

IS LEGAL PLURALISM AN OBSTACLE TO HUMAN RIGHTS? CONSIDERATIONS FROM THE SOUTH PACIFIC

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Introduction

The historical development of many Pacific Island states has resulted in plural legal systems which combine one or more legal traditions. While it would no longer be accurate to suggest that these are totally independent of each other often they appear to run in parallel lines. It is also no longer entirely accurate to suggest that there is a clear distinction between those systems of laws which are indigenous or those that are introduced, as the process of legal evolution since independence has seen the development of national law and legal institutions which draw on both.¹ While legal pluralism may have many positive advantages because it can offer a variety of possible approaches and legal solutions to particular issues, that diversity may also have disadvantages. In particular where rights and obligations may be determined by both official and unofficial law, differences of approach and priority may mean that such rights and obligations fail to be sufficiently enforced or protected because conflict rather than coherence serves to defeat or dilute such rights, and one legal response will operate to 'trump' possible others. This article

¹ For example, the Village *Fono* Act 1990 of Samoa, the Customs Recognition Act 1963 and the Underlying Law Act 2000 of Papua New Guinea and the incorporation into the Constitution of institutions consisting of traditional leaders such as the House of *Arikis* in Cook Islands, The Council of *Iroij* in Marshall Islands and the Great Council of Chiefs (*Bose Levu Vakaturaga*) in Fiji.

suggests that this may be the case in South Pacific legal systems where human rights, despite being incorporated into written constitutions, struggle to find a foothold. In particular, the right to equality before the law may be an issue in plural legal systems. While many of the points raised are applicable to a number of Pacific Island states, the focus will be on two countries, Vanuatu and Tuvalu. These two countries have been chosen because of incidents which have arisen in respect of human rights which illustrate the potential for legal pluralism to operate as an obstacle to human rights advocacy and observance.

This article will proceed by looking first at the legal systems of these two countries and the sources of official and unofficial law which are relevant in each of them and how these interact. It will then consider the location of official statements pertaining to human rights within these and any express restrictions to or limitations on the exercise and enjoyment of such rights. Finally it will examine examples of disputes which have come before the courts and involved considerations of custom or customary law. These case examples, which locate the subject of the law within the larger system of law, illustrate that the plurality of laws in these countries can operate to undermine, constrain or defeat rights claims and that the operation of legal pluralism may in fact be fundamental to the problems faced by human rights advocacy in the region.

The legal systems of Tuvalu and Vanuatu

(a) Tuvalu

Tuvalu is a small Pacific island country, located in the west central Pacific, 1050 km north of Fiji and 4020 km north-east of Sydney, Australia. It has a total land area of 26 square km consisting of nine atolls, none of which are over 4.6m above sea-level, and a population of fewer than 10,000.² Its people are largely Polynesian although there are Micronesian descendants in the northern islands (Laracy (1983)). European contact with the islands first occurred in the 1830s. In 1888 a number of naval proclamations were made in respect of separate islands claiming possession

² Central Statistics Division Ministry of Finance, Economic Planning and Industry (Tuvalu) <<http://www.spc.int/prism/country/tv/Stats/Social/demographic.htm>> (29/04/07).

of the islands for the British Crown. Tuvalu became a colony as part of the British Gilbert and Ellice Islands Protectorate, established in 1892. The group was brought under the Pacific Order in Council – and the authority of the High Commissioner for the Western Pacific based in Fiji, in 1893. Under the Gilbert and Ellice Islands Order in Council 1915 the islands were annexed to Britain and became a British dominium. Membership of the group changed as various islands were included or excluded and subsequent Gilbert and Ellice Islands Orders modified the scope of the Pacific Order in Council. However under the 1915 Order the High Commissioner for the Western Pacific had virtually unfettered power to make laws for the group, his powers and jurisdiction being equivalent to those that the Crown held. He was represented in the islands by a Resident Commissioner, who, although he could choose to consult the local Council, could also make laws without doing so. Through this structure English law was applied to the group by way of ordinances. Native law administered by native courts applied in criminal matters involving natives and in a limited range of civil matters.

In 1974 the Gilbert and Ellice Islands Colony acquired its own Constitution. Following a separation referendum a separate British dependency of Tuvalu (formerly the Ellice Islands) was established in 1975. A separate administration was established the following year and Tuvalu became independent on 1 October 1978 (Isala 1983).

In line with most countries of the Pacific region, Tuvalu acquired a written constitution at independence. In 1986 the 1978 independence Constitution was reviewed and revised. Many of the principles in the earlier Constitution were re-stated.³ At the same time however greater attention was given to the national identity of the Tuvalu people. Thus an introductory ‘Principles of the Constitution’ was adopted, stating:

³ See ‘Principles of the Constitution’:

1. The principles set out in the Preamble to the Independence Constitution are re-affirmed and re-adopted.
2. The right of the people of Tuvalu, both present and future, to a full, free and happy life, and to moral, spiritual, personal and material welfare, is affirmed as one given to them by God.’

These Principles follow the Preamble.

While believing that Tuvalu must take its rightful place amongst the community of nations in search of peace and the general welfare, nevertheless the people of Tuvalu recognize and affirm, with gratitude to God, that the 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 attitudes of co-operation, self-help and unity within and amongst those communities (Principle 3).

The new Constitution was intended, therefore, to better reflect the aspirations and values of the Tuvaluan people. It also demonstrated that the future development of Tuvalu would be determined by reference to a plurality of sources, including international law, national law made through the legislative assembly, and unofficial law found in Tuvaluan ‘values, culture and tradition’. These sources of law, their interrelationship and their application to specific cases will be considered below.

(i) national law

On independence the Tuvalu Parliament acquired the power to make laws for Tuvalu, provided they were not inconsistent with the Constitution. Schedule Five of the Constitution provides for the applicable transitional law. Existing law remained in force subject to modifications required to reflect new titles, institutions and offices introduced as a result of independence and a new Constitution. This existing law was defined in Schedule 5 sections 1 and 2, as “any Acts of the Parliament of the United Kingdom, Orders of Her Majesty in Council, Ordinances, rules, regulations, orders or other instruments having effect as part of the law of Tuvalu”, immediately before independence, provided these laws did not conflict with any provisions in the Constitution. This provision was subsequently clarified by the Laws of Tuvalu Act 1987 which is “An Act to declare what constitutes the Laws of Tuvalu”. Section 4 of this Act states that besides the Constitution the laws of Tuvalu are: every Act, customary law, the common law of Tuvalu and every applied law. Applied law is defined in section 7 as “imperial enactments which have effect as part of the law of Tuvalu”.

(ii) customary law

Reference to Tuvaluan custom and tradition is frequent in the Constitution and laws of Tuvalu. The Preamble states

AND WHEREAS the people of Tuvalu desire to constitute themselves as an independent State based on Christian principles, the Rule of Law, and Tuvaluan custom and tradition ...

Among the Principles of the Constitution it is stated that

The stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu ... depend very largely on the maintenance of Tuvaluan values, culture and tradition.

Section 12 of the Constitution states that any act, even if done under a valid law, which is “harsh or oppressive”, unreasonable in the circumstances or “is otherwise not reasonably justifiable in a democratic society ...” is unlawful. Section 15 sets out grounds on which acts may be “reasonably justifiable”. Such justification includes “national interest” which in turn is interpreted in section 9(2)(f) as referring to *inter alia* “the protection and development of Tuvaluan values and culture.” Further, in deciding if a law or act is “reasonably justifiable” section 15(5)(a) provides that a court may have regard to “traditional standards, values and practices.” Subdivision B of the Constitution lists “Special Exceptions” to the Bill of Rights and the first of these, under section 29 is the protection of Tuvaluan values, which may be used to justify restrictions on freedom of belief and expression. Further, the recognition of customary law in specific contexts such as adoption, the custody of children and the acquisition of land may have discriminatory consequences. For example, under the Adoption of Children Act Cap 20A, “the welfare and interests of the child shall be regarded as the paramount consideration” (section 7). This Act, however does not apply to customary procedures of native adoption. Thus the procedural safeguards found in the Act may be denied a child subject to customary adoption. Similarly, under section 20 the Native Lands Ordinance Cap 22, the mother of an illegitimate child may lose custody of the child if the paternity of the father is established, either by acknowledgment or by other evidence. Freedom from discrimination under the Constitution does not specifically include freedom from discrimination on the grounds of sex (section 27) and in any case discrimination “in relation to land” is

permitted (section 27(3)(v)(e)). As will be considered below, the accommodation of custom and customary law in the Tuvalu legal system can present particular challenges for human rights.

(iii) international law

Principle 3 quoted above indicates that Tuvalu sees itself as a member of the “community of nations” and, as is indicated below, is a signatory to a number of international treaties. However, following the common law influence of its former colonial administrators, international treaties do not automatically become part of Tuvalu law unless incorporated by way of domestic legislation.

(b) Vanuatu

Vanuatu is an Archipelago of over eighty islands – not all of which are inhabited – which run north north-west to south south-west between longitudes 166 and 170 and latitudes 13 and 21. It has a total land mass of approximately 12,190 square kilometers and a population of just over 200,000.⁴ Although discovered in 1606 by the Spanish discoverer Pedro Fernandez de Quiros and visited by the Frenchman, Louis-Antoine de Bougainville, in 1768 and the Englishman James Cook in 1774, it was not until the 1830s that European contact with the islands became more frequent. Joint Anglo-French administration of the islands was initiated through the establishment of a Joint Naval Commission in the New Hebrides in 1887 (Pruss 2001). In October, 1906 under the London Convention, France and Britain entered into an agreement establishing the Condominium of the New Hebrides. This was replaced in 1914 by a Protocol between the two countries - although this was not ratified until 1922 due to the First World War. Under the Convention the New Hebrides became a region of joint influence with parallel but distinct jurisdictions. French law applied to French citizens and non-French citizens who opted to fall under such laws and English law applied to English citizens and optants. Indigenous people were governed either by their own indigenous laws or by joint-

⁴ The population census of 1999 estimated just over 186,678: The 1999 Vanuatu National Population and Housing Census, Main Report, National Statistics Office, December 2000. The more recent figure of 221,417 is given by the Pacific Regional Information System <http://www.spc.int/prism/> (29/04/07).

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regulations passed by the condominium government which applied to the people of the islands as a whole, or specific native regulations. However under the Convention the Resident Commissioners of France and Britain had authority over the native chiefs. In its exercise they were obliged to respect the manners and customs of the native population provided these were not contrary to Western views of order and the dictates of humanity.⁵ Under the 1914 Protocol native courts were established to deal with civil and criminal matters which concerned natives only, and courts of first instance were established to deal with matters regulated by Joint Regulations or as provided for under the Protocol. Here French and British District Agents sat together to adjudicate, assisted by an assessor. Condominium rule continued until 1980 when The New Hebrides acquired its independence from both powers and became the Republic of Vanuatu.

On independence the Constitution became the supreme law. Parliament acquired constitutional power to introduce and pass bills but these do not become law until assented to by the President of the Republic of Vanuatu. If the President considers that a bill is incompatible with the Constitution then the matter is referred to the Supreme Court for a ruling (Article 16). Colonial or imperial law, of Britain and France, remained in force and continued to apply “to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom” (Article 95(2)). Laws passed by the Condominium government in the form of joint regulations together with any subsidiary legislation made to give effect to these also remained in force provided they could be construed or adapted in conformity with the Constitution. Not long after independence all joint regulations were re-promulgated as Vanuatu laws and published in the Revised Laws of Vanuatu 1988 (Angelo 1998). Customary law was also listed as existing law and the Constitution provided that it should “continue to have effect as part of the law of the Republic of Vanuatu” (Article 95(3)).

(i) national law

At independence Vanuatu had a mixed system of law. As indicated the Constitution provided that British and French laws which had been in force as part of the laws or applied immediately prior to independence continued to be in force

⁵ Convention of 1906, Article VIII(4); Protocol of 1914, Article 8(2).

or applied (Farran 2004; Corrin Care 1997). This transitional arrangement was typical of most of the countries of the region. Such laws would apply to the extent that they were not revoked or incompatible with the new status of the country and – in the case of Vanuatu – any application of them would take “due account of custom” (Article 95(2)). One possibly unforeseen consequence of this provision was that French and British laws now applied to everyone in Vanuatu and not just French or British nationals and optants. What that law was exactly, was far from clear. British law included: Queen’s Regulations passed for the Western Pacific by the British High Commissioner of the Western Pacific; Regulations made for the New Hebrides by the Resident Commissioner for the New Hebrides, and statutes of general application in force in England on the first of January 1976, as regulated by the amendment to the New Hebrides Order 1973. French law included: written law in force in France - as extended to the New Hebrides via the Official Gazette of New Caledonia. This included some specific legislation which did not apply in Metropolitan France and excluded some amendments to the codes which did apply in Metropolitan France (Angelo 1998), as well as regulations made by the French High Commissioner of the Pacific which were made applicable to Vanuatu. Joint Regulations and subsidiary legislation made by the French and British Resident Commissioners in the New Hebrides also remained in force until replaced or repealed. Also resolutions made by the elected Representative Assembly - which had been set up in 1977 prior to full independence - were part of the laws in force at independence. Although not expressly specified, it would seem that the phrase ‘British and French laws in force or applied in Vanuatu’ would include not only legislation but also principles of law drawn from the jurisprudence of the courts. Thus legal principles and precedents drawn from the case law of France and Britain would be relevant. In the latter case this would include Scots jurisprudence as well as that of England and Wales. In the former case this was strongly influenced by the jurisprudence of the courts of New Caledonia.

(ii) customary law

As indicated, to a large extent customary law was permitted to continue without great interference during the period of Condominium rule. At independence the significance of custom especially in relation to land was affirmed and strengthened. Firstly, as has been indicated, the Constitution stated that customary law was to continue to have effect as part of the law of the Republic of Vanuatu (Article 95(3)). Secondly, title to all land reverted to custom owners. Article 73 of the Constitution states that “All land in the Republic of Vanuatu belongs to the

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indigenous custom owners and their descendants". Non-indigenous occupiers of land were entitled to apply for leases under the Land Reform Act Cap 123. Unoccupied, neglected or disputed land vested in the Minister responsible for land, who had the right to manage it until the dispute was resolved or the customary owners identified (Article 78). This situation continues today with many areas of land being administered by the relevant minister. Thirdly, Article 75 of the Constitution provides that "the rules of custom shall form the basis of ownership and use of land". Unfortunately, custom in Vanuatu is not homogenous (Lunabeck 2004). Although Parliament is given open ended powers to ascertain custom in Article 51 of the Constitution which provides that

Parliament may provide for the manner of the ascertainment of relevant rules of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings,

the constitutional mechanism for resolving the potential internal conflicts of customary laws is limited. A National Council of Chiefs was established under Articles 29-32 of the Constitution with the task of advising on custom, and it does so from time to time. Only very recently however has the Council been placed on a statutory footing (National Council of Chiefs Act 2006) It remains to be seen whether this strengthens its role or overcomes one of the customary problems which besets its composition: the determination of who is eligible as a chief to sit on the Council (Forsyth 2003).

(iii) international law

Unlike the Tuvalu Constitution, that of Vanuatu makes no reference to Vanuatu's place or aspirations in respect of the global or international community. There is emphasis on national sovereignty. The legacy of condominium rule left Vanuatu in an ambiguous position as regards international treaties. The Condominium had no legal personality in its own right, although the New Hebrides was held to be a subject of international law (Pruss 2001). Consequently treaty obligations of the two Condominium powers were not part of the law existing at independence unless the two condominiumal powers were signatories to any international instrument and had both agreed to extend the effect of that instrument to the New Hebrides. However France's approach to the application of international law is different from

that of Britain. The French legal system does not require the domestic incorporation of international treaties or conventions provided the relevant treaty or convention is capable of direct application. Thus any treaties which were explicitly extended by France to New Caledonia – its nearest territory to the New Hebrides – also applied to the New Hebrides. It is therefore not entirely clear which international treaties and conventions, if any, Vanuatu succeeded to on independence. However, post-independence practice appears to favor a monist approach requiring the incorporation of treaties and conventions into domestic law by specific Parliamentary action.

The Place of Human Rights in the Two Systems

The starting point for the legal provision for human rights in the region is the written constitutions of the respective countries. These are based on the Westminster style of parliamentary democracy with the nation state being the central point of the legal system. This in itself causes a number of difficulties in island countries where affiliation and identity is more often to the family, clan and island rather than the state. However the misfit of political structures in Pacific islands is beyond the remit of this paper. Suffice it to say that the models on which statements of rights in these constitutions were based, were drawn from western democratic environments, with a focus on universalism and individualism. A similar background informed the international human rights treaties and conventions which are also relevant to these Pacific island countries and which inform the international assessment of any country's human rights record.

(a) National Constitutions

The revised constitution of Tuvalu includes, as did its predecessor, a statement of rights. This is found in Division 2. The form and content of these was influenced by the United Nations Universal Declaration of Human Rights 1948 and the European Convention on Human Rights 1953 (Corrin Care 1999).⁶ Unlike some of

⁶ The *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, (ETS No 5) came into force 3 September 1953. For an overview of the various rights models adopted in the region see Corrin Care (1999).

the Bills of Rights in Pacific Island constitutions that of Tuvalu is notable for two reasons. First it includes both liberties and rights. Secondly it contains very detailed lists of exceptions or restrictions to the basic rights which are given. Section 10 confers on Tuvaluans freedom to do anything which is not illegal – including unconstitutional – and which does not infringe the freedoms of others or operate against the public interest. Section 11 then lists the fundamental rights and freedoms which individuals have. These include: the right not to be deprived of life; personal liberty; security for the person; the protection of the law; freedom of belief; freedom of expression; freedom of assembly and association; protection for the privacy of the home and other property; protection from unjust deprivation of property and to other rights and freedoms set out in the same section or otherwise provided by law (section 11(1)(i)), for example rights to *habeas corpus* as developed in common law and extended to Tuvalu under the Western Pacific (Courts) Order in Council 1961.

However all these rights and freedoms can only be exercised with respect to the rights and freedoms of others and “in acceptance of Tuvaluan values and culture, and with respect for them.” (Section 11(2)(b)). There then follows consideration of each of these rights and the exceptions to them. Many of the exceptions are unobjectionable, for example, restrictions in times of national emergency, in the interests of defence, security or public health and welfare. Some however, are more contentious – at least from a universal rights perspective. For example, it is not unlawful to treat someone in a discriminatory manner if this is “(a) in accordance with Tuvaluan custom; and (b) is reasonable in the circumstances”. Further discrimination may be permitted in relation to a number of matters, notably: adoption; marriage; divorce; burial or any other such matter “in accordance with the personal law, beliefs or customs of any person or group; or ...in relation to land” (Section 27). Similarly there is a right to freedom from slavery and forced labour, except that this excludes “labour reasonably required as part of reasonable and normal traditional, communal or civic obligations” (Section 18(vii)). Also, as has been indicated above, freedom of expression and freedom of assembly are both subject to restriction by reference to Tuvaluan values. These are set out in section 29 and focus on the culture and traditions of Tuvalu, the interests of the community and the need to avoid any conduct which has divisive or unsettling consequences.

The constitution of Vanuatu also contains a statement of Fundamental Rights and Freedoms of the Individual. This is found in Chapter Two of the Constitution and incorporates the rights to: life; liberty; security of the person; protection of the

law; freedom from inhuman treatment and forced labour; freedom of conscience and worship; freedom of expression; freedom of assembly and association; freedom of movement; protection for the privacy of the home and other property and from unjust deprivation of property; and equal treatment under the law or administrative action. It also provides for non-justiciable duties including

in the case of a parent, to support, assist and educate all his children, legitimate and illegitimate, and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of Vanuatu. (Article 7(h))

Unlike the provisions of the Tuvalu Constitution, in Vanuatu there are very few detailed restrictions or exceptions placed on the individual rights and freedoms protected by the Constitution. Discrimination is permitted in the case of non-citizens, and rights may be curtailed by “legitimate public interest in defence, safety, public order, welfare and health” (Article 5(1)). There is also however provision for positive discrimination in the case of particular vulnerable and disadvantaged groups under Article 5(1) (k) which states that while everyone is entitled to “equal treatment under the law”

no law shall be inconsistent with this (right) insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

There is little evidence of Parliament having considered, or passed, positive discrimination laws. Strong adherence to custom and lack of clarity as to priorities has given rise to a number of cases in Vanuatu involving human rights issues which illustrate the difficulties faced in this complex legal system.

(b) International human rights

As both countries are members of the United Nations it is implicit that they subscribe to the Charter of the United Nations⁷ and the Declaration of Human

⁷ *Charter of the United Nations* (the ‘Charter’), opened for signature 13 February 1946, Res 22A(1) (entered into force 14 December 1946).

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Rights.⁸ Both Tuvalu and Vanuatu are also signatories to the Convention on the Rights of the Child (CRC) and to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁹ By subscribing to these international conventions these countries became bound to fulfill their international obligations by amending their national laws to comply with the terms of the Conventions, putting in place policies to support them and taking affirmative action through legislative reform (Tamata 2000). Vanuatu incorporated CEDAW into domestic law by the Convention on the Elimination of all Forms of Discrimination against Women (Ratification) Act 1995 and the CRC by a similar ratification act in 1992. Tuvalu has not incorporated either CEDAW or the CRC into domestic law.

Neither country is a signatory to the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights or the International Convention on the Elimination of all Forms of Racial Discrimination. Their commitment to international rights standards might therefore be open to question.

(c) *Priority of laws*

Prior to independence, while there were plural legal systems in place, the subject of these laws (Vanderlinden's '*sujet de droit*' (1989)) was for the most part governed by a single system of law – in the case of indigenous people, this was customary law. On independence however, matters became much more complicated because Pacific islanders suddenly became subject to a plurality of laws and legal influences, including those of the international community as they joined the family of nations. Although many islands are still among the least developed nations of the world, economic, social and political changes have

⁸ The Declaration of Human Rights was adopted by the United Nations General Assembly in 1948.

⁹ Tuvalu ratified the CRC on 14 July 1995 and acceded to CEDAW on 4 October 1999. Vanuatu signed the Convention on the Rights of the Child on 30 September 1990 and ratified it on 7 July 1993. It acceded to the Convention for the Elimination of Discrimination against Women on 8 September 1995. Both ratification and accession indicate an intention to be legally bound by the terms of the treaty.

brought with them new legal encounters. At the same time there has been a growing focus on indigeneity – both internally and at the international level of the United Nations. The priority of laws has therefore been in a state of constant flux. Hierarchies remain uncertain and this has an impact on the individual citizen – as will be seen in the case examples below.

The starting point in both countries, at least in theory, is the Constitution, which is officially the highest source of law. Thereafter however matters are less clear (Corrin Care 1998).

In Tuvalu the Laws of Tuvalu Act, Cap 1B, provides a hierarchy of laws: national legislation; customary law; the common law of Tuvalu and applied law (Section 4). The latter is defined in section 7 as “imperial enactments which have effect as part of the law of Tuvalu” which must be construed and adapted to reflect changes introduced at independence. The Attorney-General also has power to amend, by way of regulations, this imperial law to make it conform to the Constitution, any Act of the Tuvalu Parliament or customary law. The Attorney-General may also transcribe any applied law to reflect changes made to it and this transcription is tabled before Parliament, which may accept or reject it. Thus imperial enactments may remain in force in their original form but modified by an interpretative process, or as amended by the Attorney-General’s regulations, or as amended and approved by Parliament as a transcription of applied law, which on publication replaces the original imperial enactment from which it derives. Applied law is inferior to customary law and may be amended to conform with customary law. However, where there is inconsistency between customary law and the transcription of an applied law (and any subsidiary legislation made under that applied law), the transcription of the applied law approved by Parliament prevails over customary law. As Parliament may reject a transcription of any applied law tabled before it if the proposed transcription law conflicts with customary law,¹⁰ there is a good chance that customary law will prevail.

The common law of Tuvalu is English common law and the doctrines of equity, with the latter prevailing in the case of conflict between the two, but both being subject to consistency with customary law, Acts of parliament and applied laws (Section 6 Laws of Tuvalu Act Cap 1B). Whether Acts can conflict with customary law is less clear. There is no provision on this in the Laws of Tuvalu Act.

¹⁰ Sections 5, 7 and 11 Laws of Tuvalu Act 1987.

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However, given that the Principles stated at the outset of the Constitution are to be its foundation, and that among these is included the principle that

[t]he life and the laws of Tuvalu should therefore be based on respect for human dignity, and on the acceptance of Tuvaluan values and culture, and on respect for them,

it seems probable that in enacting legislation Parliament must take into account any existing customs or customary laws. Certainly Parliament may not make laws which are inconsistent with the Constitution.

In Vanuatu national law will take precedence over the law left in place on the transition from colonial administration to independence if Parliament has passed legislation which replaces the law existing at independence or has expressly repealed such law. However while any residual transitional joint regulations and subsidiary legislation have to “be construed with such adaptations as may be necessary to bring them into conformity with the Constitution” (Article 95(1)) in contrast residual French and British laws “continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.” (Article 95(2)). These provisions suggest that different interpretative exercises are required. There is also no indication as to whether French or British law should apply in case of a conflict between the two. As the 1914 Protocol was repealed at the time of independence plaintiffs do not – in law – have a choice. In practice this has rarely been a concern due to the virtual disappearance of French law from legal practice in Vanuatu but has from time to time been raised in the courts.¹¹

There may also be cases in which the Vanuatu Parliament has passed legislation which does not expressly revoke existing (pre-independence) law but does so implicitly – either in whole or in part. In the latter situation there are two further possibilities: either the previous law applies to the extent that it is not replaced or revoked, or the court falls back on the provisions of Article 47(1) of the Constitution which states “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

¹¹ See *Waiwo v Waiwo* [1996] VUMC 1; *Banga v Waiwo* [1996] VUSC 5; *T v R* [1980-1988] 1 Van. L.R.7; *Selb Pacific Ltd v Mouton* [1996] VUSC 4; *Pentecost Pacific Ltd v Hnaloane* [1980-1988] 1 Van L.R. 134.

possible in conformity with custom.” This was an issue raised in the case of *Joli v Joli*,¹² where national legislation, the Matrimonial Causes Act Cap 192, provided for divorce but made no provision regarding the allocation of property on divorce. In this case the Court held that where there were lacunae in the national law then English law, the Matrimonial Causes Act 1973, would apply to fill the gaps (Farran 2004). This assumes that there is no uncertainty as to which laws – be they British or French – apply to Vanuatu as laws of general application (Corrin Care 1997).

By contrast, in the case of *In re the Nagol Jump, Assal Vatu v Council of Chiefs of Santo*¹³ Chief Justice Vaudin d'Imecourt held that

[a]s far as Nagol jumping is concerned, there is no ‘rule of Law’ that is ‘applicable’ to it. . . Since there is no rule of law governing the matter, I must have recourse to section 47(1) of the constitution, I shall have to determine the matter according to ‘substantial justice’ and, if at all possible, in conformity with custom.¹⁴

In some situations however there is a middle ground, where there are both introduced laws and customary laws. An example can be found in *Boe v Thomas* where the court was asked to take into account the custom of the parties when assessing damages for the death of a child killed in a road accident.¹⁵ Chief Justice Cooke refused to do so on what appears to be three grounds. First, custom varied so much throughout the country that it would be impossible to lay down guidelines; second, that the assessment of customary compensation was properly within the remit of customary chiefs and not the court, and thirdly, the Fatal Accidents 1846 was a statute of general application and so applied.

The above case leads to the next question which is whether the application and interpretation of non-customary laws has sufficiently taken account of custom as required by the Constitution. This raises two issues: which or what custom should

¹² [2003] VUCA 27.

¹³ [1992] VUSC 5; [1980-1994] Van LR 545 (10 July 1992).

¹⁴ The Chief Justice here refers to a 'section' of the Constitution although these are more properly termed 'articles'.

¹⁵ [1977] VUSC 9 (1980-1994) Van LR 293 (15 May 1987).

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be taken into account and does the law prevail over custom or the other way round? The answer to this question is complicated by differences of emphasis in the French and English versions of the Constitution.

It has been suggested that

for a custom to be recognized and enforced throughout the whole country, it must have a common basis or common foundation throughout the country.¹⁶

In a country where custom may vary from place to place even within an island establishing this 'common foundation' can be difficult and certainly differences of practice and observance may vary to the extent that it may be questionable whether a particular practice is indeed a custom having the force of law.

The Chief Justice of Vanuatu has suggested that "[t]he Constitution mandated custom as a principal source in the development of dispute resolution" (Lunabeck 2004: 27), indicating thereby that custom should be the legal source or first resort when addressing new challenges to the legal system or when there are lacunae. However, although customary law is acknowledged as a source of law in the Constitution it is not clear if it is to apply to all legal matters, or only where there is no applicable law, or only to certain areas of law (Paterson 1995; Powles 1997). In Tuvalu the Laws of Tuvalu Act 1987 provides that customary law is to apply to certain specified matters, whereas in Vanuatu there are no express limitations on the application of customary law but there may either be persons to whom it does not apply – for example non-indigenous people, or matters – for example, matters falling outside customary or traditional life. There may also be areas in which it does apply but the court decides not to take account of it. This has occurred in family law cases where, for example, considerations of a child's welfare may prevail over claims of custom in determining custody or adoption.¹⁷

Parliament's failure to clarify the role and place of custom and to confer with the Council of Chiefs on matters concerning custom has meant that the resolution of

¹⁶ *Waiwo v Waiwo and Banga* [1996] VUMC 1; Civil Case 324 of 1995 (28 February 1996).

¹⁷ See *G v L* [1980-1994] Van LR 486 (18 December 1990) and *M v P* [1980-1988] 1 Van LR 333.

these potentially conflicting sources of law rests with the courts. Failure of the legislature to resolve the place and role of custom in legal development also reinforces the perception that customary law and introduced law are in conflict. It is to examples of case-law and the treatment of the individual within these systems of law that this article now turns.

(d) Human Rights in dispute: case-studies from Tuvalu and Vanuatu

To illustrate some of the dilemmas caused by the plurality of laws in Tuvalu and Vanuatu, two cases have been selected from each jurisdiction. All of these have prompted academic comment (Angelo 1998; Farran 2001, 2005; Lunabeck 2004; Olowu 2005).

The first is the case of *In Re the Nagol Jump, Assal & Vatu v Council of Chiefs of Santo* [1992] VUSC 5. The *Nagol* jump is a traditional land dive which is performed on the island of Pentecost in the Republic of Vanuatu. The jump is surrounded by myth and tradition. It has also, in recent years, been recognised as a tourist attraction with potential for economic exploitation. In 1992 a breakaway group - the Felora Association - sought to export the jump and perform it on another island. They were challenged. The matter was heard in the Supreme Court by Chief Justice d’Imecourt (rather than the local Island Court) because the Felora Association claimed that the opposition they had encountered in seeking to perform the jump elsewhere infringed their constitutional rights, notably: protection of the law; freedom of expression; freedom of assembly and association; freedom of movement and equal treatment under the law. Under Article 6(1) of the Constitution any one who feels that their Constitutional rights have been, or are likely to be, infringed has the right to “apply to the Supreme Court to enforce that right”.

Here the applicants sought an order of mandamus ordering the local and island chiefs and the local government to authorize them to jump, or alternatively an injunction preventing all these parties from interfering with their constitutional rights. They failed on all counts. Indeed the judge indicated that if anyone’s constitutional rights had been infringed it was the chiefs of Pentecost who had not been given time by the Felora Association to consider the matter. Why was this?

The rights and freedoms set out in the Constitution are framed as individual rights. The *Nagol* jump is grounded in a collective context. The yam harvest which it

celebrates is relevant to the community at large. The construction of the tower, although under the direction of an individual, depends on communal labour, and only those who are entitled by virtue of their custom ownership of the jump may perform. Individual rights in this context therefore were opposed to traditional communal interests. Recognition of the importance of custom was facilitated by the provisions of the Constitution (discussed above). In order to export the jump the Felora Association had to have the permission of the local Council of Chiefs of South Pentecost, the Pentecost Island Council of Chiefs, and of the National Council of Chiefs, as well as the permission of the Regional Council of Chiefs where they hoped to perform the exported jump. None of these bodies have legal or judicial powers under the Constitution. Although now placed on a statutory footing the National Council of Chiefs is merely an advisory body. The Felora Association claimed that the National Council of Chiefs, which had opposed them, had, as a public authority, a duty to comply with fundamental duties imposed by the Constitution under Article 7. However, as previously pointed out, these duties are stated to be non-justiciable, so the provision is toothless.

Arguably the court could have held that the issues raised by the case fell outside custom on the ground that the real issue was who had the right to benefit economically from the cultural property in question, or that constitutional rights should prevail. Uncertainty as to the appropriate judicial response is reflected in the approach of the court. For example, the language of ownership is used in respect of the jump but proprietary rights in custom are different from those of the common law. More important than ownership are the rights and obligations of custodianship of the jump, the knowledge of timing and construction, participation in the jump and the enjoyment of the benefit of a bountiful yam harvest. These customary interests do not fit easily into western legal constructions (Farran 2001, Brown 2000). Rather than focussing on the substantive claims being made the court focussed on issues of procedure, in particular customary process. It held that the renegade jumpers were to return to Pentecost and exhaust all the custom channels open to them for negotiating the export of the jump. If it was exported or performed outside the traditional villages where it originated this could only be done if certain procedures were followed and conditions met, notably that there was: a majority consent of custom owners; a majority consent of local chiefs taken according to custom; performance of all required custom ceremonies; obtaining of all custom permissions; approval of the National Council of Chiefs; permission for all custom owners to perform if they wanted to; and participation by all custom owners and their clans in the profits, which would be placed by the tour operators in trust accounts for the benefit of traditional custom owners and their clans.

In referring the matter back to the customary procedures the court evaded responsibility for taking on board on board the rights raised – whether these are seen as the property rights of the traditional owners of the jump or the rights to freedom of expression and movement of the breakaway group. By focussing on the customary procedures the marginalisation of human rights was effectively rationalised.

By contrast the second case from Vanuatu represents an attempt by the court to arbitrate between customary law and constitutional rights. In *Noel v Toto* [1995] VUSC 3 (Case 018, 1994, 19 April 1995) a dispute arose concerning the custom ownership of coastal land which generated healthy tourist income from visiting cruise ships. Under the Constitution all land reverted to the custom owners. This land had been unoccupied for some time, although not unproductive. The Supreme Court had previously determined the question of ownership of the land in accordance with custom. The outstanding issue was entitlement to the money generated by the tourist trade. The court was faced with three difficulties. First, custom land is not held by any individual at any point in time but only by persons in a representative capacity. Under custom ownership title to land cannot be disposed of. This is supported by the Constitution, under Articles 73-75 of which land is retained for future generations. Secondly, customary law is discriminatory in so far as it does not confer equal property rights on men and women. It operates in favour of men, either because land is passed patrilineally or because, even where land is passed matrilineally (and both systems are found in Vanuatu), men represent or act for their female kin. Women lose all or most of their rights to the land of their father on marriage. Thirdly, as the court found, custom was silent as to the distribution of money.

It would have been open to the court to take the approach favoured by Chief Justice Vaudin d'Imecourt in the *Nagol* jump case and apply Article 47(1) of the Constitution to determine the matter according to 'substantial justice' and, if at all possible, 'in conformity with custom'. Custom recognised a variety of different rights in respect of land, for example, rights to occupation, and to cultivation and custom ownership. However the court held that the meaning of the term 'rights' in custom was not the same as its meaning in introduced law. A customary right might be open to negotiation or be thwarted by customary obstacles such as implementation of a rule that it is an offence to bring a claim to the court. Customary tenure of land did not provide a clear foundation on which to apportion money produced in relation to the land. The court therefore had recourse to the

rights set out in Article 5 of the Constitution: the right to protection of the law and to protection from unjust deprivation of property without discrimination on the grounds of sex, and to equal treatment under the law. In consequence Justice Kent ruled that

It would be entirely inconsistent with the Constitution and the attitude of Parliament to rule that women have less rights with respect to land than men.

Here, therefore, it would appear that the rights provision in the Constitution trumped custom and also the provisions in the Constitution which provide that the rules of custom should form the basis of ownership and use of land. The decision is one which contrasts strongly with the case of *Tepulolo v Pau* considered below. However, more recent legal developments in Vanuatu may have undermined this. In 2001 new Customary Land Tribunals were established under the Customary Land Tribunal Act, No 7 of 2001, with the specific purpose of resolving customary land disputes. Legal representation is not permitted before these tribunals and the panel of assessors is drawn from those knowledgeable in custom. There is no right of appeal to the ordinary court system – although there is a hierarchy of land tribunals – and the legislation provides in section 33 that

a decision of a land tribunal is final and binding on the parties and those claiming through them, and the decision is not to be challenged, appealed against, reviewed, quashed, set aside or called in question in any court on any ground.

The Supreme Court now only has a supervisory role over land tribunals limited to the making of an enforcement order to give effect to a decision of the tribunal (Civil Procedure Rules No. 49 of 2002, rule 16.25). This procedural reform is attributable to a number of factors: the large backlog of land dispute cases before the courts; the perceived need to involve those knowledgeable in custom to adjudicate such disputes without the restrictions of rules of procedure or evidence found in the formal court system; and resistance to the definitive nature of court decisions (Paterson 2001). The consequence is a strengthening of the role of customary law in land matters and a diminution in the likelihood of claims to other constitutional rights being successful.

The first Tuvalu case under consideration is that of *Tepulolo v Pou* [2005] TVHC 1 (Case No 17, 2002, 24 January 2005). This case concerned the custody of a

young boy who was just over two years old at the date of first hearing. The parents were not married and the child was being brought up by his mother. The father sought custody, the mother opposed this. The father claimed rights under the Constitution and the Native Lands Ordinance 1957 (now Cap 22). The mother opposed by reference to the CEDAW, the CRC, the Constitution of Tuvalu and the Custody of Children Ordinance 1973 (now Cap 20). The Island Court, which has jurisdiction in land matters, awarded custody to the father. On appeal to the Resident Magistrate this was upheld. The case came before the Supreme Court for clarification on the proper interpretation of the applicable law. Five declarations were sought all of which raised human rights issues. These were: that the right to non-discrimination on the grounds of gender under section 27 of the Constitution had been violated; that section 3(5) of the Custody of Children Ordinance and section 20(2) of the Native Lands Ordinance discriminate against women on the grounds of gender and therefore are in breach of the Constitution; that the above sections are in breach of CEDAW and the CRC and therefore Tuvalu is in breach of its obligations under those conventions; that CEDAW and the CRC are applicable in domestic law where either the domestic law is in contravention of the conventions or where the meaning of a statute is ambiguous or silent; that the proper test for determining custody is the best interests of the child regardless of the gender of the parent. The judge refused to make any of the declarations sought with the consequence that the order of the Island Court remained undisturbed. How was this decision reached?

Although Principle 3 of the Constitution states that “Tuvalu must take its rightful place amongst the community of nations in search of peace and the general welfare” the court held that while the Interpretation Act (Cap 1A section 17) allows the courts to arrive at a construction of a written law which is consistent with the international obligations of Tuvalu, notably here its obligation under CEDAW and the CRC, rather than one which is not, the court could only adopt such an approach where the law was ambiguous. In this case the court did not find the law ambiguous. Reference was made to the Preamble’s advocacy of the “maintenance of Tuvaluan values, culture and traditions”, the omission of sex as a challengeable ground for discrimination and the justification of discrimination in the case of land. In combination these inclined the court to find that its power to make a compulsory residence order that a child reside with his father ‘in accordance with customary law’ had constitutional support. Constitutional recognition of Tuvaluan custom in section 27 limited the range of conduct which could amount to discrimination. Although the court acknowledged that there was scope under the Native Lands Ordinance *not* to make such an order, while still

preserving the child's right to inherit land, it chose to make the order. Whether the court felt that its decision was in the best interests of the child or not is unclear as there appears to have been no consideration of the relationship between 'Tuvaluan values, culture and tradition' and the 'welfare principle'. Indeed there seems to have been little if any consideration by the court either at the Island Court level or in the High Court, of what course of action was in the best interests of a three year old child. Elsewhere I have argued that the court could have come to a different decision (Farran 2005). What the case illustrates is that where the courts are responsible for giving effect to human rights, often because Parliament has failed to act, then the exercise is likely to involve the court in picking its way through a morass of different legal principles and values. In such circumstances there is a real danger that the court may lose sight of any fundamental rights, in this case of both the child and the mother. However, as is evident in the *Noel v Toto* case from Vanuatu, even where the court strives to give effect to fundamental rights this may be difficult to translate into practice because of the longer term consequences.

The second Tuvalu case is that of *Teonea v Kaupule & Another* [2005] TVHC 2 (Case No 23 of 2003 (11 October 2005)). In this case a missionary (Teonea) from the Brethren Church sought to establish a branch of the church in Tuvalu. It had some success in attracting adherents in Funafuti, the capital island, and then ventured to the outer islands, notably Nanumaga, where four other faiths already had churches. Here the body of traditional leaders of the island, the *Falekaupule*, ruled that no further new religions could be established on the island. Following physical threats and violence Teonea applied to the High Court of Tuvalu to make declarations recognizing his constitutional rights, notably the right to freedom of belief and worship; the right to freedom of expression and association and the right to freedom from discrimination on the grounds of his religion. There was no real dispute about the breach of rights. The issue was whether such breaches were 'justified' by reference to Tuvaluan values and customs, which, as indicated above, permeate the Constitution. In considering the significance of these the Chief Justice stated:

our Constitution ... is firmly founded on the desire of the legislature ... to hold to their traditions even if to do so means that some individual rights may be curtailed or restricted.

The objections of the local council had been based on the grounds that the adherents to the new faith were refusing to observe their communal duties and that this combined with their economic and other support of the new church

undermined the ‘spirit of togetherness of the community as a whole.’ The powers of the *Falekaupule* derive from custom and from legislation, the *Falekaupule Act 1997*, which gives statutory recognition to the duties, powers and obligations of this assembly. In particular it confers on the *Falekaupule* the powers previously exercised by local government councils. The court found however that this Act does not limit, remove or diminish any traditional powers. These therefore remain uncurtailed and unspecific. The court held that while the *Falekaupule* had the power to make by-laws under the Act resolutions such as the one made in this case were not laws for the purposes of the Constitution. This meant they escaped the provisions of section 10(2)(b) that no one should be “prevented by law from doing anything that complies with the provisions of paragraph (a).” This provides that:

everyone has the legal right to do anything that

- (i) does not injure others, or interfere with the rights and freedoms of others; and
- (ii) is not prohibited by law...

The court found that the *Falekaupule* had the right to make the decision they did; it was reasonable to do so and the decision was not unconstitutional. Further any discrimination against the applicant was justifiable. This decision has been subject to some quite trenchant criticism by Olowu (2005). From the point of view of this article it highlights the difficulty of drawing a boundary between law and non-law when considerations of custom and the exercise of traditional powers are relevant. The implication of this case is that the persistence and constitutional protection of Tuvaluan customs and values, even when they do not amount to customary law, potentially present an area of regulation impacting on daily life which falls outside the reach of human rights as listed in the Constitution.

Conclusion

The terms ‘custom’ and ‘customary law’ are often used interchangeably and without clear definition in the Pacific region. While custom may be a practice of usage without compulsion of sanction, it may also be a practice or usage which is required to be done or observed and failure to do so may result in sanction or punishment. Lunabeck (2004) suggests that it is this second meaning which makes a custom or practice customary law. However the distinction between the two may

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not be clear, especially where customs are not consistent or are subject to a variety of interpretations. Moreover it has been suggested that custom is not so much a matter of substantive rules as of process and values (Powles 1997). Thus custom is important in the process of dispute resolution, in informing how community harmony and order is to be maintained and in determining the place of the individual within the community. Evidence of these processes can be seen in the *Nagol* jump case from Vanuatu and the case of *Teonea v Kaupule & Another* from Tuvalu.

A consequences of this from a human rights perspective is that not only is there plurality of laws but also underpinning this is a plurality of values. So for example, claims by the individual may be subject to claims by the community or large group. This value is articulated in the Constitution of Tuvalu, Principle 3, quoted above.

Further, different legal processes available in a plural legal system may undermine the fundamental notion of equality before the law. For example, in Vanuatu, despite the best endeavours of those involved in setting up the Customary Land Tribunals referred to above, it has proved almost impossible to achieve female representation on the tribunals. As land is the key to other customary law issues such as the recognition of customary marriage and divorce, adoption, child custody and succession, and as legal representation is not permitted before these tribunals and the decision of the land tribunal is intended to be final, the consequence is that the process, particularly for women and children, challenges the fundamental right to equality before the law.

A further concern is that the burden of proof and rules of evidence for establishing custom are not as rigorous as those applied in cases involving introduced law. For example, it has been held that:

(t)he most common means of ascertaining and proving customary law is by oral testimony or expert witnesses or by witnesses who are not experts in customary law, that is, witness of fact.¹⁸

Indeed Schedule 1, section 4 to the Laws of Tuvalu Act, which deals with proof of custom, states that the court

¹⁸ *Banga v Waiwo* [1996] VUSC 5 per D’Imecourt CJ.

- (a) is not bound to observe strict legal procedure or apply technical rules of evidence;
- (b) may, of its own motion, call such evidence or require the opinions of such persons as it thinks fit.

Custom will often therefore be hearsay or a matter of opinion rather than fact. Sometimes it will be within the knowledge of a very small group of people; sometimes it will be secret or sacred. It may also occur that different rules of evidence are applied alongside each other in the same case. For example, Schedule 1 quoted above provides for consideration of customary law in both criminal and civil cases, ignoring differences of burdens of proof or the different sources of law which may give rise to the actions involved. A further issue is that usually the keepers of customary knowledge are male,¹⁹ as are the arbitrators of disputes. The gendered construction of customary law in Pacific island societies is beyond the scope of this article, but it must be noted that there are concerns as to whether protection of the law is afforded free from discrimination on the basis of age, sex and gender.

A further related problem is whether traditional leaders involved in rule making, law enforcement, and dispute resolution are acting in a public capacity as agents of the state? If they are not, as was held in the case of *Family Kalontano v Duruaki Council of Chiefs*,²⁰ then, as pointed out by Forsyth (2005), they may fall outside the scope of human rights provisions, if those are limited to vertical effect. In this case it was held that the Duruaki Council of Chiefs and four other chiefly respondents were individual persons so that there could be no cause of action against them for breach of constitutional rights. The difficulty is that the same traditional or customary leaders may act both formally and informally. So for example in Vanuatu a chief may sit in a formal capacity in a Customary Land Tribunal, but carry out adjudicative functions outside this tribunal on a regular basis. Moreover the very distinction between formal and informal may be artificial in countries where the daily lives of the majority of the population may be governed by custom and customary law regardless of any specific provisions in

¹⁹ See, for example, the witnesses called to a longstanding dispute about the rightful claimant of a chiefly title in *Tenene v Kalmarie* [2002] VUIC 1, Civil Case No. 01 of 2002 (7th August 2002).

²⁰ [2002] VUSC 32.

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written constitutions. The question of which system of regulation is dominant therefore is one to which there will also be a diversity of answers depending on location, personal status, and the nature of the occasion or occurrence being regulated.

By its very nature, although custom is constantly evolving and adapting, it is, by definition, retrospective, whereas the fundamental rights provisions in the Constitutions put in place at independence and the international instruments which provide aspirational models are prospective. It is declared that individuals have these rights and therefore the state must take steps to uphold and protect them. As Pacific island countries develop it might be expected that custom will provide fewer and fewer answers. The dilemma concerning entitlement to money rather than land considered in the *Noel v Toto* case is an example. However, the reinvention of custom and reinforced emphasis on its importance to the identity of indigenous Pacific islanders in a regional and global context, as illustrated in the revised Constitution of Tuvalu and the establishment of Customary Land Tribunals in Vanuatu, contradicts this expectation.

In a recent review of human rights and customary law the New Zealand Law Commission (2006) suggested that custom and human rights could be harmonised by drawing on the shared and underlying values of both. The above cases and the interplay of the many sources which make up the legal systems of the two countries considered suggest that any such convergence is some way off and that the continuing plurality of law and legal influences contribute significantly to the insecurity of human rights in the Pacific region.

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