CULTURES IN CONFLICT: THE ROLE OF THE COMMON LAW IN THE SOUTH PACIFIC

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INTRODUCTION

The geography of the small island countries of the South Pacific region ranges from the large, mountainous and mainly volcanic islands of Solomon Islands, Vanuatu, and Fiji Islands to the small atolls which make up Kiribati, Marshall Islands, Tokelau and Tuvalu. Broadly, the people of the Pacific islands can be grouped, according to ethnic, cultural and linguistic concepts, into sub-regions of Melanesia, Micronesia and Polynesia.[1] Within these broad categories there exists a multitude of cultures and traditions diverging not only from island to island, but sometimes from village to village. A simple illustration of this diversity is the number of languages spoken within the region. In Solomon Islands alone, about sixty-five vernacular languages and dialects exist.[2]

Political developments of the 1960s saw the majority of the regional countries emerge as sovereign states. The general pattern adopted was to replace pre-existing constituent laws with a new constitution,[3] and to establish a representative parliament. The preambles to the constitutions reflected a general desire for laws encapsulating local values and objectives.[4] This desire was given substance by the recognition of customary law, in most countries, as part of the formal system.[5] However, this was not to be the only law. Received laws, in force prior to independence, were 'saved' as a 'transitional' measure, to fill the void until they were replaced by locally enacted laws. Received laws included common law and equity, and legislation in force in England (or, in some cases, its former colonies of Australia or New Zealand) up to a particular date.[6] It also included legislation enacted by the coloniser especially for its colonies, protectorates or dependencies, such as the *Western Pacific (Courts) Order in Council 1961* (UK).

South Pacific law is still based on the law of England. However, the two have diverged, partly as a result of the fact that 'cut-off' dates have been imposed on received law, which prevent the application in the South Pacific of English legislative reforms and common law developments after those dates.[7] It is also a result of legislative innovation by local parliaments in their own countries. The extent and nature of this innovation differs between regional countries. To a limited extent, it is also the result of gradual developments in local case law.[8] Customary law is also a differentiating factor, but within the formal system its effect is surprisingly limited.

Against this pluralistic background, conflict between cultures is inevitable. This paper examines this conflict through the medium of regional cases, where courts have had to consider the applicability of the common law and its accompanying values, as opposed to customary law and traditional norms. The geographical context of this examination is twelve island countries from within the South Pacific region, which are bound together by membership of the University of the South Pacific ('USP').[9] Comparison is also made with decisions from the neighbouring country of Papua New Guinea and from parts of Africa. Before turning to the relevant cases, it is necessary to examine the ambiguities surrounding the status and application of the common law in the countries of the region.

SOURCES OF COMMON LAW

Common law and equity were introduced in all countries of the region during the colonial[10] era. Introduction was either by direct application by England (or its former colonies, Australia or New Zealand) or by adoption by the regional country itself. Common law and equity were continued in force at independence by 'saving' provisions embodied in the independence constitution or other constituent laws. Extracts from the relevant provisions are set out below.

Cook Islands, Niue and Tokelau

The *Constitution of Cook Islands 1965* continues in force section 615 of the *Cook Islands Act 1915* (NZ),[11] which provides

The law of England as existing on the fourteenth day of January in the year eighteen hundred forty...shall be in force in the Cook Islands.

Section 672 of the *Niue Act 1966* (NZ)[12] and section 4A of the *Tokelau Act 1948* (NZ) make similar provision for Niue and Tokelau respectively.

Fiji Islands

The *Constitution of the Republic of Fiji Islands 1997*[13] continues in force section 35 of the *Supreme Court Ordinance 1875*, which provides:

The Common Law, the Rules of Equity and the Statutes of general application which were in force in England ... on the second day of January 1875 shall be in force within the Colony.

Kiribati

Section 6 (1) of the *Kiribati Act 1989* states:

... the common law of Kiribati comprises the rules comprised in the common law, including the doctrines of equity, of England.

Nauru

Section 4(2) of the *Custom and Adopted laws Act 1971* provides:

... the principles and rules of equity which were in force in England on the thirty first day of January 1968 are hereby adopted as the principles and rules of equity in Nauru.

Samoa

Section 111 (1) of the *Constitution of Samoa 1962* provides that 'law':

... includes the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa.

Solomon Islands

Paragraph 2 of schedule 3 of the *Constitution of Solomon Islands 1978* provides:

... the principles and rules of the common law and equity shall have effect as part of the law of the

Solomon Islands ...

Tonga

Section 3 of the *Civil Law Act 1966* provides:

... the Court shall apply the common law of England and the rules of equity.

Tuvalu

The relevant part of section 6 of the *Laws of Tuvalu Act 1987* provides:

... the common law of Tuvalu comprises the relevant rules as applied in the circumstances pertaining from time to time in Tuvalu ... [and] 'the relevant rules' means the rules generally known as the English common law and the doctrines of equity.

Vanuatu

The *Constitution of Vanuatu 1980*, in effect,[14] continues in force section 15(1) of the *Western Pacific (Courts) Order 1961*, which provides:

... the civil and criminal jurisdiction of the High Court [of the Western Pacific] shall, so far as circumstances admit, be exercised upon the principles of and in conformity with: ... the substance of the English common law and doctrines of equity.

CONDITIONS ON THE APPLICATION OF COMMON LAW

As can be seen from the sections set out above, the provisions that continue the common law in force follow a similar pattern. Part of that pattern is to impose conditions on the application of the common law. Unfortunately, these conditions have not been clearly stated and give rise to difficulties of interpretation and application.

Cut-off Dates

The provisions that continue the common law and equity in force in the region usually specify a 'cut-off' date after which, theoretically, new English judicial decisions will not form part of the law.[15] In Tonga there is clearly no cut-off date. In some countries, the legislation does not make it clear whether there is a cut off date or not. The dates that appear to apply in the countries within the USP region are:

COUNTRY	CUT-OFF DATE
Cook Islands	14 January 1840[16]
Fiji Islands	02 January 1875[17]
Kiribati	No cut-off date[18]
Nauru	31 January 1968[19]
Niue	14 January 1840[20]
Samoa	No cut-off date[21]
Solomon Islands	07 July 1978[22]
Tokelau	14 January 1840[23]
Tonga	No cut-off date[24]

Tuvalu	No cut-off date[25]
Vanuatu	30 July 1980[26]

These statutory provisions do not render English decisions made after the cut-off date irrelevant. Such decisions are highly persuasive, and in practice, the regional courts will nearly always follow them. Further, in Solomon Islands, the Court of Appeal has expressly held that English decisions made after the cut-off date will be binding if they are merely declaratory of what the law was before that date.[27] It is only decisions that make new law that do not become part of the law. Once a superior regional court has followed an English decision it will be binding on lower courts of that country in accordance with the doctrine of precedent, whether it was decided before or after any cut-off date.

English or Commonwealth Common Law

The common law is continuing to develop through modern case law, not only in England, but also throughout the Commonwealth. As a result of these developments, the distance between the common law of England and the common law of the countries of the Commonwealth widens. The difference in approach makes it important to consider whether USP countries are bound by English common law or whether they are free to follow common law decisions from any Commonwealth country.

In most countries of the region, the saving provisions specify that it is the English common law (and equity) which have been adopted as part of the law.[28] The provisions in Cook Islands,[29] Kiribati, [30] Nauru, [31] Niue,[32] Tokelau[33] and Tonga[34] refer explicitly to the law 'of England,' or 'in force in England'. Similarly, the word 'England' is used in section 35 of the *Supreme Court Ordinance 1875* (Fiji). However, the courts in Fiji Islands have, on occasion shown an inclination to ignore this and to follow Australian and New Zealand precedents in preference to the English law.[35] For example, in *Nair v Public Trustee of Fiji and the Attorney-General of Fiji* ,[36]Lyons J, in following the Australian and New Zealand approach to estoppel, said:

In my opinion the future of the law in Fiji is that it is to develop its own independent route and relevance, taking into account its uniqueness and perhaps looking to Australia and New Zealand for more of its direction. This certainly is the implication when reading s 100(3) of the Constitution which establishes that the customary law of Fiji shall become part of the overall body of law of this country[37] and further, as to the later assertion, this was the sentiment expressed by the Chief Justice when convening the Supreme Court. Thus it is timely that this modern doctrine of equitable estoppel as formulated and approved by the High Court of Australia and the Court of Appeal of New Zealand be incorporated into the law of Fiji ...

In Samoa it has been held that the word 'English' in s 111(1) is 'descriptive of a system and body of law which originated in England' and not of the law as applied in England. Therefore, courts in Samoa are free to choose from amongst common law principles as developed throughout the Commonwealth.[38] The saving provisions in Tuvalu[39] and Vanuatu[40] are similar to Samoa but have not yet been the subject of express judicial interpretation.

There is no express reference to 'England' in the Solomon Islands' provisions. For that reason Daly CJ held in *Official Administrator for Deceased Estates v Allardyce Lumber Company Ltd*[41] that the term 'common law and equity' as used in paragraph 2 (1) of Schedule 3 was not restricted to the common law and equity of England. His Lordship considered that the High Court was entitled to have regard to the decisions of courts of any Commonwealth country. The Court of Appeal took a different view in *Cheung v Tanda*.[42] The court held that paragraph 2 (1) must be read in the light of paragraph 2 (2), which states:

The principles and rules of the common law and equity shall so have effect not withstanding any revision of them by any Act of the Parliament of the United Kingdom which does not have effect as part of the law of the Solomon Islands.

The Court of Appeal pointed out that this paragraph would have no relevance if it were the common law and equity of countries other than England that was being referred to. Accordingly, the court was of the view that only English common law and equity is in force in Solomon Islands by virtue of paragraph 2(1) of Schedule 3, even though there is no express reference to England in that paragraph.

In Marshall Islands, American common law is more relevant. In cases involving French law decided in Vanuatu, decisions of French courts may be of persuasive value.[43]

Suitability to Local Circumstances

The provisions that continue the common law in force specify that it will apply only if it is appropriate to local circumstances.[44] For example, section 37 of the *Supreme Court Ordinance 1875* (Fiji)[45] states that:

All Imperial laws extended to the Colony by this or any future Ordinance shall be in force therein so far only as the circumstances of the Colony and its inhabitants and the limits of the Colonial jurisdiction permit ...

A further example can be seen in the legislation applying to Cook Islands,[46] Niue[47] and Tokelau,[48] where the common law will not apply if it is 'inconsistent with this Act' or inapplicable to the circumstances of those countries. The equivalent wording in Vanuatu is contained in section 15(1) of the *Western Pacific (Courts) Order 1961*, which is set out above.

In accordance with these provisions, the principles of common law may be discarded or modified by the regional courts,[49] if they are inappropriate to the country in question.[50] This renders the distinction between English common law and the common law developed in other parts of the Commonwealth, mentioned above, academic. A regional court, which prefers a Commonwealth authority to an English authority, may justify following the latter on the grounds that it is more appropriate to local circumstances. Taken literally, these provisions could enable a court to go much further than this and depart from the common law altogether. In the neighbouring country of Papua New Guinea, in examining the common law of contract, the Law Reform Commission was 'not convinced that it suits the needs of our country.'[51] However, apart from the occasional expression of doubt, such as that in *Australia and New Zealand Banking Group Limited v Ale,*[52] which is discussed below, the courts have made no similar declarations. The 'applicability' provisions offer an opportunity for the courts to adapt the common law to take account of prevailing customs and culture. In practice, the courts have shown little desire to explore this avenue, as demonstrated in some of the regional cases discussed below.

Proof of Applicability

The exercise of the power to discard inapplicable common law doctrines is discouraged by unresolved questions surrounding evidence and proof. First, it is unclear whether applicability of the common law is a matter of law to be determined by the court on the basis of judicial notice, or whether it is a question of fact to be proved by evidence. There is little case law expressly dealing with this matter as, in practice the courts tend to assume that common law is applicable, unless a party argues otherwise. In Papua New Guinea applicability has been held to be a matter of judicial notice,[53] whilst in Solomon Islands it has been held to be a matter of evidence.[54]

Further, if proof is required, it is unclear whether the burden lies on a party attempting to rely on the common law or whether there is a presumption in favour of applicability. Again, this has not been fully dealt with by courts in the region. In *Vian Guatal v PNG*[55] the court proceeded on the basis that the normal rules of burden and standard of proof applied, although it did not expressly address the issue. However, in *Tanda v Cheung*[56] Daly CJ said:

I would want a case made out with the utmost clarity on substantial evidence before I could conclude ... that a rule of the common law was inapplicable or inappropriate in the circumstances of the Solomon Islands.

These matters need to be clarified if the courts are to be encouraged to discard common law, which is unsuitable for the cultural circumstances of the countries of the region. Guidelines as to the practical application of these provisions would also assist practitioners to insist on the consideration of this issue when the interests of their clients so demand.

Relationship with other sources of law

Looking at the position of common law from a hierarchical point of view, the Constitution is the supreme law in all countries of the region.[57] Statute is next in the hierarchy.[58] In Fiji Islands and Tonga common law is next as customary law is not a general source of law. In some of the other countries of the region, common law is inferior to customary law. However, there is no uniformity in this regard, and in most countries their relative position is uncertain. A summary of the position, which appears to apply, is set out in the table below:

COUNTRY	COMMON LAW RANKED BELOW CUSTOM
Cook Islands	Uncertain
Kiribati	In certain matters[59]
Nauru	Yes[60]
Niue	Yes[61]
Samoa	Uncertain
Solomon Islands	Yes[62]
Tokelau	Uncertain
Tuvalu	In certain matters[63]
Vanuatu	Uncertain[64]

In practice, common law will normally be followed without any consideration of whether there is an applicable customary law, even in those countries of the region, where it is inferior. Customary land cases may form an exception to this, particularly in countries where the Constitution specifically states that customary land disputes are to be determined in accordance with customary law.[65]

There are a number of possible reasons why common law is preferred to customary law. Disputes in which customary law is the obvious choice will usually be dealt with by traditional means. Within the formal system, judges and counsel may have no knowledge of or training in customary law. Those willing to attempt the feat are faced with the fundamental difficulty inherent in transferring fundamentally different concepts from one legal system into another.[66] One significant stumbling block is that the courts are unsure how customary law should be established. In Kiribati and Tuvalu this problem has been dealt with by statute.[67] In other countries of the region, the courts require customary law to be proved by evidence

before it can be applied.[68] In some countries legislative schemes have been put in place to govern matters to which customary law would otherwise apply, such as commercial use of customary land and other resources. An example is the *Forest Resources and Timber Utilisation Act*[69] in Solomon Islands. However, the common law has even been used to interpret this type of legislation.[70]

The fact that customary law is superior to common law in a number of jurisdictions makes it surprising that the courts have not made a greater attempt to apply it. Similarly, although English common law is only to be applied if it is applicable, there has been little inquiry into whether this is the case.

JUDICIAL CONSIDERATION OF APPLICABILITY OF COMMON LAW

The requirement that the common law be appropriate to local circumstances gives the opportunity for it to operate in harmony with local culture. Unfortunately, South Pacific courts have largely ignored this requirement. A rare expression of regional concern can be found in *Australia and New Zealand Banking Group Limited v Ale,*[71] where the court raised the question of the applicability of complex common law doctrines to the South Pacific. In that case the plaintiff sought to recover an overpayment made when it had miscalculated the exchange rate for AUD800, paid to it by the defendant's daughter. The daughter received in exchange a bank draft for WST17,506 instead of WST1,496, which she sent to the defendant. The question arose whether this sum could be recovered in quasi-contract or whether all civil disputes had to fall within contract or tort. In the Supreme Court Ryan CJ considered that this debate:

... must be rather bemusing for the pragmatic bystander in the South Pacific half a world away from the esoteric discussions taking place in the courts of England. ... It is a pity that English law does not take a similarly realistic approach. For my part I am quite satisfied that that the courts of Western Samoa should not be bogged down by academic niceties that have little relevance to real life.

Such concern with the applicability of the common law is rare. More often the courts tend to apply the common law regardless of its suitability. The conflict between the common law and local culture, manifested in customary law and lifestyles, has been highlighted in a number of cases coming before the courts. A selection of these is discussed below.

Application of Common Law in Preference to Customary Law

The courts' tendency to apply the common law without regard to local circumstances is perhaps best illustrated by cases where the courts have granted common law relief, even though this is in direct conflict with customary law. A good example is *Teitinnong v Ariong,*[72] a case that arose in Kiribati. The plaintiff was banished from the village on the basis that he had broken an agreement concerning the commercial sale of pandanus thatches. The High Court granted an injunction on the basis that the defendant had committed the tort of unlawful interference with the exercise of the plaintiff's legal right to freedom of movement. His Lordship ignored the fact that banishment was an accepted punishment in customary law, and said that:

Any breach of any agreement or rules made by the oldmen [sic] can only be enforced in the constituted courts of the land. The defendants or the oldmen [sic] of the village cannot take the law into their own hands to enforce their rules.

This decision predates the *Kiribati Act 1989*, which now gives constitutional recognition to customary law within the formal system.[73] However, no consideration was given to the suitability of the tort in question to the circumstances of village life in Kiribati.

Another example of the rejection of customary law in favour of common law is the case of *Semens v*

Continental Airlines.[74] This is a decision of the Supreme Court of the Federated States of Micronesia, rather than that of a regional court. However, it is a striking example of the courts' preference for common law as, in Pohnpei, where the dispute arose, customary law is expressly stated to be subject only to the Constitution. The case highlights some of the reasons which courts have put forward for favouring the common law. The plaintiff claimed damages for personal injuries suffered by him at Pohnpei airport when he was employed by a sub-contractor to unload cargo from a Continental Airlines plane. To decide the claim interpretation of a clause of the contract was required. The court held that the Constitution was the supreme law. As it had no application to the facts, the next source of law was customary law. However, the Chief Justice held that he would only be under an obligation to search for an applicable custom or tradition if the nature of the dispute and surrounding facts indicated that this was likely. His Lordship felt that this was not such a case, as the business activities which gave rise to the suit were not of a local or traditional nature. Although goods handling and moving might take place in a traditional setting, baggage and freight handling at an airport was of an international, non-local nature. The Chief Justice gave as a further reason for his decision the fact that three of the four defendants were not Micronesians. Lastly, he relied on the fact that the contract revealed no intention of the parties to be governed by customary law. Accordingly, the common law of the United States was applied.

Applicability of common law terms

Another area of concern is the use of common law terms to describe customary concepts. In 1915 Malinowski stated that:

When dealing with abstract conceptions, referring to social life, such as law, religion, authority, etc., it is necessary to be extremely careful not to project our own ideas and associations into native life and thought. One must consider how far our terms – law, legal, criminal and civil law,[75] etc. – are applicable to native conditions. To use these terms in the strict sense in which they are defined in jurisprudence would be an obvious mistake. To use them loosely and without troubling as to their meaning would be essentially unscientific.[76]

These cautionary words are echoed in *Lilo and Another v Ghomo*,[77], where Daly CJ said:

... how can one express customary concepts in English language? The temptation which we all face, and to which we sometimes give in, is to express these concepts in a similar manner to the nearest equivalent concept in the law received by Solomon Islands from elsewhere, that is the rules of common law and equity. The result is sometimes perfectly satisfactory in that the received legal concept and the Solomon Islands custom concept interact to give the expressions a new meaning which is apt to the Solomon Islands context. ... However, [some] concepts of received law have not developed a customary law meaning and the use of those expressions that denote those concepts can produce difficulties of some complexity. This is particularly so when the custom concepts which they are said to represent are themselves undergoing modification to fit them to the requirements of a changing Solomon Islands ...

The danger of applying common law terms in a different cultural context has been highlighted in a number of regional cases concerning customary land. The terms ‘trustee’ and ‘beneficiary’ and ‘primary’ and ‘secondary’ rights are prominent examples.

Trustee and Beneficiary

The use of the words ‘trustee’ and ‘beneficiary’ to describe the relationship between signatories to timber rights agreements and customary landowners is a classic example of common law terms being used to describe a customary concept. In the Solomon Islands’ case of *Allardyce Lumber Company Limited and Others v Attorney General and Others,*[78] Ward CJ suggested that those persons who sign timber rights

agreements on behalf of customary landowners are akin to trustees. However, His Lordship appears to have has second thoughts about this. In *Tovua and Others v Meke and Others*[79], he referred to 'so-called' trustees, and pointed out the difficulties that arose where a signatory represented only one of a number of tribes who have rights over land. Ward CJ pointed out that there was no guidance in the governing legislation about how the 'trustees' should perform their duties and suggested that legislation be passed to remedy this. No consideration was given to the investigation of the duties of representatives under customary law.

In *Lilo and Another v Ghomo*,[80] Daly CJ recognised that the word 'trustee' had developed a different meaning in Solomon Islands to accommodate customary relationships:

This word is used in Solomon Islands in the customary land context in a different way to its use in relation to principles of equity elsewhere.

In the recent case of *Muna and Another v Holland and Another and Attorney-General*,[81] the concept of trustees of customary land came up in another context. In that case, the court was called upon to deal with an application regarding the release of proceeds of compulsory leasing of land on Bellona Island. After acquisition the land had been registered. Distribution of the lease money was being held up by a dispute as to who were the rightful representatives of the customary landowners. The Statement of Claim asked the court to compel the first defendants to determine who were 'the rightful persons as trustees' to determine shares and distribute money. Kabui J made no comment on the use of the word 'trustees' and seems to have assumed that it was an adequate term. His Lordship held that 'to be true trustees it must be shown in custom that the Plaintiffs are the members of the tribe that owns Nukuitua land.' Given the indefeasibility created by registration, it is not clear why the court thought it necessary to go beyond the register in dealing with this matter. In these circumstances, the mixing of the common law and customary concepts only adds to the confusion.

The relationship of representatives to customary landowners cannot necessarily be equated with the role of 'trustee'. Insufficient empirical research has been conducted to state conclusively what the relationship is, and the relationship may differ from one customary area within a country to another. However, it is fair to say that the relationship is governed by customary concepts, rather than by concepts of equity arising in England.[82]

Primary and Secondary Rights

Again in the context of customary landholding, concern has been raised as to the use of the terms 'primary and secondary rights. In *Kofana and Others v Aute'e and Another*[83] Palmer J said:

Some concern was raised regarding the use of the terms 'primary and secondary rights' as being of foreign importation and not relevant to the context of Solomon Islands culture and custom. With respect however, this is not necessarily so, provided it is clear in the mind of the parties and the court what exactly is meant by the use of those terms. Similar concerns were raised in other cases but otherwise it seems the distinctions have general application where the terms are clearly understood in relation to the rights identified. ...It would be important therefore for the parties who used those terms to explain to the court what exactly is meant by those terms so that their use is understood by all.

Palmer J took a pragmatic approach towards the application of common law terms, stressing that provided parties explained exactly what rights they were referring to in a particular case the labelling of those terms was academic. Whilst this approach has merit from a practical point of view, it is arguable that the use of common law terms should not be encouraged by the courts as this perpetuates the confusion of common law terms with concepts to which they bear little resemblance.

His Lordship went on to refer to the Report of the Special Lands Commission, '*Customary Land Tenure in the British Solomon Islands Protectorate'*, ('the Allan Report'),[84] which sought to explain the meaning of primary and secondary rights in Solomon Islands customary land law. Two things are striking about the section of the Allan Report cited:

· No attempt was made to use local terminology to categorise these customary concepts; and

· the Report purports to describe these interests on the basis that the customary law position is uniform throughout the country, which is highly unlikely.[85]

The relevance of local circumstances to the common law test of reasonableness

In numerous areas of common law an objective test is applied to determine whether conduct falls within a prescribed category or whether a particular intention has been demonstrated. This test requires a determination of the reasonableness of the defendant's behaviour. The attitude of many regional courts has been to assess reasonableness without reference to local values. The question arises whether this is a proper way in which to apply the test or whether reasonableness should be assessed in the context of the social and economic circumstances of the defendant.[86]

The practical relevance of this question is illustrated by *R v Loumia and Others.*[87] The defendant admitted killing members of a rival customary group, but argued, on the basis of provocation,[88] that this only amounted to manslaughter. At the time of the killing, the defendant had just seen one brother killed and the other seriously wounded in the same fight. It was argued that any reasonable Kwaio[89] pagan villager would have responded as the defendant did. Further, it was argued that the defendant came within s 204 of the *Penal Code* [Cap 26], which reduced the offence of murder to manslaughter if, inter alia, the offender 'acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or do the act which he did.' As customary law was part of the law of Solomon Islands, it was argued that the words 'legal duty' in s 204 included a legal duty in custom. Evidence was adduced from a local chief that Kwaio custom dictated the killing of a person who was responsible for the death of a close relative.

The Court of Appeal upheld the defendant's conviction for murder on the basis that the customary duty to kill in retaliation was inconsistent with s 4 of the *Constitution*, which protects the right to life. In fact, it was never argued that the defendant's action was lawful. What the court was being urged to do was to take account of local circumstances, both in the form of customary law, which recognised a duty to 'payback' and in the form of customary life style. The Kwaio area is one in which villagers live in accordance with customary principles, and community values and duties dominate. Taking the reality of the defendant's situation into account the defence of provocation should have been considered in the context of local circumstances and been applied as an extenuating factor. Had this been done, policy considerations might still have been accommodated by way of a deterrent sentence, reducing the offence to manslaughter

This case can be contrasted with *R v Zariai-Gavene*[90] where the effect of words spoken, which were alleged to have provoked the killing, were judged in the light of the realities of life in Goilala village in Papua New Guinea. On this basis the words spoken by the accused was found guilty of manslaughter rather than murder. In *R v Rumints-Gorok*,[91] Smithers J said:

... the man in the lap lap takes the place of the man on the Clapham omnibus, so for the exemplification of the ordinary man one must take the ordinary native living the rural life of low standard led by the Accused and his relatives and similar lines ...[92]

The question of reasonableness arose in a civil context in *Maeaniani v Saemala.*[93] The defendant signed

a document stating that he had received money from the plaintiff as full settlement for his land. He later refused to execute the transfer document and the plaintiff sued for specific performance. The defendant sought to set up a plea of *non est factum* on the basis that he had not read the document as he was illiterate and that it had been explained to him as being a document concerning a loan by the plaintiff to the defendant to purchase tools and equipment to build a house on the land as a joint enterprise. Daly CJ, took particular trouble to explain the application of the plea of *non est factum* in Solomon Islands:

At the early stages of development to which we have attained we still have many people who are not familiar with the written word or with the implications of signing documents. Nevertheless the words with which Lord Wilberforce [in Gallie v Lee [1970] 2 WLR 1078] ends the passages cited above remain entirely apt to our circumstances. On the facts of an individual case a court may be more ready in Solomon Islands to conclude that the consent of a man from, for example, a rural area was truly lacking and that nevertheless he acted responsibly and carefully according to his own circumstances in signing or affixing his mark to the document. But the test remains the same; it is the evidence and circumstances which differ. I venture to suggest that a Solomon Islands Court would always approach the evidence as befits this nation rather than as befits a country at a different stage of development. [94]

In this case the plea of *non est factum* was not established. Daly CJ took account of the fact that the defendant was a carpenter and builder, who had lived and worked in the capital for twenty-five years, before returning to Malaita Island. He operated a number of taxis in the capital, was articulate and intelligent, and could be described in the broader sense as a business man.

As can be seen from the passage set out above, the relevance of local circumstances to the application of common law principles was expressly considered in this case. Whilst the judge came to the conclusion that English common law was applicable, he nevertheless recognised that different emphasis might be required when applying that test in a local context.

Applicability of common law policies

Where local circumstances are contrary to Western notions of public policy, encapsulated in common law, the latter is likely to be applied regardless of the applicability proviso.[95] Thus, for example, in Solomon Islands' custom, custody is generally determined by reference to the payment of the brideprice. If payment is made by the husband's family to that of the wife, the children prima facie remain with the father on dissolution or with his family on his death.[96] Under the common law, on the other hand, the welfare of the child is said to be the paramount consideration in determining custody.[97]. In a series of custody cases. the courts have applied the welfare principle in preference to customary law. For example, in *Sasango v Beliga*[98] the plaintiff claimed custody of her seven children and the return of certain custom valuables including pigs, shell money and porpoise teeth. The defendant and his brothers, who were the brothers of the plaintiff's late husband, were holding them. The defendant argued that according to Malaita custom the children and the property passed to him after the death of the plaintiff's husband as he had contributed to the brideprice for the plaintiff. Lodge PM followed the case of *Sukutaona v Houanihou*,[99] where 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, it would not be fair to suggest that His Lordship dismissed local circumstances as being irrelevant in *Sukutaona.* He also stated that:

Due regard for the custom background may well be an important factor in deciding where that interest lies in the sense that custom rules may well be designed to protect the children from an unsatisfactory family life where, for example, a husband or a wife has gone off with another partner and the custom rule says that parents should not have custody.[100]

In *K v T and KU*,[101] the common law was applied, in spite of the fact that customary law was admitted to be a superior source of law, on the grounds that the evidence of the custom in question was not clear.[102]

Applicability of awards of damages

Another aspect of the applicability of the common law to circumstances in the South Pacific arises in the context of the assessment of damages. In relation to quantum, it is arguable that decisions of English courts will often be inappropriate, as they are made in an entirely different economic and social climate.[103] This limitation has been expressly recognised in the region. For example, in *Sukumia v Solomon Islands Plantations Limited*,[104] Chief Justice Daly refused to assess quantum by reference to the ratio between awards in Solomon Islands, and awards for similar injuries in the United Kingdom. He pointed out that the danger in this was that it failed to take account the vast differences in standards of living and way of life.

Notwithstanding, it has also been recognised within the region that South Pacific jurisprudence is in its infancy and that there is a dearth of authority to which to refer. For this reason reference to overseas awards, is still of importance. As Wood CJ said in *Jolly Hardware and Construction Company Limited v Suluburu*[105]:

Given the almost total absence of precedents in Solomon Islands on the question of damages in personal injuries cases.... such precedents as are available whether in England, Australia, Papua New Guinea or elsewhere at least provide a useful starting point otherwise one is indeed 'grasping in the air'.

However, whilst there are few decided common law cases to refer to there is the possibility of referring to awards of customary compensation. In *Waiwo v Waiwo and Banga.*[106] the Petitioner sued for divorce on the grounds of adultery, under the *Marriage Act, 1986* (Vanuatu). The Petition also included a claim under section 17(1) of the Act for damages of 100,000 vatu, against the Co-Respondent. At first instance, Chief Magistrate Lunabek rejected Counsel for the Co-Respondent's argument that the *Matrimonial Causes Act 1986* should be interpreted in the same way as its English predecessor, the *Matrimonial Causes Act 1965* (UK). He was of the view that in addition to there being important differences between the two Acts, the Vanuatu Act containing provisions specific and particular to Vanuatu,[107] the *Vanuatu Interpretation Act* demanded:

...such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.[108]

The Chief Magistrate accepted Counsel's submissions regarding local circumstances and particularly the fact that adultery was a serious matter in custom. He also referred to the words in the Preamble to the Constitution, which stated that it was 'founded on traditional Melanesian values'. He concluded that 'damages' should therefore be assessed in the light of customary punitive damages. He went on to say that he was satisfied that punitive damages were payable not only in Tanna, where the parties came from, but also throughout Vanuatu. He therefore awarded 100,000 vatu, without giving details of how that amount was calculated.

The decision of Lunabek CM is notable in that it went further than any other case in rejecting introduced law in favour of customary law. His lordship was of the view that:

... custom must be discovered, adopted and enforced as law. This case is the testing point of this process bearing in mind of the fact that Vanuatu jurisprudence is in its infancy and that we have to develop our own jurisprudence.

The learned magistrate then went on the say the customary law might be applied, not only to indigenous inhabitants of the country, but also where an indigenous citizen and a non-citizen are involved, if there was no Vanuatu law covering the subject matter of the case.

Unfortunately, this decision was overturned on appeal. The expatriate Chief Justice rejected the learned Magistrate's determination of damages based on customary law and held that such law would apply, 'only in the event that there is not rule of law applicable to a matter before' the court.

In *Longa v Solomon Taiyo Ltd*[109] the court assessed damages for personal injuries in accordance with English common law rather than in accordance with levels of customary compensation. However, Daly LJ gave his reasons for doing this, pointing out that customary compensation is not necessarily awarded to compensate the victim, but may be awarded to repair the relationship between the family of the victim and the family of the perpetrator. However, the differences between the two systems of compensation might be viewed as a local circumstances justifying departure from the common law relating to damages and adherence to the customary system,[110] rather than an argument for disregarding it altogether.

CONCLUSION

In most countries of the region the constitution makes it clear that introduced law was 'saved' as a transitional measure. This approach is emphasised by those preambles that stress the importance of indigenous values and by the 'cut-off' dates imposed to prevent continued application of foreign law. The countries of the South Pacific were not intended to be bound forever to English common law. However, there is little evidence of 'localisation' through national parliaments. Nor is there an identifiable move towards a regional jurisprudence.[111] Any departure from English common law, has normally been in favour of Australian and New Zealand precedents than in acknowledgement of the demands of local culture. Cases such as *Waiwo v Waiwo and Banga* give cause for optimism, but generally members of the judiciary demonstrate a tendency to apply their own values and, despite the formal status of customary law, to disregard local circumstances and culture. The failure to adapt the common law to take account of the complexities of South Pacific societies has resulted in its becoming a threat to the operation and growth of local cultures.

Whilst the approach may be particularly prevalent amongst expatriate judges, it is not limited to them. Indigenous judges, trained oversea in the common law tradition also tend to adhere to common law precedents. This course no doubt gives the judiciary the security of being members of the cosy common law fraternity. It also gives judges the reassurance of handing down decisions that conform to those of their overseas peers. However, it prevents them from exploring the boundaries of the applicability of common law and inhibits the freethinking required to establish a regional jurisprudence befitting the individual circumstances of independent nations. It also prevents them from fulfilling their constitutional mandate to promote customary law as a formal source of law. The mode of recognition of customary law within these pluralistic systems needs to be addressed, in order to encourage its application. This is unlikely to happen until the common law is abandoned or, at least, restricted to cases where it is inarguably applicable to local circumstances.

Another possible means of reducing cultural conflict within the legal system is to expand traditional dispute resolution.[112] With notable exceptions, such as the village *fono* in Samoa,[113] and the role of the Chiefs in customary land disputes in Solomon Islands,[114] customary courts have largely been set up in the form of a separate legal system, existing alongside Western style courts. To some extent, this has perpetuated the problem by reinforcing the idea that received law is the appropriate law to be administered in the Western style courts, whereas customary law is to be confined to the 'customary courts'. Many 'customary' courts, established by legislation, do nothing to bridge the cultural divide as, whilst they may attempt to administer customary law, they are bound by inappropriate rules of evidence and

procedure.[115]

Legal education within the region has expanded to include undergraduate and postgraduate study of customary law.[116] Armed with this knowledge and without preconceived notions of the superiority of common law, the next generation of South Pacific lawyers may be better equipped to grapple with the conflicts inherent in legal pluralism. Legal and general education may also quash the notion that cultural pluralism within the South Pacific requires the rejection of all common law standards. What it does require is the acknowledgement and consideration of competing cultures, whilst reserving the right to reject elements of law (whether substantive or adjectival) from any source, if good grounds exist. Both common law and customary law have the advantage of flexibility. Common law may be moulded and adapted to accommodate local circumstances just as customary law may be developed beyond the bounds of the subsistence economy in which it developed. Use of this shared quality of flexibility offers the opportunity for the legal system to meet the demands of the newly independent societies of the region at last.

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[1] See further Ron Crocombe, *The South Pacific, An Introduction* (5th ed, 1989); Oliver, D, *Oceania: The Native Cultures of Australia and Pacific Islands* (1989).

[2] Acknowledgement is due to Prof. J Lynch and Dr R Early of the Pacific Language Unit, USP, who supplied this information. Although containing merely 0.1 per cent of the world's population, the Pacific region contains one-third of the world's languages: Pacific Island Populations, loc cit.

[3] Tokelau has still not gained independence, and does not have its own constitution.

[4] See for example, paragraph (a) of the declaration in the Preamble to the *Constitution of Solomon Islands*, scheduled to the *Solomon Islands Independence Order 1978*, SI 1978/783 (UK).

[5] See eg, section 76 and schedule 3, *Constitution of Solomon Islands 1978*.

[6] Except in Tonga, where no ‘cut-off’ date was specified, *Civil Laws Act 1966* (Tonga), s 4.

[7] See below.

[8] At present there is no identifiable move towards a regional jurisprudence: see Don Paterson, Jennifer Corrin Care and Tess Newton Cain *Introduction to South Pacific Law* (1999) 5.

[9] The member countries of the University of the South Pacific are Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Solomon Islands, Tokelau, Tonga, Tuvalu, Samoa, and Vanuatu. Marshall Islands is not discussed in this article as it is subject to different factors.

[10] The term ‘colonial’ is used loosely, as some countries were never colonised, but were protectorates or

dependencies.

[11] Art 77.

[12] Continued in force by s 71, *Constitution of Niue*, enacted by the *Niue Constitution Act 1974* (NZ).

[13] Section 195(2)(d).

[14] Although this subsection was revoked, s 11 of the *New Hebrides Order 1975* provides that the High Court of the New Hebrides, established by that order, was to exercise its jurisdiction as if s 15 (1) had not been revoked. The 1975 Order was continued in force by s95 (2), *Constitution of Vanuatu 1980*.

[15] Some Commonwealth countries introduced law 'for the time being' in force in England. See further, Roberts-Wray, K, *Commonwealth and Colonial Law* (1966) 545.

[16] *Cook Islands Act 1915* (NZ) s 615.

[17] *Supreme Court Ordinance 1876* s 35.

[18] *Laws of Kiribati Act* 1989 s 6(1).

[19]*Custom and Adopted Laws Act 1971* s 4.

[20] *Niue Act 1966*(NZ) s 672.

[21] *Constitution of Samoa* Art 111(1).

[22] *Constitution of Solomon Islands* Sch 3, para 4(1).

[23] *Tokelau Act 1948* (NZ) s 4A.

[24] *Civil Law Act 1966*, s 3.

[25] *Laws of Tuvalu Act* s 6(1).

[26] *Constitution of Vanuatu* Art 95(2).

[27] *Cheung v Tanda* [1984] SILR 108.

[28] See further Paterson, Corrin Care and Newton Cain, above n 8, chapter 4.

[29] Section 615 *Cook Islands Act 1915* (NZ).

[30] Section 6(1) *Laws of Kiribati Act 1989*.

[31] Section 4(1) *Custom and Adopted Laws Act 1971*.

[32] Section 672 *Niue Act 966* (NZ).

[33] Section 4A *Tokelau Act 1948* (NZ).

[34] Section 3 *Civil Laws Act 1966*.

[35] See eg, *Attorney-General of Fiji and Minister for Justice and Fiji Trade and Commerce and Investment Board v Pacoil Fiji Ltd* (Unreported, Court of Appeal Fiji Islands, CAN ABU0014, 29 November 1996) at 16, where the Court of Appeal cited with approval the Australian case law on estoppel; see also the reference to New Zealand case law, at 20.

[36] (Unreported, High Court Fiji Islands, civ cas 27/1990, 8 March 1996) 24.

[37] The *Constitution of Fiji 1990*, in which this provision appeared has since been repealed by the *Constitution Amendment Act 1997*.

[38] *Opeloge Olo v Police* (Unreported, Supreme Court Samoa, M5092/80).

[39] Section 6(4) *Laws of Tuvalu Act 1987*.

[40] Section 15(1) (b) *Western Pacific Courts Order 1961* continued in force by art 95(2) *Constitution of Vanuatu 1980*.

[41] [1980/81] SILR 66.

[42] [1984] SILR 108.

[43] *Pentecost Pacific Limited and Pentecost v Hnaloane* [1980-88] 1 Van LR 134 (CA).

[44] See further Paterson, Corrin Care and Newton Cain, above n 8, chapter 4.

[45] This section is continued in force by the *Constitution of the Republic of Fiji Islands 1997*.

[46] *Cook Islands Act 1915* (NZ) s 615.

[47] *Niue Act 1966* (NZ) s 672.

[48] *Tokelau Act 1948* (NZ) s 4A.

[49] See eg, the dicta of Daly CJ in *Maeaniani v Saemala* [1982] SILR 70.

[50] For examples of how similar provisions have been used to depart from English common law in Australia and New Zealand see *Uren v Fairfax* (1966) 117 CLR 118 where the High Court of Australia departed from the decision of the House of Lords *in Rookes v Barnard* [1964] AC 1129; *Invercargill City Council v Hamlin*

[1994] 3 NZLR 513, where the Court of Appeal of New Zealand departed from the decision of the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398. Both decisions were upheld by the Privy Council: *Australian Consolidated Press v Uren* [1969] 1 AC 590; *Invercargill City Council v Hamlin* [1996] AC 624.

[51] Papua New Guinea Law Reform Commission *Fairness of Transactions* Report No 6 (1977) 5.

[52] [1980-3] WSLR 468.

[53] *Vian Guatal v PNG* [1980] PNGLR 97.

[54] *Tanda v Cheung* [1983] SILR 193.

[55] [1980] PNGLR 97.

[56] [1980] PNGLR 97.

[57] But see eg, *Remisio Pusi v James Leni and Others* (Unreported, High Court Solomon Islands, cc 218/1995, 14 February 1997) where Muria CJ stated that it should not automatically be assumed that the *Constitution* would override customary law, but that it would depend on the circumstances of the case.

[58] See *K v T and KU* [1985/6] SILR 49 where it was held that although local Acts were superior to customary law, United Kingdom Acts were not.

[59] *Laws of Kiribati Act 1989*, Sch 1, para 4. These include disputes relating to customary land or water and most family matters.

[60] *Customs and Adopted Laws Act 1971*.

[61] *Niue Act 1966* (NZ).

[62] *Constitution of Solomon Islands*, schedule 3, para 3(2).

[63] *Laws of Tuvalu Act 1987*, Sch 1, para 4. These include disputes relating to customary land or water and most family matters.

[64] *Constitution of Vanuatu 1980* arts 47(1) and 95(3). See *Banga v Waiwo* (Unreported, Supreme Court Vanuatu, AC1/96, 17 June 1996) where it was held that customary law should only be applied if there is no other applicable law. This decision has been the subject of some criticism.

[65] See eg, Arts 71 to 73, *Constitution of Vanuatu* 1980 and *Manie and Kaltabang v Kilman* [1980-88] 1 Van LR 343.

[66] The temptation to oversimplify the process was judicially recognised in *Lilo and Another v Ghomo* [1980/81] SILR 229.

[67] *Laws of Tuvalu Act 1987*, s 5(3) and schedule 1, *Laws of Kiribati Act 1989* s 5(3) and schedule 1. The Customs Recognition Bill (SI) provides for customary law to be determined as a matter of fact rather than law.

[68] See eg, *Sukutaona v Houanihou* [1982] SILR 12. and *Sasango v Beliga* [1987] SILR 91. This is not the case in Kiribati or Tuvalu, where legislation requires customary law to be applied as a matter of law, rather than proved as a matter of evidence: *Laws of Kiribati Act 1989* s 5(3) and schedule 1; *Laws of Tuvalu Act* 1987, s 5(3) and schedule 1.

[69] Cap 40.

[70] See the interpretation of the word ‘trustee’ and ‘representative’ discussed below.

[71] [1980-3] W Sam LR 468.

[72] [1987] LRC (Const) 517.

[73] Schedule 1, para 2.

[74] 2 FSM Intrm. 131 (Pn. 1985). I am grateful to Prof Jean Zorn, who drew this case to my attention in her materials prepared for the University of the South Pacific.

[75] The division into civil and criminal law is generally not recognised in customary law: see eg, Bernard Narakobi, 'Adoption of Western law in Papua New Guinea' (1977) 5 *Melanesian Law Journal* 52, 62.

[76] *Crime and Custom in Savage Society* (1926) 576.

[77] [1980/81] SILR 229.

[78] [1988/9] SILR 78 at 97.

[79] [1988/9] SILR 74 at 76.

[80] [1980/81] SILR 229.

[81] Unreported, High Court Solomon Islands, Civ Cas 284/2002, 28 March 2002.

[82] See further *Fugui and Another v Solmac and Others* [1982] SILR 100, para 2 at 108.

[83] Unreported, High Court Solomon Islands, land cas 001/1998, 10 September 1999.

[84] Allen, CH, Honiara, 1957.

[85] See further, Ron Crocombe (ed) *Land Tenure in the Pacific* (1987)

[86] This approach has been taken in other Commonwealth jurisdictions: see eg, *Vijayan v Public Prosecutor* [1975] 2 MLJ 8, a decision of the Singapore Court of Criminal Appeal; *Nanavati v State of Maharashtra* AIR 1962 SC 605 at 629 to 630.

[87] [1984] SILR 51. See further Ken Brown, 'Criminal Law and Custom in Solomon Islands' (1986) 2 *Queensland Institute of Technology Law Journal* 133.

[88] Provocation is now a statutory defence under the *Penal Code* [Cap 26] (SI), but is based on the common law concept. See *DPP v Camplin* [1978] AC 705.

[89] An area within Malaita Province.

[90] [1963] PNGLR 203.

[91] [1963] PNGLR 81 at 83.

[92] See also *R v Awaba* Unreported, Supreme Court PNG, referred to in Ken Brown, *Fashion of Law in New Guinea* (1969) 126, where the question arose whether insulting words could provoke a killing.

Brennan AJ was of the view that common law principles should not necessarily be applied to 'native' communities.

[93] [1982] SILR 70.

[94] At p 75.

[95] For an account of the rejection of customary law on the grounds of the common law concept of public policy in Nigeria see Ajayi, F, 'The Interaction of English Law with Customary Law in Western Nigeria, II' (1960) 4 *Journal of African Law* 98 at 105.

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

[97] The 'welfare principle', is now enshrined in section 1 of the *Guardianship of Infants Act 1925* (UK), which has been held to be in force in many countries of the region. The Act is in force as part of introduced law saved in a similar way to the common law. But see *Krishnan v Kumari* (1955) 28 Law Reports of Kenya 32, where the court held that the *Guardianship of Infants Act 1925* (UK) was not an act of general application in Kenya.

[98] [1987] SILR 91. See also *In Re B* [1983] SILR 223

[99] [1982] SILR 12.

[100] Ibid.

[101] [1985/86] SILR 49. In this case the mother was pursuing custody against paternal relatives: the father of the children had died.

[102] In *Allardyce Lumber Company Limited v Laore* (Unreported, High Court Solomon Islands, cc 64/89, 10 August 1990) Ward CJ went even further and suggested that the courts should not be dealing with customary law until parliament had provided for its proof and pleading as required by paragraph 3(3) of schedule 3 of the *Constitution*, see above.

[103] See further Jennifer Corrin Care, 'Rationality or Intuition? The Assessment of the Quantum of Damages for personal Injuries in Solomon Islands' (1997) 3 *Revue Juridique Polynesienne* 133.

[104] [1982] SILR 142.

[105] [1985/6] SILR 87.

[106] Unreported, Magistrates Court Vanuatu, cc324/95, 28 February 1996. The decision was reversed on appeal in *Banga v Waiwo*, Unreported, Supreme Court Vanuatu, AC1/96, 17 June 1996.

[107] Such as provision for the dissolution of customary marriages in section 4.

[108] Section 8.

[109] [1980/81] SILR 239.

[110] The application of customary law is provided for in the constitutions of all USP countries apart from

Fiji islands and Tonga. Where there is no express provision it is unclear whether the 'applicability' provisos empower the court to apply customary law, ie it is unclear whether the enabling aspect is only negative. For Ugandan authority on point see *Fatuma Bachoo v Majothi Bolia* (1946) 13 EACA 50; compare *Maleksultan v Sherali Jeraj* (1955) 22 EACA 42.

[111] See further Paterson, Corrin Care and Newton Cain, above n 8, 5.

[112] Section 186 of the *Constitution of the Republic of Fiji Islands 1997* provides that 'Parliament must make provision ... for dispute resolution in accordance with traditional Fijian processes'. No such provision has yet been made. The human rights issues involved in such a proposal should not be underestimated See further Jennifer Corrin Care, 'Conflict Between Customary Law And Human Rights In The South Pacific' (Vol 1 Commonwealth Law Conference Papers, Kuala Lumpur September 1999, 251); Submission by the Fiji Women's Rights Movement and the Crisis Centre in *Report of the Commission of Inquiry on the Courts*, (Fiji, 1984) (Beattie Commission), p 172.

[113] *Village Fono Act 1990* (Samoa).

[114] *Local Courts Act* [Cap 19] (Solomon Islands), s 12.

[115] See eg, the *Island Court (Civil Procedure) Rules 1984* (Vanuatu).

[116] The School of Law at the University of the South Pacific offers an LLB and postgraduate degrees which include courses on customary law.