# THE STATUS OF CUSTOMARY LAW IN FIJI ISLANDS AFTER THE CONSTITUTIONAL AMENDMENT ACT 1997

**Jennifer Corrin Care, Senior Lecturer in Law, School of Law,**

University of the South Pacific[1]

## 1. INTRODUCTION

In 1987 Fiji was declared a republic, following a military coup. In 1990 a new constitution was brought into force. Whilst based on the independence constitution of 1970, it ensured the political dominance of the indigenous community. Customary law was recognised by this constitution as part of the law of Fiji. Section 100(3) of the Constitution of Fiji 1990 stated:

> *Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji:*
> *Provided that this subsection shall not apply in respect of any custom, tradition, usage or values [sic] that is, and to the extent that it is, inconsistent with a provision of this constitution or a statute, or repugnant to the general principles of humanity.*

On 27 July 1998, the Constitution Amendment Act 1997, came into force, repealing the 1990 Constitution, and establishing the Constitution of the Republic of the Fiji Islands 1997 in its place.[2] The Constitution Amendment Act 1997 omits section 100(3) from the new constitution.

Accordingly, since the 1997 Act came into force, customary law is no longer formally recognised as a general source of law in the constitution. However, this does not mean that it is no longer part of the law. Section 195(2)(e) of the 1997 constitution preserves not only all written laws, which are not expressly repealed,[3] but also 'all other law'.

Customary law is also referred to in s 186, which provides:

*(1) The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with Fijian processes.*

*(2) In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.*

The current position of customary law can therefore be summarised as follows:

> It is no longer a formally recognised source of law in the constitution.
> To the extent that it existed prior to the Constitutional Amendment Act 1997 coming into force, customary law is still law.
> Parliament must make provision for its application.

This paper compares the recognition given to customary law in the constitutions of the member countries

of the University of the South Pacific and of Papua New Guinea.[4] It then examines the problems involved in formal recognition, and discusses whether those problems explain the motivation behind the withdrawal of recognition of customary law by the 1997 Act. The paper also considers the consequences that the repeal of this important part of the constitution will have and the significance of section 186.

## 2. STATUS OF CUSTOMARY LAW IN PACIFIC ISLAND COUNTRIES

The recognition of customary law as a source of law within the formal system serves two main purposes. It shows respect for customary law and confirms its importance at national level. Many constitutional preambles within the region stress traditional values and declare them as a foundation of national government. The second purpose is to attempt to integrate customary law into the formal system.

Many regional constitutions and constituent documents contain provisions giving recognition to customary law within the formal legal system. The following table summarises the relevant provisions.

**Provisions For the Recognition of Customary Law**

| COUNTRY | PROVISION |
|---|---|
| Cook Islands | Cook Islands Act 1915(NZ), s 422 (land only): 'Every title to and interest in customary land shall be determined according to the ancient custom and usage of the natives of the Cook Islands'. |
| Fiji Islands | Constitution of Fiji 1990, s 100(3) (until 27 July 1998):<br>Set out above. |
| Kiribati | The Constitution of Kiribati 1979, Preamble; Laws of Kiribati Act 1989, s 4(2): 'In addition to the Constitution, the Laws of Kiribati comprise - ...(b) customary law ...'. Laws of Kiribati Act 1989, sch 1, para 2: ' ... customary law shall be recognised and enforced by , and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest.' |
| Marshall Islands | Constitution of Marshall Islands 1978, art X, ss 1 and 2:<br>'Nothing in Article II shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter...'. '...it shall be the responsibility of the Nitijela...to declare , by Act, the customary law in the Marshall Islands'. |
| Nauru | Constitution of Nauru 1968, s 81; Custom and Adopted Laws Act 1971, s 3:<br>'the institutions, customs and usages of the Nauruans...shall be accorded recognition by every court, and have full force and effect of law' to regulate [the matters specified in the Act].' |
| Niue | Niue Act 1966, as amended by the Niue Amendment Act 1968 (No2), s23 (Niuean land only): 'Every title to and estate or interest in Niuean land shall be determined according to Niuean custom and any Ordinance or other enactment affecting Niuean custom.' |
| Papua New Guinea | Constitution of Papua New Guinea 1975, sch 2.1(1):<br>'...custom is adopted, and shall be applied and enforced, as part of the underlying law'. |
| Samoa | Constitution of Samoa 1962, Art III(1): '"Law" ... includes ... any custom or usage which has acquired the force of law in Samoa ... under the provisions of any Act or under a judgment of a court of competent |

| | |
|---|---|
| | jurisdiction.' |
| Solomon Islands | Constitution of Solomon Islands 1978, s76 and sch 3, para 3: 'Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands'. |
| Tokelau | Tokelau Amendment Act 1996(NZ), Preamble, para 4: Traditional authority in Tokelau is vested in its villages, and the needs of Tokelau at a local level are generally met through the administration of customary practices by elders.' Tokelau Amendment Act 1967(NZ), s20: 'the beneficial ownership of Tokelauan land shall be determined in accordance with the customs and usages of the Tokelauan inhabitants of Tokelau'. |
| Tuvalu | The Constitution of Tuvalu 1986, Preamble; Laws of Tuvalu Act 1987, s 4(2) 'In addition to the Constitution, the Laws of Tuvalu comprise - ...(b) customary law...' Laws of Tuvalu Act 1987, sch 1, para 2: ' ... customary law shall be recognised and enforced by , and may be pleaded in, all courts except so far as in a particular case or in a particular context its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest.' |
| Vanuatu | Constitution of Vanuatu 1980, Art 47(1): '...If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.'; Art 95(3): 'Customary law shall continue to have effect as a part of the law of the Republic.' |

There is no express mention of custom in the Tongan Constitution of 1875.

## 3. THE REASONS FOR THE WITHDRAWAL OF RECOGNITION IN FIJI ISLANDS

Prior to 1990, there was no constitutional provision for customary laws to be part of the laws of Fiji, except as a basis for determining the tenure of native land by indigenous Fijians.[5] The purpose of s100(3) was to give customary law status in the formal legal system. The Reeves Commission's Report, on which the 1997 Act is based, acknowledged that the purpose of s 100(3) was 'to give a higher status to the customs and values of Fijians in the country's legal system' but concluded that its actual effect was 'problematic'. Although the Report does not elaborate on those problems it does proceed to note that the application of Fijian custom concerning the holding and use of land, fishing rights and chiefly titles was clearly established by entrenched legislation. The Commission considered that that approach should be followed if it was desired to apply customary law in other areas.[6]

In addition to the application of custom through Acts applying only to Fijians, the Commission considered that there might be room to incorporate customary values in to the general law applying to all citizens. Precedent for that was already to be found in s 163 of the Criminal Procedure Code, which encourages traditional settlement of cases involving certain offences, and 'substantially of a personal or private nature', and not aggravated in any way.[7]

The Commission concluded by recommending the repeal of s 100(3). Whether the motive behind this was to avoid the problematic effect of s 100(3) or to leave the way a clear for specific and well researched legislation is not clear. What is apparent is that the opportunity to reaffirm the importance of customary law was not exploited[8]

Whilst they are not spelt out in the Report, the problems surrounding integration of customary law into the

formal system include:

Defining and identifying customary law
• Proving customary law
• Conflict between human rights and customary law
• Conflict between customary law and formal law

### 3.1 Defining and identifying customary law

One of the biggest hurdles in recognising customary law as part of the formal system is the absence of a universally accepted definition. Confusion has arisen from failure to distinguish between 'custom' and 'customary law'. 'Custom' might be said to refer to all normal behaviour within a group, whereas 'customary law'; is usually taken to refer to rules governing that behaviour. However, it is often difficult to draw the line between the two. There is the related problem of deciding whether all customary rules qualify as customary law and deciding between conflicting rules. Debate has also centered around whether customary rules are capable of amounting to 'law', as the legal pluralists assert, or whether it is not, as the Austinians assert. This focus has arguably obscured the more meaningful issue of whether or not customary rules, however classified, can be successfully integrated into the formal system. These problems have been exacerbated by the fact that description and analysis of customary law is usually approached by taking formal law and legal systems as the benchmark. The submission by the Fiji Women's Rights Movement and the Fiji Crisis Centre to the Beattie Commission[9] includes the following relevant comment:

*... there is a mistaken assumption that Fijian culture is a homogenous, monolithic culture universally agreed upon by all regions, provinces and villages. In fact we know that not only are there provincial and regional variations but variations exist from village to village. Further, we know that not only is culture not uniform and monolithic but two experts from the same village may not necessarily agree on e.g. whether in custom the custody of children goes to the father or mother or whether 'bulubulu' is acceptable in rape cases...*

The term customary law is not comprehensively defined in regional constitutions. Particular questions that have arisen include whether customary rules must be 'ancient' to qualify as customary law. Some countries do not deal with this. In the Cook Islands where the definition of customary law dates back to the Cook Islands Act 1915, custom is 'the ancient customs and usages of the Natives of Cook Islands'.[10] Interpreted literally, more recent customs and usages do not qualify. Definitions introduced at independence are more palatable. The Constitution of Papua New Guinea, defines custom to include 'the customs and usages of the indigenous inhabitants of the country existing in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.[11] This elevates the status of custom and makes it clear that it will continue to develop and form part of the legal system.

In countries where new customary rules may be recognised as law, a related question is how widespread they must they be to warrant recognition as customary law? [12] This question is particularly pertinent in Melanesia where customs differ from island to island and even from village to village. The definition in the Papua New Guinea Constitution recognises local or regional rules. Most constitutions are silent on point. Until Parliament gives some guidance it is left to the courts to decide how widespread a custom must be before it is recognised.

There is also the question of whether customary law can be applicable in disputes between people from different customary groups or between indigenous and non-indigenous people.[13] This point has become more pertinent as Pacific island societies have changed. In urban areas, particularly new cultural values

have emerged to suit the new social and economic relationships and the coexistence of indigenous and non-indigenous inhabitants. In Vanuatu, some guidance was given by Chief Magistrate Lunabeck (as he then was) in *Waiwo v Waiwo and Banga.*[14] In that case, the Petitioner sued for divorce on the grounds of adultery, under the Marriage Act, 1986. The Petition also included a claim under section 17(1) of the Act for damages of 100,000 vatu, against the Co-Respondent. 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). Apart from the differences between the two Acts, the Vanuatu Act containing provisions specific and particular to Vanuatu,[15] 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.'[16]

In accepting Counsel for the Petitioner's submissions that adultery was a serious matter in custom, the learned Magistrate referred to the words in the Preamble to the Constitution, which underlined that it was 'founded on traditional Melanesian values...'. He concluded that 'damages' should therefore be interpreted as customary punitive damages.[17] He went on to say that he was satisfied that punitive damages were payable not only in Tanna, where the present disputants came from, but also throughout Vanuatu. However, he also made it clear that he would have reached the same conclusion if this had been a local customary law. He concluded that where indigenous ni-Vanuatu were involved in a case where there was no other applicable Vanuatu laws, three situations arise:

*i) if they come from the same custom area, island and under the same customary law, the law applicable to their case should be their customary law. This is exactly the situation in this case;*

*ii) if they come from the same island or different island but under different customary law, then the Court should look at the common basis or foundation of the customary law applicable. This will consist for the Court to obtain evidence on the customary law applicable and it should then weigh up the evidence on custom stating which witness the Court believes or does not believe and resolving any conflicts of custom. The Court should state the customary law that he/she intends to apply. [T]he reason for [the] decision should state the findings of facts, the law the Court considers applicable (its common basis) and the Court should then apply the law to the facts to get the result.*

*iii) if an indigenous citizen and a non-citizen are involved in a case when there being no Vanuatu laws covering the subjects, the Court would consider British or French laws applicable in Vanuatu, depending on the choice of the non-citizen as to the law to be applied and at the same time, the Court would consider the customary law of Vanuatu (if there is any) and would apply the law relevant to the case.*

The learned Magistrate, who has since been elevated to the position of Acting Chief Justice was clearly of the view that customary law might be relevant to any type of dispute, notwithstanding that the litigants were not from the same custom group, and notwithstanding that a non-indigenous litigant was involved. Unfortunately, an expatriate judge, Chief Justice Vaudin d'Imecourt set aside the award of damages on appeal in this case, and relegated customary law to the status of last resort.[18] Notwithstanding the outcome of the appeal in *Banga v Waiwo*,[19] it is likely that regional rules of custom will be applied in Vanuatu, at least where both parties come from that region.

Whilst it is still open to Fiji Parliament to incorporate particular customary rules into the law by codification, the opportunity to define and identify customary law in the Constitution has been lost.

### 3.2 Proving customary law

A fundamental question in giving effect to custom as part of the formal system, is how it is to be proved. There are two diametrically opposed answers to this. One view is that it must be proved as a matter of fact

as provided, for example, in the Customs Recognition Bill 1985 of Solomon Islands.[20] The opposing view, expressed for example, in the Laws of Tuvalu Act 1987, is that it must be proved as a question of law. Proving customary law as a question of fact involves adducing evidence on point. Apart from being a costly exercise it may also involve complicated rules of evidence, inapplicable to customary matters. Proving law, on the other hand, does not require evidence to be adduced. It also puts customary law on the same level as other sources of formal law. However, customary law is mostly unwritten, and it may be difficult for the court to decide whether a particular custom does amount to law or not.

The provision in s186(1) of the Fiji constitution that Parliament shall provide for the application of customary law is common to many constitutions within the region.. For example, in Solomon Islands, section 75 of the Constitution states as follows:

> *(1) Parliament shall make provision for the application of laws, including customary laws.*
> *(2) In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands.*[21]

These powers have still not been exercised.[22] The Customs Recognition Bill, 1995, first drafted in 1993, has failed to become part of the law in Solomon Islands. It will be interesting to see whether the Fiji Parliament is more diligent in pursuing the mandate in s 186(1).

In the Vanuatu case of *Waiwo v Waiwo and Banga,*[23] the learned magistrate held that, when considering customary law, 'a Court should not be bound to observe strict legal procedures or apply technical rules of evidence, but shall admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion) and the Court shall otherwise inform itself as it sees fit'. However, this liberal approach was rejected on appeal. Chief Justice Vaudin d'Imecourt responded to the learned Magistrate's comments in the following way:

> *It is essential to remember that Judges and magistrates are not custom chiefs and are not experts in custom of any area let alone of the whole of Vanuatu. Nor is there any such thing as THE custom of Vanuatu. Although it is conceivable that there might not be a need for strict rules regarding the obtaining of evidence of a particular custom if and when the need arises to establish a particular custom, evidence must, nevertheless be obtained and a clear custom must be established. It is important to remember that the judiciary is exhorted 'to do substantial justice and wherever possible in conformity with custom' only in the event that there is not rule of law applicable to a matter before it.*

This quote also serves as a striking example of difficulties of proof being used to reject customary law, or at least to relegate it to a source of law of last resort.

A related problem surrounds the recording of customary law. Common law and statutes pre-suppose that once custom is proved it will then be recorded and available for the future. In many African countries and within the region codification of customary law has been proclaimed as a major advance.[24] However, one of the perceived advantages of customary law is that it is flexible and constantly changing. The question arises, whether this law will cease to be customary law once it is recorded, either as a precedent or as part of a code. It is arguable that in these cases it becomes part of the common law or statutory law.

### 3.3 Conflict between human rights and customary law

A more particular manifestation of the conflict between customary law and formal law occurs in the realm of human rights. Although it is stated above that the Reeves Commission's Report does not make plain what it regards as the 'problematic' effect of s100(3), the Report does comment on the protection of

customary law against potential invalidity on the grounds of discrimination.[25] It may be inferred that this was one of the problems that the Commission has in mind. The Report points out that, whilst customary law is generally subject to the fundamental rights provisions in the Fiji Constitution, section 16(3)(d) of the Constitution validates any law 'for the application of the customary law with respect to any matter in the case of persons who, under that law, are subject to that law'. The Reeves Commission considers that this provides comprehensive protection for customary law even if it discriminates on the grounds of race, sex or any other ground prohibited by section 16(2). This is perhaps not strictly accurate, as if the customary law discriminates in a way that is contrary to the general principles of humanity, the proviso to sub-section 100(3) will prevent that customary law being formally recognised.

Whilst the Report recommends that customary law should continue to be subject to other fundamental rights provisions, it does not recommend extending this to the right to equality under the law and freedom from discrimination. Instead it recommends a compromise, drawing a distinction among the matters to which customary law relates. It recommends that customary law relating to:

> the holding, use or transmission of land or fishing rights; or
> the distribution of the produce or proceeds of and, fishing rights or minerals; or
> the entitlement of any person to a chiefly rank or title;

should not be open to challenge on the ground of discrimination on a prohibited ground. Customary law applying to other matters should not be protected from challenge on the basis of infringement of any fundamental right or freedom, including discrimination on the grounds of gender, except for discrimination on the grounds of race or ethnic origin.

This recommendation has been enacted in s38 of the Constitution Amendment Act. Section 38(1) provides that 'Every person has the right to equality before the law'. Subsections (8) to (10) limit this in the following way:

*(8) A law, or an administrative action taken under law, may limit a right or freedom set out in this section for the purpose of:*

> *(a) providing for the application of the customs of Fijians or Rotumans or of the Banaban community:*

*(i) to the holding, use or transmission of, or to the distribution of the produce of, land or fishing rights; or*

*(ii) to the entitlement of any person to any chiefly title or rank;*

> *(b) imposing a restriction on the alienation of land or fishing rights held in accordance with Fijian or Rotuman custom or in accordance with Banaban custom; or*
> *(c) permitting the temporary alienation of that land or those rights without the consent of the owners.*

*(9) To the extent permitted by subsection (10), a law, or an administrative action taken under a law, may limit a right or freedom set out in this section for the purpose of providing for the governance of Fijians or Rotumans or of the Banaban community and of other persons living as members of a Fijian, Rotuman or Banaban community.*

*(10) A limitation referred to in subsection (9) is valid only if it:*

> *(a) accords to every person to whom it applies the right to equality before the law without discrimination other than on the ground of race or ethnic origin; and*

*(b) does not infringe a right or freedom set out in any other section of this Chapter.*

Concerns regarding discrimination in the application of customary law had previously been expressed in the submission made by the Fiji Women's Rights Movement and the Fiji Crisis Centre to the Beattie Commission.[26] The submission expressed reservations about the re-introduction of the Fijian Courts on the grounds that traditional courts worked against women. The reasons for this included:

*tradition, culture and custom in the main is defined by men, not women – therefore there is a conflict about whose custom is being applied, especially given that custom is largely unwritten;*

.....

*those that are socially, economically and politically powerless as are women, commoners and poor persons, are not in a position to negotiate that the customs and traditions most beneficial to them should be applied in the proposed Fijian Court system ...*

The compromise recommended by the Reeves Commission and enacted in s 38 of the 1997 Act does not redress this power imbalance where the matters mentioned in subsection (8) are concerned. Thus the patriarchal system of inheritance of chiefly title and land is perpetuated.[27]

An example of patriarchal custom can be seen in *James Michael Ah Koy v the Registration Officer for Suva City Fijian Urban Constituency*.[28] In that case the Appellant's' mother was an indigenous inhabitant of Fiji Islands and the appellant was born in Fiji Islands, but his father was born in China. The appellant's application to be registered on the roll of Fijian voters was challenged and the Appellant sought a declaration from the he was entitled to be registered. The central issue was whether or not he was 'Fijian', as defined by s156 of the Constitution of 1990. This in turn depended on whether he was entitled to entry on the Vola ni Kawa Bula (record of registration of land holding units). Right to entry is determined by custom, tradition and practice. The undisputed evidence of the applicable custom was that only persons whose father or other male progenitor in the male line is or was the child of parents who are were indigenous inhabitants are entitled to entry as of right. Applicants claiming through their mother had to fulfill more arduous conditions. All customs had to be complied with, including at the very least the following:

> The applicant must be related through cognate blood ties to a registered member of a mataqali (clan).
> There must be general consensus amongst members of the mataqali that the applicant should be entered as a member.
> The applicant must be well known to members of the mataqali and have lived in or constantly visited the village
> The applicant must be familiar with and respect the customs and traditions of the Yavusa and the Vanua.
> The mataqali must have set aside a parcel of land and fishing area from mataqali holdings for the use of the applicant and the applicant's descendants.
> The applicant must not belong to a religion, sect, or cult that is likely to cause ill will or disharmony amongst the village community.
> The mataqali must have set aside a house site 'yavu' for the applicant within the village precincts in which to build a home.
> The applicant must have proved to be a useful member of the mataqali by contributing to communal resources and honouring traditional obligations to the mataqali, the Yavusa and the Vanua.

For those who consider that customary law does not take account of democratic values or afford equality

to women and certain other groups, the 1997 Act may be seen as a victory for fundamental rights.

### 3.4 Conflict between customary law and formal laws

The recognition of customary law as a formal source of law also raises potential conflict with other formal sources. All regional constitutions make it clear that the constitution is the supreme law. Customary law is therefore subject to the constitution. It is also, normally provided by the constitution that statute law is the second most important source of law, and therefore customary law is subject to statute.[29] The issue of whether customary law is subject to received common law and equity is less certain. Section 100(3) made no mention of this. However, as s100(3) expressly subjected customary law to the Constitution and statute, but not to common law and equity, it might be concluded, applying the *expressio unius, exclusio alterius*' rule, that customary law was superior to common law and equity.

In Nauru, the position is similar, as the Customs and Adopted Laws Act 1971 mentions only legislation as a source of law superior to customary law.[30] Schedule 2 of the Constitution of Papua New Guinea provides that custom is superior to common law and equity, which apply only if they are consistent with custom. This is also the position in Solomon Islands by virtue of sch 3, para 2(1)(c) of the Constitution. In Tuvalu[31] and Kiribati[32], customary law is also to be applied in preference to common law, but only with regard to specified matters. However, those specified matters are ones where customary law is most likely to be relevant, such as land and waters, rights of succession, dissolution of marriage, and guardianship, custody, and support. In Samoa, the effect of s 111(1) of the Constitution appears to be that once a customary law is recognised by Parliament (ie, by incorporation into legislation) or the courts (ie, by acceptance in a judgment) it is superior to common law and equity.

It is also arguable that the Constitution of Vanuatu ranks customary law as superior to common law and equity. Article 95(3) states that 'customary law shall have effect as part of the law of the Republic', but the Constitution does not say exactly what that part is. However, Art 95(2) of the Constitution states that British and French laws are to continue to apply 'wherever possible taking due account of custom'. Taken in the context of the Constitutional aspirations expressed in the preamble, this surely means that in all cases consideration should be given to whether there is relevant customary law. If there is, the application of 'foreign' laws, including common law and equity should be subject to such law, provided it is possible to apply it. Unfortunately that was not the interpretation given to the constitution by Chief Justice Vaudin d'Imecourt in *Waiwo v Waiwo and Banga*.33 His Lordship stated that s95(2) was only intended to make customary law applicable where there was no other rule of law before the court. Thus, His Lordship effectively relegated customary law to a rule of 'last resort'.

The status of customary law is also uncertain in Cook Islands, Niue and Tokelau.

Leaving such an important issue as the rank of customary law to the courts' discretion is unsatisfactory. The surrounding uncertainty often leaves parties with no alternative other than litigation to determine disputes where customary law renders a different result to formal law. This is an issue that could have been addressed in the 1997 Act.

Apart from the question of conflict arising from rank in the formal system there is a more fundamental aspect to the conflict between customary law and formal law. It could be argued that these types of law are so different in nature as to make them incompatible in a single system. In other words, it could be argued that attempts to integrate customary law into the formal system ignore the fundamental differences between the two types of law. Ntumy argues that customary law is distinctly different from other sources of law and that the legal norms comprised by it are the general rules and principles governing the activity of communal life in a traditional society.[34] He adds that:

*... the binding force of custom ultimately rests on the fact that it is habitually obeyed by those subject to it. If not fortified by established usage, it is not law. But once custom has been codified or settled by judicial decision, its binding force depends on the statute or the doctrine of precedent.*[35]

Ntumy concludes that customary law is an unsuitable subject for law reform. However, he emphasises that this is not to deny the possibility of a Melanesian jurisprudence. Rather, it underlines the need for extensive research to develop a systematic approach backed by doctrine and philosophy.[36]

## 4. THE EFFECT OF THE CHANGE

The Reeves Report notes that certain Fijian customs are established by entrenched legislation.[37] The Commission comments that this approach should be continued if it is desired to apply custom as a matter of law to other aspects of lives of Fijians, Rotumans or the Banaban Island community.

This end is achieved by s185 of the 1997 Act, which entrenches the existing Acts dealing with Fijian custom, namely:

> Fijian Affairs Act
> Fijian Development Fund Act;
> Native Lands Act;
> Native Lands Trust Act
> Rotuma Act
> Rotuman Lands Act
> Banaban Lands Act and
> Banaban Settlement Act.

Section 185(1) requires that a Bill to amend these Acts be read three times in each House and be supported by at least 9 of the 14 members of Senate appointed by the Bose Levu Vakaturaga.[38]

Outside the areas covered by this legislation, customary law will not be part of the formal law unless parliament codifies it[39] or gives it specific statutory recognition. However, the fact that customary law is not part of the formal system of law does not mean that its importance will diminish in a practical sense. Customary law endured the process of colonisation in Fiji Islands, without any formal recognition, prior to 1990. Customary law has only recently become a general source of law in the formal system in Kiribati,[40] Nauru,[41] Samoa,[42] Solomon Islands,[43] Tuvalu,[44] and Vanuatu,[45] yet there is ample evidence that customary law is still the most relevant law for the indigenous population. An example of such evidence can be seen in the 1996 Annual Report of the Law Reform Commission of Solomon Islands:

> *Solomon Islands is subsistence agriculture based. Daily life revolves around families, land, sea, and religion. The basic incidents of life are derived from our relationships with these factors. The transition to cash economy and the incidents of modern life have taxed time, attention, energy and have become a preoccupation of everyone who strives to attain the good things in life. People do not have the time to talk about law reform. It is too abstract and technical. They tend to have this attitude because there are already local customs to regulate their daily lives. Whiteman law is not their business. Let the enlightened ones deal with what is wrong with the law.*[46]

The enduring strength of customary law supports the view that formal recognition is not required to give it force.[47] Customary law still operates, as it has always done, on a separate plane, at a village level. This is recognised and enforced independently and without the need for statutory endorsement.

From this perspective it can be argued that the 1997 Act will have no practical effect. It will only remove the formal endorsement of respect for customary law.

## 5. CONCLUSION

With the coming into force of the 1997 Act, Fiji Islands joined Tonga as a regional country that does not give express constitutional recognition to customary law as a general source of law. In a region that has still to discover its own jurisprudence, it appears premature to demote customary law without proper research and deliberation. If customary law is to come to the forefront and be recognised as the most important source of law in every day life, it deserves a prominent position in the Constitution.

The importance of constitutional recognition of customary law, as a stimulus for the development of local jurisprudence is demonstrated in *Nair v Public Trustee of Fiji and the Attorney-General of Fiji,*[48] where Lyons J 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 and further, as to the later assertion, this was the sentiment expressed by the Chief Justice when convening the Supreme Court.*

With the repeal of the 1990 Constitution, the justification for a new approach to law has disappeared.

Article 8 of the ILO Convention No 169 on Indigenous and Tribal Peoples[49] provides:

> *In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.*
> *These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.*

Fiji Islands is not a party to this Convention. However the Reeves Commission purported to bear International standards in mind when formulating its recommendations.[50]

Some of the more obvious difficulties surrounding the meaning and application of customary law have been discussed in this paper. The Constitution Amendment Act 1997 evades the questions inherent in the recognition and ranking of customary law. This rare opportunity to clarify the meaning and place of customary law has been wasted, as has the opportunity to encourage its development as a dynamic force. It is suggested that it is time for the reality that for many customary law is 'the law' to be given expression.[51]

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[1] Acknowledgments are due to Ass Pro Guy Powles of the Faculty of Law, Monash University, who kindly read through the draft of this article and made a number of very valuable comments.

[2] Section 193(2).

[3] Section 195(1) sets outs a list of repealed Acts.

[4] The member countries are Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu.

[5] Section 3 Native Land Act (Cap 133).

[6] FCRC, *Towards a United Future*, 1996, Parliamentary Paper no 34/96, at para 17.103.

[7] Id, at para 17.105.

[8] The only comment made directly on point was that the contexts in which people making submissions saw custom as important concerned matters to do with respect for chiefly leadership, the conduct of ceremonies and other protocol, rather than those effecting legal rights and duties, at para 17.102.

[9] Commission of Inquiry on the Courts, Fiji, 1994.

[10] Section 2. Whilst not defined in the Constitution, s 2, Interpretation Act of Vanuatu, Cap 132, provides that 'Custom' means the customs and traditional practices of the indigenous peoples of Vanuatu'. The word 'traditional' could be interpreted as carrying with it a requirement that the custom is longstanding.

[11] Sch 1.2.

[12] See Powles, G, 'Common Law at Bay' (1997) 21 JPacS 61, for an overview of some of the problems surrounding recognition, limits and proof of customary law.

[13] In *Semens v Continental Airlines* 2 FSM Intrm 131 (Pon 1985), the Supreme Court of the Federated Sates of Micronesia answered this question in the negative.

[14] Unreported, Magistrates Court, Vanuatu, cc324/95. The decision was reversed on appeal in *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, AC1/96.

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

[16] Section 8.

[17] The learned magistrate did not explain his calculation of damages, but it is interesting to note that, in spite of the fact the award is purportedly founded on customary principles, it is twenty times the monetary amount awarded by the local chiefs.

[18] See further Corrin Care J, 'Bedrock and Steel Blues' [1998] CLB (in press).

[19] Unreported, Supreme Court, Vanuatu, AC 1/96.

[20] Section 5.

[21] Schedule 3, which contains more detail regarding application of Laws, provides in paragraph 3(3): An Act of Parliament may:- provide for the proof and pleading of customary law for any purpose; regulate the manner in which or the purposes for which customary law may be recognised; and provide for the resolution of conflicts of customary law.

[22] In 1993, some fifteen years after independence, the Solomon Islands Minister for Justice circulated the

first draft of the Customs Recognition Bill for comments. No further action was taken on the Bill until 1995 when a second draft of the Bill was issued. There has been no action since.

[23] Unreported, Magistrates Court, Vanuatu, cc324/95. The decision was reversed on appeal in *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, AC1/96.

[24] See eg, Allott AN (ed), *The Future of Law in Africa*, 1960, London: Butterworths.

[25] Para 17.108.

[26] Commission of Inquiry on the Courts, Fiji 1994.

[27] See PI Jalal, *Law for Pacific Women*, Fiji Women's Rights Movement, Suva, 1998, pp53 to 68.

[28] Unreported, Court of Appeal, Fiji, CA No23/92, 20 August 1993.

[29] It is not always clear whether received or adopted legislation is superior to customary law. The Constitution of Solomon Islands ranks 'an Act of Parliament' above customary law, but it is not clear whether the term 'Act of Parliament' includes United Kingdom Acts. See *K V T and KU*, [1985/6] SILR 49, where the Principal Magistrate upheld the contention that the term 'Acts of Parliament', when used in Schedule 3, refers only to Acts passed by Solomon Islands Parliament. However, he did not conclude that customary law was consequently superior to United Kingdom Acts, but rather, he appears to have been of the opinion that they were both part of the law, and it was for the courts to decide which should be applied. In that case the Guardianship of Infants Act 1886 was followed, as opposed to the customary law on point, which in any event was unclear.

[30] Section 3.

[31] Laws of Tuvalu Act 1987, s6(3)(b).

[32] Laws of Kiribati Act 1989, s6(3)(b).

[33] Unreported, Magistrates Court, Vanuatu, cc324/95. The decision was reversed on appeal in *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, AC1/96.

[34] Ntumy, M, 'The Dream of Melanesian Jurisprudence' in Aleck and Rannells (ed), *Custom at the Crossroads* 1995, 7-19, Papua New Guinea: Faculty of Law.

[35] Id, 11.

[36] Id, 17.

[37] Op cit, para 17.103.

[38] The Great Council of Chiefs.

[39] For examples of codified customary laws in other countries of the Pacific, see Village Incorporation Regulations 1986 (Tokelau).

[40] Laws of Kiribati Act 1987, s 4(2).

[41] Custom and Adopted Laws Act 1971, s 3.

[42] Constitution of Samoa 1962, art III(1).

[43] Constitution of Solomon Islands 1978, s 76 and sch3 para 3.

[44] Laws of Tuvalu Act 1987, s 4(2).

[45] Constitution of Vanuatu, s 47(1).

[46] Op Cit, at 10,11.

[47] See eg, Powles 'the Status of Customary Law in Western Samoa' Masters Thesis submitted to VUW (1973), part VI.

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

[49] [1947] KB 130.

[50] Adopted June 1989 as a revision of ILO Convention No 107 on Indigenous and Tribal Populations.

[50] Op Cit, para 3.79.

[51] For example, formal law might be expressed as a tool to deal with received concepts. For a discussion of some of the preliminary issues which need to be resolved see Ntumy, M, op cit.