

# MOVING BEYOND THE HIERARCHICAL APPROACH TO LEGAL PLURALISM IN THE SOUTH PACIFIC<sup>1</sup>

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## Introduction

In countries of the South Pacific, societies are often discussed in terms of the dichotomy between ‘traditional’ and ‘modern’. Similarly, legal systems are often described by reference to the dichotomy between ‘customary’ or ‘traditional’ law and ‘state law’, and between ‘informal’ and ‘formal’ justice. In fact, these divisions are becoming a thing of the past, gradually blurred by changes in the pattern of society and by the interaction between different systems of law. Further, the approach taken to the accommodation of customary law, which has been to formally ‘recognise’ it in constitutions, has, at least in theory, put an end to its independent operation. In the search for a more effective approach to legal pluralism, the existing dichotomy may often obscure a more complex interplay between the interwoven spheres of ‘traditional law’ and ‘state law’ and a new sphere of ‘blended’ law. In each of these spheres there are uncertainties, including questions of definition and scope, which constitute a potentially destabilising factor and have significant rule of law implications.

Commencing with an overview of the different sources and types of law within the ‘customary’ and ‘state’ law spheres in the South Pacific region, this paper

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discusses some of the uncertainties and tensions that arise from pluralism in practice. Examples drawn mainly from Solomon Islands are used to illustrate the various ways in which the lines between customary law and state law have been blurred. Outside Papua New Guinea (where there have been significant initiatives to promote custom: see e.g. the Underlying Law Act 2000 (PNG)), Solomon Islands is arguably the South Pacific country that has made the greatest effort to promote customary law, which has resulted in a wide range of examples from which to draw. (See further Corrin Care 2002: 33-34.)

### The South Pacific Region: Context and Culture

Pacific Island countries stretch across the Pacific Ocean, from Northern Mariana Islands in the north-west to Pitcairn in the south-east. These countries can be grouped broadly, according to ethnic, cultural and linguistic concepts, into sub-regions of Melanesia, Micronesia and Polynesia. This categorisation is not without controversy, as the diversity of culture, social organisation and practices defies sub-regional boundaries, varying from country to country and, particularly within Melanesia, from island to island, and even from village to village. The number of languages spoken provides some measure of diversity. Papua New Guinea has about 680 languages and Vanuatu 108; in Solomon Islands there are about 65 vernacular languages and dialects in existence.

Social and economic changes have had a profound impact on customary societies. Increased communication with other parts of the world, access to the international media, ease of travel and education are just some factors that have influenced change (Crocombe and Meleisea 1994: Chap. 1). Many people have moved from village to urban life and may no longer feel bound by customary rules. Notwithstanding, there is extensive evidence of the continued existence and strength of the customary law throughout the region, particularly in isolated areas.

### The South Pacific Region: Law and Legal Systems

Most of the island countries of the South Pacific are common law jurisdictions.<sup>2</sup>

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<sup>2</sup> Non-common law jurisdictions include the Overseas Territories of France, eg, New Caledonia and Easter Island. Vanuatu inherited both common law and civil law. See further Corrin (1998).

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Their constitutions are stated to be the supreme law. The power to enact legislation is devolved by the constitution to the national legislature (e.g., Constitution of Solomon Islands 1978, s 58) and national courts are empowered to carry out judicial functions. However, in most cases, foreign statutes in force at the time of independence have been retained in force,<sup>3</sup> together with 'English' common law and equity (Corrin and Paterson 2007: 32-34) and 'colonial' legislation (a term used to refer to law made locally, prior to Independence, by a person or body with legislative power bestowed by England), so far as not excluded by any other law and so far as applicable to the circumstances of the country in question. These laws were intended to fill the void until they were replaced by new laws enacted by the local parliament. Colonial legislation has, in most cases, been patriated, either by the Independence constitution or legislation. The same is not true of foreign statutes which still play a prominent role in the legal systems of many regional countries. In Solomon Islands, for example, the legislature has been slow to act and large areas of law are still governed by English statutes (Corrin Care 2002: 34). This may be compared to Samoa, where only a handful of foreign statutes remain in force (Samoa 1977: Notes to Reprint of Statutes Act 1972), and Tonga where the application of English Statutes was terminated in 2003 (Civil Laws (Amendment ) Act 2003). National courts have also been slow to forge their own path, largely being content to follow English common law rather than exploring a local jurisprudence more appropriate to local culture.

As mentioned above, most regional constitutions give recognition to customary law, rendering it a formal source of law.<sup>4</sup> However, it is important to stress that customary law does not rely on constitutional recognition for its validity. It was in force prior to colonisation and co-existed during the colonial period with the acquiescence of authorities. (See e.g. in relation to Solomon Islands and Vanuatu, Brown 2005: 38-40.) Outside of urban centres, however, for many individuals and communities customary law is still *the law*. In this context, the discussion of legal

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<sup>3</sup> For example, in Fiji Islands the date is 2 January 1875: Supreme Court Ordinance 1876, s 35; in Solomon Islands it is 7 July 1978: Constitution of Solomon Islands 1978, Sch 3, para 4(1); in Vanuatu it is 30 July 1980: Constitution of Vanuatu 1980, Art 95(2). In the case of Vanuatu, French law was also 'saved'.

<sup>4</sup> See for example, Constitution of Solomon Islands 1978, Sch 3, para 3(1); Constitution of Samoa 1960, Art 111(1); Constitution of Vanuatu 1980, Art 47(1). See further Corrin Care 1999.

pluralism from the premise of a hierarchy of laws with state law at the apex, below which other sources are nested (Benton 2002: 8), is misleading. A hierarchical approach assumes the supremacy of the common law and encourages the use of State law as the starting point for the analysis and application of customary law. As Benton points out, such an approach to legal pluralism brings with it “a sense of inevitability about the dominance of state law” (Benton 2002: 9). From the perspective of members of Pacific society in areas where custom is still respected, customary law is paramount. State law is regarded as ‘Whiteman’s law’, which is not their business (Solomon Islands Law Reform Commission 1996: 10-11). Further, as has been pointed out in the anthropological literature, legal systems do not operate in a linear fashion (Ross 1978; Scaglione 1996; White and Lindstrom 1997; see also Stearns 2001). In reality, laws and legal processes are often interwoven and a hierarchical approach obscures the complexities of this relationship. One such complexity arises from the fact that, despite the recognition of customary law and its allocation of a place in the formal hierarchy below statutory law, its precise standing in the state system is often unclear.<sup>5</sup> For example, in a number of South Pacific countries, its relationship with common law and equity is in doubt.<sup>6</sup> In Solomon Islands, for example, whilst it is stated that customary law is to prevail over English common law and equity,<sup>7</sup> in practice it is

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<sup>5</sup> See e.g. the following statement of Chief Justice Muria:

It is a fallacy to view a constitutional principle or a statutory principle as better than those principles contained in customary law. In my view, one is not better than the other. It is the circumstances in which the principles are applied that vary and one cannot be readily substituted for another. (*Pusi v Leni*, unreported, High Court, Solomon Islands, 14 February 1997, available on [www.paclii.org](http://www.paclii.org) at [1997] SBHC 100.)

<sup>6</sup> See e.g. Constitution of Marshall Islands 1978, Art X, ss.1 and 2; Constitution of Samoa 1960, Art III(1); Constitution of Vanuatu, Art 45(1) (discussed Corrin Care 1998: 601-603).

<sup>7</sup> Constitution of Solomon Islands 1978, sch 3, para 2(1)(c):

[T]he principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as ... in their application to any particular matter, they are inconsistent with customary law applying in respect to the matter.

See also, *Kasa and Kasa v Biku* (unreported, High Court, Solomon Islands, Muria

rarely applied by the courts (Corrin and Zorn 2005: 150; Corrin Care and Zorn 2002a: 25, 47, 68). Further, the relationship between customary law and constitutionally enshrined rights is often ambiguous (see further Corrin 2006a, b). Throughout the Pacific, numerous other questions regarding the precise application of customary law remain unresolved (Corrin and Zorn 2005; Corrin Care and Zorn 2002b). These uncertainties have helped to justify those schooled in the common law avoiding the application of customary law despite its formal status. In many cases, it has been bypassed altogether.<sup>8</sup>

### Pluralism in the Pacific

The term ‘legal pluralism’ does not have a single, universally accepted meaning. In the narrow sense it refers to “a situation in which two or more legal systems co-exist in the same social field” of law operating within the same country (Merry 1988: 870; see also Griffiths 1986: 38). In the wider sense it means much more than this. Sack suggests that it involves an ideological commitment in the form of opposition to monism, dualism and any other form of dogmatism or, for those who are opposed to plurality of laws, “a series of essentially undesirable compromises” of a situation that must be “temporarily tolerated as a necessary evil” (Sack 1986: 1).

In countries of the South Pacific, legal pluralism is often discussed by reference to the dichotomy between ‘customary’ or ‘traditional law’ and ‘state law’, and between ‘informal’ and ‘formal’ justice. This approach limits legal pluralism to the confines of post-colonial theory and ignores the scholarship on ‘new legal pluralism’ which acknowledges that the concept is not limited to developing countries (Merry 1988: 872; see further Greenhouse and Strijbosch 1993, which contains articles about legal pluralism in industrialized societies). Further and more pertinently for the present discussion, the ‘customary’/‘state’ law dichotomy misrepresents the South Pacific position. In contrast with many other parts of the common law world, this is not a question of law endorsed by the state as opposed

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CJ, 14 January 2000, available at [www.paclii.org](http://www.paclii.org) at [2000] SBHC 62.

<sup>8</sup> See e.g. *Banga v Waiwo* (unreported, Supreme Court, Vanuatu, Vaudin d’Imecourt CJ, 17 June 1996, available at [www.paclii.org](http://www.paclii.org) at [1996] VUSC 5), where Vaudin d’Imecourt C.J. took the view that customary law was a source of last resort, only to be applied in the absence of any other applicable law.

to unofficial law, as most regional constitutions have recognised customary law as an official source of law (e.g. Constitution of Solomon Islands 1978, s. 75, Sch 3, para 3). In this sense, customary law is both state law and part of the formal justice system, operating within the same legal system as the written law.

Moreover, a one dimensional approach to legal pluralism does not acknowledge the other layers of pluralism that operate to deny the legitimacy of the customary law versus state law distinction. Changes in the patterns of society, caused by factors such as greater mobility, access to the media, and the onslaught of Western ideas, have weakened the boundaries between customary law and state law. More pertinently for this paper, the boundaries have been further eroded by interaction between the different types of law. This ‘blurring’ process occurs in a number of ways. Perhaps the most obvious of these, and the focus of this paper, is where legislators attempt to incorporate or accommodate customary law in statute law. Another is where the state courts purport to apply common law or statute in a way that interstitially takes account of customary law.<sup>9</sup> Less obviously, the reverse may occur: courts may purport to apply customary law, but do so in such a way that they are treating it as common law (Corrin 2008).

Legislative efforts to incorporate customary law often occur on an ad hoc basis rather than as part of a well thought-out scheme. They are frequently the result of individual effort rather than a comprehensive government policy. This often results in a failure to take account of the differences between the culture and processes surrounding the customary and formal legal systems, and the lack of provision of mechanisms for overcoming the conflicts that inevitably arise. Thus for example, a requirement to take account of customary law leaves the court to struggle with the question of what exactly that law entails and how it is to be pleaded and proved (see further Corrin Care and Zorn 2002a). These omissions partly explain the third manifestation of the blending process, that is, the tendency to equate customary law with the nearest common law equivalent.

The following sections of this article seek to illustrate the multi-layered pluralism at work within the South Pacific by giving practical examples of the first of the three manifestations of the blurring process, that is, legislative attempts to incorporate or accommodate customary law in statute law. The examples chosen illustrate not only the process, but also the failure to take account of underlying

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<sup>9</sup> For an interesting example from Micronesia see *Pohnpei v Weilbacher* (5 FSM Intrm 431 (Pon S Ct Tr 1992)).

differences and the practical conundrums posed by legal pluralism in the South Pacific.

### Attempts to Incorporate Customary Law in Statutes

In several instances legislators have sought to incorporate customary law in statute. The most comprehensive example of this is in Fiji, where customary law on the holding and use of land, fishing rights and chiefly titles has been embodied in statute. The 1997 Constitution lists these statutes and entrenches them,<sup>10</sup> providing that a Bill to amend these Acts must be read three times in each House and be supported by at least nine of the fourteen members of Senate appointed by the *Bose Levu Vakaturaga* (The Great Council of Chiefs). Attempting to codify custom or encapsulate wide areas of customary law in statutes has its own problems which have been discussed elsewhere (e.g. Corrin Care and Zorn 2002a: 10, 47-48). This section looks at less ambitious initiatives.

A number of problems arise from attempts to incorporate customary law in statute. Apart from the question as to whether customary law is still customary once it is in statutory form (Corrin Care and Zorn 2002a: 10, 47-48), merely providing for the application of customary law without any guidance on how this is to be achieved arguably leaves the courts with a square peg to fit into a round hole. This issue and other difficulties that have arisen are illustrated by the following two particularly graphic examples, both from Solomon Islands. The first looks at legislation designed to deal with determination of customary land rights, and the second at an attempt to integrate customary law on succession into the National Provident Scheme.

#### *Local Courts Act and the Forest Resources and Timber Utilisation Act*

In many countries of the region 'customary courts' have been established by

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<sup>10</sup> The Constitution of the Republic of the Fiji Islands 1997, enacted by the Constitution Amendment Act 1997, 185(1). The Acts are the Fijian Affairs Act, Cap 120; Fijian Development Fund Act, Cap 121; Native Lands Act, Cap 133; Native Land Trust Act, Cap 134; Rotuma Act, Cap 122 ; Rotuman Lands Act, Cap 138; Banaban Lands Act, Cap 124; and Banaban Settlement Act, Cap 123.

legislation. The aim of establishing such courts is to provide a more flexible and informal forum for resolution of disputes. These courts are only ‘customary’ in the sense that they administer customary law. They are not traditional forums and in reality they are often adversarial, or at least overly formal, and do not resolve issues in a customary way.<sup>11</sup>

One such ‘customary court’ is the Local Court in Solomon Islands, A Local Court has jurisdiction to deal with minor disputes arising within the geographical area for which it is constituted and exclusive jurisdiction to deal with all proceedings of a civil nature affecting or arising in connection with customary land.<sup>12</sup> In 1985, the limitations of ‘customary’ courts were recognised and the Local Courts Act was amended by the Local Courts (Amendment) Act 1985. This landmark piece of legislation sought to have ownership of customary land decided in a customary way, rather than in a ‘customary’ court established on a Western model. This statutory amendment to the process for determining customary land disputes provides a good example of an attempt to incorporate customary processes into the formal court process. It also provides an example of how well-intentioned reforms do not always produce desirable results.

The amending Act attempted to return some of the decision-making on customary land matters to traditional leaders by making referral to the chiefs a prerequisite for lodging a claim with the Local Courts. Thus, Local Courts only have power to hear customary land disputes where:

the dispute has first been referred to the chiefs;  
all traditional means of resolving the dispute have been exhausted; and  
the chiefs have made no decision wholly acceptable to both parties (Local Courts Act Cap 19, s 12).

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<sup>11</sup> For example, Vanuatu’s Island Courts are subject to the following procedural rules: Island Courts (Civil Procedure) Rules 2005, Island Courts (Court Clerks) Rules 2005, Island Courts (Criminal Procedure) Rules 2005, Island Courts (Supervising Magistrates) Rules 2005.

<sup>12</sup> Land and Titles Act, Cap 133 s 254. There are exceptions to this jurisdiction: matters expressly excluded by the Land and Titles Act and questions as to whether land is or not customary land.

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However, there are difficulties with the procedure, not least the unwillingness of unsuccessful parties to abide by the chiefs' decision. This has led to an increase in litigation rather than a reduction. There have also been difficulties in ascertaining the identity of the 'chiefs' in some areas of the country.<sup>13</sup>

A further problem was exposed by the recent case of *Majoria v Jino*.<sup>14</sup> In this case it was pointed out that, whilst it was clear that referral to the chiefs was a prerequisite to lodging a claim with the Local Court, the status of any decision made by the chiefs had not been specified. In order to explain the facts of this case it is necessary to say something about the legislative scheme for the acquisition of timber rights in Solomon Islands, which is provided by the Forest Resources and Timber Utilisation Act (Cap. 40) of Solomon Islands.

The Forest Resources and Timber Utilisation Act is a further example of a statute that seeks to accommodate customary law, but a less benevolent measure than the other legislation discussed in this section. The statute was enacted to by-pass the problems that had arisen in getting permission to log customary land. It provides a process for identifying those entitled to grant 'timber rights' in respect of customary land. Under the original scheme the initial determination was made by the area council (Forest Resources and Timber Utilisation Act, s. 8, prior to its amendment by the Forest Resources and Timber Utilisation (Amendment) Act 2000). That power is now exercised by the Provincial Executive, and appeals against decisions can be made to the Customary Land Appeal Court (Forest Resources and Timber Utilisation Act, s 10(1)). Following the enactment of the Forest Resources and Timber Utilisation Act there are now two separate bodies dealing with customary land tenure: one determining customary land 'ownership', and the other the right to grant timber rights. This distinction recognises that customary land tenure is multi-layered (Corrin 2008). The relationship between timber rights 'owners' and customary 'landowners' is not specified in either Act. However, it has been the subject of a number of court decisions. The position, as it was understood to be until the case of *Majoria v Jino*, was well explained thus

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<sup>13</sup> See e.g., *Nelson Lauringi and Others v Lagwaeano Sawmilling and Logging Limited and Others* (unreported, High Court, Solomon Islands, Lungole-Awich J, 28 August 1997, available at [www.pacii.org](http://www.pacii.org) at [1997] SBHC 61).

<sup>14</sup> Unreported, Court of Appeal, Solomon Islands, Lord Slynn of Hadley P., Adams J.A., Salmon J.A., 1 November 2007, available at [www.pacii.org](http://www.pacii.org) at [2007] SBCA 20).

by Ward C.J.:

the Forest Resources and Timber Utilisation Act as amended, sets up a procedure whereby anybody wishing to acquire timber rights over customary land can identify the people with whom to deal. The procedure identifies persons to represent the group as a whole. Once the procedure has been followed, the people named by the area council are the only people entitled to sign an agreement to transfer those rights and that are clearly, as the parties to the agreement, the people to whom the royalties should be paid. ... I have no way of knowing, on the evidence before me, whether the persons identified by the Area Council as entitled to grant timber rights have that entitlement because they are landowners or because they have some secondary rights and neither can I question their decision on that. (*Tovua v Meki* [1988/89] SILR 74: 76.)

In *Majoria v Jino* the court was required to consider the relationship between the Local Courts Act and the Forest Resources and Timber Utilisation Act in respect of determination of customary land rights. The facts of the case were that, in 2002, the appellant and other named members of the Kadiki tribe were determined by the Western Provincial Executive to be the holders of timber rights in a specified area referred to as 'Rodo Customary Land'. The respondent and other members of the Bareke tribe lodged an appeal against this decision to the Customary Land Appeal Court (Western) (WCLAC). In 2003, prior to any determination by the WCLAC, the matter was referred to the Marovo Council of Chiefs, who determined that only the Kadiki tribe had any rights over 'Rodo Customary Land'. In May 2005, the appellant commenced High Court proceedings against the respondent, representing the Bareke Tribe, and the WCLAC, challenging the jurisdiction of the WCLAC to hear the appeal against the Western Provincial Executive's decision. In the same month, the Western Provincial Executive approved a timber rights agreement between the Appellant and other members of the Kadiki tribe and Rodo Development Company (RDC), and RDC was granted a timber licence. The following month, however, the WCLAC quashed the determination made by the Western Provincial Executive, holding that it failed to comply with the Forest Resources and Timber Utilisation Act, which required it to determine the holders of the timber rights, and the nature and extent of the rights to be granted (Forest Resources and Timber Utilisation Act, s 8. The Western Provincial Executive's determination in 2002 would appear to have

satisfied the requirement of s 8). The WCLAC, however, made no determination of ownership of the land in question.

In the High Court proceedings, heard in 2007, the respondent, sought to establish that a parcel of land known as 'Havahava Customary Land', lying within the boundaries of Rodo Customary land, belonged to the Bareke tribe rather than the Kadiki tribe. Brown J held that the decision of the Marovo Council of Chiefs that Havahava land was part of Rodo land, was made under a different regime (i.e. the Land and Titles Act and the Local Courts Act) and was not binding on the WCLAC, which was acting under the regime created by the Forest Resources and Timber Utilisation Act.

The appellants appealed to the Court of Appeal, challenging the decision and seeking determination of the significance of the 2003 decision of the Marovo Council of Chiefs. The Court of Appeal stated that where a decision is made by the WCLAC as to customary ownership of land as a necessary preliminary to determining the disposal of timber rights, that decision is binding on the parties. However, in this case the decision of the Marovo Council of Chiefs was given before the WCLAC made its decision. Therefore, the status of the decision of the Marovo Council of Chiefs was a crucial issue. The Court of Appeal noted that the statutory scheme was not 'entirely easy to interpret' and considered it particularly unfortunate that the status of a decision of the Chiefs was not explicitly stated in the legislation. However, the court considered that

... the key to understanding the scheme and applying it in a practical way is to recognise the important role assigned by the Parliament to the Chiefs and their decisions for the purpose of determining disputes of customary land.

They went on to say:

If the party who succeeded before the Chiefs is left in the situation that the other party can simply act as though that decision had never occurred, that would tend to discourage attempts to settle disputes by traditional means. It would encourage parties with weak cases to ignore a summons by the Chiefs to hearings or not to take the Chiefs seriously, in the knowledge that any adverse decision will not affect them. It would tend seriously to undermine the authority of the Chiefs, a

result that is obviously the very opposite of that intended by the legislative scheme. It would also encourage multiplication of litigation. It follows, as we think, that a party who disagrees with a decision of the Chiefs but who declines to take advantage of the legislative scheme for reconsidering that determination by invoking the jurisdiction of the local court must be considered to be bound by the decision. (*Majoria v Jino*<sup>15</sup>)

As can be seen from this decision, the legislative regimes introduced by the Local Courts Act and the Forest Resources and Timber Utilisation Act to deal with interests in customary land are far from clear. The position is exacerbated when the two schemes come into contact, as each Act has been devised in isolation from the other and little thought appears to have been given to their interaction. The Court of Appeal, left to deal with the resulting conflict appears to have been well motivated, acknowledging that resolution of disputes over customary land was ‘of vital importance to the people, their communities and the country’ and that therefore, it was the duty of the courts to make the legislative scheme work if this could be done consistently with the language of the statutes. Further, the Court appears to have been willing to accommodate the demands of legal pluralism, stating that, ‘the key to understanding the scheme and applying it in a practical way is to recognise the important role assigned by the Parliament to the Chiefs and their decisions for the purpose of determining disputes of customary land’. However, as in many other instances the Court appears to be dominated by a hierarchical approach, taking the common law on land tenure as a starting point. In particular, it has assumed that the rights being determined under the Local Courts Act are the same as those being determined under the Forest Resources and Timber Utilisation Act. According to earlier case law, they clearly are not (*Allardyce Lumber Company Ltd v Attorney General*<sup>16</sup>). If the courts cannot grasp the subtleties involved in customary land tenure and legislators cannot adequately accommodate the relevant law in the formal system, a significant barrier is posed for customary ‘landowners’ wanting to enforce their rights.

It is also relevant to note that the litigation between the parties to *Majoria v Jino*,

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<sup>15</sup> Above note 14.

<sup>16</sup> Unreported, High Court, Solomon Islands, Ward CJ, 18 August 1989, available at [www.pacilii.org](http://www.pacilii.org) at [1989] SBHC 1.

over the same area of customary land, is continuing in the High Court<sup>17</sup> and the Court of Appeal<sup>18</sup>. Although the dispute is primarily about customary land, which the Land and Titles Act clearly states is to be governed by customary law,<sup>19</sup> the dispute resolution process is dominated by the common law forms of relief, procedure and forum. Customary law and dispute resolution processes are again marginalised in favour of the dominant common law system and the legislation fails dismally in its aim of accommodation.

It should also be noted that there are reforms on foot in this area. The Tribal Land Dispute Resolution Bill 2008, an ambitious foray into statutory accommodation of customary processes in the formal system of land dispute resolution, is currently out for consultation in Solomon Islands. The Bill is intended to provide a new forum for determination of customary land disputes, but in its current form it is badly drafted and gives rise to its own set of problems, which are outside the scope of this paper.

#### *Solomon Islands National Provident Fund Act*

Another prominent example of a statutory amendment designed to take into account customary laws is the Solomon Islands National Provident Fund Act (Cap. 109). This Act provides for the establishment of a national provident fund ('SINPF'), which operates as a compulsory self-funded pension scheme. Funds are derived from compulsory contributions to the fund by employers and employees, which are invested and paid out to the employee on turning fifty or on retirement. It also provides that members of the fund may nominate a person to whom they

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<sup>17</sup> *Majoria v Jino*, unreported, High Court, Solomon Islands, Faulkner J., 16 May 2008, available at [www.paclii.org](http://www.paclii.org) at [2008] SBHC 54.

<sup>18</sup> *Majoria v Jino*, unreported, Court of Appeal, Solomon Islands, Goldsborough P., Williams J.A., Hansen J.A., 26 March 2009, available at [www.paclii.org](http://www.paclii.org) at [2009] SBCA 4.

<sup>19</sup> Land and Titles Act Cap 133, s. 239(1):

The manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable thereto, and all questions relating thereto shall be determined accordingly.

wish their entitlement to be paid in the event of the member's death. However, a nomination is invalidated by a subsequent marriage (Solomon Islands National Provident Fund Act Cap 109, s. 32). Originally, it was provided that, in the absence of a valid nomination, distribution would be in accordance with the intestacy provisions in the Wills, Probate and Administration Act (Cap. 33). Those provisions take no account of customary obligations, and only provide for distribution in accordance with 'Western' nuclear family values and relationships. In 1990, the national parliament amended the Act to make it more appropriate to the circumstances of Solomon Islands (Solomon Islands National Provident Fund (Amendment) Act 1990, s. 6). The amendment provides that, where a member of SINPF dies without a valid nomination in place, distribution is to be "in accordance with the custom of the member to the children, spouse and other persons entitled thereto in accordance with that custom" (Solomon Islands National Provident Fund (Amendment) Act 1990, s. 33(c)).

This effort to accommodate customary law within the formal system is no doubt an appropriate measure in a country where customary law has more resonance than state law. However, the introduction of this type of provision without any direction as to process has led to difficulties. This is well illustrated by the case of *Tanavulu and Tanavulu v Tanavulu and SINPF*.<sup>20</sup> In that case, the deceased had nominated his brother and nephew as beneficiaries when he joined the fund. When he married the following year, that nomination became void. After he died, the deceased's father applied for and was paid the amount held in the fund (\$11,079) on the basis of custom in Babatana, South Choiseul. The father deposited \$4,000 in an interest-bearing deposit account in the name of the deceased's son. He paid \$2,000 each to the deceased's brother and nephew. He used \$3,000 to meet funeral expenses and \$79 for his own purposes. The deceased's widow, who had received nothing, challenged this distribution in the High Court, seeking a declaration that she and her infant child were entitled to one third of the money each. She also alleged that

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<sup>20</sup> Unreported, High Court, Solomon Islands, Lungole-Awich J, 12 January 1998), available at [www.paclii.org](http://www.paclii.org) at [1998] SBHC 4. For other discussions of this case see: Corrin 2006a; Brown and Corrin Care 2001: 668-670; Corrin Care and Zorn 2005: 155-158. See also the Solomon Islands case *The Minister for Provincial Government v Guadalcanal Provincial Assembly*, unreported, High Court, Solomon Islands, Kapi P., Williams J.A., Goldsbrough J.A., 11 July 1997, available at [www.paclii.org](http://www.paclii.org) at [1997] SBCA 1, where the Court of Appeal refused to declare an Act which discriminated against women unconstitutional. This decision is discussed in detail in Brown and Corrin Care 2001.

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SINPF had been negligent in carrying out their duties under the Act.

The case raised several questions in relation to customary law. First, who was entitled in custom; second which custom was to be applied and how was the existence of such law to be proved; and third, what was the position where such law conflicted with fundamental rights. With regard to the first question, SINPF did not make any inquiries as to the prevailing customary law, but merely required a form to be completed with personal particulars, including the applicant's relationship to the deceased, and witnessed by a person who knew the applicant personally, together with a statutory declaration stating the applicant's relationship to the deceased and the basis for his claim in custom. Awich J considered that, having received this information, SINPF had complied with its duty and stated: "It would be absurd to expect NPF to hold elaborate inquiries that may involve travelling to the village of every deceased member or gathering witnesses in order to determine what a particular custom is." Whilst there is some truth in this, acting on a signed form and statutory declaration from an interested party, hardly qualifies as an inquiry at all.

At trial, the widow's challenged the father's version of the applicable custom. Customary law differs from place to place within Solomon Islands. In this case the custom was that of the deceased's home village of Babatana. It was not disputed that inheritance in that area was patrilineal, but the witnesses differed as to whether the deceased's father had a complete discretion to distribute the estate or whether the money should be paid to the deceased's son, with an unspecified share to be paid as of right to the mother. There was no guidance in the Act as to how customary law should be proved. The judge appears to have assumed that, in the event of dispute, proof of custom was a matter for oral evidence. The widow gave evidence herself and called one other witness on custom. The deceased's father gave evidence of custom and called two witnesses to support him, one male and one female. The judgment gives no details of how these witnesses were qualified to give evidence or what factors the court considered relevant to such competence. The court preferred the evidence of the deceased's father and his witnesses, according to which the deceased's father was entitled to distribute the proceeds of the fund to relatives as he saw fit. It was held that the children and spouse had no automatic right to payment, as they would have done if the fund had formed part of the deceased's estate on intestacy. The deceased's father had the discretion to pay some amount of the inheritance to the widow but this was not obligatory. In some circumstances, such as where the widow left the father's house, as she had

done here, he was entitled to leave her out of the distribution altogether.<sup>21</sup>

The third issue is perhaps an even more serious tension arising from pluralism that will often form a hurdle to accommodation of customary law in the state system. Given that customary law is underpinned by patriarchal and status based norms how can this be reconciled with a constitutional commitment to human rights? In this case it was argued on behalf of the widow that the rules of customary law should not govern the distribution of funds as they were discriminatory. Section 15 of the Solomon Islands Constitution provides protection from discrimination, and ‘law’ which offends against it is unconstitutional. However, the judge found that the word ‘law’ in section 15(1), did not include customary law. His basis for this finding was that the words, ‘no law shall’, in section 15(1), were referring to a law to be made in the future. As customary law was ‘evolving or was already pertaining [by which it is assumed His Lordship meant ‘existing’] at the time of the adoption of the Constitution’ it was not such a law. According to this decision, no customary law, no matter how discriminatory, would be outlawed by section 15. Awich J went on to say that even if sub-section (1) had included customary law, section 15(5)(c) and section 15(5)(d) would excuse discriminatory law in a case such as this. Section 15(5)(c) exempts certain personal law, including law ‘with respect to devolution of property on death’, from the protection against discrimination. The reasoning in this case is open to serious question, as discussed elsewhere (Corrin2006a).

On appeal, the Court of Appeal agreed with the trial judge’s conclusions: whether or not the spouse and child received a share was ‘dependent upon custom’. On the conflict between customary law and protection from discrimination, the Court of Appeal limited itself to upholding the trial judge’s decision on the basis that section 15(5) recognised that the application of customary law might have certain

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<sup>21</sup> In some areas the wife is expected to remain with the husband’s family after his death, if there are children of the marriage. If she leaves, the bride price may have to be returned and she runs the risk of losing all rights (see further *To’ofilu v Oimae*, unreported, High Court, Solomon Islands, Palmer J, 19 June 1997, available at [www.paclii.org](http://www.paclii.org) at [1997] SBHC 33). The attitude that the wife is expected to live with the husband’s family during his lifetime has prevailed outside the customary sphere in Fiji Islands, where a wife was refused a divorce on the grounds of constructive desertion and cruelty when she left the matrimonial home as she could not put up with her mother in law’s presence: *Begum v Hussein*, unreported, Magistrates’ Court, Fiji Islands (Suva), Civil Case 198/1989.

discriminatory consequences.

In addition to the three issues aired in the case, there are two other unanswered questions posed by the legislation. First, does customary law cease to apply if parties no longer feel bound by customary law? Many islanders who move from their home village for education, work or marriage become divorced from the customary system. In *Tanavulu v Tanavulu*<sup>22</sup> this may well have been the case. It is revealed that both the deceased and the appellant were both educated and lived and worked in Honiara, the deceased in human resources for a government ministry and the appellant as a nurse. They were married in Honiara in a Methodist church. The second, related question is what is the position in the case of an expatriate or some other person who does not belong to a customary community. The Act makes no provision to deal with this situation, although there are many non-islanders contributing to the fund. Common sense would suggest their entitlement should be distributed in accordance with their will or under the intestacy rules if they fail to make a valid nomination, but until this question is considered by the courts the position is uncertain.

Therefore, whilst the Solomon Islands National Provident Fund Act seeks to acknowledge the importance of customary law for members of Solomon Islands society, it does so without adequate provision for resolving the issues that it raises.

## Conclusion

It is clear from the legislation and case law discussed above that a one dimensional, hierarchical approach to legal pluralism prevails in the South Pacific. The existing dichotomy between 'customary' and 'state law' is an unhelpful way to proceed and has hampered reform. Although much has been said and written about the promotion of customary law and South Pacific jurisprudence, in practice little progress has been made since independence. The problems created then, when diverse systems of law were forced to live together, without any guidance on the manner of their relationship, are no nearer being solved. To date there has been no integrated approach to these dilemmas. Rather the reform process meanders slowly along, driven by ad hoc initiatives, seemingly driven by individual zeal and the

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<sup>22</sup> Unreported, High Court, Solomon Islands, Lungole-Awich J, 12 January 1998, available at [www.pacii.org](http://www.pacii.org) at [1998] SBHC 4.

‘outputs’ focus of donors. In each of these spheres there are uncertainties, including questions of definition and scope, which constitute a potentially destabilising factor and have significant rule of law implications.

The scholarship of legal pluralism has been largely ignored in the South Pacific, even though the emphasis on governance by many aid programmes lends itself to this focus. The approach to law reform requires a paradigm shift. The continued emphasis on the state and the common law and the limitation of legal pluralism to the confines of post-colonial theory fails to obey the constitutional mandate to recognise and promote customary law. Such a dramatic change is also hampered by the lack of an appropriate philosophical basis from which to proceed and effort needs to be concentrated on discovering exactly what South Pacific jurisprudence entails. As stated by Narakobi twenty-three years ago,

If law springs from the cultural fabric of a people, then for it to be effective it must be supported by corresponding moral and social ethics. Universal ethical postulates tend to negate the cultural roots from which Melanesia must emerge. The task of developing a Melanesian jurisprudence thus requires that careful thought is given to identifying and articulating the total cosmic view which is reflected in the Melanesian way of life. (Narakobi 1986: 227)

In the context of customary land reform, the late Ron Crocombe warned against grand schemes for reform in the Pacific (Crocombe 2002) and that is good advice. However, the lack of an appropriate philosophical basis is exactly why such schemes have been doomed to failure in the past. Recognition of the complex legal pluralism at play within the region is a small step towards development of an appropriate philosophy.

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