

**BEYOND RECOGNITION:
CONTEMPORARY JURISPRUDENCE IN THE PACIFIC
ISLANDS
AND THE COMMON LAW TRADITION***

by

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1. Introduction

In the metropolitan centres of the common law world today, questions concerning the legal recognition of custom are of slight importance and little practical consequence. Where custom is acknowledged at all, it is almost exclusively as an ancient *source* of law — an archaic vestige, the continuing impress of which has become so attenuated that, as a practical matter, it tends to be disregarded altogether. Except for a few small pockets of technical and specialised application, the role of custom in the operative dynamics of modern common law jurisprudence is generally regarded as a matter of arcane historical interest and only the most occasional theoretical significance¹.

In a very real sense, however, it is perfectly proper to think of custom, not so much as a source of law exclusively, but also — and, perhaps, rather — as a distinctive *type* of law². At the same time, it is equally correct to regard the system of common law itself, even in its most sophisticated manifestations, as essentially a customary system³.

Indeed, Simpson has gone so far as to say:

We need rather to conceive of the common law as a system of customary law, and recognize that such systems may embrace complex theoretical notions which both serve to explain and justify past practice in the settlement of disputes and the punishment of offences, and provide a guide to future conduct in these matters⁴.

For the purposes of developing a clearer, more accurate theoretical understanding of the dynamic nature of the common law tradition, this, too, may constitute a preferable analytical perspective; and for the purposes of fostering a genuinely constructive understanding of the perennial and seemingly intractable issues having to do with the relationship between law and custom in the Pacific Islands today, the adoption of such a perspective may well provide the best approach to a functional understanding of the common law tradition.

In a previous paper, arguments were presented along the lines suggested above in support of a fundamental reconsideration of the conceptual relationship between law and

* This article is based on a paper presented (*in absentia*) to the South Pacific Legal Studies Group at the 46th Annual Conference of the Australasian Law Teachers' Association, Perth, 13 July 1991.

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1. See R.J. Walker *The English Legal System* 6th edn. Butterworths London 1985 at 64-67; D.B. Furnish "Custom as a Source of Law" (1982) 30 Am J Comp L 31; S.F.C. Milsom *Historical Foundations of the Common Law* 2nd edn. Butterworths London 1981 at 11-12.

2. See W. Friedmann *Legal Theory* 5th edn. Stevens & Sons London 1967 at 251.

3. See T.F.T. Plucknett *A Concise History of the Common Law* 5th edn. Little, Brown & Company Boston 1956 at 350; M. Krygier "Law as Tradition" (1986) 5 Law and Phil 237.

4. A.W.B. Simpson 'The Common Law and Legal Theory' in *Legal Theory and Legal History: Essays on the Common Law* Hambleton Press London 1987 at 375-376.

custom in Papua New Guinea⁵. There, too, certain theoretical justifications for a substantial revision of the dichotomous construct by which the overall conceptual relationship between law and custom is conventionally portrayed were advanced at some length⁶. The principal concern of this brief article is to apply those theoretical propositions, in a very preliminary way, to some decidedly practical issues having to do with the legal recognition of custom, and to proffer this as indicative of a preferred alternative perspective from which the teaching of common law jurisprudence in, and beyond, the Pacific region might be approached more constructively.

2. The Legal "Recognition" of Custom: Qualifications and Restrictions

Without belabouring here the complex and controversial issues of politics and history that make it so, it is nonetheless true that most of the independent, semi-sovereign and dependent states and territories comprising the political domains of the insular Pacific today are effectively common law jurisdictions⁷. Of these, all but three explicitly provide (constitutionally, statutorily or by judicial determination) for some measure of legal recognition of the custom or customary practices of the local indigenous inhabitants⁸. However, where indigenous custom is formally acknowledged in this way, its recognition is ordinarily made subject to one or more of the following qualifications: firstly, custom must not be contrary to, or inconsistent with, provisions of the relevant constitutional or organic laws of the supreme political authority; secondly, custom must not conflict with the laws duly enacted by the relevant legislative organs of the government, or with binding judicial interpretations and constructions of those laws; thirdly, custom must conform to such other judicially developed rules and principles of law as may, from time to time, be pronounced by the courts; fourthly, custom must not be inconsistent with adopted statutes or rules and principles of the common law; and finally, custom must not be repugnant to justice, equity and good conscience or to the general principles of humanity⁹.

To be sure, such restrictions upon the legal recognition of indigenous custom, and the implicit subordination of local customary norms and values to those embraced within the introduced ("received" or "imposed") systems of Anglo-Australian and Anglo-American common law, are the patent hallmarks of a history of colonial administration which, for many Pacific Islanders, has only recently drawn to a close. It does nothing to diminish the significant and enduring impact of that historical experience upon a whole host of

5. J. Aleck 'Traditional Law and Legal Traditions in Papua New Guinea: A Reappraisal of the Relationship Between Law and Custom' *Proceedings of the Forty-Fifth Annual Conference of the Australasian Law Teachers' Association* Canberra 27-30 September 1990 at IV: 70-109.

6. *Ibid.* at 102-109.

7. In addition to Australia and New Zealand, the common law jurisdictions of the insular Pacific include: American Samoa, Cook Islands, Federated States of Micronesia, Fiji, Guam, Hawaii, Kiribati, Marshall Islands, Nauru, Niue, Norfolk Island, Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn, Solomon Islands, Tokelau, Tonga, Torres Strait Islands, Tuvalu, Vanuatu and Western Samoa. Non-common law jurisdictions in the region include New Caledonia, Wallis and Futuna and French Polynesia, all of which are Overseas Territories of France, and Easter Island (Rapa Nui), which is a Province of Chile.

8. Norfolk Island (an external territory of the Commonwealth of Australia) and Pitcairn (Britain's last remaining Pacific Island colony) do not have viable "indigenous" (ie., non-European) populations entertaining distinctive "traditional" customs, in the sense that these terms are generally used in respect of Pacific Island peoples. See W. Dale *The Modern Commonwealth* Butterworths London 1983 at 202-203, 314. No express provisions have been made for the legal recognition of the local customs of the Chomoros, the indigenous inhabitants of Guam, which is an unincorporated territory of the United States of America. See G. Powles and M. Pulea (eds) *Pacific Courts and Legal Systems*, Institute of Pacific Studies of the University of the South Pacific Suva 1988 at 309.

9. See C. MacLauchlan "State Recognition of Customary Law in the South Pacific" PhD Thesis University of London 1987; Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law*, Stevens & Sons 1966 at 532 et seq; Powles and Pulea (eds) *Pacific Courts and Legal Systems*, *supra* n.8 at 293-364.

contemporary affairs, however, to point out that many of these same restrictive provisions (or their functional equivalents) have been retained in the constitutions and statutes of most independent Pacific island states¹⁰, much to the same extent as they have been in those jurisdictions which entertain only an imperfect measure of political or legal sovereignty¹¹.

In many instances, the restrictive recognition provisions contained in the constitutions of independent Pacific Island countries were meant to operate only *ad interim*; that is, until such time as the respective Parliaments might enact legislation designed to facilitate a more active integration of indigenous jural values into newly autonomous systems for the administration of justice¹². A number of innovative legislative steps have, in fact, been taken towards that end¹³. In the main, however, the commitment of parliamentary energies and resources to the development of comprehensively integrative legislation of this kind appears to have waned appreciably in the years since independence (or effective self-government) has been achieved by the respective states¹⁴. As one commentator recently observed:

Despite the clear dissatisfaction with the inherited legal system and the popular belief that customary law should play a central role in the development of new laws and legal institutions, the anticipated legal transformation has not eventuated¹⁵.

Whilst these observations were made with specific reference to Papua New Guinea, they may aptly be extended, *mutatis mutandis*, to many other independent and semi-sovereign Pacific Island countries.

3. Dichotomisation of Law and Custom

In accounting for the failure of the Parliaments and courts in the Pacific Islands to bring about the development of "a new, culturally sensitive . . . jurisprudence which blend[s] customary law and institutions with modern Western law and institutions in an appropriate mix"¹⁶, any number of factors may be identified as causal. Weisbrot suggests five such factors, amongst which he includes: (a) the diminution of pre-independence anti-colonial zeal; (b) post-independence preoccupations with issues more directly related to material economic development; (c) technical problems with the interpretation and implementation of the more idealistic mandates for constitutional change; (d) a general failure of political will to institute necessary legal change; and (e) the lack of reformist initiative on the part of the legal profession, coupled with a palpable ambivalence on the part of the judiciary, in its response to constitutional invitations to assume a more actively creative role¹⁷.

10. See eg., *Constitution of Papua New Guinea* s.9, schs. 2.1, 2.2; *Constitution of the Solomon Islands* sch.3; *Constitution of Vanuatu* s.45; *Constitution of Western Samoa* art.111.

11. See eg., *Hawaii Constitution* art.XII, §.7 (and *Hawaii Revised Statutes* s.1-2); *Constitution of the Federated States of Micronesia* art.V (and *Code of the Federated States of Micronesia* ss.1-114, 1-202, 6-1604, 11-108 and 11-1003).

12. See eg. *Constitution of the Solomon Islands* s.75(1); *Constitution of Vanuatu* s.49; *Constitution of Papua New Guinea* ss20, 21 and schs. 2.1, 2.3.

13. With respect to Papua New Guinea, some of these initiatives are discussed in D. Weisbrot 'The Post-Independence Development of Papua New Guinea's Legal Institutions' (1987) 15 *Melanesian Law Journal* 9 at 45-46.

14. *Ibid.* at 47. See also K. Brown 'Criminal Law and Custom in Solomon Islands' (1986) 2 *QITLJ* 133; D. Weisbrot 'Law and Native Custom in Vanuatu' (1988) 3 *Law & Anthropology [Internationales Jahrbuch Für Rechtsanthropologie]* 103 at 113; D. Weisbrot 'Papua New Guinea's Indigenous Jurisprudence and the Legacy of Colonialism' (1988) 10 *U Haw L Rev* 1 at 30-31. Cf. J.R. Arnett II 'The American Legal System and Micronesian Customary Law: The Legacy of the United States to the New Nations of the Trust Territory of the Pacific Islands' (1985) 4 *Pacific Basin Law Journal* 161 at 184-206.

15. Weisbrot, 'Papua New Guinea's Indigenous Jurisprudence' *supra* n.14 at 2.

16. *Ibid.*

17. *Ibid.* at 2-3.

(a) Political Formulations

Each of the explanations mentioned above doubtless contains a measure of demonstrable validity in one case or another. All of them, however, may be said to fall within a single explanatory category, which this writer has elsewhere described as deriving from *political* (or politicised) formulations of the relationship between law and custom¹⁸. According to such formulations:

Law and custom are conceptualised dichotomously because they are ideologically incompatible: "Law is seen as a type of state action, distinctive in certain operational ways, but sharing its functions with other types of state action". Custom, or "traditional law", on the other hand, is "embedded in and supportive of traditional forms of stateless socio-political organisation. As manifestations of the conflicting political ideologies represented by the dichotomy between state and stateless societies, the dynamics of the dichotomy between law and custom logically instantiate expressions of the state's hegemonic assertion and the inexorable exertion of the state's political *will*. Ultimately, it is the state which will not permit the development of a symbiotic relationship between law and custom, since to do so would undermine the competitively advantageous position enjoyed by the state and those whose interests it is said to serve¹⁹.

(b) Organic Formulations

Explanatory arguments based upon politicised formulations of the relationship between law and custom can be cogent and compelling; and, as said, most (if certainly not all) such explanations for the post-colonial inertia of Pacific Island legislatures and judiciaries probably contain more than a little truth. Nowadays, however, politicised arguments tend to bolster their assertions of validity by appeals to what may be called *organic* (or ethnological) formulations²⁰, and with increasing frequency, the two formulations tend to be advanced in concert.

Organic formulations of the relationship between law and custom add a measure of scientific inevitability to the otherwise negative appraisals and dismal prognoses of political formulations of that relationship. Consistent with their ethnographic origins and the anthropological orientations of their proponents, organic formulations generally identify determinative discrepancies between "traditional" custom and the introduced common law with the respective cultural systems in which the fundamental jural concepts of each type of society — Polynesian, Melanesian or Micronesian, on the one hand, and Anglo-Australian or Anglo-American, on the other — are embedded. Organic formulations thus regard the incompatibility of law and custom as merely emblematic of the underlying epistemological differences which separate, distinguish and contrapose Pacific Island and Western cultures on broadly inclusive grounds.

From this perspective, the irreconcilability of law and custom . . . is seen as having less to do with conflicts of failures of *political will*, than with the intrinsic polarities of the jural forms (*qua* cultural forms) peculiar to [Pacific Island] and Western societies respectively²¹.

As in political formulations, the opposition of law and custom in organic formulations is also seen to be coeval and largely co-extensive with the oppositional relationship between the state and stateless societies. The organic approach, however, emphasises the deeper,

18. 'Traditional Law and Legal Traditions' *supra* n.5 at 88-92.

19. *Ibid.* at 89-90 (original footnotes omitted).

20. *Ibid.* at 92-93.

21. *Ibid.* at 92.

cultural basis of both jural and political dichotomies.

Political and organic formulations of the relationship between law and custom may be seen to differ most significantly in terms of the different aspects of incongruity in that relationship which each approach emphasises. The formulations themselves are neither contradictory nor compatible. When drawn together, they can and do provide persuasive, complementary explanations to account for the tensions and conflicts which both approaches regard as central features in the dichotomy between law and custom. In some cases, the state-centred (political) conviction that it would be impolitic or inconvenient to allow for a greater interfusion of law and custom may be stressed. In other cases, underlying (organic) factors may be focused upon, underscoring the view that a better integrated relationship between law and custom is impossible to achieve in any event.

As indicated in the opening paragraphs of this article, it is the premises upon which the organic-type arguments are based that are called into question here. Clearly, the attitudinal predisposition to view custom as inherently antithetical to law is largely a product of such organic assumptions. What is more, it is submitted that the prevalence of those wrong-headed assumptions, on the part of anthropologists and anthropologically informed socio-legal scholars alike, has contributed in some measure to both the legislative and judicial reluctance to attempt a more active and replete integration of law and custom in the Pacific Islands.

If, however, custom can come to be regarded as a kind or type of law, and if, furthermore, the common law tradition itself might, in turn, come to be understood as a dynamic and essentially customary system, then the only real obstacles impeding the development of a more harmonious relationship between the indigenous custom of Pacific Island peoples, on the one hand, and the introduced (*cum* adopted) common law, on the other, are those of the political type. In that event, although certain difficulties will continue to attend earnest efforts to surmount those obstacles, the task itself becomes eminently more practicable.

4. Law as Custom and Custom as Law: A Prophylaxis

Arguably, the only context in which it is appropriate to contemplate the formal legal "recognition" of custom is where the customary values, attitudes, beliefs and practices in question are those entertained by members of distinct minority communities (ethnic, religious, linguistic or otherwise), which have come to be embraced within the pre-existing socio-cultural arrangements of a larger, dominant polity²². Where such minority groups are comprised of early or local indigenous inhabitants of the subject jurisdiction, questions of "recognition" are complicated by a special set of political and ethical problems. On that basis alone, such matters deserve to be treated on their own distinctive merits and they will not, therefore, be addressed here.²³

Where custom or customary laws are part and parcel of the underlying value system(s) entertained by a majority or a substantial plurality of the early or indigenous population, it is wholly inappropriate that a system of common law should (or should be expected) merely to "recognise" those fundamental jural values; and as a purely practical matter, such

22. See S. Poulter 'Separate Cultures in One Land: Legal Recognition of Cultural Pluralism — an English Perspective' in *Conference Papers Proceedings of the 9th Commonwealth Law C.C.H. Auckland 1990* at 121-128; J. Norgren and S. Nanda *American Cultural Pluralism and Law* Praeger New York 1988.

23. See eg. C. MacLachlan 'The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm' (1988) *Int'l & Comp LQ* 368; G.K. Wright 'Recognition of Tribal Decisions in State Courts' (1937) 37 *Stan L Rev* 1397; M.J. Matsuda 'Native Custom and Official Law in Hawaii' (1988) 3 *Law & Anthropology* [Internationales Jahrbuch Für Rechtsanthropologie] 135; W.W. Tiffany 'Applicability of the Adverse Possession Principle in American Samoa' (1981) 52 *Oceania* 136.

an approach will probably prove untenable in the long term in any case. However, to recognise the impropriety and impracticability of such a situation, does *not* necessarily impugn or derogate from the utility or suitability of a common law system, where such a system has been, for better or for worse, adopted and retained.

The common law, as Sir Robin Cooke recently remarked, "is nothing if not malleable"²⁴, and the capacity of a system of common law to adapt to and accommodate the customary jural values of "other" peoples becomes problematic only when the malleable nature of the common law tradition is obscured by ethnocentric fixations on one or another variant of its myriad expressions. Indeed, the remarkable thing about the common law tradition is not so much its venerable tendency to be consistent in one country, but rather its extraordinary capacity to become whatever it must be in another.

Hence, in developing cogent arguments in support of the proposition that it is the law which must change, in order to accommodate the jural values reflected in changing indigenous custom — which is to say, in effect, that it is custom wherein the prerogative to "recognise" the law properly resides — the more sensible and efficacious course is to seek justifications for that proposition within the law itself.

The implications of this alternative perspective for the way in which the concepts and phenomena of indigenous custom, no less so than the basic subjects in common law jurisprudence — contracts, torts, criminal law and so forth — are taught in the Pacific Islands, may be telling. Consider, for example, the observations of Sir Anthony Mason, who, in acknowledging the socio-cultural and historical connections between Australia and England, as well as the inevitable influence of those connections upon the legal cultures of the respective peoples, nevertheless insists: "There is . . . every reason why we should fashion a common law for Australia that is best suited to *our* conditions and circumstances"²⁵.

Consider, too, the extent to which the common law in the United States has departed, even in the specifics of fundamental legal principles, from that of England; and the degree to which the courts of the individual states fashion and re-fashion "American" common law to suit the jural values, attitudes and beliefs of the different communities — the different *customs*, if you will — of the peoples they embrace. Illustratively, the Supreme Court of the State of Hawaii readily endorsed the expansion of the category of bystanders entitled to recover damages for emotional distress beyond the conventional common law requirement of a blood relationship to include a step-grandchild, because:

[t]he Hawaiian concept of adoption . . . differs from that in other common law jurisdiction . . . [T]he custom of giving children to grandparents, near relatives, and friends to raise whether legally or informally remains a strong one. Hence the plaintiff should be permitted to prove the nature of his relationship to the victim and the extent of damages he has suffered because of this relationship²⁶.

So it is — or, at any rate, so it ought to be — throughout the common law world²⁷, with the salutary consequence that "the general character of the common law is very much what the hierarchy of national courts, and each generation of judges and practitioners therein, make it"²⁸. This must be (or, again, ought to be) especially true in those jurisdictions where,

24. 'The Dynamics of the Common Law' in *Conference Papers supra* n.22 at 3.

25. Sir Anthony Mason 'Future Directions in Australian Law' (1987) 13 *Monash UL Rev* 149 at 154 (emphasis supplied). Similar sentiments are expressed in His Honour's remarks at the inauguration of the Faculty of Law at the University of Wollongong (19 February 1991). See also D. Wood 'Adjudication and Community Values: Sir Anthony Mason's Recommendations' in M.P. Ellinghaus, A.J. Bradbrook and A.J. Duggan (eds) *The Emergence of Australian Law* Butterworths Sydney 1989 at 89.

26. *Leong v. Takasaki* (1974) 55 *Hawaii* 398, 520 P.2d 758 at 766 (per Richardson CJ).

27. See eg. G. Sri Ram 'Dynamics of the Common Law — The Malaysian Experience' in *Conference Papers supra* n.22 at 9.

28. Cooke 'The Dynamics of the Common Law' *supra* n.22 at 3.

released from the constraints of colonial legal administration (and a predominantly expatriate bench and bar), the right, the opportunity and the obligation to do so is unfettered²⁹.

To the extent that the substantive, socio-culturally responsive fashioning of the common law, as opposed to the mere *ad hoc* “recognition” of custom, may properly be regarded as essentially a judicial responsibility in the Pacific Islands (even if only as a response to parliamentary default), there must be a corollary duty placed upon the lawyers who go before the courts to bring these issues to the fore and to argue forcefully for something beyond the mere “recognition” of custom³⁰.

5. Conclusion

So long as custom remains an adjunct consideration in modern legal education in and for the Pacific Islands, so long as the “traditional” (and changing) jural values, attitudes and beliefs of Pacific Island peoples remain something apart from, and peripheral to, the development of an understanding of the underlying principles which constitute the very stuff of the common law, the opportunity for a meaningful integration of custom into the body of the law will be minimal at best³¹. To teach custom or customary law, even with the most sympathetic of intentions, as something to be “recognised” (*vel non*), is perforce to relegate customary values to this marginal and effectively subordinate position³²; and this, it is submitted, will be so whether custom is approached as a discrete legal subject³³ or incorporated into another conventional unit of study³⁴ (although the latter probably provides a somewhat better approach to conceptual integration).

Therefore, what judges, lawyers and, perhaps most importantly, legal educators in the common law jurisdictions of the Pacific Islands must come to recognise and act upon, is what judges, legal scholars and (one hopes) lawyers and law students throughout much of the rest of the common law world are increasingly coming to realise: viz. that custom — the fundamental jural values of the community (or communities, as the case may be) — is the primary legitimate basis upon which the rules and principles of common law must rest; and that the common law tradition itself is best understood, employed and developed when it is regarded fundamentally as a system of customary law.

29. See eg. *Constitution of Papua New Guinea* sch.2.4, which provides:

In all cases, it is the duty of the National Judicial System, and especially of the Supreme Court and the National Court, to ensure that, with due regard for consistency, the underlying law develops as a coherent system *in a manner that is appropriate to the circumstances of the country* . . . [emphasis supplied].

30. See Sir Mari Kapi ‘The Underlying Law in Papua New Guinea’ in *Conference Papers supra* n.22 at 129, 132-134.

31. See G. Woodman ‘Studying the Laws: Respecting the Customary Laws in the Curriculum’ (1987) 15 *Melanesian Law Journal* 118. Cf. B.L. Ottley ‘Legal Education in the Developing Countries: “The Law of the Non-Transferability of Law” Revisited’ (1979) *Loy. L.A. Int’l & Comp LJ* 47.

32. See B.W. Morse and G.R. Woodman ‘Introductory Essay: The State’s Options’ in *Indigenous Law and the State* Foris Publications Dordrecht 1988 at 5-24.

33. See eg., D. Weisbrot (ed) *Customary Law in Papua New Guinea: A Case and Materials Source Book* Materials for the Use of Law Students at the University of Papua New Guinea, Port Moresby 1977.

34. See eg., D. Roebuck, D.K. Srivastava and J. Nonggorr *The Context of Contract in Papua New Guinea* University of Papua New Guinea Press Waigani 1984.

