

LEGISLATING PLURALISM

STATUTORY 'DEVELOPMENTS' IN MELANESIAN CUSTOMARY LAW¹

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It was hoped that the common law of Papua New Guinea would quickly develop. Unfortunately, this has not happened. The judges have moved very slowly, preferring to re-adopt pre-Independence legal rules or the English common law rules than to develop new rules to suit conditions in our country. ... The blame does not lie entirely with the judges, however. There is very little evidence that the profession is persuading the judges to consider developing new legal rules

We consider that if the mode of declaring and developing the underlying law was re-stated in a way that requires the profession and the judges to consider customary law and to consider if it meets the needs and aspirations of the people, then a new common law of Papua New Guinea would begin to develop. (Papua New Guinea Law Reform Commission 1977: 10)

¹ The authors wish to thank Christine Stewart, Peter Murgatroyd, Kenneth Brown, Guy Powles, Eric Kwa Lokai and Steve Zorn for their contributions to this article. We dedicate the article to Bernard Narokobi who continues as he began, nurturing custom and customary law.

Introduction

For more than a quarter century the Independent State of Papua New Guinea and the Republic of Solomon Islands, two South Pacific nations, have wrestled with the problems of pluralism. How do nations, formed out of the colonial experience from disparate cultures, honour the integrity of each cultural group within their boundaries whilst at the same time promoting a sense of unity and nationhood? In relation to law, this comes down to the question: how does the legal system use customary law when the customs of each country differ from region to region, even from village to village?

In both Papua New Guinea and Solomon Islands the most recent attempts to resolve these questions involve the enactment of statutes that tell the courts when and how to recognize and apply custom. However, though there are many similarities between these neighbouring Melanesian nations, the two statutes are very different. Papua New Guinea's Underlying Law Act provides that the courts should treat custom as law and should use custom in preference to the imported common law, in order to fashion a home-grown common law based primarily on custom. Solomon Islands' Customs Recognition Act provides that custom ought not to be used unless its existence can be proved in the same way that a fact or foreign law is proved, and that, even then, it should not be used in all areas of law.

In this Article we will first briefly review the colonial and post-colonial history that led to the passage of these Acts. We will then analyse the Acts in some detail. Along the way, we will venture some guesses as to why the two Parliaments have produced such different responses to similar problems of pluralism. But, first, a brief introduction to the countries, their histories, and the issues.

The Reason lies in History

Colonialism created the crudest forms of legal pluralism.² Most colonial administrations in the Pacific brought with them whatever parts of their home

² There are numerous books and articles analysing colonial legal history, both colonial legal regimes generally and colonial law Melanesia in particular. See, for example: Hooker (1975); Burman and Harrell-Bond (1979); Starr and Collier (1989); Chalmers and Paliwala (1984); Weisbrot, Paliwala and Sawyerr (1982); Zorn and Bayne (1975).

legal system they believed would help them govern the natives (Paliwala, Zorn and Bayne 1978; Bayne 1975.). Indigenous legal systems did not disappear, however, though they were deeply affected by colonialism and its aftermath.³ For example, in Papua New Guinea, a Melanesian archipelago in the far southwest corner of the Pacific, the statutes and regulations of the imposed legal system constituted the only official law of the colony, but colonial governors permitted customary dispute settlement processes to continue, so long as custom did not overtly threaten the authority or aims of the colonial enterprise (as, for example, in the case of payback, a custom against which laws were enacted: Ottley and Zorn, 1983: 265-273).

Even before the colonial incursion, the peoples of Melanesia were not strangers to legal pluralism, though the customary variety of plural law-ways differs significantly from the hierarchy of legal systems created under colonialism. In pre-colonial times Melanesia was a patchwork of small, homogeneous village societies. Membership in a Melanesian village society depended primarily on kinship – on membership in a resident clan or lineage -- and, for the most part, the social order was maintained and expressed through these kinship and quasi-kinship obligations and relations.⁴ Apart from chiefs or bigmen, and excepting the

³ The books and articles on this topic are too numerous to capture even the most important in a footnote. Books on the topic that contain references to many of the other sources include those listed in the previous note. Customary law was affected by the colonial political and legal system in many ways, in particular (a) by colonial rules limiting its impact or actually outlawing parts of it, (b) by its relegation to second-class status within the overall colonial and post-colonial legal system, in that it became the municipal law of villages within larger political systems, rather than the highest laws of sovereign political entities, (c) by the jurisdictional limitation to certain kinds of parties and certain kinds of disputes, (d) by the existence of an alternative legal system (the state-imposed system) to which people could turn if not satisfied with custom, and (e) by the example of that state legal system, upon which customary norms and customary dispute-settlement processes began to model themselves. See, in addition to the works above cited: Gordon and Meggitt (1985); Moore (1986); Ottley and Zorn (1983). These and other works point out that custom had almost as great an impact on the imposed legal system as the imported law had on it.

⁴ This altogether too brief description is based upon numerous ethnographies. Many anthropological texts seek to describe the pre-colonial cultures of the Pacific. For useful reviews, and a bibliography of these ethnographies, see Foerstel and Gilliam (1992). Although, by definition, no anthropologist was in a position to observe Pacific cultures prior to the colonial period, most of the early

men's house, there were no separate political or legal institutions in Melanesia. There were no legislatures, courts or police. Law and custom were the same.⁵

ethnographies pretend to write as if colonization had not occurred. Excellent critiques of this ethnographic method can be found in Marcus and Fischer (1986) and Kuper (1988). Anthropologists have probably written more about Melanesia than about any other corner of the world. Two of the earliest into the field were Bronislaw Malinowski and Margaret Mead, and their work is still influential. Mead, however, did not write directly about law, whereas Malinowski did, e.g. Malinowski (1926).

⁵ As, in this Article, are 'custom' and 'customary law'. Some writers on Pacific and other traditional legal systems distinguish between 'custom' and 'customary law'. Unfortunately for consistency, however, they do so in different ways and for different reasons. There are at least three main differentiations made. (a) Some use 'custom' to mean rules or norms of the indigenous peoples, while 'customary law' is saved for those customary rules that have been recognized and applied by the state courts, thereby becoming part of the formal law. This distinction is useful because readers can easily tell which the writer is referring to. Also, it points out that the adoption of custom by state courts changes the customs into something different. They cease to be the flexible and ever-changing, mostly unwritten, mostly unconsidered, norms of a culture, and become rules that courts treat as precedent. See, for example, Woodman (1969). (b) Some legal scholars, however, do not like to make that distinction between 'custom' and 'customary law' because it is the distinction that the colonial rulers made, and they meant by it that the 'customs' of indigenous peoples were not 'law' in any sense and, indeed, were inferior to the 'laws' that the colonizers brought with them or imposed on their subjects. For discussions of colonial approaches to custom, see Zorn (1992); and Ottley (1995). In opposition to that colonial view, many scholars purposely use the phrase 'customary law' to refer to the unwritten norms, usages, rules and values of the indigenous peoples of the Pacific. Another example of this political use of the terms 'custom' and 'customary law' occurs in the laws of Papua New Guinea. The older Papua New Guinea Customs (Recognition) Act 1963, which required courts to treat the unwritten norms of the peoples of Papua New Guinea as facts, not as laws, referred to those norms as 'custom'. The more recently enacted Underlying Law Act 2000, which provides that these norms and usages are to be the primary and major source of Papua New Guinea's own common law, refers to them as 'customary law'. (c) Colonial (and even some post-colonial) legislation and court-made laws used the term 'custom' to refer only to those norms and usages of the indigenous peoples of the Pacific that had existed since long before colonial times, i.e., since 'time immemorial'. Thus spoke the Papua New Guinea Native Customs (Recognition) Ordinance, enacted during the

Each Melanesian village was a separate and autonomous entity, with its own customs and its own processes for enforcing norms and resolving disputes, or, in other words, with its own law. Although the political autonomy of villages did not survive colonialism and statehood, Melanesian villagers still expect that they and their neighbours will practice their own customs and adhere to their own values and beliefs. To an outsider, there might seem much that all Melanesian societies have in common.⁶ But Melanesians themselves experience their communities as exceedingly diverse. The government of Papua New Guinea recognises the existence within its borders of over 600 different languages, many of which are spoken by societies of only a few hundred or a few thousand people. Each of these languages signifies the existence of a unique culture, with its own customs, norms and values, and with, that is to say, its own customary law.

The various western powers that ruled Melanesia made of these disparate societies four (later three) colonial entities -- Dutch/Indonesian Papua, British/Australian Papua, German/Australian New Guinea, and the British Protectorate of the Solomon Islands⁷ -- thereby ending the autonomy of the village societies, putting

colonial period,. At independence, the Constitution, Art. 20, redefined 'custom' as the "customs and usages of the indigenous inhabitants of the country ... regardless of whether ... the custom or usage has existed from time immemorial". After independence, the Customs (Recognition) Act was revised to adopt the new definition of custom. (d) Finally, many lawyers, judges, legislators and scholars use the two terms 'custom' and 'customary law' interchangeably, without paying much attention to shades of meaning.

⁶ Pre-colonial Pacific Islands societies were, for the most part, small, autonomous communities. Membership and status in the community depended primarily on kinship and marriage. Technology was simple (the primary occupations relating to food-getting, through swithin gardening, fishing and hunting), producing a subsistence economy in which each household produced enough for its own members' survival, but leaving insufficient surplus to support a leisure class or to allow for much division of labour. Even in Polynesia, with its chiefly and royal castes, there was little status differentiation. Members of the community interacted on the basis of relative equality. Most communities partook of a rich and textured social, religious and mythic life.

⁷ After World War II Australia joined the trust territory of New Guinea and the colony of Papua into a single unit for some (but not all) administrative purposes. Although many distinct ordinances and regulations of the two entities remained,

unrelated (even warring) cultures into the same political unit, and separating villages that had been related not only culturally, but through long-sustained marriage and trading relationships. At independence the territorial boundaries created under colonialism continued, creating a problem for the governments, and especially the judiciary, of the new nations that is shared with many other post-colonial states.

Many influential policy-makers in the newly independent states wanted to do away with the vestiges of colonialism and re-assert their own cultures by throwing off the alien statutes and the imported common law, and replacing them with the customary law of Melanesian tradition.⁸ But it was not easy to do this and, at the same time, build a political and economically viable nation. In both Papua New Guinea and Solomon Islands, there were great varieties of customs. Nation-builders, including judges, who were anxious to impart legitimacy and authority to a national legal system, feared that emphasizing these differences would serve only to pull the fragile new nations apart.⁹ Moreover, customary law had not been created for societies that hoped to entice foreign investors onto their soil. The *comprador* class worried that customary law would be a barrier to development (Amarshi (1979)).

The compromise adopted both in the Solomon Islands and Papua New Guinea Constitutions was to create a legal system based largely on common law models, but to require that the state courts adopt decisional rules from customary law

there were more similarities than differences in political and legal styles: Nelson (1983).

⁸ See, for example, the addresses to the Seventh Waigani Seminar, which took place shortly before Papua New Guinea's independence, by The Hon. Michael T. Somare, first Prime Minister of Papua New Guinea, and Bernard Narokobi, a member of the Constitutional Planning Commission and first chairman of the Papua New Guinea Law Reform Commission: Somare (1975); Narokobi (1975).

⁹ In *S.C.R. No. 1 of 1977: Pouis Tatut v Chris Cassimus* [1978] PNGLR 295, the Supreme Court held that custom could become a rule of the underlying law only if the custom obtained throughout the country. In *S.C.R. No. 4 of 1980 (No. 2); Re petition of M.T. Somare* [1982] PNGLR 151, the judges discussed this and other issues that made them believe customary law was, perhaps, too difficult to apply. See also Nonggorr (1995). There were additional reasons for the judiciary's unwelcoming attitudes towards custom, including colonial attitudes and positivist training: Zorn (1992); Ottley (1995).

whenever a rule from custom that was applicable to the case could be found.¹⁰ The Constitutions contained some suggestions about how this could be done,¹¹ but the details were left to the Parliaments of both nations, which were supposed to adopt rules that would guide the courts in this difficult process (Papua New Guinea Constitution, s.20 and Schedule 2.1(3); Solomon Islands Constitution, s.5). The colonial adventure, however, had left neither the courts nor Parliament particularly able to handle these problems.

Custom and the common law in the colonial period

The colonizers of Papua New Guinea and Solomon Islands did not believe that the Melanesian communities had legal systems. The Germans, Australians and English of the late nineteenth century were positivists, believing that a legal system existed only in the presence of a government that had a legislature to make rules, courts to apply the rules, and police to enforce them. Seeing none of these in the customary legal systems of Melanesia's small communities, the colonizers felt free to import their own legal systems into the colonies. Indeed, the supposed absence of law became a justification for the colonial exercise. The colonizers saw themselves as bringing law to lawless peoples (Zorn 1991; Ottley and Zorn 1983: 273).

¹⁰ Constitution of the Independent State of Papua New Guinea, s.20 and Schedule 2 (16 September 1975); Constitution of Solomon Islands, s.76 and Schedule 3 (7 July 1978). The Papua New Guinea and Solomon Islands Constitutions can be found in Pacific Law Unit and Institute of Pacific Studies (n.d.).

¹¹ Schedules 2 of the Papua New Guinea Constitution and 3 of the Solomon Islands Constitution are similar in this respect. Both provide that the common law of the new nation is to be made up of rules from customary law (so long as such are not in conflict with the Constitution or a written law) and rules from the English common law in existence prior to independence (so long as such are not in conflict with the Constitution, a written law or customary law). Schedule 2.3 of the Papua New Guinea Constitution also permits judges to develop Papua New Guinea's underlying law (the term was coined for Papua New Guinea's homegrown common law, to distinguish it from the imported common law) by creating appropriate rules if no rule can be found in either of the above sources. In creating such new rules, judges are to look for analogous principles in the customary law of Papua New Guinea, in legislation and court decisions in other countries, and in the National Goals, Directive Principles and Basic Rights set forth in the Papua New Guinea Constitution.

For much of the colonial period the imported courts were used primarily by the colonizers themselves as forums in which to settle their own disputes. Melanesians seldom came before the courts, and then usually as criminal defendants. When they had disputes amongst themselves they tended to settle them in the village, using customary norms and processes. Only in the 1960s, coincident with the development of nationalist movements in colonies round the world, did Melanesians begin to see the colonizers' courts as places where they might possibly win vindication for land taken from them or torts wreaked upon them (Strathern 1972; Epstein 1974; PNG Commission 1973; James 1985).

Colonial judges and magistrates did use custom occasionally in cases in which Melanesians were parties, but the way in which this was done demonstrates that the judges and magistrates believed it to be not only different from, but also inferior to, the common law (Ottley and Zorn 1983: 272-273). Melanesians would, the colonizers were sure, eventually develop the sophistication necessary to know and follow the imported laws. Until that happened, however, it would be unjust to hold Melanesians to the standards set by the imported legal system. Thus, rural Melanesians, who had not had much contact with missionaries or schools, were able to plead custom as a defence in criminal trials, but educated Melanesians could not (Ottley and Zorn 1983: 269-272).

In Papua New Guinea the Native Customs (Recognition) Ordinance 1963 was the colonial administration's first legislative attempt to deal with custom in the courts. It represented in some respects a step forward for custom, in that it at least envisioned that the colonial courts would occasionally use custom, but it severely limited that use, providing at section 2 that custom included only those traditions that had been held by indigenous Papua New Guineans "since time immemorial" and that custom could be applied in civil cases only when both parties were native-born Papua New Guineans.¹²

¹² At s.8 the Ordinance further limited the civil law application of custom to cases involving the ownership and inheritance of land or water held in customary tenure, customary marriages and family matters, transactions which the parties intended or justice required to be regulated by custom, and decisions about the reasonableness of an act or the state of mind of an actor. At s.7 the Ordinance limited the criminal law application of custom to defences: ascertaining the state of mind of a defendant, deciding the reasonableness of the defendant's acts, deciding whether the defendant was entitled to other defences (such as provocation or self-defence) and determining the penalty. Finally, at s.6, the Ordinance provided that custom could be recognized and enforced by state courts only if the custom were not "repugnant to the general principles of humanity". Shortly after independence the Native Customs (Recognition) Ordinance was amended and

The treatment of custom in Solomon Islands during the colonial period was similar. Whilst customary law was tolerated so long as it was used by natives to regulate affairs amongst themselves, and even promoted as a means of social control of natives, its role in the state system was restricted (Corrin Care et al. 1999: 3). Native courts were established to deal with minor, local matters, were “constituted in accordance with the native law or customs of the area in which the court is to have jurisdiction”, and were to administer “the native law and custom prevailing in the area” (Native Courts Act, Cap 33, ss.3, 11). But custom was not expected to play any significant part in the deliberations of the higher courts.

Custom in Melanesian constitutions

The Papua New Guinea and Solomon Islands Constitutions contain very similar provisions in regard to custom. Both define custom as a contemporary, developing phenomenon, in the following terms:

[Custom means]... the customs and usages of indigenous inhabitants of the country ... regardless of whether or not the custom or usage has existed from time immemorial (Papua New Guinea Constitution, s. 20).

Both provide for Parliament to make laws regarding the proof and pleading of custom (Papua New Guinea Constitution, s.20 and Schedule 2.1(3); Solomon Islands Constitution 1978, s.75 and schedule 3.3). And both provide that, until Parliament acts, the courts should endeavour to create a homegrown common law using both custom and the English common law as sources (Papua New Guinea Constitution, Schedule 2; Solomon Islands Constitution, Schedule 3).

In order to emphasise that this new common law should not merely be a restatement of English law, the Papua New Guinea Constitution gives it a new name, calling it the “underlying law” (Papua New Guinea Constitution, s 20 and Schedule 1.2). However, it is clear that the expectations of the Papua New Guinean drafters for the underlying law were the same as the intentions of the

renamed the Customs Recognition Act, cap. 19. The requirement that custom be a tradition that had existed from time immemorial was dropped from the amended Act, but the other limitations were retained: see below.

Solomon Islands drafters for the common law.¹³ Both wanted the common law of their new nations (whatever it might be called) to adapt to the special circumstances of the nation and, to that end, to be based to a large extent on rules from custom. This intention is encapsulated in the Preambles to the Constitutions of Papua New Guinea and Solomon Islands.

However, both Constitutions are ambiguous about the very points on which they perhaps should have been most clear. Schedule 2 of the Papua New Guinea Constitution, for example, provides in Schedule 2.1 that the courts should use custom in developing the underlying law, and in Schedule 2.2 that the courts may also use the English common law in developing the underlying law. The Schedule does not expressly state which of these two possible sources has preference. It can be argued that custom does, both because it comes first in the Schedule and because the Constitution provides that the common law ought not to be used if it would conflict with custom (as argued by Sir Mari Kapi, the Deputy Chief Justice, in *S.C.R. No. 4 of 1980: In the Matter of M.T. Somare* [1981] PNGLR 265: 285-286). It has also been argued that, since the Constitution does not expressly state a preference for either, judges may choose whichever they prefer (as argued by Miles J. in the same case). Since expatriate judges, and even some indigenous judges, prefer the law in which they were educated, the English common law has probably been used much more frequently by Papua New Guinea's courts than has custom.¹⁴

The Solomon Islands Constitution does not suffer from the ambiguity of the Papua New Guinea Constitution. It clearly establishes customary law as a source of law in the formal legal system and, equally clearly, gives it preference over common law and equity (Solomon Islands Constitution, Schedule 3, para 2(1)(c) and 3(1)). It also makes it clear that custom is inferior to Acts of Solomon Islands Parliament (Schedule 3, para. 3(2), which in turn are placed below the Constitution (section

¹³ This was not surprising, since there was a considerable overlap. Professor Yash Ghai, who had served as a consultant to the Papua New Guinea Constitutional Planning Commission, also helped to draft the Solomon Islands Constitution. Professor Ghai was later a consultant to Papua New Guinea's Law Reform Commission, helping to draft the Underlying Law Bill.

¹⁴ The judges themselves have given additional reasons for their infrequent use of custom. Sir Bori Kidu, then C.J., blamed counsel, noting that they seldom "produce evidence or material necessary for the Judges ... to use to recognize custom or to develop the underlying law" (*The State v Paul Pokolo*, unreported National Court judgment N404 of 1983: 7-8).

2). However, the relationship between customary law and English statutes is less clear.¹⁵ The finer detail regarding the application of customary law, such as rules for its proof and pleading, are left to Parliament to provide (Schedule 3, para 3(3)).

A moment of legal change

Independence brought euphoria to Papua New Guinea, and great hope. There was much activity in the legal profession, aimed at making the law more appropriate to the customs and conditions of the country.

The Papua New Guinea Law Reform Commission began work not long after independence on a bill that would fulfil the constitutional mandate that Parliament make rules for the pleading and proof of custom and for the development of the underlying law. The Commission hired a consultant to assist in drafting the law,¹⁶ and held a seminar on “law and self-reliance” in July 1976, attended by Law Reform Commission personnel, magistrates, law teachers and lawyers (Papua New Guinea Law Reform Commission 1977: seminar participants are listed at 87). A working paper containing an initial draft of the proposed Act was ready almost precisely a year after independence (Papua New Guinea Law Reform Commission 1976).

The initial draft of the Underlying Law Act removed the ambiguities that had been present in the Constitution by declaring that the underlying law should be developed, first, by looking to custom for applicable rules. The initial draft also provided that courts should look to the English common law only if custom offered no applicable rule.

The Law Reform Commission solicited comments on the initial draft, primarily from participants in Papua New Guinea’s legal profession, and held another seminar in March 1977 (Papua New Guinea Law Reform Commission Report 1977; list of commentators: 88; list of seminar participants: 85). Eight months later, in November 1977, the Law Reform Commission published report

¹⁵ See *K v T and KU* [1985/6] SILR 49, where it was held that preference given to “Acts of Parliament” over customary law in schedule 3, para 3(2) refers only to Acts of the English Parliament.

¹⁶ Professor Yash Ghai, then of the Scandinavian African Studies Institute (Papua New Guinea Law Reform Commission 1977: Appendix, 83).

containing a revised version of the Bill (Papua New Guinea Law Reform Commission Report 1977).¹⁷

The post-colonial malaise

In the heady months immediately following independence, many people believed that there would be great changes in the law. For a long time, that did not happen, either in Papua New Guinea or in Solomon Islands.

(a) Papua New Guinea

In September 1976, barely a year after independence, the Law Reform Commission criticised the Papua New Guinea courts for not following the Constitutional mandate to develop the underlying law:

It was intended to make a new start on the legal system at independence. Papua New Guinea kept only the pre-independence statutory law that it wanted and repealed the rest. ... A greater role was given to custom. The principles and rules of common law and equity of England were adopted as part of the underlying law, but only to the extent that they were appropriate and applicable to the circumstances of Papua New Guinea.

It was hoped that the common law of Papua New Guinea would quickly develop. Unfortunately this has not happened. The judges have moved very slowly, preferring to re-adopt pre-Independence legal rules or the English common law rules than developing new rules to suit conditions in our country. (Papua New Guinea Law Reform Commission 1976: 2)

Just over a year later, in its final report on the underlying law, the Commission repeated the same lament (Papua New Guinea Law Reform Commission 1977: 9-10). A quarter century later they could have said the same.

¹⁷ The revisions did not substantially change the substance of the bill. Custom was still placed first in the hierarchy of sources; if anything, its position was strengthened. But the new version was more concise than its predecessor, and resolved some of the drafting ambiguities of the initial version.

Parliament did not enact the Underlying Law Act in 1977. Nor in 1978. The bill was presented to Parliament at least once in the late 1980s, but it was not enacted then either. Instead, the Customs Recognition Act, a barely modified version of the colonial ordinance, continued in effect. And throughout those years the Papua New Guinea courts continued, for the most part, to prefer pre-Independence holdings or rules from the English common law.

There are many reasons for this impasse, but the most important is probably the effect of colonialism on the values and beliefs of the post-colonial society. Colonised peoples tend to adopt the attitudes of their colonizers. The belief that custom is not law, and that it is not good enough (or modern enough, or certain enough) to be law, continued for many years to dominate the post-colonial legal system. (For discussion of the use (and the lack of use) of customary law in the post-colonial courts, see, for example, the articles collected in James and Fraser (1992)). But perhaps the post-colonial era is finally coming to an end. In recent years, the courts of Papua New Guinea have shown themselves more willing to recognise and use custom (a trend documented in Aleck and Rannells 1995). And, at last, in April 2000, Parliament passed the Underlying Law Act. However, Parliament did not enact the revised version of the Act, contained in the Report of the Papua New Guinea Law Reform Commission (1977). Instead, it enacted, with some small changes, the initial version, contained in Working Paper of the Papua New Guinea Law Reform Commission (1976). In discussing the Act, we will refer both to the Working Paper and the Report, since both contain useful information about how courts should interpret and apply the Act.

(b) Solomon Islands

Between independence and 1993 the Solomon Islands Parliament was conspicuously silent as to the role of custom in the formal legal system. Unlike Papua New Guinea, Solomon Islands did not have a Law Reform Commission.¹⁸

¹⁸ The Law Reform Commission was not established until 1994, when the Law Reform Commission Act 1994 was passed. Its first terms of reference, drawn up by the Commission on 23 May 1995 and approved by the Minister, did not include customary law. The terms of reference did include a review of the Acts of the United Kingdom Parliament which were of general application under schedule 3 of the Constitution to check whether they met the modern needs of society. The Law Reform Commission did not complete the task allocated to it, due to lack of resources (Solomon Islands Law Reform Commission 1996) and is now without a Chair.

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Schedule 3, paragraph 3(3) of the Constitution had authorized Parliament to provide for the proof and pleading of customary law, the recognition of custom, and the resolution of conflicts, but for a number of years Parliament failed to act. It is, as we hope to make clear in this article, difficult to legislate about custom, and, in the absence of a Law Reform Commission to help them think through the issues, Parliament may have felt that no one was up to the task.

Whatever the reason, the courts were left to grapple on their own with custom, guided only by Schedule 3, paragraph 3(1) of the Constitution, which states only that, "customary law shall have effect as part of the law of Solomon Islands". This provision is not as helpful as the courts might have wanted, or needed. It fails to tell the courts what part customary law should play, let alone how to get it to play that part. So, in the absence of meaningful Constitutional or statutory guidance, the courts tended to follow their common law instincts and to marginalize the role of custom, by requiring strict proof of its existence according to western rules of evidence and procedure.

In *Allardyce Lumber Company Limited v Laore* ([1990] SILR 174) Ward CJ criticised Parliament for its inaction and went as far as to say that, in the absence of a statute, the courts should perhaps not be applying custom at all. This approach ignored the text of the Constitutional provisions. The mandatory words "shall have effect" in Schedule 3, paragraph 3(1) assures customary law a place in the legal system, and Parliament is merely empowered in permissive terms to legislate for the details. Ward CJ's suggestion also ignored the wider framework of the Constitution, in particular the emphasis in the Preamble on the need for custom to play a continuing role in the legal system.

In 1993, during the brief government of Billy Hilly, the Customs Recognition Bill was circulated with a view to addressing the status of customary law. But the government changed before the Bill could be enacted. In 1995 a slightly different version of the Bill was drafted. It was enacted without change, but not until late 2000. Even then, its commencement was postponed until a date to be appointed by the Minister. There is some doubt amongst the Solomon Islands legal fraternity as to whether the Act will be brought into force.¹⁹ For the reasons discussed below, it is our opinion that this is just as well.

The Bill was based upon Papua New Guinea's Customs Recognition Act. Parliament's choice of the Papua New Guinea law may be disappointing, but it was not surprising. Some model was needed, and, unless the Parliamentary

¹⁹ Conversation with President of the Bar Association of Solomon Islands.

drafters had chanced upon the Papua New Guinea Law Reform Commission Working Paper (1976) or Report (1977) on the Underlying Law Act, the Papua New Guinea Customs Recognition Act was the most likely model available.

Papua New Guinea was Solomon Islands' nearest neighbour. Many Solomon Islands lawyers, including the Hon Andrew Nori, Minister of Justice and Legal Affairs of Solomon Islands at the time the Bill was drafted, had been educated at the Law Faculty of the University of Papua New Guinea, where they would have studied the Customs Recognition Act. Nor was there a plethora of other models available. In addition to Papua New Guinea, only Tuvalu and Kiribati have statutes governing the pleading and proof of customary law (Laws of Tuvalu Act 1987; Laws of Kiribati Act 1989). If the Solomon Islands drafters had turned to Tuvalu and Kiribati, they would have found models much more accepting of custom than was Papua New Guinea's statute (Zorn and Corrin Care 2001: 17-18), but, despite having all three been British dependencies,²⁰ there was little post-independence contact between them and Solomon Islands. Communications between Pacific Island nations are difficult, and infrequent even between near neighbours. Laws are often published only in mimeo, and are difficult to find even within the country, so it is unlikely that after independence the law departments of Solomon Islands kept track of what was happening in those far-off Polynesian nations.²¹

The Customs Recognition Act of Solomon Islands

Nevertheless, it is ironic (and, again, illustrative of the difficulty in communicating between countries in the Pacific) that, at the very time that Papua New Guinea was at last divesting itself of its Customs Recognition Act, Solomon Islands was enacting legislation which was almost identical, even to the name. Here we shall discuss the key provisions of the Solomon Islands Act in some

²⁰ All three had been British protectorates, governed by the Western Pacific (Courts) Order in Council 1961. For the provenance of these rules, Corrin Care 1998: 2.

²¹ Happily, these longstanding problems may have been ended by the advent of the internet, which has made communication across the vast spaces of the Pacific much easier, and has also aided in making statutes and case reports widely and systematically available. See, especially, the Pacific Law Materials website of the University of the South Pacific: www.vanuatu.usp.ac.fj/paclawmat.htm.

detail, primarily in order to compare it with both the earlier Papua New Guinea Act and the Underlying Law Act.

The Solomon Islands Customs Recognition Act 2000 (No. 7) is stated in the long title to be an Act to provide for the recognition of customs as a part of the law of Solomon Islands. This title is misleading as, like its model the Customs Recognition Act of Papua New Guinea, the Solomon Islands Act has three objectives: (1) to establish guidelines for the proof of customary law; (2) to reinforce the recognition of custom and establish its boundaries; and (3) to establish guidelines to govern cases where there is a conflict between customs.²² The provisions relating to each of these objectives will now be considered in turn.

Proof of customary law

The most significant feature of the Customs Recognition Act is that it provides that questions about the existence, nature and application of custom must be "ascertained as though they were matters of fact". This is in direct contrast to s.16(1) of the Underlying Law Act, which, as discussed below, provides that customary law is a question of law, not fact.

The consequence of treating customary law as fact is that it must be pleaded and proved like any other fact. Accordingly, it may be necessary to bring witnesses to court, often from remote areas of the country. The cost of this may prevent legitimate claims succeeding. Further, insisting on proof as fact would normally subject customary law to the confines of the High Court (Civil Procedure) Rules 1964 (made pursuant to the power conferred by s.22, Western Pacific (Courts) Order in Council, 1961 (UK)) in civil cases, the Criminal Procedure Code (Cap. 7) in criminal cases and, in all proceedings, the legislation and common law of evidence applicable in Solomon Islands.²³ In fact, these restraints have been eased

²² The Papua New Guinea Customs Recognition Act (Cap. 19) has a more appropriate long title: "an Act relating to the determination and recognition of custom".

²³ In the past these restraints have often led the courts to reject customary law, on the basis that it has not been adequately proved. See, for example, *Allardyce Lumber Company Limited v Laore*, unreported, High Court, Solomon Islands, civ cas 64/1989, 10 Aug 1990, where failure to establish customary ownership of the reef and seabed by evidence was the reason for declining to uphold the customary title.

by s.5 of the Act. Section 5(1)(a) provides that in considering questions as to the existence, nature or application of custom the court is not bound to observe the strict rules of procedure or technical rules of evidence. Instead the court is directed by s. 5(1)(b) to:

- (i) Admit and consider such relevant evidence as is available (including hearsay evidence and expressions [of] opinion; and
- (ii) Otherwise inform itself as it thinks proper.

The court is specifically permitted to refer to, and accept as evidence, books, treatises, reports or other reference works, and statements by chiefs or provincial governments, whether or not they have been published (s.5(2)(a)).

In spite of the fact that section 5 has lessened the potentially adverse impact of section 3, the treatment of custom as fact is still unsatisfactory. It automatically demotes custom from its constitutional status as a formal law, superior to common law and equity and at least on a par with English statutes. It also means that judges are prevented from applying customary law which is within their own knowledge and from conducting their own research in reference works of their own choice. (Cf e.g. Powles and Hill 2001). Whilst the proviso to section 5(2) provides that “this subsection shall not limit in any way the discretion of the Court in obtaining evidence or informing itself on the question” of customary law, from past performance it seems unlikely that judges will do so.²⁴

Recognition of custom

(a) restriction of recognition

Section 6 of the Act bears the marginal note, “Recognition of custom”, and provides that:

²⁴ See for example *Narovo v Peter Geli, John Soga, Harold Sai And Solo Semi*, unreported, High Court, Solomon Islands, Land Appeal Case 4/1996, 2nd May 1997, where Awich J. refused to deal with a case until the parties had obtained directions from the local court or customary land appeal court as to the meaning of primary and secondary rights in land.

...custom 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 –

- (a) its recognition or enforcement would result, in the opinion of the Court in an injustice or would not be in the public interest, or
- (b) be inconsistent with the provisions of the Constitution or an Act of Parliament.

This section is based on s.3 of the Papua New Guinea Act and is another demonstration of the drafter's failure to take account of the different context in which the earlier Act was passed. When the Papua New Guinea Native Customs (Recognition) Act was enacted, customary law was not a source of formal law. The statute provided for limited recognition in the formal courts, as an alternative to setting up local (or 'native') courts. After independence the Papua New Guinea Constitution required that custom be treated as a major source of state law. This should have led almost immediately to the repeal of the Customs Recognition Act. Instead, the 1963 Act was re-enacted with only cosmetic changes as the Customs Recognition Act, and this dinosaur remained in force until 2000. Since independence, the status of customary law in Solomon Islands has been relatively clear. To enact legislation based on a model designed for a colonial legal system that favoured the introduced law over custom is totally inappropriate.

There are some significant differences between the Solomon Islands Act and equivalent sections of the Papua New Guinea model. Section 6 of the Native Customs (Recognition) Act imposed four exceptions on the recognition of custom:

- (a) Repugnancy;
- (b) Inconsistency with legislation in force;
- (c) Injustice;
- (d) Conflict with the welfare principle.

Of these, (c) and (d) survived in the post-independence legislation, whereas the Solomon Islands Act incorporates (b) and (c) only. Obviously the colonial repugnancy clause in (a) is no longer necessary, and certainly not appropriate, in either country. In Papua New Guinea, customary law that was "repugnant to the general principles of humanity", would be unconstitutional, as it would contravene the human rights provisions.²⁵ This is not entirely true in Solomon

²⁵ See eg, *Re Raramu and Yowe Village Court* [1994] PNGLR 486, where the court declined to recognise a custom that was discriminatory and therefore unconstitutional.

Islands as, in the case of anti-discrimination provisions, human rights are subject to customary law.²⁶ However, the injustice and public policy proviso in s.6(a) of the Solomon Islands Act, which is identical to s.3(1)(a) of the Customs Recognition Act of Papua New Guinea, is sufficient to cover any foreseeable conflict. In any event, the legislation is well rid of the colonial overtones of a repugnancy clause. In both Papua New Guinea and Solomon Islands, the superior position of the Constitution and legislation is guaranteed by the Constitution (Constitution of Papua New Guinea, s.11; Constitution of Solomon Islands 1978, s.2 and schedule 3, para 3(2)). Accordingly, it is unclear why the drafter of the Solomon Island Act thought it necessary to resurrect this provision from the pre-independence New Guinea legislation.

(b) limits on recognition in criminal and civil cases

Section 3 is couched in permissive tone, bearing witness to its colonial heritage, but it is not unduly restrictive in effect. However, in addition to the general restrictions imposed by s.3, the Act imposes further and more specific restrictions. Sections 7 and 8, which are almost identical to sections 4 and 5 of the Papua New Guinea Act, limit the purposes for which custom may be taken into account in criminal and civil cases respectively.²⁷ In criminal cases custom may be taken into account only:

- in order to ascertain a person's state of mind;
- as a factor in deciding whether a person has acted reasonably;
- as a factor in deciding whether to convict;
- as a factor in determining the appropriate penalty on conviction;²⁸
- to avoid injustice.

²⁶ Section 15(5)(d). This sub-section is open to an alternative interpretation, which is discussed in Corrin Care 2000.

²⁷ Narokobi (1976) pointed out that the recognition provisions in the 1963 Act were "extremely limited in substantive law" and that they allocated no role at all in procedural aspects of the law.

²⁸ In *the State v Emp Mek* [1993] PNGLR 330 the equivalent provision in the Papua New Guinea Customs Recognition Act was interpreted restrictively as allowing custom only to mitigate or aggravate the punishment prescribed by the Criminal Code.

In civil cases custom may be taken into account only in relation to:

- rights relating to customary land and things in, on or produce of customary land;²⁹
- rights relating to water, the sea, sea-bed, reef, river or lake;
- devolution of customary land on birth, death or the happening of a certain event;
- trespass by animals;
- customary marriage, and divorce, custody and guardianship in connection with a customary marriage;³⁰
- a transaction the parties intend or justice requires should be regulated by custom rather than law;
- as a factor in deciding whether a person has acted reasonably;
- the existence of a state of mind;
- to avoid injustice.

The Preamble to the Independence Constitution, together with sections 75, 76 and schedule 3 make it clear that customary law is to be integrated into the formal system, with a status arguably superior to all introduced law. However, read literally, sections 7 and 8 of the Act mean that customary law will no longer generally “have effect as part of the law of Solomon Islands” as provided in Sch.3, para.3(1) of the Constitution, but will be part of the law only in the limited areas listed in ss.7 and 8. Although a court that was particularly well disposed towards customary law, and particularly creative, could perhaps bring in custom in other areas of law, by relying on the Act’s avoidance of injustice provision, for most courts and most cases these two sections will have the effect of relegating custom to a minor role, dealing with specific matters only.

The question then arises whether sections 7 and 8 are constitutional, given that they conflict with sch.3, para.3(1). Section 75(1) specifically says that Parliament “shall make provision for the application of laws, including customary law”, but

²⁹ A change of wording from the Bill makes it arguable that customary law may not be taken into account in cases involving ownership of customary land, as opposed to ownership of rights “in, over or in connection with customary land”.

³⁰ Section 9 provides that “notwithstanding any other law, custom shall be taken into account in deciding questions relating to guardianship and custody of infants and adoption”.

legislating to restrict the role of custom as a general source of formal law is arguably different from providing for its “application”.

Another question that arises is whether sections 7 and 8 apply to restrict the cases in which custom may be recognized in the customary courts. Obviously, the sections do not apply outside the state system. In indigenous forums, customary law will continue to be 'the law'. But what of courts established within the state system to administer customary law? Section 6, the general recognition provision, refers to recognition and enforcement in “all courts”, and ‘court’ is defined in section 2 as meaning, “any Court of Solomon Islands of competent jurisdiction”, which would include the Local Courts (under the Local Courts Act, Cap 19) and the Customary Land Appeal Courts (under the Land and Titles Act, Cap 93, s .55). Sections 7 and 8 refer respectively to “a criminal case” and “a case other than a criminal case”, but do not mention ‘courts’. This leaves uncertain whether they apply to the Local and Customary Land Appeal Courts. The better view would appear to be that they do not, a view that is supported by reference to the text of these provisions. ‘Criminal’ and ‘civil’ are not appropriate classifications for customary law matters that arise in these tribunals. Further, section 8 refers expressly to the High Court Civil Procedure Rules, which apply only in the High Court, and, in the absence of any specific rule on point, in the Magistrates’ courts (Magistrates Court (Civil Procedure) Rules , O 4).

(c) restriction of recognition in cases involving the welfare of children

Paragraph 6(1)(c) of the 1993 Customs Recognition Bill provided a further restriction on the recognition of customary law, which was not to be recognised where,

... in a case affecting the welfare of a child under the age of 16 years, it would not [be] in the best interests of he child.

This paragraph was copied from sub-section 6(1)(d) of the Papua New Guinea Native Customs (Recognition) Act, mentioned above. It was omitted from the 1995 Bill and from the Act. In Solomon Islands’ custom, custody is generally determined by reference to the payment of brideprice. If the husband’s family makes payment to the family of the wife, the children prima facie remain with the father on dissolution and with his family on his death.³¹ Introduced law takes a

³¹ See further *In re B* [1983] SILR 33, which sets out the basic position in Melanesian custom. For the rule that on the death of the husband the children remain with his family see: *Sasango v Beliga* [1987] SILR 91.

different approach. The common law 'welfare principle', enshrined in section 1 of the Guardianship of Infants Act 1925 (UK), which has been held to be in force in Solomon Islands,³² provides that the welfare of the child is the paramount consideration in determining custody. The courts have applied the welfare principle in preference to customary law in a series of custody cases.³³ In *Sukutaona v Houanihou* ([1982] SILR 12) the Chief Justice said that "the courts have always regarded the interest of the children to be of paramount importance and should continue to do so". However, he also asserted the relevance of customary law, regarding it as

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 parents should not have custody ([1982] SILR 12).

Whilst direct reference to the paramountcy of the welfare principle has been omitted from the Solomon Islands' Act, section 9 of the statute specifically directs the court to take custom into account in deciding questions relating to guardianship and custody of infants and adoption. However, it is unclear whether section 9 is merely intended to endorse the *Sukutaona* approach, or provides that custom should prevail over the welfare principle. Had paragraph 6(1)(c) of the Bill been included in the Act, its specific provisions would have prevailed over the more general provision in s.9, according to the rule expressed in the latin phrase *generalia specialibus non derogant* (the general does not override the specific). The fact that it has been omitted might be taken as evidence of the legislature's intention for custom to override the welfare principle. Running counter to this is the rule of statutory interpretation that common law rules are not abrogated by statute unless this is done expressly.³⁴ Further the words "shall be taken into account" in s.9 suggest that other factors also will be taken into account, and the

³² The Act is in force as part of introduced law. But see *Krishnan v Kumari* (1955) 28 Kenya L.R. 32, where the court held that the Guardianship of Infants Act 1925 (UK) was not an act of general application in Kenya.

³³ *K v T and KU* [1985/86] SILR 49; *Sasango v Beliga* [1987] SILR 91. See also *In Re B* [1983] SILR 223

³⁴ *R v Secretary of State for the Home Department ex parte Puttick* [1981] 1 QB 767 at 772.

welfare principle is the most obvious contender. The fact that the welfare principle is embodied in an English statute capable of applying in Solomon Islands also raises the question whether the Customs Recognition Act can override the introduced Act. It is clear from the Constitution that it can (Constitution of Solomon Islands 1978, Schedule 3, paragraph 1). Unfortunately, this does not really assist, as it is still unclear whether s.9 is intended to abrogate the welfare principle, whether common law or statutory.

Conflict between customs

Custom in Solomon Islands differs from island to island and from village to village. The fact that customary law is not a homogeneous body of law has often been the justification for restricting its role in the legal system. Unlike other sections of the Customs Recognition Act, which tend to restrict the use of custom, Section 10 could increase its use in the courts, because it provides a means for the courts to choose amongst potentially conflicting customary regimes.

Section 10 provides that where a court is faced with conflicting systems of custom and is not satisfied on the evidence that only one of them is applicable, the court shall consider all the circumstances and may adopt the system that it is satisfied the justice of the case requires. This is a far less detailed provision than that contained in the Papua New Guinea Underlying Law Act, which is discussed below. It is also a less detailed approach than that advanced in the neighbouring country of Vanuatu. There in *Waiwo v Waiwo and Banga*,³⁵ Senior Magistrate Lunabek (as he then was) put forward suggestions for dealing with conflict not only between different regimes of customary law, but also between customary law and introduced law, which may be summarized as follows:

- a. If the parties are from the same custom area and are governed by the same customary law regime, that regime should be applicable to their case.
- b. If they come from the same Islands or different Islands and are subject to different customary law regimes, the court should look for a common basis or foundation in the customary law applicable.

³⁵ Unreported, Magistrates Court, Vanuatu, civ cas 324/95. The decision was reversed on appeal in *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, app cas 1/96.

- c. In cases where not all parties are indigenous and which are not governed by the formal law of Vanuatu, the Court should consider the British or French law applicable in Vanuatu, depending on the choice of the non-citizen as to the law to be applied and at the same time, the Court should consider any applicable customary law.

The Customs Recognition Act arguably leaves too much to the discretion of the Solomon Island courts. The rules put forward in the *Waiwo* case, and the provisions of the Papua New Guinea Underlying Law Act provide useful suggestions as to how that discretion should be exercised.

Differences between the Customs Recognition Acts of Solomon Islands and Papua New Guinea

Generally speaking the Solomon Islands Act follows the Customs Recognition Act of New Guinea almost word for word. However, there are two significant differences. First, the Solomon Islands Act has an additional section. Section 4 provides that where the existence of a particular customary law is in question the following facts are relevant:

- a. Any transaction, practice or usage by which the right or custom in question was treated,³⁶ claimed, modified, recognized, asserted or denied, or inconsistent with its existence; and
- b. Particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from.

This section does not appear in the Native Customs (Recognition) Act, nor in the legislation in Kiribati (Laws of Kiribati Act 1989, schedule) and Tuvalu (Laws of Tuvalu Act 1987, schedule). It seems likely that it is based on a provision for establishing the existence of a custom or trade usage in a jurisdiction where customary law is recognised as an exception to the common law or in an

³⁶ The word 'treated' appears to be a misprint for the word 'created', although this has been denied by the legislative drafter. The authors are grateful to Val Haynes for drawing this issue to their attention.

international context. Nevertheless, it may be a useful tool for determining the existence of custom where there is a dispute between the parties about this.

The second difference is that, whereas the New Guinea Act uses the term 'custom' throughout, the Solomon Islands Act uses 'custom' in some places and 'customary law' in others. Customary law is defined in section 2 of the Solomon Islands Act as having the meaning assigned to it in the Constitution. Whilst 'native custom' was defined in section 4 of the Papua New Guinea colonial ordinance, the Papua New Guinea Customs Recognition Act does not define 'custom'. However the footnote in the revised edition of the *Laws of Papua New Guinea* refers to sch 2.1 of the Constitution and to the definitions of custom contained in section 1.2(1) of the Constitution and section 3(1) of the Interpretation Act.

The two Constitutions use different terms. The Papua New Guinea Constitution refers to custom, and the Solomon Islands Constitution to customary law. This, perhaps, is why the drafter of the Solomon Islands Act changed the word 'custom' to customary law. However, it is surprising that the drafter did not do so consistently, and in particular that the name of the Act was not changed to the Customary Law Recognition Act.

The Customs Recognition Act of Solomon Islands gives custom a much narrower role, limiting the kinds of law suits in which custom may be used and imposing strict guidelines for finding and proving custom.

The Underlying Law Act of Papua New Guinea

The Papua New Guinea Underlying Law Act has four objectives: (1) to change the attitudes of lawyers and judges towards custom by renaming and redefining it; (2) to require that custom become the underlying law's major source; (3) to establish guidelines to help lawyers and judges find the appropriate customary rule; and, more generally, (4) to assist courts in developing the underlying law (long title and sections 1, 3, 16 and 7; Papua New Guinea Law Reform Commission 1977: 'Summary', 6-7).

Renaming and redefining custom

In pursuit of the first objective the Act uses the term 'customary law' to describe the same phenomenon that was earlier called 'custom'. The Act's definition of 'customary law' in s.1(1) is copied, word for word, from the definition of 'custom' in the Papua New Guinea Constitution, s.20.

Why the changed terminology? There is great power in names.³⁷ The definition may be the same, but the connotation has been altered. To many lawyers and judges, 'custom' is *not* law, and, since the rule of law is a fundamental tenet of legal education, they feel, to say the least, uncomfortable when called upon to use something called 'custom' instead. Customary *law* is a different matter entirely. (Interestingly, Papua New Guinea Law Reform Commission (1977), which is in most respects very thorough, does not even mention the change in terminology.)

Moreover, the events of the colonial period encouraged an attitude of disdain for all things native, including custom, not only amongst the colonizers themselves, but amongst Pacific peoples as well, as mentioned above. Independence did not entirely erase these colonial beliefs and attitudes.³⁸ The drafters of the Underlying Law Act probably hope that the change in name will erase memories, enabling customary law to escape the leftover disdain under which custom still labours.

The definition of customary law that the Act puts forth is another means by which the drafters aim to raise the status of custom in the minds of judges and lawyers. The Act defines 'customary law' as:

... the customs and usages of the indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial ... (Underlying Law Act 2000, s 1(1)).

The Act did not need to restate the entire definition; it could merely have referred to the Constitution, which contains the same definition in s.20. By restating it, the

³⁷ As many Pacific Islanders know. It is not uncommon in traditional societies for people to have two names, only one of which is known to everyone. To know a person's secret name is to have power over that person.

³⁸ There are, indeed, third world scholars who refer to the situation in which their own nations find themselves as post-colonial, rather than as independent, in order to point up how strongly the beliefs, attitudes, values and, therefore, the structures imposed during the colonial period have continued to hold sway over the citizens of the formerly colonized countries. Two excellent anthologies, collecting the writings of many of these scholars, are: Darian-Smith and Fitzpatrick (1999); and Ashcroft, Griffiths and Tiffin (1995).

Act is reminding judges and lawyers that they are to treat customary law as a living and changing organism, and to apply it as it exists at the moment.

When the Papua New Guinea Constitution first put forth this definition, it constituted a major change not only from the practice but also from the values of colonial courts. The courts in colonial times used only those customs that had “existed from time immemorial” because those courts did not view custom as law. They did not see custom as a viable legal system in its own right, and as inferior to the common law. To them customs were merely the unfortunate practices of a savage people not yet socialized into behaving according to the strictures of the introduced legal system. The colonial courts believed that they would have to apply custom only until folks had become sophisticated enough to know and understand state law, at which point custom would wither away. Until that time, which they were sure would come, the courts would continue to apply the ancient customs that in their view still enslaved people, but they would certainly not apply any new custom that was not a part of the introduced legal system (See Ottley and Zorn 1983).

The Constitutional definition proclaims a new role for custom. By requiring courts to apply the custom of the moment, it recognises that custom changes. Moreover, it recognises that custom is not something that Pacific Islanders will grow out of as they become more sophisticated. Nor, the Constitution implies, will Pacific islanders come inevitably to prefer the imported common law. The Constitution and, after it, the Underlying Law Act recognise that custom is the law of the indigenous peoples of the Pacific.

Customary law as the primary source of the underlying law

The ultimate goal of the Underlying Law Act is to make customary law the pre-eminent source of Papua New Guinea’s underlying law. According to the Law Reform Commission, Section 7 is the “key section” of the Act because:

Under the section, customary law will become the primary source of the underlying law and common law, the secondary. The general presumption is that customary law is to be applied, and the common law applies [only] by way of an exception. (Papua New Guinea Law Reform Commission 1976: 22)

Section 7 together with Sections 3, 4 and 6 make abundantly clear what Schedule 2 of the Papua New Guinea Constitution (which s.24(2) of the Act abrogates) may have left murky. Schedule 2.1 of the Constitution had provided that, in the

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absence of an applicable rule derived from statutes or the underlying law, the courts should adopt a rule from custom, and Schedule 2.2 had provided that, in the absence of an applicable rule derived from statutes or the underlying law, the courts could also choose to adopt a rule from the imported common law. The Constitution did not explicitly state whether custom came ahead of the common law, and, as already noted, the courts, counsel and legal scholars have debated the question ever since. The Underlying Law Act puts an end to the debate. Over and over, it states that customary law comes first.³⁹

In its Report the Law Reform Commission answers potential critics of this approach:

The ... relationship [set forth in the Underlying Law Act] between common law and customary law reflects what is implicit in the 'directive' parts of the Constitution. It will, no doubt, be argued that the aspirations of the [Act] are out of harmony with the economic and social development of the country, the development of the 'modern' commercial sector of the community in particular. It is true that to a significant extent, the continued viability of customary law will depend on the manner in which it can be developed, and adapted to changing needs and conditions. The [Act] entrusts responsibilities to the judiciary in this respect, but even if the courts fulfil that responsibility constructively and imaginatively, other forms of action (e.g., legislation) may be necessary to ensure the proper recognition and development of customary law. (Papua New Guinea Law Reform Commission 1977: 20)

³⁹ Section 23 of the Act also provides that custom should come first in interpreting statutes and the Constitution:

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

This makes it clear that statutes should be interpreted in such a way as to make them appropriate to the conditions of the country and that even though the words in a statute might have one connotation in England or Australia, the same words might have a different connotation in the different context of Papua New Guinea.

(a) provisions putting customary law first

Part III of the Act is titled “Formulation of the Underlying Law.” It begins with Section 6, titled “Order of Application of Law,” which provides that,

... the court shall apply the laws in the following order –

- (a) written law;⁴⁰ and
- (b) the underlying law; and
- (c) the customary law; and
- (d) the common law.⁴¹

Section 7 repeats Section 6, adding more detail. It provides, first, that, “where the written law does not apply to the subject matter of a proceeding, the court shall apply the underlying law” (Section 7(1)). Then, at Section 7(2), it reiterates:

If the underlying law does not apply to the subject matter of a proceeding, the court shall apply the customary law unless –

- (a) subject to Subsection 6,⁴² the court is satisfied that the parties intended that the customary law shall not apply to the subject matter of the proceeding; or

⁴⁰ “Written law” is defined in s.1(1) of the Act as “the laws stipulated in Section 9 of the Constitution”. The Law Reform Commission defined it more accessibly, though at greater length:

By written law is meant the Constitution, Organic Laws, Acts of Parliament, Regulations made under an Act of Parliament, Emergency Acts and Emergency Regulations made under the Constitution and Acts of Provincial Parliaments made under authority of the Organic Law on Provincial Government. (Papua New Guinea Law Reform Commission 1977: 18)

⁴¹ This section appears in neither Law Reform Commission draft (Papua New Guinea Law Reform Commission 1976, 1977). Given the existence of Section 7 (not to mention Sections 3, 4 and 5), it is redundant.

⁴² Subsection 6 provides that the court may apply customary law, even if the parties seem to have agreed to the contrary, if the court believes that that agreement is based on an attempt “to avoid, for an unjust purpose, the consequences of the customary law”.

- (b) the subject matter of the proceedings is unknown to the customary law and cannot be resolved by analogy to a rule of customary law without causing injustice to one or more parties.

In the guise of setting limits on the use of customary law, subsection (b), by referring to matters that are unknown to customary law but that could be resolved *by analogy to a rule of customary law*, probably broadens its use beyond the areas in which courts have used it heretofore. There are numerous transactions and events – for example, contracts for the purchase and sale of goods, mortgages, torts caused by automobiles or aeroplanes, fires caused by faulty electric wiring – which did not occur, at least not in that precise market or technological form, in pre-colonial times, and, therefore, might not be subject to customary law rules. However, there are customary rules governing analogous transactions and events, such as brideprice and other ceremonial exchanges, temporary use rights given to land or other property, or remedies for injuries to persons or property from any circumstance. A court with a broad vision could begin to use these analogous rules in fashioning an underlying law that would more exactly reflect the culture and circumstances of Papua New Guinea.

Section 7, subparagraph (3) provides that the imported common law may be used only if nothing home grown is available. Moreover, even then, it can be used only under limited conditions – and, even if all the conditions are met, the court is still advised merely to “consider applying the common law”, which suggests that a court could always decide to create a new principle of the underlying law, even though a common law rule that meets all the conditions is available.⁴³

⁴³ When might a court do that? The Law Reform Commission probably hoped that courts would so act when the common law rule is not, on its face, contrary to the circumstances of the country or inconsistent with the National Goals, Directive Principles or Basic Social Obligations, but has the potentiality of so being, if, say, it is used incorrectly or too often. Those conditions are set out in Section 4(3), which provides that the imported common law “shall *not* be applied unless” (italics added) –

- (a) it is consistent with a written law; or
(b) it is applicable and appropriate to the circumstance of the country; or
(c) it is consistent with the customary law as applied under Subsection (2); or

Section 4 also contains provisions that should help to ensure that the courts will use customary law more frequently in the future. First, while Section 4(2) provides that customary law “shall apply *unless*” it fails to meet the statutory conditions, Section 4(3) provides that the common law “shall *not* be applied” unless it meets the statutory conditions (italics added). And Section 4(4) requires of the courts that they give reasons based upon Sections 4(2) and 4(3), both for refusing to apply a principle of customary law and for applying a rule of the common law.

(b) describing customary law by reference to the National Goals

Section 4(2) provides that customary law shall apply unless it is (a) inconsistent with a written law or (b) contrary to the National Goals and Directive Principles, the Basic Social Obligations or the Basic Rights guaranteed by the Constitution. Since the Constitution is itself a written law, one wonders why the drafters felt it necessary to spell out the Constitutional provisions. There may be three very good reasons. The Law Reform Commission points to the first:

[The Act] provides that customary law shall apply unless it is inconsistent with the National Goals and Directive Principles and Basic Social Obligations [contained in the Proclamation to the Constitution, nos. 1 to 5] or the Basic Rights⁴⁴ guaranteed by the

-
- (d) its application and enforcement would not be contrary to the National Goals and Directive Principles and Basic Social Obligations established by the Constitution; or
 - (e) its application and enforcement would not be contrary to the basic rights guaranteed by ... the Constitution.

In their desire to ensure that everyone would understand the proper order of preference, the drafters in the Office of the Parliamentary Counsel may have gone a bit too far. By adding subsection (c), they have confused us all, because, according to Sections 6 and 7, the introduced common law applies only if an applicable rule of customary law does not exist. So, if the courts find a customary rule that passes muster under Sections 7(2) and 4(2), they ought never to get to Section 4(3).

⁴⁴ Section 55 of the Constitution contains a list of fundamental human rights that is similar to those contained in other Pacific Islands constitutions and in the United Nations Charter on Human Rights. For an analysis of the relation between these

Constitution. These qualifications are different from the present restrictions on customary law. Under Schedule 2 [of the Constitution], custom is inapplicable if it is inconsistent with the law, or if it is "repugnant to the general principles of humanity". The [Act] removes that qualification as well as the 'injustice' and 'public interest' qualifications in Section 6 of the [Customs (Recognition) Act] ... These qualifications are vague and can be used by a court unsympathetic to customary law to exclude unduly its application. (Papua New Guinea Law Reform Commission 1977: 20)

As that quotation suggests, it is necessary, if customary law is to become a viable part of the underlying law, to wean the courts from using tests that are vague or biased against custom.

A second reason for using the core Constitutional principles is that they are more related to the circumstances of Papua New Guinea than are tests that the courts might borrow from the imported common law (Zorn 1992: 112-117). Moreover, the inclusion of Basic Rights in the list of tests gives the courts confidence that customs antithetical to human rights will not survive judicial scrutiny.

A third reason for using the core principles is that they provide the courts with a means for differentiating between customs that ought to become part of state law and customs that ought not to:

... [C]onsiderable changes are taking place in Papua New Guinea. Often the law accommodates itself to these changes, but sometimes it lags behind them, and occasionally it acts as a brake on these changes. What should be the policy [of the Underlying Law Act] in this regard –

- (i) should it facilitate these socio-economic changes by repealing the old law and enacting new rules more conducive to certain kinds of changes or
- (ii) should it seek to prevent the socio-economic changes by entrenching the customary law or
- (iii) should a selective approach be adopted, so that some changes are encouraged while others are discouraged?

fundamental human rights and custom, see James and Fraser (1992): especially 12-38.

The Constitution has adopted the selective approach. The National Goals and Directive Principles spell out the areas for consolidation and the directions for change, and these have clear implications for the future of customary law. While the basis of our development must be traditional values and practices, the National Goals recognise that some of these values and practices are incompatible with the desired goals (e.g., equal rights for women). (Papua New Guinea Law Reform Commission 1977: 19-20)

Like most workable constitutional documents, the Papua New Guinea Constitution is a paradox. Its core provisions function both to affirm tradition, and to distinguish those traditions that are acceptable in contemporary circumstances from those that are not.

(c) the repeal problem

The Underlying Law Act has not expressly repealed the Customs Recognition Act. Section 24 of the Underlying Law Act does repeal the “underlying law as prescribed by Schedule 2 ... of the Constitution” (a provision which was probably self-repealing anyway), but no mention is made of the Customs Recognition Act. The Law Reform Commission must have been of the view that express repeal was required, or at least that this would be the safest course. In its Report, the Commission stated that it envisaged not only the repeal of schedule 2 of the Constitution but also the repeal of those sections of the Customs Recognition Act that limit the courts’ use of custom in civil cases (Papua New Guinea Law Reform Commission 1977: 35).⁴⁵ However, the draft repeal Bill, appended to the Commission’s Report, was not brought to Parliament when the Underlying Law Act was passed in 2000.

⁴⁵ Section 5 of the Customs Recognition Act provides that, in civil cases, custom may be taken into account only in relation to: rights relating to customary land and things in, on or produce of customary land; rights relating to water, the sea, sea-bed, reef, river or lake; devolution of customary land on birth, death or the happening of a certain event; trespass by animals; customary marriage, and divorce, custody and guardianship in connection with a customary marriage; a transaction the parties intend or justice requires should be regulated by custom rather than law; as a factor in deciding whether a person has acted reasonably; the existence of a state of mind; and to avoid injustice.

Unless (and until) a repeal Bill can be presented to Parliament, it will be for those who want the Underlying Law Act to have its full effect to convince the courts that the Customs Recognition Act was repealed by implication. This will not be an easy argument to make, especially to courts that would prefer to keep the Customs Recognition Act operating because they prefer to limit the use of custom. There is, unfortunately, no explicit statutory support for implied repeal: the statute on repeal and expiration, Division 13 of the Interpretation Act of Papua New Guinea (Cap. 2), does not mention implied repeal. Therefore one must look to the common law for rules governing implied repeal. There, although one finds leading English cases holding that later legislation replaces all earlier law with which it is inconsistent,⁴⁶ one also finds that there is a presumption against implied repeal.⁴⁷ If possible the courts will try to give effect to both the later and the earlier provisions. It is particularly rare for an entire Act to be repealed by implication. Direct contradiction of the earlier provision by the later provision is required to convince a court to infer an intent to repeal.⁴⁸ The statutory indications of direct contradiction are that:

- the provisions are so inconsistent that they cannot both have legal effect;⁴⁹ or
- they cover the same ground in a mutually exclusive way;⁵⁰ or
- they deal with the same subject matter in ways that cannot legally co-exist.

The case for direct contradiction may be supported by showing that continuing the earlier provision(s) in force will:

- defeat the purpose of the new provision(s); or
- result in serious inconvenience; or

⁴⁶ *Paine v Slater* (1883) 11 QBD 120; *White v Islington Corporation* [1909] 1 KB 133.

⁴⁷ *Jennings v US Government* [1982] 3 All ER 104.

⁴⁸ *Peter Rarai v Susan Collins* [1986] PNGLR 68.

⁴⁹ *Ibid.*

⁵⁰ *The State v Kiap Bangi* [1988-89] PNGLR 300. See also *The State v Natapalau Tulong* [1995] PNGLR 329.

- mean that effect cannot be given the later provisions(s).⁵¹

Applying these principles, it will be easiest to convince the courts that the later Act has repealed those provisions of the earlier Act that cover precisely the same ground. For example, section 2 of the Customs Recognition Act, which provides that customary law is to be ascertained as if it were a question of fact, is directly and overtly inconsistent with section 16 of the Underlying Law Act, which provides that customary law is a question of law and not a question of fact. It ought not to be difficult to convince a court that the Underlying Law Act has impliedly repealed section 2 of the Customs Recognition Act.

In less clear-cut areas, it will be more difficult. The outcome on any particular provision will depend on differing judicial perceptions of the terms of the legislation.⁵² Moreover, the current justices of the Papua New Guinea Supreme Court have inherited from their colonial and post-colonial predecessors a positivist approach to adjudication.⁵³ There was on the part of many members of the Papua New Guinea judiciary, at least during the colonial period and for the first decade or so thereafter, a tendency to prefer a rigid application of the 'plain meaning' of statutes and common law to more nuanced and thoughtful interpretations that took the purpose of the statute or holding into account. It is probably this tendency towards positivism that has caused a number of commentators to forecast that judges and magistrates will be unlikely to hold that the Underlying Law Act has, by implication, repealed section 5 of the Customs Recognition Act (e.g. Powles and Hill 2001).

However, though it might be difficult to convince the court of this, it is not by any means impossible, given the strength of the arguments in favour of implied repeal. It is the express intent and purpose of the Underlying Law Act that the state courts

⁵¹ *Ibid.*

⁵² Even in the case of apparent contradiction, there is no guarantee that the courts will hold that implied repeal was intended. Canons of interpretation, such as the 'rule' that general provisions do not repeal specific ones may be used to keep provisions alive. This uncertainty could most easily have been overcome by express repeal with saving provisions in respect of any sections of the Customs Recognition Act, which it was sought to retain in force. As it is, counsel will have to exercise all their persuasive skills.

⁵³ For a description of positivism, its colonial beginnings and its effect on the development of the underlying law in Papua New Guinea, see Zorn 1991, 1992.

will fashion an underlying law made up primarily of rules that originated in customary law and that, to accomplish that end, the courts will use custom whenever an applicable rule from custom is available (ss.4, 6 and 7). Section 5 of the Customs Recognition Act, conversely, provides that state courts may use custom only in cases involving family matters, customary land, and other issues of primarily domestic or village interest. If custom is used only in regard to these matters, it will not form the major part of the underlying law. It will continue to rule only in matters that, although important to the parties involved, are of small import to the great affairs of the nation. Applying the tests set forth above, it is our conclusion that continued application of section 5 by the courts would defeat the purpose of the later Act and mean that its key provisions could not be given effect.⁵⁴

Guidelines for finding and proving customary law

Another aim of the Law Reform Commission in drafting the Underlying Law Act was to make it easier for customary law to be pleaded and proved than had been the case under the Customs Recognition Act, ss.16 and 17. The central provisions of the new Act, on the evidentiary standards needed for the recognition of customary law, are contained in sections 16 and 17. Section 16(1) provides that, "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".

There are two reasons why this provision alone can be expected to produce significant changes in the extent to which the courts use customary law. First, it permits the courts to declare customary law by judicial notice.⁵⁵ This should make

⁵⁴ The Parliamentary debates that preceded passage of an Act also offer information about the scope it was intended to have. Every Member who spoke – both those in favour of the Bill's passage and those against – presumed that they were voting for an Act that would require the courts to apply customary law generally and in regard to most matters that would come before the courts. Papua New Guinea Parliamentary Debates 1998: Speeches by Bernard Narokobi (for), Iairo Lasaro (against), Stephen Pokawin (for), Jacob Wama (against), Alfred Kaiabe (for), Dr. John Waiko (for).

⁵⁵ As noted by the Papua New Guinea Law Reform Commission (1977: 24). Strictly speaking, courts do not find law by judicial notice. They find generally accepted facts by judicial notice. They find the law in statute compilations, case law reports, treatises and other reputed legal sources. However, there is a similarity in that facts found by judicial notice do not need to be subjected to rules

it less likely that the courts will refuse to adopt custom until it has been subjected to extensive and rigid pleading and evidentiary rules, a practice that has far too often led to its exclusion from judicial consideration (Zorn and Corrin Care 2001). Second, the designation of custom as 'law' rather than as 'fact' raises its status from something less than (or, at least, different from) common law, to something roughly equivalent to common law. This should also increase the court's willingness to recognise and apply customary law.

Although customary law can be ascertained by judicial notice, it is not always possible to find it so easily. The Law Reform Commission understood that it would be

unrealistic to expect that all the courts [would] have knowledge of, or ready access to knowledge of, customary law. Therefore, the [Act] provides a variety of ways of ascertaining customary law (Papua New Guinea Law Reform Commission 1977: 24).

Section 16(2) lists a broad range of sources to which courts may refer in order to find the relevant customary law. They may look to cases, books, treatises, reports or other written works, to statements and declarations made by local, provincial and other government authorities, and to evidence and information presented to the court in person by "a person whom the court is satisfied has knowledge of the customary law relevant to the proceedings" (s.16(2)(b)(iii)). A court may also on its own motion "obtain evidence and information and obtain the opinions of persons as it thinks fit" (s.16(2)(b)(iv)).

The Act does not stipulate whether, once a court has decided to call for evidence on customary law, it must proceed through the possible sources in the order laid out in the Act, or whether it may choose whichever of these sources seems to it most appropriate. Nor does the Act expressly permit courts to look to sources not on the list although the list is so lengthy and wide-ranging that courts could probably fit almost any likely source under one or another of the items. However, given that Section 16(2) is not mandatory (using the permissive "may"), it is most probable that the Act intends courts to be free to refer to whichever of these sources they choose, or to use something else entirely.

of pleading or evidence, such as the hearsay rule, and the rule that parties have the right to question witnesses. Nor do such facts need to be brought to the court's attention by counsel for one of the parties; the court can bring these facts into court on its own. Courts find and apply the law in similar fashion.

STATUTORY 'DEVELOPMENTS' IN MELANESIAN CUSTOMARY LAW

Jennifer Corrin Care and Jean G. Zorn

Section 17 also provides new guidelines for choosing which customary rule to apply to particular proceedings and is thereby likely to expand further the use of custom in state courts. Section 17 is particularly concerned with a contemporary phenomenon, transactions between people from communities "with different customary law rules on the subject matter" (s. 17(1)(b)). As discussed above, until the enactment of the Underlying Law Act, the Papua New Guinea courts believed it impossible to apply customary law to any case in which the parties came from communities with different customs.⁵⁶

The Underlying Law Act now makes it possible.⁵⁷ Section 17(1)(b) provides that the court should use whichever customary law the parties intended to be applied, unless no such intention can be discovered, in which case the court should use "the customary law that is, in the opinion of the court, most appropriate to the

⁵⁶ *Application of Thesia Maip; In the Matter of the Constitution s42(5)* [1991] PNGLR 80. However, statutes, even those not yet enacted, may have a life beyond their own jurisdictions. The guidelines contained in Section 17 for applying customary law to cases in which the parties are from communities with different customary rules are too similar to those recently proposed for Vanuatu by Acting C.J. Vincent Lunabek for the similarity to be mere coincidence, especially since the Acting Chief Justice obtained his legal education in Papua New Guinea. See *Waiwo v Waiwo & Banga*, unreported, Senior Magistrates Court, Vanuatu, Civ. Cas 324/ 1995, February 1996; and *Molu v Molu No. 2*, unreported, Supreme Court, Vanuatu, Civ Cas 30/1996, 15 May 1998.

⁵⁷ In Section 1(2), the Act provides the courts with a rule to determine what community a person is from.

[A] person ... is a member of a community if ... he adheres to the way of life of the community; or he has adopted the way of life of the community; or he has been accepted by that community as one of its members...

Section 1(2)(b) provides that a person can cease to be a member of a community by adhering to or adopting the way of life of another community or being accepted as a member by that other community. Thus Section 1(2) implies that Papua New Guineans can voluntarily change their tribal status, becoming members of a community in another village or region of Papua New Guinea, or perhaps opting for membership in the urban community. It also suggests that expatriates can become members of Papua New Guinean customary communities.

subject matter.”⁵⁸ Section 17(1)(c) provides special rules for succession cases, and differentiates between succession to land and succession to other property:

[W]here the matter concerns a question of succession, the customary law of the community to which the deceased belonged, except with regard to interests in land, in which case the customary law of the place where the land is situated shall apply ...⁵⁹

We can presume that the drafters intended the rules enunciated in Section 17(1)(c) to apply to every case involving succession to customary land, and, conversely, that Section 17(1)(b) was intended to apply only to transactions not involving succession to land.

The ambiguities in Section 17 will provide much grist for the courts' mills in years to come. For example, Section 17(1) ends with a catch-all provision: "... in all other cases the court shall apply the customary law it considers most appropriate to a particular case". But neither the Act nor the explanations provided by the Law Reform Commission suggest whether there is a difference between the invocation in s.17(1)(b) of "customary law that is ... most appropriate to *the subject matter*" and the mention in s.17(1)(d) of "customary law ... most appropriate to *a particular case*."⁶⁰

⁵⁸ The Act itself contains no guidelines intended to help courts understand what is meant by "appropriate to the subject matter." The Law Reform Commission Report, however, explains: "The factors to be considered in the choice of the appropriate law are the place and nature of the transaction and the place and nature of the residence of the parties" (Papua New Guinea Law Reform Commission 1977: 25).

⁵⁹ Section 1(1) of the Act, which defines "customary law" in the same terms used by s.20 of the Constitution, also provides that "customary law" may differ from place to place.

⁶⁰ Section 17(2) will also prove difficult for the courts to understand. It provides:

In deciding on which customary law is to apply under Subsection (1)(b) and (d), the court shall have regard to – (a) the place and nature of the transaction, act or event, and (b) the nature of residence of the parties.

It is not clear what the courts are expected to make of these instructions.

Although the Law Reform Commission intended the evidentiary provisions of the Act to make customary law more accessible to state courts, some of the provisions nonetheless might make it almost as difficult for the courts to recognise and adopt customary law as it has always been. For example, Section 16, whilst for the most part easing access to customary law, contains one provision that could narrow the gates. Section 16(2)(a) provides that, in determining questions concerning the existence or content of customary law, the courts “*shall* consider the submissions made by or on behalf of the parties” (emphasis added). Does this mean that the courts cannot consider customary law unless counsel for the parties raise it, or does it merely mean that, if counsel do provide the court with submissions on point, then the court must consider them? Given the Act’s general aim of easing the way for customary law, we would suggest that it be interpreted as meaning the latter.

However, the Papua New Guinea legal system is heir to the positivist belief that everything the judge can consider in deciding the case must come from counsel, so the Papua New Guinea judiciary might lean toward the former interpretation. This could lead to the courts’ using customary law much less than the Act intends. Admittedly the Act at section 15 makes it a duty of counsel to bring evidence about customary law to the court. However, no specific penalty is prescribed for counsel’s failure to do so.⁶¹

The significant changes which the Underlying Law Act has made to the rules of pleading and evidence should make it much easier for courts to recognise and adopt customary law, despite some ambiguities and uncertainties, which we have discussed and which the courts will in all probability be called upon to resolve.

⁶¹ Moreover, the requirement on counsel to present evidence or information about customary law to the court is limited to those proceedings “in which [there is] a question of whether the customary law applies to that proceeding”. This could provide a very large hole, through which those who do not want to use custom, can escape. Who will decide in each proceeding whether there is a question about whether customary law applies? The court? Counsel? The parties? The Underlying Law Act suggests at Sections 4 and 7 that the question will arise in every proceeding for which there is not already an applicable rule of the written law or the underlying law, but we cannot necessarily count on the courts to interpret Section 15 to affirm this.

The development of the underlying law

The last, but by no means least important purpose of the Act is to provide guidelines on the development of the underlying law. Not surprisingly, since 'underlying law' is merely the name chosen for Papua New Guinea's home grown common law, most of the guidelines contained in the Act are jurisprudential principles already known to the common law. However, in keeping with the Act's generally modernizing trend, the Act tends to reject older positivist rules in favour of newer policy-oriented approaches. In this part of the Article, we will discuss first the guidelines for formulating new rules for the underlying law and then the provisions relating to precedent and *res judicata*.

(a) formulating new rules and dealing with old rules

The Underlying Law Act provides that, if no rule of the underlying law exists, and if no rules from customary law or the English common law are available, the court must formulate a new underlying law rule (ss. 7(4), (5)).⁶² There are activist courts with much experience in formulating new rules of the common law.⁶³ The Papua New Guinea court has never been one of them. So the drafters of the Act have provided the court with guidelines to help them in this endeavour. The new rule must be appropriate to the circumstances of the country (s.7(4)). It must also conform to what the Law Reform Commission called "the inspirational principles" (the National Goals and Directive Principles, the Basic Social Obligations and the Basic Rights contained in the Constitution) (s.7(5)(a) and (b); Papua New Guinea Law Reform Commission 1977: 21). To help it in

⁶² We would suggest that the courts should also formulate a new rule of the underlying law if a case decided before the Act came into operation fails to meet the standards of Section 24(1), the transitional provision, and if no applicable rules from customary law or the common law exist. Only by subjecting pre-existing cases to the tests set forth in the Act will the courts be able to ensure that the underlying law is formulated from the sources that Parliament intended to be used.

⁶³ The U.S. Supreme Court during the late 1950s and 1960s was such a court. Judges on these courts tend to be followers of legal realism, a jurisprudential approach that begins from the insight that every time a judge decides a case, a new law is made. From that observation, it is a smallish step for judges to conclude that, since they are making law any way, they might as well do it purposively.

constructing an appropriate rule, the court is encouraged to look for analogous rules in written and customary law, and even in the laws of foreign countries.

Schedule 2 of the Constitution permitted the court to look only to foreign jurisdictions "with similar legal systems", but the Underlying Law Act permits the courts to look at cases from any foreign jurisdiction (Constitution, Sched. 2.3).⁶⁴ At the same time, however, the Act rules out the use of these foreign judgments, or, for that matter, the judgments of the colonial courts, as precedential, or even as persuasive (s.21):

The section specifically indicates that foreign or pre-Independence decisions have neither binding nor persuasive effect in order to allow the courts to look for helpful solutions to legal problems, without feeling required to follow or distinguish those decisions. If the post-Independence courts are to be free to develop a truly Papua New Guinea law they must not be fettered by outside decisions which reflect the perceptions and world-views of other societies (Law Reform Commission 1977: 26).

The Act would have the courts create an underlying law based primarily on customary law, and informed by the core principles of the Constitution. To date, the positivist judges of Papua New Guinea's courts, uncertain how to deal with 'inspirational principles', have referred very seldom to National Goals and Directive Principles, the Basic Social Obligations, and the Basic Rights. By telling judges to test the rules from customary and common law, as well as the new rules that the court is formulating, against these principles, the Act may have shown the courts how these key elements of the Constitution can play a meaningful role in their decisions.

⁶⁴ As the Law Reform Commission pointed out in discussing Section 6 of the Underlying Law, it is not

... easy to determine what a 'similar legal system' is, and there is a danger of being attracted by superficial similarities. A more relevant criterion than similarity of legal system is the similarity of social, economic and political policies, and there is no reason why our courts should not look to progressive Third World countries which may, for example, have civil systems of law. (Papua New Guinea Law Reform Commission 1976: 23, 1977: 21, which contains the same note, except that it omits the words "Third World").

One of the first tasks that fall to the courts of a new nation is to create the common law. This is never an easy task, and is even harder in a fragmented former colony. Had the Underlying Law Act been enacted in 1976, when it was first proposed, it would have served as a useful guide to the new courts of the new country. But by now there have been more than a quarter century of court decisions. A Papua New Guinea common law exists. It was, however, not fashioned in the way laid out in the Underlying Law Act. Most of it has come from English or pre-independence precedents. Little of it is based on custom. At this point in time, what is the court to do with this encrustation of law. If the court has been following a rule that did not come from custom, is that still binding precedent? Is it even a rule of the underlying law? The Act suggests not:

A principle or rule of customary law or a principle or rule of common law or a formulated rule of the underlying law which was in effect immediately before the coming into operation of this Act, is adopted and applied as part of the underlying law, on the coming into operation of this Act (s.24(12)).

This provision can be interpreted in two ways.⁶⁵ It might mean that the only rules that ought still to be considered part of the underlying law are those that the courts finds by following processes like those laid down in the Act (that is, by going to the common law only if investigation reveal that no applicable rule from customary law exists). An argument in favour of this interpretation is that Schedule 2 of the Constitution also mandated this procedure.⁶⁶ However, since, as we have seen, the Papua New Guinea courts have seldom done this, such an interpretation of the transitional provision would mean that a great many of the court decisions of the last 25 years would no longer be of precedential value.

An alternative way to interpret the transitional provision would save the courts much time and trouble, but at some cost to the homegrown nature of the legal system. The provision can be interpreted as permitting any prior court decision to stand, so long as the court based its ruling either on custom or on the common

⁶⁵ Because the transitional provision was inserted into the Act by the Office of the Parliamentary Counsel, and not by the Law Reform Commission, neither the Working Paper nor the Report contains any comments on this issue.

⁶⁶ There is, however, some argument as to whether Schedule 2 of the Constitution did, in fact, require courts to look first to custom, or whether it permitted them to choose equally between custom and the common law. See above.

law, with no requirement as to the order in which the courts should have used these sources in any particular case. Since judges today might prefer an interpretation of the transitional provision that validates what the court has been doing, it is likely that they will adopt the latter interpretation. That choice has the added benefit that it would provide more certainty in that it would reduce the number of decisions that could be called into question. However, it would also mean that an opportunity to replace common law rules with customary law will be lost, and the underlying law will continue to be made up of too many imported common law rules.

(b) precedent

The Act presumes that eventually the underlying law will be, in many respects, like any system of common law. To make sure that happens, the Act charges the courts with a duty to ensure that the underlying law develops “as a coherent system” (s.5).⁶⁷ But the Act also requires the underlying law to be “appropriate to the circumstances of the country”, and charges the courts with the duty to see to this as well (s.5).⁶⁸

⁶⁷ The Act also gives special responsibilities to the Chief Justice and the Chair of the Law Reform Commission. All decisions that do not turn solely on the application of written law are to be forwarded to the Chief Justice and the Law Reform Commission Chair, each of whom has the responsibility to review the decisions, and to send any that should be reviewed to the National Court. The standards for review are slightly narrower for the Law Reform Commission Chair than for the Chief Justice, but the general intent seems to be that both are to ensure that the underlying law develops coherently and with due respect for custom, in compliance with the requirements set forth in the Underlying Law Act, and taking account of the circumstances of the country. Persons aggrieved by decisions of the National Court may appeal to the Supreme Court (Underlying Law Act, ss.8, 11, 12 and 13).

⁶⁸ The phrase – “appropriate to the circumstances of the country” – is key to many provisions in the Underlying Law Act. For example, Section 4 requires that any customary or common law rule adopted as part of the underlying law by the court be appropriate to the circumstances of the country. Yet the phrase is not defined, either in the Act or in Papua New Guinea Law Reform Commission 1976 or 1977.

If the underlying law is to remain appropriate to the circumstances of the country, it must be able to change as those circumstances change. In recognition of this, the rules of precedent provided in the Act are liberal. Courts are bound by the decisions of higher courts (s.19),⁶⁹ but the Supreme Court and National Court are not entirely bound by their own decisions. They may formulate a new rule of the underlying law whenever either of them considers “that a rule of the underlying law is no longer appropriate to the circumstances of the country” (s.9).⁷⁰

A standard for over-ruling precedent, like that in the Underlying Law Act, would have easily resolved the problems that the Solomon Islands High Court faced in *Maerua v Kahanatarou*.⁷¹ The case involved a dispute over the ownership of customary land. The Respondent claimed the land through female ancestors, the Appellant through the male line. An earlier High Court judgment had determined that the customary law in that part of Solomon Islands was patrilineal. In this case, the High Court reversed that earlier judgment, finding that custom in that part of Solomon Islands was matrilineal, but the Court had to depend upon a number of factors special to the case in order to overrule the earlier decision. Most importantly, the Court was able to point out that, in the earlier case, the question of whether the custom was patrilineal or matrilineal had not been at issue, so, on that point, the High Court had accepted an unsupported statement of the Local Court as to the appropriate customary rule, and had not itself considered the question:

[E]veryone would, I think, agree that decisions of the High Court in such terms on custom should be approached with caution. The weight to be given to such a decision must be seen against the case in which the decision was reached. One must ask was it a decision on a matter raised in court and argued by the parties? Was there substantial evidence of the custom? There could of course be no assumption that the Chief Justice knew the custom from his own knowledge. The answer to each of these

⁶⁹ Unless varied or repealed by the Supreme Court or National Court, *res judicata* is also an operative principle (s.18).

⁷⁰ The Act directs the courts to the same principles and laws for formulating a rule in this circumstance as Section 7(4) and (5) lay down for formulating a rule when no rules of the underlying law, customary law or the common law exist. See above.

⁷¹ [1983] SILR 95.

questions in the present case is, no. The only basis for the High Court's finding on the custom, which was in any event not the only reason for the decision, was an inference from the judgment of the Local Court, a judgment expressly founded entirely on credibility of witnesses of fact. In those circumstances, I cannot give the words used by the then Chief Justice on the subject of custom the binding effect claimed for them by the Appellant.

The High Court was able to overrule the earlier decision only because it was able to find that, in essence, no decision had been made. A law permitting the courts to overrule decisions whenever they are not appropriate to the circumstances of the country would have made it easier for the court to reach this decision. Requiring property to devolve patrilineally when the custom is matrilineal is, surely, inappropriate to the circumstances of the country.

There is always a tension in the common law between the need for flexibility, to ensure that the law will remain in touch with an ever-changing culture, and the need for stability, to ensure that people in general, and actors in the market in particular, can organize their activities, transactions, and agreements according to dependably certain rules. Perhaps in recognition that its standard for overruling precedent is relatively liberal, the Act provides that, when a prior decision has been overruled, a court may,

... apply to a situation a decision of law that was over-ruled after the occurrence of the situation, or a practice, doctrine or custom that was current or accepted at the time of the occurrence of any relevant transaction, act or event (s.22).

This provision should go some way towards alleviating the unfairness that might otherwise be felt were parties made subject to rules that had not existed at the time that they were acting, especially if their activities had been planned in light of principles that the court then overruled.

The underlying law described by the Act is like the common law in that it forms a coherent system with rules that can be depended upon not to change arbitrarily. At the same time, however, the Act permits the underlying law also to take after the customary law. The Act allows the underlying law to be flexible, able to change whenever the circumstances of the country change. This is a difficult balance to sustain, and it will be up to the Papua New Guinea courts in the years ahead to maintain it.

Conclusions: The New Legislation Compared

It is beyond doubt that a wholesale adoption of introduced law and legal systems is inappropriate for the island states of the South Pacific. As Narokobi has stated:

It is absurd for an independent nation to declare itself bound by the laws of another nation, or the decisions of another nation. To the extent that the sovereign will of a nation may be found in a state; and to the extent that will is given efficacy through judicial decisions, it is even more absurd to think that in the case of the PNG Sovereign, its will might be made to depend on what the English or Australian courts say the will of their respective sovereigns might be (Narokobi 1976: 117).

At independence neither Papua New Guinea nor Solomon Islands took the opportunity to discard entirely the introduced legal system. In Solomon Islands essentially the only concessions to the differences between Solomon Islands and England were a limitation on the 'saved' introduced law by the imposition of a 'cut-off' date (meaning that future judicial and legislative law-making overseas would not be imposed) and the addition of customary law to the sources of formal law. However, this small bow to custom was, at least from a psychological point of view, a significant milestone in the promotion of indigenous law.

In Papua New Guinea the promotion of customary law was taken further with a specific mandate to the courts to create an underlying law, based on custom as well as on the introduced common law. For some this did not go far enough. For example, Narokobi regarded it as a compromise, preferring that customary law be adopted as the only source of the underlying law (Narokobi 1976: 118).

Narokobi's fears that the common law of England would in practice continue to prevail, proved well founded. There is ample evidence, both from Papua New Guinea and Solomon Islands, supporting the view that common law continued for many years to dominate in the formal courts.⁷² Factors such as the common law

⁷² See, e.g., *Acting Public Prosecutor v Nitak Mangilonde Tanganis of Tampitanis* [1982] PNGLR 299; *Longa v Solomon Taiyo Ltd* [1980/81] SILR 239; *R v Loumia and Others* [1984] SILR 51. The position may be changing, however. Muria C.J. and Palmer J. of Solomon Islands have both in recent years produced more and more decisions that are grounded in customary law. Members of the Papua New Guinea Supreme Court, Amet C.J. in particular, have expressed the intention to do this as well. Elsewhere in Melanesia, Lunabek, Acting C.J., is actively

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training of the lawyers and judiciary and the absence of source material on customary law, contrasting with the wealth of legal materials available on English law, among other factors discussed above, helped to entrench the common law and to marginalise customary law.

The two statutes recently passed in Melanesia are intended to enhance the role of customary law. However, in the case of Solomon Islands, the Customs Recognition Act 2000 is based on legislation that Papua New Guinea has discarded in favour of something more strongly supportive of customary law - which leads us back to a question with which we began: why would Solomon Islands enact legislation that its neighbour has found unsatisfying?

A number of answers now present themselves. Most important, we believe, is the presence in Papua New Guinea (and absence from Solomon Islands) of a Law Reform Commission. In Papua New Guinea, that governmental agency has played an important role ever since independence. It serves not only as a source, additional to the legislative and Parliamentary counsels' offices, which are usually quite busy with day-to-day work, for the drafting of statutes. But also, as attested by the Working Paper and Report it issued when it circulated various drafts of the Underlying Law Bill, it operates as an explainer of and lobbyist for legislation (Papua New Guinea Law Reform Commission 1976, 1977). Also of primary importance is the support for the Underlying Law Bill and other aspects of custom by influential figures such as Bernard Narokobi. Mr. Narokobi was Chairman of the Law Reform Commission in 1977 when the Bill was first drafted and circulated. He has written extensively about the need for Melanesian countries to find themselves in their own traditions, and never lost hope that the Underlying Law Bill would eventually become law. It was his private member's bill that brought it before Parliament in 2000 (Papua New Guinea Parliamentary Debates 1998: speech by Mr. Bernard Narokobi, at that time Leader of the Opposition).

Whilst these are probably the major reasons, there are in addition a number of lesser reasons, some of which have already been discussed. Perhaps Papua New Guinea could not enact an underlying law act until it had experienced life under the Customs Recognition Act. If that is true, we can only hope that the courts of Solomon Islands do not require quite so many years of experience as occurred in Papua New Guinea. We prefer to look upon the enactment in Solomon Islands of the Customs Recognition Act as a hopeful sign, as a signal that Parliament

engaged not only in bringing customary law into his decisions but also in formulating rules to help all Vanuatu courts to do this.

supports the notion of integrating customary law more fully into the state legal system and is searching for a way to help that to happen.

Unfortunately, as it now stands the Solomon Islands Customs Recognition Act, if ever brought into force, may have the opposite effect. Rather than increasing the likelihood that courts will use custom, it may instead decrease the use of customary law, because it:

- requires customary law to be proved as a matter of fact, rather than as law;
- restricts recognition of customary law to a list of specific cases, topics and areas of law;
- is unclear as to whether guardianship and custody cases are to be decided in accordance with customary law, or whether custom is just a factor to be taken in to account; and
- may give too much discretion, with too little guidance, to the courts in deciding conflicts between different customary regimes.

The Underlying Law Act of Papua New Guinea is several steps ahead of the Customs Recognition Act. It treats custom as law. It requires that courts and counsel try to find an applicable rule from custom before even considering the imported common law. Perhaps, in continuing to allow courts to use the imported common law as one of the sources of the underlying law, it does not go as far in privileging custom as some would like, but there is no constitutional mandate for that. However, it does leave the way clear for the promotion of customary law as the major part of a new 'homegrown' law, albeit flavoured with introduced common law. Nevertheless, it is not free from problems:

- The Act is not clear as to whether the current underlying law of Papua New Guinea includes those decisions that were reached by colonial and post-colonial courts without consideration of applicable customary law.
- Customary law may not be used if there is a written law on a point, even though customary law may be more appropriate.
- It is uncertain whether the Papua New Guinea Customs Recognition Act is impliedly repealed, either in whole or in part.
- The recognition of custom is still essentially left to counsel and the courts, and, though the Act mandates them to use custom, in the absence of any agency overseeing this mandate, it still may not be fulfilled.

As with the Papua New Guinea and Solomon Islands constitutional provisions on sources of law, the effect of this new legislation depends much on the attitude of counsel and the courts. It is possible that the common law bias, which has in the past severely restricted the role given to customary law by the judiciary in both

countries, will prevent the Underlying Law Act from reaching its full potential, although, as we have mentioned, this bias is receding. In Solomon Islands the dangers inherent in bringing the Customs Recognition Act into force have been recognised amongst the profession and it is to be hoped that this will not happen.

In the meantime, legal education and training in the region, at the University of the South Pacific and elsewhere, is focusing increased attention on customary law.⁷³ This long overdue attention will, it is hoped, widen and deepen the debate and assist in finding solutions to the problems posed by the colonial heritage of legal pluralism. In the meantime customary law remains the most important source of law for the majority of people in Papua New Guinea and Solomon Islands and awaits its rightful place in the formal system.

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⁷³ See, for example, the research and commentary on customary law and the formal legal system published recently by the University of the South Pacific in the *Journal of South Pacific Law* available at www.vanuatu.usp.ac.fj.

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