand)

Susan Healy (New Zealand)

Manuka Henare (New Zealand)

Belynda Himiona (New Zealand)

Chief Justice Heta Kenneth Hingston
(New Zealand /Niue)

Pat Howley (Papua New Guinea)

Elise Huffer (Fiji)

Prof Bob Hughes (Vanuatu)

Samantha Hung (Fiji)

David Irwin (New Zealand)

Imrana Jalal (Fiji)

Frances Joychild (New Zealand)

Rae Julian (New Zealand)

Justice Frank Kabui (Solomon Islands)

Chief Justice Sir Mari Kapi
(Papua New Guinea)

Glenys Karran (New Zealand)

Alisi Katoanga (New Zealand)

Sir Kenneth Keith (New Zealand)

Rev Robert Kereopa (New Zealand)

Tagaloa Tuala Don Kerslake (Samoa)

Javed Khan (New Zealand)

Pefi Kingi (New Zealand)

Kristina Kirk (New Zealand)

Thane Oke Kyaw-Myint (UNICEF, Fiji)

Andrew Ladley (New Zealand)

Sai Lealea (New Zealand)

Joy Liddicoat (New Zealand)

Jenny Ligo (Vanuatu)

Chief Justice Vincent Lunabek
(Vanuatu)

Prof Cluny Macpherson (New Zealand)

Agathe Malsungai (Vanuatu)

Linita Manu'atu (New Zealand)

Gabrielle Maxwell (New Zealand)

Tina McNicholas (New Zealand)

Aroha Mead (New Zealand)

Chief Justice Robin Millhouse (Kiribati)

Magistrate Lines Moleen (Vanuatu)

Viran Molisa (Vanuatu)

John Momis (Bougainville)

Richard Moss (New Zealand)

Kavita Naidu (Fiji)

Prof Vijay Naidu (Fiji /New Zealand)

HE Bernard Narokobi
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Carol Nelson (New Zealand)

Prof Karen Nero (New Zealand)

Cath Nesus (New Zealand)

**New Zealand Agency for International
Development** (NZAID)

New Zealand Baha'i community

**New Zealand Human Rights
Commission**

**New Zealand Ministry of Foreign
Affairs and Trade** (MFAT)

New Zealand Ministry of Justice

Bob Newson (New Zealand)

Richard Ngatai (New Zealand)

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Chief Justice Arthur Ngiraklsong
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Douglas Ngwele (Vanuatu)

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Commissioner for Human Rights**
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- Prof Don Paterson** (Vanuatu)
- Fa'amatua'inu Tino Pereira** (New Zealand)
- Maiava Visekota Peteru** (Samoa)
- Diana Pickard** (New Zealand)
- Alexandra Pierard** (New Zealand)
- Guy Powles** (Australia)
- Michael Powles** (New Zealand)
- Justice Mere Pulea** (Fiji)
- Alipate Qetaki** (Fiji)
- Alison Quentin-Baxter** (New Zealand)
- Justice Bruce Robertson** (New Zealand)
- David Robie** (New Zealand)
- David Robinson** (New Zealand)
- Prof Yves-Louis Sage** (French Polynesia)
- Kabini Sanga** (Solomon Islands/New Zealand)
- Chief Justice Patu Falefatu Maka Sapolu** (Samoa)
- Sam Sefuiva** (New Zealand)
- Lopeti Senituli** (Tonga)
- Shaista Shameem** (Fiji)
- Ced Simpson** (New Zealand)
- Suliana Siwatibau** (Fiji)
- Claire Slatter** (Fiji/New Zealand)
- Shennia Spillane** (Australia /Fiji)
- Rebecca Spratt** (New Zealand)
- Tamasailau Sua'ali'i-Sauni** (New Zealand)
- Annette Sykes** (New Zealand)
- Tina Takashy** (FSM)
- HE Sisilia Talagi** (Niue)
- Freda Talao** (Papua New Guinea)
- Aisea Taumoepeau** (Tonga)
- Michael Taurakoto** (Vanuatu)
- Peter Taurakoto** (Vanuatu)
- Kayleen Tavoia** (Vanuatu)
- Te Puni Kokiri** (Ministry of Maori Development) (New Zealand)
- Teresia Teaiwa** (Fiji/New Zealand)
- Fe'iloakitau Kaho Tevi** (Tonga/Fiji)
- Prof Konai Helu Thaman** (Tonga/Fiji)
- Judge Stephane Thibault** (New Caledonia)
- Hillary Toa** (Vanuatu)
- Cama Tuberi** (Fiji)
- Fuimaono Tuiasau** (New Zealand)
- Mele Tuilotolava** (New Zealand)
- Morgan Tuimaleali'ifano** (Samoa/Fiji)
- Beverley Turnbull** (New Zealand)
- UNICEF Pacific** (United Nations Children's Fund) (Fiji)
- Hon Albert Tu'ivanuavou Vaea** (Tonga)
- Ivanica Vodanovich** (New Zealand)
- Justice John von Doussa** (Australia)
- Mosese Waqa** (Fiji/Australia)
- Prof Alan Ward** (Australia)
- Chief Justice Gordon Ward** (Tuvalu/Fiji)
- Charles Wea** (New Caledonia)
- Chief Justice Robin Webster** (Tonga)
- Alastair Wilkinson** (UNESCAP, Fiji)
- Prof David Williams** (New Zealand)
- Piccolo Willoughby** (Fiji)
- Steven Winduo** (Papua New Guinea/New Zealand)
- Prof Adrien Wing** (United States of America)
- Tom Woods** (New Zealand/Solomon Islands)
- Rev Akuila Yabaki** (Fiji)

Appendix 8

Acronyms

ADR	Alternative Dispute Resolution
APF	Asia Pacific Forum of National Human Rights Institutions
AusAID	Australian Agency for International Development
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
DDRIP	Draft Declaration on the Rights of Indigenous Peoples
ECHR	European Court of Human Rights
ECPAT	End Child Prostitution, Child Pornography, Child Sex Tourism and Trafficking in Children for Sexual Purposes
FSM	Federated States of Micronesia
FSPI	Foundation of the Peoples of the South Pacific International
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LAWASIA	Law Association for Asia and the Pacific
MFAT	Ministry of Foreign Affairs and Trade (New Zealand)
NGO	Non Government Organisation

NHRI	National Human Rights Institution
NZAID	New Zealand Agency for International Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PIF	Pacific Islands Forum
PJDP	Pacific Judicial Development Program
PNG	Papua New Guinea
RRRT	Pacific Regional Rights Resource Team
SPC	Secretariat of the Pacific Community
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNESCO	United Nations Educational Scientific and Cultural Organisation
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
USP	University of the South Pacific

Appendix 9

Glossary

The meaning of words and phrases as they are used in this Study Paper.

Accession: (In relation to international human rights treaties) The process of assenting or agreeing to a treaty. Often treaties must be signed (see **signature**) by states within a limited period of time, but states that do not sign within this period may later accede to the treaty. The treaty then becomes binding on the state.

Ad hoc: For a particular purpose, case by case, not consistent.

Appellate court: A court that can hear appeals from a lower court.

Bench: Judges and magistrates collectively.

Big man: Male customary leader whose position is acquired through possession of particular qualities or skills (Melanesia).

Bose Levu Vakaturaga: Great Council of Chiefs (Fiji).

Bride price: Modern term for customary exchange practices on betrothal and marriage.

Civil and political rights: Rights of liberty or rights that require the state to refrain from certain actions against individuals (for example, the rights to freedom of expression and belief). See also **economic, social and cultural rights**.

Civil law: Law relating to private interests including infringement of someone's rights, as distinct from criminal law. (Note: this meaning is different from "civil law" as a type of legal system, defined below.)

Civil law system: A type of legal system in which the law is spelled out in statutory codes, in contrast to the **common law** system.

Civil society: Sectors of society not part of government or business, including non-government organisations, trade unions and churches.

Common law: Law developed over the years by judges, through binding principles derived from the facts of particular cases, as distinct from statute law.

Community justice bodies: Bodies for maintaining order and resolving disputes at the community level.

Constitution: The primary legal document of a state, which prevails over statutes and other forms of law.

Culture: Those things that manifest a people's way of life (including custom law and other forms of law).

Custom: What people of a particular cultural community habitually do.

Custom law: System of law, subject to change, comprising the values, norms and practices accepted as appropriate by members of a cultural community.

Customary international law: Practice which is consistently followed by states from a sense of obligation, such that the practice becomes a legally-binding rule.

Due process: The conduct of proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a competent authority.

Economic, social and cultural rights: Rights that require positive action by the state to ensure the provision of goods and services necessary for the enjoyment of these rights (for example, rights to health and education). See also **civil and political rights**.

Entry into force: An international human rights treaty is said to enter into force when a certain number of states have ratified or acceded to it (the number required will be set down in the treaty itself). The treaty then becomes enforceable against the states that are parties to it.

Falekaupule: Island council (Tuvalu).

Fono: Assembly or council (Samoan and some other Polynesian languages). In this study paper, the term is used mainly with reference to the village council of **matai** in Samoa.

Gender: The social roles of men and women, as distinct from their biological sex.

Globalisation: Increasing integration of countries with the wider world, such as through trade and migration.

Good governance: The exercise of economic, political and administrative authority to manage a country's affairs in a participatory, transparent and accountable manner.¹

Human rights: Rights considered to be inherent in persons by virtue of their humanity.

Ifoga: A ceremony of apology for a wrong, involving families or communities rather than individuals (Samoa).

¹ Adapted from definition on NZAID website <<http://www.nzaid.govt.nz>> (accessed 11 September 2006).

i-Kiribati: People indigenous to Kiribati.

Indigenous: People descended from the original inhabitants of a particular place or country.

Indo-Fijian: A person from Fiji of Indian ancestry.

Jurisprudence: The philosophy of law. This can vary from country to country; for example, Pacific jurisprudence would refer to a philosophy of law giving effect to Pacific values.

Justiciable: (Of rights or duties) Able to be enforced in the courts. (Also **non-justiciable**, not able to be enforced in the courts.)

Kastom: Custom (Melanesian pidgin).

Malvatumauri: National Council of Chiefs (Vanuatu).

Mana: Personal power or standing (New Zealand Maori and other Pacific languages).

Matai: Customary leaders who hold a title as representatives of their extended family (Samoa).

Natural justice: Minimum standards for the fair conduct of a hearing or decision-making process. For example, decision-maker(s) must be impartial and have no interest in the outcome of the decision, and must give all parties an opportunity to be heard.

ni-Vanuatu: People indigenous to Vanuatu.

Non-justiciable: See **justiciable**.

Norms: Standards of expected behaviour, arising from a community's values.

Pacific (countries and territories): All Pacific Island countries and territories plus Australia and New Zealand are included in the terms "the Pacific" and "Pacific countries and territories".

Pacific Island countries and territories: The Pacific Islands collectively, excluding Australia and New Zealand, are referred to as "Pacific Island countries and territories".

Pacific Plan: A plan for strengthening regional cooperation and integration, endorsed by leaders of the Pacific Islands Forum in 2005.

Practices: Those things habitually done to give effect to values.

Ratification: (In relation to international human rights treaties) Formal confirmation by a state that it is bound by a treaty. For example, a treaty may be ratified once legislation required to give effect to it has been enacted. Ratification follows **signature**.

Remedy: The legal means of enforcing a right, or preventing or redressing a wrong.

Reservation: (In relation to international human rights treaties) A statement made by a state that is a party to a treaty, to the effect that certain provisions of the treaty do not apply to that state.

Restorative justice: A community process whereby all those who have been affected by a particular harm are brought together to discuss the effects of the harm, how the harm might be remedied, and how relationships between people can be restored.

Rules: Codes of behaviour (written or unwritten) that are strictly insisted upon, and that may or may not be part of law.

Signature: (In relation to international human rights treaties) An indication by a state that it intends to become a party to a treaty in the future. A state that has signed but not ratified a treaty is not bound by it, but should do nothing which would frustrate the object of the treaty.

State-made law: Law made by the organs of the state including the constitution, statutes and common law. State-made law is distinct from **custom law**, though it may give recognition to custom law.

Statute: A law passed by a legislature; the body of law contained in legislation as distinct from **common law**.

Succession: (Of international human rights treaties) When one state takes over from another and takes on the treaty obligations of its predecessor. Thus, some Pacific Island countries have become parties to human rights treaties at independence by succeeding to treaty commitments made by the former colonial power.

Tapu: Set apart under ritual restriction (New Zealand Maori; related terms exist in other Pacific languages).²

Taupulega: Village council (Tokelau).

Tradition: Practices and beliefs seen as having come from a community's ancestors.

Values: A community's underlying beliefs about what is good and right.

² Definition from Joan Metge *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) 85.

Appendix 10

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This bibliography includes sources referred to in the footnotes as well as other useful sources. There are three categories: material about the Pacific generally; relevant material not specifically concerned with the Pacific; and material about particular Pacific countries.

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Pacific Islands Legal Information Institute (PACLI) website < <http://www.pacii.org> > is an invaluable source of information about Pacific Island legal systems. Many cases are available on the site, together with other useful documents.

Journal of South Pacific Law is an electronic journal produced by the School of Law at the University of the South Pacific. Articles from the journal have been located on two different websites, and this is reflected in the footnotes for this study paper. However, all articles from 1997 onwards have now been brought together on one site at < <http://www.pacii.org/journals/fJSPL/index.shtml> > .

Pacific Plan website < <http://www.pacificplan.org> > is a useful source of information and documents concerning the Pacific Plan and Pacific regional integration.

Secretariat of the Pacific Community (SPC) website < <http://www.spc.int> > includes much useful information on the land, sea and peoples of the Pacific, including Pacific cultures, demography, and the position of women and youth.

Radio series: Two ABC Radio Australia series on the Pacific have excellent websites with full transcripts and other source material. These series are a valuable source for the views of Pacific people about key issues facing their countries and the region:

- “Time to Talk”, a series about politics, society and governance in today’s Pacific: < <http://abc.net.au/timetotalk/default.htm> >
- “Carving Out”, a series about development in the Pacific: < <http://www.abc.net.au/ra/carvingout> >

Pacific news: We have relied on the following websites for up-to-date news about the Pacific:

- Radio New Zealand International < <http://www.rnzi.com> >
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