STATE RECOGNITION OF CUSTOMARY LAW
IN THE SOUTH PACIFIC.

CAMPBELL MCLACHLAN

PRESENTED

by

Dr Campbell
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for Professor Tony Angelo
& all my friends at
Victoria University of Wellington
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London June 1988

ABSTRACT

This thesis examines the recognition by the state of the customary law of indigenous peoples by reference to a comparative study of Commonwealth South Pacific jurisdictions. It aims both to illuminate the process of recognition as a contribution to the comparative theory of legal pluralism and to describe distinctive elements of the experience with recognition in the Pacific.

The Pacific case shares many of the features of the introduction of Western law into non-Western societies generally, but the absence of complex plural legal systems during the colonial period and the contemporary vitality of traditionalism have required a reworking of the policy basis and techniques for recognition.

This task is approached from four propositions. 'The persistent fact of pluralism' is informed by an acknowledgement that legal pluralism exists and persists as a factual phenomenon, regardless of the accommodation afforded to custom in the state legal system. The nature of this phenomenon and the options open to the state are explored in Chapter I 'Legal pluralism and legal pluralism: colonial misconceptions'. 'The colonial experience and the idea of customary law' discusses the status *de jure* of customary law in the Pacific during the colonial period and evaluates the impact of custom and approaches to its recognition.

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Finally, the fourth proposition, 'justice and group identity', sees recognition as justified by the requirements of justice in relation to indigenous groups within the nation state. Chapter IV, 'Human rights and cultural relativism', evaluates the scope for group identity within a framework of non-discrimination and the protection of individuals' human rights.

The thesis concludes by contrasting the changing ideological role of custom with the realities of recognition and by contrasting recognition by the incorporation of custom into state law with recognition by the adjustment of state law to acknowledge the separate sphere of custom.

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ABSTRACT **CONTENTS**

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Independence and the reassertion of the indigenous identity of Pacific peoples has created a fresh impetus for recognition. 'The implications of a reassertion of autochthonous values' are explored in three chapters on contemporary reforms: Chapter III, 'Custom as a source of underlying law' on the general incorporation of custom; Chapter V, 'Disputes: custom as process' on local-level 'customary courts'; and Chapter VI on 'Land: custom as title'.

Finally, the fourth proposition, 'justice and group identity', sees recognition as justified by the requirements of justice in relation to indigenous groups within the nation state. Chapter IV, 'Human rights and cultural relativism', evaluates the scope for group identity within a framework of non-discrimination and the protection of individuals' human rights.

The thesis concludes by contrasting the changing ideological role of custom with the realities of recognition and by contrasting recognition by the incorporation of custom into state law with recognition by the adjustment of state law to acknowledge the separate sphere of custom.

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Cassibell McLachlan
London
February 1986

PREFACE CASES

My interest in the subject of this thesis began while I was a Junior Lecturer in Law at Victoria University of Wellington, New Zealand (1983-4). There I pursued research on the Conflict of Laws and edited a special issue of the *Victoria University of Wellington Law Review* on 'Law in the Pacific' (1984) Vol 14 no 3. The thesis was completed while I held a Commonwealth Scholarship at University College London (1985-8). I gratefully acknowledge the financial assistance of the Commonwealth Scholarships Commission. During my research I was able to present a paper 'The renaissance of custom in the South Pacific' to a conference of the Commission on Folk Law and Legal Pluralism on 'Folk law and Indigenous rights: a comparative perspective' (Sydney, 1986). I was also able to attend the First South Pacific Law Conference (Apia, 1986). In 1987 I assisted the Commonwealth Secretariat with the provision of legal materials relevant to the coup in Fiji.

I am grateful to many people for discussions and the provision of material. The following deserve special mention: Professor Michael Freeman, University College London, my unfailingly supportive supervisor; Mr Neroni Slade, Assistant Director, Legal Division, Commonwealth Secretariat, formerly Attorney-General of Western Samoa; Professor Yash Ghai, University of Warwick, for the loan of many background papers; Mr Benedict Kingsbury, Balliol College, Oxford who is preparing a thesis on 'Indigenous peoples in international law'; and Mr Paul McHugh, Sidney Sussex College, Cambridge whose thesis is on 'The aboriginal rights of the New Zealand Maori at common law'. The staff of the Legal Division of the Commonwealth Secretariat and the Legal Library at the Foreign and Commonwealth Office have also rendered invaluable assistance. Finally, I thank Bernie Hurd, who enthusiastically undertook the typing; and my wife Rhona who lovingly tolerated the intolerable.

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INTRODUCTION

A THEMES

I Reconsidering the Recognition of Customary Law

The nature of the interaction between state law and the customary laws of indigenous peoples, and the consequences of this situation of legal pluralism for state legal policy, are in the throes of reappraisal, both at the theoretical level and in the practice of Pacific states. This thesis addresses the process of the state recognition of customary law, as the response of the state to pluralism, by reference to material drawn from a comparative study of Pacific jurisdictions. As such, it aims both to illuminate the process of recognition as a contribution to comparative theory and to describe distinctive elements of the experience with recognition in the Pacific.

In one sense, the dilemma facing Pacific states in relation to customary law is one which will be familiar to those interested in the introduction of Western law into non-Western societies generally. Colonialism brought with it a system of state legal regulation which was the antithesis of the indigenous orders of the stateless societies to which it was applied.¹ The state system consisted of the wholesale translocation of a European legal system which differed not only in content but also in fundamental approach from customary law. The result, regardless of whether or not the state attempted any accommodation of indigenous orders, was a continuing plurality of systems of legal regulation in indigenous societies. Decolonisation did not change this because independence confirmed the emergence of the state and the survival of state law.

But, in the Pacific at least, three factors have compelled a reconsideration of the state's relationship to custom. The first is that the colonial period did not result in the creation of complex plural legal systems, by which the state administered customary law and which have characterised approaches to recognition elsewhere. To a considerable degree, the question of recognition was left

unresolved. The second factor is the realisation of the factual persistence of custom, that indigenous local orders have not passed away in the face of the introduction of a state legal system but continue to play an important, if not dominant, role in the regulation of Pacific societies. The third factor is the vitality of traditionalism, the ideological role of custom in the reassertion of the identity of the indigenous peoples of the Pacific. These factors together have required a reworking of the policy basis for the recognition of custom and an exploration of legal techniques to implement recognition. This task has been increasingly in issue in the Pacific over the last two decades as independence has been achieved in the island states and as the position of indigenous peoples in Australasia has been seen more in terms of self-determination and the preservation of a separate cultural identity. Thus, much of the law and the reform proposals discussed in this work are recent and further developments are already on the horizon.

In this situation, a reconsideration of the recognition of customary law seemed to involve the following necessary steps. First, the myths and misconceptions surrounding the subject had to be exposed so that the legal issues could be seen in their proper context. The ideology of custom, both in the colonial period and upon independence, and the reassertion of indigenous identity have to an extent obscured and distorted the actual position of custom and the possibilities for recognition. Additionally, what is here termed the ideology of legal centralism has restricted the extent to which, as a policy matter, a state legal system can accept the existence of indigenous legal orders. Second, it was necessary to locate the legal issue of recognition within a satisfactory explanation of the factual situation to which recognition is a response. In other words, it was necessary to provide a satisfactory model of legal pluralism. Third, recognition had to be seen in an historical context. This is so not simply because the interaction between state and customary laws is the product of an historical process which forms an inheritance for present measures. The historical context of colonialism also created a construct of ideas about recognition which continues to influence approaches to the subject.

These steps are necessary pre-conditions to a critical appraisal of current measures for recognising customary law. They enable

consideration of the policy issues and range of options open to the state in introducing further reforms of state law to take account of custom. This thesis advances four propositions in relation to these steps. 'The persistent fact of pluralism' argues that, because legal pluralism must be envisaged as a factual descriptions of the operation of different systems of legal regulation in society, the point of reference for recognition is not existing state systems of recognition - plural legal systems - but the fact of pluralism. Further, both the state and the customary system have an independent capacity to act and react. State law is not the only dynamic factor. This situation is a persistent one, as customary orders have shown a vitality which belies a determinist assessment of state law superceding custom. 'A legacy of colonial misconceptions' suggests that approaches to recognition generally are still dominated by a paradigm developed in the colonial period, which is not a value-free approach, but rather was developed to meet the needs of colonialism. In the contemporary context, this inheritance is inappropriate but the reassertion of autochthonous values has created a new social policy requirement to address the issue of recognition. It is requiring a reorientation of the basic assumptions of state law to take account of the separate identity of indigenous groups. Finally, it is argued that the case for recognition may be justified by the state legal system's search for justice in responding to legal and cultural diversity. The systematic readjustment of state law to take account of the separate sphere of custom may be better accomplished by the detailed review of particular areas where custom and state law interact than by the general incorporation of custom into state law.

The remainder of this introduction develops each of these propositions. Part B distinguishes the approach taken here from existing approaches to custom and its recognition and describes and defends the basis for a comparative Pacific study. Part C outlines the structure of the chapters.

II The Persistent Fact of Pluralism

One begins with the proposition that legal pluralism is a description of a factual situation which arises when different modes of legal regulation overlap in their application to society. This situation, as has been suggested, is characteristic of law in

Pacific societies. In the Pacific context, it arises from the creation of the state and the introduction of state law on top of a mass of stateless societies which had and which retain internal forms of legal regulation. However, it is possible that legal pluralism provides a more adequate description of the role of legal regulation in many societies, including Western societies. This possibility will be further examined later. For the present, it is sufficient to distinguish the fact of legal pluralism from the plural legal system, an expression which describes systems of alternative regulation built into the state legal system. In other words, state recognition of customary law may result in the creation of a plural legal system but legal pluralism exists and persists as a factual phenomenon regardless of whether or not state law chooses to recognise the fact. Although much of the body of this thesis is concerned with plural legal systems, with forms of accommodation of indigenous orders already attempted by state law, it is premised on the factual existence of pluralism. For it is the fact of pluralism which creates the necessity to come to terms with the issue.

Moreover, pluralism is not merely a fact, it is a persistent fact. In the Pacific, customary legal orders have shown a remarkable persistence and vitality. It is even possible to speak of a renaissance or reassertion of custom. This persistence confounds one of the most basic assumptions underlying the creation of plural legal orders under colonialism: that customary law was a passing phenomenon which would die out as indigenous peoples embraced the benefits of Western law and Western civilisation. Colonial plural legal orders were seen as temporary, a messy compromise which was not ideal but the best that could be done until the 'civilising mission' was complete. These assumptions have proved to be false, and in many other geographical contexts as well as the Pacific. David, writing on sources of law in the *International Encyclopedia of Comparative Law*, betrays an ambivalent assessment of custom (perhaps based on his experience drafting a radical reform of the Ethiopian Civil Law):²

According to theory, custom may have lost its authority and may now occupy only a secondary position among the sources of law. However, in reality it has a completely different weight, because it is custom that in fact rules the behaviour of men. The effectiveness of sources of law other than custom presupposes the allegiance of the community, or the exercise of

constraint; the conditions are not always right for this last. Custom is perhaps not a source of law, strictly speaking, but it may be a reason for the ineffectiveness of the law. Politicians and lawyers should take note of this.

Woodman and others have shown how, in the African context, the factual persistence of customary law limits the effectiveness of radical changes which purport to 'abolish' pluralism. On analogy with the fake doctor in Moliere's play who declares that the parts of the body have been changed around by his decision, Woodman observes:³

Thus the customary laws which the Law seeks to confine may still seem to many people part of the natural order. *Nous avons changé tout cela*: but a legislator no more than a fake doctor can reform the natural order by declaration.

Again, it is possible that the persistent fact of pluralism, seen more widely as irreducible conflicts of political and moral views entertained by groups within society, is a feature of Western societies which fundamentally alters the role of law. As Rawls comments:⁴

These conditions profoundly affect the requirements of a workable conception of justice: among other things, such a conception must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life (or what I shall call for short 'conceptions of the good') affirmed by the citizens of democratic societies.

This diversity of doctrines - the fact of pluralism - is not a mere historical condition that will soon pass away; it is, I believe, a permanent feature of the public culture of modern democracies. Under the political and social conditions secured by the basic rights and liberties historically associated with these regimes, the diversity of views will persist and may increase.

The comparison between the persistence of pluralism generally in the West and the persistence of legal pluralism in the South Pacific is of course inexact. However, broadly, both situations suggest that the basis and shape of the state legal system may have to be modified to take account of the continuing existence of groups within society with different goals, cultures and living patterns than those defined by the dominant ideology of state law.

Further, this fact of continuing pluralism means that both the state and customary groups retain the capacity to define and change

their legal system in response to changed perceptions and realities. The implications of this are not always appreciated. First, the encounter between state and customary law is often one of mutual incomprehension. As Stanner commented in relation to the Australian Aboriginal people:⁵

Various European things - our authority, our customs, our ideas and goods - are data, facts of life which the Aborigines take into account in working out their altered system. But I have seen little sign of its going much beyond that. Those Aborigines I know seem to be still fundamentally in struggle with us. The struggle is for a different set of things, differently arranged from those which most European interests want them to receive. Neither side has clearly grasped what the other seeks. All this issues in a dusty encounter to which nothing yet is particularly clear.

In a legal context this raises issues of commensurability between the two systems - to what extent it is possible for the concepts in one system to be understood and therefore 'recognised' by the other. It also suggests that changes on the interface between the two systems are likely to be differently interpreted and thus have different results on each side. Bohannan has described this situation as a 'systematic' or 'working' misunderstanding.⁶ Both systems are thus engaged in a dialectic in which state law (and its attempts at 'recognition' of customary laws) is only half of the equation. While the focus of this work is thus on 'state recognition', this should not be allowed to obscure the fact that the state is only one actor in the process. The fact that customary group 'recognition' or accommodation of state law is outside the province of this work does not marginalise its importance. Indeed, the ramifications of the 'group's eye view' must inform state recognition.

III A Legacy of Colonial Misconceptions

The second major proposition is that existing approaches to the recognition of customary law are conditioned by the colonial experience. These approaches - reflect fundamental misconceptions about the nature of customary law and its continuing role and are inappropriate in the modern context. Yet they continue to rule from the grave - limiting the range of possibilities for recognition. As Griffiths notes:⁷

Legal pluralism in this sense has been a fixture of the colonial experience. Furthermore, it has generally persisted beyond the moment of formal 'Independence', proving one of the most enduring legacies of European expansion and characterizing at the present day the larger part of all the world's national legal systems.

Hooker subtitles his basic work on legal pluralism *An Introduction to Colonial and Neo-Colonial Laws*.⁸

The shape of the colonial plural legal system was dictated by the needs of colonial administration. Recognition of indigenous orders was a practical necessity. Government could not be carried out without the cooperation of the indigenous peoples and so colonial administrators sought to work through indigenous institutions. However, the intention was still to subvert these institutions to administrative requirements. Furthermore, the colonial system was built on a rigid compartmentalisation of 'natives' and Europeans. The plural legal system helped to reinforce these divisions. The colonial legal order was obsessed with the creation of order and regularity. It thus imposed standardised, rigid patterns on customary systems which had been much more fluid and varied. It sought to codify and register. It abstracted a body of legal rules from the customary system for application in state courts operating according to Western procedures. This was all highly artificial - removed from the realities of customary law on the ground. Its essential purpose was not to recognise but to monopolise customary law.

The colonisers constructed their systems of recognition not from the realities of customary law on the ground but from Western conceptions of native societies and native law. These presented an image of unchanging and rigid rules and immutable hierarchies: 'Life, to the savage, is a sort of charmed circle, of which custom marks the never-changing circumference'.⁹ The colonial misconception denied the capacity for change in customary law. It saw the only alternatives as the 'pure' pre-contact customary system and the introduced legal system. A belief in determinism or evolution - whether idealistic or fatalistic - led the colonisers to see customary systems as inevitably doomed to extinction.

These assumptions, and the approaches and systems developed from them, continue to dominate law and legal thought about the recognition of customary law not only in the Pacific but generally. As Bennett,

author of a recent book *Application of Customary Law in Southern Africa: The Conflict of Personal Laws*, comments:¹⁰

Little real advance has been made on the colonial solutions to the problems of legal pluralism. The states of Africa inherited from Europe a formal legal framework and a style of thinking which continues to be influential. New perspectives on legal pluralism are needed to provide a fresh understanding of the conflict of personal laws and to escape the unimaginative colonial approaches.

Lawyers have tended to assume that the colonial approaches are value-free legal techniques for recognition and also that they are the sum total of possible approaches. In fact, nothing could be further from the truth. But this assumption has discouraged awareness of the process of recognition itself as both problematic and capable of a much wider range of solutions.

iv The Implications of a Reassertion of Autochthonous Values

The changed climate of opinion engendered by independence and the reassertion of the position of indigenous peoples created the political will to recognise customary law but did not necessarily provide the techniques or the necessary 'paradigm shift' in the orientation of the legal system. The rhetoric spoke in terms of a 'renaissance of Melanesian values'¹¹ but the legal realities proved more intractable. As Ghai, constitutional advisor to a number of Pacific states, notes:¹²

The incorporation of customary values and practices and the accommodation of traditional authorities in the constitution was the most difficult and complex intellectual and technical problem in the whole exercise.

This was partly a problem of legal technique but equally it was a problem of changing fundamental assumptions and priorities. As Narakobi, Papua New Guinea's first Law Reform Commissioner, argues: '... why has there been no commitment to a Melanesian form of jurisprudence? In my view, the lack of development in this area is the direct result of a failure to formulate an appropriate philosophical basis from which it can proceed'.¹³

The ideology of legal centralism continues to dominate legal thinking in ways which exclude the possibility of recognising

customary law. This will be seen, in judicial decisions and in public debate, to be a constantly recurring theme. An example of it is the submissions of the New Zealand Law Society on a report on the Maori and the criminal justice system, *Te Whainga i Te Tika: In Search of Justice*. Two principles formed the basis of the Society's response:¹⁴

- (a) That it is essential for the health of the community that there be one law for all before it;
- (b) That the law should deal fairly with and be accessible to all that come before it - with appropriate allowance for their individual backgrounds and needs.

Yet there have been many recent calls in the South Pacific for some form of enhanced recognition of customary law. In Fiji, for example, successive governmental reports since 1981 have recommended:¹⁵

- (i) that consideration be given to the possibility of reintroducing Fijian Courts to be incorporated into the present centralised court system;
- (ii) that further study be carried out with a view to consider the desirability of incorporating customary laws, where appropriate, into our legal system.

In Australia, the Australian Law Reform Commission has published its monumental report *The Recognition of Aboriginal Customary Laws*.¹⁶ An earlier report by the Papua New Guinea Law Reform Commission awaits implementation.¹⁷ In New Zealand the Royal Commission on the Electoral System has recommended that:¹⁸

Parliament and Government should enter into consultation and discussion with a wide range of representatives of the Maori people about the definition and protection of the rights of the Maori people and the recognition of their constitutional position under the Treaty of Waitangi.

In Tuvalu, the recently revised Constitution gives much greater scope for indigenous values, and a current review of inherited Imperial legislation is concerned to increase the role of customary law. In Tokelau there is also a review of existing law, designed to make the legal system more truly responsive to local needs. The Constitutions of Papua New Guinea, the Solomon Islands and Vanuatu commit their governments to comprehensive reviews of the legal system in order to increase the role of customary law.

These are but instances of a sea-change in attitudes within state institutions to indigenous law in the South Pacific. This has

already been reflected to some extent in judicial decisions. It may be seen as part of a much wider regional and international process, concerned with redefining the place of indigenous groups within the nation state.¹⁹ It provides a direct impetus for the present study.

v Justice and Group Identity

The search for a new approach to state recognition of customary law involves a reexamination of the basis of such recognition as a matter of principle and an exploration of the range of possible practical approaches. Underlying any new approach must be a respect for the separate and autonomous sphere of customary law. As Sack has said in the Papua New Guinea context:²⁰

The purpose of recognising 'custom' as part of the underlying law is not to codify 'custom' and to integrate it into the country's legal system but rather to assist in changing the whole structure of this system gradually but fundamentally. As already stressed, the Law Reform Commission is charged with reforming the 'law' and not with reforming 'custom'. Indeed, the development of 'custom' is recognised - if only implicitly - as one of the few remaining prerogatives of the people of Papua New Guinea. 'Custom' is no more the business of the Independent State of Papua New Guinea than it was of the colonial state. Nor are the Independent State of Papua New Guinea and its legal system the servants of 'custom'. In this sense the Constitution continues the 'two spheres' approach. But the goal has changed dramatically. Instead of trying to change the people until they fit into the given framework of the state and its 'law', the aim is now to alter this framework so as to accommodate the (changing) needs and aspirations of the people. The Constitution does not accept that apartheid and eventual assimilation are the only two possible relationships between 'law' and 'custom', opting instead for what may be called a co-operative pluralism.

This cooperative pluralism involves the readjustment of state law in contemplation of the reality of indigenous orders within its jurisdiction. A principal justification of this readjustment may be found in the notion of justice itself, although a conception of justice which is wider than that informing the internal logic of the state system. As the Australian Law Reform Commission held:²¹

The Commission's proposals are presented not only, or even principally, as a concession to Aboriginal claims or demands. The recognition of Aboriginal customary laws is not part of a negotiated and independent settlement of claims, nor is it as such a matter of self government or autonomy. The recommendations are primarily a response to the legal system's

search for justice in dealing with the Aboriginal people of Australia, a people with distinctive traditions and ways of life. Seen in this perspective, the recognition of Aboriginal customary laws has the aspect of a principled response to legal and cultural diversity, and not just of another government 'service'.

The non-recognition of customary law creates factual situations of conflict with state law which are *per se* unjust. The non-recognition of customary marriage disentitles customary spouses from receipt of state benefits, denies the legitimacy of their children, fails to protect them from giving evidence in court against each other. Non-recognition of customary child care rules fosters the removal of children from their communities. Non-recognition of custom in the criminal law area allows an offender to be punished for an action deemed imperative under customary law, or may make for double punishment. Non-recognition of customary hunting and fishing rights may result in the failure to protect traditional food resources or in an offence against state law being committed in the collection of those resources. Non-recognition of sacred sites may result in the desecration of those sites. In all of these cases, and many more could be cited, the simple failure to recognise customary law causes injustice. The adjustment of state law to accommodate customary law may thus be regarded as a requirement of justice. A parallel may be drawn here with the Rawlsian idea of an 'overlapping consensus' as forming the basis of a political theory of justice in a situation of pluralism in Western liberal democracies, and with the basic rationale for Private International Law.²²

The recognition of customary law also has the result of fostering the identity and cultural coherence of indigenous groups. As Eggleston notes, again in the Australian context:²³

The official recognition of tribal law ... would not only solve some practical difficulties but would be tangible recognition by white society of the value of Aboriginal culture.

It reinvests in the indigenous group an internally based capacity to regulate its own affairs to a much greater extent. While the recognition of customary law is perhaps not the exclusive means of ensuring a greater degree of local autonomy, measures such as customary courts and the conferral of land and resource rights based on customary law do in fact have that effect.

The whole process entails a shift from a conception of law as essentially a territorial phenomenon - an aspect of territorial sovereignty - to a personal conception, law as an attribute of people belonging to groups within a larger society.

Inherent in this idea of recognition is that, while it will be a wide-ranging process, its range dictated by areas of concern to customary law where state law impinges, it will also be detailed. Ghai, consultant on the Papua New Guinea Customary Law reference, recommended that the Law Reform Commission eschew complete reliance on general recognition of customary law through its incorporation as part of the underlying law, and work instead on resolving problems of the interaction of laws in specific substantive areas.²⁴ In an important passage, the Australian Law Reform Commission elaborates its concept of 'functional recognition':²⁵

While the difficulties and uncertainties are not avoided by approaching the Reference in a functional way, issue by issue, they are made clearer and more manageable. A functional approach best accords with other important principles. It allows Aboriginal people to maintain control over their customary laws. It involves minimum interference with the way Aborigines choose to live their lives, and it leaves the way open for further change and adjustment when necessary. It also reduces the problems of translation, which are particularly acute given the conceptual differences that exist between the general law and Aboriginal customary laws. It enables use to be made of informal methods of adjustment and accommodation, while at the same time allowing for specific incorporation where this is appropriate. Problems of definition of customary laws and practices are for most part reduced to more manageable problems of evidence in particular cases. The differing experiences of Aborigines in different areas of Australia can thus be catered for. By contrast, no form of categorical recognition could be expected to deal with the wide range of legal and social questions raised by the Reference. The inherent inflexibility of such forms of recognition would tend to prevent the most just and appropriate solution being found for each case. Moreover, categorical forms of recognition emphasise, rather than minimising, the difficulties inherent in recognition. These include:

- the difficulties in, and the inappropriateness of, embarking on a search for any one all-purpose definition of 'customary laws and practices';
- the ambiguity of 'recognition' itself: to propose 'recognition' of Aboriginal customary laws is to begin, not to conclude, the inquiry;
- the need to secure to all Aborigines basic human rights, including the right to participate in the life of the general Australian community;

- the difficulties inevitably presented by the transitions which Aboriginal communities are experiencing and the long history of externally-caused disruption;
- the need to avoid, as far as possible, setting up separate, possibly conflicting, systems with resulting inefficiencies and inequities.

It may be argued that such an approach is a minimalist one. It assumes the continued operation of a body of state law, whose substance is not fundamentally transformed by custom. It denies the possibility of a national legal system based on custom. It dissects customary law, which is inherently a unified system, woven into the social, political, religious and economic relations of the indigenous group.

In response, one might recall that the conception of recognition presented here is about the adjustment of state law in order to respect the autonomous sphere of customary law. While the focus may thus be on particular substantive aspects of interaction, the net result may well be a significant transformation in the role of law in relation to indigenous groups. The extent of such a transformation will be partly a result of political decision but it will also depend on the continuing vitality of indigenous culture and on the extent to which state law is needed, whether for an ambient non-indigenous population or to service non-indigenous sectors of state policy or the economy.

B THE PACIFIC CASE IN COMPARATIVE PERSPECTIVE

I Distinguishing Existing Approaches

The approach to the recognition of customary law developed here should be distinguished from a number of other possible approaches to the subject. In the first place, this is not a thesis about the content and nature of customary law as a self-contained system. That type of enquiry is essentially the province of anthropology.²⁶ It could only be meaningfully carried out by empirical research and within the narrow context of a particular community. The South Pacific has, as a region, been the subject of extensive anthropological research. The process of constructing an ethnographical record of indigenous societies began with the earliest European contacts. Many of the classic works of anthropological

literature are based on Pacific research. Further, some of this research concentrated on legal anthropology – the task of determining the nature of indigenous normative orders and methods of dispute resolution. Malinowski's *Crime and Custom in Savage Society* (1926), which rapidly established itself as a standard reference work, was based on research in the Trobriand Islands of Papua New Guinea. His was only one work of many concerned with isolating legal elements in Pacific societies. Yet this research was almost never applied to the resolution of practical problems posed by the interaction of customary law with state law. Typically it focused on the micro-scale of an isolated community. Although anthropological research was invariably conducted amongst groups who were now part of a larger unit, the colonial or independent state, it frequently ignored this interface. Thus Simon Roberts prefaces his classic *Order and Dispute: An Introduction to Legal Anthropology* with the comment:²⁷

Quite apart from questions of perspective, this does not pretend to be a comprehensive survey of the field. In particular, I have neglected the important subjects of pluralism and change; and said nothing about the relationships of these small-scale societies to those larger nation states within which they are now all encapsulated.

Here Roberts draws attention to the limitations of an anthropological approach in the present context. Even where anthropology attempted to examine legal aspects of indigenous societies, it rarely examined how they might fit within a broader framework. Nor did it attempt to explain the historical transformations central to the encounter between customary laws and state law. This does not mean that an approach to recognition can ignore the content of customary law. Obviously it cannot. Content and nature shape the type of adjustments required of state law. However, what is involved in the process of recognition is itself deeply problematic and the primary focus here.

Second, we are here concerned with taking a critical look at the nature and processes of recognition. Central to the argument is the proposition that existing approaches are not the only possible ones, nor are they value-free or ahistorical. They are essentially rooted in a colonial paradigm. What might be called a 'formalist' tradition of research into the recognition of customary law assumes that the complex and technical branch of colonial law known as 'the

interpersonal conflict of laws' exhausts the possible field of study. These works are concerned with issues of recognition but they are essentially chronicling the internal working out of a particular type of plural legal system constructed to meet colonial requirements. Key works in this formalist tradition are Allott's *New Essays in African Law*,²⁸ and Hooker's *Legal Pluralism*.²⁹ There are several other notable regional studies.³⁰ Some attempt has been made to explore the interpersonal conflict of laws on an internationally comparative basis.³¹

These works are useful insofar as they define current structures for legal pluralism and show how the courts have coped with problems of interaction. However, they yield little in the way of policy approaches for the future, and they do not attempt to place the system studied in a social context. Further, the interpersonal conflict of laws enquiry leaves out of account many areas of interaction which do not easily fit its conceptual categories. These areas typically include topics of central importance to indigenous peoples: land and economic rights, crime, local dispute resolution. In any event, the interpersonal conflict of laws method has not characterised either past or present approaches or the policy debate in the South Pacific. Isolated attempts to place the debate in this framework seem doomed to obscurity and irrelevance.³² At least, the interpersonal conflict of laws can only become relevant once a series of prior, and more important, questions have been asked and answered. This is what is attempted here.

Third, a new school of revisionist scholars have sought to understand what happened to customary law in the colonial period. Much of this writing is implicitly determinist in that it argues that colonialism had a fatally transforming effect on custom.³³ It performs a vital demythologising function, placing the formalist approaches in a social and historical context. The 'fatal impact' theories prompt a deep scepticism as to what was done in the name of 'recognition' in the colonial period. However, they are rarely concerned to pursue the implications of the theory for present policy. This is beyond the remit of a critique of colonialism and fails to take account of two fundamental propositions on which the present study is based: the persistent fact of pluralism and the implications of a reassertion of autochthonous values. In fact, such theories frequently harbour a

dichotomy between regarding customary law as an element of a past form of social relations, which has or will pass away under the impact of capitalism and the rise of the state, and, on the other hand, regarding it as a persistent aspect of popular resistance, an 'alternative version'³⁴ of customary law. Either way, such studies do not explore the context of the present debate, nor the techniques needed for the implementation of recognition in state law.

This is not to say that we are here prescribing specific solutions for Pacific states for the recognition of customary law. That is a matter for Pacific governments in consultation with their indigenous citizens. There are no simple solutions, and, as has been argued, recognition has to proceed in a functional way and in many specific contexts. However, this process cannot proceed until the conceptual and historical context has been established and a range of possible techniques elaborated. Hence the justification for this study.

II A Pacific Regional Study

At first sight, the South Pacific seems an unduly broad geographical area in which to examine the recognition of customary law. Yet the region shares some common characteristics which justify a comparative approach. Material has been drawn from the following countries:

- Australia
- Cook Islands
- Fiji
- Kiribati
- Nauru
- Niue
- New Zealand
- Papua New Guinea
- Solomon Islands
- Tokelau
- Tonga
- Tuvalu
- Vanuatu
- Western Samoa

These countries vary enormously in size, wealth and population, from the subcontinent of Australia to the micro-state of Tuvalu whose nine coral atolls have only a total of 26 square kilometres supporting a population of just 9,500. They encompass 'traditional' subsistence

lifestyles and urban ones. Indigenous cultures are very varied. Within Papua New Guinea alone, there are over 700 language groups with distinct cultural patterns. In some countries, such as Samoa, the culture achieved a much more unified pattern but that was not accompanied by political unity prior to colonisation. In Australia and New Zealand the indigenous people now find themselves heavily outnumbered by a settler population and, as a result, do not exercise political control. Elsewhere some continuing control may be exercised by a metropolitan power (Tokelau, Cook Islands, Niue). In other island states the indigenous people have, since decolonisation, achieved political control, although there may still be significant immigrant minorities. In Fiji there is a tense coexistence of native Fijians and Indian Fijians. Cooperation. It has spawned a shipping

Wherein lies, then, the case for a comparative study? In the first place, all of the countries surveyed were within British control during the colonial period. Only Tonga resisted full colonisation successfully. In the case of Papua New Guinea, control was in Australian hands and in the case of Western Samoa, Tokelau, Niue and the Cooks, New Zealand was the colonial master. But the result as a matter of law was very similar. As Chapter II will show, the extension of British sovereignty over the Pacific followed its own particular regional dynamic. Everywhere the resulting state legal system is based on an heritage of English law. Thus the content and procedures of state law are directly comparable amongst the countries surveyed. Further, the broad lines of approach to the recognition of customary law stem from a common heritage of colonial principles and ideology. Journals devoted to the Pacific. All of this adds up to a

This commonality would have been lost if the French and American territories of the South Pacific had been included. In the French case, the territories of New Caledonia, French Polynesia (Tahiti) and Wallis and Futuna remain colonial possessions of metropolitan France, which still exercises considerable control over their governance. The introduced legal system and its language are French. The French colonial system for the recognition of customary law follows different patterns to the English system.³⁵ The United States is only slowly divesting itself of its Micronesian UN trust territories and possessions (Federated States of Micronesia, Marshall Islands, Palau, Guam, Northern Mariana Islands). Strategic considerations have

encouraged the US to retain considerable control. Although these territories are beginning to experiment interestingly with customary law issues,³⁶ their American heritage often casts these issues in a different light. For example, in American Samoa issues of cultural relativism in human rights are cast in terms of the applicability of the Bill of Rights in the US Constitution.³⁷

More fundamentally, the common Commonwealth membership of the countries under discussion (pace Fiji's recent lapse) has made of them both a political community and a community of discourse. The South Pacific Forum is the regional political organisation, on which all the countries studied are represented.³⁸ The Forum has undertaken an ever-increasing range of activities, assisted by its secretariat, the South Pacific Bureau for Economic Cooperation. It has spawned a shipping line and a fisheries agency, and has concluded a number of international conventions including the Rarotonga Treaty establishing a Nuclear-free Zone.³⁹ Also at the regional level is the University of the South Pacific, based in Suva. The University serves all the island states of the region save Papua New Guinea which has its own university. The University of Papua New Guinea and the newly-formed Pacific Law Unit of the University of the South Pacific share an interest in regional law studies. The Institute of Pacific Studies at the University of the South Pacific has already done much to foster debate in law-related areas. Comparative Pacific law courses are now offered at a number of Australasian universities. Moreover, although there is no Pacific law journal, there is the *Melanesian Law Journal*, which publishes articles of general Pacific relevance, and a host of general journals devoted to the Pacific.⁴⁰ All of this adds up to a significant community of discourse which has been further enhanced by a regular Pacific Island Law Officers' Meeting,⁴¹ and now a South Pacific Law Conference.⁴² Furthermore, there are a number of studies treating legal topics on a regional basis.⁴³

These factors create a climate for comparison. The reassertion of autochthonous values and the consequent impetus for state law reform which have surfaced to some extent in all the countries under study justify the application of the comparative method to the issue of state recognition of customary law. There is no attempt to exhaust the detail of the law in every country. Rather, material is used by way of illustration of more general comparative themes. This, in

turn, should assist in an understanding of state recognition which is relevant not only to Pacific states but also to other countries grappling with the implications of pluralism.

III Intersection with Other Themes

Pluralism is not unique to the Pacific, nor to the colonial encounter with indigenous societies. There is no special magic in the state law/customary law dichotomy. As Chanock points out in an African context:⁴⁴

It is pressing the obvious to point out that the disparity and possible conflict between different kinds of law in society is not one unique to Africa, or to colonialism, or to foreign rule, or to cultural conflict. It is a problem arising out of the growth of the state and its modes of regulation everywhere, both where communities are relatively homogeneous and where they are culturally and regionally diverse.

State recognition of customary law is also to some extent an arbitrarily isolated subject which intersects with a number of other themes. The move towards informal dispute resolution is a current theme in Western legal reform, as well as a basis for the recognition of custom.⁴⁵ One may also view the recognition of custom as one means of fostering an alternative, people-centred, participatory development.⁴⁶ There is an interface here with constitutional mechanisms for decentralisation or self-determination.

Especially in the case of indigenous minority peoples, such as the Australian Aboriginal people or the New Zealand Maori, recognition issues tend to be bound up with a whole raft of issues concerning their position and rights, including their autonomy, land rights, language and culture, non-discrimination and ethnic relations and treatment by the state legal system. Only a fraction of these issues have anything to do with the recognition of customary law *stricto sensu*. But they provide a social context which shapes the nature of the enquiry.

One might conclude this section by recalling that the idea of 'law as tradition' is as much a part of the ethos of English law as it is of any customary system in the Pacific;⁴⁷ and that the correlation between law and the customs of society is always inexact. The Pacific case is but one instance, admittedly with its own dynamic, of a congenital condition of all legal systems.

C THE COURSE OF THE ARGUMENT

Despite the growing community of discourse on law in the Pacific region, this is in many respects a first work in its field, in the sense of a comparative assessment of state recognition in the South Pacific designed to illuminate some more general questions about the recognition of customary law as an aspect of legal pluralism. Within this mandate, the work adopts a structure for addressing the issues which is thematic and which reflects major concerns in the theoretical literature and the priorities as expressed by the indigenous peoples of the Pacific.

Chapter I, 'Legal Pluralism and Legal Theory', locates the discussion within a general framework of legal pluralism studies. As has been argued, a major impediment to practical progress on recognition is ideological - an inability to move beyond the paradigm of legal centralism and perceive the limits of state law. This 'paradigm shift' sheds new light on the perennial debate over the nature of customary law, at least insofar as it is necessary to answer that question for the purposes of a study of interaction between customary laws and state law. In fact, as Chapter I will demonstrate, these definitional questions may be less problematic in the interaction context than has been supposed. There is no irreducible incommensurability between state law and customary laws. Chapter I concludes with a comparative discussion of legal methods for dealing with the interaction of legal systems; with the range of options open to state law in dealing with customary orders - a range which includes various forms of 'recognition'; and with the policy arguments for and against recognition. Here will be considered the related themes of informal dispute resolution, participatory development, indigenous rights and self-determination. Much of the focus in the arguments against recognition rests on human rights grounds, which are pursued in detail in Chapter IV.

Chapter II, 'The Colonial Experience and the Idea of Customary Law', puts in place the second major limb of the argument: an analysis and critique of colonial attitudes to the recognition of customary law, attitudes which continue to dominate thought on the subject. It is, then, primarily a history of ideas. But a necessary prelude is a precise investigation of the *de jure* effect of British imperial

expansion and the introduction of English law on indigenous law in the Pacific. This survey shows that, while broad concerns of colonial law to respect indigenous sovereignty and indigenous law were at play in the Pacific, the region had its own distinctive dynamic. In Australasia this dynamic was dominated by white settler interests, while in the islands the idea of government for the benefit of the indigenous peoples was more influential, encouraging greater protection of customary law.

Having established the legal basis for recognition in colonial law, Chapter II proceeds to discuss the application of various theories about the impact of the colonial experience on customary law. It looks, firstly, to the ideas motivating the colonisers. These are put in perspective through what have been described as the 'fatal impact' theories which justify the argument that the systems for recognition constructed in the colonial period were constructed to meet the needs of colonialism and were thus coloured by it. However, the evidence suggests that indigenous communities showed considerable independent vitality, a vitality partly expressed through the persistence of customary law. The colonial version of custom was thus a distortion of the real 'alternative' version. There is a similar gap between recent uses of custom as a political symbol and the reality on the ground. A discussion of 'the politics of custom' closes Chapter II's treatment of the idea of customary law.

Chapter III, 'Custom as a Source of Underlying Law', looks at the progress of schemes for the general recognition of custom as a source of rules in the state legal system. The achievement of independence and a desire to find an autochthonous validity for the legal system, led to a widespread movement to include custom as a source of underlying law. Yet, in many respects, the framers of the constitutions were simply deferring the issue, beginning rather than concluding the discussion, through this method. Those who were left to bear the responsibility for transforming the system were the superior court judges who, as the cases show, are both unwilling and ill-equipped to take up the challenge. The search for substantive norms for a national legal system from the diverse rules, values and procedures of indigenous groups is, if not fundamentally misconceived, at least an insufficient form of recognition. Law reform proposals based on the same premises are equally infected with the same faults.

While the attempt to construct an indigenous jurisprudence out of customary laws may well be fatally flawed, this does not mean that the underlying law can take no account of custom. Chapter III proceeds to investigate the capacity of the common law itself to recognise custom and recent progress in Australasia towards this end. Chapter III concludes with some projects for the general recognition of customary law, which attempt to put into practice the concept of functional recognition outlined above, and thus to address the problems of recognition which general incorporation brushes aside.

Chapter IV, 'Human Rights and Cultural Relativism', is devoted to the working out in a Pacific context of what is often claimed to be the principal source of guiding policy in the recognition of customary law: international human rights standards. This takes place against the background of wider philosophical and international law debates about the extent to which the international human rights standards are in fact expressive of Western values and therefore either inapplicable or capable of different interpretation in different cultural contexts.

All Pacific states have accepted the international human rights standards, whether through adherence to international conventions or through constitutional Bills of Rights. However, the implications of these standards for indigenous societies were not always fully perceived at the time of reception. This chapter considers these implications on two fronts. First, the concept of discrimination - can it be reconciled with the preservation of group identity and customary authority inherent in the recognition of customary law? It is argued that, while in some cases recognition may have a discriminatory effect, it is not *per se* discriminatory. On the contrary, basic human rights objectives are likely to be enhanced. Secondly, Chapter IV considers conflicts between custom and human rights across a broad spectrum of particular cases. These suggest that, while state law has always been concerned to draw a line on its recognition of other systems, a narrow interpretation of human rights standards may well have an unjust effect in customary situations. The state should not abdicate its responsibility to contain abuses of power wherever they occur and to protect the individual. On the other hand, current debates in the Pacific, and recent reforms, share with recent developments in the international human rights arena a fundamental uneasiness about the rights of the individual *v/s* - *à* - *v/s* group rights, community and individual.

Subst Chapters V and VI explore two substantive aspects of recognition: land and dispute resolution. These have both occupied a central space in Pacific debates on recognition. They allow for the detailed investigation of themes discussed in earlier chapters. Yet, in important ways, land and dispute resolution involve their own special considerations.

Chapter V, 'Disputes: Custom as Process', takes as its basis the idea of customary law as being at least as much a process for the resolution of disputes as a set of norms. These processes in themselves have to be taken into account by state law. However, the establishment of 'customary courts' may only be indirectly related to customary processes. They can frequently lead to the more rigorous administration of state law or, at least, to the imposition of state court processes. Nevertheless, local justice mechanisms can also allow for a community based justice system, more responsive to local needs and values. They can provide a greater degree of participation and accountability than is possible in a centralised justice system. Perhaps for these reasons, village or island courts administering their version of customary law have been widely established in Pacific states, or at least proposed. This chapter evaluates these courts and their role as enforcers of customary law.

Chapter VI, 'Land: Custom as Title', finds its context in a vigorous land rights movement in the South Pacific. Although this developed as a response to European settlement and the ensuing alienation of indigenous lands, the land rights movement relies on customary law as the basis - political and legal - for the entitlement of indigenous peoples. This has been equally true in Australasia and in the island states. At the point of defining entitlement, the land issue raises questions of commensurability - competing notions of the basis and definition of rights in land - and the effect of registration as a form of recognition of customary land law.

Within the constraints of this thesis, it has been necessary to eschew direct and detailed consideration of many other substantive issues within the recognition of customary law, issues which deserve their own attention, such as marriage, custody and adoption, specific criminal offences, fishing rights, even accident compensation for work in the traditional economy and indigenous business groups. The aim has been to provide a new theoretical context for state recognition.

Substantive issues have, for the most part, been woven into the theoretical discussions as illustrating general themes. Nevertheless, this is only a beginning, a prelude to a multiplicity of specific enquiries.

A CONCEPTIONS AND MISCONCEPTIONS

The study of state recognition of customary law is the study of the reactions of the state to the existence of indigenous legal orders within its jurisdiction. It addresses the question: how may the state come to terms with the fact of legal pluralism? Although there is widespread acceptance in the Pacific that pluralism is a characteristic feature of law in Pacific societies, discussion and solutions have been hindered in the first instance by some basic conceptual difficulties surrounding pluralism, custom and recognition. The purpose of this chapter is to focus the enquiry by looking to the nature of legal pluralism and the place of the recognition of customary law within it.

This is a necessary process if we are to get beyond the narrow range of solutions derived from colonial models and begin to formulate a range of options open to the state, and the policy bases for different choices. Yet it is complicated by the lack of any generally agreed criteria or approach. As Snyder comments: 'There is, to date, no satisfactory theory of legal pluralism'.¹

The first task, then, of this chapter is to describe the concept of legal pluralism and the range of possible legal pluralist studies. The basic proposition here is that an ideology of legal centralism is intimately tied up with state law. Legal centralism restricts our ability to perceive other sources of law operating to some extent independently of the state and sometimes in conflict with state law. Contrary to the ideology, 'Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion'.² Seen in this perspective, as the fact of a multiplicity of legal orders within society, legal pluralism is as much a feature of Western industrialised societies as of the specific case of the transfer of Western law to non-Western societies studied here. This has been obscured historically by the rise of the state. Studies of pluralism in Western societies are helpful to the extent that they illuminate

I LEGAL PLURALISM AND LEGAL THEORY

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the way multiple legal orders interact. They also serve as a reminder that legal pluralism is neither simply a by-product of colonialism, nor in itself a policy or goal capable of adoption or rejection, 'it is neither desirable nor undesirable in the abstract'.³ It is thus possible to construct a theory of legal pluralism and an analysis of the methods of recognition of customary law which is ahistorical and value-free before examining the situations of particular countries in a social and historical context.

Having established a general model of legal pluralism, it will then be possible, in Part C, to focus more particularly on pluralism in the context of the encounter between the customary law of indigenous communities and an imported system of state law. Here one must confront the classic conundrum of legal anthropology: is custom 'law' or, put another way, is there any basis for comparison between customary law and state law? In one sense this is less problematic in a study of the interaction between customary law and state law than it would be in a study of custom operating in isolation. The incidence of conflict between the two systems itself defines the focus. Attempts to delimit *a priori* the legal element in custom could simply impose the standards of one system on to the other and ignore relevant concerns. In fact the question of abstract definition only arises in the context of particular types of recognition, especially the general incorporation of custom as a source of underlying law.

This is not to deny fundamental differences in approach between custom and law. These differences are acutely perceived by people living within a dual system, and are a major reason for a system of recognition. But the problem of, to use Kuhn's phrase,⁴ the incommensurability of two competing paradigms continues to arise, both generally and in specific cases, in regulating the interface between law and custom.

Yet state law, and specifically English law as a system of state law, does already contain some rules and techniques for managing pluralism. Part D examines five comparative sources of rules of recognition for their relevance to the present study.

The rules of Private International Law are a recognition of a plurality of systems of private law at the international level. Private International Law concedes that in certain circumstances a relationship or dispute or status will be more appropriately governed

by a foreign system of law than by domestic law. In so doing, it accepts, in a limited fashion, the principle of the personal, rather than territorial, application of law.

The idea of the personality of laws has had a much wider currency in Western legal thought, especially before the rise of the modern nation state. It also informed the system of rules developed to manage co-existing systems of law in colonial territories. These rules were thus called the interpersonal conflict of laws. The problems of pluralism in the colonial period were perceived as interpersonal because the main emphasis lay in separating the colonisers, who brought with them a European system of law as their personal law, from the colonised, who retained their customary or religious system.

In developing the interpersonal conflict of laws the colonial judge and legislator looked initially to Private International Law as an analogy, and to the rules for the recognition of a local custom in England. Although only a marginal source of law in England, the latter has proved a potent, if less than wholly appropriate, source of rules for the common law recognition of customary law elsewhere.⁵

Finally, English law is facing a new pluralist challenge, with some parallels to the recognition of indigenous customary law, in the need to accommodate the ethnic customs of immigrant communities. Here the problem is initially one of Private International Law - immigrants carry with them their foreign personal law. But it is becoming increasingly a matter of reformulating domestic policy to facilitate a plural regime.

Having examined these various responses to the problems of pluralism, it will be possible to classify in Part E the range of options open to the state in dealing with indigenous customary law. The interpersonal conflict of laws is only one possible response to this central issue of what is involved in 'recognition'.

Finally, Part F, 'Why recognise customary law?', discusses the general policy arguments often raised in the Pacific and elsewhere. These arguments have to be addressed because the recognition debate is often conducted at a high level of generality. Recognition is rightly perceived as involving fundamental issues about the nature and shape of society and law's place and function in it. There is no avoiding that. Yet care should be taken to ensure the specific applicability

of policy arguments. The contexts of the particular area of the law, the type of society, general social policies and the type of recognition envisaged all alter the relevance and cogency of particular policy arguments. There is no one right answer.

Concerns about the shape of society cut both ways. Objectives of nation-building, development, modernisation may be contrasted with alternative development, the fostering of participatory institutions and decentralisation, and ethnic diversity.

There is also a human rights context to the policy debate. Detailed consideration of whether the recognition of customary law may involve discrimination or conflict with other human rights standards is reserved for Chapter IV. Nevertheless, there is also the positive import of developing notions of indigenous rights, which are receiving attention at the Public International Law level. We must therefore examine the interrelationship between self-determination (at least as a political principle for indigenous peoples, if not as a right at international law) and the recognition of customary law.

B WHAT IS LEGAL PLURALISM?

I Western and Non-Western Contexts

At first sight, law in Pacific societies bears an obviously pluralistic aspect. Yet it is surprisingly difficult to define exactly wherein the pluralism lies. In some countries such as, for example, Australia until very recently, an investigation of the content of the state legal system would yield many different sources of law (statute, the Common Law, the Constitution etc) and many distinctions between classes of persons (the sane and insane, minors and adults etc) but none of this seems to amount to a definition of the Australian legal system as pluralistic. The pluralism in Australia, at least in the context of the present study, seems to result from a social or cultural distinction between the Aboriginal people as an ethnic group and the rest of Australian society. The legal aspect of this pluralism is the interaction between the customary law of the Aboriginal people and general Australian law, whether or not the latter recognises the former, and reflects this recognition on its face.

However, while a definition of legal pluralism in terms of the content of state law is clearly inadequate, so too is a definition of

legal pluralism based on ethnic pluralism. A society, such as that of Western Samoa for instance, may be highly ethnically homogenous and yet it may still be said that legal pluralism is the major characteristic of law in Western Samoa.

These examples are a *propos* of suggesting that, while legal pluralism has presented an obvious umbrella term for consideration of the state law/customary law issue as it relates to indigenous peoples in the Pacific and elsewhere, the meaning of the term is by no means clear. As the examples illustrate, a definition cannot be sought either solely by reference to state law or solely by reference to social organisation. Rather legal pluralism is located in the combination of law and society.

In seeking to elaborate a descriptive theory of legal pluralism, this section will draw upon theories about the operation of law in Western societies. This approach may seem perverse. After all, legal pluralism is often held up as a feature of law which distinguishes societies which have been the subject of colonisation from European societies. At a session on pluralism at the XIth Congress of the International Academy of Comparative Law, the Rapporteur Dr C G Powles noted:⁶

I requested Reports from all countries possessing a plurality of legal systems. The jurisdictions of Europe, both Western and Socialist, denied the existence of pluralism within Europe.

The decision to reverse the usual context is deliberate. First, until recently, research into law in colonised societies, while acknowledging the centrality of legal pluralism, has essentially avoided considering its true nature and dynamics. This is partly a problem of the orientation of the relevant research disciplines. As Roberts, speaking of the African context, reminds us:⁷

... anthropologists tended to explore the relationship of different dispute settlement agencies within a single society, rather than the relationship between these and adjacent agencies of the national legal system In sharp contrast, lawyers typically did their research within the national legal system Lawyers approached problems of legal pluralism in Africa using the techniques developed under the private international laws of modern Western states This approach contemplated the co-existence of two similar legal systems, whose rules operated in the same way and made no allowance for the possibly different characters of the systems involved.

Further, the creation by state law of highly complex plural legal systems, methods by which the state formally recognised customary law, has obscured consideration of the *a priori* factual situation of pluralism. The whole question is overlaid with ideas about the encounter between indigenous societies and Western colonisers, the methods of colonial government and age-old debates about the nature of law and custom which obstruct a direct appreciation of the factual nature of pluralism.

Finally, it is a central proposition of this thesis that legal pluralism is a feature of law in every society. There is no divide between societies where law is pluralistic and those where it is not. Of course there are differences in the type and degree of plurality but these differences do not materially change what legal pluralism is.

II The Ideology of Legal Centralism

The search for a descriptive theory of legal pluralism begins by refuting the ideology of legal centralism which, it is argued, forms the paradigm for our generally held conception of law. Griffiths introduces this ideology:⁸

An important part of the ideological heritage of the bourgeois revolutions and liberal hegemony of the last few centuries is a complex of ideas concerning the nature of law and its place in social life. According to what I shall call the ideology of *legal centralism*, law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organisation exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state....

It is the factual power of the state which is the keystone of an otherwise normative system, which affords the empirical condition for the actual existence of 'law'. Hence the necessary connection between the conception of law as a single, unified and exclusive hierarchical normative ordering and the conception of the state as the fundamental unit of political organisation.

Precisely because it is an ideology, a mixture of assertions about how the world ought to be and *a priori* assumptions about how it actually and even necessarily is, legal centralism has long been the major obstacle to the development of a descriptive theory of law.

For present purposes, the following elements of the paradigm of legal centralism deserve particular emphasis. The central notion is

that of the connection between law and state. This has a number of facets:

- (i) the *imprimatur* of the authority of the state defines the existence of law. Thus, rules, normative orders, methods of dispute resolution which occur outside the authority of the state cannot by definition be law;
- (ii) law is territorial in application. That is, the geographical boundaries of the state, the limits of the territorial power of the sovereign, define the limits of the application of law. Within these territorial limits, law is presumed to apply to all persons and all acts present or occurring there;
- (iii) the power to make law flows from a central source. All exercises of law-making capacity, whether by public officials or by private individuals (as in the case of the creation of contracts, wills, trusts etc), are exercises of powers bestowed by the state legal system, and defined by it. This creates a pyramid-shaped view of law as proceeding in an orderly and internally coherent fashion from a single source, whether that source be simply conceived as the sovereign or, more sophisticatedly, as a fundamental Rule of Recognition;
- (iv) the law is a logically complete set of rules which is sufficient to govern all factual situations and which, at any given point in time, is certain in content and capable of ascertainment;
- (v) the sovereign is omniscient. There are no limits to the subjects or persons concerning which law may be made. Coupled with the principle of omniscience is an assumption of the efficacy of law. Law is the prime method for solving social problems or effecting social change. Changes effected by law are generally assumed to be effective, in the sense that, backed by the power of

the state, they have consistent results and they have the results intended by the law; (vi) society and the state are congruent notions in the sense that the relevant social field for consideration of the social effects of law is the total population of the state which, in a general way, expressed in the notions of popular sovereignty or social contract, legitimates the state. There are two corollaries of this. First, within 'society' there are only a mass of individuals, citizens-isolate, each of whom is to be treated identically in contemplation of law. Second, this means that groups within 'society' are irrelevant to the operation of law. Of course in civil society, individuals may and do belong to many groups but the separate identity of groups as such is not a concern of the law. From this is derived the principle of the uniform application of law, 'one law for all'.

These propositions are not elements of a description of law, but rather constitute commonly held notions about the role of law, which circumscribe the limits of possible approaches taken by legal professionals. They thus have validity only to the extent that they reflect an ideology.

The reason for the growth of this ideology may be found partly through the historical phenomenon of the rise of the state, and with that the concomitant growth in the role of the national legal system. As Galanter suggests:⁹

One of the striking features of the modern world has been the emergence of those institutional-intellectual complexes that we identify as national legal systems. Such a system consists of institutions connected to the state, guided by and propounding a body of normative learning, purporting to encompass and control all other institutions in the society and to subject them to a regime of general rules. These complexes consolidated and displaced the earlier diverse array of normative orderings in society, reducing them to a subordinate and interstitial status.

Belley argues that it is the centralisation of law in the hands of the state, a phenomenon which has been occurring in Western societies since the sixteenth century, which has engendered a centralist vision and obscured non-state forms of legal regulation.¹⁰

The centralist view has left its imprint deep in legal scholarship and not just in the positivist tradition which has been so much concerned with the relationship between law and state. Fitzpatrick shows that equally Marxist scholarship has not been responsive to legal plurality.¹¹

... the causal dynamic of the mode of production in Marx's work and his schema of stages in which a mode successively replaces another involve the law characteristic of the prior mode being replaced by the law characteristic of the latter. In this general tendency of his work Marx was, of course, in very good company. Broadly, Marx, Weber and Durkheim were all primarily concerned with the emergence and existence of modern society - with capitalism, rationality, bureaucratic domination, an anticipated organic solidarity. Traditional orders and the family were being swept aside or rendered marginal - 'the woof of time is every instant broken, the track of generations effaced'. It was a new-created world. In this world it is not just the case that a new type of law displaces earlier types. Rather, the essential 'law' is not only defined by the new world but is definitive of it.

III The Limits of State Law

This is not the place to attempt any general critique of the centralist/statist conception of law, a task which would involve consideration of most of the central concerns of the philosophy of law. The present, modest objective is to show how such a conception inhibits the study of pluralism. It does so firstly by denying the existence of non-state forms of legal regulation, either by arguing that such forms are really delegated exercises of state law or, alternatively, by denying that such forms are 'law' at all. Secondly, and as a consequence of this, the centralist view does not consider the interrelation of state and non-state law to be problematic.

In contrast to the centralist view, the sociology of law has repeatedly discovered the existence of alternative sites of law-making in society and has been concerned to examine the role of state law in relation to these other sites and modes of regulation. Modern Western societies in fact contain a proliferation of groups and associations which are to some extent 'self-regulating', which create their own 'indigenous law' or 'private justice'. One might instance: schools and universities, hospitals, social clubs, neighbourhood groups, religious or ethnic communities, the family, the workplace. These are all groups, frequently overlapping in the sense that an individual may

belong to or be affected by several, which may create and administer their own law. In doing this they are neither entirely separate from the influence of state law nor are they entirely dominated by state law and subsumed by it.

This tension between internal ordering and dispute resolution and external control by the state has, for instance, characterised the debate about contracting and international commercial arbitration within the international trading community.¹² However, some of the most acute recent analyses have been in the context of the factory and labour law.¹³ Labour law lends itself particularly well to a pluralist analysis because state law reforms in this area have a history of at best partial success and because the factory or workplace is a highly regulated environment, generating a multitude of rules and fora for dispute resolution. Henry's study¹⁴ began as an attempt to contrast modes of dispute resolution and regulation depending on the type of workplace organisation - capitalist company to worker cooperative, with the latter alone developing a concept of private justice:¹⁵

... I began with the view that private justice existed as a separate, alternative form of justice and one which might promise us a glimpse of future forms of law suitable to post-capitalist or even socialist legality. In the course of research it became apparent that this view was simply wrong. Not only was it found that state law relies upon private justice to exercise some of its control functions, but private justice itself relies on state law to exercise its discipline. The one form is not separate from the other but each are necessary parts of the other. At the same time, however, each part has its own limited autonomy. They exist together as mutually dependent but semi-autonomous parts of a totality of social control.

... different kinds of organisational structure accommodate aspects of the whole range of theoretically identifiable forms of private justice. Thus, for example, companies with a hierarchical decision-making structure and which were firmly committed to the private ownership of property, not only exhibited aspects of the punitive and corrective forms of discipline, but also relied on collective peer group discipline - sanctions taken by workers on their fellows. Conversely, worker co-operatives, although explicitly adopting collective decision-making policies and conferring equal status on their members, also exhibited an executive form of elite decision making in discipline which might be thought to be exclusive to the harsh authoritarianism of the punitive disciplinary form. Perhaps most surprisingly these co-operatives also relied on state law, in spite of their professed independence and 'alternative' approach.

Thus pluralism was found to be a characteristic of law in the workplace regardless of the form of social organisation of the

workplace. More generally, legal pluralism constitutes a 'pervasive reality'¹⁶ which helps to provide a more complete explanation of how law actually operates in any society. By conceiving of state law as only one method of regulation and dispute resolution, pluralism allows for interpretations of when and why people choose state law to regulate their disputes as opposed to other fora; of how state law norms may be influenced by group norms; of the political uses of state law as a 'backup' in private disputing.

Thus far it has been argued that:

- (i) legal pluralism is neither an attribute of the internal structure of a state law system nor of the structure of society, but of the operation of law in society;
- (ii) as such, it is not a means of distinguishing some societies from others. Legal pluralism in one form or another is an attribute of law in all societies;
- (iii) it consists in a recognition that, contrary to its own ideology, state law is not the only form of regulation or dispute resolution in society and that many groups within society have a capacity to create their own rules and dispute resolution processes;
- (iv) the resulting picture is one of a continuous interaction between these forms of ordering, 'indigenous law' and state law.

The challenge now is to find a model of law in society which enables us to encompass this phenomenon, to classify legal pluralist studies, and to begin to pursue the 'shadows' between indigenous law and state law, the manifold facets of interaction: suppression and resistance, recognition and reaction.

iv Descriptive Models of Legal Pluralism

Pospisil provides a starting-point here with his idea of 'Legal Levels and Multiplicity of Legal Systems'.¹⁷ His perspective is anthropological. He begins by showing the influence of legal centralism on anthropological thinking. An insistence on law as the property of society as a whole has led many anthropologists either to deny that primitive societies had law at all or to insist on an

undifferentiated pattern which takes no account of the differing influences of subgroups. Pospisil suggests instead that law has to be understood in relation to the component parts of the social structure. In order to explain this relationship, Pospisil develops a concept of 'legal levels'. Every subgroup has its own legal system but these systems may be ranked:¹⁸

Since the legal systems form a hierarchy reflecting the degrees of inclusiveness of the corresponding subgroups, the total of the legal systems of subgroups of the same type and inclusiveness (for example, family lineage, community, political confederacy) I propose to call *legal level*.

While his conception of law is pluralistic in the sense that it sees law as an essential attribute of any social group, of which there may be several within a wider society, the description of the resulting situation in terms of legal levels is unsatisfactory. It implies that legal systems can always be ranked and that there will always be rules regulating the precedence of one system over another. Pospisil supports this interpretation by examples from Papuan society which suggest that each subgroup has competence over particular subjects and disputes, and by including in his Western examples the federal state such as the United States. Yet he also goes some way towards recognising the insufficiency of a neat hierarchy of legal levels by mentioning the criminal gang - undoubtedly a law-generating subgroup, but impossible to fit into an ordering of legal levels. He qualifies his somewhat static notion of levels by introducing the concept of 'legal power' which, he suggests, need not reside at the apex of the pile of legal levels (where a centralist/statist view would place it) and which may shift over time. Finally, Pospisil's theory uncovers a serious conceptual difficulty potentially faced by any pluralist theory. Namely, once a whole society/state reference point for law has been discarded, one is left with the problem of defining the social subgroups relevant to the operation of law and of defining law itself.

These are problems which, in one guise or another, have persistently confronted the sociology of law in its attempts to explain the relationship between types of law and types of social organisation; the way state law actually operates on the ground; the way legal rules develop. Thus, to some extent, the modern founders of

legal sociology, Gurvitch, Weber, Ehrlich, were all concerned with legal pluralism.¹⁹ At least they envisaged all societies as composed of groups with law-creating capacity. However, they were less occupied with the interactions between the laws of different social groups, which is our primary concern here.

The most useful concepts for understanding this process of interaction have been developed by another anthropologist, Sally Falk Moore. The starting point for her approach is that the best way to understand how law works in society, or why it fails to work, is to adopt the small social field usually observed by the anthropologist and to examine its interrelation with the larger world around it in terms of legal regulation. The key feature of such a small field is its semi-autonomy.²⁰

The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.

She goes on to stress that the semi-autonomous social field is defined not by its organisation 'but by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them'.²¹

Moore is not, then, proposing any general theory of the operation of law in society. In fact her immediate purpose is simply to illustrate that within particular social groups (in the case of her examples, the garment industry in New York and the Chagga of Mount Kilimanjaro), state law may be less important than group norms and may even fail to have its intended effect because of these. Although the identification of semi-autonomous social fields is dependent on their capacity to make law, Moore gives little to assist us in distinguishing law from other forms of social control. Nevertheless the concept of the semi-autonomous social field is peculiarly useful for the more limited purpose of understanding the dynamics of legal pluralism. As she says:²²

... the concept of a semi-autonomous social field puts emphasis on the issues of autonomy and isolation, or rather, the absence of autonomy and isolation.... It draws attention to the connection between the internal workings of an observable social field and its points of articulation with a larger setting.

This concept sets out the general focus for legal pluralist studies on the interrelation of law-making fields, the 'points of articulation' between them. This is a matter of dynamic process rather than static organisation.

v The Impetus for Pluralist Studies

If, as has been argued, pluralism is a general characteristic of law in all societies, how may we explain the recent sudden upsurge of scholarship written under the sign of legal pluralism? There is now a *Journal of Legal Pluralism and Unofficial Law*,²³ and a Commission on Folk Law and Legal Pluralism.²⁴ Despite a proliferation of conferences and papers, legal pluralism as a research discipline remains an amorphous field. Allott and Woodman in their 'Introduction' to the papers of the first of the Commission's conferences²⁵ point to the novelty of the field and the range of research interests it encompasses. The common rubric of legal pluralism has brought together people working in disciplines and areas which would otherwise rarely connect. Anthropologists and lawyers come together, the former to understand the nature and effect of the external legal influences on the small social group, the latter to understand the limits of state law and the possibilities of its greater responsiveness to the internal orders of social groups. Secondly, those interested in the laws of indigenous peoples in the Third or Fourth World are brought together with those interested in the self-regulation of semi-autonomous groups in industrialised societies. Thirdly, within the indigenous peoples category, one may distinguish the role of customary law in independent Third World states from the position of the laws of the indigenous minorities of the Fourth World. Fourthly, the field encompasses both descriptive approaches, concerned to understand the interrelation of laws, and prescriptive approaches concerned to alter the existing relationship in some way.

Accepting this diversity, it is possible to distinguish some emerging trends which may account for the current interest in legal pluralism. In the Third World legal pluralism provides a fresh context for considering the relationship between the systems of state law introduced on colonisation and the customary or religious laws of the people. The assumptions of both the colonisers and the

developmentalist elites that succeeded them that pluralism was a temporary and messy compromise which would pass away to be replaced by a unified 'modern' system have been confounded by the persistent fact of pluralism. There has thus been a need both to understand this phenomenon and to develop responses to it which are not tied to the limited models presented by colonial law.

The second general trend is a movement towards informal justice - a movement which is having far-reaching effects on the face of state legal systems in many parts of the world, including the West. Informalism is a reaction against those traits which distinguish Western legal systems from other methods of order and dispute-resolution: its system of *a priori* rules, the distance of the judge from the parties and the dispute, its formality, its specialisation. It is also an attempt by the state to embrace the rules and processes of indigenous law and to tap these, on the grounds that they provide a more effective means of ordering society and of resolving disputes. As such, as Abel has noted,²⁶ the informal justice movement is a deeply contradictory one - recreating for the purposes of state law processes which state law had previously helped to break down; extending state control in the name of recognising non-state institutions. Nevertheless the trend is widespread:²⁷

Within the substantive civil law we find reforms in divorce, probate, residential land transfers, and tort that are ostensibly intended to decrease the magnitude and complexity of state intervention in those transactions. Significant segments of the criminal law have been repealed - primarily those concerning 'victimless' crimes involving drugs, gambling, sexual behaviour....

These substantive changes are paralleled by numerous procedural reforms that alter the rules within existing institutions or create new ones (small claims, housing, and family courts on the civil side, juvenile courts on the criminal) and that foster informal procedures at the edges of or outside formal institutions (e.g. negotiation and pretrial and preappeal conferences). Finally, there has been a rapid proliferation of informal alternatives to the criminal process: probation and parole for both juvenile and adult offenders, pretrial diversion, community corrections, restitution etc.

This has been a conscious recognition of the limits of the efficacy of state law and a desire to explore informal alternatives on the other side of the divide.

The third general trend reflected in current writing on legal pluralism is a resurgence in interest in the legal position of ethnic

minorities and of indigenous peoples within the nation state. This involves a shift in emphasis in recognising that the special needs of minority groups may not be met simply through equality with the ambient population, but may require a range of special legal measures. These measures may include recognition of customary law. At any rate, customary law will frequently be a major basis for the group's claim to distinctiveness, cohesion and differential treatment. Within this trend one might distinguish the position of indigenous peoples within 'white settler' societies: Canada, USA, Australia, New Zealand, where the issues are at least as much constitutional and frequently cast in terms of a struggle for self-determination.

vi Pluralism and the Plural Legal System

These trends, then, make up a diverse set of sources for the study of legal pluralism. How might the descriptive theory of legal pluralism, a theory which applies more or less to law in all societies, be specifically applied to a study of the customary laws of indigenous peoples within the nation state? It enables state law and state law's responses to customary law to be viewed within the factual context of pluralism. Earlier studies had tended to mix up the factual situation of pluralism with the state's responses to it. Thus Hooker in his book *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* includes discussions of where state law has attempted to sweep away indigenous law (Turkey, Thailand, Ethiopia, USSR) as well as discussions of deliberate preservations of indigenous law (India, Africa, Malaysia, Indonesia). But, though he recognises at the outset that a statist view of law may be inadequate, his focus on the issue of legal pluralism retains this statist perspective. He lists three common features of situations where there are 'multiple systems of legal obligation' arising within the state:²⁹

First, the national legal system is politically superior, to the extent of being able to abolish the indigenous system(s). Second, where there is a clash of obligation between systems then the rules of the national system will prevail and any allowance made for the indigenous system will be made on the premisses and in the forms required by the national system. Third, in any description and analysis of indigenous systems the classifications used will be those of the national system. Indeed, we may speak of 'dominant' and 'servient' laws.

Later, he is even more explicit about the dominance of state law:³⁰

It should be stressed at this point that the systems which we designate 'dominant' all operate and were or are effective from a position of political superiority in any particular area. In both practical and theoretical terms this means that the legal system of the dominant legal culture possesses absolute and unqualified power on its own terms to admit, alter, or suppress any existing indigenous laws.

Dominance and servience are central to Hooker's analysis and result in the virtual exclusion of any indigenous perspective on pluralism. This has the curious result of denying the reality for which state law systems of recognition were constructed: customary law only exists when, and to the extent that, state law says it exists. Further, it divests the study of legal pluralism of its context: there is no external means of assessing and comparing the existing state responses.³¹ One cannot construct a theory of legal pluralism solely out of observing that some state legal systems contain a selection of different norms applying to the same fact situation,³² without seeking to understand the social situation to which state law is reacting.

It is necessary, therefore, to draw a distinction between *legal pluralism* - a factual description of the operation of law in society - and a *plural legal system* - a system of law which itself contemplates different sets of rules applying to similar situations. In the present context, the customary laws of indigenous peoples in relation to state law, the plural legal system is the result of state law's accommodations of the indigenous order. In order to draw this distinction, Woodman employs the terms 'deep legal pluralism' for the former and 'state law pluralism' for the latter.³³

This is a crucial distinction to maintain because the extent of pluralism and the content of the constituent parts of a plural legal system bear only a limited and inexact relationship with the reality of pluralism on the ground. The plural legal system may develop a body of 'customary law' which does not reflect the actual practice of customary law. Woodman calls the former 'lawyer's customary law' and the latter 'sociologist's customary law'. The plural legal system may choose to 'recognise' only certain aspects of indigenous customary law and ignore other aspects (for instance, land and family law but not criminal law). The customary law system itself will develop ways of accommodating state law, its own responses to pluralism.

Although the two concepts are very different and must be kept separate in legal pluralist analysis, both types of pluralism need to

be considered in analysing the relationship between the customary laws of indigenous peoples and state law. Even at the level of description, the plural legal system adds an additional layer of rules and choices which themselves influence the behaviour of individuals operating within them. This has been demonstrated by the careful studies of the Benda-Beckmanns in Indonesia.³⁴ Here, the rules and processes of customary law (*adat*) and religious Islamic law coexist with a state law system which also 'recognises' the other systems in ways which differ from their reality as a separate system. The resulting factual situation has been described as 'the jungle of legal pluralism':³⁵

... the complex ways in which people are influenced by the different legal conceptions, in which they see them in purposive strategies, and the ways in which the system of legal pluralism is continually reconstituted.

Thus the plural legal system itself has a social reality. This leads Benda-Beckmann to criticise the simple model of legal pluralism based on semi-autonomous social fields. While such a model accounts for the initial generation of bodies of rules which may conflict, it does not go on to show how:³⁶

... legal conceptions may be, and usually are, 'appropriated' by other agents in other situated contexts, in semi-autonomous fields other than those in which they originated. Once appropriated, they become internal to the semi-autonomous field and are reproduced within it; at the same time, of course, they may also be reproduced in the semi-autonomous fields in which they originated.

The idea that the plural legal system is itself reductive of change in indigenous societies is also noted by the Australian Law Reform Commission.³⁷

This is not to suggest that a study of state recognition as a discrete aspect of legal pluralism is impossible. Rather, it serves as a reminder that the response of the state is only one of the dynamic factors and, if that response results in the creation of a plural legal system, such a system must be continuously assessed against the background of factual legal pluralism.

C CUSTOM, LAW AND COMMENSURABILITY

I Order and Dispute in Customary Societies

Legal pluralism is a feature of law in all societies but we are here concerned with one particular context: the encounter between the customary laws of the indigenous peoples of the Pacific and an introduced system of state law. While our focus is on the process of interaction between the systems and on state law responses in that process, we do need to consider the nature of customary law. This is not an enquiry into content - an impossible, even meaningless, task given the enormous variety of customary systems found within the Pacific. Within Papua New Guinea alone there are 700 different language groups, each with distinctive forms of social organisation and customs. Australian Aboriginal societies are equally diverse. Pacific societies do not conform to uniform cultural patterns and the incidence of rules and dispute resolution institutions are no exception to this. The content of particular systems of customary law and the way they operate in particular societies can only be studied anthropologically: by the detailed observation of the actual processes of order and dispute in a micro context.

The burden of the present enquiry is different. It is to single out the features of law in customary societies which colour the way it interacts with state law, the basis of comparability between the two systems. This Part, then, begins by looking at some general distinguishing features of order and dispute in customary societies. These consist largely in an absence of a discrete subsystem within society which may be separately marked out as 'the legal system'. Rather systems of order and dispute are indistinguishably embedded in a larger matrix of moral and religious beliefs and social relations. Thus, the question posed in section (ii), 'do customary societies have "law"?' may well be unhelpful. Such a question has mostly been asked in the context of systems of state 'recognition' designed to abstract a set of rules from customary societies for use in state contexts. Customary rule compiling has not been as much a feature of the Pacific experience as it has, say, in Africa. One reason may be the perception, at least in the case of some Pacific societies, that there are no rules. In the context of interaction with state law (iii), these definitional issues are not as conclusive as they may seem at

first sight. The incidence of conflict between the systems itself defines the problem and the relevant aspects of customary rules and processes. However, fundamental differences in approach between customary and state systems may, as section (iv) discusses, create problems of commensurability when state law attempts to accommodate custom.

The distinguishing features of order and dispute may be most easily defined negatively: by the absence of the central features of a Western legal system. Malinowski sought, in his study of order and dispute in the Trobriand Islands (Papua New Guinea), *Crime and Custom in Savage Society*, to examine the operation of a system of social control which had no 'central authority, codes, courts and constables'.³⁷ Roberts, discussing the differences between methods of order and dispute in customary societies and in our own, says:³⁸

... the basis for the sharpest contrast between such societies and our own lies in the differentiated character of our legal arrangements, existing as they do as a discrete and specialized sub-system having to do exclusively with matters which we identify as 'legal'. Despite the wide range of organizational forms which may be found in small-scale societies, the mechanisms for maintaining continuity and handling disputes tend almost universally to be directly embedded in everyday life, unsupported by a differentiated legal system.

Of course there are many methods of maintaining order and resolving disputes outside the formal legal system in Western societies, methods which tend to be obscured by the ideology of legal centralism but which are no less vital for social order. The difference is that Western societies also have an extra layer of rules and processes which are marked out as 'the legal system'. It is the elements of that system (or at least of its ideology) which are lacking in customary societies: decisions according to pre-established and certain rules; the role of legal specialists (lawyers and judges) and official enforcement agencies. By contrast, customary societies may not articulate rules at all or, at any rate, distinguish legal rules from rules of morality, religion or etiquette. They may possess no centralised dispute resolution agencies. If they do have courts, they may not enjoy unchallenged pre-eminence in the resolution of disputes. There may be no police, bailiffs or prisons. In the absence of such formalised agencies, 'law' in customary societies must be understood in a much broader framework of norms and means of resolving disputes.

Eggleston underlines the close nexus between law and religion in traditional Australian Aboriginal society:³⁹

Some difficulty is experienced in identifying what should be regarded as 'law' in tribal society because the Aborigines did not regard 'law' as a separate system as it is perceived in our society and there were in most tribes no clearly separated legislative and judicial institutions nor indeed formal institutions of any kind. Law and religion were intimately bound up in Aboriginal society and any attempt to identify certain segments of Aboriginal life as 'legal' involves the imposition of alien categories of thought on the tribal society. Some modern Aborigines have made comparisons between their law and the Australian legal system on the basis of common notions of rules and sanctions for their breach but they have also interpreted the word 'law' to mean 'way of life' and 'religion'.

Customary society may not only reject a distinction between 'sacred' and 'secular', it may similarly reject a separation of 'legal' from 'political'. Epstein stresses the political character of many disputes:⁴⁰

... the nature of the offence is defined not by the act itself as by the social context in which it occurs. That is to say, how a particular act is interpreted, and more importantly, what reaction follows it, will depend very much on the social relationships and interests of the parties involved.

Thus, particular disputes are often just part of an ongoing history of social relationships and rivalries. Further, both sides may seek to support their claims by reference to equally valid rules of customary law. Rules of customary law are not therefore always determinative of the outcome of disputes. Since they are unwritten, they are capable of alteration either in specific contexts or over time. In any event, they cannot be divorced from the social context, a context characterised by the myriad of overlapping, multiplex relationships of a small community.

II Do Customary Societies Have 'Law'?

Given the undifferentiated character of customary societies, and the contingent status of 'legal rules' within them, can it be said that such societies have 'law' at all? In the first instance this very much depends, as Moore has pointed out, on 'what one is trying to emphasize for analysis'.⁴¹ Indeed, the Australian Law Reform Commission described it as 'a rather arid definitional

question'.⁴² A definition of law based on a description of a modern Western municipal legal system would naturally exclude customary law. Hart is explicit about this in *The Concept of Law*. He distinguishes customary law on the grounds that it consists only of primary rules of obligation and lacks the secondary rules defining their application, change and enforcement which are the hallmarks of a legal system.⁴³ He goes on to assert that, in any event, 'few societies have existed in which legislative and adjudicative organs and centrally organized sanctions were all entirely lacking'.⁴⁴

In the present context, Hart's distinctions may not be relevant. It has been argued that an examination of the historical dimension of law in Western societies reveals the crucial role of tradition in Western law and the 'systematic incoherence' which a continuous layering of traditions introduces into the legal system.⁴⁵ Secondly, it has been shown that in many indigenous societies there are persons or institutions fulfilling very similar functions to those of the legislature, judge or state official in Western societies.⁴⁶ However, more fundamentally, a positivist definition of law based on a Western municipal legal system is simply not helpful in seeking to understand the maintenance of order and the resolution of disputes in indigenous societies. For this reason, Roberts rejects 'law' as a useful framework for discussion in the case of such societies.⁴⁷

Under these circumstances it becomes necessary to establish a different framework for this study; one that will not come under strain in the face of diverse values and various institutional forms. In choosing to focus on 'order' and 'dispute', two simple assumptions are made. First I take it for granted that some degree of regularity must prevail in any social group if it is to survive. That much is implied in the very idea of a society. Secondly, it is assumed that disputes are inevitable; as Weber insisted: 'conflict cannot be excluded from social life'.

The need to define 'law' in customary societies is not therefore essential to anthropological investigation. In fact it has usually arisen instead in the context of systems of state recognition designed to abstract a fixed and certain corpus of customary rules for use in state contexts. The initial impetus here was colonial administration. In Africa, for example, colonial officials often had to hear appeals or oversee the operation of customary courts, and therefore needed a manual of the applicable rules.⁴⁸ Pospisil records his astonishment at

finding his own book *Kapauku Papuans and their Law*⁴⁹ being used as a code of Kapauku law in the Dutch administration of justice in Indonesia.⁵⁰

The movement to define and codify customary law reached its apogee in the transition to independence in Africa. There the twin policies of African nationalism and nation-building seemed to point to the creation of a unified legal system based on a codification of customary law. The most celebrated of these projects was the *Restatement of African Law*, undertaken by the School of Oriental and African Studies in the University of London.⁵¹ This aimed to record the customary laws of much of Commonwealth Africa. As such, it relied heavily on the abstraction of rules of customary law from the social context and dispute resolution processes of customary societies. They were frequently couched in English legal terms. Subsequent criticism has argued convincingly that what was produced bore little relationship to the actual operation of customary law on the ground.⁵² The codifications froze a fluid reality. They glossed over local differences. They ignored the disputing processes of customary societies, envisaging instead the application of these 'rules' of customary law in Western-style courts. It was assumed that customary rules could be expressed and would operate in the same way as rules of English law.

Whether by way of statutory codification or by judicial application in state courts, this type of 'recognition' results in the development of a new set of norms ('lawyers' customary law') which bear only a tangential relationship to the operation of customary law on the ground. Part of this process involves state law defining which customary norms are to be given 'legal' status and excluding others of equal importance in customary society.⁵³ Yet these lawyers' versions of customary law very largely supply the context for treating indigenous methods of order and dispute as law.

For reasons more fully rehearsed in Chapter II, the state administration of customary law so characteristic of Africa was less a feature of the Pacific experience. There are some isolated examples of codifications: Grimbé's paternalistic codes for the Gilbert and Ellice Islands;⁵⁴ the records of the Fiji Native Lands Commission;⁵⁵ Marsack's *Notes on the Land and Titles Court in Samoa*.⁵⁶ More recently, the Law Reform Commission of Papua New Guinea has initiated

a Customary Law Development Project. This has proceeded by using university students to return to their home districts, record specific conflict cases and compile brief restatements of customary law as it operates in their district. These reports are a mixture of observation of cases (both in customary fora and in the village courts) reported discussions with people in the village (both about customary rules and current social trends) and personal opinion. While much valuable information is thus presented, it is difficult to see its direct application to the stated purpose.⁵⁷

... to provide the basis for developing a Papua New Guinean legal system based on Papua New Guinea values, customs, beliefs, perceptions and institutions. It was expected to gather customary law materials with a view to developing such materials along national policy lines and integrating any underlying principles discovered into a self-reliant and uniquely Melanesian national legal system.

However, other work undertaken in Papua New Guinea and in Melanesia generally suggests a more extreme reason for the minimal attempts to codify custom. Many Melanesian societies lack the qualities of centralised administration found in many of the large African traditional kingdoms where law bears a much closer resemblance to Western patterns.⁵⁸ This has led some writers to suggest that Melanesian societies have no law at all. France comes close to suggesting this in refuting colonial attempts to build administration on a customary base in Fiji. He cites a Fijian chief 'who, when asked to explain the custom of his tribe in the matter of chiefly succession, replied that the custom was to fight about it'.⁵⁹ In Papua New Guinea, some research has suggested that rules play only a very limited part in the resolution of disputes, that they amount to little more than bargaining positions and that social and political considerations are the determining factors.⁶⁰ Further, it has been noted that, particularly in the case of Highland societies, fighting may be the culturally approved means of resolving many disputes.⁶¹ Thus Strathern quotes an ageing Hagen 'Big Man' as saying: 'In the past we fought; now white men have come we sit down on the back of the law'.⁶² In this context, it is said 'customary law' is meaningless and its recognition would also be so.

This view seems to miss the point. It is doubtless true that indigenous societies in the Pacific differ in the extent to which they

stress the operation of rules, third-party intervention in the resolution of disputes and resort to peaceful rather than violent means for resolving disputes. However, to claim from this that some societies have no law is to throw the baby out with the bathwater. It flies in the face of much anthropological evidence of indigenous conceptions of justice,⁶³ and of the part which rules play in regulating everyday conduct, whatever might happen in the 'hard' cases.⁶⁴ One returns to Roberts's initial premises that societies must have some regularity in the maintenance of order. However, most significantly here, a denial that indigenous societies have law fails to explain the ways in which the persistence of custom creates conflicts with state law.

III Definition and Interaction

An examination of the *interaction* of state and customary law itself goes a long way towards resolving the definitional conundrums. Numerous cases in state courts and official reports attest to the existence and significance of customary methods of order and dispute, whether characterised as 'law' or not. Many of these cases of conflict will be discussed in succeeding chapters but it may be helpful to mention a few examples.

As Angelo relates, the Tokelauan community itself voiced its displeasure to the New Zealand Government at amendments to the marriage laws which were contrary to custom.⁶⁵

In respect of marriage the law until 1969 respected traditional incest rules. The marriage regulations of that year however introduced the New Zealand system of prohibited degrees (which for instance permits first cousin marriages, a relationship regarded by Tokelauan custom as incestuous). When the significance of the new rules became clear to the communities in Tokelau, representations were made which resulted in an amendment in 1975 to extend the list of prohibited relationships.

The Report of the Commission on District Government in Western Samoa found as a fact that the *Ali'i* and *Faipule* operating at the village level exercised both legislative and judicial functions.⁶⁶

The trial and punishment of those guilty of offences against custom or against regulations, and the settlement of disputes, have always been among the major functions of the *ali'i* and *faipule* ... the system remains to the present day as the

mainstay of law and order everywhere except within the vicinity of the Town of Apia.

In Australia, although there has been essentially no recognition of Aboriginal customary law, the courts have been presented with numerous occasions where it was impossible to ignore its existence. The Australian Law Reform Commission identified over fifty cases relating to sentencing in the criminal law alone where customary law had been pleaded in mitigation.⁶⁷ In many of these cases the judges had no difficulty in accepting the existence of Aboriginal law, whatever weight they gave to it. Thus, for example, Gallop J commented in *R v William Davey*:⁶⁸

It seems to have been the sort of accident where you were forced to take some sort of action according to your tribal customs and traditions, and that [the victim] ... should not have intervened in what was essentially an argument between you and your wife.... One of the things that I take account of always in a case like this, it being something which has happened within the Aboriginal community, is to pay close regard to what your community ... thinks about what you did.

Similarly, although customary marriages have not had any recognition in Australia, the Department of Aboriginal Affairs identified some 4889 'tribal unions' amongst Aborigines in the Northern Territory alone but only 151 'legal marriages'.⁶⁹ Evidence before the Law Reform Commission disclosed that 'Aborigines themselves unhesitatingly describe their traditional unions as marriages, and distinguish between marriage and other (i.e. de facto) unions'.⁷⁰

Indigenous people living under the dual system perceive both their customary system and state law as binding forms of social control. From the village perspective, the mechanisms of state law are often seen as only one (and often the least successful) means of resolving disputes. Thus, even in Fiji, where an organised system of courts has operated for a century, villagers see the customary remedies such as *i soro* (the ritual apology) as more effective.⁷¹ The magistrates' court is only resorted to when customary procedures break down and its decisions are often regarded as not 'resolving' the dispute.

From a state law perspective, there has been little difficulty in accepting the existence of customary law. In New Zealand, Prendergast CJ's bald dictum in 1877 that 'On the foundation of this

colony, the aborigines were found without any kind of civil government, or any settled system of law',⁷² has been disproved time and again in the courts and outside them. An attempt to plead this in relation to customary marriage in Samoa was thrown out by a Full Court of the New Zealand Supreme Court in 1961.⁷³

The point was argued in full in the Australian case of *Millirrpum v Nabalco* (1971),⁷⁴ a case on Aboriginal land rights. The Solicitor-General had argued that the customs of the Aborigines were not 'law' because there was no authority capable of enforcing them. Blackburn J rejected this 'Austinian definition of law as the command of a sovereign'.⁷⁵

I do not believe that there is utility in attempting to provide a definition of law which will be valid for all purposes and answer all questions. If a definition of a law must be produced, I prefer 'a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people'....

He then proceeded to analyse the submission in its component parts. He found first that Aboriginal customary law did not fall on the other side of an 'unbridgeable gulf'.⁷⁶ On the contrary, the evidence showed 'a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence'.⁷⁷ Secondly, this system did relate to an existing and definable group. Finally he turned to the element of enforcement:⁷⁸

The argument amounted to saying that in a system where people merely behave in certain predictable or patterned ways, apparently without the inclination to behave otherwise, and with no recognizable section of the community designed for the repression of anti-social behaviour, or the application of compulsion to ensure adherence to the pattern, or the determination of disputes, there is no recognizable law. Where, it was asked, was there any indication of authority over all the clans, and where, beyond the influence of the elders, was the authority within each clan? Feuds were admitted to be common: did this not show that law was absent? None of these objections is in my opinion convincing. The absence of an identifiable sovereign authority is a characteristic of the community of nations; it does not convince me that there is no such thing as international law. The specialization of the functions performed by the officers of an advanced society is no proof that the same functions are not performed in primitive societies, though by less specially responsible officers. Law may be more effective in some fields to reduce conflict than in

others, as evidently it is more effective among the plaintiff clans in the field of land relationships than in some other fields. Mutatis mutandis, the same is patently true of our system of law. Not every rule of law in an advanced society has its sanction....

These examples tend to show that issues raised by the interaction of state law and customary law cannot be avoided by excluding custom from the realm of law. Equally the existence of pluralism is accepted as a fact both by indigenous communities and by state officials and judges.

Once this point has been reached, it may not be necessary to characterise any particular rule or process as 'law' in order to take it into account. How, for instance, would such a characterisation help in contemplating the relevance for state law of the Samoan form of ritual apology, the *ifoga*? It is frequently performed as a confession of guilt and apology by either the guilty party or his family to heal social relations. It is almost always accepted as a resolution of the dispute. Whether this process is described as 'legal' or not is immaterial to the issue posed for the state court either in a criminal or civil context. It is an issue which cannot easily be avoided and to which the courts have given different answers. In American Samoa, the court is empowered to reduce the extent or duration of a criminal sentence if an *ifoga* has been performed.⁷⁹ In one of the few reported Western Samoan cases on the subject, an *ifoga* performed after the institution of proceedings for damages for a traffic accident was expressly not intended by the parties to be in settlement of the claim.⁸⁰

Even where customary societies may have resolved certain types of disputes by fighting, state law still needs to understand the norms and dynamics of such societies in order to develop effective responses. Thus the Paney Committee Investigating Tribal Fighting in the Highlands⁸¹ premised its recommendations on an analysis of the forces within Highland Society which led to and characterised the mode of tribal fighting. Many of these were directly related to breaches of customary law. In its responses, the Paney Committee drew on customary principles of group liability, subsequently incorporated in the Inter-Group Fighting Act 1977. Thus, even in this extreme situation, custom was relevant. Excluding it from legal purview would have excluded the real problems and their solution.

It is therefore submitted that, for an understanding of the process of interaction and in developing state law responses to it, an exhaustive definition of customary law is unnecessary and unhelpful. It is more profitable to proceed on specific enquiries to determine the ambit and appropriateness of state law in customary contexts, even if this means including a wider range of norms, values and practices. Marilyn Strathern took this approach in a rare example of applied anthropology, reporting on sexual offences in Papua New Guinea.⁸² In that report she tested the relevance of the sexual offences contained in Papua New Guinea's Queensland-model Criminal Code against a wide range of anthropological evidence as to customary rules and values. She found that many offences in the Code were not so regarded in most Papua New Guinea societies and, equally, that some offences felt to be highly culpable in Papua New Guinea (such as adultery) were not punishable under the Code. Interestingly, the usual objection made to studies of customary law in Papua New Guinea - that general statements cannot be made because of the degree of cultural diversity - was found inapplicable in an interaction context:⁸³

... to my mind, the apparent logic behind such questions is, on empirical grounds, spurious. It treats local variations as some kind of amorphous, threatening and tangled web. If one submits such variations to systematic scrutiny in respect of defining wrongs, elucidating procedures in dispute-settlement and so on, it becomes quite clear that *certain common legal principles inform the attitudes of many Papua New Guinean cultures towards sexual offences....* There seems considerable consensus, for example, as to what constitutes the basic nature of certain offences, that is what in an act are the *grounds for offence...*; two examples may be cited here: commonly the most offensive aspect of 'rape' is the use of violence (the question of consent as emphasised in Western law being interpreted as ambiguous), while one offensive aspect of 'adultery' lies in the infringement of prior rights to a spouse's sexual services.

She further noted that, by dealing with the majority of sexual offences at the Village Court level, it would be possible within a broad framework to take into account local values.

The Australian Law Reform Commission was as much concerned with Aboriginal values and practices as with customary law *stricto sensu*. Thus the proposals for the recognition of hunting, fishing and gathering rights are as much about the preservation of these activities in the context of competing resource uses as they are about

the recognition of customary laws regulating hunting, fishing and gathering.⁸⁴ Similarly, the proposals on child custody, which recommend an 'Aboriginal child placement principle', are primarily designed to preserve Aboriginal families and groups by keeping Aboriginal children within them.⁸⁵ While traditional Aboriginal society has always made arrangements for alternative child care, there is no institution corresponding to the Western notion of 'adoption'.

In New Zealand, the Waitangi Tribunal, the Planning Tribunal and the courts have recently accepted the relevance of Maori spiritual and cultural values in planning law.⁸⁶

Although it has been seen that a strict equation of custom and law is beside the point in the present context, problems of commensurability may still arise. The approach taken by customary law to particular aspects of social ordering may be so different to state law that a basis for comparison sufficient to enable state law to comprehend and adjust itself to custom may be impossible to find. It is this problem which must now be addressed.

IV Problems of Commensurability

The idea of the incommensurability of competing paradigms, an idea developed by Kuhn to explain the history of science,⁸⁷ provides a useful tool for analysing the basis for comparison involved in the recognition of customary law. It is not simply, as Diamond and others have argued, that the Rule of Law and the Order of Custom cannot coexist.⁸⁸ The persistent fact of pluralism belies any simple theory of legal evolution. Rather the whole basis of each system's approach to any particular issue may be so different that it may be difficult to equate the two.

An illustration of this problem is furnished by the process of recognising Aboriginal land rights. Returning to *Millirrpum v Nabalco*, Blackburn J found that, although the Aborigines have 'law', their conception of property is incommensurable with Western conceptions:⁸⁹

I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate.... It makes little sense to say that the clan has the right to use or enjoy the land. Its members have a right, and so do members of other clans, to use and enjoy the land of their own clan and other land also. The greatest extent to which it is true that the clan as such has the right to use and enjoy the clan territory is that the clan may, in a sense in

which other clans may not ... perform ritual ceremonies on the land.... The clan's right to exclude others is not apparent.... The right to alienate is expressly repudiated by the plaintiffs in their statement of claim.

In my opinion, therefore, there is so little resemblance between property, as our law, or what I know of any other law, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests.

Whatever the accuracy of this finding (and, as will be seen, it is highly questionable), it set the scene for a subsequent statutory programme to recognise Aboriginal land rights in the Northern Territory. In 1972 the Australian Government commissioned Mr Justice Woodward (who had been counsel for the plaintiffs in *Millirrpum*) to inquire into 'appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land'.⁹⁰ Thus, perhaps partly as a result of the *Millirrpum* case, the primary focus in the grant of land rights was to be on traditional entitlement and not on need. This would require intensive investigation of what were 'the traditional rights and interests'. However, equally significantly, there was no reference to traditional ownership, only to the more elastic category of rights and interests. Woodward's discussion of the Aboriginal relationship to land includes the following cautionary observations:⁹¹

On enquiry, it soon becomes clear that the social organization of the Aboriginal people is highly complex. The problem of understanding it is made worse by a number of factors. These include, firstly, the difficulty of expressing many Aboriginal ideas and arrangements in English terms. Even simple words as 'owner' and 'tribe' can be misleading. Some words used by anthropologists such as 'horde', 'clan' and 'band' have been given more precise meanings in their writings on the subject, but they have not always been used in the same way and so require definition each time they are used.

Further, some Aboriginal concepts related to land-owning have no parallel in European law.

Given his awareness of these difficulties, it is perhaps surprising that Woodward proposed model legislation in which much depends on the identification of 'traditional Aboriginal owners'. The Aboriginal Land Rights (Northern Territory) Act 1976 provides that claims may only be made by or on behalf of the traditional Aboriginal owners of the land.⁹² Although the land is held by a Land Trust and managed by a Land Council, the traditional owners retain a central place in the

scheme. They have veto powers over mining and roading applications,⁹³ and may receive substantially greater benefits under royalty payments. These are all non-traditional incidents ascribed to the holders of traditional rights. The Act defines 'traditional Aboriginal owners' as:⁹⁴

... a local descent group of Aboriginals who -

(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land.

Maddock and others have shown that this definition singles out unjustifiably one group within a larger Aboriginal community as 'owners', thereby ignoring the equally important role of other groups in relation to the land.⁹⁵ In so doing the Act draws upon two sources of confusion. The first is the Aboriginal use of the word 'owner', which in folk parlance does refer to the patrilineal descent group exercising primary spiritual responsibility. The complementary matrilineal group is referred to as 'managers'. It should not be assumed that the Aboriginal use of the word 'owner' was ever meant to correspond to a Western legal concept. The second source of confusion is that the Act adopts an assignment of ownership made by some anthropologists long before land rights were even on the agenda. Again, they may not have used the term in any exact legal sense. At any rate the early view had already been widely challenged by other anthropologists.

Land claims brought under the Act have highlighted the artificiality of restricting ownership in this way. Although some flexibility has been achieved, this is limited by the restrictive words of the statute. The whole issue could have been avoided if ownership were vested instead in the entire community. This has been the approach taken in South Australia,⁹⁶ and recommended in Western Australia.⁹⁷

The Northern Territory experience illustrates the difficulty of matching Aboriginal conceptions of land tenure, in which a number of groups exercise complementary spiritual and economic rights and duties, with Western conceptions. Yet this is a case where state law has applied standards to customary law which it does not necessarily

apply to itself. At least in English law, 'property' and 'ownership' in land are not the basis of the system. Instead English land law recognises a variety of overlapping estates and interests in land. Thus the model adopted by Blackburn and Woodward may distort not only Aboriginal reality but also English reality.

Aboriginal land tenure furnishes but one example of the difficulties and dangers inherent in the recognition of customary law. At critical points, the process can require the 'translation' of legal concepts from one system into the other. In this process the reality may be significantly and unjustly distorted. A similar analysis could be applied, for instance, to marriage. Western assumptions that a marriage will come into being at a particular time and in the context of a defined ceremony, that it will be monogamous and founded on the consent of the parties, may not be shared by customary societies.⁹⁸

There is no easy answer to the problem of finding a sufficient basis for comparison between custom and state law to enable recognition. This problem is the working out in particular contexts of the more general differences between order and dispute in customary societies and the Western model of law discussed above. Yet to claim that custom and law are incommensurable is to fail to deal with the injustice involved in non-recognition. A focus on commensurability does however highlight the need to avoid imposing Western structures and assumptions on customary law. The extent to which such structures and assumptions are imposed depends on the method of recognition. Thus, the need to find 'traditional owners' imposed by the Northern Territory legislation was avoided in South Australian legislation which granted land rights instead to the whole community. The need to equate customary marriage with state law marriage was avoided in the Australian Law Reform Commission's proposals by leaving the definition of customary marriage in Aboriginal hands and by recognising it 'functionally', that is, examining step by step which of the incidents of state law marriage were appropriate given the characteristics of the customary marriage.⁹⁹

So far, this chapter has been concerned with presenting the nature of the phenomenon of legal pluralism in the context of the encounter between the customary law of indigenous peoples and an introduced system of state law. It is now possible to turn to the ways in which state law may respond to that phenomenon. This will be

tackled by looking firstly to precedents in the law for managing pluralism, then to the range of possible options in the indigenous law context, and finally to the policy considerations involved in recognition.

D LEGAL PRECEDENTS FOR MANAGING PLURALISM

Although the ideology of legal centralism might suggest otherwise, there are in fact a number of legal precedents in state legal systems for the accommodation of cultural diversity. These all have the effect of modifying the principles of the territorial application of laws and of 'one law for all' to take account of legitimate cultural differences. This section will briefly discuss the following precedents:

- (i) Private International Law
- (ii) Personality of Laws
- (iii) Interpersonal Conflict of Laws
- (iv) Custom in English Law
- (v) Ethnic Minorities in England

These are relevant because they have influenced approaches to the recognition of customary law, and they may, by analogy, provide a source of techniques for recognition. However, these precedents have also limited the debate, and so it will be necessary to see in what ways comparison is unjustified.

1 Private International Law

Discussions of the recognition of customary law often compare the problem with the resolution of conflicts between legal systems at the international level. Thus Eggleston comments:¹⁰⁰

Australian lawyers generally think of 'conflict of laws' in an international context, rather than as embracing the conflict between Australian and Aboriginal legal systems. The main difference between the international 'conflict of laws' and the Aboriginal problem is that in the former the two legal systems operate within clearly defined and mutually exclusive territorial boundaries. On the other hand, the tribal Aboriginal situation arises in an area over which the Australian governments and their legal institutions assert full jurisdiction and sovereignty. The similarity between the two types of 'conflict of laws' is also important. The essence of the problem in both cases is the same, namely: the conflict arising between the rules of law and legal institutions of two different societies or groups of people.

However, opinions have differed radically as to the usefulness of the analogy and the applicability of the techniques of private international law to recognition of customary law. Sack argues that the private international law model has inhibited recognition:¹⁰¹

This 'international private law' model appears to be the only way in which positive law can theoretically handle the plurality of law. Since it is perceived by legal positivism as unnatural and unfortunate, legal positivism must respond to it defensively, if not with hostility.

On the other hand, Morse and Woodman find the analogy useful in building a concept of recognition as acknowledgement, which 'may be compared with the provisions of a state's private international law which assert that specified types of functions are validly performed by the institutions of other states'.¹⁰²

Bartholomew¹⁰³ and Allott¹⁰⁴ have both argued that the analogy has done more harm than good when judges have sought to apply it in the recognition of custom. Private International Law is, they argue, built on the very principle of legal systems of territorial application which is contradicted by pluralism within a territory. On the other hand, Tier¹⁰⁵ sees the techniques of Private International Law (jurisdiction, choice of law, connecting factors) as very much applicable at the domestic level.

What, then, is to be made of the contribution of Private International Law? Firstly, the recognition of foreign law is motivated by very similar considerations of justice and the membership of a social group as the recognition of customary law. Savigny, the father of the classical conflict of laws method, was influenced by the idea of law as an intimate part of the *Volksgeist* of a people.¹⁰⁶ In an early marriage between Private International Law and historical jurisprudence, he saw rules of Private International Law as necessary to reflect that cultural dimension of law on the international plane. Dicey stressed the importance of justice for individuals:¹⁰⁷

The application of the foreign law is not a matter of caprice or option. It does not arise from the desire of the sovereign of England or of any other sovereign to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.

Indeed, if the subject is to be justified at all, it must be on the basis of a wider concept of justice for individuals caught in the web

of transnational disputes than the particular conceptions of justice embodied in domestic laws can afford. Thus, conflicts rules are concerned to connect people to the system of law governing the society to which they belong. They seek to avoid the injustice of double jeopardy and to promote equality of treatment and the reasonable expectations of the parties by recognising the existence and effects of foreign systems of law.

The rules of Private International Law are, then, rules of 'recognition' in the same sense as in the recognition of customary law. That is to say, adopting Hart's terminology,¹⁰⁸ they are secondary rules which determine the sphere of application of primary rules in space. Private International law is concerned with the point of interaction between different sets of primary rules (in its case, different national legal systems), and with determining which primary rules are to apply to which people and legal transactions.¹⁰⁹

The effect of the existence of Private International Law is to qualify the monopoly which state law claims over its territory. Its rules restrict the ambit of operation of domestic law in order to recognise the valid sphere of operation of foreign laws. In many cases, fundamental principles of domestic law are conceded to cultural diversity. Family law offers a rich field of experience: customary marriage, polygamous marriage, unilateral 'talaq' divorce and systems of matrimonial property. All these institutions are unknown, even repugnant, to English domestic law but they have been accommodated through the Conflict of Laws. The principle of territoriality is thus modified in a limited fashion to allow for the personal application of laws.

At the level of technique, Private International law has grappled with many of the issues which beset the recognition of customary law. Five deserve special mention:

(a) *Classification*¹¹⁰ Before the relevant conflicts rule can be selected, a legal institution or dispute must first be classified as falling into a particular legal category. Different legal systems may classify disputes and institutions differently. More fundamentally, the host system may not know institutions existing in foreign systems. Thus 'classification' in Private International Law raises similar issues to the problem of 'commensurability' in the recognition of customary law.

(b) *Ascertainment*¹¹¹ The admission of a system of law which is not that of the forum must surmount the problems of evidence and proof. In discussing the proof of Aboriginal customary laws, the Australian Law Reform Commission finds a persuasive analogy with proof of foreign law: 'Aboriginal customary laws are not, of course, foreign to Australia. In one sense, however, they are and will remain "foreign": Australian courts lack "organs to know and to deal with" Aboriginal customary laws just as much as (in many cases, much more than) questions of foreign law'.¹¹² The same issues, as to whether to treat the other system as 'law' or 'fact' and what sources to rely on, surface in both contexts.¹¹³

(c) *Public Policy*¹¹⁴ Private International Law has always allowed the courts to refuse to recognise a rule of foreign law if it would be manifestly contrary to public policy. In the context of the recognition of customary law, this issue is often addressed under the rubric of 'repugnancy'. It has much in common with the debate on the controlling effect of human rights standards.¹¹⁵

(d) *The Time Factor*¹¹⁶ The content of any legal system is always in a state of change. Equally, the degree of connection between individual and legal system may alter over time. These problems, considered in Private International Law as 'the Time Factor', are much more acute in the context of customary law where there may be no authoritative mechanisms for the determination of change in the law and where individuals may opt out, wholly or partly, from their traditional lifestyle.

(e) *Jurisdiction and Choice of Law* In distinguishing the questions of whether or not the domestic court should take jurisdiction over a case with a foreign element from the subsequent issue of what law should be applied if the court does take jurisdiction, Private International Law highlights alternative possible approaches to the recognition of customary law, which may either occur by conceding an independent jurisdiction to customary courts or by applying customary law in the state courts.

In these respects, the analogy of Private International Law is an illuminating one. However, it cannot be taken too far. Conflicts rules are only designed to deal with the exceptional case. The recognition of customary law may, on the other hand, be expected to have much greater transforming effects on the state system and must

therefore be seen in a broader policy context. Conflicts rules only deal with a limited class of legal problems. The whole area of crime, which is one of the most important areas for conflict between customary law and state law, is left out of account in international conflicts of law. Although the conflict of laws is concerned with the personal application of legal systems, those systems are in every case *national* legal systems. There is therefore a stronger basis for comparison than there is between state and customary laws.

II Personality of Laws

Modern Private International Law is often linked historically to much more wide-ranging systems of personal law operating in ancient and medieval times.¹¹⁷ The incidence of plural legal systems, based on the principle that people carried their personal law with them, has been traced from Ancient Hebrew Law, ancient Egyptian and Greek Law and into the break up of the Roman Empire. The high water mark of the principle of the personality, rather than territoriality, of laws was reached in the early Middle Ages. Bishop Agobard's remark (c. 850) that of five persons in one room, each may follow a law of his own, is often quoted to illustrate the resulting situation.¹¹⁸ In this period, the personal system included not only family and land law, contract and tort, it even extended to the criminal law. Muslim jurisprudence also recognises that non-Muslim may regulate many aspects of their lives according to their own personal laws. Muslim law itself has always been a system of personal rather than territorial law. As Pearl comments: 'This jurisprudential concept existed in Muslim thought even after the territorial formulations of the sovereign jurisdiction of the nation state had become the underlying notion of Western Europe'.¹¹⁹

Reference to this historical and comparative background serves as a reminder that law need not be territorial in application and that plural legal systems are thus not an aberration. Nor are such systems exclusively a creature of the colonial experience. Further, legal pluralism need not be seen solely in terms of the encounter between state and non-state forms of legal regulation.

III Interpersonal Conflict of Laws

The study of the rules which regulate the interface between systems of personal law may be termed 'the interpersonal conflict of laws'.¹²⁰ As a field, this includes, for example, conflicts between secular and canon law in Christian countries,¹²¹ and between different systems of personal law in Muslim countries.¹²² But the interpersonal conflict of laws is most closely associated with the systems established by European colonising powers to allow for the continuation of religious and customary legal orders observed by their colonised subjects.¹²³ Such systems were not an essential corollary of colonisation. The imperial power could have denied any recognition to the personal laws of its subjects and sometimes did. Such an option is not open in the recognition of foreign law. Rules of Private International Law are an invariable feature of relations between modern states. On the other hand, once the decision has been taken to work a system of personal laws into the colonial legal system, those laws had far more effect on the face of the system than foreign law could ever do. The vast majority of people continued to be governed by their personal law and thus, superficially, introduced European law had only a small role. However, in reality, the changes wrought were immense. The personal laws operated at the sufrage of state law and within the scope allotted by it. Moreover, such laws were often administered through institutions established by the colonial state. All of this radically transformed the content and operation of the personal systems.

In developing techniques for managing this colonial plurality, the interpersonal conflict of laws borrowed the methodology of Private International Law: jurisdiction, choice of law, connecting factors, repugnancy (the public policy exception) and proof. It reflected the preoccupation of colonialism itself with dividing the colonisers from the colonised. Thus the 'natives' were to be governed by their personal law, the colonists and imperial administrators by the introduced European law. Complex rules were needed to deal with the many technical problems arising from rigid delineations of status: 'mixed' transactions between natives and Europeans; the definition of who was a 'native'; the effect of changes of religion; the extent to which a native might opt out of his personal law.¹²⁴ Although recent reforms in some African countries have sought to modify this rigidity

by adopting a 'mode of life' test,¹²⁵ the conceptual baggage of a conflict of laws approach continues to dominate the law in many former colonial territories.

The interpersonal conflict of laws, because it has been directly applied to the recognition of customary law and because the resulting judicial decisions provide a wealth of precedent, cannot be ignored in a response to pluralism. Nevertheless, quite apart from the fact that - as Chapter II will show - this method has not characterised the approach in the Pacific, it is also of limited assistance in principle. As a series of 'second order' techniques, it does not deal with the first order issues, namely how to construct a system which responds to the way in which customary law actually operates on the ground. It focuses on some areas of customary law where a 'personal law' approach seems most directly applicable, such as marriage and family law generally, but it fails to deal with some of the most important areas of interaction: land, economic rights, and crime. It is more concerned with developing abstract rules to link people with a given system. As the Australian Law Reform Commission has argued,¹²⁶ this tends to obscure consideration of the factual incidence of customary law and of the merits of recognition. Finally, by casting the issue in terms of different groups of people following different personal laws - a context which might have seemed accurate enough in colonial society - the interpersonal conflict of laws fails to account for the conflict between state and customary law in an ethnically uniform society.

IV Custom In English Law

Private International Law was not the only analogy which influenced the colonial recognition of customary law. English law had always itself recognised a residual category of custom.¹²⁷ This has included distinctive forms of land tenure, special rules of inheritance, rights to use common land or the seashore for particular purposes, rights of way, hunting, fishing and foraging rights and rights to hold a market. The essence of the English concept of a custom is a legal rule which differs or derogates from the general law, which applies only in particular circumstances to a particular locality, and which has obtained the force of law by virtue of continuous observance since time immemorial. Halsbury thus

distinguishes four essential characteristics: immemorial existence, reasonableness, certainty and continuity.

The requirement of immemorial existence is fixed under the Common Law as a requirement that the custom has been observed at least since 1189.¹²⁸ The apparent rigidity of this rule is in fact modified by an evidentiary presumption which applies on unrebutted evidence of continuous user as far back as living testimony. Nevertheless, this requirement does underline the residual nature of English custom as essentially a hangover from pre-Common Law times.

The condition that a custom should be reasonable may be compared with the similar tests of public policy in Private International Law and repugnancy in the Interpersonal Conflict of Laws. Customs may of course differ from the Common Law (that is the reason for their existence as a separate category) but they must not fail the further test of reasonableness. Halsbury suggests that customs will most often be held reasonable where they confer a benefit on a large class of the community and do not unduly or unjustly restrict the rights of the public or individuals.¹²⁹

Finally, a custom has to be certain as to its subject, as to the locality to which it applies and as to the persons affected by it; and its observance must have been continuous. It will usually be proved by taking expert evidence of old and knowledgeable persons of the locality, although judicial notice may be taken of notorious customs.

While custom as a residual category led a marginal existence in England, judges were not slow to appreciate the potential significance of this category in colonial contexts. Indeed, the *locus classicus* on the subject involved the persistence of custom in colonised Ireland: *The Case of Tanistry* (1608).¹³⁰ The Common Law rules were applied to Indian marriages and adoptions in Canada, in the first case on the basis that the common law recognised a separate category of consent marriages anyway,¹³¹ and in the second on a straightforward application of the common law tests.¹³² In British Africa and India, the common law rules furnished a pre-statutory justification for the application of local custom, though a narrow reading of the immemoriality rule was plainly unworkable.¹³³

The common law rules did provide a precedent for judges in dealing with the customary laws of indigenous peoples outside the English setting. Their approach was 'flexible and pragmatic'.¹³⁴

Nevertheless they also proved to be insufficient. As Allott reminds us: 'Local customs were an atrophied survival of the customary laws of the early medieval period, a rare exception to the general law'.¹³⁵ More was needed to address the much more profound pluralism of the colonial territories and this therefore led to the development of the interpersonal conflict of laws. At any rate, the existence of a potential body of common law rules did not in itself determine the willingness of colonial judges to apply customary law: witness the situation in colonial Australia and New Zealand.¹³⁶ Finally, the common law rules are premised on custom being exceptional. There can be no derogation from statute and only so much derogation from the common law as the particular rule requires.

v Ethnic Minorities in England

Paradoxically, English law is once again being confronted by the need to develop a domestic form of pluralism. This lies in the reverse of heritage of Empire: the customs of the new ethnic immigrant communities.¹³⁷ Britain has had ethnic minority groups for centuries (for instance, the Jewish and the Gypsy communities) and allowed a certain measure of differential treatment in the legal system for them. The post-war influx of West Indian, African and Asian immigrants has, however, radically altered the dimensions of the problem, both quantitatively and qualitatively. While the British Government has adopted an official policy of cultural pluralism,¹³⁸ the response of the law so far has been *ad hoc*. The implications of legal pluralism in Britain have not been comprehensively examined.¹³⁹ Nevertheless, the case law provides some illuminating lessons.

Since the ethnic minority communities of Britain are *immigrant* communities, many legal issues concerning them originally arose in a Private International Law context. A marriage has been entered into, a dowry paid, or a divorce pronounced abroad, and the English courts are faced with determining its significance in England. Pluralist issues have carried a persistently international flavour because of the very real links which immigrants frequently retain with their country of birth. Because of cultural attitudes, many immigrants from, for instance, the Indian subcontinent continue to be domiciled abroad while living in England. They never give up the intention to

return home and thus never conceive the intention to remain in England indefinitely necessary for the acquisition of an English domicile.¹⁴⁰ A further consequence of the immigrant character of such communities is that immigration law itself has been at the cutting edge of dealing with legal cultures and many British responses have been through the medium of immigration controls.¹⁴¹ All of this has placed immense strain on conflict of law rules which were only designed for the occasional situation. The result has been a mass of judicial decisions and, in particular problem areas, statutory amendments and law reform proposals.¹⁴² This flood of activity has tended to obscure the ultimate policy questions surrounding ethnic communities which do become English in a conflict of laws sense but which retain a separate cultural identity.

The second general observation which may be made is that the need to deal with cultural pluralism in the law has proved unavoidable for the English context. Pluralism is a fact and the state legal system cannot shut its eyes to it. A corollary of this is that the English courts and legislature have not found it necessary to define 'customary law' as an abstract concept. They have instead reacted to a wide range of customary values, institutions and behaviour: Sikhs wearing turbans instead of crash helmets on motorcycles;¹⁴³ long term informal fostering of African children;¹⁴⁴ female circumcision;¹⁴⁵ dowry; arranged marriages; *ta/aa* unilateral divorce. In many cases what has been involved has been an adjustment of English law concepts to take account of different institutions. Thus, the Islamic form of dower, the *mehr*, has been enforced in England as a contractual debt;¹⁴⁶ the concept of duress as a ground for a petition of nullity has been broadened to take account of forced marriages.¹⁴⁷

Nevertheless, for present purposes it is important to be clear about the differences as well as the similarities between recognition of the customs of immigrant communities and of indigenous communities. The differences have a policy as well as a technical significance. They are important in the Pacific region where, in a number of countries, significant immigrant ethnic minorities co-exist with indigenous peoples within the broader society. The Australian Law Reform Commission, while agreeing that the general Australian legal system might well pose special problems for the continuing practice by immigrant communities of their traditions and beliefs, drew the following distinction:¹⁴⁸

Migrants came to the Australian community (the community founded by migration and subsequent organisation and settlement after 1788) not as communities but as individuals (or families). They came to a community with its own laws and legal culture. They are entitled to respect for their opinions and practices, and to share in the formulation and amendment of laws and government policies. Their views on the legal system and its impact on them are important. But the position of the members of Aboriginal communities is different. This is their country of origin. In relation to the general community, they exist not merely as individuals but as a prior community (or series of communities) inhabiting territory to which the general community itself migrated (without their agreement and without their having any control over that process).

Chief Judge Durie, distinguishing the position of the Maori in New Zealand from immigrant Pacific Island communities, comments:¹⁴⁹

Too often, I fear, Maori rights are not identified, or they are subjugated to our current courtship with multi-culturalism. At least Pacific cultures should understand the prior right of the tangata whenua or those who traditionally belong to a place. That right is occasionally apparent in the names of Pacific peoples (Vanuatu - whenuatu - the people of the land, and Kanaka - tangata - the people, for example). I am not so sure that European settlers in Polynesia see the distinction or realise that the equation of Maori groups with other minority cultures offends both Pacific tradition as well as common law rights.

This crucial distinction - that the case for the recognition of Indigenous law rests on different policy considerations - means that only limited technical lessons may be learned from the recognition of immigrant customs. We are here concerned with a much more fundamental form of pluralism and must now turn to consider directly the range of possible options open to the state.

E STATE RESPONSES TO INDIGENOUS LAW

i A Comparative Theory

There have been very few attempts to catalogue state responses to indigenous law.¹⁵⁰ Most studies of the subject are not comparative and therefore work within the model already evolved for the particular jurisdiction under investigation. There has been some comparative debate on specific state responses. The methods of general incorporation of custom as part of the underlying law,¹⁵¹ codification,¹⁵² the interpersonal conflict of laws,¹⁵³ and the development of local justice mechanisms¹⁵⁴ have received such

attention. However, it is often assumed that these are exclusive solutions rather than being alternative or complementary methods. The purpose, then, of this Part is to propose a general framework for considering both negative and positive responses which the state may make to indigenous law.

What is the point of such a comparative framework? It underlines a fundamental proposition of this thesis that what is involved in the process of recognition is itself problematic. As the Australian Law Reform Commission reminds us: 'to propose recognition of Aboriginal customary laws is to begin, not to conclude, the inquiry'.¹⁵⁵ It is therefore necessary to analyse the range of different possible approaches. This puts the various methods adopted in different countries in comparative perspective and enables a genuine sharing of experience. Thus, a comparative framework also contributes to the development of reform proposals.

However, there are considerable difficulties in the way of such an exercise. A variety of terms are used in the literature to describe state responses. Thus, state law may 'recognise', 'use', 'acknowledge', 'apply', 'adopt', 'enforce', 'take into account', 'give effect to', 'permit to continue', or 'accommodate' customary law. Further, the term 'recognition' may itself encompass a multitude of different methods, from the 'incorporation' of custom into the state system, to the 'exclusion' of the state system in areas where custom is to apply, to the 'translation' of customary institutions into the state system so as to accord them state law effects, to the 'adjustment' of state law to 'accommodate' custom.¹⁵⁶

More fundamentally, as law performs different functions and operates in different ways in any society, the type of response may differ depending on the substantive area of the law in question. Morse and Woodman,¹⁵⁷ following Hart,¹⁵⁸ propose a working distinction between 'imperative norms' and 'norms of validation'. By the former, they mean rules of the criminal law type which prescribe penalties for the commission of certain acts. By the latter, they refer to rules which grant powers or define effects to designated acts or statuses (marriage, adoption, chieftaincy, contract). This distinction is a useful tool for analysis but it is not sufficient to account for all the types of conflict between state and customary law encountered in an examination of the Pacific material, nor the range of responses

adopted in the region. The approach taken here has been to build up a framework from actual examples from the Pacific and not to be unduly constrained by *a priori* classifications. On this basis, it seems necessary to refer to two further functions of law. The first is as a means of dividing resources, such as land, fisheries etc. The second is to consider the processes and institutions of the law (legislative and dispute resolving) as well as its rules. With these four aspects of law in mind, it is possible to consider negative state responses and then two broad categories of positive responses, incorporation and acknowledgement. This Part concludes with discussion of possible syntheses between custom and state law.

II Negative Measures

Many of the conflicts between state and customary systems do not occur out of a deliberate express state suppression of custom but simply and incidentally by the operation of a state law system which takes no account of custom. In the field of imperative norms, a range of such incidental conflicts may arise:¹⁵⁹

- A person may be imperatively required by customary law to do an act which is itself an offence under an imperative norm of state law. This is the most direct type of conflict between the two systems and will most frequently occur where customary powers of punishment are being exercised.
- *Double Jeopardy* A person may commit an act which is regarded as an offence under the imperative norms of both custom and state law. This can result in that person being punished twice, once under each system.
- Custom may regard an act as an offence which is not so regarded by state law. A frequent example of this in the Pacific is adultery which is regarded very seriously in most communities but which has rarely been the subject of state law prohibition.¹⁶⁰
- Conversely, state law may punish as offences acts which are not regarded as culpable in custom. Strathern's study of sexual offences in Papua New Guinea¹⁶¹ showed that the criminal code frequently focused on acts and concepts which were irrelevant in the customary context.

- More broadly, state law may fail to have regard to indigenous standards when considering the application, within its own imperative norms, of standards such as 'reasonableness', 'intention', 'provocation', 'disorderliness'.

Turning to norms of validation:

- State law may refuse to accord the effects and benefits accorded to a state law status or institution to the parallel institution in customary law. Thus, the non-recognition of customary marriage may lead to state law regarding the children of that marriage as illegitimate and to the denial of social security, insurance and accident compensation benefits and the refusal of privileges such as spousal non-compellability in the law of evidence.¹⁶² Similarly, the non-recognition of the village or village council may lead to its lack of standing before state courts or inability to enter into financial obligations.¹⁶³
- Further, state law may, by shutting its eyes on customary institutions, intrude on the customary sphere and work to destroy those institutions. For instance, the non-recognition of customary child care arrangements may lead to the forcible removal of children from the customary group through fostering or adoption.¹⁶⁴

Focusing on conflict between norm-creating or norm-applying institutions:

- The existence of the authority structures of the state, together with the non-recognition of the traditional institutions may undermine the authority and ability to maintain control of the latter.¹⁶⁵
- Conversely, failure to recognise the vitality and importance of customary institutions may be to drive into illegality the most effective mechanisms for the maintenance of order and to create conflicts of legislative and judicial jurisdiction.¹⁶⁶

Finally, in the field of resources:

- State law may by non-recognition simply deprive people of resources vouchsafed to them by custom. The most glaring

example of this is the non-recognition of traditional land rights where failure to accommodate the customary system of tenure has led directly to the divestment of the land.¹⁶⁷

- More subtly, by putting indigenous peoples on the same footing as the ambient population, state law may fail to protect the exercise of customary rights from external intrusion. Thus, for example, section 2 of the Rivers and Streams Act 1882 (Fiji) by vesting the ownership of all rivers in the Crown for the benefit of the general public effectively overrode special indigenous fishing rights.¹⁶⁸

These have all been examples of the *incidentally* negative effects of non-recognition. There are fewer examples of *directly* negative measures. However, mention might be made of the Sorcery Act 1971 (Papua New Guinea) which creates a variety of offences in relation to the practice of sorcery.¹⁶⁹ There is an express denial of the validity of customary adoptions in Niue¹⁷⁰ and the Cook Islands¹⁷¹ and of customary marriage in New Zealand.¹⁷² Similarly, it is expressly provided in New Zealand that Maori customary title to land is not enforceable against the Crown.¹⁷³

III Positive Measures - Recognition by Incorporation

In discussing the range of possible positive measures which states may adopt to recognise customary law, it is important to remember that respective approaches are not exclusive. They may be complementary. Further, they will not all be equally appropriate. However, an evaluation of them will depend much on the subject-matter in question and on the social context.

Measures of recognition by incorporation all involve to some degree the attempt to include within the state legal system norms or institutions of customary law. This inevitably involves some element of transformation.

- * *General Incorporation as Underlying Law* A potentially far-reaching method of recognition by incorporation is to include custom as a source of underlying law in the state legal system, performing an analagous function to that of the common law in England. This method involves ranking custom along with other

sources of law and places the onus on the state judiciary to develop the law. General incorporation was the basis for the construction of plural legal systems in Africa where it led to the development of a system of interpersonal conflict of laws. It has been the subject of recent experiments in the Pacific, which are discussed in Chapter III 'Custom as a Source of Underlying Law'. A subsidiary method of general incorporation is to make custom the underlying law of a particular set of courts. Thus, for example, section 10 of the Island Courts Act 10/1983 (Vanuatu) provides:

Subject to the provisions of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order.

Similarly, a particular substantive area may be generally incorporated into state law for administration and enforcement in state courts. A most frequent example is land. Thus, for instance, the Western Samoa Constitution recognises customary title to land and then provides for its application in a state law institution: the Land and Titles Court.¹⁷⁵

* *Codification* Instead of leaving custom to be generally incorporated on a case by case basis in the state courts, state law may instead apply and enforce customary law on the basis of a codification. The move to codify became popular in Africa in the transition to independence because it seemed to offer a more certain means of laying the foundations of a national legal system based on custom. As a method of recognising customary law, codification has been widely criticised because it freezes the fluid reality of custom, divorces customary rules from their customary context and subjects them to alien procedures and removes control over the rules from the indigenous people themselves. There are relatively few examples of codifications in the Pacific but mention might be made of the Kiribati Lands Code.¹⁷⁶ This is a meticulous codification of the customary rules governing the ownership, transfer, distribution and succession of land in Kiribati. The rules are classified according to the particular islands to which they apply and may be amended at the request of the relevant island council.¹⁷⁷

Closely associated to codification is the process of registration. In this the task of ascertaining the rules governing, for instance, customary rights to land and other resources is left to a commission but the result is comprehensive state law definition of customary interests. This method has been widely used in relation to land¹⁷⁸ and, in Fiji, also for fishing rights.¹⁷⁹ It may also be used for status issues such as marriage.¹⁸⁰

* *Specific Incorporation by Reference* On a more specific level, state law may seek to embody a particular rule of customary law and to enforce it as state law. It may do this by reference -referring the definition of the precise content of the rule to custom - or by replication - spelling out the content of the customary rule in a state law provision. As examples of specific incorporation by reference, one might instance the Western Samoan constitutional provision that 'a *matai* [chiefly] title shall be held in accordance with Samoan custom and usage',¹⁸¹ or the Tokelauan definition of *Taupulega* as 'in relation to any village ... the council of that village constituted in accordance with the custom and usage of that village'.¹⁸² In New Zealand, section 88(2) of the Fisheries Act 1983, which declares that 'Nothing in this Act shall affect any Maori fishing rights', has been recently held to allow for the continued exercise of Maori fishing rights, defined by custom, in cases where otherwise the provisions of the Fisheries Act would be infringed.¹⁸³

* *Specific Incorporation by Replication* State law may attempt to express the content of the customary law rule in legislation. This approach shares, on a smaller scale, the dangers of codification. One example where this degree of specificity has been attempted with some problematic results is the definition of traditional owner in section 3(1) of the Aboriginal Land Rights (Northern Territory) Act 1976, discussed above.¹⁸⁴ An area where some island jurisdictions have been ready to amend state law so that it expresses and enforces the customary rule is in the definition of the prohibited degrees of relationship for marriage purposes.¹⁸⁵ However, other aspects of customary marriage rules, such as promised or arranged marriages, are more

difficult to incorporate, both because of the flexible way in which custom operates and because of human rights considerations.¹⁸⁶

* *Incorporation of Customary Authorities and Institutions* State law may incorporate not merely customary rules but also customary institutions. Thus, in the legislative field, many Pacific constitutions allow a role for a traditional Council of Chiefs.¹⁸⁷ This role is frequently advisory only,¹⁸⁸ although such a Council may be given a more direct power to protect customary interests through legislative veto.¹⁸⁹ Chiefs may also be guaranteed representation in the legislature.¹⁹⁰ Perhaps the most complete example of chiefly ascendancy in the process of government is Western Samoa, where the franchise is restricted to chiefs.¹⁹¹ Chiefs may also exercise judicial functions. Thus, for example, Vanuatu's Island Courts Act 1983 provides, in section 3(1), that at least one of the three justices appointed to an island court shall be 'a custom chief residing within the territorial jurisdiction of the court'.

* *Admission as Fact* Instead of incorporating and enforcing custom as law, state law may simply take it into account as fact. Under this method, the rules and processes of state law will not be changed but the manner of their application may be influenced by the reality of the operation of custom. Within this category comes the exercise of prosecution and sentencing discretions and the interpretation of such standards as 'reasonableness', 'provocation' etc. This type of recognition is contemplated in criminal cases by section 4 of the Customs Recognition Act Ch.19 (Papua New Guinea). It has been clearly distinguished from the process of general incorporation as underlying law in Papua New Guinean case law.¹⁹² Thus, considerable flexibility has been achieved through this method, even in jurisdictions (such as Australia) where there is no legal basis for the recognition of customary law. Admission as fact may be relevant not just in criminal matters but also in other areas of the law where open-ended concepts are involved, such as assessing the compensable injury in a tort case,¹⁹³ or 'breach of moral duty' in a family protection claim on succession.¹⁹⁴

* *Adjustment of State Law* Admission as fact does not involve the

application or enforcement of customary law. Rather, State law adjusts its own rules and categories to take account of customary ways. While this may be accomplished through admission as fact, it may equally require the adjustment of the law. This is a wide category of recognition. It may involve giving state law effects to customary norms of validation. Thus, for example, social security benefits may be made available to the spouse of a customary marriage.¹⁹⁵ It may involve ranking traditional rights to distribution on death with other claims in a succession case;¹⁹⁶ or ranking traditional fishing rights with other claims in environmental decision-making.¹⁹⁷ It may involve adjusting police or court procedures to respect traditional perceptions and behaviour. Although adjustment does involve some treatment of customary law in the state system, it differs from incorporation because it simply alters state law to acknowledge the separate sphere of custom rather than attempting to utilise custom as part of the state system. In this way it is close to the second range of methods of recognition now to be considered: recognition by the acknowledgement of autonomy.

iv Recognition by Acknowledgement of Autonomy

Starting from the opposite premises to recognition by incorporation, recognition by acknowledgement of autonomy assumes that customary law operates in an essentially separate sphere to that of state law. Recognition in this sense thus involves a decision by state law to restrict its own sphere of operation in order to respect the autonomous sphere of custom.

- * *General Exclusion* The most complete withdrawal of state law would be the acknowledgement of complete indigenous autonomy within a specified territory and a consequent removal of all state competence there. This model has characterised United States Indian law.¹⁹⁹ Through the development of the concept of 'domestic dependant nations',²⁰⁰ relations between the tribes and federal and state governments have been built on an acknowledgement of the internal sovereignty of the tribes with a concomitant inherent right to self-government. Thus modern

American Indian law is mostly concerned with problems of jurisdiction between tribal governments and others. This idea of divided sovereignty was not recognised in British colonial law until the development of the protectorate in the late nineteenth century.²⁰¹ Early measures in New Zealand²⁰² and Fiji²⁰³ allowed for a lesser concept of customary law applying in specified territorial areas but these were never put into effect. The assumption of British sovereignty over the Pacific Islands did progress through stages where the internal self-government of the island tribes was respected but this did not survive full annexation.²⁰⁴ The Australian Law Reform Commission found that, although many Aboriginal people supported greater Aboriginal autonomy, they did not favour the withdrawal of state law altogether.²⁰⁵

* *Autonomy Models* Without withdrawing state law altogether, the state may concede to indigenous communities a measure of autonomy which either expressly includes the replacement of state law by customary law on certain subjects or simply creates more space for the operation of custom. There is a complex interface between autonomy or 'self-determination' and the recognition of customary law which will be further explored in the final part of this chapter. Suffice it to mention now that a self-determining indigenous community may elect not to regulate itself according to customary law. Alternatively, the process of achieving self-government may result in the adoption of many of the forms of the state, such that recognition issues will still have to be faced. Self-determination does not necessarily entail recognition of customary law. It is Canada which has recently pursued a self-government approach in relation to its indigenous peoples, and recognition of customary law issues have been seen in the light of that process.²⁰⁶ In Australia, the grant of land rights, especially in the Northern Territory and South Australia, has been accompanied by a significant enhancement of autonomy. The development of Aboriginal governing councils which administer Aboriginal land and the Aboriginal people resident on it increase this perspective on land rights as, at least partly, an exercise in self-government.²⁰⁷ Simply because the grant of land rights

(together with the rights to control what happens on the land and to exclude others) makes more room for Aboriginal people to pursue their traditional lifestyles, it is a form of recognition of customary law.²⁰⁸

- * *Specific Exclusions* At the level of detail, state law may also acknowledge a sphere for the operation of customary law outside its domain. It is instructive here to return to the example of fishing rights. Thus, in Vanuatu customary fishing is effectively excluded from state regulation because licences are required only for boats of a length of ten metres or more.²⁰⁹ In Kiribati, the scope of customary fishing rights is a matter of positive protection:²¹⁰

No person shall take fish in any sea or lagoon area or on any reef forming part of the ancient customary fishing ground of any kainga, utu or other division or subdivision of the people unless he shall first have obtained a licence so to do under the hand of the Minister....

In one sense this is a case of specific incorporation by reference but the effect of it is the protection of the indigenous community and its resource base from outside encroachment. In this way it goes further than, for instance, the New Zealand provision discussed above. Examples of specific exclusions may also be drawn from the area of norms of validation. Thus, for instance, customary divorce is treated in the following way in the Solomon Islands:²¹¹

Where two Islanders have been married by the custom of the Islanders ... the marriage may only be dissolved, annulled or separation ordered in accordance with the custom of the Islanders.

- * *Acknowledgement of Legislative Powers* Acknowledgement of a separate sphere for customary law may extend not only to substantive rules of custom but also to the institutions which prescribe and apply it. Care must be taken here, however, to distinguish acknowledgement of existing institutions which have been created and are constituted according to custom and the creation by state law of state institutions, even if the latter are to apply customary law. Thus, systems of local and provincial government,²¹² with powers to legislate on customary matters or village and island courts with powers to apply custom

are not exercises in acknowledgement because these institutions are creatures of state law. A rare example of the acknowledgement of legislative powers is the Tokelau Village Incorporation Regulations 1986.²¹³ The Regulations incorporate the three existing villages of Tokelau, acknowledge their existing decision-making structures, and regulation 18 allows the villages to continue to exercise extensive legislative powers, including the imposition of taxes and the prescription of criminal offences. The explanatory note observes: 'At present the conduct of village affairs is governed by local custom. These regulations provide a legal framework within which that system will continue to operate'. The Regulations do impose conditions and restrictions on the exercise of village powers, especially to allow for the operation of the village outside the customary sphere in, for instance, financial matters.²¹⁴ But the system is based on the acknowledgement of customary authority.

* *Acknowledgement of Norm-applying Powers* State law may also acknowledge the competence of customary authorities to apply customary rules in the resolution of disputes. In a recent landmark case in Fiji, *R v Lati et al*,²¹⁵ the Chief Justice, Sir Timoci Tuivaga, revised sentences handed down in the magistrates' court for assault on the grounds that the matter had been satisfactorily dealt with by the customary authorities. The case concerned a visit to a village by people of a neighbouring village. After the welcome party, one of the visitors was seen talking with Lati's sister at a lonely spot some distance from the village. This occasioned the assault. In response a village meeting was held in which the respondents were reprimanded and each given three strokes of the cane by a village elder as a punishment. A *tabua* was then presented by the village to the chief of the visiting village, which was accepted as complete reconciliation. However, meanwhile, the matter had been reported to the police. Tuivaga CJ commented that:²¹⁶

... the sentencing court did not with respect give sufficient credit to the customary sanctions which from time immemorial have always been available within a village community for regulating the social behavior and conduct of

its people. It must be acknowledged that the Makadru villagers had taken great pains, in the absence of any police presence in the island, to settle the problem in the only way known to them which is by their own established customs and traditions. Though these have no legal force as such they are nevertheless entitled, in a suitable case, to recognition by the courts in such a manner so as to uphold their sanctity and moral force within the Fijian society. As observed above all the respondents had been dealt with appropriately in the Fijian customary way and whatever potential strife that might have resulted between the two villages because of the incident had also been taken care of appropriately in the Fijian customary way. One could not wish for a more civilised way of sorting out a potentially explosive situation.

Other countries have experimented with organised forms of acknowledgement of norm-applying powers. One example is the Local Courts (Amendment) Act 1985 (Solomon Islands).²¹⁷ The adversarial procedure followed by the local courts was perceived as exacerbating rather than resolving customary land disputes. Therefore it was sought to lay greater stress on customary dispute settlement. Section 8 D (1) of the Amendment Act thus provides:

... no local court shall have jurisdiction to hear and determine any customary land dispute unless it is satisfied that -

- (a) the parties to the dispute had referred the dispute to the chiefs;
- (b) all traditional means of solving the dispute have been exhausted; and
- (c) no decision wholly acceptable to both parties has been made by the chiefs in connection with the dispute.

This must be established by certificates and statements and the local court has wide powers to register or enforce the chiefs' decision and to refer the dispute back to the chiefs. In New Zealand an informal diversion scheme operates in West Auckland where the Te Atatu Maori Committee hears and deals with cases referred to it by the court, the police, the local school and voluntary community officers.²¹⁸ The Maori Committee is a customary body, not a creature of statute, and it operates according to customary procedures. Its authority rests entirely on a consensual acceptance of the group resolution of community problems.

v Synthesis?

Honoa te pito ora kite pito mate

'Graft the new onto the old' (Maori proverb)

Discussion thus far has drawn a sharp distinction between recognition by incorporation, whereby state law co-opts the rules and processes of customary law, and recognition by acknowledgement of autonomy, whereby state law restricts its own scope, acknowledging the separate sphere of custom. Implicit in this distinction is the need to distinguish the sources of customary law and state law as a basis for analysing methods of recognition. This is indeed a major motif of the thesis as a whole. However, it leaves open the question of how far a synthesis between custom and law is possible. We are here addressing prospects for a genuine coming together of the two systems rather than the domination of custom by the state.

One can only offer tentative directions here. The degree and type of possible synthesis will be affected by whether the indigenous people co-exist with an ambient population or whether they are a governing majority of the country.

Firstly, there are many institutions in the Pacific which, although they are strictly speaking creatures of state law, are in fact so heavily influenced by and so much a part of the customary system that a distinction is unrealistic. This is a matter of degree and the acceptance of a state institution into the customary community may change over time. Thus, the Western Samoan Land and Titles Court was initially established by Dr Solf, the then German Governor of Western Samoa, in 1903.²¹⁹ There had been no previous national body for resolving land and title disputes, which had been a frequent source of conflict. Initially the new court (or commission as it then was called) was staffed entirely by Europeans and Samoans sat only as advisors. Now, however, although the court is usually presided over by a European judge, the other judges are Samoan. The court is regarded by the Samoan people as the bulwark of Samoan custom.²²⁰ Its brief extends beyond land and titles claims to a more general jurisdiction as the protector of the fabric of customary life.²²¹ Its proceedings are conducted in a customary manner and it is much resorted to by litigants.

An even more striking example is the Maori Land Court in New Zealand. As will be seen in Chapter II C 2 ii, this court was established in 1865 as a deliberate attempt to subvert Maori custom and to divest the Maori of their customary land. Over a century later, the same court has been transformed into an institution which is perceived by many of the Maori people as a protector of their interests. The 1980 Royal Commission on the court found that:²²²

The Maori Land Court has, because of its long association with the Maori people, adopted a number of practices different from those of European courts. It has acquired a Maori character. It is regarded by many as a Maori institution which must be retained The Maori people ... seemed to us to have a deep love and respect for it, its judges and its staffs. They wished to retain it as 'our court', and made clear that its abolition would inflict a deep emotional blow.

The Maori Affairs Bill 1987 will take the court even further in this direction by introducing a number of measures designed to make the court's procedure more consonant with Maori custom.²²³ These comments as to the degree of identification with the institution and the extent to which it is perceived as protecting and expounding *Tikanga Maori* (Maori customary values and practices) may be made *a fortiori* of the Waitangi Tribunal.²²⁴

A similar synthesis may be perceived in the exercise of some legislative functions, especially at the local level. Thus, for instance, in Papua New Guinea, the New Ireland Provincial Government's Constitutional Review Committee reporting in 1984 expressed serious concern at the extent to which local customs, tradition and culture were being displaced by imported forms and recommended provincial legislation on a wide range of customary subjects.²²⁵ The provincial legislature responded with the Customary Compensation Act 1986 which provides that claims for customary compensation in New Ireland may only be made in accordance with the custom of New Ireland; seeks to limit the amount of compensation payable; prohibits claims in certain cases (such as payback, tribal warfare and motor vehicle injuries); and establishes procedures for the mediation and arbitration of compensation disputes. Similarly, the Solomon Islands Central Islands Provincial Assembly has enacted bye-laws to control the payment of bride price which place the responsibility for the resolution of disputes about bride price on local level customary committees.²²⁶

These are, of course, exercises of power delegated to state law instrumentalities under national legislation. But the fact that the power is being exercised much closer to the level where custom actually operates and is being exercised by members of the indigenous community who will have direct experience of the customary system brings this legislation closer to a synthesis between the two systems.

The constitutional level holds some prospects of articulating a balance between custom and state law if it can be seen as a genuine expression of common ground rather than just another state law imposition. The new Tuvalu Constitution 1986, discussed in Chapter IV D ii, is one detailed attempt to work out a compromise. This idea has also been at work on a much broader front in New Zealand. Relations between Maori and pakeha are premised upon the Treaty of Waitangi.²²⁷ The notion of 'treaty' expresses well the agreement of both parties to provide for a common basis for their future on-going relationship. This is how it is regarded by the Maori.²²⁸ This view is also being increasingly acknowledged by state law. A government White Paper proposing a Bill of Rights justified the inclusion of provisions relating to the Treaty in the following way:²²⁹

For the Maori the Treaty of Waitangi holds a unique place. Many of them see the Treaty as symbolising their rights as Maoris and as providing a basis for the recognition and protection of those rights. As a resolution of the Turangawaewae hui in September 1984 declares, the Treaty of Waitangi is a document which articulates the status of the Maori as tangata whenua o Aotearoa. It is a symbol which reflects te mana Maori motuhake (the distinction of being specially Maori). A Bill of Rights that ignored this would be at best an incomplete document. *It could well be seen as simply one more pakeha law, irrelevant to the deepest concerns of the Maori.*

A recent watershed judicial decision of the New Zealand Court of Appeal has explored the implications of the Treaty as an ongoing relationship. *New Zealand Maori Council v Attorney-General*²³⁰ turned on the meaning of section 9 of the State-owned Enterprises Act 1986. The Act transfers much Crown land in New Zealand to newly-established state-owned enterprises. Section 9 provides that 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'. The court found that the Treaty signified a partnership between the Crown and the Maori, with the concomitant obligations that each partner act reasonably and in

utmost good faith. In the instant case, the Crown had not met those obligations and was required to propose a suitable scheme for protecting Maori land claims over Crown land which was to be transferred to the state-owned enterprises.

These developments provide a suggestive basis for considering the potential for constitutional syntheses between state law and custom.

F WHY RECOGNISE CUSTOMARY LAW?

I The Specificity of Policy Arguments

Questions about state recognition of customary law intersect with some of the most fundamental concerns of social policy in relation to indigenous peoples and the role of law in the pursuit of policy.²³¹ The primary context for this thesis is the working out of the implications for state law of the factual persistence of pluralism, implications which may be seen in terms of principle.²³² But the social policy arguments are significant, not so much for what they contribute to particular technical problems of recognition but because they influence the extent and type of recognition which a state may contemplate. In this way, they are relevant in their own right as opinions which may be held by policy makers and in society at large. They should be seen in this light, rather than as determinative answers to the question why or why not to recognise customary law.

Twining has commented strongly on the sterility of the generalised debate as to the 'merits' and 'demerits' of the codification of customary law.²³³

This 'controversy' is reminiscent of some of the worst kinds of jurisprudential dispute in which issue is never really joined, the validity of the various arguments is not put to the test and in which each protagonist sets up his own enemy as an Aunt Sally and then knocks him down with ease, the result being, in Teufelsdröckh's phrase, 'Triumphant Victory for All'. Part of the trouble with these arguments stems from the ignoring of the great variety of objectives and methods that has lain behind different attempts to describe or record or codify customary law. The validity and strength of the arguments of each 'side' varies considerably according to the type of undertaking that is being considered.

These comments apply with equal cogency to recognition in general. It is work recalling briefly the types of variables which may affect the relevance of the policy arguments:

- * *Subject matter* The particular area of the law under consideration radically affects both the possible types of recognition, as has just been seen in the preceding Part, and the relevant policy arguments. For instance, the principle of the uniform application of the law may be seen as having more force in the criminal law than in family matters; the inhibiting effect of custom on development may apply more to land tenure than to crime.
- * *Social context* The shape of the society within which customary law operates will also affect the policy arguments. Where the indigenous people are a minority struggling to assert their separate identity from the non-indigenous ambient population, recognition policies are more likely to be framed in terms of indigenous rights and self-determination. These policies tend to recede where the indigenous people control the state and the status of custom becomes an issue of the direction of national development.
- * *Social policy* Not merely the shape but also the direction of society will affect perceptions of the continued role of customary law. The present work finds its context in a reassertion of autochthonous values in the Pacific which has only recently been acknowledged by governments. As the New Zealand Court of Appeal commented in 1987:²³⁴

For more than a century and a quarter after the Treaty [of Waitangi], integration, amalgamation of the races, the assimilation of the Maori to the pakeha, was the goal which in the main successive Governments tended to pursue.... Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity.

A similar *volte face* can be discerned in social policy in Papua New Guinea from the ideas of unification, modernisation and the adoption of Western forms espoused in the Derham Report 1960²³⁵ to the strong emphasis on the value of indigenous culture and 'Papua New Guinean' ways in the Constitution (1975).

- * *Method of recognition* The fourth variable is the type of recognition envisaged. Criticisms which may hold true, for example for the incorporation of custom as a source of underlying law, may not apply to measures of adjustment of state

law or of acknowledgement of a separate sphere for custom. This was the point made by Twining and it was also emphasised by the Australian Law Reform Commission in its discussion of criticisms of recognition.²³⁶

II Arguments Against Recognition

It is a major tenet of the present work that the issues involved in recognition cannot and should not be dealt with in a generalised, all-or-nothing fashion. That underpins much of the criticism levelled at general incorporation in Chapter III and the treatment of discrimination and human rights issues in Chapter IV. The discussion in Chapter IV is especially germane to the policy debate because it is in the language of human rights that many criticisms of recognition are phrased. Chapter IV argues, both on the basis of an interpretation of the content of human rights principles and through a detailed investigation of the ways in which conflicts with custom actually arise, that no generalised view about the incompatibility of human rights with the recognition of custom or the uniform universal application of human rights standards may be appropriate.

The principle of the uniform universal application of the law is not in fact a rigid requirement which rules out the possibility of the recognition of customary law. It is rather an aspect of the ideology of legal centralism, an ideology which is contradicted by the realities of the operation of law in society - even in Western societies. Nevertheless uniformity has a powerful hold on policy makers. As Allott notes: 'practically every African country has now adopted a unification of laws policy'.²³⁷ In Australia, the Minister for Aboriginal Affairs included the following observations in his reaction to the Australian Law Reform Commission's Report:²³⁸

... if equality of all before the law is a fundamental principle of our legal system - and surely that should be beyond argument - is it a concomitant that all citizens, without exception, must conform to a single mould? If so, is that fair to those people who were here long before our British-based laws were imported, and who had developed their own highly structured methods for regulating their affairs? On the other hand how can two different laws be applied to deal with the same issue?

The Report which the Commission has produced achieves, in my view, a sensible and sensitive balance.

In Africa, the policy of unification is explicitly linked with the idea of nation-building. Thus Ojwang cites the development of a national identity as a reason for preferring a unified state law system: 'The civil law ... appears to be the legal regime of the future, evolving assuredly alongside the *nation*, which seeks to fuse its various ethnic societies into one people with one common destiny'.²³⁹ Nation-building has also been cited as an important objective in the Pacific. Thus, in a submission to the Papua New Guinea Law Reform Commission on its Underlying Law Report, it was argued that the law of the new state 'must be a universal system, applicable and applied evenly throughout the whole country, and thus a powerful force in the creation of a national identity and not an instrument of fragmentation and division'.²⁴⁰ The post-colonial state, because of its relative novelty and insecurity as a new force in indigenous societies, is likely to need to assert its authority in law and order matters by buttressing the monopoly of state law against rival centres of power.²⁴¹ In states where the indigenous population is a minority, it may be seen as socially divisive that the law recognise plural legal systems.²⁴²

The third general policy argument militating against recognition, which is frequently made, is that of modernisation. Thus the Derham Report which recommended that Papua New Guinea adopt a complete replicated version of the Anglo-Australian justice system 'expressly asserted the superiority of the processes of Western justice over traditional perceptions of justice'.²⁴³ This assumption that the introduced Western legal system is the law of the future is the lineal descendant of the evolutionary theories of legal development which underlay colonial attitudes to customary law.²⁴⁴ It surfaces today in many guises. One is the programmatic role of state law as an instrument of development. All Pacific Island states are committed to 'development' - a goal pursued through development plans.²⁴⁵ It is often claimed that customary land tenure inhibits the possibilities for economic development.²⁴⁶ More generally, custom is seen as tied to an outmoded economic system and thus it will inevitably pass away as modernisation takes hold.

III Arguments for Recognition

Developmentalist thinking has been confounded by the persistence of custom and by an alternative line of policies and principles which emphasise alternative participatory development,²⁴⁷ community access to resources and indigenous rights. There are many signs in the Pacific that the idea of an alternative development, which would be rooted in customary patterns, was embraced by the state. Pacific Island states were decolonised late. The new leaders had, as Ghai comments:²⁴⁸

... seen the failure of development efforts in Asia and Africa, the increasing social stratification in these countries, the distortion of traditional values and institutions by alien values and institutions, the despoliation of the environment, the emergence of new forms of imperial control and the negative influences of transnational corporations.

As a consequence they consciously sought to foster a people-centred, self-reliant development. This may be seen at work in the National Goals and Directive Principles of the Papua New Guinea Constitution which emphasise integral human development, equality and participation, national sovereignty and self-reliance, the conservation and wise use of natural resources and the environment and Papua New Guinean ways. Law had an important role to play in the achievement of these goals and principles and was to transform itself in the furtherance of them.²⁴⁹ Similarly the return of all land to the custom owners by the Vanuatu Constitution represented a deliberate bid for self-reliant development based on customary law.²⁵⁰ The Tuvalu Constitution 1986 enunciates principles of the maintenance of Tuvaluan values, culture and tradition and of traditional forms of communities, which principles are to be reflected in the legal system. In these Constitutions, the recognition of custom is seen as important because it is an autochthonous basis for development and because it helps ensure popular participation in institutions (economic, political and legal) and popular access to resources.

The theme of popular participation may be linked to the informal dispute resolution movement which emphasises decentralised justice institutions, operating in local communities, concerned more with the resolution of disputes than with the application of fixed rules.²⁵¹ Informalism is a world-wide trend which may lend support for the

creation of local-level customary courts in the Pacific.²⁵² Seen in this light, the recognition of customary law enhances the effectiveness of conflict management and the successful maintenance of harmony in the community.²⁵³

Finally, and most problematically, the recognition of customary law has been associated with the rights of indigenous peoples and, in particular, the right of self-determination. The question of the rights of indigenous peoples has been receiving increasing attention at international law,²⁵⁴ partly as a result of a growing indigenous peoples movement in the international arena²⁵⁵ and partly as a recognition that indigenous peoples have special needs as groups which are not adequately met by the existing framework of international human rights norms. A key element in the movement for indigenous rights is the desire of indigenous peoples to preserve their cultures and lifestyles in the face of outside encroachment. The core of the concept of 'indigenous peoples' has been the so-called 'Fourth World': indigenous groups who, as a result of European colonisation, have become minorities in their own country, where a majority settler population controls the state but who have maintained a distinct cultural identity linked to the pre-colonial past. As such, the New Zealand Maori and Australian Aboriginal people would be included along with the North and Latin American Indian. In Third World states, such as those of the Pacific Islands, the concept is less certain of application. Their populations are clearly indigenous in a broad sense but their need to articulate indigenous aspirations in the international arena has generally been exhausted by decolonisation.²⁵⁶ Nevertheless, recent international conventions in the Pacific region recognise the importance of indigenous values and customs and seek to protect them.²⁵⁷

The primary focus in the current development of indigenous peoples' rights is the principle of self-determination. It has been argued by some publicists that this principle, which is a norm of international law enshrined in the major human rights covenants, may be capable of application outside the context of decolonisation as a basis for a greater degree of autonomy for indigenous minority peoples.²⁵⁸ What implications does this have for the recognition of customary law? The Australian Law Reform Commission was careful to distinguish the two:²⁵⁹

To treat the recognition of Aboriginal customary laws as the channel for Aboriginal self-determination is to distort the issues.... But it is as necessary to keep in mind that some of the demands being voiced by Aboriginal people and their organisations are essentially demands for self-government or autonomy, at least in certain areas, and that such demands are not able to be satisfied simply through recognition of Aboriginal customary laws and traditions. But the issues dealt with in this Report are important in their own right, however much it is necessary to place them in their proper context as part, and only part, of a wider debate.

Nevertheless this comment related at least in part to the nature of the Commission's approach to recognition. As it points out, it may have been possible to pursue recognition as part of a direct negotiation between the Aboriginal people and the Australian Government.²⁶⁰ As has been seen, recognition by acknowledgement of autonomy is indeed one approach which may be taken to recognition.

There is undeniably a close nexus between self-determination and the recognition of customary law. The requirement of self-determination may engender a process of reform designed to indigenise the legal system and make it responsive to indigenous needs and aspirations. This may lead, as it has in the case of the Tokelau Law Project,²⁶¹ to a recognition of customary law. Conversely, customary law may provide the basis for claims of distinct identity and a continuity with the pre-colonial past which may, as in the case of the land rights movement in Australia, also lead to a greater autonomy. Similarly, many forms of recognition can have the effect of enhancing autonomy in as much as they return the control of resources to indigenous groups, allow them to define the basis for the use of those resources and invest in them control of the administration of justice.

However, there are also important distinctions to be borne in mind. Self-determination involves a much wider range of issues of governance which cannot be tackled via the medium of the recognition of customary law. Further, the achievement of self-determination does not dissolve the issue of recognition. Indigenous governments may well, as experience in the Pacific island states indicates, adopt more of the forms of state law than of customary law. They are then likely to find, as Pacific island states have, that the recognition of customary law still remains on the agenda awaiting resolution.

II THE COLONIAL EXPERIENCE AND THE IDEA OF CUSTOMARY LAW

It were indeed sincerely to be wished, that the intercourse which has lately subsisted between Europeans and the natives of the South Sea Islands may be broken off in time, before the corruption of manners which unhappily characterises civilized regions, may reach that innocent race of men, who live here fortunate in their ignorance and simplicity.... If the knowledge of a few individuals can only be acquired at such price as the happiness of nations, it were better for the discoverers, and the discovered, that the South Sea had still remained unknown to Europe and its restless inhabitants. *George Forster, 1777*¹

With all our 'highfalutin' to the contrary, the wrongs we have committed in the names of Christianity, civilisation, progress are manifold. We are, as a race, a race of robbers and spoilers. *Sir John Thurston, 1879*²

It is of the utmost importance to seize, if possible, the spirit in which native institutions have been framed, and endeavour so to work them as to develop to the utmost possible extent the latent capacities of the people for management of their own affairs without exciting their suspicion or destroying their self-respect. *Sir Arthur Gordon, 1879*³

A WRITING LEGAL HISTORY

The idea of customary law cannot be fully understood in isolation from the historical context of the colonial experience, for it was the contact between colonisers and colonised which engendered the legal pluralism, which is the object of this study. As Griffiths comments: 'Legal pluralism in this sense has been a fixture of the colonial experience. Furthermore, it has generally persisted beyond the moment of formal "independence" - proving one of the most enduring legacies of European expansion.'⁴ The primary purpose, then, of this chapter is to examine, in the context of Pacific societies, the effect which colonialism had on custom and, in particular, the articulation and development of customary law.

This exercise in legal history is directed at a better understanding of the problems and possibilities in the recognition of

customary law as they present themselves today, as well as to the effects which the impact of colonialism has had on the nature of customary society. It must therefore attempt to separate out the history of the recognition of customary law from a much wider body of material on the effects of colonialism generally, and in its legal manifestations specifically. Yet this separation is only to highlight the location of the recognition of customary law within this broader framework. It would be only a fraction of the truth to describe the formal apparatus for the recognition of customary law, without seeking to examine the concepts of colonial governance, and of economic conservation and exploitation by which it was motivated.

This chapter is thus concerned more with the history of ideas and of systems, than with the full detail of the black letter of the law. Laws adopted were rarely isolated and random expedients. Rather they were manifestations of policies and reactions to circumstances dictated by colonialism as an institution. The isolation of law as a separate object of study within colonialism gains support from the colonial administration's own views about its role. Everywhere in the British Empire, but perhaps nowhere more so than in Oceania, law and justice objectives were at the forefront of British colonial policy. Others at the vanguard of European expansion, missionaries, traders, settlers, were motivated by other objectives but it was for the administrators to hold the line of law and justice. A large part of this role, as perceived by the administrators themselves, was to mitigate the ravages of their fellow countrymen on the natives and to protect and enhance their societies and cultures. In this, as they saw it, customary law had a vital role to play. It was the true basis for the maintenance of order in native societies and thus deserved full support in the task of native administration. These ideas gained their fullest expression in the policy of 'indirect rule' which, as will be seen, was a feature of Pacific administration long before Lugard and Cameron elevated it to the status of dogma in British tropical Africa.⁵

One side of the colonial experience, then, is the impact of the colonisers, and the translation of their ideas and systems into laws which affected, some would say fundamentally altered, customary societies. This impact is explored in Parts B and C of this chapter. Part B, 'The Translocation of Laws and the Colonial Paradigm',

outlines some of the formal features of colonial law as introduced in the Pacific and then rehearses the ideological bases on which the recognition of customary law was constructed. Part C, 'The "Fatal Impact" Theories', examines a growing body of sceptical scholarship which questions the reality of the recognition of customary law as claimed by the colonial administrators. Ranger sets the base-line for this work in his terse statement: 'What were called customary law, customary land-rights, customary political structure and so on, were in fact *all* invented by colonial codification.'⁶ Much of this scholarship has focussed on Africa, but some has also explored the Pacific case. Part C marshals the evidence for these transformations in the Pacific and examines whether, as proponents of such theories often claim, customary law is thus a fiction best disregarded.

A partial refutation of the sceptics may be obtained by switching the focus from the activities of the colonisers to the people whose customary law it after all was: the colonised indigenous peoples. Assessing their reaction to the 'recognition' of their customary law is a more difficult enterprise, though a far more important one. Much of it must be based on hearsay. Yet what may be learned suggests that the impact of colonialism may not have been so fatal: customary societies were at once more ready to change internally to meet new circumstances, and obstinate in maintaining their own traditional systems. At any rate, the effectiveness of colonisation was determined not solely by the dictates of the colonisers but also by the customary structures on which colonialism was imposed. These themes are developed in Part D, 'The Jungle of Legal Pluralism'.

A focus on indigenous peoples' own perceptions of customary law also comes to the fore in Part E, 'The Politics of Custom', where the political significance of the idea of customary law is examined in the context of the emergence of the independent island states, where custom played important but often conflicting roles, and in the context of the assertion of the rights of indigenous peoples. The connection between custom and political power is not to be underestimated. However, nor should it get in the way of some realism about customary law, which process is begun in Chapter III with a detailed examination of the prospects for an indigenous jurisprudence. However, it is first necessary to set out the general features of the colonial paradigm as applied to the Pacific.

B THE TRANSLOCATION OF LAWS AND THE COLONIAL PARADIGM

1 INDIGENOUS SOVEREIGNTY AND IMPERIAL EXPANSION

I General Principles

British imperial expansion, in the Pacific as elsewhere, was posited upon a principle of indigenous sovereignty. This was not merely a moral concession to the many native peoples who became subject to colonial domination: it was a legal principle, which involved a number of legal consequences, not only for the assumption of British sovereignty but also for the continuing status of customary law.⁷ Yet, precisely because the formal extension of British authority into the Pacific spanned more than a century, a century in which colonial law was in a constant state of evolution, and because different circumstances motivated each subsequent move, the application of the principle of indigenous sovereignty had a chequered history. Indeed, the enduring paradox of the Pacific story is that British governmental influence commenced in 1788 with the establishment of a penal colony at Botany Bay in New South Wales, Australia, where there was no recognition of Aboriginal sovereignty at all, a fact which also had fatal consequences for the recognition of Aboriginal customary law in the colonial period. Subsequently, in the islands, the British went further than they had hitherto been prepared to go in their administration of an extra-territorial jurisdiction. Yet the classic principle of indigenous sovereignty remained the benchmark in colonial policy.

In the first place, the principle required that British sovereignty could only be assumed over new territory either derivatively, by cession from the indigenous people, or, exceptionally, by conquest. The description of a colony as 'settled' related not to the basis on which sovereignty could be assumed but rather to the extent to which English law was imported *ab initio* into a new colony. Colonial law did however recognise an independent basis for the exercise of British jurisdiction over British subjects abroad in its development of extra-territorial jurisdiction, which was expressly not intended to impair indigenous sovereignty.

However, even where British sovereignty had been obtained, that act neither resolved the fate of indigenous law nor exhausted the

implications of indigenous sovereignty. Colonial law still had to resolve the issues of the law applicable to the colonists, to relations between the colonists and the indigenous people, and to the indigenous people themselves in their relations *inter se*.⁸ In particular, the mere assumption of sovereignty did not determine the title to land and the survival of the customary law of land tenure.⁹

The rules resolving these issues were genuinely pan-imperial. To quote Chapman J, delivering judgment in *R v Symonds*, the New Zealand *locus classicus* on the subject:¹⁰

The intercourse of civilised nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our Colonial Courts, and the Courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has called the 'vice of judicial legislation'. They are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.

When the British acquired sovereignty over what in the language of the Age of Expansion was known as 'Christian territory' (where a legal system readily cognisable to the colonists was in operation), that system continued to operate, governing colonisers and colonised alike. The Crown did, however, acquire, as an incident of sovereignty, the right to modify the pre-existing law by legislation, and the power to create courts. The universal application of the pre-existing law was even on occasion argued in 'non-Christian territories'. For instance, Stephen presented the following submission in relation to Australia:¹¹

This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither

can it be called a conquered country as Great Britain was never at war with the natives, not a ceded country either, it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them; *therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours.*

In point of fact, such a suggestion proved unworkable both in exercising the exigencies of government which sovereignty entailed and in governing the relations of the colonists *inter se*. From the demands of the latter, especially in the context of the settlers in the American colonies, arose the doctrine that the common law was the birthright of the Englishman, which could be carried with him into settlements established in non-Christian territories. Thus:¹²

... English persons inhabiting non-Christian territory held the birthright to English law in their relations *inter se* This did not displace the common law presumption of the continuity of the pre-colonial law so much as limit its applicability to the indigenous population The exemption of the non-indigenous population from the aboriginal law (that is, the transformation of the customary code from a territorial to a personal character) was, therefore, a qualification upon the common law presumption of the continuity of the pre-colonial law.

From this root-stock of common law principles in relation to colonisation, which were themselves in a state of continuous evolution, British colonial practice developed many forms of accommodation of the indigenous order. Yet their initial formal entry in the Pacific, the establishment of a penal colony on the eastern seaboard of Australia in 1788, from which much subsequent activity radiated, was marked by an uncharacteristic non-recognition of the pre-colonial order of the Aboriginal people.

II Australia

British sovereignty over Australia was acquired without any recognition of prior Aboriginal sovereignty. In particular, there was never any attempt made to enter into treaty relations with the Aboriginal people, so as to obtain the colony by cession, a pattern of conduct so widespread elsewhere in the Empire.

Australia has always been regarded as a 'settled' colony, although the consequences of this classification may not be as decisive for the recognition of Aboriginal customary law as the

prevailing orthodoxy would have it.¹³ Lord Watson, building upon previous authority,¹⁴ held in *Cooper v Stuart*:¹⁵

The extent of which English law is introduced into a British colony, and the manner of its introduction, must necessarily vary according to its circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory, practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.

Blackburn J in *Milirrpum v Nabalco*¹⁶ held himself bound by this dictum, although the High Court of Australia was subsequently evenly divided over whether the issue could be reopened.¹⁷

Nevertheless, whatever the accuracy of the classification, of more significance in the present context is its effect on the recognition of customary law. As has been earlier suggested, the mere manner of assumption of sovereignty did not in itself determine the future of indigenous law, especially as it applied to the relations of the indigenous people *inter se*. In fact, the common law recognised the continuity of the pre-colonial law, at least in its application to the indigenous inhabitants. This seems to have been the initial position in Australia, or it was at least entertained by some judges and officials.¹⁸ However, typically, colonies which were destined primarily for settlement, and where the settler population rapidly outnumbered the indigenous population, entertained less sympathetic views to the survival of customary law. As a matter of administration, there was less practical need to do so.

Moreover, Aboriginal society had a number of characteristics which disturbed the pattern which, as will be seen, colonial law found necessary for the recognition of customary law. It was relatively small in population and thus, as a practical matter, did not directly challenge the authority of the settler state. It was dispersed throughout the vastness of the continent and very diverse, composed of numerous different cultural and language groups. The economic basis of life was one of hunting and gathering and this, coupled with an identification with land which was primarily spiritual, constituted a vastly different attitude to land ownership to that prevailing in the common law. Aboriginal societies were not generally centralised,

chiefly societies, and so they could not easily be co-opted into the state system. Their laws and institutions did not conform to English conceptions. They were, at any rate, hopelessly ineffective in

All of these factors militated against the recognition of Aboriginal customary law in the colonial period, and by the mid-nineteenth century the position was settled. The British House of Commons Committee on Aborigines in British Settlements reported in 1837 of the Australian Aborigines:¹⁹

So destitute are they, even of the rudest forms of civil polity, that their claims, whether as sovereigns or as proprietors of the soil, have been utterly disregarded. The land has been taken from them without the assertion of any other title than that of superior force, and by the commissions under which the Australian colonies are governed Her Majesty's sovereignty over the whole of New Holland [Australia] is asserted without reserve.

Full jurisdiction of English law over Aborigines and a refusal to recognise Aboriginal customary law were upheld by the courts in criminal matters,²⁰ in marriage²¹ and in title to land.²² What recognition did occur in the colonial period was haphazard and largely a matter of administrative discretion.²³

III Early British Extra-territorial Jurisdiction in the Pacific

Yet Australia was perhaps the outstanding exception in colonial policy on indigenous peoples. Elsewhere in the Pacific, British policies were much more consistent with the dictates of colonial law. From the beginning the British had studiously avoided any extension of British sovereignty or English law over the Pacific. Acts of the Imperial Parliament of 1823²⁴ and 1828²⁵ had conferred a limited extra-territorial jurisdiction on the courts of New South Wales based on the Murders Abroad Act 1817.²⁶ The courts were empowered to try

all Treasons, Piracies, Felonies, Robberies, Murders, Conspiracies, and other Offences of what Nature or kind soever committed in the islands of New Zealand, Otaheite, or any other island, country or place, situate in the Indian or Pacific Oceans, and not subject to his Majesty's or to any European State,

if such offences were committed by British subjects. These Acts expressly disavowed any claims to sovereignty. They only applied to

British subjects, and not to the indigenous peoples. They only came into operation if the offender could be brought before a British court in Australia. They were, at any rate, hopelessly ineffective in controlling the mischief for which they had been enacted.²⁷

IV New Zealand

Acknowledgement of prior indigenous sovereignty inhering in the Maori people was the basis of the assumption of sovereignty over New Zealand by the British in 1840. Indeed, as McHugh comments, New Zealand was an example *par excellence* of established principles of colonial law,²⁸ and not, as so many previous commentators seem to have regarded it, an imperial aberration.²⁹

At the heart of the controversy over the constitutional status of New Zealand, and of pivotal significance for Maori rights generally, and in particular for the recognition of Maori customary law, is the Treaty of Waitangi 1840.³⁰ The Treaty was concluded between Hobson, as the representative of the British Crown, and the Chiefs of the Maori tribes of New Zealand, of which some 512 eventually signed. The process of obtaining signatures and, indeed, the production of the text itself in Maori and English versions, was inevitably messy. This has left the nature of the bargain, quite apart from its juridical status, difficult to assess.

The Treaty was structured into three articles. Under the first, the Chiefs ceded to the British Crown what in the English text was described as 'sovereignty', and, significantly, in the Maori text as *kawanatanga* or 'governorship', an invented word which implied some lesser form of administration which did not impair the power which the Chiefs exercised over their tribes internally. Under the second article, the Crown guaranteed to the Maori what in the English text was described as 'the full exclusive and undisturbed possession of the Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess'. In the Maori text this read as *te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katou* which, literally translated, means 'the highest chieftainship of their lands homes and prized possessions'. The Chiefs also guaranteed to the Crown, in a rider to Article II, the exclusive right of pre-emption over their lands. The Crown was to have the exclusive right to buy land from the Maori for sale to the

pakeha (European) settlers. Under the third article, the Maori people received 'all the Rights and Privileges of British subjects'.

Read in the light of the consistent tenets of colonial policy towards native peoples up to 1840 (pace Australia), the Treaty of Waitangi was essentially what colonial law would have dictated. It merely recognised the position, rather than creating a fresh source of rights.

McHugh summarises the effect of British annexation on the status of Maori customary law:³¹

Maori customary law survived the Crown's sovereignty over New Zealand. English law superceded the tribal code on matters incidental to the sovereignty of the Crown and where the latter included customs repugnant to 'fundamental principles' of English law. The tribe members' acquisition of the status of British subjects occurred with the annexation and did not affect this continuity. No act of state was performed by the Crown as it acquired the territorial sovereignty disrupting this continuity. Indeed, the Maori text of the Treaty of Waitangi recognised the *rangatiratanga* of the chiefs and so was probably an express saving of the customary code. Moreover, the English text of the Treaty provided for the Maori to have the 'undisturbed' enjoyment of their property including their forests and fisheries. This provision presupposed the continued viability of customary law at least in its definition of the traditional (real and personal) property rights. Nonetheless English law was introduced with the Crown's sovereignty as the law governing the relations of the settlers *inter se*.

Valid though McHugh's point is, one must be careful not to impute to the Colonial Office, and to Hobson, an *ex post facto* clarity of approach. The evidence, in the crucial period before and after 1840, does suggest a consistent desire to recognise and protect Maori interests but some dispute as to the best means for achieving that, and as to the consequences of colonial law for Maori customary law.

The crucial document in shaping general colonial policy towards indigenous peoples during this period was the Report of the House of Commons Aborigines Committee 1837.³² This Report, the high water mark in nineteenth-century humanitarian idealism towards indigenous peoples, was a direct inspiration for many of the instructions issued by the Colonial Office in respect of New Zealand.³³ It was premised upon the principle of indigenous sovereignty and on the idea that the protection of the native peoples was the special responsibility of the Crown (i.e. of the executive and not of the legislature, whether

colonial or imperial). Yet the Report reflected a general ambiguity in humanitarian thinking in its attitude to indigenous law. On the one hand, colonisation was to be a 'civilising' mission and this, in the Victorians' eyes, meant that native peoples should enjoy the civilising benefits of British justice. On the other hand, the 'amalgamation' of the natives and the colonists should not occur in a way which was destructive to the natives and had to be a gradual process.

This dichotomy was felt in acute form in relation to the Maori. They were perceived as a race much advanced up the 'ladder' of civilisation and thus had at once a greater claim to sovereignty and a greater prospect of successful 'civilising'. The position as to Maori custom thus went through several drafts before receiving its final form in Lord Normanby's Instructions to Hobson of 14 August 1839. These included an injunction that 'until [the Maori] can be brought within the pale of civilised life, and trained to the adoption of its habits, they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals'.³⁴

Although Hobson and others made this clear in public statements issued in New Zealand in 1840,³⁵ no such provision was included in the Treaty of Waitangi itself. Adams draws the following conclusion:³⁶

On the one hand, Hobson's inclusion in the Treaty of Waitangi of an article granting the Maoris the rights and privileges of British subjecthood accorded fully with the ultimate goal of Colonial Office policy: complete assimilation. On the other hand, Hobson omitted from the Treaty the very important rider contained in Normanby's and, later, Russell's instructions, that in the meantime harmless Maori customs should be protected from the operation of English law. The omission was of no small significance, for it meant that the Colonial Office and the Colonial Government were not committed by treaty to uphold any aspect of Maori society, but only Maori rights to land.

Russell's instructions to Hobson of 9 December 1840, which went into some detail on the subject of customary law, finished on the note that:³⁷

It is important to advert distinctly to this topic, because without some positive declaratory Law authorising the Executive to tolerate such customs, the Law of England would prevail over them, and subject the natives to much distress and many unprofitable hardships.

The first Charter for the Colony, which established a system of local courts, gave those courts a full territorial jurisdiction, which impliedly did not exempt the Maori. 1875) empowered the Governor to

While this evidence does qualify any theory of unbounded continuity, one should remember that such an argument depends on the operation of general colonial law and not on either the actions or statements of colonial officials or the language of the Treaty. Moreover, the Maori version of Article II of the Treaty may include protection of customary law.

The fate of Maori customary law in the rest of the nineteenth century was to illustrate graphically the divergence between the imperial law as administered by the Colonial Office, by Westminster and by the Privy Council on the one hand, and the New Zealand legislature and courts, including the Native Land Courts, on the other.

v FIJI

This conflict of views was indeed one of the precipitators of an increased British official presence in the Pacific Islands. The next firm foothold in the Pacific was Fiji and there too the British government was forced to intervene in an attempt to protect the native Fijians from the rapacious demands of the European settlers. A tenuous native government under King Cakobau was only too aware of what they were fighting to preserve (and of the fate of the Maoris in New Zealand).³⁸ However, internal dissent, settler hostility and external insecurity eventually forced cession. A deed dated 10 October 1874, signed by Cakobau and twelve other chiefs, ceded to Her Majesty full sovereignty and dominion over the islands and their inhabitants. This was a further illustration of the continuing vitality of the principle of indigenous sovereignty in the Pacific.

Nevertheless, the terms of the Treaty were less than wholehearted in their protection of indigenous rights or customary law and represented a determination to avoid the pitfalls of Article II of the Treaty of Waitangi.³⁹ Fijian land rights were only preserved in respect of land 'in actual use or occupation of some Chief or tribe' or 'actually required for the probable future support and maintenance of some Chief or tribe' (Article 4). Otherwise, the Crown was the absolute proprietor. The rights of the chiefs, as ceding parties,

were only to be recognised 'so far as is consistent with British Sovereignty and the colonial form of government' (Article 7). The colony's first charter (2 January 1875) empowered the Governor to create a Legislative Council to pass law and to appoint judges but was silent on law and custom.

While indigenous rights in Fiji thus find an uncertain support in the constituent instruments of the Colony, Fiji's first two Governors, Sir Arthur Gordon and Sir John Thurston, were to pioneer a form of administration which was highly protective of the native Fijians' way of life, land, political structures and customary law and which, at the imperial level, was a novel precursor of indirect rule.

vi The Western Pacific High Commission

Meanwhile, Australasian pressure and the glimmerings of imperial responsibility were combining to urge the creation of a wider jurisdiction over the rest of the Pacific. The formalised position of Fiji made possible administratively an increased 'law and order' presence across the vastness of an ocean, which was inherently difficult to govern. The new regime was inaugurated by the Pacific Islanders Protection Act 1875. This Act marked a turning point in colonial law. Hitherto the British had always insisted that, if they were to erect an extra-territorial jurisdiction exercisable locally over British subjects and native inhabitants, there had to be some treaty, grant, usage or sufferance from the local native rulers.⁴⁰ Early reports from the Pacific suggested that the island societies lacked the requisite stability to make such arrangements.⁴¹ Nevertheless the Act scrupulously respected the autonomous sphere of the native authorities. Indeed, the whole thrust of the Act, as its short title suggests, was to protect the islanders from the depredations of British subjects. Section 6 provided:

It shall be lawful for Her Majesty to exercise power and jurisdiction over Her subjects within any islands and places in the Pacific Ocean not being within Her Majesty's dominions, nor within the jurisdiction of any civilised power, in the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory, and by Order in Council to create and constitute the office of High Commissioner in, over, and for such islands and places, or some of them, and by the same or any other Order in Council to confer upon such High Commissioner power and authority, in Her name and on Her behalf, to make regulations for the government of Her

subjects in such islands and places, and to impose penalties, forfeitures, or imprisonments for the breach of such regulations.

The same section authorised the High Commissioner to constitute a court for such a purpose. This section was followed significantly by section 7:

Nothing herein or in any such Order in Council contained shall extend or be construed to extend to invest Her Majesty, her heirs or successors, with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid, or to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion....

The 1875 Act was thus still firmly committed to the principle of indigenous sovereignty. Indeed, it was the limitation imposed by the Act giving jurisdiction only over British subjects which bedevilled the hapless history of the Western Pacific High Commission, subsequently constituted by the Western Pacific Order in Council 1877. The Commission was continuously stymied in its attempts to mete out justice by its lack of jurisdiction over natives. At one point in 1881, such a jurisdiction was proposed. But even though the standard of civilisation test had by then gained ascendancy in international law, militating against native sovereignty, the proposed Bill lapsed.⁴²

vii Protectorate Status

However, British colonial law was to develop an intermediate form for the exercise of imperial power which proved to be of significant use in the Pacific: the Protectorate. The Protectorate also avoided an assumption of absolute territorial sovereignty but it did allow for more effective administration. Protectorates ensured that, in the scramble for Africa and the Pacific, British influence could be preserved and the native inhabitants protected from other Western powers. These were aspects of 'external' sovereignty. However, the 'internal' sovereignty was left to the native people. As McHugh comments: 'This "internal" sovereignty left the indigenous institutions and laws intact and ensured the native polities' nominal retention of the status of territorial sovereign'.⁴³ In the Pacific, Papua became a protectorate in 1884, the Gilbert and Ellice Islands in 1892 and the Solomon

Islands in 1898. This new order of things was reflected in a revised Pacific Order in Council in 1893 and paved the way for a more intensive administration of the Islands, though still under the general superintendency of the High Commissioner.

viii Papua New Guinea

In the transition into full colonial status, different patterns began to emerge. In the west of the region, Papua (then known as 'British New Guinea') became a British colony, largely as a result of heavy-handed Australian pressure, in 1888.⁴⁴ The Letters Patent declared that there was 'no civilised government'. The Royal Instructions required the Administrator to support any measures 'conducive to civilisation and the suppression of barbarous customs'. The Courts and Laws Adopting Ordinance 1888, as amended the following year, established the basic legal regime for Papua throughout the colonial period. It introduced the common law, as far as applicable to local circumstances, applied a number of statutes, including the Queensland Criminal Code, and established a Central Court. The Administrator had the power to exclude native districts from the rigours of the introduced law but he never exercised it. Thus the natives were, at least technically, subject to the full force of the law.

Land was the only major exception to this. On the establishment of the protectorate in 1884, the Crown had guaranteed indigenous land rights. The 1888 Letters Patent confirmed that there might be no purchase of native land by non-natives. The Crown alone had the right to secure the alienation of native land, which it could subsequently grant to settlers.⁴⁵ Otherwise, custom received only piecemeal recognition in the nascent state legal system, through the medium of Native Regulations made under the Native Board Ordinance 1889 but this was as much a vehicle of paternalistic control as a reflection of existing custom.

ix Samoa

The other half of modern Papua New Guinea had fallen under German control in 1885. It was a growing German influence in the Pacific generally which forced Britain to take a more active interest than it might otherwise have done. This was reflected in the

Final Act of the Berlin Conference on the Affairs of Samoa 1889.⁴⁶ This Conference sought to balance the rights of the three foreign powers with interests in Samoa: Britain, Germany and the United States. Article I recognised 'the independence of the Samoan Government, and the free right of the natives to elect their Chief or King, and choose their form of government according to their own laws and customs'. Article III established a Supreme Court with extensive jurisdiction over land and in disputes between natives and foreigners. Although the basic law of such a court was to be the common law of England, the Chief Justice might render his decision 'in the case of native Samoans and other natives of the South Sea Islands, according to the laws and customs of Samoa'.

The status of customary law in Samoa during the troubled final quarter of the nineteenth century (before it became a German protectorate in 1900) was fully canvassed by a Full Court of the Supreme Court of New Zealand in *Samoan Public Trustee v Annie Collins*,⁴⁷ in a case stated from the High Court of Western Samoa. One Joseph Collins, the son of an American citizen and a Samoan woman, and himself an American citizen, was born in Samoa, lived there all his life, and had a Samoan domicile. In 1870 he married a Samoan woman, Sina, according to Samoan custom. He died intestate on 21 February 1920. On 1 May 1920 the Samoa Constitution Order (New Zealand) came into force replacing German law with New Zealand/English law. The question for the court was whether his children were legitimate for the purpose of succession to his estate. This involved an examination of how the German law in force in Samoa at the time of Joseph Collins's death would have regarded the succession in the light of a marriage before even the Berlin Conference. It was an especially difficult enquiry because German law would have had regard to Joseph Collins's US nationality in matters of succession, and also because a controversial law made by Malietoa, King of Samoa, in 1890 had forbidden all marriages between Samoans and subjects of the Great Powers with consuls in Samoa, except those performed by such consuls. Nonetheless, the New Zealand Supreme Court was prepared to accept as law the customs of the Samoans, at least in order to validate this marriage conducted before the Malietoa law and before German protectorate status. It rejected arguments based on New Zealand nineteenth-century authorities that native custom was not cognisable.

x The Gilbert and Ellice Islands

The Gilbert and Ellice Islands slipped from protectorate to colony status in 1915.⁴⁸ The initiative for this, half-hearted as it was, did come from Britain but the island governments signed forms requesting colonial status. This was solemnly recited in the Gilbert and Ellice Islands Order in Council 1915. The preamble mentioned that 'Whereas the Native Governments of the said Islands have expressed their desire that these Islands should be annexed to, and should henceforth form part of, His Majesty's Dominions...'. The Order retained the structure of High Commission government which had been provided for in the Pacific Order in Council 1893. However, that Order had been designed to apply only to non-natives. Yet a general system of laws based on the common law was not expressly introduced in 1915. On the contrary, section 8, which gave the High Commissioner legislative powers, contained two significant provisos:

- (1) That nothing in any such Ordinance or Ordinances contained shall take away or affect any rights secured to any native in the colony by any treaties or agreements made on behalf or with the sanction of Her late Majesty Queen Victoria, His late Majesty King Edward the Seventh, or of His Majesty, and all such treaties and agreements shall be and remain operative and in force, and all pledges and undertakings therein contained shall remain mutually binding on all parties to the same.

....

- (3) That the High Commissioner, in making Ordinances, shall respect any native laws and customs by which the civil relations of any native chiefs, tribes, or populations under His Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction, or clearly injurious to the welfare of the said natives.

xi New Hebrides

The New Hebrides had, during the latter part of the nineteenth century, become a byword for lawlessness and corruption. An Anglo-French agreement of 1878 had guaranteed its independence and neutrality. In practice this left an increasing band of settlers free to engage in unscrupulous land buying and native labour recruiting.⁴⁹ The French Government nursed imperial aspirations for the territory, and thus lent much support to French settlers. The Western Pacific

High Commission was defeated in its attempts to control the situation by perennially scarce resources, a misguided non-interventionist policy and by deliberate renunciations of British citizenship and British ship registration by Anglophone settlers.

Australian pressure saved the British from losing interest in the islands altogether. By fitful degrees, condominium administration was established. First, in 1887, an Anglo-French Joint Naval Commission was constituted. This had only the most minimal powers of intervention. As Scarr comments: 'The result was that, for thirty years after the issue of the principal Western Pacific Order in Council, the New Hebrides were more the Alsatia of the Pacific than Fiji had ever been'.⁵⁰

The next effort was the Anglo-French New Hebrides Convention of 1906. This had its origins in attempts to do something about the land situation; however, British attempts to have all European titles thoroughly investigated were foiled by the French. National Courts were established for the nationals of each power. A Joint Court was to have jurisdiction in all land and civil cases in suits between natives and non-natives, and in cases of crime by the former against the latter. The Joint Court did not open until 1910, and was substantially sabotaged by the French. Meanwhile, European control over disputes between the natives *inter se* was exercised by a variety of irregular means: 'courts' constituted by the Presbyterian missions and *ad hoc* actions of the Joint Naval Commission which were judicially approved by the British National Court.⁵¹ Article VIII of the Convention gave the Resident Commissioners 'jurisdiction over the native Chiefs' with 'power to make administrative and police regulations binding on the tribes, and to provide for their enforcement'. Only the most desultory interest was taken in this area, and not until 1917 was a Joint Regulation made giving the Joint Court jurisdiction over serious offences.

Meanwhile the new 1914 Anglo-French Protocol (which came into force in 1922) went further into the realms of native administration by allowing for a system of native courts. Paragraphs 4 to 6 of Article 8 provided:

4. The High Commissioners and Resident Commissioners shall cause a collection of native laws and customs to be made, and these, where not contrary to the dictates of humanity and the

maintenance of order, shall be utilised for the preparation of a code of native law, both civil and penal. This code, in which the High Commissioners and Resident Commissioners may subsequently introduce, by joint decision, such modifications as they may consider necessary, shall fix the penalties to be applied in cases not specified in the present Convention and shall distinguish between matters exclusively subject to the administrative authority of the High Commissioners and Resident Commissioners, and matters coming within the jurisdiction of the Native Courts to be set up under paragraph 5 of the present Article. The code of native law shall be put into force successively in one region after another. For this purpose the High Commissioners or Resident Commissioners shall issue joint Regulations defining the area in which the code of native law is to be applied and the dates on which it is to be put into force.

5. When the Code of native law is recognised as being applicable in whole or in part to an area, the High Commissioners or Resident Commissioners may institute Native Courts in that area, and determine the territorial jurisdiction of such Courts by special joint regulations.

6. Each of the Native Courts instituted shall be composed of one of the two Agents of the administrative district in which it is situated, who shall act as President, and of two native assessors, who shall be appointed annually by joint decision of the two Resident Commissioners and may be reappointed.

In the unique circumstances of the New Hebrides, the legal presumptions were in favour of non-intervention in native affairs. However, in practice this sanctioned very widespread intervention, especially by European settlers through the continuing scandal of land acquisition.

2 THE RECEPTION OF ENGLISH LAW

I General Principles

Acceptance of prior indigenous sovereignty and recognition of pre-colonial customary law were fundamental principles to British colonial law. These principles guided the British colonisation of the Pacific, although their application to such a wide range of jurisdictions and over more than a century of imperial expansion led to many divergences and new developments in fact. The special characteristics of the Pacific and the historical evolution of the colonial law principles also shaped the manner of the introduction of English law into the region.

The purpose of this section is to contribute to the formal examination of colonial law in relation to the recognition of

customary law, the general effect of the reception of English law. The rules governing the reception of English law will be examined for their effect on customary law. This will be applied to the case of the Pacific. Then some evaluation of the significance of the introduction of English law will be presented.

The extension of English law to the colonies was primarily a function of the common law. Statute played but an ancillary, confirmatory role. The common law regarded the reception of English law as dependent upon the basis of the acquisition of the colony. In colonies acquired by cession or conquest, the pre-existing law continued, governing colonised and colonisers alike. Further, the Crown had wide prerogative powers to grant a non-representative assembly and enact ordinary legislation in such colonies until it granted either English law or a representative assembly.⁵² In settled colonies, on the other hand, English law was imported as the birthright of the English settlers themselves (though this was not fatal to customary law within its own sphere of operation). The Crown held no ordinary legislative power in a settled colony and its constituent power was limited to the establishment of a representative assembly.

This clear distinction between conquered or ceded colonies on the one hand and settled colonies on the other was not reflected in practice. In particular, it was eroded during the nineteenth century in two important respects. First, English law might still be held to apply in colonies acquired by conquest or cession, but only to the English settlers themselves in their relations *inter se*. Second, the category of 'settled colony', to the extent that such categorisation affected the reception of English law, had been extended to include not merely uninhabited territory but also territory inhabited by native peoples, whose laws it would have been impractical to apply to the English settlers.

McHugh summarises⁵³

... the confusion that had crept into British practice during the early nineteenth century as to the appropriate status for a new colony. In some cases the position of the English inhabitants was treated as paramount, an emphasis which suggested the settled designation, but in other cases the formalities of territorial acquisition (treaty with an uncivilised ruler) could prevail.... No guidance to selection

of the appropriate emphasis was ever forthcoming. The most that can be said is that those colonies acquired from aboriginal tribes and treated as settlements must have presented occasions upon which the Crown felt the birthright argument to be particularly strong.

Thus it became possible, as happened in New Zealand, for a colony to be regarded as 'settled' and, at the same time, for the Crown to satisfy the principle of indigenous sovereignty by obtaining a treaty of cession. Much was shaped by the character and purpose of the colony and the perceived need to grant a representative assembly.

In any event, as established earlier, the reception of English law into a settled colony as the birthright of the settlers was not fatal to the survival of the indigenous customary law. In the first place, the reception of English law was for the benefit of the English settlers. The principle had little application to the native inhabitants. In the second place, the rules for the recognition of customary law were themselves common law rules which had been developed for the colonial situation.⁵⁴ The two systems were thus not mutually exclusive.

Statutes which expressly adopted English law did not change this position. They simply confirmed the common law. An administrative machine, including legislature, executive and courts, which colonialism introduced, might well have needed a residual body of law from which to work but this did not of itself resolve the fate of indigenous law.

With these principles in mind, it is possible to review the position in the Pacific. The, to date uncontroverted, position of Australia as a settled colony has already been dealt with. Although it was suggested and the matter is currently being reargued before the High Court of Australia, that this need not have been fatal to the recognition of Aboriginal customary law, in fact this seems to have been the case. The common law reception of English law was confirmed by section 24 of the Australian Courts Act 1828 (Imperial).⁵⁵

II New Zealand

New Zealand was from the start regarded as a settled colony, though this did not alter the perceived need to obtain Maori consent to colonisation, nor was it terminal to Maori customary law. No formal guarantee of the survival of Maori customary law was

contained in the Treaty of Waitangi, although Normanby's instructions to Hobson had suggested the importance of the topic, and Hobson publicly declared at the time that customary law would be respected. The situation throughout the crucial first decade of the life of the new colony remained a fluid one.

Hobson's first set of instructions as Governor were the product of much agonising in the Colonial Office and, as a result, do not necessarily speak with a consistent voice on customary law. Lord Russell, Secretary for Colonies from September 1839, added to the original draft of the Permanent Under-Secretary, James Stephen, that Hobson should look 'rather to the permanent welfare of the tribes now to be connected with us, than to their supposed claim to the maintenance of their own laws and customs'.⁵⁶ To assist in achieving this desired amalgamation, the Maori were to be provided with official 'protectors' who would oversee the application of English law to them. However, Stephen recognised that Maori custom constituted 'law' and included the following clarification of the continued operation of custom:⁵⁷

Amongst the native customs there are some which it will be the duty of the Government not to respect. Of these, the chief are cannibalism, human sacrifice and infanticide. With such violations of the external and universal laws of morality no compromise can be made, under whatever pretext of religious or superstitious opinion they may have grown up. On the other hand, there are customs which, however pernicious in themselves, should rather be gradually overcome by the benignant influence of example, instruction and encouragement than by legal penalties. And, finally, there are customs which, being rather absurd and impolitic, than directly injurious, may be borne with, until they shall be voluntarily laid aside by a more enlightened generation. *It is important to advert distinctly to this topic, because, without some positive declaratory law, authorising the executive to tolerate such customs, the law of England would prevail over them, and subject the natives to much distress, and many unprofitable hardships.*

This uneasy tension between a desire to achieve the swiftest possible amalgamation of the two races, and dictates of colonial law and, indeed, of common sense which suggested maintenance of customary law, continued to be reflected in Colonial Office directives. Thus Stephen recorded three years later:⁵⁸

I know of no reason why in all matters purely *inter se* - their marriages, inheritances, contracts & so on, & even in the

definition and punishment of crimes - they should not live under their own law or customs: such customs only excepted, as are abhorrent from the universal laws of God-; As for example infanticide and cannibalism. And even in questions between the State & the Natives, I know not why they should not be governed by their own laws & customs to the utmost possible extent: gradually of course superceding them by our own laws, as the natives may learn to understand & appreciate it. At this moment this is the case in Ceylon in many respects. It is the custom throughout the whole of British India. Even in Canada, the Indian is at once subject to the British Crown, & exempt from subjection to very much of the laws of the province. Establish this distinction, & the Queen's sovereignty would in no exercisable manner injure the native chiefs or their people. But, to be sure, if these black men are, in respect of their own allegiance, to be brought under the yoke of Blackstone's commentaries, it would be as good a *reductio ad absurdum*, as could be proposed.

Nevertheless, the common law was felt to be an insufficiently clear basis on which to formulate a legal policy for the Maori. Officials, especially Governor Fitzroy and Clarke, the first Chief Protector, wanted clarification by means of legislation.⁵⁹ Meanwhile, a system of courts had been established under the first Charter for the colony, and, though at first they had little effect outside the fledgling European centres, there were cases aplenty applying English law to the Maori. Fitzroy therefore introduced four ordinances in 1844, all designed to modify English law to meet Maori needs. An Unsworn Testimony Ordinance removed the necessity of a Christian oath for the non-Christian Maori. A Jurors Ordinance removed the property qualification for jurors in the case of the Maori. A Cattle Trespass Amendment Ordinance allowed claims for trespass by cattle as much on unfenced land as on fenced land. However the most significant measure was the Native Exemption Ordinance. This Ordinance opened with the following preamble.

Whereas it is greatly to be desired that the whole aboriginal native population of these Islands, in their relations and dealings amongst themselves, be brought to yield a ready obedience to the laws and customs of England. And whereas this end may more speedily and peaceably be attained by the gradual than by the immediate and indiscriminate enforcement of the said laws, so that in course of time, the force of ancient usages being weakened and the nature and administration of our laws being understood, the Native population may in all cases seek and willingly submit to the application of the same.

The Ordinance then set out in twelve short sections the following rules:

- * no Maori to be arrested for a crime against another Maori unless an information has been laid by two high chiefs of his tribe;
- * offences by Maori against pakeha beyond the limits of any town only to be prosecuted by warrant directed to two chiefs of the relevant tribe;
- * bail to be allowed for all offences save rape and murder;
- * theft to be punished by way of a fine of four times the value of the goods;
- * that part of the fine which constitutes the value of the goods to be paid to the victim by way of compensation;
- * no imprisonment for debt.

These provisions were vastly unpopular amongst the settlers in New Zealand and not regarded with great favour in the Colonial Office. So the Imperial power made another effort to clarify the situation. The New Zealand Constitution Act 1846 (Imperial) contained a special section on indigenous law.⁶⁰ Section 10 was described in its marginal note as 'Laws of aboriginal or native inhabitants to be maintained, where not repugnant to Principles of Humanity'. It read:

And whereas it may be expedient that the Laws, Customs, and Usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves in all their Relations to and Dealings with each other, and that particular Districts should be set apart within which such Laws, Customs, or Usages should be so observed; be it enacted, That it shall be lawful for Her Majesty, by any such Letters Patent as aforesaid, to make Provision for the purposes aforesaid; any Repugnancy of any such native Laws, Customs, or Usages to the Law of England, or to any Law, Statute, or Usage in force in the said Islands of New Zealand, or in any Part thereof, in anywise notwithstanding.

The substance of this section was repeated in section 71 of the 1852 Constitution (15 & 16 Vict c 72), which is still in force, although the marginal note was changed to 'Her Majesty *may* cause Laws of aboriginal native inhabitants to be maintained'. The section has usually been regarded as simply empowering the creation of native districts - something that was never done. Some have gone further and asserted that the need to create such districts proved the non-recognition of customary law in the ordinary case outside such districts.⁶¹ However, and this appears more clearly in the 1846 Act, it is possible to read the two limbs of the preamble disjunctively so that customary law was preserved in the relations of the Maori *inter se* outside any special aboriginal district. Some support for this

position may be gleaned from the Instructions accompanying the 1846 Constitution which provided, *inter alia*,⁶²

In cases arising between the aboriginal inhabitants of New Zealand alone, beyond the limits of the said aboriginal districts, and in whatever relates to the relations to and dealings of such aboriginal inhabitants with each other beyond the same limits, the courts and magistrates of the entire province ... shall enforce such native laws, customs, and usages as aforesaid.

That this achieved, as McHugh claims, 'a restoration *de jure* to the Maori of their customary law on those matters *inter se* where previously English law was technically applicable',⁶³ seems to be rather overstating the point. There was certainly the potential in the common law to recognise the pre-existing customary law, but the critical early years of development were marked by vacillation and uncertainty. Further, a split between the intentions of Colonial Office and the Colonial Government in New Zealand was developing, which was to be mirrored later in the nineteenth century by a similar split between the Privy Council and the colonial courts on Maori customary law, the Treaty of Waitangi and Maori land rights. In essence, the imperial authorities supported Maori rights as part of a consistent pattern of colonial law, while the New Zealand authorities attempted to subvert them. This tortuous battle for the recognition of Maori customary rights at common law has been fought from the earliest days of the colony until the present day.

Returning, however, to the nineteenth century, the position of English law in New Zealand was confirmed by the English Laws Act 1858, section 1 of which imported the laws of England as at 1 January 1840 'so far as applicable to the circumstances of the said colony'. There then commenced a 'statute based' approach to Maori customary law, under which custom could only be recognised if a New Zealand statute specifically allowed for its recognition. This approach was taken in relation to land, being confirmed by section 84 of the Native Land Act 1909 which provided that 'Save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other manner'.⁶⁴ Similarly, specific exemptions were provided for customary marriages⁶⁵ and adoptions, although the effect of these was cut down by judicial decision, and they were subsequently abolished.⁶⁶

The decisions of the New Zealand courts, especially from 1875, served to underline the non-recognition of customary law outside the provisions of the statute book and, indeed, to emasculate the few statutory provisions that had been enacted. The leading case is *Wi Parata v Bishop of Wellington* (1877),⁶⁷ a decision of Prendergast CJ. The case concerned an attempt by a Maori tribe to regain land given by Crown grant to the Bishop on trust for educational purposes, which had not been carried out. The claimants thus had to establish their prior aboriginal title and that it could avoid the Crown grant. The Court found that no such title was cognisable. In a series of now notorious dicta the Chief Justice denied the existence of customary law; held that the assumption of British sovereignty would at any rate have extinguished it; that all land rights could stem only from the Crown; that the Treaty of Waitangi had no legal effect; and that statutes which presumed the existence of customary law could not call into being what did not exist. Thus:

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law In fact, the Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, those rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government There existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land.⁶⁸

The existence of the pact known as the 'Treaty of Waitangi' entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of Islands, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been stated. So far indeed as that instrument purported to cede the sovereignty ... it must be regarded as a simply nullity.⁶⁹

The Act [Native Rights Act 1865] speaks further on of the 'Ancient Custom and Usage of the Maori people', as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being.⁷⁰

Wi Parata's case was followed in a long line of land cases.⁷¹ A similar approach was adopted in relation to customary marriage,⁷² and customary fishing rights.⁷³ The only contrary notes were sounded in the early case of *R v Symonds* (1847);⁷⁴ in some very isolated Native Land court decisions;⁷⁵ and in the few cases which reached the Privy Council.⁷⁶ The reception of English law was thus, very largely and

until very recently, held to be unlimited by customary law, which had no general status in the New Zealand legal system.

III The Pacific Islands

The position in Fiji seems equally redolent with potential ambiguities. However these were never challenged or explored in the courts as occurred in New Zealand, perhaps because of the far more extensive protection of customary law extended by the colonial administration. Roberts-Wray avers in cryptic fashion that Fiji though 'a colony acquired by cession by local chiefs', has always since colonisation had English law as its basic law and that 'Fijian customary law is in force only to the extent to which it is given legislative form'.⁷⁷ This seemingly contradictory statement (if general principles of colonial law are applied) gains some support from the limited terms of the treaty of cession (discussed above) and from early legislation. It has never been doubted that Fiji was a ceded colony, and equally that such cession was by a number of chiefs and not by a sovereign government.⁷⁸ The provisional government established by Sir Hercules Robinson had immediately applied all the laws of New South Wales to the new colony.⁷⁹ Then the Supreme Court Ordinance 1874 no 14 provided in section 26:

The Common Law, the Rules of Equity and the Statutes of general application which were in force in England at the date when the Colony obtained a Local Legislature that is to say on the second day of January 1875 shall be in force within the Colony

Section 28 established a proviso as to 'the circumstances of the Colony and its inhabitants and the limits of the Colonial jurisdiction'. More significantly for present purposes, section 35 allowed the Governor by Proclamation 'to declare that the jurisdiction vested in the Supreme Court under this Ordinance shall not extend to any district or part of a district of the Colony specified in such Proclamation or that such jurisdiction shall only be exercised over any particular class of the inhabitants thereof'.⁸⁰ This section supported, much more clearly than had its New Zealand counterparts, the argument that otherwise English law was generally applicable, to natives and settlers alike, and that customary law had no role to play in the basic law. Because of the structure of native administration in Fiji, the Supreme Court was not much patronised by native litigants, and did not have cause to pronounce on the issue.

The position was similarly anomalous in the rest of the Pacific, presided over by the Western Pacific High Commissioner's Court. Though that Court undoubtedly applied English law,⁸¹ it was limited in its personal jurisdiction. The 1877 Order simply provided in section 6 that it applied to:

- (1) All British subjects, for the time being within the Western Pacific Islands, whether resident there or not.
- (2) All British vessels, for the time being within the waters mentioned in Article 5 of this Order.
- (3) Foreigners, in the cases and according to the conditions in this Order specified, but not otherwise.

By 1893 when much of the Western Pacific had already achieved at least protectorate status, the Order in Council was fully revised, and remained in a similar form until 1961. Section 3 now provided for a further category of person who could be subject to the Order: a Native. The section on territorial jurisdiction, instead of simply enumerating a list of islands to which the Order applied, provided:

4. *Limits of Order* The limits of this Order shall be the Pacific Ocean and the islands and places therein, including -
 - (a) Islands and places which are for the time being British settlements,
 - (b) Islands and places which are for the time being under the protection of Her Majesty,
 - (c) Islands and places which are for the time being under no civilised government

The following section on personal jurisdiction was cast in negative terms:

5. *Persons subject to this Order* In islands and places which are not British settlements, or under the protection of Her Majesty, jurisdiction under this Order shall be exercised (except only as in this Order otherwise expressly provided) only over Her Majesty's subjects and any foreigners or natives, in so far as by reason of being, or having been, on board a British ship or otherwise they have come under a duty of allegiance to Her Majesty, and their property and personal and proprietary rights and obligations.

The implied corollary of this was that, in British Protectorates and Settlements, the jurisdiction of the Commissioner's Court was plenary and thus the English law applied by that court applied to natives as well as British subjects. This point did not occasion the

controversy which it had in East Africa,⁸² and the Court did exercise jurisdiction over natives.⁸³ However, this was very much the reception of English law by the back door, especially given the wide qualifications made for the Gilbert and Ellice Islands when they became a colony (discussed above). Further, the High Commissioner's Court was exceptionally remote from day-to-day life in the Western Pacific. The actual picture of legal administration was, at least in the case of the Gilbert and Ellice Islands, dominated by a virtually self-contained system of colonial native courts.⁸⁴

In territories which fell under Australian or New Zealand control, there was an express introduction of the common law, but this often took time to establish: Papua New Guinea, 1888; Nauru, 1922;⁸⁵ Samoa, 1921;⁸⁶ Cook Islands and Niue, 1966;⁸⁷ Tokelau, 1969.⁸⁸

IV Comparisons with Africa

In the Pacific, neither the reception of English law nor the conservation of customary law were tidy processes. By contrast, the African experience, which has dominated thinking on the recognition of customary law, was characterised by express statements of the applicable rules.⁸⁹ Such rules were located in either the constituent Order in Council for the territory (as in East and Central Africa) or the Supreme Court Ordinance (as in West Africa). The pattern was commenced by the Supreme Court Ordinance 1876 of the Gold Coast Colony. Because the establishment of the colony meant the acquisition of a plenary territorial jurisdiction by the Supreme Court, it was felt necessary not only to specify English law as the generally applicable law, but also to legislate for customary law. The formula of specific reception of English law (as at a specific reception date) together with a qualification for customary law was rapidly applied all over the continent. A typical proviso was article 20 of the Uganda Order in Council 1902:

In all cases, civil and criminal, to which natives are parties, every Court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality, or inconsistent with any Order in Council, Ordinance, or any regulation

The African approach was a wholesale one in that, by introducing English law and native law as concurrent sources of basic law, it

charged the courts with a heavy responsibility to work out the parameters of each source. This did not happen in the Pacific to any significant extent until Independence (see Chapter III). The African approach also meant that the focus of study on the extent of the recognition of customary law was set firmly on the decisions of the superior courts, which were perhaps the worst guides to actual practice. However, it did have two redeeming virtues. First, it removed much of the uncertainty which was characteristic of the reception of English law in the Pacific. Second, it gave customary law a form of legitimacy within the colonial legal system. This provided an opportunity to mitigate the otherwise harsh application of alien English law. It removed official responsibility for the recognition of indigenous law from resting simply with the executive and legislature, and allowed for the protection of indigenous societies through the courts. The result was the development of a highly complex, specialised branch of the law, known as the interpersonal conflict of laws which defined the persons governed by each system of laws. Although this was based on rather rigid categories of racial status, case law exposed many difficult grey areas in the attempt to administer concurrently, but separately, through the same court system, English law and customary law.

Why were the lines of development different in the Pacific? The ethos of empire should surely have meant the enforcement of identical rules whatever the geographical location. Only tentative answers can be offered here. In the first place, Australia and New Zealand were part of the 'first wave' of Imperial expansion, in which the rules with regard to the introduction of English law into territories inhabited by native peoples were in a constant state of evolution. Additionally, the Australasian colonies were established for settlement purposes. This strengthened the legal basis for an exclusive application of English law. It also reduced the need and willingness to cooperate with indigenous societies. Moore makes the following comment based on African observation:⁹⁰

In the colonies, the laws of indigenous populations were of major importance to the administering powers. Order had to be maintained with a small staff, limited funds, and little equipment. Colonial administrators could not possibly hope to revamp completely the indigenous legal/political system, and for that matter, in many places, did not aspire to do so. Like it or not, they had to acknowledge the local legal order.

These considerations were very relevant in Africa, especially where the native population was an essential labour force in the colonial economy.⁹¹ In Australasia, the native population was a hindrance to the colonial policy for those territories. Early self-government for those colonies, a requisite of their 'settled' status, further reduced the ability of the Colonial Office and the Privy Council, as guardians of the colonial law on indigenous peoples, to control unsympathetic settler opinion.

In Fiji and the Western Pacific, the distinctions are less discernible. Fiji was, of course, made a colony before that point was reached in most of Africa. Annexation was carried out by the then Governor of New South Wales, Sir Hercules Robinson, and in several respects the Treaty of Cession and Supreme Court Ordinance drew on New Zealand experience (the modified land guarantees, the provision for exempted districts). The Western Pacific generally had its own rubric of colonial development, generated by the Pacific Islanders Protection Act 1875. The principal reason for the annexation of much of the Pacific was strategic: a need to maintain British influence in the face of French, German and American competition. This need did not call for rigorous administration or for a coherent policy on the legal system. The absence, in most places, of a settler population of any size minimised the need for the common law as a pool of legal rules for resolving civil disputes. The very remoteness of the Supreme Court for the region, the High Commissioner's Court, militated against intensive judicial administration.

Nevertheless, both in Africa and in the Pacific, though perhaps more noticeably in the latter, the true nature of the recognition of customary law is disclosed not from the formal elements of the basic law and decisions thereon by the superior courts, but from subsidiary legislation and the work of the lower courts. Here the Pacific was the scene of extensive experimentation.

v The Nature of the Received Law

However, before reviewing some of the themes which emerged from that experimentation, it will be useful to advert to the extent of the legal revolution which had been wrought by the introduction of English law. Allott coins the term 'translocation of laws' to describe the phenomenon of the wholesale introduction of a

legal system which had been originally developed for use elsewhere.⁹² What was introduced was, after all, not merely a simple code and a court to administer it, but the entire body of English law at the reception date: common law and United Kingdom legislation. This presented an inheritance of stunning complexity, with which some states are only now coming to grips.

Nevertheless in crucial respects the inheritance of English law was a debased inheritance. It is often claimed, or at least implicitly assumed, that the introduction of English law brought with it all the benefits of the Rule of Law for indigenous peoples. For example, in New Zealand, the status of British subject conferred by the Treaty of Waitangi was seen as extending to the Maori the advantages of access to British justice. Yet here again the African experience suggests otherwise.

Seidman discusses a range of factors supporting the argument that the reception of English law in the colonies did not mean that the indigenous peoples received all the benefits of British justice.⁹³ First he suggests that, though reception statutes commonly provided for a qualifying of English law to take account of local circumstances, this 'grounded upon the rocky shoals of judicial conservatism and imperial ideology'. Secondly he argues that the technique of reception at a fixed date coupled with the effect of limiting reception of statutes to those 'of general application' meant that much United Kingdom legislation aimed at reforming the harshness of the common law and creating a welfare state was never received in the colonies. Thirdly he shows how the basic individual liberties and rights of democratic representation were excluded from the colonial regime. He concludes:⁹⁴

English law may have nominally been the general law of the colonies; but it was a peculiar form of English law that had excised from its corpus any of the democratic forms or economic protections which are claimed to be the brightest jewels in the English legal crown.

These arguments run much wider than the present enquiry in that they call into question the role of law in the colonial state. However, they do serve as a useful reminder of the type of legal system which colonialism superimposed on the indigenous order. Broadly, colonialism was above all based on an authoritarian rule

which transformed for its own purposes the indigenous orders with which it came into contact. Transformation was as much a feature of the colonial 'recognition' of customary law as of other aspects of governance. This theme will be explored in Part C of this chapter (The 'Fatal Impact' Theories). It is first necessary to examine the conceptions of the colonisers as to the recognition of customary law and the methods they adopted.

3 INDIRECT RULE

1 The Influence of Ideas: 'Noble' and 'Ignoble' Savage

The attitude of the colonisers to customary law was not conditioned simply by the exigencies of governance or by economic factors, although both of these were important. It was also conditioned by a set of ideas, both about the nature of customary society and about the effect of colonisation upon it. These ideas did not all point in a single direction. They did not amount to a consistent policy. Yet they proved as powerful a tool in shaping colonial policy in relation to indigenous law as economic and administrative considerations.

These ideas came from a variety of sources. In the first place, Western philosophy had, at least since the days of Montaigne and Montesquieu, endlessly debated the true nature of the indigenous peoples with which Western explorers and colonisers were coming into contact.⁹⁵ Two strands of thought might usefully be distinguished. On the one hand, there were those such as Rousseau who saw native peoples as expressive of some perfect balance with each other and with nature - a balance which the onslaught of Western civilisation could only destroy. This 'noble savage' tradition translated easily, at the level of colonial administration, into a desire to preserve indigenous cultures for their own sake. One can do no better than to refer back to the quotes from Forster, Thurston and Gordon with which this chapter commenced. Indeed, the Pacific gripped the romantic vision of the Enlightenment as embodying the essence of the noble savage. The experiences related by the forerunners of European 'civilisation' in the Pacific: the explorers, traders, adventurers, missionaries were of enormous significance back in Europe. Oscillations in philosophical thought and public opinion in turn influenced the colonisers.⁹⁶

However the influence of the opposite idea, the theory of the 'ignoble savage', was also at large. The 'ignoble savage' tradition regarded the native peoples as essentially in a state of darkness from which the light of European civilisation was destined to release them. This meshed in with evolutionary theories on the development of man. Primitive man was at the bottom of a ladder and had to pass through a number of stages before he could attain the level of 'advanced' Western man. This tradition, which resurfaced in the form of social Darwinism, found a special popularity amongst legal theorists. Montesquieu in his *The Spirit of the Laws* (1748) had propounded a four stage theory of social development based on four successive modes of subsistence: hunting, pasturage, agriculture and commerce. Sir Henry Maine, in his influential *Ancient Law* written just over a century later (1861), similarly pursued the idea of legal evolution. In opening up the study of law to an historical perspective, Maine admitted that primitive societies had law but he also sought to rank that law on a scale of development. In Chapter 1 of his work, 'Ancient Codes', he suggests a universal transition from royal command to custom as administered by chiefs to codification. In Chapter 5, he applies a similarly universal set of principles to an examination of 'Primitive Society and Ancient Law'. In identifying the key aspects of primitive law as concerned with family relations and status, Maine then elaborates:⁹⁷

The movement of the progressive societies has been uniform in one respect. Through all its course, it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account.... Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract.... We may say that the movement of progressive societies has hitherto been a movement *from Status to Contract*.

Marx was equally concerned with charting an historical course by means of socioeconomic formations through the development of human society.⁹⁸ He likewise ranked primitive societies at a prior stage of development to feudal, capitalist and, ultimately, communist modes and presented this course of development as universally applicable and unilinear.⁹⁹

These theories had a direct influence on the colonisation of the Pacific, though adopted by a diverse range of adherents. The

missionaries clearly saw their role as one of transforming indigenous societies, dragging them up the ladder of progress. Though inspired by a desire to act in the best interests of the natives, the missionaries were quite ready to sweep away 'barbarous' customs: indeed it was a major purpose of the evangelical movement. The Aborigines Protection Society, which was formed by five members of the committee which had produced the 1837 House of Commons Report, took a more complex view in relation to customary law. While its primary aim was the protection of indigenous peoples, it did not wish to see them denied the 'benefits' of English law and British subjecthood. This led them, for instance, to protest at the provisions included in the New Zealand Constitution for the creation of native districts.

Tensions between these two conceptions of native societies found ready expression in the debates about the recognition of customary law in colonial times. The vacillations in New Zealand policy between preservation of customary law and its gradual or immediate eradication are clearly illustrated in the preambles to early statutes discussed above.

II Indirect Rule: Administration and Anthropology

A later wave of ideological contributions to the recognition of customary law came with the development of colonial administration in relation to native peoples as a science in its own right, and with the attempt to harness anthropology for administrative purposes. The Colonial Office itself provided a vast forum for the exchange of views and for the formulation of policy. Ideas and institutions developed in one context were frequently applied elsewhere. Thus the office of the protector was established in New Zealand after initial experimentation in Australia, as a means of discharging the Crown's special responsibility to native peoples, especially in relation to the legal system. Of course, colonial officials were likewise transferred around the Empire, taking their native policies with them.

However, the deliberate articulation of native policy reached its summit in the concept of 'indirect rule' which was consciously recorded and pursued by administrators. Indirect rule became the hallmark, the 'peculiar genius', of British rule, especially in tropical Africa. The *locus classicus* is Lord Lugard's *The Dual Mandate in British Tropical Africa* (1922). It has been defined as¹⁰⁰

adapting for the purposes of local government the institutions which the native peoples have evolved for themselves, so that they may develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they have inherited (moulded or modified as they may be on the advice of British Officers) and by the general advice and control of those officers.

Indirect rule was paternalistic in the sense that ultimate control and day-to-day supervision were retained by the British and indigenous structures were subordinated to them. Nevertheless it was conservationist in its desire to retain, rather than sweep away, those indigenous structures. However, as Read argues in relation to East Africa,¹⁰¹ the appeal to traditional values made by indirect rule masked a much more intensive administration by colonial officials at the local level than had hitherto been contemplated. Indirect rule achieved this despite itself because it was a consistently and vigorously applied principle. Further, indirect rule nursed a tension between the 'civilising mission' and reliance on native forms. To quote again from Cameron's East African memoranda, he recognised that indirect rule involved 'trying, while we endeavour to purge the native system of its abuses, to graft our higher civilisation upon the soundly rooted native stock....'.¹⁰²

What role did the principle of indirect rule play in the Pacific? An initial indication is given by the policies of Sir Arthur Gordon, first Governor of Fiji and High Commissioner for the Western Pacific. Gordon believed passionately in the need for colonial administrations to work through native institutions. He went to some lengths to create for himself a position as paramount chief in the native polity and to learn Fijian. He instituted and clothed with a mixture of traditional and colonial authority a Great Council of Chiefs and local administration based on chiefly authority. Gordon embodied many of the influences so far discussed. As France records¹⁰³, he

kept a copy of Maine's *Lectures on the Early History of Institutions* with him in Fiji. His agreement with the unilinear evolutionary theories which it contained is evident from his description of Fijian culture as 'the shape into which the first elements of society when emerging from barbarism naturally crystallize'.... When, therefore, Gordon based his native policy on the preservation of the basic institutions of Fijian society, the nature of these institutions was known to him, not

from careful observation in Fiji, but from the recognition that all societies at Fiji's stage of development from savagery to civilisation have the same characteristics.

Another influence on Gordon's policies was the nascent science of anthropology. Anthropology provided the means to understand native societies. Writing his celebrated introduction to Hogbin's *Law and Order in Polynesia* in 1934, Malinowski stated:¹⁰⁴

... anthropology has had either to show its practical utility or become disqualified as an idle mental game. Colonial Governments, missionary bodies, educational agencies in the tropics, are rapidly realising that knowledge of the human material on which they have to work is necessary for a successful achievement of the ends they set out to attain. Hence the modern anthropologist has to study the various populations of Africa, Asia, the New World or the South Sea islands, first of all in their essentials, secondly in the transitional stages from the old order to the adaptation to Western influences.

In fact, the pursuit of applied research was relatively rare by the early anthropologists. Equally exceptional was an attempt to examine the processes of change engendered by contact with the West. Anthropology was wedded to a paradigm of primitive society as an unchanging order. Nevertheless the Pacific was a fertile field for anthropologists, and some of the greatest contributions to the anthropology of law were produced there: Radcliffe-Brown's 'Primitive Law' (1933),¹⁰⁵ Malinowski's *Crime and Custom in Savage Society* (1926), Hogbin's *Law and Order in Polynesia* (1934). These works focused on the nature of customary law within a self-contained customary society. As such, they contributed little to the administrative concerns of colonial officials. This is not to say that the latter did not have a keen interest in anthropology. On the contrary, Gordon, for instance, considered himself something of an anthropologist and the views of another such, Lorimer Fison, were very influential in shaping the (erroneous) lands policy.¹⁰⁶ The Gilbert Islands, too, early attracted colonial officials, such as Charles Swayne and Arthur Grimble, who were ready to translate their amateur interest in anthropology into actual administrative practice and, ultimately, into law.

This amalgam of Western conceptions - philosophical, humanitarian, administrative, anthropological - about native societies combined to produce an image of such societies as above all unchanging

and hierarchical. That, in relation to customary law, squared with the notion of custom in English law as existing from time immemorial,¹⁰⁷ and with Maine's equation of primitive law with ancient law. The Noble Savage tradition would itself view customary societies as expressive of a changeless balance and harmony. Thus, for instance, Gordon saw his task in relation to the customary law of land tenure in Fiji as paring away recent, and heretical, developments and returning to the original and authentic model.¹⁰⁸ The image of hierarchy not only squared with common conceptions about customary societies as bound by status and ruled by chiefs, it also suited administrative convenience: the chief became the intermediary between colonisers and colonised.

III Theory Into Law: The Interpersonal Conflict of Laws

The principle of indirect rule in relation to the law involved some form of recognition of customary law as a matter of the separate administration of the natives. This had two corollaries. The legal structures for native peoples would be administrative rather than judicial - the formal judicial hierarchy existing for the non-native population. Secondly, the plural legal order thus created would be kept clearly separated by means of definitions of racial status and rules to determine which system of laws was applicable to which persons. This 'two spheres' approach was regulated by what rapidly became a complex and technical branch of the law: the interpersonal conflict of laws. Allott makes the point that the need for interpersonal conflict of law rules only arose when two conditions were present.¹⁰⁹ First, the colonial State had to have made the decision to give customary law a formal place within the State legal system. But secondly, both customary law and the received law had to be to some extent in competition, in the sense that they provided alternative systems of rules on the same subject, and it was possible for legal problems to arise in the grey area between the two systems. The conflict of laws was a particular issue where State courts were called upon to administer customary law concurrently with received law. Conversely, where the two systems were administered in separate courts, the incidence of conflicts problems was less.

Colonial law was thus concerned, through the medium of the interpersonal conflict of laws, to prescribe and confine the

situations within which customary law could be allowed to operate.¹¹⁰ In the criminal law, for instance, the State maintained a much more exclusive control, seeing the maintenance of 'law and order' as an essential incident of sovereignty. On the other hand, family law was seen as a classic area for the operation of customary law. In this again, support might be drawn from Maine, in his emphasis on the primacy of the family as an institution in primitive society. Further, even in the West, there was a tradition of plurality in marriage laws, with the competing jurisdiction of the Church. Marriage fitted well into the new structures of colonial law, because one could focus on defining a set of rules, a task infinitely more problematic when it came to a wider range of civil disputes.¹¹¹

The structures of the interpersonal conflict of laws dominated colonial thinking generally on the recognition of customary law. It was a model which, as Sack suggests,¹¹² equated customary law with foreign law as an outside system only to be accommodated as the exceptional case - however frequently the exception was invoked. The interpersonal conflict of laws was thus perceived as, in some senses, a subcategory of Private International Law. Similar techniques and similar conundrums characterised the debate: characterisation, connecting factors, choice of law, jurisdiction, repugnancy/public policy, ascertainment and proof.

The paradigm of the interpersonal conflict of laws dominated judicial decisions in the superior courts and academic comment in British colonies in Africa and Asia. This technical literature was concerned with a small number of complex problems but not with the context of the system it was detailing.

The assumption was that the plural legal order was a transient expedient which would pass away once European contact had wreaked its full impact on customary societies and customary law: 'the messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality'.¹¹³ Unification was seen as the ultimate goal.¹¹⁴ Initially this drew support from the 'ignoble savage' tradition: colonisation was a 'civilising' mission; native societies would sooner or later progress towards the Western model; native peoples must be educated to see the advantages of British justice. Subsequently this was to be supported by the emerging concept of the State, as itself the source of law and the initiator of development amongst its citizens.

In this formalist tradition, the Pacific was a somewhat remote participant. As has been seen, it largely lacked the clear statutory basis for a plural legal order, characteristic of Africa and elsewhere. The State judicial system frequently exercised only a desultory superintendence over the administration of the law (especially in jurisdictions subject to the High Commissioner's Court). Vast areas of the Pacific, irrelevant to colonialism's economic needs, continued in fact to follow a customary way of life innocent of official intervention. The limited penetration of the State meant that many issues about the recognition of customary law could be left to one side. As the Resident Commissioner in the Solomon Islands commented in 1935:¹¹⁵

... the natives should be left, as far as possible, to their own devices while we hold a watching brief to see that there is nothing done which might be considered repugnant to a British sense of fair play. Perhaps my views are sentimental but with all deference I dislike a native custom which is not an English law being made a law to be administered in our Courts and which differentiates between natives and Europeans and Chinese. I have no doubt in time the natives will adapt themselves to our laws.

However, it was not everywhere simply a matter of a watching brief. The comparative isolation of the Pacific, the vast distances separating territory from territory did allow for a degree of original experimentation.

IV Pacific Experiments in Indirect Rule

It is impossible to generalise about native administration in the Pacific. In the Solomons, for example, no attempt at 'indirect rule' was made until the 1940s with the establishment of native courts and special provision for native marriage and divorce.¹¹⁶ In Papua New Guinea, direct rule remained the basic administrative model until the 1960s. The image of direct rule was its frontline patrol officer: the Kiap. Direct rule was forcefully defended by Murray, Papua New Guinea's Administrator from the turn of the century until 1940. Murray, again drawing upon European conceptions of custom ('Among such people status is more important than contract in creating rights and duties'¹¹⁷) and on determinist ideas of its fate ('We must not forget it is our social custom and not that of the primitives that will eventually survive'¹¹⁸), concluded:¹¹⁹

In territories like Papua, where there is little or no trace of native administration or native judicial procedure, there is nothing to build upon and a government which believes in the indirect method has a difficult task before it.

As has been seen, in Australia and New Zealand, repression of native authority and non-recognition of custom were the norm. However, some illuminating examples of indirect rule and a consequent attempt to bring custom into the legal system are to be found. Here it is proposed to discuss three: the short-lived official Runanga system in New Zealand; the long-lived Fijian Native Administration; and Native Laws in the Gilbert, Ellice and Tokelau Islands.

v New Zealand - the 'Runanga' System

Experiments with a 'mixed' system of the administration of justice in New Zealand had begun with the inception of the Resident Magistrates system in 1846,¹²⁰ which required that, in disputes between Maori *inter se*, the Magistrate sit as a Court of Arbitration with two native assessors and that all decisions be unanimous. In the 1850s, as an indigenous resistance to the growth of British influence and the alienation of land, the Maori themselves began to revitalise their traditional *runanga* (councils) to act as centres of dispute resolution and local law-making. Fenton, who eventually became Chief Judge of the Native Land Court, envisaged that this resistance movement could be turned to advantage. Thus he proposed an official Runanga system which was adopted by Grey in 1861. This involved constituting separate judicial and legislative authorities at the local Maori level. The Village Runanga would have a by-law making power under the direction of a Resident Magistrate. Other Maori would be appointed to the post of Assessor, with a limited independent jurisdiction, supervised by Circuit Court Judges. The Runanga would have as their primary responsibility legislation for matters considered important in custom, and the delineation of traditional land rights. In the words of one of its enthusiastic promoters: 'It is not merely government but self-government which is to be introduced'.¹²¹ The scheme was indeed remarkable because it was an early experiment in working through native institutions and because it was genuinely fashioned from an indigenous initiative. However, the 'New Institutions' (as they were called), though introduced and operated, were victims of the racial conflict, soon to degenerate into

open war, of their day. As Ward summarises: 'The patient work of the more able magistrates and their Maori associates could not prevail against basic conflicts of interest, fundamental prejudices and the passions of the militant'.¹²² The New Institutions faded from view by 1863, as war engulfed the country, to be replaced by the overtly transforming Native Land Court, constituted under the Native Lands Act 1865. The Native Rights Act of the same year reiterated the settler view that the consequence of the Maoris' status as British subjects was the full and undifferentiated application of English law (though it did preserve customary land rights, at least until extinguished by operation of the court).

VI FIJI - Gordon and a Model Chiefly Oligarchy

In Fiji, on the other hand, where settler influence was firmly controlled by the Governor, and where the furtherance of the Fijian race was seen as the sacred trust of the British colonial administration, a system of Native Administration was instituted which foreshadowed the ideals of indirect rule and which remained in force almost unchanged until independence. As Roth claimed in a paper written in 1951 and significantly entitled 'Native Administration in Fiji during the past seventy-five years: a successful experiment in indirect rule', the native administration initiated by Sir Arthur Gordon was based on native principles:¹²³

How precisely he wrought these principles into a practical policy acceptable to the Fijians is evident from a perusal of the code of Native Regulations made under the Native Affairs Ordinance which he enacted. This was the first code of Fijian custom set down in writing after discussion by representatives from all parts of the Colony and, generally speaking, the great body of custom that it contains has been understood for generations; and so it was not something new and therefore suspect to the Fijians to whom it was applied.

At the apex of the system was the Council of Chiefs which was, and still is, a body outside the constitutional system but with very significant advisory powers in relation to native affairs. Gordon commenced a tradition, which also survives to this day, of making the Council of Chiefs bear the responsibility for any major changes in native affairs. Beneath the Council was a regularly imposed hierarchy of province, district and village, each presided over by a chief. The judicial system for the native Fijians was likewise a matter of native

administration, administered by Native Stipendiary Magistrates. All of this was underpinned by preservation of the resource, the loss of which was proving so fatal to the Maori: land. What Gordon wished to avoid was the prospect of the Fijians becoming a landless labouring peasantry dependent on the European planters. Accordingly, and despite the language of the Treaty of Cession, he determined to preserve all unoccupied land for Fijians and initiated a process to register it.¹²⁴ Economically, this had two immediate consequences. First, Gordon had to find an alternative source of cheap labour to satisfy those European planters (including the all-powerful Colonial Sugar Refining Company) who already had a foothold in Fiji. In order to do this, he authorised the import of indentured labourers from India, thus creating a racial situation in Fiji which would prove explosive a century later. Second, the Fijians had to be made to produce enough not simply for subsistence but also to provide a surplus for independent cash. This and other social, economic and health objectives were all enforced through the Native Regulations.¹²⁵

Gordon's policy had three hallmarks. It was firstly about imposing a single uniform order on Fijian custom. As one Chief pronounced at an early meeting of the Council: 'This being a new age requires everything to be clear and defined'.¹²⁶ Secondly, it bolstered the power of the chiefs but at the same time compromised it by making chiefs servants of the administration. Fijians thus competed more than ever for chiefly status and the rewards which participation in the bureaucracy brought, and a powerful oligarchy was entrenched. Thirdly, the Fijian administration concerned itself with a mixture of custom and paternalistic concerns reflecting the Victorian values of the British colonial officers.

vii The Gilbert and Ellice Islands - Paternalism Rampant

This mix is reflected, too, in the earliest attempts at codifying custom in the Gilbert, Ellice and Tokelau Groups. There the formal assumption of British rule had been preceded by decades of rigorous proselytising and a missionary theocracy had emerged complete with complex codes which were a mixture of Victorian and customary values. The first step after the achievement of Protectorate status was the promulgation of 'Native Laws'.¹²⁷ These laws, which followed a

similar format for each of the island groups, established a rudimentary system of judicial administration and a code of criminal offences. Courts were to be constituted by a Magistrate, responsible only to the Resident Commissioner. Only in the case of murder was reference to the High Commissioner mandatory. The Magistrate was to be assisted by a council (*Kabure* in the Gilberts, *Vaipuli* in Tokelau) to assist him in his by-law making powers, and to sit as jury in court cases. The Magistrate was also to be assisted by a scribe and policemen. MacDonald comments:¹²⁸

... the appointment of Magistrates was the structural change that was to have the greatest long-term effect.... As the Magistrate was the one responsible for administering the law he was soon recognised, by officials and Islanders alike, as the head of the island government. He was also seen as the agent of the central government; as the one who acted in its name, learned to invoke its power, and was responsible to it rather than to the local community. Thus the emergence of the Magistrate as the dominant figure in island government was made inevitable by a combination of local perceptions and Imperial policy.

The rules themselves were an amalgam of customary, missionary and administrative sources. Thus compensation was prescribed as an appropriate penalty in cases of theft, adultery and fornication with the betrothed wife of another man. Women proved guilty of adultery could be sentenced to make mats, sinnet, hats or other articles for the benefit of the island. As to missionary influence, it was forbidden to work on plantations, cut out copra or do similar work on Sunday. The laws also included administrative strictures, such as 'the duty of the Magistrate and *Vaipuli* to see that all lands are cleared of useless bush and planted up with coconuts, bananas or other food producing trees'.¹²⁹

This initial model, which left most of the responsibility in native hands, and which was constructed by the first Resident Commissioner, Swayne, after study of local attitudes, did indeed reflect Gordonian precepts of indirect rule. However the system was radically transformed into an autocratic model by Swayne's successor, Campbell. Campbell used the native governments to carry out his own commands, and effected this through widespread abuse of the provision in the Native Laws for the making of local regulations. A large part

of these were concerned with imposing criminal sanctions for the non-performance of civic duties: cleanliness, upkeep of houses and villages, care of animals and produce. By the 1920s these authoritarian practices had reached absurd proportions with over three-quarters of an island's population being found guilty of a breach in any given year. Moreover Campbell devoted his energies to stamping out custom.¹³⁰

For example, sorcery, infant betrothal, polygamy, the *eiriki* custom (involving a sexual relationship between a man and his wife's younger sisters), and the soliciting of goods or services (a long-established custom which always involved reciprocation) were all banned, but because these practices were still controlled by community pressures the regulations were ignored by most Islanders and seldom enforced by island governments.

The new Resident Commissioner, Arthur Grimble, continued the paternalistic pattern in his Regulations for the Good Order and Cleanliness of the Gilbert and Ellice Islands 1930.¹³¹ The difference was that Grimble dressed up his curfews, compulsory civic labour, dancing restrictions, and feast licences as custom. Thus Young, Chief Judicial Commissioner for the Western Pacific, commented:¹³²

Mr Grimble ... is an expert in, and has made a special study of, native law and custom, as well as being conversant with native ideas of right and wrong, and also with the native language: he has prepared the code after long and careful inquiry, no one is a better judge of the need for laws applicable to natives of the nature indicated than he is.

The amazing rigidity achieved throughout this period was only formally dismantled by the enthusiasm of a District Officer who became Resident Commissioner: Maude. His anthropological ability allowed him to perceive the considerable disjunction between Grimble's laws and the reality of custom, and the overweening control of Commissioner and Magistrate. Maude's proposals, which gave more power to local councils, were reflected first in Regulations¹³³ and then in the Native Governments Ordinance 1941. These recognised and allowed for the diversity of customary law - native governments were allowed to enact special regulations to meet local circumstances and most did so. Attempts to limit the powers of the Magistrate and create active and elected councils were less successful.

These, then, were some of the forms of native administration adopted by the British as part of the practical working out of their

colonial policy. What, in general, was the fate of customary law when brought in contact with the processes of colonialism? A powerful body of scholarship argues that the impact of colonialism was fatal to customary law, transforming it out of all recognition and beyond all redemption as a significant locus of rules and authority. The burden of Part C is to discuss these theories in their application to the Pacific.

C THE 'FATAL IMPACT' THEORIES

1 THE COLONIAL INVENTION OF CUSTOMARY LAW

I Legal Determinism

This Part takes its title from Alan Moorehead's populist 'Account of the Invasion of the South Pacific': *The Fatal Impact*.¹³⁴ The view that European penetration of the Pacific was one which was certain to be fatal both to the culture of the islanders and, indeed, to their very survival has been central to European thought. In this the early explorers, the missionaries and a later generation of Social Darwinists all conspired, whether out of feelings of guilt or a belief in inevitable progress. As Howe summarises: 'Whether one believed in the nobility or ignobility of islanders, and whoever one blamed for their situation, the result was not in question: European contact meant the demise of island peoples'.¹³⁵ In the case of the law, as we have seen, the official assumption was that, whether or not any 'recognition' of customary law was attempted, custom must eventually give way to received English law. The fate of customary law was sealed.

The idea of the 'fatal impact' is here applied by analogy to a raft of theories about customary law in the colonial period which, broadly, argue that colonisation so transformed the pre-contact reality that what was called 'customary law' was in effect nothing more than an invention of the colonisers. Much of this analysis has been developed in relation to African material, although one important aspect is provided by Fitzpatrick in his analysis of Papua New Guinea, and many Pacific examples may be pursued.

Because these theories, implicitly or explicitly, challenge the present reality of customary law through an historicist analysis, it

is vitally important to examine their relevance to the Pacific and their general implications. In broadest outlines, the theories suggest that: (a) pre-contact native society was so fluid that any attempt to freeze a defined customary law was futile; (b) the colonisers' attempts to 'recognise' customary law reflected more of their own preconceptions of native society than the reality of it; (c) anyway, the 'recognition' of customary law was an unreal exercise because it subjected custom to an alien set of requirements and procedures; (d) custom was further subverted in its subjection to a colonial capitalist economy for which the 'preservation' of customary law served important objectives of economic exploitation; (e) customary law could also be deployed in nontraditional ways by some sectors of the native population to control the effects of change; (f) thus, to continue to recognise 'customary law' was to continue a colonial lie.

II Freezing a Fluid Reality

Contrary to the image which the colonisers had of customary society, and therefore also customary law, as something unchanging from time immemorial, prehistorians now suggest that in fact customary societies were in a fluid state of constant change long before Europeans ever arrived on the scene. There were no fixed tribes, no immutable customs. Thus the European attempt to capture customary law was bound to be in vain. The search for the true pre-contact custom was a search for a nonexistent grail. Further, the attempt to define, record and apply custom necessarily froze the pre-contact fluidity.

Ranger makes this point in relation to Africa:¹³⁶

These societies had certainly valued custom and continuity but custom was loosely defined and infinitely flexible. Custom helped to maintain a sense of identity but it also allowed for an adaptation so spontaneous and natural that it was often unperceived. Moreover, there rarely existed in fact the closed corporate consensual system which came to be accepted as characteristic of 'traditional' Africa. Almost all recent studies of nineteenth-century pre-colonial Africa have emphasized that far from there being a single 'tribal' identity, most Africans moved in and out of multiple identities.... Similarly ... competition, movement, fluidity were as much features of small-scale communities as they were of larger groupings.

Chanock argues further that pre-colonial Africa was not merely fluid, it was also in a state of rapid change:¹³⁷

The theory on which the British courts worked was that the pre-conquest period was the time during which the customs, being put forward in the colonial courts, were in being. But the nineteenth century in this region saw several waves of conquest prior to that of the British, as well as a huge acceleration in the slave trade. Political power, punishments, ranks and statuses, marriage and inheritance, land and labour, all underwent far-reaching changes and were all the subject of competing claims and moralities. There was no established normality when the British took over but much conflict which carried over into the colonial courts as different groups of people began to learn to use these courts to their advantage by establishing their claims as custom.

These factors - fluidity and change - militated against attempts to define custom and the resulting processes instituted by colonial law could only be a colonial invention, designed to serve the purposes of colonialism by confining people into specified tribes, territories and statuses.

III A Strait-Jacket of Alien Procedures

The second limb of argument supporting a colonial creation of customary law relates to the artificial life customary law took on as a body of rules pleaded in state courts. Twining was the first to point out, in his classic critique of the projects to codify customary law in Africa,¹³⁸ that there had been too much emphasis on the collection and enforcement of customary law rules, whereas the significant thing was the processes within which such rules operated. These processes were ignored when a body of customary rules was abstracted for application in the state courts. There, the procedures were those of English law. Read¹³⁹ and Woodman¹⁴⁰ take this idea further by exploring some of the means used which effected the transformation of customary law. Read suggests that the 'repugnancy clause' - the overt check on the content of customary law - was in fact the least transforming aspect of colonial law. Instead, it was the very attempt to apply custom in new institutions which caused the greatest change.¹⁴¹

Sweeping changes must surely have been inevitable when a system of customary law was operated through novel institutions - even if that law be regarded as embracing mainly normative rules of

conduct. But in fact a more meaningful interpretation of customary laws in their traditional setting would probably relegate specific rules of conduct to a place of importance below that given to the processes and institutions through which such rules traditionally operated.

Woodman argues that the activities of the State courts created an intermediate level of law between that which actually applied on the ground ('sociologists' customary law') and English law. He calls this new animal 'lawyers' customary law'. The institutionalising process involved in the creation of lawyers' customary law includes: (a) limitations on the forms of claims, remedies and modes of enforcement available; (b) the selection of particular norms as 'legal' rather than merely moral; (c) the development of new norms to meet new circumstances peculiar to State courts; (d) failure to keep pace with developments in customary law; (e) use of the repugnancy clause; (f) express importation of common law doctrines as qualifications on customary rules; (g) the effect of the doctrine of precedent.

The corollary of this line of argument is that the 'synthetic' customary law created by the State courts is not descriptive of an indigenous reality which has a valid claim to be preserved. More generally, custom is inextricably embedded in its particular set of social relations, indeed it is nothing more than those social relations, and thus cannot be abstracted and served up for use in the state legal system. There is no 'essential comparability' between custom and law.¹⁴²

iv Capitalism and Conservation

Another strand of theoretical development has been to explore the extent to which the 'recognition' of customary law served the ends of capitalism in the colonial state. Fitzpatrick, applying a Marxist analysis in *Law and State in Papua New Guinea*,¹⁴³ argues that the 'conservation of the traditional model of production' – a process which necessarily entailed the recognition of customary law – was an important aspect of colonial economic exploitation. In part this conservation was just a practical necessity: the initially limited penetration of the capitalist mode of production had no need to sweep all before it. Nor could it have. However, the traditional mode was also positively useful for capitalism:¹⁴⁴

The traditional mode subsidizes the provision of labour used in capitalist production. It also helps create surplus, in such as peasant production, which is extracted and retained within the capitalist mode. The conservation of the traditional mode functions as well in class containment through, for example, the maintenance of ethnic division. This function is of special significance given the weakness of the colonial and post-colonial state.

According to this theory, although capitalism inevitably permeated and transformed the whole basis of indigenous societies, its ends were best served by the appearance of relying on traditional authority. Hence the importance of customary law.

Yet, as Snyder has shown,¹⁴⁵ even the appearance of conservation masked internal transformations of customary law, as the dictates of capitalism required. Thus, subtly and often within existing customary terms, the emphasis and meanings of customary law altered to serve the new economic demands of production being placed on customary societies. In all of this the chiefs, as mediators between colonised and colonisers, were able to profit from the advantages presented by their new-found ability to make capitalist profits from exploitation of traditional rights and relationships.

v Native Manipulations

The new opportunities, and new stresses, presented by the onslaught of colonialism were reflected in indigenous reactions through the medium of customary law. Sometimes these reactions involved the use of custom to embrace the new opportunities presented by capitalism. But equally they might represent a conservative reaction to change, an attempt to exercise new controls necessitated by the disintegration of customary societies. Ranger summarises:¹⁴⁶

Codified and reified custom was manipulated by such vested interests as a means of asserting or increasing control. This happened in four particular situations, though it was not restricted to them.

Elders tended to appeal to 'tradition' in order to defend their dominance of the rural means of production against challenge by the young. Men tended to appeal to 'tradition' in order to ensure that the increasing role which women played in production in the rural areas did not result in any diminution of male control over women as economic assets. Paramount chiefs and ruling aristocracies in polities which included numbers of ethnic and social groupings appealed to 'tradition' in order to maintain or extend their control over their subjects. Indigenous populations appealed to 'tradition' in order to

ensure that the migrants who settled amongst them did not achieve political or economic rights.

This aspect has been most fully developed by Chanock in *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*,¹⁴⁷ where he shows Africans structuring their appeals to custom, and presenting these for transformation into customary law in the State courts, as a response to the needs of the times and the threats of social change.¹⁴⁸

... the customary law that we have accepted is the result in the former British colonies, partly of a congruence of interests between male elders and British administrators, and more fundamentally, the way in which the defensive reaction by elements in African societies to the disruptive changes of the 20th century, led them to try to erect and to emphasize, particular forms of family, marriage, duty, right and obligation.

Chanock concludes his analysis by suggesting that the invented colonial customary law is a legacy of an imaginary past best rejected.

How are these themes relevant to the Pacific experience, and what are their implications for the present study? This is the subject of the next section.

2 THE PACIFIC CASE

1 General Distinguishing Features

The compelling nature of the 'fatal impact' theories arises from their claim that what was done in the name of custom in fact masked fundamental changes and resulted in the creation of a colonial fiction. This set of ideas can and should be brought to bear in applying an historicist analysis to continuing issues of pluralism wherever they arise. Such analysis must be detailed - sifting out colonial imposition from the reality on the ground. It is a central theme of this thesis that colonial models for the recognition of customary law are inappropriate precisely because of their imposed nature. The studies just reviewed are valuable in that they demystify this aspect of colonialism. However, to the extent that they, too, regard only some pre-colonial past as expressive of 'true' customary law, they fall into the same trap as the colonisers. Customary law is simply what is today recognised by the indigenous people as customary, whatever the sources from which it has been

evolved. The process of its evolution is a complex and continuing one, involving factors both external and internal to customary societies. Some aspects of the internal reaction are examined in Part D, 'The Jungle of Legal Pluralism'. This section looks at the external pressures.

Before examining two particular examples of the colonial transformation of customary law in the Pacific, land registration in Fiji and the operation of the Native Land Court in New Zealand, it is as well to reiterate some of the general features of the Pacific case which distinguish it, at least in part, from Africa.

First, Pacific societies were in pre-contact times, relatively isolated and relatively static. This is not to say that such societies did not develop, nor that there was no communication between them. On the contrary, the peopling of the Pacific was a process which involved travel from island group to island group, and much cultural adaptation.¹⁴⁹ Further, although the effective political units of pre-contact society may have been small, there was constant communication, at least between neighbouring groups - whether for purposes of exchange, marriage or warfare.¹⁵⁰ Although the culture of these groups was highly resistant to European categorisation, it would be equally incorrect to view pre-contact societies as so fluid and subject to change as a result of outside pressure that there was no discernible group or law. The diversity of language suggests otherwise,¹⁵¹ as does much ethnographic evidence.¹⁵² The geography of the Pacific - a pattern of islands - lent itself to isolation. The fixed constraints of survival on small islands limited the range of living options.¹⁵³ These factors make it difficult to see the Pacific as a melting-pot - the model posited for Africa.

One must further recall the limited and late nature of European penetration. There was no centuries old tradition of trade - whether for slaves or goods. There had been no successive waves of foreign invaders or settlers. Many parts of the Pacific - especially, but not exclusively, in Melanesia - were not brought under the effective control of the colonial state until after World War II.¹⁵⁴ As has already been seen, there was frequently no attempt to administer native populations intensively. The registration of interests in customary land, for example, was in many countries hardly attempted at all (for example, Samoa, Papua New Guinea, Vanuatu, Solomon

Islands)¹⁵⁵. More generally, even where intensive experiments in native administration were carried into effect, these usually involved separate low-level regimes. They did not involve the creation, through litigation in superior British-style courts, of a 'lawyers' customary law'. There was no basis for this in the initial statutes establishing courts and sources of law, and the 'African model' was not subsequently pursued. Thus the artificial plant, so fruitful a subject of enquiry in the African context, never really took root in the Pacific. In the event, the whole issue has remained rather more inchoate and unresolved than in Africa.

These factors suggest that, in the Pacific context, it may not be appropriate to view customary law as purely the creature of colonialism. Nevertheless, external transformation did occur, sometimes with deliberate intention and sometimes despite the contrary intention to preserve.

II The New Zealand Native Land Court

The Native Land Court, established under the Native Lands Act 1865 (NZ), was a clear case of deliberate transformation. Kawharu comments:¹⁵⁶

War and confiscation, prominent in histories of New Zealand's race relations, in fact touched few tribes south of the central North Island volcanic plateau and fewer still north of the Auckland Isthmus. But it was different in the peace which followed, for with it came the Native Land Court, a veritable engine of destruction for any tribe's tenure of land, anywhere.

The preamble of the Act expressly stated its purpose as encouraging the extinction of Maori proprietary customs. Sewell elaborated in 1870:¹⁵⁷

The object of the Native Lands Act was twofold: to bring the great bulk of the lands in the Northern Island which belonged to the Maoris, and which, before the passing of that Act, were extra commercium, except through the means of the old purchase system, which had entirely broken down, within the reach of colonization. The other great object was the detribalization of the Maoris - to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system. It was hoped by individualization of title to land, giving them the same individual ownership which we ourselves possessed, they would

lose their communistic character, and that their social status would become assimilated to our own.

The Act accomplished these objectives by allowing the Court to investigate title on the application of any individual Maori (s 21) and by limiting the persons in whom title could be vested: 'Provided always that no certificate shall be ordered to more than ten persons Provided further that if the piece of land adjudicated upon shall not exceed five thousand acres such certificate may not be made in favour of a tribe by name' (s 23). The Act contained little to discourage European speculators from dealing with the Maori prior to a court hearing - there was no penalty and no restriction on subsequent alienation, only a simple provision that contracts prior to the issue by the court of a certificate of title were void (s 75). Ward comments:¹⁵⁸

The Maori people were consequently exposed to a thirty-year period during which a predatory horde of storekeepers, grog-sellers, surveyors, lawyers, land agents and money lenders made advances to rival groups of Maori claimants to land, pressed the claim of their faction in the Courts and recouped the costs in land.

The Court process involved selecting, from the many groups which had interests in a particular block of land according to Maori custom, ten individuals to hold the land as tenants in common. These were not regarded by the court as trustees for the *hapu* (sub-tribe) they represented, but as absolute owners. Unscrupulous *pakeha* (Europeans) thus only needed to bring their influence to bear on ten persons. Native Land Court Judges subsequently asserted that the 'ten person' rule was in accordance with native custom, as they were required to certify under the Act, though this was patently not the case.¹⁵⁹ In fact, the Court was a law unto itself: unrestrained by legislative amendments attempting to temper alienation;¹⁶⁰ unrestrained by superior court review because of its exclusive jurisdiction in matters of native custom;¹⁶¹ unrestrained by the numerous petitions directed against it by the Maori.¹⁶² Quite apart from the wholesale alienations fostered by the new process, the Court also radically undermined the whole basis of tenure of such land as did remain in Maori hands. The ten owner rule eroded *hapu* solidarity and communal responsibility (as it was meant to do). Further, in exercise of its jurisdiction to

determine matters of succession to Maori land (where the court had previously determined title to that land),¹⁶³ the Court evolved a system which was neither English law nor custom, but which had ruinous results for the Maori.¹⁶⁴ Section 30 empowered the Court to determine succession 'according to law as nearly as can be reconciled with Native custom'. The *terminus a quo* was *Papakura Claim of Succession*,¹⁶⁵ where Chief Judge Fenton had to choose between the claims of the *hapu* and those of the immediate family of a grantee nominated on the original Native Land Court title. Fenton held:¹⁶⁶

It would be highly prejudicial to allow the tribal tenure to grow up and affect land that has once been clothed with a lawful title, recognised and understood by the ordinary laws of the country. Instead of subordinating English tenures to Maori customs, it will be the duty of the Court, in administering this Act, to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of English rules of descent, as can be secured without violently shocking Maori prejudices.

This was cause enough to reject tribal succession. However Fenton also rejected the then prevailing English rule of primogeniture, and settled instead on succession by all the deceased's children as tenants in common. Although Fenton appealed to Maori custom as justification for this, there was not basis for this, and no one believed there was.¹⁶⁷ This was the first step in the disastrous fragmentation of Maori lands. It was a multiple ownership which did not reflect actual use and occupation, as pre-contact custom had done, but accidents of succession. It was a multiple ownership which stymied the effective use of the remnant of land which remained in Maori hands and created the characteristic pattern of land holding which has continued ever since.

III FIJI - The Mistake of Mataqali Land Ownership

In New Zealand the external transformation of custom was a deliberate, even cynical, one. There was an attempt to destroy the traditional basis of Maori society and this was done through only the most thinly veiled references to native custom. In Fiji, the registration of land was conducted with entirely the opposite intent, but it also had a transforming effect. Animated by a desire to preserve the customary Fijian way of life, Gordon rightly saw the land base as crucial. But he equally wanted to systematise customary land

law and give it a formal place in the legal system.¹⁶⁸ He therefore instructed the Council of Chiefs to present to him an outline of the nature of customary tenure. The chiefs had a powerful incentive to do this: to prevent alienation of their lands to European settlers. If they could demonstrate that their land was held according to certain and common principles, and that by custom land was inalienable, they and Gordon's Land Claims Commission would have a powerful tool to resist settler demands - an appeal to law. Pragmatism, then, encouraged the choice of a single, commonly recognised, communal unit as the holder of land. The unit chosen for this was the *mataqali* or clan. Yet successive Land Commissioners, appointed to register customary land under the Native Lands Ordinance 1880, which was premised upon *mataqali* ownership, found that this unit was not an accurate and universal metwand for land tenure. On the contrary, the evidence disclosed an enormous diversity of land holding techniques; in many cases no settled agreement on title; and, frequently, a remembered history of constant change in ownership as a result of conflict and contested claims. The Commissions began by establishing membership of the relevant social units, and then applied portions of land to those units. However, they found no uniformity either in social organisation. The truth was that Fiji was composed of numbers of different subcultures and that pre-contact life had at any rate been too unstable for certain tenures to evolve.

During the hearings of the Commissions, Fijians most frequently expressed the wish that the rights of those in actual occupation should be recognised. Fijians frequently protested that *mataqali* ownership was 'European custom', not Fijian custom. Of this the Lands Commissioners themselves became convinced. However the demands of the settlers and administration to complete the survey speedily led to the retention of the *mataqali* method. France concludes:¹⁶⁹

And so the social unit of the Fijian people which successive Native Lands Commissioners had discovered to be most remote from the exercise of land rights was gradually transformed, through a number of causes unconnected with Fijian custom, into the legally registered owner.

That the Fijian land tenure system, for which the law provides, sit uneasily upon Fijians is apparent: inequalities of land distribution which result from the system of *mataqali* registration are evaded by informal arrangements....

While colonial land registration in Fiji has thus failed to represent adequately the position on the ground, the myth of *mataqali* ownership has acquired the status of dogma with Fiji's ruling elite, resisting this time the demands of another non-native group, the Fijian Indians.

The example of Fiji is by no means unique in the Pacific. Crocombe's ground-breaking study of land tenure in the Cook Islands¹⁷⁰ illustrates a parallel process of more-or-less well intentioned misconceptions, resulting in a false rigidity. Elsewhere he has argued:¹⁷¹

What is called customary or traditional tenure in many parts of the Pacific today may be more accurately called '*colonial tenure*': a diverse mixture of varying degrees of colonial law, policy, and practice with varying elements of customary practices as they were in the late nineteenth century after many significant changes had [already] been wrought on the pre-contact tenures....

Yet it should not be assumed that the only determinants of change in the colonial encounter were the external ones of the colonisers. The actions and reactions of the colonised were as significant in the equation. In the field of customary law, these show at once an adaptability (and a readiness on the part of some sections of the indigenous population to profit from the new plural order), and a resistance to colonial impositions.

D THE JUNGLE OF LEGAL PLURALISM

1 INDIGENOUS TRANSFORMATIONS

I General Themes

That colonialism had an impact on customary law is indisputable. That such an impact was 'fatal', in the sense that colonialism so subverted customary law to its own ends that all that remains is merely 'colonial law', is however less clear. Fitzpatrick puts the opposite view:¹⁷²

... the pre-capitalist legal order combines with the state legal order in ways that affect basically the operation of state law. Indeed, state law is not the only dynamic legal factor. Pre-capitalist law operates often in opposition to state law and often despite efforts in state law to prohibit or supercede it.

Further pre-capitalist law develops innovatively to accommodate the effects of capitalist penetration.

This is a theme which is not restricted to the colonial period. It invites study of the ways in which a plurality of legal orders actually operate on the ground, whether those orders are 'recognised' by the State or not. This approach has been dubbed by Franz von Benda-Beckmann 'the jungle of actual legal pluralism'.¹⁷³ A disjunction between the letter of State law and social reality is a major theme of, and reason for, the enquiry undertaken in this thesis.

However, the capacity of indigenous law to either resist or react creatively to the imposition of State law during the colonial period does provide some important clues to the nature of legal pluralism. Here, one can only sketch some of the general trends discernible in the Pacific and focus on some isolated examples of those trends.

The focus in section 1 is on internal transformations - the way customary law altered through changing perceptions and actions of the indigenous people themselves, reacting indirectly to the challenges of colonisation. This section will then focus on a uniquely successful, and radical, internal transformation: the Tongan Constitution 1875 and the new legal order inaugurated by it. What Tonga achieved successfully, a resistance of colonial domination through the adoption of Western legal forms, many other parts of the Pacific also tried but failed.

Section 2 discusses the reverse situation of indigenous resistance movements, and their reliance on customary law in their revolt against colonial domination. The importance of appeals to custom in resistance movements is echoed in the independence movements of the island states and in the claims for self-determination made by the indigenous peoples of Australasia - issues which are taken up in the final Part: 'The Politics of Custom'.

In cataloguing indigenous transformations, one should recall what is perhaps obvious, that from the internal point of view, external changes are interpreted on the basis of, and for the way they affect, indigenous norms. Kawharu makes the point, commenting on the Maori, who were undergoing enormous change as the result of the forcible activities of an imposed Native Land Court, that individuals still had to find *mana* (standing/prestige) and self-esteem through the

structures of their own society. Although the Court had divested the elders of many of their deliberative functions, nevertheless their leadership ability, especially in legal matters and land administration, remained the key to the survival of Maori society during the colonial period.¹⁷⁴

Strathern's study of the imposition of official courts in Hagen in the Papua New Guinea Highlands shows that the Hageners restructured the official model of law and courts in their own minds, in order to fit them into channels for dispute resolution already existing in their own society.¹⁷⁵ Although the Administration regarded the operation of their unofficial courts, claiming some official attributes, as 'illegal', it was in fact this system which made the imposition of law comprehensible to the Hageners and contributed to the peaceful settlement of disputes.

Lundsgaarde, in his analysis of transformations of law in Kiribati,¹⁷⁶ suggests that colonial courts became an integral part of Gilbertese life but that the decisions of those courts were in turn influenced by traditional Gilbertese culture:¹⁷⁷

... the highly litigious Gilbertese appear to thrive psychologically on the theatrical opportunities provided by the stage and spectacle of native courts and that they have thus deliberately contributed to the 'working misunderstanding' between the British and themselves....

... the appearance of a British administration has not displaced the areas of traditional Gilbertese culture that influence formal legal procedure and decision. For example court decisions are partly the outcome of the attitudes, beliefs, values, prejudices and opinions held by individuals, members of various religious factions, large corporate kin groups, and any other segments of the island populace.

These examples suggest that the colonial legal encounter was often as much a matter of interpenetration as of imposition. Yet customary norms and procedures did themselves change or acquire new meanings and emphases in the light of the influences of capitalism, Christianity and conceptions of Western legality.

The opportunities presented to the 'Big Men' of Melanesian societies to profit from their traditional position in production for the market have been widely documented.¹⁷⁸ The social structure provided the Big Men with a basis from which to accumulate wealth and position, which they could further enhance though the use of

traditional channels of exchange. Customary land tenure provided the flexibility to allow Big Men, through their knowledge of custom and vigorous use of inheritance claims, to appropriate disproportionate shares of the communal land for cash crop purposes. Nevertheless, these wealthy peasants appreciated that their preeminence depended on their being seen to conform to customary expectations, and the customary group still retained ultimate control over the land.

Another set of transformations resulted from the dual impact of Christianity and conceptions of Western legality. In many cases these went hand in hand as Pacific leaders reacted to missionary pressure to reform customary law and to codify the results. Nineteenth-century Pacific societies abounded with these quasi-missionary, quasi-traditional codes. One might refer again to the comment of the Fijian chief: 'This being a new age requires everything to be clear and defined'. The impetus to record and define was often enthusiastically taken up. Strathern notes, of local government councils in the Papua New Guinea Highlands:¹⁷⁹

Councillors for a long time imagined that one of their functions was to draw up 'law' at council meetings, and both Hagen and Del Councils were concerned ... with the need to frame legislation on problems (as the male councillors saw them) relating to bridewealth, divorce, and control of sexual promiscuity in women. They also regarded themselves as being able to modify 'government law'.

An early example *par excellence* of an indigenous desire to embrace the codification of law is the Kingdom of Tonga.

II Tonga - A New Constitutional Order

Tonga alone of all the island states of the Pacific was never fully colonised. Even in the heyday of imperial expansion, Tonga retained a large measure of independence, in law and in fact.¹⁸⁰ This was due in no small measure to the remarkable ability of King George Taufa'ahau Tupou I, who successfully pacified and unified Tonga under a centralised monarchy and then proceeded to draw fully and widely from missionary and legal sources in order to build up a comprehensive code of laws.¹⁸¹ In many respects, these codes reflected missionary standards of Victorian morality and regulated Tongan life to an excessive extent. But they also, and significantly, sought to improve the lot of the common people vis-a-vis the nobles and to protect Tonga from the harmful effects of European exploitation.

King George's first ventures into codified law-making were the Vava'u Code of 1839 and a further Code of 1850. These bore the distinctive and direct imprint of missionary teachings, but were the result of deliberate decisions of the King. They were not foisted on the country by the missionaries, many of whom were dissatisfied with the 1850 Code. Then, in 1860, King George found a new adviser in Rev Shirley Baker, a Wesleyan missionary who was to play a decisive, if controversial, role in the politics of the kingdom for much of the rest of the century. A new Code in 1862 saw the emergence of three key features of the Tongan legal system:

- * Constitutional Monarchy - the King was to be bound by his laws as well as his people;
- * Emanicipation of the Commoners - 'All chiefs and people are to all intents and purposes set at liberty from serfdom, and all vassalage, from the institution of this law; and it shall not be lawful for any chief or person, to seize, or take by force, or beg authoritatively, in Tonga fashion, any thing from any one';¹⁸²
- * No Alienation of Land to Foreigners;¹⁸³ and guaranteed allotments for commoners.¹⁸⁴

The new mood of legality in Tonga, which was specifically designed to make Tongan sovereignty cognizable by the Western powers, reached its apogee in the Constitution of 1875. This remarkable document - one of the oldest extant written Constitutions in the world and much venerated in Tonga - drew upon missionary sources as well as the Hawaiian Constitution of 1840. It is in three parts: Declaration of Rights; Form of Government; and Lands. The Declaration of Rights is a notably complete early attempt to spell out the Western liberal conception of civil and political rights, with strong Christian influences. In its 33 sections, it prohibits slavery, punishment without trial, search without warrant, double jeopardy, retrospective laws and confiscation of property; it protects freedom of worship, the sanctity of the Sabbath, freedom of speech and press, the writ of habeas corpus, impartial trial by jury and the taxpayer's right to vote. The Declaration was, for nearly a century, the sole source of underlying principles for the Tongan legal system as there was no reception of the Common Law.¹⁸⁵

The Form of Government was a complex compromise between a hereditary monarchy, the nobility and some representation of the people. It institutionalised a fixed format of 20 noble families with

estates, and integrated them into Privy Council, Cabinet and Legislative Assembly. The Assembly consisted of 20 nobles and 20 commoners elected by universal male suffrage. The King retained extensive independent deliberative powers. The Chief Justice was in a highly influential position under the Constitution - he was also a Privy Councillor, Member of Cabinet, Member of the Legislative Assembly, Legal Adviser, Law Draftsman and Chief Police Magistrate. For the first 30 years of the new regime, all the judges were Tongan and proceedings were held in Tongan.

As to the Land, the 1875 Constitution again prohibited all alienations to foreigners - only a lease with Cabinet approval was allowed. Ultimate title to all land in Tonga remained with the Crown. It was divided into 20 noble estates, and each noble might lease sections of his estate to commoners at a rental fixed by the Legislative Assembly. Subsequent legislation established that every Tongan male, on reaching 16 years, would be entitled to an 8 1/4 acre allotment for life (to pass to his eldest son), together with a smaller urban allotment.¹⁸⁶

The pattern of codification set by the Constitution was followed in successive years into every area of the law, such that there is now almost no room for the operation of an underlying law - whether it be custom or the Common Law. The Codes are not borrowed legislation - they are Tongan. The primary language of the law is Tongan, although in practice statutes are published in Tongan and English.

What is the significance of the Tongan experience for the present study? First, it was a successful autochthonous assertion of statehood which achieved its objectives, namely, the prevention of colonial domination, the prevention of alienation of land to European settlers and recognition of independent sovereignty by the major powers.

Second, what Tonga achieved, many other Pacific peoples sought but failed, either because European domination overcame them or because the cultural basis of their society did not lend itself to centralised administration. Howe¹⁸⁷ in particular has advanced the theory that centralisation succeeded in Tonga (and, ultimately less successfully, in Hawaii and Tahiti) because the customary sociopolitical system of those countries lent itself to centralisation. Conversely, the competitive anti-centralising nature

of the societies in New Zealand, Samoa and Fiji prevented just such an experiment. Nevertheless, everywhere there were attempts to adopt new laws and new forms of government. France, examining the abortive attempts at chiefly governments in Fiji in the 1860s, comments:¹⁸⁸

The laws were freely and fully discussed by representatives of those on whom they were to have effect in full awareness that the changing conditions demanded modifications in traditional practices. That hypersensitive attachment to a real or imagined past which was to frustrate the schemes of later reformers did not emerge to challenge the legislation of the native governments.

Third, although the Tongan Constitution and laws incorporated elements of the pre-existing custom and in a broad way conserved the Tongan way of life, they also freely embraced a wide variety of foreign influences designed to 'improve' standards of morality, justice and living in Tonga. This was a revolution wrought from the inside, and one reflected in practice as well as on paper. Tonga thus proves the capacity of an indigenous Pacific society to transform itself through the adoption of a Western-style legal system.

2 RESISTANCE

1 New Zealand - King, *Kotahitanga* and the Courts

While Pacific peoples may have at times embraced transformations to their customary law, they could equally regard it as a source of independent legality in their attempts to resist colonial domination. Thus, for many resistance movements, appeals to custom and the establishment of a rival legal system to that of the State were important elements. These themes were very evident in New Zealand as a guiding force in the King independence movement; in the establishment of the *Kotahitanga* or Maori Parliament; and in continued assertion of Maori customary law in the State courts over a century in which those courts almost totally failed to afford them any redress.¹⁸⁹

The King movement began as a tribal land league to resist the encroachments of European settlers and, later, of the Native Land Court. But it also had the wider aim of a degree of self-determination for the Maori people. This was to be a limited form of autonomy - the sovereignty of the Queen was still recognised. However, the twin attempt to resist the harmful effects of colonial

law and colonial magistrates, and to resuscitate the *mana* of the chiefs entailed reliance on an indigenous basis of law and authority. The King movement was thus a search for law – a law which would uphold Maori social cohesion and restrain landsellers. As such it had to be deliberately destroyed by the settler government.

After the Land Wars of the 1860s there were several attempts to create a supra-tribal organisation. Most significant of these was the *Kotahitanga* ('unity') Parliament. This was a sustained attempt, which reached its peak in the 1890s, to resist Wellington authority by establishing a separate Parliament to handle Maori affairs. Committees under the Parliament would administer Maori land (to the exclusion of the Native Land Court), enforce game conservation laws, and try Maori people for breaches of custom. Yet the *Kotahitanga* Parliament still wished to work within colonial structures and drafted a Federated Maori Assembly Bill, which Parliament in Wellington simply refused to debate.

Despite the sham equality offered under colonial law and the continued failure of the colonial courts to recognise customary law (except as a front for destroying it), the Maori continued to press their claims for recognition. Even when the battle for customary rights to land was lost by the Native Lands Act 1909, the Maori shifted the contest to lakes (*Tamihani Korokai v Solicitor-General*),¹⁹⁰ rivers (*In re the Bed of the Wanganui River*),¹⁹¹ foreshores (*In re Ninety Mile Beach*),¹⁹² and fisheries (*Walpapakura v Hempton*,¹⁹³ *Inspector of Fisheries v Weepu*,¹⁹⁴ *Keepa v Inspector of Fisheries*).¹⁹⁵ In all of this, the Maori sought to resist the universal application of the *pakeha* legal system and to assert the continued vitality of Maori customary law.

II Samoa-Mau

In Samoa, too, resistance of colonial domination involved a rejection of colonial law and express reliance on custom. Throughout much of the interwar period, New Zealand attempts to administer Samoa were effectively stymied by a movement known as *Mau* ('opinion' or 'opposition').¹⁹⁶ Although this movement was supported by a number of prominent part-Europeans resentful at the Administration's interference with their trading interests, it was essentially an indigenous Samoan movement. At its height it commanded

the allegiance of the majority of Samoans. Mau was effective in resisting all attempts by the Administration to interfere in Samoan life and the Administration, for its part, enacted draconian legislation to control it. This culminated in an armed and fatal struggle in 1929.

Mau was undoubtedly a movement for self-government which specifically involved a rejection of the imposed legal system. There were boycotts of the Administration's courts and of the poll tax. But it was also positively an assertion of the continuing validity of custom. The village councils, which no administration (even since independence) has managed to integrate into the state system, continued to operate autonomously performing judicial and administrative roles. In some areas supra-local administrations developed - complete with courts and police. Behind all of this was a reassertion of Samoan traditionalism to combat the changes - some inevitable, some imposed - wreaked upon Samoan society and culture by colonialism.

III Solomon Islands - Maasina Rule

In the aftermath of World War II, when the British colonial administration had been totally disrupted by Japanese invasion, and the Solomon Islanders had experienced the egalitarianism and largesse of the American forces, a resistance movement developed on Malaita known as *Maasina* ('Brotherhood') Rule.¹⁹⁷ Like Mau and the Maori resistance movements, Maasina Rule is not susceptible of any single straightforward explanation. It was a broad-based opposition to the inequities and disempowerment of colonial rule. It included religious and millenarian elements. Nevertheless, central to the political doctrine of the movement was an attempt to base Malaita society on a reinterpreted version of customary law. Keesing usefully summarises Maasina Rule's political objectives:¹⁹⁸

- (a) To organize politically in a hierarchical system of chiefs - at descent group, neighbourhood, subdistrict, and district level. Through this administrative structure, separate from and parallel to the Headmen and District Administration, the people could engage in collective bargaining with the government.
- (b) To unite descent groups, Christians and pagans, and language groups, under a common 'rule of brotherhood' in which traditional enmities were to be transcended to achieve collective goals.

(c) To group previously fragmented local groups into larger communities, and establish large meeting villages where collective projects could be undertaken.

(d) To reorganize production, both for subsistence and for export, on communalistic lines, with community-wide work details and communal gardens. 'Communalistic', in this Malaita context, doubtless conveyed different things to different people; but it meant, fundamentally, an extension to the wider cluster of people in a 'line' of the rights and obligations of members of a single family over their gardens. (That is, an obligation to contribute work according to age, sex, and ability, the right to partake of its produce according to need, and the right to have the profits used by its leader(s) for the collective benefit of all.)

(e) To codify 'Custom', particularly related to ancestors, taboos, lands and the sex code; and, while conceding that criminal offences of homicide, assault, and theft be dealt with under Protectorate law, to demand jurisdiction over customary matters.

(f) To demand greatly increased wages for plantation labour and just and egalitarian working conditions.

(g) To refuse to pay the government head tax, at least until reasonable return, in the form of medical services and education, was provided; and to collect a 'pound head' from adherents to enable the chiefs to bargain with the administration with community resources behind them.

Central to the organisation which Maasina Rule planned and executed, and demanded official recognition of, was a system of courts presided over by *araha'ou'ou* (custom chiefs) - a response to the Administration's native courts. People were much preoccupied with attempts to record custom, and family genealogies which could serve as a basis for more certain land tenure.

The Administration's response was to declare all these indigenous structures 'illegal' and to imprison several thousand Solomon Islanders until the strength of the movement had been broken in 1950. In a nice irony given the present focus on a struggle between indigenous and introduced law, the nine original Head Chiefs had been sentenced to six years hard labour for violations of the Unlawful Societies Act 1799 and the Seditious Meetings Act 1817.

These three examples of resistance to colonial rule in the Pacific suggest some more general propositions in relation to the recognition of customary law. First, they suggest the importance of custom as a cohesive force in indigenous societies. Although the leaders of the King, Mau and Maasina movements were progressive in the sense that they embraced the material benefits of European contact and the tenets of Christianity, they sought to integrate these into a

society which retained continuity with the past, and expressed the way of life they wanted for themselves. This process centrally involved customary law, albeit modified and formalised. Moreover, such movements frequently sought ways (usually rejected by the colonial governments) of integrating their indigenous structures into the State system. There was a seeking of recognition. Finally, the resistance movements illustrate the political appeal of custom, an appeal which would surface again during and after independence.

E THE POLITICS OF CUSTOM

Custom as a political symbol can lead a life quite independent of the realities of customary law. Further, the stresses of political situations can imbue customary law with a special significance, which it might lack in the absence of a crisis. Customary law can serve political objectives either as a means of asserting authority within an indigenous society or as a claim of right in relation to the ambient population or to the State. In all of this, custom may play conflicting roles.

This political dimension cannot be ignored in any 'legal' analysis of the recognition of customary law, although it should not be allowed to distort the factual realities of customary law nor the legal issues involved in its recognition.

It has already been touched on in Chapter I's discussion of indigenous law and self-determination. It surfaces again in Chapter III, in an attempt to explain the reasons for the inclusion of customary law as a source of the underlying law in many Pacific constitutions. Again, it serves as a potent political argument in Pacific debates on human rights (Chapter IV). Moreover, as it provides an independent source of rights to State law, custom has served an important political purpose in establishing an entitlement to land rights (Chapter VI). In this part, it is proposed to examine just two examples of custom in nationalist movements: Vanuatu at independence and Fiji in the *coup d'état* of May 1987. In both of these cases, the political uses of custom diverged from the realities of customary law.

Vanuatu approached independence as a country riven with divisions.¹⁹⁹ In the first place, the Melanesian societies of Vanuatu are very diverse in culture, language and social organisation. Secondly, Vanuatu had been administered throughout the colonial period as a condominium, with equal French and British participation. This was frequently a recipe for disaster. The dual administration was inefficient and made coordination of a national policy impossible. The French were openly imperialist in promoting French influence, and it was mainly French settlers who were responsible for the scandal of land alienation. There was a further division amongst the *ni-Vanuatu* (people of Vanuatu) themselves on religious lines. The Protestants tended to be English-speaking and progressive. The Catholics were French-speaking and found a common identity with pagan islanders in their opposition to English influence. The Protestant Anglophone bloc became the New Hebrides National Party, later renamed the Vanuaaku Pati. The Francophone opposition to this consisted of a variety of interests: French colonists, Catholics, mystical and secessionist movements such as John Frum and Nagriamel (Jimmy Steven's bid for an independent Santo supported by American business).²⁰⁰ Both sides made much of an appeal to *kastom* ('custom'). For the Vanuaaku Pati, *kastom* was a symbol of the indigenous identity of the *ni-Vanuatu*, a source of alternative validity which could be contrasted with the repressive aspects of colonial rule. It could also be used as a local powerbase for the Pati itself. For their opposition, however, actively sponsored by the French, *kastom* represented local-level power which was resistant to the centralising nationalist claims of the Vanuaaku Pati. This conflict did lead to violent clashes in the period leading up to independence. Additionally at the national level, as well as attempts to create a representative assembly before independence, there had been established a Council of Chiefs. This adopted the name *Mal Fatu Mauri* ('a living stone of very high status'). However some *ni-Vanuatu* were unhappy about chiefs taking a role in national political affairs, which they felt was unc customary.

Vanuatu emerged into independence with more than a passing reference to *Kastom*. The Constitution's Preamble refers to 'traditional Melanesian values'. As will be seen, there are express adoptions of customary law as part of the national legal system.

There is provision for island courts to have jurisdiction over customary matters and the role of chiefs is to be provided for in such courts (Article 50). In a radical set of provisions, all land in Vanuatu is to be owned by indigenous customary owners defined according to customary law (Chapter 12). Moreover, under Chapter 5, the National Council of Chiefs is put on a constitutional footing with provisions for it to be consulted by Parliament on matters of custom (Article 28). Yet Vanuatu's national leaders have realised that custom may not fit so easily into the new structures of the State. The Prime Minister, Father Walter Lini, has shown considerable ambivalence about custom. At one point he wrote:²⁰¹

Traditional custom and culture, which are important and vital influences in our society, provide another challenge for us. Some people, mainly politicians, have used culture, custom and custom chiefs for their own aims. Custom and culture must develop freely, and should not be encouraged or forced by any European system of legislation. Contemporary leaders have to be on the watch to ensure custom is not clouded by politics or modernisation.

This has been reflected in attempts to exclude the Council of Chiefs from decision making in important areas of the law with a clear custom element. These have included the Penal Code (with its provisions on witchcraft and arranged marriages) and the lands legislation. As an attempt to retaliate, the Council of Chiefs pushed through a private member's amendment to the Penal Code which made adultery an offence.²⁰² They felt it unfair that the rural population could be punished for adultery under customary law but that the urban elite could not. Thus, the symbolic, political significance of custom as an appeal to national unity rapidly dissipated as the new state began to operate.

Perhaps even more interesting is the practical effects of this politicisation of custom at the local level. It was an important part of Vanuaaku Pati policy to foster independent custom-based local-level organisation in the last days of the Condominium.²⁰³ This policy was often enthusiastically taken up by the ni-Vanuatu but with occasionally bizarre results. In their attempt to translate the vague political appeals to kastom into a workable scheme of customary law, the ni-Vanuatu were engaged in an effort to remember past practices constituting 'tru kastom'. This represented a reified past, not the

reality of present practice. It also resulted in a desire to codify what had been flexible and unwritten. Larcom, for instance, discovered the people of Malekula taking an intense interest in European ethnographic studies about their society and relying on them to resolve disputes.²⁰⁴ The irony, as in the case of the Fijian land registration project, was that the ni-Vanuatu came to venerate as custom what had clearly been a mistaken interpretation by the European ethnographer. Elsewhere there were similar attempts to 'revive' custom,²⁰⁵ although equally some villages evolved local legal systems which were a realistic blend of traditional influences and present needs.²⁰⁶ Nevertheless, central government has begun to legislate on matters of local administration in ways which may override the village schemes.²⁰⁷

II FIJI- The Coup and a Chiefly Oligarchy

The *coup d'état* of 14 May 1987 in Fiji also illustrates the contradictory political functions of custom.²⁰⁸ As has been seen, the British colonial administration in Fiji was characterised by zealous protection of the Fijian way of life. The enforcement of customary law was a major tenet of native administration. However, in their efforts to secure these objects the British did two things with far-reaching effects on Fijian life. First, they imported indentured Indian labourers to work on the European plantations. This was to prevent the Fijians becoming a landless proletariat. However the Indians stayed and by 1946 had numerically outstripped the native Fijians. Second, the British administration bolstered the power of the chiefs, thus creating a chiefly oligarchy which did not rest its authority solely on the support of the common people. Fiji's Great Council of Chiefs, unlike its Vanuatu counterpart, has always been an important voice in the Fijian national polity. These two factors gave much impetus to custom as a political tool. On the one hand, it could be used to legitimate the special rights of the native Fijians in the face of Fijian Indian competition. On the other hand, it could be used to confer legitimacy on the claims of chiefly power.

The 1970 Independence Constitution was specially designed to preserve the Fijian *status quo*. Under a complex voting system, Fijians were guaranteed equal representation in the House of

Representatives and retained control in the Senate. Moreover, section 68 entrenched a set of statutes dealing with native Fijian rights (especially those concerned with land and local autonomy)²⁰⁹ so that effectively the assent of the Great Council of Chiefs was required for any amendment.

Nevertheless the national Fijian Government gave little recognition to customary law (outside the land sphere). Indeed, on the eve of independence and under the influence of the 'modernising' ethos of the day, virtually all the regulations providing for local level administration and the enforcement of customary law through a system of Fijian courts were abolished.²¹⁰ The Fijian Government has become successively more centralised. Meanwhile in the villages there has been mounting dissatisfaction with the decline in support for customary authority - although *de facto* many elements of the customary system continue to operate. Recently, a number of government reports have officially noted the deleterious effects of the breakdown of the customary system and called for its reintroduction as an element in local administration and the maintenance of good order.²¹¹ These ideas are under discussion by the Great Council of Chiefs,²¹² but have not so far been implemented.

These considerations colour the claims made by Lieutenant-Colonel Sitiveni Rabuka, the perpetrator of the 1987 military coup, that a major reason for the coup was that: 'We would like to safeguard the Fijian land issues and the Fijian traditional way of life'.²¹³ This claim was amplified in the Submission of the *Taukei* ('people of the land') Movement to the Constitution Review Committee, which met in July/August 1987.²¹⁴ Although the process of consensual constitutional reform initiated by the Committee was cut short by the second coup of 25 September 1987, its Report provides a valuable guide to the views and priorities of the various sectors of the Fijian population.

The *Taukei* Submissions emphasised that native Fijian culture, tradition and values should be the foundation of the State of Fiji. They rejected Western liberal notions of democracy, liberty and equality. As part of the re-orientation of the Fijian system of government, the Submissions envisaged that: 'Existing foreign concepts of property rights, criminal codes and judicial system must be reformed to recognised and adopt *Taukei* values'.²¹⁵ Elaborating on

this idea, it was argued that customary law should take precedence over the English common law; that Parliament should provide technical rules for the recognition of customary law; and that all judges should have an understanding of Fijian cultural values and custom.

In the discussions of the Review Committee, several members favoured dealing with these subjects expressly in the Constitution. Eventually the Committee recommended that Parliament accord the following matters high priority:

- * recognition and application of customary law;
- * rights of ownership and use in respect of riverbeds and the foreshore (including swamps, reefs and sandbanks);
- * proprietary rights in relation to minerals and underground waters;
- * protection of the traditional cultural heritage.²¹⁶

Although presented as an attempt to preserve the Fijian way of life in the face of Indian domination, in fact the 1987 coup was more concerned with dissent within native Fijian ranks. The ousted Government, led by Dr Bavadra, was after all a coalition between an Indian party and the Fijian Labour Party. Dr Bavadra and many of his ministerial colleagues were native Fijians. The Bavadra Government represented a threat not so much of Indian domination but of common revolt against a chiefly hegemony which had been increasingly less interested in fostering the customary way of life and more interested in personal advantage.²¹⁷ Further support for this interpretation may be gleaned from the Taukei Submissions to the Constitution Review Committee. The original submissions had stressed 'the need to preserve the Chiefly System and the need to use this as a basis of leadership in the nation'.²¹⁸ In these submissions, this was to be done by constituting an Upper House (Bose Vaka Turaga) composed of 20 elected members and 20 'Traditional Provincial Chiefs'. In the Report of the Review Committee, the majority was in favour of abolishing the upper house altogether, but including eight members elected by the Great Council of Chiefs in the House of Representatives.²¹⁹ However, the majority also advocated an electoral system which would have required all native Fijians to vote in the electorate where they held a proprietary land unit registered on the *Vola ni Kawa Bula* (native land register).²²⁰ This would have had the effect of compelling urban voters to vote in their rural tribe electorate. It would thus have inhibited the development of a multi-racial labour party.

The coup may thus be interpreted as a last ditch attempt to repolarise the races and preserve chiefly control. Although the appeal was to custom, the reality was far from it. The coup has at any rate highlighted an enormous diversity of views in Fiji as to its future direction. No unified support for the Taukei position, even amongst the native Fijian population, emerged from the 829 written submissions and 161 oral submissions made to the Constitution Review Committee. The rigidity in the lands and chiefly systems, cemented by the 1970 Constitution, have only inhibited the search for solutions in Fiji, which might be more in tune with the actual practice of customary law.

The Fiji coup brings to a close this chapter's historical and ideological analysis of the role of customary law in the state legal systems of the South Pacific. This enquiry has not been merely a preface to present concerns, an historical excursus which can be considered and then forgotten. It is a central theme of this thesis that the recognition of customary law cannot be understood in isolation from a century or more of cultural, economic and legal interaction. That the colonial experience was a profoundly transforming one is not denied. At the most basic level, if there had been no introduction of the State or State law, there would be no need to examine the 'recognition' of customary law. It is the processes of interaction which give rise to this need. This chapter has attempted to show that colonialism did not result in the obliteration of customary legal orders. Far from it. Quite apart from the colonial system's own attempts to take account of customary law, customary orders themselves have shown remarkable persistence and vitality. Nevertheless, the colonial approach to recognition has limited the range of current thinking on the subject. As this chapter has shown, the colonial approach was dictated by the exigencies of colonialism itself. Colonial plural legal systems may thus not be appropriate models for present approaches to the recognition of customary law. The central assumption of the colonial paradigm, that plurality was a passing phase because customary law was a dying phenomenon, has been proved emphatically wrong. Present responses must be conditioned by a history of interaction but not constrained by outmoded attitudes.

III CUSTOM AS A SOURCE OF UNDERLYING LAW

A GENERAL INCORPORATION AND THE AUTOCHTHONOUS CONSTITUTION

I Introduction

A fundamental method of incorporating custom into the state legal system is to make it a source of the generally applicable law, performing an analogous function to that of the common law in the English legal system. This type of general recognition involves the enunciation of a *Grundnorm* or rule of recognition which ranks the sources of law in a hierarchy, determining the extent of each source's operation and precedence in cases of conflict. This chapter is devoted to the interpretation and assessment of this method of recognition in the light of experience in the Pacific.

As has just been discussed at the close of Chapter II, the political and ideological importance of custom as a manifestation of the separate identity of an indigenous people is not to be underestimated. Custom bestows an autochthonous legitimacy upon the claims of indigenous peoples for greater power and autonomy. It provides an alternative locus of authority to the perceived foreign and frequently oppressive nature of state law. As such, custom achieved particular importance during the transition to independence and the process of constitution-making in the island states. It has also received increasing prominence in the assertions of the rights of the indigenous peoples of Australasia.

Yet, while the issue has often been central to the independence debates, it has just as frequently proved too difficult for adequate resolution by the Constitution which was meant to define the *Grundnorm* of the new state. The opportunity to draw a blueprint for the new society, which was provided by the constitution-making process, was often passed over in view of the exigencies of governance which independence required. Nowhere was this more evident than in the provisions for the sources of law.

While ideological and political considerations were strongly in favour of a formal and general embracing of custom as the prime basis

for the new legal system, practical considerations and the ideology of statehood itself pointed to a continuation of the inherited system of colonial law. This is not to cast doubt upon the good faith and serious intent of the framers of the constitutions. It is simply that there are fundamental difficulties in trying to make the disparate customs of stateless societies into the law of a nascent state. To propose the recognition of customary law is to begin, not to conclude, the inquiry.

Yet the effect of general incorporation is to defer any proper inquiry and to shift the primary responsibility to those who are in many ways the least equipped to conduct it: the superior court judges. The superior judiciary are the most removed from customary society and the most closely associated with the inherited colonial law of all state judicial officers. Also, by virtue of their peculiar and limited role in relation to the indigenous inhabitants, they only have limited opportunities to develop an indigenous jurisprudence.

It is thus the central tenet of this chapter that the paradigm shift involved in the recognition of customary law cannot be accomplished simply by incorporating custom as a source of underlying law without further consideration of the nature and roles of custom and of the state legal system respectively. The subjection of custom to an alien judicial structure without more is an exercise which is doomed at best to limited success and at worst to the subversion of the original objects of that exercise. There is no evidence to suggest that the mere achievement of independence should change this.

This argument is supported by a number of key issues, which general incorporation fails to confront and which have surfaced in the working out of general incorporation of custom in the courts. The nation builders envisaged the creation of a national indigenous jurisprudence, yet custom is a living reality only at a local level and may supply no discernible national standard. This reflects in the legal sphere the more general contradiction in terms between the state and stateless societies. Secondly, custom was to become a source of the underlying law, yet how the state judges were to become acquainted with it was rarely clarified. The judge takes judicial notice of the common law, yet this cannot practically be expected of a superior court, far removed from the local customary context. On the other hand, to make custom a question of fact and thus to allow for evidence

of it in each case is laborious, inconsistent with its status as a source of law and, worse, shifts responsibility for the underlying law to the further remove of the parties and their counsel. Thirdly, the Westminster system of government was seen as requiring the supremacy of statute over the underlying law, whether of English or customary origin. Yet the vast bulk of the Pacific statute book is made up of inherited colonial and United Kingdom legislation which took little or no account of custom. Statute regulates many of the areas, such as the criminal law, where conflicts with custom are the most acute.

The ensuing sections of this chapter trace these themes through the evidence of Pacific legal systems. It was in the Melanesian states of Papua New Guinea, Vanuatu and the Solomon Islands that the incorporation of custom as a source of underlying law achieved the greatest prominence in the constitution-making process. Their constitutional provisions and their subsequent fate in the courts and at the hands of the law reformers are thus analysed in depth, with occasional comparative reference to the experience in other jurisdictions. The attempt thus far in Melanesia to create a indigenous jurisprudence is then evaluated. This line of development is then contrasted with the present attempts to reinterpret the recognition of custom by the common law in Australasia. Whether limited to land, as in the doctrine of aboriginal title, or based more widely on the effect of colonisation on the precolonial law, these arguments draw heavily on the historical context discussed in the opening sections of Chapter II but are similarly directed at giving custom a place as part of the underlying law.

To suggest, as this chapter does, that the general incorporation of custom as a source of the underlying law has greater ideological and political significance than practical effectiveness is not to suggest anything radically new, nor is it to minimise the importance of the method. Although they held high hopes for an indigenous jurisprudence, Melanesia's constitution framers also recognised the many issues left unresolved. Sections in the constitutions providing for subsequent legislative clarification and law reform proposals bear witness to this. Further, general incorporation may stand as a testament of faith: that custom is legitimate and important and that it is to be a fundamental benchmark for subsequent legal development. Such a profession of faith is important in its own right, even if practical and structural difficulties impede its progress.

Nevertheless general incorporation is neither a necessary nor a sufficient state response to the existence of customary law. To reiterate: to propose the recognition of customary law is to begin, not to conclude, the inquiry. This point needs to be made strongly because the recognition of customary law is too often seen exclusively in terms of general recognition. This chapter thus concludes with a discussion of some alternative approaches to the recognition of customary law which are still general in the sense that they involve a fundamental and thorough-going reorientation of the legal system, but which avoid many of the pitfalls of general incorporation. Particular attention will be focused on the technique of functional recognition developed by the Australian Law Reform Commission in its Report on the Recognition of Aboriginal Customary Law and on the processes developed by the Tokelau Law Project. It will be seen that these provide the basis of an alternative approach to recognition which squares more closely with the fundamental objectives of recognition.

The discussion begins with Papua New Guinea and a constitution which is both explicit about its autochthonous nature and which is central to an understanding of the debate about the incorporation of custom as a source of 'underlying law' (an expression coined in Papua New Guinea). Papua New Guinea was most emphatically, and in contrast to many other Pacific jurisdictions, a case of a consciously new beginning.

II Papua New Guinea

The development of an indigenous jurisprudence was a top priority for Papua New Guinea's constitution makers. Michael Somare, Papua New Guinea's first Prime Minister, wrote in 1973, just prior to independence:¹

We are facing, at this very moment, the need to devise a system of laws appropriate to a self-governing independent nation. The legal system that we are in the process of creating must ensure the orderly and progressive development of our nation. But, in addition, it must respond to our own needs and values. We do not want to create an imitation of the Australian, English or American legal systems. We want to build a framework of laws and procedures that the people of Papua New Guinea can recognize as their own - not something imposed on them by outsiders.

Developing on this, the Indigenous Constitutional Planning Committee advocated the incorporation of Papua New Guinean ways as a national goal in the Constitution in the following terms:²

The process of colonisation has been like a huge tidal wave. It has covered our land, submerging the natural life of our people. It leaves much dirt and some useful soil as it subsides. The time of independence is our time of freedom and liberation. We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundations of our ancestral land. We must take the opportunity of digging up that which has been buried. We must not be afraid to rediscover our art, our culture, and our political and social organisation. Wherever possible, we must make full use of our ways to achieve our national goals. We insist on this despite the popular belief that the only viable means of dealing with the challenges of lack of economic development is through the efficiency of western techniques and institutions.

Papua New Guinean ways became the fifth national goal enunciated in the Constitution. However, the exigencies of independence did not allow as full a consideration of the implications of this goal for law as the framers of the Constitution might have wished. Section 9 specifies the sources of law:

The laws of Papua New Guinea consist of:

- (a) this Constitution; and
 - (b) the Organic Laws; and
 - (c) the Acts of Parliament; and
 - (d) Emergency Regulations; and
 - (e) laws made under or adopted by or under this Constitution or any of those laws, including subordinate legislative enactments made under this Constitution or any of those laws; and
 - (f) the underlying law
- and none other.

Custom is introduced as a source of law within the unique rubric of 'the underlying law'. CJ Lynch, who was Constitutional Draftsman, explains that:³

... the expression 'the underlying law' is a fairly novel one, and indeed terms such as 'common law', 'unwritten law', and so on were considered in the drafting of the Constitution and for various reasons (mainly practical ones) rejected. Broadly speaking, it means the same in essence as 'the common law' (including the rules of equity) as the latter expression is used in Anglo-American legal systems.... It means the 'unwritten' law, the rules of which have not only to be applied, but also enunciated and developed, by the courts.... However, the underlying law differs significantly from the English Common Law ... in the way in which rules of local customary law are grafted onto it by the Constitution.

The underlying law is subordinate to both the Constitution and statutes.⁴ Section 20(1) envisages that a future Act of Parliament

shall authoritatively declare the underlying law and provide for its development. This section provided the impetus for the law reform project, to be considered later in this chapter⁵. However, until such a fundamental revision could be achieved, section 20(2) provides that the interim arrangements prescribed by Schedule 2 shall apply.

Schedule 2, consistent with the Constitution's creation of a national legal system, attempts to weld the rather disparate sources of custom and the English common law together into a coherent whole. Schedule 2 provides that 'custom is adopted, and shall be applied and enforced, as part of the underlying law' except 'in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity'.

Schedule 2.1(3) provides that an Act of Parliament may:

- (a) provide for the proof and pleading of any custom; and
- (b) regulate the manner in which, or the purposes for which, custom may be recognized, applied or enforced; and
- (c) provide for the resolution of conflicts of custom.

As Parliament has not yet so legislated, these questions of the implementation of custom are still governed by the pre-Independence Customs Recognition Act (1963) Ch. 19.

Schedule 2.2 adopts the principles and rules of the common law and equity of England in existence immediately before Independence as part of the underlying law⁶, except if, and to the extent that:

- (a) they are inconsistent with a Constitutional Law or a statute; or
- (b) they are inapplicable or inappropriate to the circumstances of the country from time to time; or
- (c) in their application to any particular matter they are inconsistent with custom as adopted by [Sch. 2.1].

Where neither custom nor common law are applicable, the courts have a duty to develop the underlying law by formulating an appropriate rule, having regard, under Sch. 2.3:

- (a) in particular, to the National Goals and Directive Principles and the Basic Social Obligations; and
- (b) to Division III.3 (basic rights); and
- (c) to analogies to be drawn from relevant statutes and custom; and
- (d) to the legislation of, and to relevant decisions of the courts of, any country that in the opinion of the court has a legal system similar to that of Papua New Guinea; and

(e) to relevant decisions of courts exercising jurisdiction in or in respect of all or any part of the country at any time, and to the circumstances of the country from time to time.

The judges, especially those of the Supreme Court and the National Court, have an affirmative duty to develop the underlying law 'as a coherent system in a manner that is appropriate to the circumstances of the country from time to time'⁷, and are to make reports on their progress.⁸

As a legislative scheme, the provisions of Schedule 2 give a prominent place to custom. It is the first source of the underlying law. The common law is only adopted subject to custom. In filling the gaps, the judges are given wide latitude to develop an indigenous jurisprudence. Further, custom is given a wide definition as:⁹

the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises regardless of whether or not the custom or usage has existed from time immemorial.

However, the apparent breadth of the constitutional provisions as to custom is restricted by the pre-Independence Customs Recognition Act Ch.19, which has continued in operation and which deals with the matters referred to in Schedule 2.1(3). Section 2(1) of that Act makes proof of custom a question of fact. It then goes on to relax the rules of evidence so as to allow a court to receive a wide range of oral and written evidence in order to assist it in establishing the existence, nature and application of a custom. Section 3 provides that 'custom shall be recognized and enforced by, and may be pleaded in, all courts' but it lays down two exceptions. The first is general, where recognition or enforcement of a custom in a particular context would result in injustice or would not be in the public interest. The second provides that the welfare of a child must always override custom.

Sections 4 to 6 enumerate an exhaustive list of situations where custom may be taken into account. Section 4 deals with criminal cases:

Subject to this Act and to any other law, custom may be taken into account in a criminal case only for the purpose of-

(a) ascertaining the existence or otherwise of a state of mind of a person; or

- (b) deciding the reasonableness or otherwise of an act, default or omission by a person; or
 - (c) deciding the reasonableness or otherwise of an excuse; or
 - (d) deciding, in accordance with any other law whether to proceed to the conviction of a guilty party; or
 - (e) determining the penalty (if any) to be imposed on a guilty party,
- or where the court thinks that by not taking the custom into account injustice will or may be done to a person.

Section 5 deals with civil cases:

Subject to this Act and to any other law, custom may be taken into account in a case other than a criminal case only in relation to-

- (a) the ownership by custom of or of rights in, over or in connexion with customary land or-
 - (i) any thing in or on customary land or-
 - (ii) the produce of, customary land, including rights of hunting or gathering; or
- (b) the ownership by custom or rights in, over or in connexion with the sea or a reef, or in or on the bed of the sea or of a river or lake, including rights of fishing; or
- (c) the ownership by custom of water, or of rights in, over or to water; or
- (d) the devolution of customary land or of rights in, over or in connexion with customary land, whether-
 - (i) on the death or on the birth of a person; or
 - (ii) on the happening of a certain event; or
- (e) trespass by animals; or
- (f) marriage, divorce or the right to the custody or guardianship of infants, in a case arising out of or in connexion with a marriage entered into in accordance with custom; or
- (g) a transaction that-
 - (i) the parties intended should be; or
 - (ii) justice requires should be, regulated wholly or partly by custom and not by law; or
- (h) the reasonableness or otherwise of an act, default or omission by a person; or
- (i) the existence of a state of mind of a person, or where the court thinks that by not taking the custom into account injustice will or may be done to a person.

Section 6 requires custom to be taken into account in custody and adoption cases. Section 7 adopts a broad choice of law rule to resolve conflicts between systems of customary law, allowing the court to adopt the system 'that it is satisfied the justice of the case requires' or, in default of that, 'the ordinary rules of the underlying law'. There is a residual discretion to vary or depart from even these broad principles 'to such extent as the justice of the case requires'.

The Customs Recognition Act was a ground-breaking attempt to legitimise custom in Papua New Guinea when it was introduced in 1963. But it now sits ill with the constitutional scheme and a number of anomalies are uncovered in seeking to integrate the two. The Constitution makes custom part of the underlying law but the Act instead treats custom as a question of fact. The Constitution assumes that, since custom is part of the underlying law, it will form a general basis for the national legal system. The Act restricts the application of custom to a set of prescribed areas of the law. Most of the areas listed in sections 4 to 6 are areas where custom may be recognised with or without the Customs Recognition Act. The scope allowed in criminal cases by section 4 essentially only extends to the admission of custom as a fact in the application of state law.¹⁰ This is also implied by the words 'taken into account' in the civil case sections. At any rate, many of the subjects listed in those sections are already covered by their own statutory regimes with specialised provision for custom.¹¹

Although in cases of conflict the constitutional provisions ought to take precedence over the earlier statutory ones, in practice, as will be seen, the specific language of the Customs Recognition Act has restricted the scope for the development of custom as a source of underlying law in Papua New Guinea.

III Melanesia

In contrast to the complex and detailed scheme provided for in Papua New Guinea, relatively little direction is given to the courts elsewhere in the Pacific. The Constitution of Vanuatu is an altogether less prolix document than that of Papua New Guinea. The Constitutional Committee did not devote much of its attention to the sources of law, but it was concerned generally to find ways in which custom could be incorporated.¹² The sources of law in Vanuatu are extremely diverse owing to its former status as a condominium, jointly administered by Britain and France. The Constitution, by Article 93, preserves joint regulations and British and French laws in force immediately before independence.¹³ However Article 93 (3) provides that 'Customary law shall continue to have effect as part of the law of the Republic.' Further the joint regulations are to be construed 'with such adaptations as may be necessary to bring them

into conformity with the Constitution.' British and French laws shall only apply to the extent that they are not 'incompatible with the independent status of Vanuatu, and wherever possible taking due account of custom'.

Chapter 8 of the Constitution, which deals with 'Justice' also contains provisions enjoining reference to custom. Article 45(1), establishing the judiciary, provides that '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'.

The question of how custom is to fit into judicial proceedings is deferred by Article 49:

Parliament may provide for the manner of the ascertainment of relevant rules of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or Court of Appeal and take part in its proceedings.

No such legislation has as yet been made. The Constitution of Vanuatu thus presents a somewhat oblique picture on custom as a source of law. It is recognised, and received British and French law, even if statutory, is subject to it. However its application is not defined with any precision, in the way that it is in Papua New Guinea.

The Constitution of the Solomon Islands is something of a half-way house between those of its melanesian neighbours. Section 75, like Section 20(1) of the Papua New Guinea Constitution, enjoins Parliament to consider the basis of the legal system at some later date, making 'provision for the application of laws, including customary laws', and having 'particular regard to the customs, values and aspirations of the people of the Solomon Islands'. Until it does so, section 76 provides that Schedule 3 is to apply. Paragraph 1 of Schedule 3 preserves United Kingdom Acts of general application.¹⁴ Paragraph 2 gives effect to the principles and rules of the common law and equity save in so far as they are inconsistent with the Constitution or with statute, inapplicable or inappropriate in the circumstances or inconsistent with customary law. This is an identical list to that found in Schedule 2.2 of the Papua New Guinea Constitution. Finally, paragraph 3 gives effect to customary law save that which is inconsistent with the Constitution or an Act of

Parliament. Paragraph 3(3) echoes Schedule 2.1(3) of the Papua New Guinea Constitution in allowing for an Act of Parliament to prescribe the technical rules necessary for application of customary law in the national courts.

iv Polynesia

Outside Melanesia, custom is less often found as a source of underlying law. In Fiji, Tonga and the Cook Islands, for instance, it does not figure as a formal source at all. This does not of course mean that customary law has no role in those jurisdictions. It may continue to play a vital role in island life outside the state legal system. Further, state law may simply have adopted other techniques of recognition. Customary land tenure, for example, often receives express and particular recognition. Nevertheless, there is some comparative material on general recognition from Western Samoa, Tuvalu, Nauru and, outside the territorial ambit of the present study, some bold innovations in Micronesia.

Article 111 of the Western Samoan Constitution defines 'law' as:

...any law for the time being in force in Western Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by-law, or other act of authority made thereunder, 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 Western Samoa *and any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction.* [emphasis added]

This curious provision occasioned no debate in the Constitutional Convention. Dr Aikman, one of the Constitutional advisors, confined his explanation to the role which the English common law would play and made no reference to custom, although at another point in the Debates it had been suggested that article 111 might allow for the recognition of the customary authority of the *Ali'i* and *Faipule* (village chiefs).¹⁵ Powles describes this as an 'unfortunate definition',¹⁶ and finds it difficult to give it any sensible meaning. It purports to restrict the role of custom in the legal system to that which has been recognised by statute or judicial decision, but gives no guidance as to when or how it may acquire the force of law by judicial decision. The phrase may do little more than legitimate the functions and decisions of the quasi-customary Land and Titles Court, already recognised in Part IX of the Constitution.

In Tuvalu, where the Constitution itself makes no provision for the sources of law, this matter has been dealt with by legislation. The Laws of Tuvalu Bill 1987, which comes into operation on 1 January 1988, prescribes the role of customary law, and gives it supremacy over the inherited English common law. The main purpose of the Bill is to make provision for the Tuvalu Inherited Imperial Statutes Project, which is engaged in defining the corpus of inherited imperial statutes presently in force in Tuvalu and adopting them individually as part of the Tuvaluan statute book. This process, which aims to prune the dead wood of inherited statutes, and to adopt only those relevant to Tuvalu, itself has considerable implications for the status of custom as an alternative source of law to fill the gap left by the repeal of many inherited statutes.

Clause 4(1) of the Bill makes the Constitution the supreme law of Tuvalu. As will be seen in Chapter IV, the new Constitution, especially in relation to human rights, gives considerable latitude to custom. Clause 4(2) then includes customary law as part of the laws of Tuvalu. Clause 5 defines the place of customary law:

- (1) Customary law comprises the customs and usages, existing from time to time, of the natives of Tuvalu.
- (2) Subject to section 4(1), customary law shall have effect as part of the Law of Tuvalu, except to the extent that it is inconsistent with an Act or an applied law published pursuant to section 11(1) and subsidiary legislation made thereunder and so published.
- (3) Schedule 1 has effect with respect to the determination and recognition of customary law.
- (4) The Minister may amend Schedule 1 by regulation, subject to the agreement of the Chief Justice.

Clause 6(3)(b) provides that the common law shall have effect as part of the law of Tuvalu save in so far as 'in its application to any particular matter it is inconsistent with customary law in respect of that matter'. Clause 8 allows the Minister to make amendments to applied laws before presenting them to Parliament for adoption, to bring them into conformity with, *inter alia*, customary law.

Schedule 1 is a detailed code on the determination and recognition of customary law. In format it follows closely the Papua New Guinea Customs Recognition Act in that it relaxes the rules of evidence for the proof of custom; enumerates specified classes of criminal and civil cases where custom may be taken into account and

applied respectively; and provides for conflicts of custom. However there are some important substantive differences. The existence and application of customary law are to be determined not as questions of fact but as questions of law. Thus, as clause 1(1) makes clear, 'any such question may be raised by the court itself, notwithstanding that the question has not otherwise been raised'. The rest of clause 1 requires a court, if it entertains any doubt on a question of custom after having heard submissions and consulted written sources, to constitute a special inquiry where it may, 'of its own motion, call such evidence or require the opinions of such persons as it thinks fit'. The remainder of the Schedule is cast in terms of a positive duty to recognise and enforce customary law, rather than a closely circumscribed power. In all, the Tuvalu Bill thus attempts to address many of the procedural problems which have stymied the emergence of an indigenous jurisprudence elsewhere.

v Micronesia

One Micronesian jurisdiction within the ambit of the present study which has dealt with the recognition of customary law as part of the underlying law is Nauru. The Custom and Adopted Laws Act 1971 (Nauru), as amended in 1972 and 1976, adopts a highly specific approach to incorporation both of custom and of inherited English law. In relation to the latter, it details, in the First Schedule, a long list of parts of the statute law of England, printed in the third edition of *Halsbury's Statutes of England*, which are excluded from the general adoption of English law in Nauru under section 4. Section 3 of the Act deals with Nauruan institutions, customs and usages. It provides:

(1) The institutions, customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save insofar as they may hereby or hereafter from time to time be expressly, or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded recognition by every court and have full force and effect of law to regulate the following matters -

- (a) title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any written law not being an applied statute;
- (b) rights and powers of Nauruans to dispose of their property, real and personal, inter vivos and by will or any other form of testamentary disposition;

- (c) succession to the estates of Nauruans who die intestate; and
 - (d) any matters affecting Nauruans only.
- (2) Any custom or usage by which -
- (a) any person is, or may be, entitled or empowered to take or deal with the property of any other person without that person's consent; or
 - (b) any person is, or may be, entitled or empowered to deprive the parents of a child of its custody and control without their consent,
- is hereby abolished.

The section thus represents a limited attempt to establish the sphere of operation of Nauruan custom to be vouchsafed by the general legal system.

In those Micronesian states which are emerging from United States trusteeship even more radical solutions have been experimented with. Article V(2) of the Palau Constitution provides that:

Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.

Lynch comments that this provision 'imposes in effect a fetter on the legislative power, the legal significance of which cannot be known until the courts have dealt with the matter thoroughly'.¹⁷ Ghai is blunter: 'a concept bristling with jurisprudential difficulties and conundrums'.¹⁸ The position is similar, though not stated as directly, in the Federal Micronesian Constitution, where the courts' decisions 'shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia' (article XI(11)). The Constitutional Convention Committee had stressed that:¹⁹

The intent and purpose of this provision is that future Micronesian courts base their decisions not on what has been done in the past but on a new basis which will allow the consideration of the pertinent aspects of Micronesian society and culture.

Similar clauses are to be found in the constitutions of the other Micronesian states.²⁰

B THE CONSTITUTION, CUSTOM AND THE JUDGES

Despite the express incorporation of custom as a source of underlying law in a number of Pacific constitutions, and the key position which the rhetoric of constitution making often gave to the development of an indigenous jurisprudence, custom has figured in only a few superior court decisions since independence. This paucity of cases should not be interpreted as a failure *ab initio* of any recognition of custom by state law. Some limitations of superior courts and of underlying law should be considered. First, with the exception of Papua New Guinea, the Pacific jurisdictions under consideration in this chapter are small and the number of significant cases likely to come before the superior courts is limited. The enquiry here is restricted to the superior courts, because typically the inferior courts are governed by a separate statutory regime, which gives much greater scope for custom.²¹ These courts will be dealt with in Chapter V. Further, the workload of the superior courts reflects a heavy emphasis on criminal jurisdiction, rather than civil. The criminal law is substantially codified, and only leaves limited room for non-statutory rules, even in jurisdictions where the common law is the only source of the underlying law.

As to the civil law, which is the area where the underlying law has greatest play in common law legal systems, some principal areas of customary dispute, in particular land and status are regulated by separate regimes and separate courts. More generally, in civil disputes parties will not resort to the state courts unless they perceive their processes to be relevant and necessary to the resolution of their dispute. In many cases, unofficial mechanisms provide a preferred forum.²² All of these points merit expansion, but in the present context they simply serve as a reminder of the limited role of the superior courts and of the underlying law in Pacific jurisdictions, and of the number of issues relating to the interaction of custom and law left for consideration in discrete areas of the legal system.

I Solomon Islands

The superior courts of the Solomon Islands have only considered the effect of Schedule 3(3) of the Constitution in a handful of reported instances.²³ In *Balou v Kokosi*²⁴ the question was whether a woman who was married in custom could get orders against her husband under the Affiliation, Separation and Maintenance Act 1971. Section 10 of that Act required that the applicant be a 'married woman'. Daly CJ found that Schedule 3(3) had made customary law part of the law of the Solomon Islands and that it had to be enforced as such. Therefore, when the legislature talked simply of a marriage, it must be construed as referring to all marriages valid in Solomon Islands law, including customary marriages.²⁵ He was aided in this finding by the Islanders Marriage Act (Cap.47), section 4 of which preserved and recognised a category of customary marriages. Thus, although the Islanders Divorce Act (Cap.48) excluded customary marriages from the jurisdiction of the High Court to grant divorce, providing instead that remedies in relation to such a marriage may only be ordered 'in accordance with the custom of Islanders',²⁶ the remedies in the Affiliation Act were held to be open to a customary spouse.

Two custody cases, while not referring expressly to Schedule 3(3), have considered the effect of the incorporation of custom as part of the underlying law. In *Sukutaona v Houanihou*²⁷ a magistrate had relied on custom to refuse an application of a wife for custody of children. Daly CJ remitted the case for retrial by a different magistrate. He held:²⁸

It is quite right that custom law is now part of the law of Solomon Islands and courts should strive to apply such law in cases where it is applicable. However, it must be done on a proper basis of evidence adduced to show the custom and its applicability to the circumstances. This evidence should be given by unbiased persons knowledgeable in custom law or extracted from authentic works on custom.

Daly CJ did not find this requirement to have been met in the instant case. He went on:²⁹

In any event it remains open to question to what extent rules of custom law of the kind discussed in this case should be firmly applied to cases where the welfare of the child is at stake.

The courts have always regarded the interest of the children to be of paramount importance and should continue to do so.

The 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 that parent should not have custody.

A thorough consideration of the custom rules will often reveal that they too are founded on the sort of common sense that all courts look for in their laws and the application of them.

In *In re B*³⁰ Joses Sanga, Magistrate, applied these dicta to a case where custom was clearly proved. The couple had been married in custom, and had then separated, the child remaining with her mother. The customary rule was that, once bride price was paid, the children of the marriage would become the property of the buyer. The magistrate refused to follow this rule, and applied instead the common law presumption that young children should stay with their mother.

It is difficult, if not impossible, to reconcile these exercises of judicial discretion with the express injunction of Schedule 3(3). The incorporation of customary law in the Solomon Islands has not been subjected to any qualification of repugnancy, nor is there a provision, such as that prevailing in Papua New Guinea, excluding custom 'in a case affecting the welfare of a child under the age of sixteen years, [where] its recognition or enforcement would not, in the opinion of the court, be in the best interests of the child.'³¹ Further, both judges leave out of account the significance of the customary rule in the context of the kinship structures of Melanesian society.

Daly CJ again considered Schedule 3(3) in *Igolo v Ita*.³² That case came on appeal from the Customary Land Appeal Court. It concerned a chieftainship claimed by Igolo on the basis of his being the son of the previous chief. Igolo attempted to plead the common law presumption of legitimacy. Daly interpreted Schedule 3(3) as allowing customary law to prevail over all received law, both U.K. statutes of general application and common law and equity. Only the Constitution and Solomon Island statutes were superior. The context of an adjudication over customary land made the received law presumption inapplicable, although the Land Court had not so much applied a customary rule as made its decision, on the factual evidence, without using the presumption.

The Court of Appeal considered Schedule 3(3) in the criminal case of *Loumia v DPP*.³³ There the issue was whether the custom of 'payback' killing could be a defence to murder sufficient to reduce it to manslaughter. Section 197 (c) of the Penal Code created the defence that the accused 'acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death....' The appellant argued that Schedule 3(3) admitted customary law as a source of law, and that therefore 'payback' killing could amount to a legal duty. The Court of Appeal (Wood CJ, Connolly and Kapi JJA) unanimously scotched this argument as contrary to the Constitution, the Penal Code and the common law. 'Payback' killing infringed the right to life as protected by section 4 of the Constitution. Connolly JA then went on to construe the effect of the Penal Code, finding that it 'together with so much of the common law as it incorporates, is a complete statement of the law in relation to the offences with which it deals.... It is beyond question that a killing for revenge or retaliation could not have been regarded as a lawful act in the application of the Code or at Common Law.'³⁴ Kapi JA stressed section 3 of the Penal Code which provided for interpretation of its provisions in accordance with English Law.

The reaction of the Court in the context of this particular case is perhaps understandable, because of the extreme nature of the custom involved, but the decision seems to throw the baby out with the bathwater. The case is authority for the proposition, though admittedly it is obiter, that custom can play no part at all in cases brought under the Penal Code, which prescribes all of the more serious criminal offences. To construe this from the language of the pre-independence Code, as the Court has done, is to fail to take Schedule 3(3) of the Constitution seriously.

II Papua New Guinea

The Papua New Guinea Constitution gave a greater spur to the courts to take custom seriously in developing an indigenous jurisprudence. However reference to Schedule 2.2 has been patchy and inconclusive. This has led some commentators to argue that, far from developing the underlying law, the post-independence judiciary have actually retreated from the position achieved in colonial times.³⁵

A major blow to Schedule 2.1 has been struck by the development of a doctrine of national custom by the Supreme Court. In *Constitutional Reference No.1 of 1977 : Poi Si Tatut v Chris Cassimus*,³⁶ the Court had to decide whether an action for enticement was available in Papua New Guinea. The common law action had been abolished in England prior to the reception date. It could not therefore be applied under Schedule 2. The court then held that only a nationwide custom could be applied under Schedule 2.1:³⁷

before undertaking the duty of formulating an appropriate rule as part of the underlying law, in regard to a matter close-knit into the fabric of traditional village life, the Court would, I think, need to have evidenced before it an appropriate almost country-wide custom.

This further provided a reason for not formulating a rule of underlying law under Schedule 2.3.

This requirement was also imposed by the Court in *Supreme Court Reference No.4 of 1980*,³⁸ where the *locus standi* of the Leader of the Opposition to challenge the constitutional validity of the Defence Force (Presence Abroad) Act 1980 was in issue. Under the authority of that Act, Papua New Guinea troops were sent to Vanuatu to help the Vanuatu Government suppress a rebellion. It was argued that, as a 'Big Man', the Leader of the Opposition had standing in custom to speak in any forum. The Court rejected this again on the grounds that the evidence had only disclosed a local custom, not a nationwide one. Kapi DCJ qualified the rule suggested in 1977 in the following way:³⁹

In my view before a custom is adopted and enforced as part of the underlying law under Schedule 2.1 of the Constitution it must be established that there is a community of indigenous inhabitants of this country which recognises a certain customary rule. In a case which involves a dispute between two individuals regarding their private rights, it must be established that a custom which the court proposes to adopt as law is recognised and extends to both parties. In a case which involves an issue which has a general application to the whole country ... as in this case, it must be established that there is a custom which is common to all societies throughout the country.

Although the Court did thus decline to apply custom it did develop a new rule of standing, which was significantly wider than the common law rule.

A landmark case on sentencing policy, which considered the effect of the underlying law provisions was *St v Uname Auname*.⁴⁰ In

that case, five men were charged with the wilful murder of an old woman who was allegedly a sorceress, responsible for many deaths. Four of the accused pleaded guilty and each was sentenced to three months imprisonment with hard labour and ordered to pay compensation of five pigs to the deceased's son. Narakobi AJ based that sentence on local custom, the National Goals and Directive Principles and the underlying law provisions of Schedule 2. On appeal, the Supreme Court unanimously quashed these orders and imposed a six year sentence. Kidu CJ did not consider the compensation or the underlying law provisions, but he did find the sentence grossly inadequate. The cultural setting of the respondents was relevant, but it had to be balanced against the dictates of the Penal Code. Only Kapi J analysed and criticised Narakobi's approach in detail. Considering the order of customary compensation he began with section 37(2) of the Constitution which provides that '... nobody may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law'. Here the offence and the penalty were prescribed by the Criminal Code. Narakobi had relied on section 4(e) of the Customs Recognition Act Ch.19, which allows custom to be taken into account in determining penalty. But that, held Kapi J, meant only that custom could be a factor to be considered in determining a statutory penalty, and not that it may itself create a penalty. As to the underlying law, Kapi J found that⁴¹

... there is no room for developing the underlying law in this case. The development of the underlying law under Schedule 2.3 arises only where there appears to be no rule of law that is applicable. In this case the Criminal Code Act is applicable.

Further cases have grappled with the relevance of compensation to sentence. Narakobi AJ considered this issue in *St v Tendi Kallo U/O*.⁴² It was a case of murder. The accused had killed his son, while the latter was beating his mother. The accused pleaded provocation, which Narakobi accepted as reducing the offence to manslaughter. He then went on to consider the effect of the payment of compensation of pigs worth K3,000. He relied on his duty to develop the underlying law, which he found could include custom both at the level of determining liability and of determining sentence. He found that custom considered the accused responsible for the killing, and that compensation was an appropriate penalty. He thus placed the offender on a good behaviour bond for one year and fined him K100.

This approach was reviewed by the Supreme Court in *APP v Nitak Mangilondie Tanganis*⁴³ and again by Kapi in *St v Kupara*.⁴⁴ These cases insisted that the effect of compensation be proved by evidence. General statements from the Bar table were not enough. In the latter case, Kapi DCJ was careful to distinguish the relevance of compensation to sentence from development of the underlying law. He saw custom in criminal cases as essentially only relevant to the circumstances of the accused:⁴⁵

as to what circumstances are relevant on sentence, these are determined by practice and principles developed by courts in sentencing. As to whether or not custom is taken into account, this is limited by its relevance to these circumstances. This is altogether a different matter from recognising, enforcing, or adopting custom as part of the underlying law under the Constitution. Custom may be taken into account on sentence without enforcing it as part of the underlying law.

Another context where the underlying law has been pleaded is that of family relationships. Could a man be charged with Incest for having sexual intercourse with his adopted daughter, adopted under custom in accordance with the Adoption of Children Act Ch.275, Part VI? Andrew J had said not, but without referring to custom, in *St v Missimb Kais*.⁴⁶ The Supreme Court endorsed this in *Sangumu Wauta v St*⁴⁷ and seized the occasion to emphasise the subordinate position of custom to written law. Prentice CJ disapproved 'the Incrustation of unwritten (variable) custom upon the pillars of the Criminal Code':⁴⁸

Is the Criminal Code's provision as to Incest to take effect in the different societies and villages differentially according to what may be proved as to the particular adoption process and its particular local effect in each particular case? Such a possibility would render the operation of the statutory criminal law and its administration quite uncertain. Findings of guilt in each case would depend not upon the terms of the statute, but upon the evidence as to the particular 'law' in each case. Availability of witnesses as to such 'law' and the variable enthusiasm of prosecuting counsel and of police, in procuring their attendance would surely prove an unsatisfactory basis for finding the law. Such a process would possibly militate strongly against the development of 'a coherent system' of underlying law (Schedule 2.4 of the Constitution).

The effect of custom was taken account of more recently by Barnett AJ to determine whether a half-sister was a sister for the purpose of incest.⁴⁹ Here custom and the common law coincided, so the inclusion of

half-sister within the meaning of sister could safely be enunciated as part of the underlying law.

Instances of cases involving the underlying law outside the criminal law area are very rare, but mention might be made of *Aundak Kupil v St*⁵⁰ where, in a common law claim for damages, the National Court held that the custom of the Whagl people in the Highlands of allowing the victim of a motor car accident to claim compensation was not inconsistent with the Constitution, and could therefore be taken into account in reducing the amount of damages.

C LAW REFORM AND THE DEVELOPMENT OF THE UNDERLYING LAW

The Papua New Guinea Constitution provided that Schedule 2 was only a stop-gap measure in the development of the underlying law. A definitive statute was envisaged for the future, and its drafting was to be a major endeavour of the Law Reform Commission. The Commission responded rapidly with a working paper in 1976⁵¹, and a report the following year⁵². The Report was based on the failure of the courts to make the new beginning which the Constitution had asked of them and the need for better guidelines to assist them in their task. The Report sought to reformulate the provisions of Schedule 2 and of the Customs Recognition Act. The topic was divided in two. Provisions relating to the criminal law were hived off into a separate series of amendments to the Penal Code⁵³.

The scheme of the Underlying Law Bill, which the Commission proposed, is to establish customary law as the primary source of underlying law. Clause 4 provides:

- (1) Customary Law is adopted and shall be applied, either directly or by analogy as the underlying law unless -
 - (a) it is substantially inconsistent with any written law relevant to the subject matter; or
 - (b) its application would be contrary to the National Goals and Directive Principles, Basic Rights and Basic Social Obligations under the Constitution.
- (2) Where the court considers that part of a rule of customary law to be applied as the underlying law does not comply with the provisions of paragraphs (a) or (b) of subsection (1) the court may, in so far as it is practicable to do so, modify that part of the rule in such a way as to make it comply with the provisions of this section.

Some significant aspects of this proposal are that, unless substantially inconsistent, customary law may coexist with statute

(clause 3); the common law becomes very much a subsidiary source of law (clause 5); custom is also to be the primary source in interpreting statutes (clause 17).

The proposal sought to reinforce the application of customary law by providing rules to assist its ascertainment. Clause 10(2) imposes a duty on counsel to call evidence and provide information on the nature of the relevant rule of customary law. Clause 10(4) goes further in allowing the court to take judicial notice of customary law and obtain information and evidence of its own motion.

Clause 11 then provides a limited set of interpersonal conflict of law rules to decide which regime of customary law should apply to a case. The key connecting factor is membership of a community, which clause 1(2) defines according to a two limb test of adherence to or adoption of the way of life of a customary community and acceptance by that community. This would allow expatriates and Papua New Guineans from other communities to belong to a community. Clause 11 suggests the following conflicts rules:

- * the *lex situs* for customary land;
- * the law of the community to which the deceased belonged for succession to property other than customary land;
- * otherwise, in cases of conflict, the law which the parties intended;
- * failing that, the most appropriate law, having regard to the transaction, the residence of the parties and the justice of the case;
- * an inter-group rule, if one exists in the relevant customary systems.

The law reform project was commenced a mere fifteen months after Independence. The need for haste was seen as justified because: 'If the problem is left any longer the pre-Independence practices in the courts may have time to consolidate and be more difficult to alter in later years'.⁵⁴ Two seminars were held to discuss the proposals⁵⁵ and comments were elicited, although there was little involvement of the non-legal public.⁵⁶ The expatriate Chief Justice, Sir Sydney Frost expressed unfavourable views on the project.⁵⁷

The Report was never considered by Parliament, and has thus never become law. The Commission has continued to produce reports on specific areas of customary law,⁵⁸ and to pursue research on the subject.⁵⁹ The General Constitutional Commission recommended, in its final report in 1983, that:⁶⁰

- (a) An Act of the National Parliament envisaged by section 20 and Schedule 2 of the Constitution be enacted now as a matter of urgency;
- (b) For that purpose the recommendations of the Law Reform Commission on the Declaration and Development of the Underlying Law be implemented as a matter of urgency;
- (c) The Courts, the legal profession and the Law Reform Commission be encouraged to place greater emphasis on the development of the underlying law.

Despite these recommendations, Parliament has not acted and Schedule 2 remains unchanged.

D THE FAILURE OF AN INDIGENOUS JURISPRUDENCE

I Systemic Limitations

The inclusion of customary law as a source of the underlying law served important political functions in the creation of Independent Pacific states. In keeping with the general principle of autochthony,⁶¹ which was at work to a greater or lesser extent in the constitution-making exercise everywhere in the Pacific, it was important to allow the legal system to reflect Indigenous norms. Yet, as a technique, the incorporation of customary law as a source of the underlying law transferred responsibility to the judiciary, whose province it was to enunciate the underlying law in its application to particular cases. This was done without any real attempt to analyse what was involved in the general incorporation of customary law or the new techniques and structures which might need to be evolved to contain it within the judicial system.

On the whole, save for a few isolated examples of judicial activism, the record of the courts in addressing the underlying law challenge does not appear overly encouraging. As well as the few cases already discussed where the matter has been raised, the books are replete with examples of the blind adoption of common law principles.⁶² A nice example of this is the Solomon Islands case of *Funua v Cattle Development Authority*⁶³ where the liability of the owner of a bullamacow for personal injury caused by it on escape was assessed according to the (pre-reform) common law rules about *ferae naturae* and *mansuetae naturae*. Although the magistrate described these rules as a 'picturesque chaos'⁶⁴ he decided the case entirely on the basis of them, without reference to custom.

Some explanation of this trend can be found in the lack of training of both judges and counsel in customary law. It is not the milieu in which they have been trained or are used to working. Many judges of the superior, and even inferior, courts in the Pacific continue to be expatriates, as is the profession, what there is of it.⁶⁵ The experience of Papua New Guinea does not however encourage confidence that an indigenised judiciary and profession is any more willing to take custom into account.

A practical limitation on judicial development has been the relative lack of any legislative assistance in tackling the procedural and structural problems entailed in a common law reception of custom. Commenting on the duty to develop the underlying law, one Papua New Guinea Supreme Court Judge said:⁶⁶

In some quarters it is fashionable to suggest that the Supreme Court is shirking this duty. It is not so. We are not given the tools with which to work.

The courts are dependent on the 'hit and miss' of litigation for the degree to which they can develop the underlying law. In the first place this depends on the litigants themselves. As the former Chief Justice, Sir Sydney Frost, commented, this operates as a major constraint on the National and Supreme Courts whose main business involving citizens is criminal, an area which is covered by the Code.⁶⁷ Hardly any civil litigation involving citizens occurred in those courts, and this meant that relatively few opportunities were presented to National Court judges to develop a new underlying law.

More fundamental is the equivocal status of custom as a source of underlying law, and the implications of that for the ascertainment of customary law in the courts.⁶⁸ The common law draws a distinction between questions of law, of which a judge is presumed to take judicial notice, and questions of fact, which must be proved by the parties. The classification of custom into one or the other category is thus of vital practical importance. If it is to be a question of law, the superior court judge will have a duty to inform himself of it. Where, as will usually be the case, his education and personal experience do not equip him sufficiently in this task, provision will need to be made for documentary or oral information. If, on the other hand, custom is regarded as a question of fact, the onus is on the

parties and their counsel to prove it, and the judges will have no independent duty to ascertain it. However, in such a case, the law of evidence would need to be scrutinised for its suitability in the proof of customary law.

The English common law treats both English custom and foreign law as questions of fact which must be proved by the parties. Colonial law, as it was developed in India and Africa envisaged a hybrid status of custom. Essentially it was a question of fact and the responsibility of the parties, but judicial notice could be taken of notorious customs. This compromise gave considerable scope for judicial transformations of custom, and it squared awkwardly with positivist notions of a coherent, unified and ascertainable legal system. It also gave custom a secondary, and more tenuous, place than the received common law, of which the judges took judicial notice as a matter of course.

Politically, therefore, there was every incentive on independence to make custom a question of law. This is reflected in the language of the constitutional and legislative texts examined in Part A. Everywhere (save Samoa and Nauru) custom is *part of the law*. Yet, in the same breath, the sources of law sections contemplate subsequent provision for the proof and pleading of custom, terms much more consonant with custom being a question of fact. Indications are that the superior court judges are insisting on this latter interpretation, as the cases of *Sukutaona v Houanihou* and *Sangumu Wauta v St* illustrate. This is also the position taken by section 2 of the Customs Recognition Act Ch.19 (Papua New Guinea). This is inconsistent with the primacy accorded by the Constitution to custom as a source of underlying law. Clause 10 of the Papua New Guinea Law Reform Commission's Underlying Law Bill sought to facilitate the treatment of custom as a question of law both by widening the court's powers to inform itself and thus take judicial notice of custom, and by imposing duties on counsel.

Custom's ambiguous status means that, for the moment at least, much of the responsibility for the development of an indigenous jurisprudence lies not with the judges but with counsel. Even if they were interested in shouldering this burden, counsel may find themselves hampered by the law of evidence. Only in Papua New Guinea and Tuvalu has the legislature liberalised the law of evidence to

avoid problems which would otherwise occur with the rules on hearsay and expert evidence in their application to knowledgeable members of an indigenous community. There has only been limited experimentation in the Pacific with alternative methods of ascertainment, such as assessors and referees.⁶⁹ Unless the legislature or the courts move to tackle these practical problems, customary law will remain at the margins of litigation, whatever the Constitutions say.

The dilatory response of the legislature runs wider than these technical questions. Another major impediment to the development of an indigenous jurisprudence was the failure to review pre-Independence and inherited statutes. In many cases this is legislation which was made without a thought for the circumstances of the country. The Constitution had little choice, because of pressure of time, but to 'roll over' this legislation, and its existence operates as a major constraint on custom, filling many areas where custom could have a role to play. Only in Vanuatu and (more radically) in Palau was this supremacy of written law questioned, yet pre-Independence and inherited statutes are not within the protection of the principle of Parliamentary Sovereignty - they were not made by the post-Independence legislature, nor was their enactment sanctioned by the popular sovereignty of the electorate.

II The Contradictions of Custom as National Law

There is a wider political agenda to the diminishing interest of the legislatures in fundamental law reform since Independence. The process of constitution-making focussed the minds of the country's leaders on legal issues, as they attempted to establish a legal framework for governance. In the course of this process, the underlying law played an important ideological role. After Independence, governments became more and more preoccupied with day-to-day survival and economic development. This attitude was displayed in the comments of a senior Papua New Guinea government minister in the context of a parliamentary debate about an alleged serious breach of ethics by an expatriate Supreme Court judge:⁷⁰

Because of this matter of public importance we have wasted our time, and now we cannot debate about roads and other necessary things which the country badly needs. I do not regard this as a matter of public importance and it should be thrown out to make way for something important.

In Vanuatu, the strength of the nationalist appeal to *kastom* was its non-specificity. Subsequent experience there has highlighted the difficulties involved in actually doing anything about the problem by means of legislation, and the reluctance to act.⁷¹

The status quo of received law is convenient for both the capitalist business community and, indeed, for the agencies of the state. The former relies on the free trading structure provided by the Common Law and is profoundly suspicious of local alternatives which could confine this. As Fitzpatrick comments in relation to law reform in Papua New Guinea:⁷²

Where the changes are basically neo-colonial they are successful. Forces operative in the colonial situation continue even if in different forms. Fundamental changes, especially those countering the metropolitan bourgeoisie, are either not enacted or assume an anaemic existence at the level of enforcement. The changes accommodate and legitimate new political rule within a persisting economic situation.

As far as the State is concerned, customary law represents an alternative power base within the community, which is a threat to state authority. The State is a recent innovation in the Pacific, and the development of a state monopoly on law is an important exercise in enhancing its legitimacy. State officials, whether in the legislative, executive or judicial arms of government, derive their authority from the State, and not from custom.⁷³ As Ottley and Zorn note:⁷⁴

A government faced with the necessity of establishing and maintaining its authority to rule, however, believes that it must wrest law-making and law-enforcement powers from the people. By monopolizing the law and its process, the state raises itself. Customary law, then, is viewed by the government, whether or not correctly, as a direct attack upon the legitimacy of the state.

These political themes are unavoidable in any consideration of the radical reorientation of the underlying law implied by the general incorporation of customary law. But a deeper set of problems is provided by the failure of the general incorporation method to consider just exactly how custom is to perform the role of an underlying law within the state legal system. This is a problem of the commensurability of the competing paradigms represented by 'law' and 'custom'.⁷⁵ Customary law evolved to meet the needs of small-scale

communities, operating with only a limited degree of contact with the outside world. Its adoption as part of a national legal system is incongruent with this basic fact of its evolution. As David notes in a general discussion of custom as a source of law: 'Customary law is compromised, in particular, as soon as one tries to replace the communities of village or tribe with a national community which is a completely different thing in nature and scale'.⁷⁶ If custom depends for its existence on the life of customary communities, it is also a difficult, artificial exercise to separate a legal element, a system of rules, from the systems, processes and institutions of customary society.⁷⁷ Ghai comments:⁷⁸

It is often said that customary law is less a system of rules than a set of values, principles and standards, and a method of solving disputes. The essence of customary law proceedings is not to impose liability by the application of firm legal principles to the given fact situation, but to resolve the dispute by ensuring a just solution, generally through some process of compromise. It is said that the search for compromise is dictated by the need to preserve social harmony in the small-scale traditional community. The range of issues that the dispute settlers decide is generally much wider than the issue or issues that might be the immediate cause of the dispute, and they consider wide-ranging evidence. It is difficult to be conclusive on this point. That customary law does have its rules is undeniable; but these rules are not always applied in the way that a rule of common law might be. The need to maintain clan relationships, the political strength of the parties, the desire to reiterate and reassert traditional principles play an important role, but these factors are played out against the customary rules.

The ambiguity and flexibility inherent in customary rules are not features which readily translate into the process of adjudication within the national court system. It is often asserted that this factor creates an insurmountable impasse, rendering the entire process of the recognition of customary law a meaningless exercise. This thesis, amongst other things, attempts to refute that argument. However it does have real implications for general incorporation as a method.

The nature of customary law as an emanation of customary society also affects the type of matters on which customary law might be concerned to rule, and the things people might be interested in disputing about. Sir Sydney Frost's comment about the absence of Papua New Guinea nationals from the civil list in the National Court

suggests not only that nationals prefer to resolve their disputes elsewhere, but also that the nature of their disputes does not correlate with the concerns of the common law, which, in its residual role as unwritten law, is primarily concerned with the transfer of property and the performance of obligations between individuals operating within a cash economy. Customary law reflects a social system which, in its origins, predates the cash economy and which operates along different lines. It thus has little interest in answering the legal problems which the development of such an economy is likely to throw up. It does have great interest in problems, such as bridewealth, status and sacred knowledge, to which the common law has no answer. There is thus a situation of considerable mutual irrelevance.

The development of customary law within small-scale societies raises a further spectre for its application as a source of the underlying law: that of diversity. This is a notable feature of the societies of the Melanesian countries which have used the general incorporation technique. Custom thus plays a very ambiguous role in the development of a national identity and of a national legal system. On the one hand, it operates as a unifying force, asserting the common distinctiveness of the new nation, but on the other it provides a real basis for conflict and confusion. Something of this national/local dichotomy came out in the Papua New Guinea Law Reform Commission project (and, as discussed, in judicial decisions). In one sense, the Commission saw the development of an indigenous jurisprudence as a selective, conscious and creative development by the courts of a national legal system from the source of customary law. In another sense, it saw the resolution of particular disputes as being decided by particular local customary laws, and provided interpersonal conflicts rules to enable this. Perhaps it was hoped that a process of progressive approximation would be set in train through judicial decisions in particular cases, which would be acceptable to the myriad of Papua New Guinea communities, as representing a new national standard.

This scepticism about general incorporation does not deny the valuable role which a residual judicial capacity may play in the recognition process, but it does suggest that, without more, it is unlikely to be sufficient to address the interactional issues.

E CUSTOM AT COMMON LAW IN AUSTRALASIA

I Introduction

In contrast to their island neighbours, the metropolitan powers of Australia and New Zealand have not been the recent subject of the exercises in constitution-making, which have provided the impetus for the re-evaluation of the role of custom as a source of the underlying law. Nevertheless, the common law itself provides some scope for the recognition of custom. The historical context of this recognition at common law in its application to British colonies has already been examined in Chapter II. However, as part of a more general re-evaluation of the position of the indigenous people of Australasia, recognition at common law is, or at least, has the potential to be, not merely of historical interest in Australia and New Zealand. This form of recognition is directly analogous to the general incorporation of custom as a source of the underlying law, in the sense that it involves a fundamental change in the *Grundnorm*, or rule of recognition governing the sources of law in the legal system. However it differs from the approach taken in the Melanesian countries in two respects. First, here recognition involves the incorporation of custom not as a separate, and possibly competing source of law to the common law, but as a part of that common law, or by virtue of it. Second, the intention is not to reshape the legal system applicable to everyone within the territory of the State, but only to allow for the maintenance of a separate corpus of rules applicable to the indigenous inhabitants (although this separate corpus will affect the operation of the general legal system).

The arguments for recognition at common law may be summarised as falling under four distinct, yet related, heads:

- i the application of the rules recognising English custom in English law to countries, such as Australia and New Zealand, where English law has been received;⁷⁹
- ii the application of general principles of colonial law allowing for the survival of the pre-colonial customary law, at least in relation to the dealings of the indigenous people *inter se*;
- iii more specifically, the survival, under colonial law, of the pre-colonial land tenure in a form of modified continuity ('the doctrine of aboriginal title');

iv the recognition and development of rights, including rights to the preservation of customary law, under the original treaty of cession between the indigenous people and the colonising power (specifically, the Treaty of Waitangi in New Zealand).

This array presents a labyrinthine range of possibilities for the assertion of indigenous rights in the courts. Some limitations on the scope of the present enquiry should, however, be noted. The process of re-evaluating the status of indigenous rights and indigenous law at common law, although it depends to a large extent upon historical material, is a recent process. There is, as yet, comparatively little in the way of settled law suggesting any recognition of custom at common law in Australasia. The position is different in North America, whence many of the Australasian arguments draw their inspiration.⁸⁰ Further, much of the current debate focuses on issues with wide political ramifications beyond the recognition of customary law. The purpose of this section is to explore the nature and progress of the arguments for recognition of custom at common law in Australasia as a means of achieving general recognition of custom through the courts.

One should be aware of two material differences between Australia and New Zealand in this regard. New Zealand was relatively densely populated by the Maori upon colonisation, and their forms of civil government and social organisation were more readily appreciated by the colonisers than those of the Aboriginal people in Australia. One consequence of this was the conclusion in New Zealand of the Treaty of Waitangi in 1840 between the British Crown and the Maori. This document, ambiguous in language and status, has provided a different basis for Maori claims than for Aboriginal ones, where there is no comparable agreement. The New Zealand courts have also been the scene of unremitting litigation from colonisation to the present day, providing a source of jurisprudence which is, as Roberts-Wray notes,⁸¹ unique in the Commonwealth. There is no similar history in Australia.

II New Zealand

Until recently, the orthodox view on the status of Maori customary law in the New Zealand legal system was that it had no recognition save that expressly vouchsafed by statute. As was seen in Chapter II, the survival of Maori customary law and land tenure was reconsidered in a series of cases in the New Zealand courts during the last quarter of the nineteenth century.⁸² These cases, contrary to earlier authority and despite the efforts of the Privy Council, established that there was no common law basis for the recognition of Maori customary law. Furthermore, the rights guaranteed to the Maori under Article II of the Treaty of Waitangi were not enforceable in municipal courts. Thus customary law could only be recognised and enforced where statute expressly provided for it. This 'statute-based' approach was consistently upheld during much of the twentieth century. It was confirmed in relation to land by section 84 of the Native Land Act 1909 which provided that customary title to land was unenforceable except as allowed by statute.⁸³

In relation to fishing rights, despite the existence of a section in the Fisheries Act 1908 preserving 'existing Maori fishing rights', Stout CJ held that there was no basis for their recognition. In *Waipapakura v Hempton* he found:⁸⁴

It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right, but if it meant to do so no legislation has been passed conferring the right and in the absence of such both *Wi Parata v The Bishop of Wellington* and *Nireaha Tamaki v Baker* are authorities for saying that until given by statute no such right can be enforced....

Similarly, although the Native Land Court was empowered by legislation to recognise customary marriage in the administration of native estates, there was no general recognition of customary marriage. As Chapman J held in *Rangi Kerehoma v Public Trustee*:⁸⁵

There is only one marriage law in New Zealand for all races ... and the so-called marriage according to Maori custom is no marriage in law.

This statute-based approach was repeatedly reaffirmed by the courts, notably in the cases *In re the Bed of the Wanganui River* and *In re the Ninety Mile Beach*,⁸⁶ and in further fisheries claims.⁸⁷ The

concentration of academic commentators on the legal status of the Treaty of Waitangi obscured the existence of an argument based on the common law itself.⁸⁸

Yet a recent body of scholarship has argued that the common law does provide a basis for the recognition of customary law and land tenure and that this requires a fundamental change in the New Zealand approach.⁸⁹ Instead of requiring statutory recognition before customary law may be given effect, the courts should instead screen statutes to see whether they expressly extinguish customary law which may otherwise be presumed to survive. This argument is based upon a reworking of the applicable principles of imperial law and their early acceptance in New Zealand.

It has been recently accepted by the High Court in *Te Weehi v Regional Fisheries Officer*.⁹⁰ Te Weehi was charged with collecting undersize paua under the Fisheries (Amateur Fishing) Regulations 1983 and behaving in a threatening manner towards a fisheries officer acting in the execution of his duties under the Fisheries Act 1983. In order to escape these provisions, Te Weehi had to prove (and the onus was on him to do so) that he was exempt by virtue of section 88(2) of the Fisheries Act 1983 which provides: 'Nothing in this Act shall affect any Maori fishing rights'. As has been seen, a considerable line of authority had held that the Maori had no customary rights to fish independent of the general law and that section 88(2) and its predecessors did not confer such a right. Williamson J reconsidered those cases against the background of earlier New Zealand authority which had accepted a common law basis for recognition and Canadian and other authorities on the survival of customary rights. He held:⁹¹

I note that the customary right contended for in this case is not based upon ownership of land or upon an exclusive right to a foreshore or bank of river. In that sense this claim is a 'non-territorial' one. The customary right has not been expressly extinguished by statute and I have not discovered or been referred to any adverse legislation or procedure which plainly and clearly extinguishes it. It is a right limited to the Ngai Tahu Tribe and its authorised relatives for personal food supply.... It follows that I prefer the reasoning ... concerning the preservation of customary rights unless extinguished, rather than the view that such rights are excluded unless specifically preserved or created in a statute.

Thus the right argued for in the case did fall within section 88(2) and provided a lawful excuse to the taking of undersized paua.

Although Williamson J was assisted in reaching his decision by the statutory language, nevertheless *Te Weehi* does amount to an acceptance of the survival of Maori customary law at common law in New Zealand. This approach has been applied to another fishing claim by Greig J in *New Zealand Maori Council & Runanga o Muriwhenua Inc v Attorney-General*.⁹²

The significance of the common law recognition of custom was further considered in the planning case of *Huakina Development Trust v Waikato Valley Authority*.⁹³ In that case the appellants challenged the grant of a water right by the first respondent on the grounds that the discharge of treated effluent into a river would offend Maori spiritual values. The Water and Soil Conservation Act 1967 contained no specific inclusion of such values in the planning process and previous cases had held that they could not be considered.⁹⁴ This position was in contrast to the Town and Country Planning Act 1977 which in section 3(1)(g) specifically directed that the relationship of the Maori people and their culture and traditions with their ancestral land was a matter of national importance to be taken into account. Chilwell J considered a wide range of authorities in holding that the Planning Tribunal had erred in refusing to consider the spiritual values and cultural relationship of Maori people to the river waters. He found that, although the Treaty of Waitangi was not part of the municipal law of New Zealand in the sense that it gave rights enforceable in the courts by virtue of the Treaty itself, it was part of the fabric of New Zealand society and could therefore be used in the interpretation of legislation.⁹⁵ He further accepted, relying on New Zealand and Privy Council authority,⁹⁶ that 'customs and practices which include spiritual elements are cognisable in a Court of Law provided they are properly established, usually by evidence'.⁹⁷ Chilwell J thus allowed Maori custom, recognised through the medium of the common law, to be included as an element in the interpretation of the general language of the statute.

Aside from the work of the courts, the general incorporation of Maori customary law into the New Zealand legal system has also been furthered by the establishment of the Waitangi Tribunal.⁹⁸ The Tribunal was set up under the Treaty of Waitangi Act 1975, as amended

in 1985. The Act does not incorporate the provisions of the Treaty into New Zealand law *stricto sensu*, nor as yet does the Tribunal have the power to make binding decisions. Section 6 of the Act allows the Tribunal to make recommendations to Government on Maori claims that they are or are likely to be prejudicially affected by legislation or Crown policies or practices, acts or omissions, adopted at any time since 1840 which are 'inconsistent with the principles of the Treaty'. Under the Treaty of Waitangi (State Enterprises) Bill 1987 it is proposed to allow the Tribunal to make binding recommendations for the return to Maori ownership of an land transferred to state enterprises under the State-Owned Enterprises Act 1986.⁹⁹

The Tribunal has delivered four significant reports, all since 1983.¹⁰⁰ In doing so, it has begun a process of interpreting the Treaty and assessing legislation and Crown policies and practices against the rights guaranteed under it. Although this has no direct effect on the state legal system its indirect effect is considerable. The Tribunal's investigative rather than adjudicative nature has allowed for very wide-ranging enquiries. For example, the Finding of the Tribunal on the *Manukau Harbour Claim* considers every aspect of the control and use of the harbour, including environmental issues, fishing, planning laws, industrial exploitation and Maori artefacts. The Report makes recommendations for the amendment of legislation and official practice which go beyond the confines of the particular claim. The Tribunal's reports have resulted in changes to government policy and practice¹⁰¹ and in the enactment of legislation.¹⁰² They have also been cited in judicial decisions.¹⁰³

As well as the work of the Tribunal, there have been two further recent developments relating to the legal status of the Treaty. The first is the Government's proposal to protect the rights of the Maori under a Bill of Rights.¹⁰⁴ Article 4 of the draft Bill provides:

- 1 The rights of the Maori under the Treaty of Waitangi are hereby recognised and affirmed;
- 2 The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.

The explanatory comment on this Article stresses the 'living and organic' nature of the Treaty. It cites the Waitangi Tribunal:¹⁰⁵

The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.

The exact effect of Article 4 is unclear, both as to the extent to which it may allow redress for past denials of rights and as to the way in which paragraph (2) qualifies paragraph (1). The proposed Bill of Rights, and especially the provisions on the Treaty, continues to arouse controversy.¹⁰⁶

The Court of Appeal has also considered the meaning and present significance of the Treaty in *New Zealand Maori Council v Attorney-General*.¹⁰⁷ Although that case turned on a statutory preservation of rights under the Treaty, the decision is of more general application. Cooke P, commenting that 'the Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas',¹⁰⁸ held that it 'signified a partnership between races'.¹⁰⁹ The direction taken by the partnership might well change over time, as the direction of social policy in New Zealand had changed from the amalgamation of the races to 'the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity'.¹¹⁰ But the characteristic obligation of partnership, the obligation of utmost good faith, remained binding on both partners.

What are the implications of the changing status of the Treaty of Waitangi for the recognition of Maori customary law as part of the underlying law? It is possible to found the recognition of Maori customary law directly on the common law itself. This approach, based on colonial law precedent, has now been accepted as having a modern application. Nevertheless the importance of the Treaty as the basis of relations between the Maori and the Crown in New Zealand suggests that questions of the recognition of customary law will be addressed in terms of the Treaty. As discussed in Chapter II, the language of the Treaty, because it includes not merely protection of Maori rights to their lands, forests and fisheries but also of chiefly power (rangatiratanga) and prized possessions (taonga), does provide a basis for this.¹¹¹ The rights protected under the Treaty also extend to other aspects of Maori cultural identity, such as language.¹¹² But customary law has played an important role in defining the nature and

content of Maori rights which the Crown is bound to protect. Thus in the Manukau Claim, the Tribunal heard extensive evidence on the traditional apportionment of the fisheries and waters of the Manukau harbour. It recorded:¹¹³

To the Maori, the waters of the sea and river are as much roads and gardens as roads and gardens on land. The harbour was as much owned and apportioned to the care and use of different tribes as the land was. To the local tribes the Manukau was their garden of the sea.... Maori Customary Law is the antithesis of the English Common Law which considers that harbours belong to the Crown. The Maori people believe the Treaty of Waitangi promised them that Maori Customary Law would prevail.

Their recommendations do not accord primacy to customary law but attempt to ensure its continuing relevance in overall planning for the harbour. They do not therefore recommend that the ownership or control of the harbour be returned to the Manukau tribes. Instead they propose the appointment of Maori Guardians to identify the nature of Maori customary interests and to advise on the effect of development on those interests. They further recommend that work begin on legislation which would effectively recognise Maori fishing rights, not as exclusive, but as part of a compromise with other uses.

It thus seems that Maori customary law will, by virtue of the increased recognition of the Treaty, come to play an increasing role in the legal system. This is likely to be more than simply residual, because the constitutional status of the Treaty will necessitate the revision of legislation. However, it will not be unqualified because of the need to take into account other rules and interests.

III Australia

Aboriginal customary law has effectively never been recognised at common law in Australia. The main reason for this, though its sufficiency is now in question, is that Australia was regarded as a colony acquired by settlement,¹¹⁴ as a consequence of which, it was said, existing customary law was extinguished and the English common law was received *in toto*. The *locus classicus* for this view is *R v Jack Congo Murrell*¹¹⁵ where the Full Court of the New South Wales Supreme Court held Murrell liable under English law for the murder of another Aborigine and declined to accept a customary law defence, despite the argument of Stephen:¹¹⁶

This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country as Great Britain was never at war with the natives, not a ceded country either, it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them; therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours. The reason why subjects of Great Britain are bound by the laws of their own country is that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not themselves bound by laws which afford them no protection.

The whole question was fully argued in a case, which has probably come to receive disproportionate attention as a turning point in Aboriginal relations, although it did not itself change the prevailing orthodox view of the law: *Milirrpum v Nabalco*.¹¹⁷ The plaintiffs were Aborigines from Yirrkala a Christian mission in Arnhem Land Reserve, who contended that their proprietary rights had been invaded by Nabalco, a mining company to which the Commonwealth government leased part of the Gore Peninsula in 1968. They asserted the application of the doctrine of aboriginal title. The case came before Blackburn J in the Supreme Court of Northern Territory. In an exhaustive written decision he found against the plaintiffs and refused to accept the application of the doctrine of aboriginal title to Australia as a settled colony. Blackburn J discussed the general principles of colonial law and their application in America, Canada, India, Africa and New Zealand, as well as Australian authorities and historical material. In the result, he found that the decision of the Privy Council in *Cooper v Stuart* that New South Wales (of which the Gore Peninsula was then a part) was a settled colony, was binding on him.¹¹⁸ The classification of a colony as settled was a matter of law which, once established, could not be questioned upon a reconsideration of the historical facts.¹¹⁹ The consequence of this classification was held to be fatal to the survival of customary law and land tenure.¹²⁰

... in principle from the moment of the foundation of a settled colony English law, so far as it was applicable, applied in the whole of the colony.... The question whether English law, as

Factor applied to a settled colony, included, or now includes, a rule that communal native title where proved to exist must be recognised, is one which can be answered only by an examination of what has happened in the laws of the various places where English law has been applied. I have examined carefully the laws of various jurisdictions ... and ... no doctrine of communal native title has any place in any of them, except under express statutory provisions. I must inevitably therefore come to the conclusion that the doctrine does not form, and never has formed, part of the law of any part of Australia....

To There is ... much additional authority from which, in my opinion, the same conclusion must be drawn. This includes all the Australian cases to which I was referred on this aspect of the case. None of them either expressly or impliedly refers to any doctrine of communal native title; the issues in all of them arose between non-aboriginal subjects, or between such subjects and the Crown. They all affirm the principle, fundamental to the English law of real property, that the Crown is the source of title to all land; that no subject can own land allodially, but only an estate or interest in it which he holds mediately or immediately of the Crown. On the foundation of New South Wales, therefore, and of South Australia, every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown. The plaintiffs, who cannot point to any grant from the Crown as the basis for the title which they claim, cannot succeed unless they can show that there is a doctrine in their favour which in Australia co-exists in some manner with the dominium of the Crown.

Milirrpum has been the subject of considerable criticism,¹²¹ and of judicial disapproval.¹²² It resulted directly in a major new regime for Aboriginal land rights in the Northern Territory.¹²³ It is not regarded as having settled definitively the status of the doctrine of Aboriginal title in Australia.¹²⁴ That issue is currently before the High Court of Australia in *Mabo v Queensland and the Commonwealth*, a case which involves Murray Island in the Torres Strait.¹²⁵ Nevertheless, for the moment it stands uncontroverted, and with it, any potential for custom to play a role as part of the underlying law.

The Australian Law Reform Commission has considered the relevance of these arguments in its report.¹²⁶ While not expressing a definite view on common law arguments yet to be authoritatively pronounced upon by any court, the Commission points out the numerous hurdles in the way of proving any form of customary rights at common law. These include the uncertainty of the law; the need for litigation in every case; evidential difficulties in proving the continuity of custom; and the wide play of statute. All of these

factors bear out the peripheral role which the common law can play in the recognition of custom. It further considers that the settled/conquered colony debate is outside the ambit of its enquiry. That classification, its consequences for the underlying law, and the consequences of reclassification now involve important political issues as much as legal ones.¹²⁷

To a considerable extent this reassessment or re-evaluation of the processes of British acquisition of Australia is an aspect of the moral and political debate over past and present relations between Aboriginal and non-Aboriginal Australians. That debate is of great importance quite apart from any specifically legal consequences it may have.... The issue for the Commission in the present Reference is the extent to which Aboriginal customary laws and traditions should be recognised by the Australian legal system now, nearly two hundred years after permanent European entry into Australia. The reassessment now of Australia's status as a settled colony would not as such bring about appropriate forms of recognition.

The Commission thus proceeded to adopt a functional approach to recognition, rather than general recognition. This they saw as allowing a clearer appreciation of the issues and avoiding the uncertainty, unevenness and inequity of a general recognition approach.

F AN ALTERNATIVE: FUNCTIONAL RECOGNITION

This final Part of Chapter III shifts the focus to examine two projects for the state recognition of customary law which are still 'general', in the sense that they involve an attempt at the wholesale orientation of the legal system to take account of custom but which go about this in a functional and specific way, rather than by constitutional injunction. The broad outlines of such an approach have been discussed in Part A(v) of the Introduction: 'Justice and Group Identity'. There it was suggested that the most effective way for state law to deal with the injustices resulting from the non-recognition of custom, a method which would respect the autonomous sphere of customary law and group identity, was to engage in a wide-ranging reevaluation of areas of concern to customary law where state law impinges. This process would identify specific, functional responses which could be made by state law. The need for such a

reevaluation may be further justified by the difficulties encountered in the development of an indigenous jurisprudence discussed in this Chapter.¹²⁸ Milestones in this process have been: the 1937

The two law reform projects treated here, the Australian Law Reform Commission Report¹²⁸ and the Tokelau Law Project,¹²⁹ both started from a similar basis: an almost complete non-recognition by the state of indigenous law. In Australia this had been achieved by executive and judicial decision relatively early in the colonial period.¹³⁰ In Tokelau the formal legal position was less certain. The islands partook of the unclear status of custom of the Gilbert and Ellice Islands Protectorate and Colony, of which they formed a part until 1926.¹³¹ Their transfer to New Zealand in that year was accompanied by a simple continuance in force of existing laws.¹³² Then, in 1969, a new section was added to the Tokelau Act which brought into force the law of England as at 1840 as the underlying law of Tokelau.¹³³ This was designed to bring Tokelau into line with metropolitan New Zealand and probably had the effect of denying all recognition to custom, except in the case of land which was specifically preserved.¹³⁴ Thus, both reform projects began with a *tabula rasa* in terms of state recognition.

In both cases this position *de jure* was clearly contradicted by an extensive and operational system of customary law *de facto* which had persisted despite non-recognition by the state and which was of more direct importance in the lives of the indigenous inhabitants than the state system.

Both projects are recent. The Australian Law Reform Commission was given its Reference on the Recognition of Aboriginal Customary Law in 1977 and presented its Report to Parliament in 1986. The Tokelau Law Project began in 1984 and is still continuing. Both projects found their context in a more general change of policy by the state towards the indigenous people. In Tokelau this is partly the result of United Nations pressure. Tokelau is a dependent territory subject to the oversight of the Committee of 24.¹³⁵ The Tokelau Law Project is thus a part of the preparation of the territory to exercise an act of self-determination. In Australia, government policy in relation to the Aboriginal people has moved away from assimilation, which had persisted until the 1960s, to 'self-determination'. This has been expressed by the Commonwealth Government as 'the fundamental right of

Aboriginals to retain their racial identity and traditional lifestyle, or, where desired, to adopt wholly or partially a European lifestyle'.¹³⁶ Milestones in this process have been: the 1967 referendum which empowered the Commonwealth to make special laws for Aborigines;¹³⁷ the enactment of legislation to recognise Aboriginal land rights; the establishment of various Aboriginal representative bodies and the development of Aboriginal self-management; and proposals, which have not so far come to fruition, for a *Makarrata*, or treaty, between the Aboriginal people and the Commonwealth.¹³⁸

In other respects, however, the position of the Aboriginal people of Australia and the position of Tokelau are at opposite ends of the spectrum. Tokelau is geographically isolated. Its three islands are populated almost exclusively by Tokelauans. It has been the subject of only very limited interference from the outside world. The state legal system has had an equally restricted impact on customary life. By contrast, the Aboriginal people of Australia have been subjected to continuous, and often brutal, change since colonisation. They are spread out across the Australian continent and live in varying degrees of contact with the ambient population. They are far and away the most disadvantaged group in Australia and the state legal system has been both a prime cause and a prime indicator of that disadvantage.

These distinctions suggest that different approaches may well have been found appropriate for recognition and, more generally, that neither model is likely to be universally applicable. In fact, both projects draw on a range of the methods enumerated in Chapter I E within their general functional approach. The ensuing sections examine the processes adopted in each project and the distinctive features of each.

I Australian Law Reform Commission Report

Within the Terms of Reference for the Australian Law Reform Commission Report reflected a growing concern and controversy over inequities in the application of the criminal justice system to Aboriginal people. A community court had been proposed by an Aboriginal community at Yirrkala in the Northern Territory.¹³⁹ Special rules for the police interrogation of Aboriginal suspects had been proposed for enactment in the Senate.¹⁴⁰ A number of highly-publicised

cases had been construed, or misconstrued, as judicial applications of customary law.¹⁴¹

However, the Commission was not confined to the criminal law. Significantly, the Terms of Reference left open the question of whether or not Aboriginal customary law should be recognised and, if so, to what extent. The Report was thus an enquiry into policy as well as method. Initially the Commission experienced serious difficulties in establishing its methods and objectives.¹⁴² In the result it conducted its most wide-ranging enquiry ever. It travelled all over Australia holding discussions with many different Aboriginal groups. The Commission conceived its Report as premised upon the need for substantial Aboriginal acceptance and endorsement and for continuing review in consultation with the Aboriginal people. An imposed 'solution' would be at best ineffective and at worst destructive.

The Commission addressed issues of recognition in the following areas of the law:

- * marriage
- * succession to property
- * child custody, fostering and adoption
- * substantive criminal liability
- * customary law offences
- * sentencing
- * police interrogation and general issues of evidence and procedure
- * proof of customary law
- * local justice mechanisms
- * traditional hunting, fishing and gathering rights

The only two areas where non-recognition of custom has caused major difficulties not dealt with in the Report are land rights and the protection of the Aboriginal cultural heritage. These were omitted on the grounds that they were both already the subject of other inquiries.¹⁴³

Within the broad rubric of 'adjusting' state law to take account of custom, the Commission's recommendations range over a wide variety of methods, depending on the subject area. To give some illustrative examples, the Commission recommended that:

- * Customary marriage should be recognised for certain purposes of state law but not simply equated to a Marriage Act marriage;

* However, traditional Aboriginal marriage rules, such as those relating to promised marriage, should not be enforced by state law;

* Aborigines should be able to apply to have an intestate estate distributed in accordance with the customary laws of the deceased's community but claims for family provision should prevail in clear cases of need;

* There should be an Aboriginal child-placement principle in cases involving the care or custody of Aboriginal children requiring a preference for keeping such children within their Aboriginal community;

* A partial customary law defence, reducing murder to manslaughter, should be created where the defendant has acted in the well-founded belief that he was required to do so by customary law;

* But there should be no general customary law defence. Problems in the criminal law area may be better dealt with through the exercise of prosecutorial discretions, diversion schemes and in sentencing.

* The courts should be given a legislative discretion to take customary law into account in sentencing.

* There should be no general system of Aboriginal courts. If any are to be set up, it should only be at the instigation of and after careful consideration by members of the Aboriginal community concerned.

* Traditional hunting and fishing rights should take priority over commercial and recreational hunting and fishing but they should be subject to conservation interests.

It is not possible to indicate the detail of the Commission's recommendations but certain distinctive features of its approach stand out. First, the proposals are tailored to a concept of customary law as living and changing, rather than immutable and rooted in some immemorial precolonial past. The recommendations are based on observation and discussions as to present trends and realities. Codification is rejected as a method because it would artificially freeze customary law and inhibit future change.

Second, the Report respects the separate and independent sphere of Aboriginal customary law. It does not attempt to co-opt Aboriginal

institutions in order to promote the interests of the state. Indeed the Report criticises the Queensland Aboriginal courts on the grounds that they are exercises in state control, and considerations of Aboriginal autonomy and self-management are major reasons for the Commission's recommendation not to develop a comprehensive hierarchy of Aboriginal courts, nor a supervising agency.

Third, the proposals do not envisage the rigid classification of Aboriginals and other Australians into two separate classes each governed by a separate legal system. That would not accord with the realities of the many different contexts in which Aboriginals live, nor with expressed Aboriginal wishes that state law continue to apply to them. The Commission's approach does not exclude any Aboriginal person from the benefit of its proposals *ab initio*. There is no restriction to 'traditionally-oriented' or 'reservation' Aboriginals. In every case the relevance of customary law is a question of fact. Thus, the Commission accepts that its proposals could in particular cases apply to persons who are not Aboriginal.¹⁴⁴

Fourth, the Report does not purport to pre-determine the areas in which state law will 'allow' customary law to survive, but rather examines areas of state law where the non-recognition of customary law has created injustice. Finally, the Report does not envisage an inevitable withering away of customary law and an assimilation of the Aboriginal people. Rather, it creates conditions for the indefinite continuity of a plural legal system in Australia.

II Tokelau Law Project

The Terms of Reference of the Tokelau Law Project involved a comprehensive inquiry into the law of Tokelau. The initial step was to prepare a statement of the law presently in force in Tokelau and to prepare a consolidated edition of statutes in force in Tokelau incorporating such amendments as might be necessary 'accurately to reflect the present constitutional and legal structure of Tokelau'. Only as an adjunct to this was the Project 'to investigate Tokelau custom with a view to its recognition by or incorporation in legislation where appropriate'.

In the event, the process of consultation with the villages of Tokelau disclosed that a much more rigorous reorientation of state law in relation to the island communities was necessary. The

international pressures from the United Nations and the practical administrative necessities of dealing with the outside world seemed to require some form of written, formalised legal structure. Therefore the question became how to create such a structure in conformity with the wishes and aspirations of the community.

The first stage in this process has been to recognise the customary authority of the villages themselves. Thus, the Tokelau Village Incorporation Regulations 1986¹⁴⁵ incorporate each of the three villages; provide for their management through the customary bodies and officials; and allow the villages an extensive legislative power, circumscribed only by superior legislation and Tokelau's international obligations. The Tokelau Amendment Act 1986 confers a wide judicial jurisdiction on locally resident indigenous Commissioners and provides that the Commissioners may discuss any case with the relevant *Taupulega* (village council).¹⁴⁶ In both of these cases, state law simply recognises a situation already operating in practice according to customary law. However, the effect of the legislation is to place the villages, which are the centre of the customary system, also at the centre of the state system. This has been mirrored by changes in administrative practices on the part of the Tokelau Administration which equally give the villages a key role in the execution of government work projects and fiscal matters.¹⁴⁷

In the second place, work has begun on reforming the substantive law of Tokelau to bring it into conformity with custom. Thus, the Tokelau Marriage Regulations 1986¹⁴⁸ prescribe prohibited degrees of relationship which are those required by custom. Dispensation may only be given by the Administrator on the recommendation of the *Taupulega*.¹⁴⁹ The assent of the *Taupulega* is also required for the dissolution of marriage.¹⁵⁰ The new Criminal Code is to make adultery, *de facto* unions and fornication criminal offences.

The third stage is to translate the body of legislation which is to be applicable to Tokelau into the Tokelauan language.¹⁵¹ This process has revealed, at a very detailed level, the difficulties involved in comparing state law with custom. In many cases, the Tokelauan language simply has no equivalent word for an English legal concept. Thus, the only word for 'law' is *tulafono* (custom of the elders), which is insufficient to describe the various types of law in a state law system (Acts, Regulations, judgments etc). Conversely,

custom may contain legal concepts for which there is no ready English equivalent, for example *moetolo* (a customary offence involving the disturbing or touching of a sleeping woman at night by a male who is not her husband). The approach of the Tokelau Law Project has been to eschew the simple adoption or transliteration of English terms and to attempt to achieve a 'functional equivalence' by translating the ideas of the English terms into simple Tokelauan language.

The final outcome of the Tokelau Law Project is not yet certain. In contrast to the Australian Report which was presented as a whole but which has yet to be put into effect, the Tokelau Project has proceeded piecemeal and individual enactments are being put in place as they are agreed in Tokelau and New Zealand. Because the changes are only being put into effect with the approval of the village communities and because they are based on a significant devolution of powers to those villages, it seems likely that state law will more adequately reflect custom. What is less certain is that custom will be prepared to accept its own further 'legalisation'.

It is sometimes claimed that human rights are a western construct, which have been developed without regard for important cultural differences in non-western societies. The concept of human rights, at least as formulated in the international instruments is, it is said, inappropriate in such societies and destructive of indigenous social organisation. Thus Pollis and Schwab argue³

Human rights as a twentieth-century concept and as embedded in the United Nations can be traced to the particular experiences of England, France and the United States Thus to argue that human rights has a standing which is universal in character is to contradict historical reality. What ought to be admitted by those who argue universality is that human rights as a Western concept based on natural right should become the standard upon which all nations ought to agree, recognising, however, that this is only our particular value system.

This argument surfaces at a number of levels. It may be the subject of philosophical treatment: that the idea of an universal equality, as expressed in the concept of human rights, cannot hold against the diversity of cultures. It may serve as an argument against the adoption of international human rights instruments, on the grounds that, as expressed, the rights contained in those instruments cannot be applied in certain cultural contexts. It may further serve

IV HUMAN RIGHTS AND CULTURAL RELATIVISM

He that will carefully peruse the history of mankind, and look abroad into the several tribes of men, and with indifference survey their actions, will be able to satisfy himself that there is scarce that principle of morality to be named, or rule of virtue to be thought on (those only excepted that are absolutely necessary to hold society together, which commonly too are neglected betwixt societies) which is not, somewhere or other slighted and condemned by the general fashion of whole societies of men, governed by practical opinions and rules of living quite opposite to others.¹

The peace that we enjoy here in Samoa is not attributed to any international laws on human rights but to our time-honoured customs and traditions.²

A THE MEANING OF CULTURAL RELATIVISM

It is sometimes claimed that human rights are a western construct, which have been developed without regard for important cultural differences in non-western societies. The concept of human rights, at least as formulated in the international instruments is, it is said, inappropriate in such societies and destructive of indigenous social organisation. Thus Pollis and Schwab argue:³

Human rights as a twentieth-century concept and as embedded in the United Nations can be traced to the particular experiences of England, France and the United States Thus to argue that human rights has a standing which is universal in character is to contradict historical reality. What ought to be admitted by those who argue universality is that human rights as a Western concept based on natural right *should* become the standard upon which all nations ought to agree, recognising, however, that this is only our particular value system.

This argument surfaces at a number of levels. It may be the subject of philosophical treatment: that the idea of an universal morality, as expressed in the concept of human rights, cannot hold true against the diversity of cultures. It may serve as an argument against the adoption of international human rights instruments, on the grounds that, as expressed, the rights contained in those instruments cannot be applied in certain cultural contexts. It may further serve

as an argument that the same rights contained in an international instrument ought to be interpreted differently depending on the cultural context. Finally it may simply serve to state a conflict between some human rights norms and the customary norms of a particular society.

In a recent review of the expanding literature on human rights and cultural relativism, Renteln argues that the debate has been conducted at a level of abstraction which obscures consideration of the true problems.⁴ More detailed studies of the conflict and compatibility of human rights standards with particular cultural contexts were necessary. South Pacific jurisdictions afford an opportunity for such a study. Human rights standards have been adopted in law, whether by international convention or constitutional Bill of Rights, in all the jurisdictions examined here. Whatever the philosophical or historical origins of such standards, they are law. However, precisely because of this universal adoption, the nature of the conflict with the norms and institutions of customary society may be illustrated by actual examples.

Human rights does not simply provide another forum for consideration of the conflicts between state law and custom. It also has important policy implications for the state recognition of customary law as a whole. For human rights provide the parameters within which such recognition may occur. Thus human rights are an integral part of the policy debate on the merits and possibilities of recognition.

It is the central tenet of this chapter that these policy issues must be addressed through specific study of substantive areas where problems arise. There is no irreducible conflict between human rights and customary societies in general. In many respects human rights considerations may be seen as requiring the recognition of customary law. Where conflicts do arise, the meaning of the human rights provision and the shape of the proposed recognition both require careful analysis in assessing whether the conflict is real or apparent.

This point is illustrated in the discussion in Part C as to whether the recognition of customary law is *per se* discriminatory. It is argued that the concept of discrimination does not prevent all distinctions between classes of persons, even where the basis for such

distinctions is racial, provided such distinctions pursue a legitimate aim, have an objective justification and a reasonable relationship of proportionality exists between the ends and the means. Thus measures for the recognition of customary law which reflect actual cultural differences and do not result in unjustifiable disadvantage to others may be consistent with the non-discrimination principle. This is reflected in international and constitutional practice. But two major Pacific cases to consider the issue have failed to analyse the meaning of discrimination in relation to indigenous societies.

Part D opens by showing that detailed consideration of the conflict between human rights and custom has been rarely attempted in the Pacific. Although the elimination of iniquitous customary practices was one objective of the international human rights movement, there was only limited consciousness of the possible effects of the adoption of such standards in the Pacific. There were some reservations entered to the international conventions and limited discussion in the constitution-making process led to some qualifications to rights enshrined in the Bills of Rights. But, for the most part, issues about conflict and compatibility surfaced later. An exception to this, and an attempt to confront the issue, is the revised Tuvalu Constitution 1986 which does draw a new balance between 'Tuvaluan values, culture and tradition' and the freedoms of the individual. Part D concludes by comparing the cultural relativism debate to an older debate about repugnancy and public policy in the Conflict of Laws and finds that the greater precision afforded by the reference to codified human rights may in fact result in the application of a stricter control on recognition than that imposed by the analogous tests.

The remainder of the Chapter is devoted to case studies of three particular areas where conflict between custom and human rights has emerged in Pacific practice. The first is the exercise of customary authority by village councils in Western Samoa and Kiribati. In neither case are the customary institutions recognised in law but in both cases they exert considerable *de facto* decision-making power. The remedy of last resort for refusal to obey the council's orders is banishment from the village. Cases in both jurisdictions have considered the compatibility of this power with the Bill of Rights. They highlight the problems of reconciling the duties of the individual in close-knit customary group with individual freedoms.

The relationship between the group and the individual has also been prominent in the criminal area. The second case study concerns two attempts to take account of customary norms in the criminal law. The first, the Inter-Group Fighting Act 1977 (Papua New Guinea), developed a notion of group responsibility for inter-group fighting, which was designed to control such fighting by imposing a liability which better accorded with customary perceptions. It was ruled unconstitutional as contravening the presumption of innocence. In Australia, the Law Reform Commission has proposed a carefully balanced response to the way state courts might take account of traditional punishments.

The final case study concerns the recognition of customary marriage. Although such marriages may contravene a number of human rights standards, their non-recognition may equally wreak injustice. Thus, as the case of Australian Aboriginal customary marriage illustrates, there may be a compelling case for a form of recognition which balances competing justice considerations.

The Chapter begins by outlining the extent of the application of the international human rights instruments and the process of adopting Bills of Rights in the Pacific, where external pressures dominated.

B THE REACH OF HUMAN RIGHTS IN THE PACIFIC

I International Instruments

Human rights are reflected very widely in the legal systems of the South Pacific.⁵ The incorporation of human rights standards has been part of the world-wide movement for the protection of human rights, but the process has assumed a special dynamic in the Pacific. The island states, almost universally, have a Bill of Rights, modelled on international precedents, contained as a chapter in their respective constitutions. However, they have only participated to a minimal extent in the major international conventions themselves. In most cases, where island states are parties to the international conventions, it is because those conventions have been applied to them by a metropolitan power when they still held colonial or protectorate status. One must bear in mind the scale of many of the island states. Their position as micro-states in the international community militates against full

participation in the United Nations and other aspects of the multi-lateral system.⁶ By contrast, the metropolitan powers of Australia and New Zealand have participated very fully in the international conventions, but have no Bill of Rights as part of their domestic constitutional law. Both states have recently entertained proposals to enact Bills of Rights.

The status of the principal international conventions relevant to this study in the Pacific is as follows.⁷ The International Covenant on Civil and Political Rights 1966⁸ (ICCPR) has been ratified by Australia, New Zealand and the United Kingdom. New Zealand has accepted the competence of the Human Rights Committee under article 41. Its operation has been extended to the Cook Islands, Niue and Tokelau. The United Kingdom extended the operation of the Covenant to the Gilbert Islands (now Kiribati), the Solomon Islands and Tuvalu (with reservations). The International Covenant on Economic, Social and Cultural Rights 1966⁹ (ICESCR) has been ratified by Australia, New Zealand and the United Kingdom, with the same extensions. By declaration, the Solomons have acknowledged their continuing obligations under that Covenant, subject to the reservations originally entered by the United Kingdom. The International Convention on the Elimination of all forms of Racial Discrimination 1966¹⁰ (ICERD) has been ratified or acceded to by Australia, New Zealand, Fiji, Tonga, Papua New Guinea and the Solomon Islands. Again by virtue of New Zealand, it also applies in Niue, Cook Islands, and Tokelau. Fiji and Tonga entered significant reservations. As regards the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962, only Fiji, New Zealand and Samoa are parties. The United Kingdom, which acceded in 1970, applied it to all territories under its territorial sovereignty. The Convention on the Elimination of all Forms of Discrimination against Women 1979¹¹ (CEDAW) had been ratified by Australia and New Zealand, and applied on their request to the Cook Islands and Niue (the former entering a reservation).

II the Constitutions of Fiji, Kiribati, the Solomon Islands

The position in the island states is more adequately reflected by reference to their constitutions. All of these contain Bills of Rights. Ghai notes that fundamental rights are 'a part of the Constitution which has been seldom seriously debated or questioned'.¹² The origins of the fundamental rights provisions are to be found in United Nations and British decolonisation practice. A dramatic exception to this principle is the Constitution of Tonga 1875,¹³ which pre-dates decolonisation by nearly a century and whose Declaration of Rights is so complete that there are 'few empty spaces available for fresh material to be taken' from the European Convention.¹⁴

Yet elsewhere the pattern is that prescribed by Westminster, or rather, more accurately, by Whitehall. This pattern originated in the Nigerian Constitutional Conference of 1957. As de Smith¹⁵ relates, before that time there were virtually no Commonwealth precedents for a Bill of Rights, and, as is well known, orthodox British constitutional theory set its face firmly against such 'nonsense on stilts'.¹⁶ Successive Constitutional Conferences and Commissions considered such vague declarations as empty and unhelpful. Of course the United Kingdom had ratified the European Convention on Human Rights in 1951, and in a flush of post-war enthusiasm, extended it to 42 dependent territories in 1953, an event which aroused little interest at the time. Then the Nigerian independence negotiations began to go awry, because of difficulties in placating minority groups. A proposal for a Bill of Rights was the least offensive political solution as de Smith comments wryly:¹⁷

Historically the new vogue for bills of rights in Commonwealth Constitutions is traceable to a desire to afford concrete reassurance to minority groups in Nigeria which would have preferred other forms of constitutional protection.

The precedent adopted in Nigeria was about the only workable precedent then available (pace Tonga): the European Convention. Once Nigeria had created a precedent, the idea spread rapidly through the emerging Commonwealth to countries which had no significant minority problems. It became, immediately, the only acceptable thing to do, and what did for Africa, for Asia and for the Caribbean, also did for the Pacific. The 'British export' model is, more or less, faithfully

reflected in the constitutions of Fiji, Kiribati, the Solomon Islands (and, until recently, Tuvalu). Two salient features of this model are that it is confined to civil and political rights (economic and social rights and people's rights are beyond the pale) and that the rights are defined to a reasonable level of specificity (broad guarantees are qualified by lists of exceptions).

Slightly different, but nonetheless external, forces were at work in Western Samoa, by virtue of the supervision of the United Nations Trusteeship system. The promotion and encouragement of respect for human rights and fundamental freedoms is one of the principles of the United Nations, defined in the Charter as one of the objectives of the International Trusteeship System.¹⁸ The UN visiting Mission to Western Samoa, which reported in 1959 on the preparations for independence noted:¹⁹

The Mission found that consideration had not yet been given to the question of including some provisions concerning human rights in the Samoan Constitution. It, therefore, suggested that the Constitution should contain provisions on the lines of the Universal Declaration of Human Rights and the constitutions of other states.

The Western Samoan Constitution, and its twin in Nauru (drafted by the same adviser, Dr J W Davidson) also bear the imprints of the European Convention and the Nigerian Constitution, although they differ at the level of detail from the subsequent British export model found elsewhere in the South Pacific.

In Vanuatu a rather more terse list of rights is included in Chapter 2, and this is supplemented by a set of non-justiciable fundamental duties. These reflect a precedent set by the Constitution of Papua New Guinea which contains Basic Rights, Basic Social Obligations (which are non-justiciable as in Vanuatu) and National Goals and Directive Principles, which are integrated into the fabric of the Constitution in a number of ways, although not directly justiciable.²⁰ Papua New Guinea was able to build on its previous experience with the Human Rights Ordinance 1971, but elaborated its rights in a unique manner.²¹

More recent developments, in which the issue of cultural relativism has played a more conscious role, are a new Constitution for Tuvalu in 1986, a mere eight years after independence which came

complete with a British export model constitution. The 1986 Constitution makes a detailed attempt to grapple with harmonisation of human rights and 'Tuvaluan values and culture'. In Australia, a Human Rights Bill had been tabled in Parliament, though its fate is currently uncertain. In New Zealand, however, a Bill of Rights is still under discussion, following a White Paper, and it includes provision for Maori rights.²²

Finally, LAWASIA has initiated discussion on a regional Convention and Commission for Human Rights in the South Pacific. Following an initial conference in 1985²³, a drafting group has been examining proposals based on the African Charter on Human and Peoples' Rights (the 'Banjul' Charter).²⁴ The use of the Banjul Charter as a precedent significantly widens the scope of the debate from the classical range of civil and political rights to peoples' rights and individuals' duties.

C DISCRIMINATION AND LEGAL PLURALISM

I International and Constitutional Context

Now that the stage of human rights in the Pacific has been set, it is possible to consider some specific issues about the interaction between human rights and customary law. A major initial question here is whether legal pluralism or the recognition of customary law is *per se* discriminatory. The standard of discrimination is most likely to come into play where the customary law relates to a minority group within the country (as in Australia, New Zealand or Fiji) or where the customary system is premised upon a hierarchy, such as the *matai* system in Western Samoa.

The non-discrimination and equality principles are found in the ICERD (in relation to race) and the ICCPR (generally) as well as in all the Pacific constitutions. In fact the principle of non-discrimination and equality is perhaps the most fundamental human right, because it is a prerequisite to the enjoyment of all other rights.²⁵ Yet the standard is not an easy one to apply. As the Australian Law Reform Commission comments:²⁶

Many, if not most, laws in some way distinguish or differentiate between people on grounds thought to be relevant for the purposes of the law in question. Given the nearly universal need

of laws to distinguish or 'discriminate', the principles of 'equality before the law' or 'equal protection of the law' cannot require that laws apply universally or in the same way to all members of the community.... The difficulty, then, is to find a workable test for distinguishing laws which involve proper or acceptable distinctions or differences from those which involve improper or invidious ones. This difficulty is particularly acute when the 'group or class' which the law singles out has common features such as a shared culture or language. These features may justify special treatment, or they may be associated with other features which do so. They may also be indicia of a common race, descent or ethnic origin. Yet it is universally agreed that discrimination on the grounds of race or ethnicity is improper, involving a particularly serious violation of the principle of equality. There is thus a tension between the principle of equality and non-discrimination, and the need to make special provision, including special legal provision, for members of minority groups because of the distinct problems they face.

The need to draw distinctions, especially to protect the special needs of minority groups, has been generally recognised in international law and also in much domestic law. McKean summarises the position in international law:²⁷

The principle does not require absolute equality or identity of treatment but recognises relative equality, i.e. different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary, and the onus of showing that particular distinctions are not justifiable is on those who make them. Distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realised and the means employed. These criteria will usually be satisfied if the particular measures can reasonably be interpreted as being in the public interest as a whole and do not arbitrarily single out individuals or groups for invidious treatment.

How does this relate specifically to the recognition of customary law? Many Commonwealth constitutions exempt the law relating to the acquisition and use of land and provisions for the application of the personal law in cases of adoption, marriage, divorce and succession from the non-discrimination requirement.²⁸ Even where there is no such express exemption, the courts have held the survival of a plural system of personal laws to be reasonably justifiable.²⁹

Some Pacific constitutions adopt the express approach in providing that the discrimination principle is not to affect the

application of customary law. The Solomon Islands Constitution, for instance, specifically exempts in section 15(5) laws that make provision:

- (d) for the application of customary law;
- (e) with respect to land, the tenure of land, the resumption and acquisition of land and other like purposes.

The question of whether customary land tenure was discriminatory was indirectly in issue in the Cook Islands case of *Clarke v Karika*.³⁰ In that case, the Cook Islands Parliament had attempted to settle a long-standing land dispute by means of a private Act, the Rehearing of Te Puna Lands Act 1980, which allowed for the rehearing of claims in respect of a particular piece of disputed land. The Cook Islands Constitution Article 64 prohibited discrimination and protected equality in general terms. One possible source of discrimination was that Parliament had singled out a blood-related group in the legislation. The Court of Appeal held on that head of argument:³¹

Insofar as this is a claim of discrimination or unequal treatment because of family origin, the answer is that the family relationship is inherent in the land tenure system. The terms of the 1980 Act indicate that the essential reason why that group of people is affected is that titles to a particular tract of land are in dispute; it is not their relation to one another.

Discrimination and customary land tenure have been much to the fore in Fiji, where the Independence Constitution safeguarded the rights of the native Fijians *v/s*-à-*v/s* the Indian Fijians and others.³² The main focus for this protection was land and political representation, but there was also provision for a separate native Fijian legal system.³³ Many of these special rights are found in a set of legislation which was constitutionally entrenched.³⁴ This legislation, at least in its present form, was not subject to the non-discrimination provisions of section 15, because section 15(5) exempted legislation in force before 23 September 1966 from the operation of the section. The Fiji Constitution also contained exceptions for personal law and customary law similar to those found in the Solomon Islands.³⁵ When Fiji became a party to the ICERD in 1973, it entered a reservation in the following terms:³⁶

To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in article 5(c),

that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5(d)(v), or that the school system of Fiji may not fulfil the obligations referred to in articles 2, 3, or 5(e)(v), the Government of Fiji reserves the right not to implement the aforementioned provisions of the Convention.

However Fiji has received criticism from the Committee on the Elimination of Racial Discrimination on the extent of its reservation.³⁷ Pointing out that unequal rights for different racial groups should not be maintained after the objectives for which they were intended have been achieved, the Committee suggested that the reservation should be withdrawn.

II *Gerhardy v Brown*: Are Land Rights Discriminatory?

The recent Australian case of *Gerhardy v Brown*³⁸ threw the issue of non-discrimination and traditional rights to land into sharp relief. The Pitjantjatjara Land Rights Act 1981 (South Australia) vests in the Pitjantjatjara people, the traditional owners of the land, inalienable freehold title to the former North-West reserve, comprising some 10% of the state's land area. Section 19 of the Act provides that no person other than a Pitjantjatjara may enter on to this land without the written permission of the Anungu Pitjantjatjaraku, the governing council. Entry onto the land without such a permit constitutes an offence. Robert John Brown, who was an Aborigine but not a Pitjantjatjara, was charged with the offence of illegal entry upon Pitjantjara lands. He argued that section 19 was invalid for inconsistency with the federal Racial Discrimination Act 1975.

The Pitjantjatjara Land Rights Act had at least three basic objectives. The first was to recognise traditional rights to land as the basis for a negotiated settlement of lands to their traditional owners. In this respect it was part of a much larger Australian movement to grant land rights to aborigines in recognition of their traditional ownership, which the common law had not recognised.³⁹ The second was to confer a large degree of self-management on the traditional owners to regulate their own affairs and control the development of their land. The restriction on the right of entry was a corollary of this. It was also a protection of the third objective: the preservation of Aboriginal culture. As Brennan J said:

'....Aborigines with traditional relationships with their country may reasonably be thought to need protection from inundation of their culture and identity by those who embrace different values and who constitute a majority in Australian society'.⁴⁰ A freedom of movement provision, such as that embodied in Article 5(d)(i) of the ICERD, would cut across such an objective. The argument that freedom of movement can be culturally damaging has also been made in Australia recently in respect of Norfolk Island.⁴¹ In short, the Pitjantjatjara Land Rights Act was enacted to further the position of the Aboriginal people, who are both a singularly disadvantaged group in Australian Society and a group with a distinct culture as the indigenous inhabitants of Australia. The Australian Government adverted to this distinction in its report to the UN Committee on the Elimination of Racial Discrimination: 'It is worth emphasizing again however that the problems confronting Aborigines ... should not be seen exclusively in terms of racial discrimination. Clashes of value systems and cultures are frequently at issue. They are not easily, nor perhaps should they be, addressed in the context of the Convention'.⁴² The difficulty of equating the preservation of the autonomy and distinct culture of a disadvantaged indigenous minority people with the concept of discrimination was at the heart of *Gerhardy v Brown*.

Millhouse J, in the Supreme Court of South Australia, had held that section 19 was discriminatory. The High Court of Australia unanimously reversed his judgment, but not on the grounds that the Pitjantjatjara Act involved no discrimination. It declined to decide that issue, preferring instead to classify the Act as a special measure, justifying an exception to the principle of non-discrimination. The Racial Discrimination Act 1975 (Commonwealth) provides in section 10(1):

If, by reason of, or by a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

This section is subject, by virtue of section 8(1), to Article 1(4) of the ICERD which excludes from the Convention's general prohibition of

racial discrimination in Article 1(1) certain special measures:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The thrust of Article 1(4) is thus to allow for positive discrimination as an exception to the otherwise absolute prohibition of distinctions based on race.⁴³ It is unclear whether the standard of discrimination defined in Article 1(1) of the ICERD is subject to the general qualifications as formulated by McKean, or whether it imposes a stricter standard, meaning that all racial distinctions are discriminatory in terms of the Convention unless they constitute a special measure.⁴⁴ The High Court seems to have accepted a narrow view of discrimination in *Gerhardy v Brown* as justifying its reliance on the special measures provision.

Yet the High Court's reliance on special measures has a number of unsatisfactory consequences in the context of measures, like the Pitjantjatjara Act, which preserve and protect the traditional culture of an indigenous people. First, special measures are 'in order to ensure such groups or individuals equal enjoyment or exercise of human rights'. This language squares nicely with the classic case of positive discrimination, such as education or employment quotas, where the goal is to assist a disadvantaged group to reach the level of the general community. But the Pitjantjatjara Act is not concerned with advancing the Pitjantjatjara people, it is concerned with allowing them to maintain and develop a separate way of life.⁴⁵ Second, the special measures provision implies a time limit, that such measures will only be temporary until the disadvantaged group reaches the level of the majority, that they are a means of progressive development towards an end. While the Court rejected the view that special measures could only be temporary or short-term, but could continue as long as the objectives they supported needed protection, this is a further area where the application of Article 1(4) seems strained. The final flaw in the Court's reliance on special measures was that it deflected

attention from a detailed treatment of whether the Pitjantjatjara Act was discriminatory in the first place.

Both Sadurski⁴⁶ and Brownlie⁴⁷ argue convincingly that the concept of discrimination cannot be treated in the abstract, distinct from both a theory of social justice and the particular social context. There are many passages in the decision of the High Court and, in particular, of Gibbs CJ which suggest a judicial 'colour blindness', an unwillingness to distinguish between invidious racial distinctions and benign racial distinctions which operate in favour of an oppressed social group.⁴⁸ Brownlie suggests that the enquiry ought to have been conducted by assessing the reasonableness of the objectives and the proportionality of the means employed.⁴⁹

Thus the question of discrimination is that of the relevance of the reference to race, or religion, or sex. Only women can become pregnant, but that does not mean that making special arrangements for pregnant women is in legal terms discrimination on grounds of sex. In the case of the recognition of the traditional ownership rights of the Pitjantjatjara the reference is similarly to a double criterion: that of tribal origin and that of traditional ownership. The fact that traditional ownership is peculiar to aborigines does not make recognition of such land rights discriminatory in law. The legal recognition has an objective basis; it is not arbitrary and is discriminatory only in the sense that a reasonable and legitimate policy coincides with racial origin in the same way as pregnancy coincides with womanhood....

The second principle is that the modalities of the different treatment must not be disproportionate in effect or involve unfairness to other racial groups. This is very much a factual issue but the facts must themselves reflect some delicate nuances as to what is in local terms reasonable. In the case of the recognition of land rights, the restriction on freedom of movement, linked with such recognition, raises the issue of proportionality. In other words, even when the different treatment is not discriminatory in a legal sense, the modalities, the method, of implementation may be unreasonable and hence discriminatory at the second level.

If the High Court had dealt with the case in terms of this analysis of the meaning of discrimination in law, it could have got to grips with the real effect of both traditional land rights and the restrictions on access. The Law Reform Commission notes some potential problems here. On traditional land rights it states:⁵⁰

The Land Rights Act assumed that the only persons who were 'traditional owners' of the lands were Aborigines who were members of the Pitjantjatjara, Yungkutatjara or Ngaanatjara

people, and that these people, or most of them, were 'traditional owners' of all or part of the land. Neither assumption was strictly necessary to the scheme of the Act, and if either proved to be wrong in any significant way then serious problems of equal protection could arise.

On restrictions on access it notes:⁵¹

Thus individual Pitjantjatjara could not invite non-Pitjantjatjara to visit them without permission. More seriously, perhaps, a non-Pitjantjatjara married to a Pitjantjatjara who wished to live on the lands would have to obtain a permit to do so.

III A-G v Salpa'la Olomalu: Is Matal Suffrage Discriminatory?

The issue of discrimination and protection of the customary system was also in point, and was also ultimately avoided, in the decision of the Court of Appeal of Western Samoa in *Attorney-General v Salpa'la Olomalu*.⁵² At stake in that case was the constitutional validity of sections 16 and 19 of the Electoral Act 1963, which established two separate electoral rolls for Samoa. The individual voters roll was restricted to the small non-Samoan population. In the 45 territorial constituencies only the matal, or traditional heads of families, had the vote. A number of Samoans who were thus disenfranchised argued that sections 16 and 19 were contrary to Article 15 of the Constitution, which enshrined equality before the law and equal protection under the law.

St John CJ thought that they were right. He prefaced his reasons with the following dictum:⁵³

If the decision is thought by some to be inconsistent with Samoan custom or culture that factor is not taken into account except so far as custom has been preserved by the Constitution. Nor is the fact that the decision may lead to a change in the political organisation of the country a relevant consideration. The Constitution speaks; it is obeyed.

The Chief Justice then proceeded, on the basis of general principles of constitutional interpretation in the Commonwealth, to interpret the Samoan Constitution. He held that:

I there was 'discrimination' between matal and untitled people in section 16, and between Samoans and Europeans in section 19;

II United States Supreme Court decisions manifested a

rigorous application of equality to State elections;

iii Article 44, dealing with the electoral rolls had been significantly altered by the addition of the words 'subject to the provisions of this Constitution', which evinced an intention to subject Article 44 to Article 15;

iv matai suffrage is nowhere expressly provided for in the Constitution;

v voting is not expressly exempted from Article 15;

vi unless Article 15 did apply to voting, Parliament could disqualify the adherents of a particular religion or political persuasion;

vii Article 15(4) imposed an obligation on Parliament to consider the removal of matai suffrage when it enacted the Electoral Act in 1963;

viii at any rate, 'progressive removal' justified intervention at the date of the case, twenty years after Independence;

ix the Constitution has only preserved specific aspects of Samoan culture, upon which it has superimposed the concept of national government, which is alien to Samoan culture. On this aspect he commented:⁵⁴

Specific areas of custom have been preserved; custom generally has not. Indeed the notions of national government and custom are not easily reconcilable.... Unity as a nation is a notion which was absent in Samoan political theory.... the Constitution is a successful marriage of modern national government and an old culture. The framers had to cater for both facets. They left Samoan Culture where it had always been, on the land and in family organisation but they superimposed on that culture a national government framework....

He concluded 'that nothing short of universal suffrage for all citizens male and female, who have attained the age of 21 years, will suffice to satisfy the constitutional strictures as they now stand'.⁵⁵

The decision caused uproar and consternation in Samoa. One MP denounced the decision as a 'step against the very plans of God'.⁵⁶ Because an election petition which had been filed challenging the validity of the election in the Prime Minister's constituency would, if successful, have required a by-election to preserve his position, the Court's decision precipitated an immediate constitutional crisis.⁵⁷

The options open to the Government were to accept the decision and arrange immediately for full adult suffrage; to have the all matai Parliament amend the Constitution or to appeal to the Court of Appeal. They chose the third option and a Court of Appeal was constituted from three New Zealand judges (Cooke P, Mills and Keith JJ).

The Court of Appeal agreed that the electoral provisions were indeed discriminatory, but held that Article 15 was never intended to apply to electoral arrangements. They found that:

I the provision in the Western Samoan Constitution creating separate territorial constituencies and an individual voters' roll was unique, and therefore no major importance could be attached to comparisons with other constitutions (especially the United States Constitution), save insofar as they highlighted the absence in the Samoan Constitution of a provision guaranteeing universal suffrage (such provisions were found in the major human rights instruments and all other Pacific Commonwealth Constitutions);

II the omission in the Constitution of any direct reference to universal suffrage was significant. Momentous constitutional changes were not to be brought about by a side wind or loose and ambiguous general words. Therefore Article 15 did not extend to voting rights;

III Article 44 itself contemplated a distinction between the modes of voting in territorial constituencies and under the individual voters' roll. The words 'subject to the provisions of this Constitution' in Article 44(3) were not sufficient to subject Article 44 to Article 15;

IV the proceedings of the Constitutional Convention clearly supported the proposition that the Constitution allowed the continuation of the matai voting system unless and until altered by the Parliament;

V while the meaning of a Constitution might alter over time, such an argument could not apply to a span of a mere 20 years and to a fundamental question such as voting rights.

The Court thus upheld the validity of sections 16 and 19 of the Electoral Act. The judges concluded in the following terms:⁵⁸

It may be as well to add that the present judgment does not imply any view on the part of the Court about whether or not

continuing to use the matai system as the main basis for elections to the Legislative Assembly is in the long-term interests of Western Samoa. We recognise the argument that in an indirect way the matai system is democratic. At the same time, as the Attorney-General accepted in argument, there may be room for doubt whether all those adult citizens who are not qualified for the individual voters' roll do have a really effective voice in the territorial constituencies - especially if they do not live in villages. These, however, are questions, not of law, but of social and political policy: questions which, on our interpretation of the Constitution are to be decided by Parliament, not by the Courts.

There is no denying the significance of the matai system in the Samoan polity. It is the very foundation of family and social organisation.⁵⁹ Its inclusion within the national political system has placed increasing strains on the system, as matai have been caught between conflicting desires to preserve their exclusivity and the traditional basis of their authority on the one hand, and on the other to create more titles in order to secure more votes.⁶⁰ The matai system is thus a traditional institution undergoing dynamic change, at least partly as a result of the exigencies of State law.

Nevertheless its retention as the basis for electoral suffrage was strongly endorsed by Samoans in the United Nations and other fora in the preparations for independence. Both the United Nations, in its visiting missions and in meetings of the Trusteeship Council and the Fourth Committee, and the New Zealand Government had repeatedly tried to urge the Samoans to accept universal suffrage. But they both came to recognise that the issue of franchise was a matter for the Samoans themselves to decide. Thus, the Trusteeship Council concluded, having heard the representations of Tupua Tamasese, the senior *Fautua*:⁶¹

Noting that the present system of Samoan suffrage is in accordance with the recommendations of the Constitutional Convention of 1954, and having heard the detailed explanations given by the Honourable Tamasese, *Fautua*, in particular that the matais are the representatives of the people freely chosen in accordance with Samoan custom and that the Samoan social system is susceptible of adaptation to changing conditions, the Council, while recognising the desirability of working towards universal adult suffrage, hopes that the Samoans may feel able to adopt this system in due course, but considers that such a system of suffrage should not be imposed upon the people of the Territory against their wishes.

The Constitution, whose text was agreed by the Constitutional Convention of 1960, nowhere deals expressly with suffrage. Article 44

prescribes constituencies, but not who may vote in them. This omission was deliberately designed to allow for the continuation of matai suffrage, but also not to impede any subsequent move to universal suffrage. During discussion of Article 44, an amendment which would have explicitly required universal suffrage, but limited representation to the matai was debated and emphatically rejected.⁶² Yet, because the Convention itself was not a truly representative institution and was heavily dominated by matai, the United Nations insisted on a plebiscite.⁶³ It is often claimed that the plebiscite demonstrated the free and overwhelming support of all Samoans for matai suffrage.⁶⁴ But the questions asked were equivocal, and did not focus on suffrage. They were:

- 1 Do you agree with the Constitution adopted by the Constitutional Convention on 28 October 1960?
- 2 Do you agree that on 1 January 1962 Western Samoa should become an Independent State on the basis of that Constitution?

86% of those eligible turned out to vote at the plebiscite, and of those 83% answered yes to the first question, and 79% answered yes to the second question. As Powles suggests,⁶⁵ it is very likely that the untitled people voted in accordance with the wishes of their matai. All subsequent attempts to introduce universal suffrage, including the report of a special committee in 1979,⁶⁶ have failed resoundingly.⁶⁷

The *travaux préparatoires* of the Constitution demonstrate a clear intention to allow the continuation of matai suffrage. The Constitution attempts to achieve this by omission rather than by explicit statement. Yet what is missing from the judgments of both the Chief Justice and the Court of Appeal, especially from the latter, is any comprehensive investigation of the real issue in the case, namely the effect of the principle of non-discrimination, as defined in Article 15, on voting rights. One might recall Brownlie's comments on *Gerhardy v Brown*:⁶⁸

The issues raised by *Gerhardy v Brown* are familiar to the international lawyer and the international law materials have a particular value. No doubt the problems are to be examined very much in terms of their own time and social setting. However, the international experience indicates certain points of general technique.

He then went on to propose the tests for discrimination, which were rejected by St John CJ,⁶⁹ and not considered by the Court of Appeal. Article 15 could have exempted voting rights from its scope, but it did not. This left the court with the task of conducting this enquiry, which ought to have been premised on the meaning and reach of Article 15 itself, in the light of international and comparative material⁷⁰ and local circumstances.

IV Is the Recognition of Customary Law Compatible with the Non-Discrimination Principle?

The conduct of Pacific States in relation to the international conventions, the content of their constitutional provisions and the emerging body of case law bear witness to a growing awareness of the implications of the non-discrimination principle for the recognition of customary law. Yet the cases, or at least *Gerhardy v Brown* and *Salpa'ia Olomalu*, do not demonstrate a willingness on the part of the judiciary to examine with any degree of sophistication the concept of discrimination. The problem which we have been discussing here throws discrimination into a different context from that in which it has been classically applied. This is not a case of the oppression of the weak or a minority by the powerful or the majority. The recognition of customary law can, as *Gerhardy* shows, be about the protection of the separate identity of a minority. The drawing of distinctions may be both justifiable and necessary. Woodman refutes the general argument that the equality principle demands uniformly applicable law in the following terms:⁷¹

Equality of treatment does not mean uniformity of treatment. There is in general terms no objection under this principle to a legal pluralism which applies different constituent systems to members of different sections of society provided that no section is disadvantaged thereby. Thus different formalities of marriage may be prescribed for different groups. Legal pluralism of itself does not infringe this policy. It may indeed be argued that equality is denied if one social group within a state, with its own social norms, is denied legal recognition and required to conform to uniform, alien norms as a condition of receiving legal support.

In relation to the recognition of the customary law of minority groups, this is not to be seen either as positive or reverse discrimination. Recognition of customary law is simply not about

extending special benefits to help a minority improve its position relative to the rest of the community. This was one of the essential difficulties with trying to make *Gerhardy's* case fit within the regime of the ICERD. Of course, such recognition may indirectly end up by having that effect, as the restrictions on the right to own land in most Pacific countries, and their express exemption from the non-discrimination principle, illustrate. Nevertheless, this is a matter of degree. Non-discrimination does not prevent all distinctions in the law. All laws draw distinctions. Non-discrimination outlaws unjustifiable distinctions, not those which are reasonable responses to different situations. The Australian Law Reform Commission concluded that special measures for the recognition of Aboriginal customary laws would not be racially discriminatory and would not involve a denial of equality before the law or equal protection if the measures:⁷²

- * are reasonable responses to the special needs of those Aboriginal people affected by the proposals;
- * are generally accepted by them; and
- * do not deprive individual Aborigines of basic human rights, or of access to the general legal system and its institutions.

Of course, not all recognition of customary law occurs against the background of an ethnically pluralist society. Where there is no such diversity and where the society shares an homogenous culture, there may still be arguments that particular aspects of the customary system, which are recognised by state law, are discriminatory against sections of the society. This was part of the issue in *Salpa'la's* case. But that is not a criticism of recognition itself. Some distinctions may be reasonable, as the dictum from *Clarke v Karika* suggests. But at any rate judgments can only be made in the context of particular rules and practices.

D CUSTOM AND HUMAN RIGHTS IN CONFLICT

I Express Recognition of Conflict in Conventions and Constitutions

Human rights standards have received very widespread acceptance in the legal systems of Pacific States. Yet, as suggested above in the discussion of the reach of human rights in the Pacific, this has seldom been a conscious process or, at least, the implications of an acceptance of human rights standards for customary society have seldom been thought through. Few of the island states participated directly in the drafting of the major international conventions. Where they are parties, this is usually as a result of a metropolitan colonial power. In Australia and New Zealand this aspect of the ratification of international human rights instruments has not been highlighted until recently.⁷³ When Bills of Rights were incorporated in constitutions only exceptionally was the matter given attention.

Yet at least one of the thrusts of the international human rights movement was directed against customary practices. Thus the Marriage Convention 1962 includes the following preambular statements:

Recalling further that the General Assembly of the United Nations declared, by resolution 843 (IX) of 17 December 1954, that certain customs, ancient laws and practices relating to marriage and the family were inconsistent with the principles set forth in the Charter of the United Nations and in the Universal Declaration of Human Rights,
Reaffirming that all States, including those which have or assume responsibility for the administration of Non-Self-Governing and Trust Territories until their achievement of independence, should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, *inter alia*, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, and establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.

Similarly CEDAW states as a preambular purpose:

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.

Article 2(f) includes 'customs and practices' as one of the things States Parties have an obligation to modify or abolish if they offend

against the principle of non-discrimination against women. Article 5(a) pledges States Parties to take all appropriate measures:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and *customary and all other practices* which are based on the idea of the inferiority or the superiority of either of the sexes or on *stereotyped roles* for men and women.

Article 14 specifically applies the provisions of the Convention to rural women, including those working in the non-monetized sectors of the economy. They are to be ensured the right, *inter alia*, to participate in all community activities.

When the European Convention was concluded, it was contemplated that European states would extend its application to their colonies, but Article 63(3) allowed for the application in such territories to be 'with due regard ... to local requirements'. This proviso recognised the cultural differences which were likely to exist. Nevertheless, although the European Court has not discussed Article 63(3) in the context of non-Western societies, its margin of appreciation in taking account of local customary practices seems to be fairly narrow.⁷⁴

As has already been noted, some possible conflicts with custom have been accommodated by reservations to the international instruments. Thus customary marriage in the Solomon Islands was preserved by United Kingdom reservations to Article 23(3) ICCPR and Article 10(1) ICESCR. Fiji and Tonga exempted their land and electoral systems from the application of ICERD. The Cook Islands, which requested the application of CEDAW, reserved the right not to apply Article 2(f) and Article 5(a) to the extent that the customs governing the inheritance of certain Cook Islands chiefly titles may be inconsistent with those provisions.

Nevertheless, the international instruments do constitute a substantial constraint on the recognition of customary law and, more generally, on the preservation of customary society. One area where Pacific States have commonly acted is in the neo-traditional area of the Christian religion. For instance, a Cook Islands Act, the Religious Organisations Restrictions Act 1975, names four denominations which may operate in the Islands. All others must apply to the Minister for a permit. This is to prevent the unrestricted

missionary zeal of numerous sects which have moved into the Pacific but it is likely to be contrary to the freedom of religion. This was acknowledged by the representative of the Cook Islands in presenting its initial report to the Human Rights Committee.⁷⁵ In Niue, the intrusion of religious sects that hold worship on Saturdays rather than Sundays led to the incidence of fishing on Sundays. The legislature reacted with the Sunday Fishing Prohibition Act 1980. Tongatule, Assistant Secretary to the Niuean Government, comments:⁷⁶

There was some concern that the Sunday Prohibition Act might contravene the United Nations Convention. The Niuean authorities avoided the wrath of the UN community by pointing out that this was an issue peculiar only to the small and fragile Niuean community.... The advent of international rules and regulations also contribute to the questioning of customary practices. Assemblymen are often puzzled why international rules do not act in the best interest of a small community. The freedom to practise one's own religion as required by the Human Rights Convention cannot be understood in the Niue context where divisiveness in the community would prevail if more faiths are allowed to gain a firm hold in Niue.

The United Nations Conventions are the major legal constraints on the Tokelau Law Project.⁷⁷ Tokelau was not consulted when the UN Conventions were extended to it and many aspects of Tokelauan life and organisation would not comply with them. Yet new legislation for Tokelau, which attempts to take greater account of custom, is constrained by the Conventions. At the most basic level, the ICCPR assumes courts, judges, lawyers, money, documentation - which are all alien to Tokelau. The requirement of legal assistance in Article 14(3)(d), which was the subject of a reservation by the United Kingdom in the Gilbert Islands (Kiribati), is equally inapplicable in Tokelau. Nevertheless the Tokelau Amendment Act 1986 which provides for the appointment of Commissioners to exercise summary jurisdiction in Tokelau attempts to cope with Article 14(3)(d) in the following way in section 7:

- (4) In any criminal proceedings, a Commissioner may, at any time during those proceedings, discuss the case, in the presence of the prosecutor, the defendant, and the defendant's counsel (if any), with the Taupulega of the island for which that Commissioner is appointed.
- (5) Where any such discussion is held, the Commissioner shall give -
 - (a) The prosecutor; and

(b) The defendant or the defendant's counsel (if any) - the opportunity to be heard and to tender evidence on any matter raised in that discussion.

The Tokelau Village Incorporation Regulations 1986 confer wide by-law making powers on the customary village councils. This is, however, qualified by regulation 18(4)(1) which provides that village rules which are inconsistent with any of Tokelau's international obligations will be of no effect.

Angelo explores the notion of human rights in relation to Tokelau.⁷⁸

The notion of human rights is alien to Tokelau.... The law as such protects human rights. Because of the physical and communication isolation of Tokelau, and the fact that human rights are not current important issues, change in the area of discrepancy between the law and the practice is likely to be slow. To date there are no real conflicts in the area of human rights, but they can readily be envisaged, for instance in the field of the United Nations Convention for the Elimination of all Forms of Discrimination against Women, which New Zealand ratified in January 1985. That Convention makes it quite clear that the government must take all steps within its power to eliminate e.g. sex-stereotyping of roles within the community. True to its Polynesian tradition, Tokelau culture is founded on a basic sex stereotyping of male and female roles. There is however no evidence that this stereotyping is leading to any degradation or ill-treatment of men or women. In today's context it is inconceivable that the basic assumptions of community life will be or could be changed.

A detailed working out of a compromise between the international standards and the need to recognise customary law has been attempted in some areas of the law by the Australian Law Reform Commission in its report on the recognition of Aboriginal customary law, aspects of which will be examined later in this chapter. But for the most part, the potential conflicts have not been expressly addressed within the region. The general consciousness that they may be a problem is, however, growing. Prime Minister Mata'afa of Samoa said in commemorating International Human Rights Year in 1968:⁷⁹

However, these conditions [of the Universal Declaration of Human Rights] must be adapted to different ways of life in different countries, because what is right and just in one country is not always considered the same in another country. This is what we in Samoa must be careful of, that in enforcing the provisions of the Declaration we do not radically change our customs and outlook so that the practices we have always considered wrong

and unjust become right and just, and vice versa.... Once natural Samoan courtesy is lowered by adopting too many practices for the benefit of the individual instead of for Samoans as a whole, then our country will reach the stage where it will be weakened by the loss of her old and respected customs because it is our own old customs that protect us.

Attorney-General Bale of Fiji reiterated this point in opening the 1985 LAWASIA Conference on Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific:⁸⁰

Some people, especially those in traditional rural communities, which is characteristic of Island States in this part of the Pacific, may look at the fundamental rights and freedoms as attacking or undermining some of the basic features of traditional and communal rural life. The emphasis that is placed on the individual, upon each and every individual, and upon the freedom of every individual to do what he wishes, can be seen to be, to a significant extent, inconsistent with the emphasis that is placed in traditional communities upon the community, and upon conformity with the views of the community.

Professor Paterson, of the Pacific Law Unit of the University of the South Pacific, summarises the 'traditionalist viewpoint' as incorporating three areas of concern about the impact of human rights standards on customary society.⁸¹ First, human rights emphasise the individual over the community and over the achievement of consensus within the community. Second, many customary societies, especially in Polynesia, are built around a division between leaders and commoners and the exercise of authority by the former over the latter. Third, community life involves the performance by members of the community of social duties which do not typically receive recognition within the human rights framework.

Moving from the international sphere to the constitutional provisions on human rights, one recalls Ghai's comments that this has been a part of Pacific constitutions which has seldom been seriously questioned or debated. In Vanuatu for instance the Bill of Rights was introduced to the Constitutional Committee by one of the consultants with the justification that 'all countries in the world included a declaration on Human Rights in their Constitution'⁸², and the proposal received little discussion.

In Western Samoa, however, there was considerable concern that the human rights provisions might undermine the authority of the *Ai'ua* and *Faipule* (Chiefs and Orators). Dr Davidson, one of the

constitutional advisors, records that the Working Committee had decided that the Constitution would not normally be used 'for the enactment of reforms for which an unambiguous public demand had not yet developed',⁸³ but it did consider that freedom of movement and residence would have the effect of prohibiting customary banishment. Yet the draft Constitution was not explained to the Convention in a way which assisted its members to appreciate the conflict. It was claimed variously that the Constitution was built on the basis of custom and that custom operated outside the Constitution. Members repeatedly expressed their concern that the *pule* (authority) of the matal and the operation of Samoan custom should not be undermined by the Constitution and adopted a resolution to that effect.⁸⁴ The Convention may have felt that this disposed of the matter and thus that there was less need for further discussion in the context of the Bill of Rights.

While the full implications were not explored, a number of points were raised, one member commenting that he saw his main task as ensuring consistency between the provisions and their customs.⁸⁵ Members did touch upon thrashing as a punishment meted out by the matais in Article 7 (freedom from inhuman treatment);⁸⁶ the powers of the village council to punish under Article 10 (rights concerning the criminal law);⁸⁷ and devoted much attention to the control of religious observance by the matal under Article 11. In the event, only one article of the Bill of Rights makes any express reference to custom. That is Article 8 which exempts from the freedom from forced labour 'any work or service which is required by Samoan custom'. The Convention heartily endorsed this, as the performance of unpaid service by the taulele'a (untitled men) to their matal is the basis of the Samoan communal order and, as one member pointed out, the matal also performs service to the village by ensuring the harmonious running of its affairs.⁸⁸ Yet, as will be seen later in this chapter, the Convention failed to resolve the position of the village council, especially in its quasi-judicial role, with the Bill of Rights. The constitutional advisors foreclosed discussion on this issue in the interests of enacting a Bill of Rights which would conform to the dictates of the United Nations.

In Papua New Guinea, the only qualifications taking account of custom, apart from a similar reference to 'communal duties' in the

forced labour section,⁸⁹ are a reference to the traditional religious beliefs and customs of the peoples of Papua New Guinea in the freedom of religion section,⁹⁰ and the exemption of the village courts from the detailed provisions on the protection of the law, saving only that they exercise their powers and procedures in accordance with natural justice.⁹¹ Nevertheless, the Constitution in Papua New Guinea also establishes a set of basic social obligations which stress the interdependence of its citizens within the social framework. These are exhortatory and non-justiciable.

II Steps Towards a Compromise: The Tuvalu Constitution 1985

Only one Pacific constitution has sought to deal comprehensively with this potential conflict and that is the recently revised Constitution of Tuvalu 1986. Tuvalu became independent in 1978 under a 'British export model' Constitution. This contained a Bill of Rights including the standard list of fundamental rights and freedoms of the individual derived from Commonwealth precedents. In 1986, assisted by Lynch (the constitutional advisor to Papua New Guinea) and after extensive debate in their *maneapas* (councils of elders) and island councils, the people of Tuvalu adopted a new and much more lengthy document. It opens with a statement of the Principles of the Constitution. Principles 3 to 7 read:

- 3 While believing that Tuvalu must take its rightful place amongst the community of nations in search of peace and the general welfare, nevertheless the people of Tuvalu recognize and affirm, with gratitude to God, that the stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of island communities and attitudes of co-operation, self-help and unity within and amongst those communities.
- 4 Amongst the values that the people of Tuvalu seek to maintain are their traditional forms of communities, the strength and support of the family and family discipline.
- 5 In government, and in social affairs generally, the guiding principles of Tuvalu are -
agreement, courtesy and the search for consensus, in accordance with traditional Tuvaluan procedures, rather than alien ideas of confrontation and divisiveness;
the need for mutual respect and co-operation between the different kinds of authorities concerned, including the central Government, the traditional authorities, local governments and authorities, and the religious authorities.

6 The life and the laws of Tuvalu should therefore be based on respect for human dignity, and on the acceptance of Tuvaluan values and culture, and on respect for them.

7 Nevertheless, the people of Tuvalu recognize that in a changing world, and with changing needs, these principles and values, and the manner and form of their expression (especially in legal and administrative matters), will gradually change, and the Constitution not only must recognize their fundamental importance to the life of Tuvalu but also must not unnecessarily hamper their expression and their development.

These principles are the basis of the Constitution, to be observed in its interpretation and application at all levels of government and organised life. In particular they are the basis from which human rights and freedoms derive (section 13).

Part II of the Constitution sets out the Bill of Rights. This part contains a number of qualifications of the standard civil and political rights and freedoms in order to protect Tuvaluan values, culture and tradition. For instance, the freedoms of religion and expression are qualified in the following way:

29 (3) Within Tuvalu, the freedoms of the individual can only be exercised having regard to the rights or feelings of other people, and to the effect on society.

(4) It may therefore be necessary in certain circumstances to regulate or place some restrictions on the exercise of those rights, if their exercise -
(a) May be divisive, unsettling or offensive to the people; or
(b) May directly threaten Tuvaluan values or culture.

Section 29(5) then goes on to allow for the making of such restrictions subject only to the limitations imposed by section 15, which creates a general requirement that 'all laws, and all acts done under a law, must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity'. One of the factors which a court may take into account in determining whether this requirement has been complied with is 'traditional standards, values and practices ... of Tuvalu'. The protection and development of Tuvaluan values and culture is also a referent in assessing the requirements of the national interest under section 9(2)(f). All of the rights and freedoms can, in Tuvaluan society, be exercised only 'in acceptance of Tuvaluan values and culture, and with respect for them' (section 11(2)(b)).

Freedom under law is defined in section 10 as

the least restriction on the activities of individuals consistent with the public welfare and the maintenance and development of Tuvalu and Tuvaluan society in accordance with this Constitution and, in particular, in accordance with the Principles set out in the Preamble.

Therefore, although subsection (2) confers the legal right to do anything that is not prohibited by law, subsection (3) states that this is not to deny the existence of non-legal 'cultural, social, civic, family or religious obligations ... or to prevent such obligations being given effect by law if, and so far as, it may be thought appropriate to do so'.

Within this seemingly exhaustive general rubric, there are a number of specific exceptions mentioned under particular rights and freedoms. So traditional obligations or the performance of their equivalent are exempted from the forced labour and freedom of belief sections.⁹² Freedom of movement may be restricted to prevent 'the disruption or potential disruption of the local economy, ecology or distinctive culture'.⁹³ The freedom from discrimination does not include acts which are in accordance with Tuvaluan custom, provided they are reasonable in the circumstances and not harsh, oppressive or unlawful.⁹⁴

The 1986 Tuvalu Constitution thus represents the first thorough attempt to achieve a new balance between distinctive values, customs, culture and traditions on the one hand, and human rights on the other. The result leaves human rights performing something of a safety-net against unusually oppressive laws or acts, but not undermining the basic tenets of Tuvaluan life.

This Part has necessarily belaboured the relatively meagre evidence in the practice of States, both in the international and constitutional spheres, of an awareness of potential conflicts between human rights and custom. With the exception of Tuvalu, it is still the typical pattern for human rights to have been formally endorsed but for that to have had little impact on customary practice. Later in this chapter, we shall examine some isolated instances where the courts have addressed the issue but these are the exception rather than the rule. First it may be helpful to review some of the precedents for dealing with this type of conflict.

III Repugnancy, Public Policy and the Conflict of Laws

The debate about human rights and cultural relativism is related to a much older and more venerable debate about repugnancy, public policy and the conflict of laws. Wherever one legal system seeks to admit another into its midst, there will be debate about the limits of recognition. In Private International Law this issue is given the label 'public policy'.⁹⁵ In the interpersonal conflict of laws, as it developed in Africa and other parts of the British colonial empire, it was called 'repugnancy'.⁹⁶ The guiding principle in both contexts was however the same: to provide a margin of judicial discretion in the application of a legal system with which the judges were not familiar. A 'repugnancy' clause was the universal stock in trade of the British judge in colonial outposts. As Chanock says: 'The basic commandment of the legal mission was the repugnancy test'.⁹⁷ British judges were, on occasion, quite explicit about the role of repugnancy. The *locus classicus* is the following dictum of Wilson J from the Tanganyikan case of *Gwao bin Kilimo v Kisunda bin Ifuti*:⁹⁸

Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what is morality. But unfortunately, the standards of different communities are by no means the same. To what standard, then, does the Order in Council refer - the African standard of justice and morality or the British standard? I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery.

The precise ambit of repugnancy is difficult to define, for its very essence was its flexibility. It has been variously suggested that it was applied less frequently as judges came to have a better understanding of the societies in which they were operating, and that where customs which might otherwise have been found repugnant supported the policy of indirect rule by supporting the local hierarchy, they were upheld.

At the formal level, as outlined in Chapter III, the repugnancy test survives in the Pacific. Thus, for example, Schedule 2.1 of the Papua New Guinea Constitution only adopts customs which are not 'repugnant to the general principles of humanity'. It therefore subsists alongside the human rights provisions.

In many respects, despite their more dogmatic appearance, the repugnancy and public policy tests enshrined a more lenient standard than those found in a Bill of Rights. For instance, in the international sphere, English law has recognised numerous institutions, such as polygamous marriage and unilateral divorce, which are both radically contrary to English ideas of morality and to the United Kingdom's international human rights obligations. An indication of this is found in the declaration of the United Kingdom on accession to the Marriage Convention:

It is the understanding of the Government of the United Kingdom that paragraph (1) of Article 1 [free consent of the spouses] and the second sentence of Article 2 [prohibition of under age marriages] of the Convention are concerned with the entry into marriage under the laws of a state party and not with the recognition under the laws of one state or territory of the validity of marriages contracted under the laws of another state or territory.

Despite a recent tendency to appeal to international human rights standards in the formulation of public policy in Private International Law,⁹⁹ an undue extension of the practice would nullify much of the operation of the family law area of the subject. Neither Private International Law nor the recognition of customary law can operate except on the basis of a wider conception of justice to that informing an isolated legal system. Much of what is involved is the taking account of rules and institutions which are already in operation regardless of the dictates of the 'receiving system'.

Poulter, in a recent work on *English Law and Ethnic Minority Customs*,¹⁰⁰ examines the room for the recognition of ethnic minority customs in English domestic law, against the background of the international human rights conventions to which the United Kingdom is a party. In almost every case where a significant degree of recognition has been achieved in English Private International Law for foreign domiciliaries he concludes that the conventions leave little scope for pluralism in English domestic law.¹⁰¹

What, then, are we to make of this brief excursus into the related field of repugnancy and public policy? The tests perform a similar function of an escape valve in dealing with a set of rules and practices of which the State courts only have a limited appreciation. The appeal to human rights standards adds considerable precision to

this exercise over the inherently vague concepts of repugnancy and public policy. Human rights standards are also expressed in terms of positive rights and freedoms enjoyed by individuals, rather than a negative prohibition selectively imposed by the State. Further, human rights norms constitute an appeal to an universal standard, rather than one imposed by one culture upon another. Nevertheless, in their application, they may result in less flexibility in the recognition of customary law than the older, and looser, tests.

E CASE STUDIES OF CONFLICT

1 THE VILLAGE COUNCIL AS AUTONOMOUS REPUBLIC: BANISHMENT AND STATE CONTROL

I Western Samoa

The village councils of Western Samoa have never been successfully integrated into a system of local government under state control. This has not been for the want of trying on the part of successive Samoan administrations, whether colonial or independent. The earliest ethnographical reports of Samoan life attest to the 'singular government' of Samoa through the medium of remarkably vital village councils, composed of all the *matai* of the village.¹⁰² Davidson's description of the village *alii* and *falpuke* 'virtually as rulers of autonomous republics'¹⁰³ has been echoed by many others, such as F & M Keesing who said of the village that 'it approximates in miniature an independent state'.¹⁰⁴ In pre-European contact times, the village was really the only effective political unit in Samoa. Davidson, in a confidential report to the New Zealand Government in 1947, said that the fundamental difficulties involved in governing Samoa¹⁰⁵

spring from the immaturity of indigenous political institutions above the village level. Within the village Samoan organization has been, and largely remains, highly effective. The village still functions as a unit, socially and economically; and the edicts of the village *fono* [council] are still accepted as the rightful means of maintaining law and order. But beyond the village the Samoans had no stable system of administration, only complex networks of alliances formed on grounds of tradition, consanguinity or policy. To find a comparison within our ordinary knowledge or experience, we must look to the sphere of international relations, rather than to that of the internal

government of states. The nightmare history of the Balance of Power in Europe has its counterpart in the tangled story of Samoan dynastic alliances.

While elsewhere in the Pacific indigenous local government has often been superseded by imposed provincial structures or the indigenous form is harnessed by state law,¹⁰⁶ the Samoan village *fono* has resisted all attempts at integration and has indeed become 'the repository of elements of resistance to change'.¹⁰⁷

The turn of the century German administration created the office of *pulenu'u* ('controller of the village'), which continues today to act as a conduit between central government and the village, but the *fono* refused to allow this post to upset the established focus of power which resided in the ranking of hierarchy of chiefs within the *fono*. Thus the post of *pulenu'u* does not enjoy high status within the village. Attempts between the wars by the New Zealand administration to integrate the councils into a pattern of local government, such as the Native Regulations (Samoa) Order 1925, failed conspicuously in the face of the Mau rebellion. A major report in 1950, which proposed the integration of the village councils under a District and Village Government Board and the consequent regulation of the *fono*'s legislative and judicial functions, failed equally to get off the ground.¹⁰⁸ The Constitutional Convention reflected the on-going ambivalence in Samoan affairs between the recognition that the true strength of the village council stems from its autochthonous non-statutory base and the desire to see its authority recognised by state law and protected from encroachment by introduced organs of central government. Discussions at the Convention culminated in a resolution that:¹⁰⁹

In conformity with the Preamble to the Constitution, where it is stated that Western Samoa shall be 'an Independent State based on Christian principles and Samoan custom and tradition', the Constitutional Convention affirms its conviction that the well-being of the country in the future, as in the past, is dependent upon proper support and protection being given to the *pule* of the *alii* and *faipule*. The Convention further believes that the relationship between the central government and the *alii* and *faipule* of the districts and villages must be placed upon a formal and constitutional basis.

They endorsed urgent consideration of the 1950 proposals. This did not happen. A 1970 Commission¹¹⁰ endorsed this continuing policy of

caution. Since then, a new emphasis on rural development has placed greater emphasis on the roles of *matai* and *fono*. The new plan, which has encountered the traditional resistance, was incorporated in an Internal Affairs and Rural Development Act 1983.¹¹¹

Apart from this most recent attempt to do in the name of development what successive generations of central government have failed to do in the name of good administration, the village council has remained essentially an institution *extra legem*. Yet its practical effect on the day-to-day lives of the population of Samoa is much greater than any of the organs of central government. This is no less true of its judicial powers, which are regularly exercised over all manner of offences and disputes. Most disputes, whether minor or major, are still settled at this level and never get reported to the police or surface in the State courts. The Land and Titles Court gives its indirect blessing to this exercise of *pule* by the *matai*.

Of the many punishments customarily meted out by the *fono* perhaps the most drastic is banishment. Freeman records instances in the nineteenth century when this amounted to the forced exile of whole families and the destruction of their homes and crops,¹¹² but in modern times 'it would now be consistent with custom to describe banishment more mildly as "exclusion for the time being" from particular lands or village'.¹¹³ This is a remedy of last resort which has to be understood in terms of the protection of the communal life of the closely-knit village (and, formerly, the absence of alternative solutions such as imprisonment).

The general attitude of the State judges, especially before independence, has been to avoid conflict with the village councils and the remedy of banishment has been both acknowledged and accepted.¹¹⁴ Yet, and this is the point to which this section has been leading, the Bill of Rights does contain within it the seeds of considerable conflict both over the nature of the village council's jurisdiction generally and, specifically, in relation to banishment. This potential conflict became a reality in a decision of St John CJ in 1980: *Tariu Tuivaiti v Sila Faamalaga*.¹¹⁵

Where does the conflict with the Bill of Rights lie? The first area of conflict is under Article 9, which enshrines the right to a fair trial, in the following terms:

In the determination of his civil rights and obligations or of any charge against him for an offence, every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The village council is not a 'tribunal established by law' although it does exercise extensive civil and criminal jurisdiction within the customary arena. The Article cannot of course have meant that every dispute must always come before a court of law: it is enough that courts exist so that people are 'entitled' to bring their claims before them. Nevertheless, given that the village councils exercise a jurisdiction which has a much greater proportionate effect on the lives of ordinary Samoans than the State courts, and given that their jurisdiction over those within the village is not easily escaped, questions of due process must give rise to doubt. There is, for instance, no uniformity in the application of the *audi alteram partem* rule.¹¹⁶ There is further the risk of double jeopardy, if a punishment is exacted at village level and then also in the State courts. This conflicts with Article 10(3). Article 10(1) also calls into question the council's jurisdiction in its basic requirement that 'No person shall be convicted of an offence other than an offence defined by law'.

The rights of religion and free speech are likely to run counter to the *pule* of the *matai*, a possibility which was much discussed at the Constitutional Convention. However, what was not discussed, although the constitutional advisors were fully aware of it, was the conflict between the customary power of banishment and Article 13(1)(d) which protects the rights of Samoans to move freely through Western Samoa and to reside in any part thereof. This conflict, amongst others, was in issue in *Tariu's* case, a case which illustrates nicely the changing pressures in Samoan life.

Tariu Tuivaiti was an untitled man of the village of Matautu Falelatai, who owned and operated a bus company. He refused to attend church on Sundays contrary to the orders of the village council which, after repeated efforts at persuasion and reconciliation, banished him and his family from the village and prohibited all other members of the village from riding on his buses on pain of a fine or, ultimately, banishment. Tariu Tuivaiti sued four *matai* of the village for damages and asserted his religious freedom under Article 11. The *matai* did

not contest this claim. St John CJ awarded substantial damages, including punitive damages, against the defendants and ordered them to refrain from preventing the plaintiff from entering the village. He held:¹¹⁷

Since independence, the village council has no power to enforce attendance at church or choir practice, or to compel contribution towards any church project and any punishment of any member of the village for failing to do any of those things is prohibited by the constitution. If those in power in a village agree to punish in those circumstances it may amount to a civil conspiracy and they can be liable therefore and can have damages awarded against them.

The case has been taken as a finding on the unconstitutionality of banishment, a position which the present Chief Justice, the Samoan Vaovasamanaia Phillips, also accepts.¹¹⁸ Yet perhaps the most interesting aspect of *Tariu's* case is not the finding but its effect. Thomas reports¹¹⁹ that severe punishments were meted out on those in the village who sympathised with the bus driver and that by 1983 compensation had not been fully paid and the man had not been able to return to his previous home.

There is more room for latitude in the interpretation of the Constitution with respect to banishment than *Tariu's* case implied. Articles 11(2) and 13(2) both permit 'reasonable restrictions ... in the interests of ... public order'. There is thus a balancing of interests required which would focus attention on the role of the village councils. All investigations of law and order in Samoa have stressed the central role of the village council. The Police and Prisons Report 1976 found that:¹²⁰

The *Matai* and the village council still have an important part to play in law enforcement, and command the respect of the majority of the Samoan people with the improvement of education and the consequent awareness by people of their rights under the law, the legality of the operations of the village councils will inevitably be questioned. To us, it is such a valuable institution that its preservation must be ensured.

Powles also refers to 'the untested argument that the councils have constitutional and legislative protection founded on the concept of collective *pule* - an incident of the holding of *matai* titles and therefore exclusively within the jurisdiction of the Land and Titles

Court'.¹²¹ This argument gains some support from the Constitution, which recognises *matai* titles 'held in accordance with Samoan custom'¹²² and which establishes a Land and Titles Court with jurisdiction 'in relation to *matai* titles'.¹²³ Further, banishment is from customary land over which the *matai* and ultimately the Land and Titles Court have jurisdiction.

II Kiribati

The Kiribati case of *Teitinnang v Arlong*¹²⁴ presents a nice counterpoint to *Tar'u's* case because it too involved banishment and some of the changing pressures in Pacific Island life. By contrast with Samoa, there has for most of this century been a division in Kiribati between the Island Councils, which are the organs of state authority, and the customary institution, the *unimane* (council of older men).¹²⁵ The latter, which operates at the village level, has considerable continuing influence on the lives of the *I-Kiribati* (people of Kiribati) and on the conduct of the affairs of the Island Council but has no formal legal status.

In *Teitinnang v Arlong*, the plaintiff and other members of Abatao village made and sold 150 bundles of pandanus thatches to the Housing Corporation for \$525, which they shared among themselves. This was done contrary to an agreement between the *unimane* of Abatao and its neighbouring village Buota to share equally the proceeds of all sales of pandanus thatch. As a result of this transaction, the *unimane* of Buota imposed a fine of a pig and a bag of rice upon the plaintiff and each of those who shared in the making of the thatches. They refused to pay the fine. The *unimane* decided as a result to prohibit them from passing and repassing through Buota village; from sending their children to the Island Council school in Buota; from using their lands or houses in Buota and from using the public bridge that joined Buota and Tanaea. The plaintiff alleged breaches of his rights under the Constitution's Bill of Rights, and especially Article 14(1) relating to freedom of movement. The defendants countered with a claim that the inter-village agreement was binding on the plaintiff.

Maxwell CJ found that:

I as no rules of court had yet been promulgated as required by section 17(5), he had no jurisdiction to entertain

an action based upon breach of the Constitution. This finding seems to be based on an erroneous reading of the facilitative role of section 17(5). The failure of the High Court Rules Committee to prescribe procedural rules for human rights cases cannot render the Bill of Rights of no effect;

ii no redress by way of declaration could be entertained for a breach of the Bill of Rights (section 88);

iii the Bill of Rights could not give rise to an action between individuals.¹²⁶

The rights and duties of individuals, and between individuals, are regulated by private laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the country. It is my view, therefore, that the duties imposed by the Constitution under the Fundamental Rights provisions are owed by the government of the day to the governed. I am of the opinion that an individual or a group of individuals, as in this case, cannot owe a duty under the Fundamental Rights provisions to another individual so as to give rise to an action against the individual or group of individuals.

iv nevertheless the defendants had committed the tort of unlawful interference with the plaintiff's legal rights: 'The defendants or the oldmen of the village cannot take the law into their own hands to enforce their rules'.¹²⁷ Therefore an injunction would be granted.

v the decision between the old men of the two villages was not a binding contract and there was at any rate no contractual relationship between the plaintiff and the defendants.

The decision illustrates the difficulty of fitting the basic structures of communal living into the straightjacket of the common law. It also raises the issue of the 'third-party applicability' of Bills of Rights, which is of particular significance in relation to customary institutions and powers which have no legal recognition.¹²⁸ The doctrine of the non-application of Bills of Rights to dealings between private persons *inter se*, which has some support in the jurisprudence of the United States Supreme Court,¹²⁹ was ushered into the Commonwealth in the following dictum of the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*:¹³⁰

Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 already existed, it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and as regards infringement by one private individual of rights of another private individual, section 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to.

This dictum was, strictly speaking, obiter, as the decision involved the actions of a judge in his official capacity. Nevertheless it has subsequently been followed on this point both in Trinidad¹³¹ and in Belize, in a case which involved a statutory corporation's power to dismiss an employee.¹³² This doctrine seems to have been accepted by Maxwell CJ in *Teitinnang's* case, though it was firmly rejected by the Solomon Islands Court of Appeal in *Loumla v DPP*.¹³³ That case involved a defence to murder on the grounds that 'payback' killing involved performance of a customary duty which, it was argued, had become a legal duty by virtue of the Constitution's general recognition of customary law.¹³⁴ The Court of Appeal rejected this argument as contrary to the Penal Code and to section 4 of the Constitution (protecting the right to life). Kapi JA went to some pains to distinguish *Maharaj*, which had been cited by counsel as authority for the proposition that the Constitution did not apply to dealings between private persons.¹³⁵ The basis of his distinction was material differences between the Constitutions of Trinidad and the Solomon Islands. Although the Trinidad Constitution is premised upon the assumption that existing law is already consistent with the Bill of Rights and this fact does appear to have some significance for Lord Diplock, the essential point about public/private rights is unaffected by this assumption.

While it is no doubt true that the principal purpose of Bills of Rights is to protect the citizen against the great powers of the State, that purpose is, like many other aspects of Bills of Rights, ill suited to countries where the State is not the only power in the land in relation to law and order matters. Practice in relation to the International and European conventions confirms that Bills of

Rights can apply to private actions if the specific rights can be so applied in terms of the language used.¹³⁶ A proposal in Article 2 of the draft New Zealand Bill of Rights to limit its provisions to public and governmental laws and actions has been criticised as affording insufficient protection.¹³⁷ Some Pacific Constitutions do make the application of the Bill of Rights to private persons explicit.¹³⁸

2 CRIMINAL RESPONSIBILITY, CUSTOMARY PUNISHMENT AND THE PROTECTION OF THE INDIVIDUAL

I Inter-Group Fighting in Papua New Guinea

Loumia's case illustrates the conflict between custom and a non-derogable human rights principle in the criminal law. The right to life, the most basic of all human rights, has little room for cultural relativity. This has been endorsed by the Australian Law Reform Commission in relation to Aboriginal customary law.¹³⁹ Yet not all areas of criminal conduct deliver such a clear answer and the criminal law continues to be a minefield of conflicting perceptions. A recent report on law and order in Papua New Guinea comments:¹⁴⁰

This Constitution was adopted from Western laws and based on a distinct tradition of individualism there is frequently a serious clash between the two concepts of personal rights and group obligations; and the government is continuously confronted with a dilemma of both principle and practice the present schizophrenic condition of shifting between the old and the new with no recognition of their fundamental conflicts contains the seeds of disaster.... Of course international standards constrain the 'customariness' of a state wishing to be modern: but it could be that a reconsideration of custom in Papua New Guinea could make it more modern than its mentors.

The report singles out for special mention as part of the 'schizophrenic condition' *Supreme Court Reference No 3 of 1978: In the Matter of Section 11(3) of the Inter-Group Fighting Act 1977*.¹⁴¹ Inter-group fighting has always been a problem in Papua New Guinea, especially in the Highlands. It has been the subject of numerous scholarly¹⁴² and administrative investigations, and if anything has appeared to increase in recent times. After a particularly sharp increase in the early 1970s, the government commissioned the Paney Committee to report on tribal fighting in the Highlands.¹⁴³ Its report was a watershed document for Papua New Guinea and many of the more

Innovative law reforms of recent years have stemmed from its recommendations. The Committee identified the long-term causes of the fighting as:

i Intense kin group loyalties which often elevate minor disputes between individuals into major confrontations between opposing kin groups;

ii the need to fight which is brought on by anxieties over rapid cultural and economic changes and a feeling of relative political powerlessness;

iii the failure of the official court system to dispense what the people perceive as justice, based on local customs and sanctions, and the consequent reluctance of the people to utilise the courts for dispute settlement;

iv the dearth of an official government or police presence in rural areas;

v social problems of a society in transition.

The short term causes of tribal fighting were found to be:

vi disputes over land, caused by population pressures and land shortages in certain areas, and conflicting boundary claims in most areas;

vii the widely-held belief that death, particularly of clan leaders, is caused by sorcery invoked by an enemy group;

viii intentional or accidental killings which lead to 'payback';

ix disputes over women which arise from claims of adultery or rape, requests for divorce and brideprice payment conflicts; and

x disputes over damage by, or theft of, pigs - which

despite the introduction of a cash economy are still regarded as a prime source of wealth, power and prestige.

From this it may be seen that the Paney Committee made a serious effort to come to grips with the real forces at work in customary society in the Highlands and it framed its recommendations accordingly. The report's principal recommendation was a system of village courts. This became a reality in the Village Courts Act 1973, which will be examined in Chapter V. It also made wide-ranging recommendations on social and economic policy, policing, compensation,

land and prisons. However of paramount significance for present purposes were the Committee's recommendations on group liability. These involved the application of customary notions about group responsibility for tribal fighting. The Committee recommended a new offence of tribal fighting directed against the group as a whole. If a member of a kin group which fought wished to escape this liability, he would have to prove that (and the onus would be on him to do so) he had not fought nor was he in any way culpably involved in the fight.¹⁴⁴

Aboriginal. Objections on human rights grounds prevented the enactment of this proposal in 1975 but in 1977, after a fresh outbreak of tribal fighting, Parliament passed the Inter-Group Fighting Act 1977. The Act allows for the establishment of 'fighting zones' which bring into operation Parts III and IV of the Act creating certain offences in relation to tribal fighting and allowing for group punishment. Section 11 creates the offence of taking part in an intergroup fight and subsection (3) provided: 'A person charged with an offence against this section is guilty of that offence unless he proves, to the satisfaction of the court, that he did not take part in actual fighting'.

The Act had the support of Highlands leaders and almost immediately several areas were declared 'fighting zones'.¹⁴⁵ The Act was immediately successful in stopping tribal warfare. From the date of its implementation to the date of the Supreme Court reference in August 1978 there were only seven fights in Enga province. One of these was made an example with 177 prosecutions. It was this set of cases which precipitated the Supreme Court Reference. The Supreme Court ruled that section 11(3) was unconstitutional because it violated the presumption of innocence enshrined in section 37(4) of the Bill of Rights.

The immediate downstream effect of the decision was a widespread belief in the Highlands that the Court had rendered the entire Act invalid, and a re-escalation in tribal fighting, which had reached such a peak by 1979 that a State of Emergency had to be declared in all five highlands provinces. The Supreme Court's ruling, upholding the constitutional right, had effectively emasculated a creative response to a serious crime problem which was built upon customary principles.

II. A Customary Law Defence and Customary Punishments in Australia

The Australian Law Reform Commission, in its report on the Recognition of Aboriginal Customary Laws, has considered the issues of human rights raised, *inter alia*, by a proposal to allow a defence based on the argument that the accused committed the act which was in breach of the general law because he was compelled to do so by Aboriginal customary law.¹⁴⁶ The interplay of human rights and Aboriginal customary law in the criminal justice system had figured large in the Commission's terms of reference which had included the following factors:

- (c) the need to ensure that every Aborigine enjoys basic human rights;
- (e) the difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race; and
- (f) the need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community.

The Commission was directed to 'give special regard to the need to ensure that no person should be subject to any treatment, conduct or punishment which is cruel or inhumane'.

Much controversy, both prior to the Reference and in the Commission's early work,¹⁴⁷ had centred around the Aboriginal traditional punishment of spearing. The Commission heard evidence that these traditional punishments were still widely accepted in Central Australian communities.¹⁴⁸ It stressed that provisions such as Article 7 of the ICCPR prohibiting cruel, inhuman or degrading treatment or punishment contained terms which could change in application depending upon the cultural context. Spearing, which might appear to the outsider as cruel, might be regarded by traditional Aborigines as inevitable and necessary. Conversely:¹⁴⁹

punishments ... such as prolonged imprisonment especially among alien strangers and away from their own country [are] markedly more 'inhumane and unconscionable' than a spear through the thigh - usually voluntarily accepted as part of a consensus settlement.

The Commission was careful to distinguish the different contexts in which this type of traditional punishment could appear before the

state court. It clearly could not be incorporated in a sentence handed down by a state court.¹⁵⁰ Conversely, if a victim of traditional punishment complained, the law would be bound to extend its protection and punish the offender. In fact the Commission found that there had been¹⁵¹

few, if any, prosecutions of a traditionally oriented Aborigine for inflicting a punishment such as spearing which did not lead to the death of or serious injury to the victim.... The inference is that the process leading to such punishment is substantially a voluntary one, and that complaints to the police in such cases are not made or pursued.

If such a punishment does result in serious injury or death, there is the question of whether the acting under customary law can constitute a general defence, a partial defence (reducing murder to manslaughter) or be a factor in sentencing. This kind of case, which is relatively rare, did occur, for example in *R v Charlie Limbiari Jagamara*,¹⁵² where the accused, an elderly Aboriginal man, had pleaded guilty to the manslaughter of another Aborigine who he believed had had an illicit association with his wife. He had inflicted a stab wound with a spear but had not intended to kill. In sentencing the prisoner to imprisonment until the rising of the court, Muirhead J commented '... there was no intention at this time to inflict a death-producing blow, but merely to inflict a wound which would satisfy the prisoner's traditional views as to the appropriate response in the situation in which he found himself faced'.¹⁵³

The Commission did however find that one of the factors which persuaded them against the establishment of a general customary law defence was the need to ensure the equal protection of the law to the victims of Aboriginal assaults. But this consideration would not apply with equal vigour to a partial defence which reduced murder to manslaughter, nor to the taking account of the 'double jeopardy' argument: that the Aborigine had already suffered or would suffer traditional punishment within his own community as well as punishment under State law.¹⁵⁵

3 MARRIAGE

Marriage has not been a major focus for the state recognition of customary law in the South Pacific. A separate category of custom marriages outside the purview of state law is expressly acknowledged in some Melanesian states.¹⁵⁶ Elsewhere there is no such recognition.¹⁵⁷ In New Zealand marriages by Maori custom are expressly declared invalid.¹⁵⁸ Yet, in Australia at least, customary marriage has persisted as a vital institution despite its non-recognition by the state. The recommendations of the Australian Law Reform Commission illustrate the conflicting justice requirements involved in the attempt to recognise such marriages.¹⁵⁹

Customary marriage has been a particular focus of the international human rights movement. This has centred around requirements of the full age, free consent and equality of the intending spouses (UDHR Art 16, ICCPR Art 23, ICESR Art 10). The Marriage Convention goes further in singling out customary practices for special State action to ensure the free consent of the parties, to prohibit under age marriages and to ensure that all marriages are registered. These rights are reiterated in detail in CEDAW Article 16. There is thus in the international instruments much which is inimical to the recognition of customary marriage. This was acknowledged in the reservations as to customary marriage entered by the United Kingdom on applying the ICCPR and ICESCR to the Solomon Islands.

Yet, in important ways the non-recognition of customary marriage wreaks injustice. The Australian Law Reform Commission found, for instance, that there were at least 4889 'tribal unions' but only 151 'legal marriages' amongst the Northern Territory aborigines.¹⁶⁰ Such marriages were likely to have some or all of the following characteristics: they were likely to be polygamous; to involve under-age partners; they were likely to have been 'arranged' by the families of the spouses; they would not have been registered and, indeed, custom would not prescribe any precise date or ceremony signifying marriage, which would instead be recognised by the community with an exchange of gifts between the families and cohabitation of the spouses. Aboriginal customary marriage was thus both a widespread institution and one which failed in many respects to meet Western concepts or the requirements of international human rights standards.

general. In contrast to the position elsewhere in the common law world,¹⁶¹ the common law in Australia had never recognised customary marriage. As Martin CJ stated in *R v Cobby*: 'We may recognise a marriage in a civilised country but we can hardly do the same in the case of the marriages of these Aborigines, who have no laws of which we can take cognisance'.¹⁶² The Marriage Act 1961 (Cwlth) leaves little or no room for recognition of customary marriage and existing Australian legislation contains only very occasional references to Aboriginal marriage.¹⁶³ What is the effect of this for Aboriginal spouses? They are denied rights which the general law accords to married people such as:

- i status of children - the children of Aboriginal marriages are illegitimate;
- ii adoption, fostering and child welfare laws, including both parental consent to adoption and qualification to adopt;
- iii distribution of property on death: intestacy and family provision;
- iv accident compensation (including for workers' compensation, compensation on death, criminal injuries compensation and repatriation benefits);
- v statutory superannuation schemes;
- vi social security;
- vii spousal compellability and marital communications in the law of evidence;
- viii unlawful carnal knowledge - not an offence where the parties are married;
- ix income tax legislation.

There was thus a compelling case upon general equal benefit grounds for some form of recognition of customary marriage. As the Commission noted,¹⁶⁴ Australian law had already gone a considerable way towards recognising different marriage patterns through Private International Law. It found the solution to the conflicting need to recognise customary marriage and the standards imposed by the human rights instruments in the concept of functional recognition. This approach 'requires a more detailed examination of areas in which marital status is relevant, to determine whether the recognition of traditional marriage is appropriate in each area'.¹⁶⁵ Thus there is no

general equation of customary marriage with marriage under the general law for all purposes. This approach does not, according to the Commission, involve the enforcement of aspects of traditional marriage which are contrary to basic human rights.¹⁶⁶ The Commission argues, for instance, that in relation to under-age marriages 'the effect of the Commission's proposals would not be to confer a legal status of marriage, but to confer benefits and protections on traditional spouses, irrespective of age, to the same extent as persons married under the Marriage Act'.¹⁶⁷ They came to the same conclusion with respect to polygamy. Because the effect of the proposals is to extend benefits and protection, it is difficult to argue that they are discriminatory against Aboriginal women. The Commission has thus drawn a very careful line between what are on their face competing interests. It may however be doubted whether its proposals conform to the spirit and intention of the human rights instruments.

F COMMUNITY AND INDIVIDUAL

Much effort has been expended in this chapter towards emphasising the *conflicts* between human rights standards and customary norms and towards an approach which suggests that 'cultural relativism' should be addressed at the level of detail: examining where conflicts actually do occur and whether, if at all, they can be resolved rather than merely assuming a simple dichotomy between human rights and customary norms. Human rights have been formally embraced by all the Pacific legal systems, but this does not dissolve the problem.

However, it should be borne in mind that not everything in the set of human rights is to be seen as subversive and destructive of customary society. For a start, the whole thrust of human rights protection was in support of the oppressed and particularly the oppressed members of minorities. Article 27 of the ICCPR goes further in protecting minority customs:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

While Article 27 does not mandate recognition of the customary laws of minorities, it does suggest the importance of the legal recognition of cultural differences. Other provisions in the International covenants, such as the right to found a family and procedural rights in relation to a criminal trial, can similarly require some recognition of customary law.

A good example of the supportive role of human rights standards is the Solomon Islands case of *Fugui v Solmac Construction Ltd.*¹⁶⁸ In that case Solmac, which it originally appeared (mistakenly) had been granted a logging licence, destroyed trees which the applicants claimed they had a right to crop. They asserted their right to compensation for the loss of their property interests, under the right of protection from deprivation of property referred to in section 8(1) of the Constitution. The judge found that they did have a right to crop in custom and that this right was not adequately protected in the procedures for compensation established by the Forests and Timber Act. He concluded:¹⁶⁹

I have no hesitation in finding that the right to crop the coconuts is 'property' within s.8(1) of the Constitution. It is a right which is granted in custom, capable of inheritance as I have found and enforceable against the rest of the world.

In cases of conflict between human rights and customary norms, one should be wary of dressing up ethnocentric preconceptions as human rights. Angelo makes this point on the position of women in Tokelau and it is reiterated by Diane Bell in relation to Aboriginal women. In making the case for a women's perspective on the recognition of Aboriginal customary law, she concludes:¹⁷⁰

Lest it be imagined that I as a white feminist am imposing women's liberationist ideals on Aboriginal women, let me quote to you a favourite observation of an Aboriginal friend of mine. We had been discussing child rearing and she had pointed out to me that children were shared by a number of members of one's family camp. This lightened the burden of child rearing for mothers. White women, however, she observed, were locked inside all day just like prisoners. To escape, they sought the right of equal opportunity in employment and education. They attempted to break down the sex role stereotyping to achieve liberation. In her view the recognition of women's rights came not through the infiltration of men's domains and through a minimizing of the differences between male and female roles, but rather in a recognition of her distinctive contribution to her society. It was a role of independence, responsibility and authority wherein she was enhanced as a woman.

Equally, however, one should not be too sanguine about identifying abuses of power whether they occur within the customary framework or outside it. Chanock makes the point that:¹⁷¹

... we tend to fall easily into the general position that custom was expressive of a homogenous value system, that it was long lived, that it represented what people in communities actually did, and that as a consequence it was in some way egalitarian or at least acceptable to them as a whole, while the state's law was by contrast an imposition, or an oppression, from outside. But it is important to remember that custom is not simply what people do, but that it is a set of values expressive not just of communal life, but of a way of maintaining order and by which some do what others make them do.

Powles echoes this from the Pacific perspective:¹⁷²

... greater familiarity over the years with the functioning of societies (whether Western or Pacific) leads me to look for more effective means of checking the abuses of power.... In the Pacific the failure of legal systems from all sources will be that they are unable to cope, not only with the interaction problem but also with the combinations of power within each state - power drawn from political office, public service position, accumulated wealth, entrepreneurial opportunity, access to outside aid (economic and political), traditional authority at various levels, control of land and natural resources self-determination of the group ... requires balancing against self-determination of the individual, lest he be oppressed by the group's combination of economic and non-traditional as well as traditional powers.

There is a broader issue encapsulated by the cultural relativism debate which may be summed up in the classic *Gemeinschaft-Gesellschaft* distinction drawn in legal theory between societies which only exist to the limited extent necessary to foster the rights and freedoms of the individual (*Gesellschaft*) and those societies where the life of the community itself is paramount and the individual only takes his place within the structure of that community (*Gemeinschaft*).¹⁷³ As the evidence of the case studies to which this chapter has been largely devoted shows, Pacific traditional societies were 'communities' rather than 'associations'. However Pacific societies, too, are subject to change and the adoption of human rights standards is only one aspect of a wider matrix of social and economic changes which are increasing the free choice of the individual to opt out of customary patterns of social control. Ultimately, the foundation of any new attempt to recognise customary law must be the free choice of

lifestyle of the individual. This distinction was well brought out by Brennan J in relation to land rights in *Gerhardy v Brown*:¹⁷⁴

The difference between land rights and apartheid is the difference between a home and a prison. Land rights are capable of ensuring that a people exercise and enjoy equally with others their human rights and fundamental freedoms; apartheid destroys that possibility.

The Management of Disputes

If customary law is at least as much about the processes adopted for the resolution of disputes as it is about the application of rules, then the attitude of the state to customary dispute resolution institutions will be of crucial significance in any process of recognition. Yet this type of recognition, because it involves consideration of processes, mechanisms and institutions, may have more structural implications for the state legal system than adjustment of its substantive rules to take account of custom.

Many Pacific states have sought to manage customary disputing by developing local-level justice mechanisms which operate in the customary sphere and according to customary norms and processes. There has been a parallel development of specialist state institutions to deal with the most intractable of all areas of customary disputing: land. However, the establishment of these 'customary courts' has been a deeply contradictory process. Justified on the one hand by a rhetoric of 'customising' the judicial process, informal justice and investing power over disputing in the people, these courts have on the other hand resulted in an extension of state power and authority into the heartland of customary society. This is not to suggest that 'customary courts' may not have a valuable role to play in meeting the needs of both customary and state law, but it does caution against an unquestioning acceptance of such new institutions as purely customary.

The purpose of this chapter is to consider a state role in customary disputing against the background of the general themes advanced in this thesis. Part A thus develops some broad propositions about the nature of dispute resolution in customary societies and the variety of ways in which such resolution techniques may conflict with or be accommodated by state law. It then looks at the genesis of 'customary courts' both in terms of principle and as a matter of historical development. A further contradiction in the adoption of

V DISPUTES: CUSTOM AS PROCESS

A A STATE ROLE IN CUSTOMARY DISPUTING

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such courts in the Pacific is that, while native courts had been the cornerstone of indirect rule in colonial Africa, they were less of a feature of the Pacific colonial experience. The achievement of independence in Africa led to a concerted move to abolish such courts and develop a unified, professionalised, formal judicial structure. Conversely, independence in the Pacific seemed to justify the opposite: an embracing of the informal, participatory, customary model.

Part B focuses in detail on the village courts of Papua New Guinea. These courts were a further by-product of the reassertion of custom engendered by decolonisation. They have been very widely adopted and are now the key judicial institution in the country, at least from the perspective of the Papua New Guinean villager. However, their operation displays many of the contradictions of a mixed state/customary institution.

Land courts have been a much more longstanding feature of the Pacific scene. This has been partly because most states have recognised, at least to some extent, the customary land tenure system but also because land has always been the major cause of dispute, both within customary society and as a result of the pressures of European settlement. As Part C demonstrates, the creation of a land court is only one option open to the state in relation to customary land disputes. Land courts underline the contradictions of the customary court as created by state law.

At least since Llewellyn and Hoebel it has been something of a truism that the operation of customary law may be best observed in the way disputes are managed, for 'not only the making of new law and the effect of the old, but the hold and the thrust of all other vital aspects of the culture, shine clear in the crucible of conflict'.¹ An investigation of disputing serves to underline many of the distinctive features of customary law discussed in Chapter 1C: 'Custom, Law and Commensurability'. In the absence of the formalised, centralised justice institutions of the state, the resolution of disputes in customary societies must be handled by a much wider range of mechanisms, ranging from self-help and violence to various forms of talking: mediation, arbitration, community decision-making. Because disputes occur in the context of small-scale, close-knit communities, they are likely to have an effect on the whole group and likely

therefore also to involve the participation of the whole group in their resolution. By virtue of this group involvement and of the absence of separate and distanced justice institutions, dispute resolution is likely to bear a political character. The social status and relations of the disputants will be highly relevant and the immediate cause of the dispute will be seen in the context of ongoing relationships and of ongoing causes of conflict. In the absence of the coercive power of state law machinery, the essential thing in customary dispute resolution is to secure the agreement of the parties. Of course, this cannot always be achieved and disputes can smoulder for years or escalate. But customary law abounds in techniques, such as the ritual apology in Samoa² and Fiji³ and compensation in Melanesia,⁴ designed to heal the rift between the disputants.

II Approaches to Interaction

The intimate connection of customary law with the group context in which it operates and with the way in which disputes are resolved in customary societies has already been stressed as a reason for the contradictory role of custom as national law in Chapter IIID, 'The Failure of an Indigenous Jurisprudence'. The nature of customary disputing and also of the small-scale, close-knit groups within which it operates must also inform an analysis of the creation of 'customary courts'.

To what extent do Pacific societies already contain 'customary courts', in the general sense of community institutions for the resolution of disputes according to customary law? Many Polynesian societies contain highly formal structures, exercising quasi-judicial functions. This is especially true of the village councils of Western Samoa and Tokelau, the *Fono*⁵ and *Taupulega*⁶ respectively. However, even in less structured, acephalous societies such as those commonly found in Melanesia and amongst the Australian Aboriginal people, group decision-making on disputes is often observed. Thus, for instance, Epstein has recorded the operation of customary moots, *varkurai*, on Matupit in Papua New Guinea.⁷ Similarly, the Australian Law Reform Commission has noted the existence of formal moots or adjudicating committees in some Aboriginal communities.⁸

However, in the context of the interaction between custom and state law, it is important to keep in mind that state law may need to

develop responses to a much wider range of dispute resolution techniques than simply the actions of formal decision-making bodies. Some of the most intractable conflicts between the state and custom occur where the person carrying out a punishment required by customary law thereby commits a state law offence.⁹ In another situation, the person may have committed an offence at customary law which is resolved by customary procedures and may then be exposed to double jeopardy through state prosecution.

Customary institutions may resist integration into state structures and may indeed act as a focal point for resistance to the state generally. Thus, historically, as Chapter IID2 shows, many movements which sought to resist colonial rule in the Pacific placed considerable importance on maintaining rival dispute resolution institutions which applied customary law. In Western Samoa, the village councils have maintained their autonomy from central government despite successive attempts to integrate them into a system of local government and village courts. The councils continue to be seen as the bulwark of the customary system and constitute the major element in the maintenance of law and order at the village level.

Elsewhere customary dispute resolution institutions may exist alongside state law local courts, operating unofficially, sometimes in conflict with and sometimes complementing the official bodies. Thus, for example, in Kiribati the *unimane* or traditional village council has no recognition at law. The state has established a system of Magistrates' Courts and island councils which operate at the local level but the *unimane* continues to exercise considerable customary authority in ways which may conflict with state law.¹⁰

By way of contrast, the Hageners of the New Guinea Highlands have restructured the processes of dispute resolution in the traditional society in the image of the introduced state system. Thus Strathern's study of the region in 1972¹¹ (just before the introduction of the village courts) shows the Big Men of Hagen societies who have achieved administrative status in the state system as local government councillors or *komiti* (village officials) exercising judicial functions. Although the official model denies the legitimacy of such exercises of judicial authority, the councillors and *komiti* expressly justify their authority through their link with the state system and not solely in terms of custom.¹²

Instead of isolating and withdrawing themselves, dismissing 'law' as something relevant only to official courts, they have mentally structured the present state of affairs so that they themselves and their leaders can behave as though their courts were part of the official system, and something of the role of *kiap* [district administrative officer] devolves upon councillors. Councillors and *komiti* in this light become mouthpieces for what they interpret to be *kiap* law.

Thus the unofficial courts, operating in the interstices of the official system, represent an indigenous attempt to embrace state law and render it useful in the resolution of customary disputes.

For their part, state courts at the local level in indigenous communities may not necessarily be interested in enforcing customary norms and procedures. They may be deliberate extensions of state control into the customary arena. Much of the rationale for the introduction of Courts for Native Affairs in Papua New Guinea in the colonial period, courts at the lowest level of the hierarchy applying only to 'natives', was the pacification of the country. To this end such courts were to discourage resort to customary means of dispute resolution and to educate the 'natives' in the new standards of the Administration.¹³ The Queensland Aboriginal Courts which presently operate in Aboriginal communities in Queensland are still, despite recent reforms, essentially exercises in the imposition of state control according to state law.¹⁴ The Australian Law Reform Commission has included the following criticisms of them:¹⁵

- * the courts are inferior or 'second-class' institutions;
- * the lack of real Aboriginal influence or control;
- * the courts' inability, or failure, to take into account local customs and traditions;
- * criticism of the courts as an aspect of the reserve system as a whole, which is seen as an imposition of alien structures and values.

These preliminary observations and examples, then, permit the following general comments in relation to the creation by state law of 'customary courts':

- * In important ways customary law is located in the dispute resolution techniques of customary societies but neither the rules nor the processes may easily be abstracted for use in a state institution;
- * Customary societies themselves contain many dispute resolution

- institutions but there is also a much wider range of methods for resolving disputes, of which state law may have to take account;
- * The conflicts will not be resolved simply by the establishment of a 'customary' court;
 - * The indigenous institutions have the capacity to react themselves to the existence of rival state courts. This reaction may include cooperation but it may equally include resistance or transformation. Thus the establishment of a state 'customary' court will not necessarily succeed in co-opting customary institutions;
 - * At any rate, not all local-level state courts established in indigenous communities are intended to reinforce customary law. They may be extensions of state power deliberately designed to break down customary authority.

III Justifying the Creation of Customary Courts

How, then, may the creation of customary courts be justified? Three broad and interrelated themes have been advanced: informal justice, local self-determination and government through participatory institutions.¹⁶

Customary courts may be seen in the light of a general movement, which is not restricted to indigenous societies, to develop alternative justice mechanisms which respond more closely to the needs of the community. Examples of such mechanisms in Western societies would include small claims tribunals, the development of arbitration in labour and commercial disputes, institutionalised forms of conciliation and mediation in family disputes and community justice centres. There is a common emphasis on avoiding the austerity of tabulated legalism. Thus, frequently, such mechanisms rely on rules developed within the community in which they are operating. In placing a priority on settling the dispute between the parties, such mechanisms will often avoid the strict application of rules altogether. There is a parallel here with customary courts which seek to reinvest in the community the power and responsibility to resolve its own disputes. Seen in this light, customary law gains legitimacy as the applicable set of community standards most likely to resolve the dispute satisfactorily. This end will be further enhanced by the fact that the decision-makers are drawn from the local community and

will therefore have a greater awareness of the disputants and the underlying causes of the dispute. Finally, 'customary' courts may be able to harness some of the procedures of customary law which may be more effective in resolving the dispute than the limited and formal responses of state courts.

Abel, in an extensive review of the development of informal justice internationally, suggests that 'customary' courts may indeed share many of the characteristics of informal justice in Western settings.¹⁷ The ambiguities which he identifies in the movement generally such as:

- * according to a fixed state law pattern. However,
- * the extension of state control under the guise of deference to their non-state alternatives;
- * informal justice as a conscious attempt to reinforce systems of community social control which are in fact eroding;
- * the fact that such institutions may confirm and bolster existing power relations in the community;
- * the persistent tendency of such institutions to reformatise, reprofessionalise and rely on state authority,

will be seen to be shared by 'customary' courts in the Pacific. However, the Abel study does bear out the wide spread of the informal justice movement and the fact that it expresses strongly and widely held ideals as to the nature and purpose of justice institutions.

That these ideals are shared in the Pacific may be witnessed by, for example, a recent report on *Law and Order in Papua New Guinea*, prepared under the auspices of that country's private and public sector research institutes.¹⁸ The report, which surveyed the whole range of Papua New Guinea's law and order problems, specifically rejected the options of 'more of the same' or increasing the role and sanctions of the state in favour of a 'non-state option'. This involved placing primary emphasis on informal methods of social control. The authors comment:¹⁹

Papua New Guinea is fortunate in having so many viable communities within which informal mechanisms operate, traditions of dispute settlement and public recognition of the value of this resource. Some developing countries who have lost their community courts, and some Western jurisdictions which legislated these courts out of existence hundreds of years ago, are now struggling to re-establish community participation in law and order problems through community-based systems of conflict resolution.

The Report argues that the state should adopt a supportive role in relation to these informal mechanisms. This is to involve a reorientation of all the state institutions concerned with law and order, including the police, but particularly further support for the system of village courts.

The second justification commonly advanced for the creation of customary courts is that they are an exercise in self-determination. Of course this need not be so. Local-level courts may be imposed on the community by the state, operating by virtue of the coercive power of the state and according to a fixed state law pattern. However, equally, they may involve the withdrawal of state institutions and their replacement by institutions designed and supported by the local community itself. The Australian Law Reform Commission explored the implications of the principle of self-determination for the creation of local justice mechanisms in Aboriginal communities. It observed that this meant that, contrary to the colonial model of the deliberate state creation of such courts, the desire for and the structure of local justice mechanisms had to emerge from Aboriginal communities themselves.²⁰ Further, self-determination in dispute resolution was bound up with a wider range of issues about autonomy generally.²¹ This was only tangentially related to the recognition of customary law because Aboriginal groups might choose, in the exercise of autonomy, to develop structures for the resolution of disputes which were not customary. Thus the Commission considered that the establishment of a new general system of Aboriginal courts would be inappropriate except in the context of negotiations for local self-government. It found support for such courts in very few Aboriginal communities but it did recommend that such schemes be proceeded with in particular cases where requested by the community.

The link between customary courts and self-determination is often explicitly made in relation to indigenous minority peoples. Thus *Te Whainga i Te Tika: In Search of Justice*, the report of a recent advisory committee on legal services in New Zealand, advocates community-based processes, commenting: 'For Maori communities, this would be consistent with the trend to return to *whanau* [family] and *hapu* [subtribe] responsibility and self-reliance. The base for this remains largely intact in rural areas'.²² However, the principle may also apply in the assertion of the autonomy of local communities in the island states.

Self-reliant development and popular participation in government were major themes in the transition to independence in the island states. The second directive principle of the Papua New Guinea Constitution is 'equality and participation' which includes the participation of the people in all the structures of government and equal access to legal processes. A seminar shortly after independence on 'law and self-reliance' stressed that:²³

A self-reliant development assumes that local resources should be used, and in the area of the law this means that a greater effort should be made to base the legal system on the values, rules and procedures of customary law. A foreign imposed system of law has built into it a continuing or at least a long-term reliance on foreign techniques, cases and legislation, and personnel. The particular foreign system imposed on Papua New Guinea is not geared towards popular participation. In fact as the imposed legal system has spread through the country, it has resulted in less and less participation by the people in dispute settlement processes, while at the same time its effect was to centralise power.

The seminar noted that village courts had been introduced to encourage popular participation in dispute settlement.

Popular participation and alternative development are themes which have received international attention, frequently as a means for mobilising the rural poor against the power of the state and big business. Although there are implications for many other types of legal institution (such as business groups, cooperatives etc), there has been a particular emphasis on local justice mechanisms as a focus for participation and resistance.²⁴

IV The Legacy of Native Courts

If these principles provide a modern justification for 'customary' courts, there are some curious features in their historical development. Native courts were, as Morris has aptly noted, the cornerstone of indirect rule in Africa.²⁵ Indirect rule was to be achieved by working through the chiefs and existing native institutions. Native courts supported this because they enabled the chief to continue to exercise judicial as well as executive authority. Customary law, as the foundation of native society, was the basis of the law applied in the native courts. All of this was clearly articulated. Thus Cameron stated in his basic memorandum on native courts: '... they are not a new system invented by us, but a

continuation of the judicial functions of native authority.... Their primary function is to give effect to that well established and understood body of customary law which regulates native society...'.²⁶

Although in principle the native courts were indigenous institutions which were simply recognised by the colonial administration, the rhetoric disguised much active creation and change. In many places, no formal indigenous institutions could be discovered so the British had little choice but to create them.²⁷ The courts came under the direct supervision of British administrative officers who would check the records, hear appeals in their magisterial capacity and frequently even sit in on court proceedings.²⁸ The administrative officers exercised an educative function as well as an appellate one: their ultimate purpose was to introduce British standards of justice to the native courts.

With the approach of independence, the native courts in Africa were increasingly seen as anachronistic. They were discriminatory in the sense that they only had jurisdiction over Africans. Europeans were subject only to the ordinary courts. The growing African elite was resentful of having to accept the continuing authority of the chiefs. The African legal profession were excluded from the native courts and objected on principle to the lack of separation of executive and judicial powers at the local level, which were both vested in the chief. They further objected to the dual court structure and the exercise of so much judicial authority by laymen. Thus the objectives of professionalisation, uniformity, modernisation and nation-building all seemed to point towards the abolition of the native courts and their replacement by a unified structure of state courts. This conclusion was reached at a series of influential conferences of Judicial Advisers in the 1950s and 1960s.²⁹ It was substantially carried through in most African countries.

Contrast this with the pattern in the Pacific. As Chapter IIB3 has shown, there were relatively few experiments with indirect rule in the region. Native courts were eschewed in favour of the direct administration of the indigenous peoples through courts such as the Court for Native Affairs in Papua New Guinea. Only in Fiji was a separate Fijian magistracy constructed out of the customary authority of the chiefs. The Fijian Native Courts were as much the product of colonial invention and intervention as their African counterparts.

They enforced a rigorous code of administrative regulations. By the 1960s they were seen as paternalistic and outmoded for the same reasons that were advanced in Africa and were abolished in 1966.³⁰

Elsewhere in the Pacific, where indirect rule had not been the model for colonial administration, the idea of local-level courts staffed by the indigenous people and responsive to customary law took hold in the postwar period. Thus, in the Solomon Islands, where there had been much debate about the recognition of custom but little activity, a system of native courts was established in 1942.³¹ These courts were to apply customary law and were staffed by government-appointed headmen sitting with assessors. The 1942 Regulation is still the basis of the local courts in the Solomon Islands.³²

In the Gilbert and Ellice Islands, the authoritarian control of the Magistrate, who had been a crucial figure in colonial administration until World War II, was progressively reduced by the new Resident Commissioner, Maude.³³ This culminated in the introduction in 1965 of a system of island courts.³⁴ Although these courts were constructed along Western lines and had English law as their basic law, they were staffed by indigenous lay magistrates and they had the power to observe and enforce the observance of custom.³⁵ The island courts are still the basic courts in Tuvalu but have been abolished in Kiribati.³⁶

Village courts were introduced in Papua New Guinea in 1973 but there had been an intense debate about the viability of native courts during the colonial period, especially since World War II. Various draft ordinances had been prepared but rejected by the administrative authorities in Port Moresby and Canberra.³⁷ The fresh wind of self-government ushered in the Papua New Guinea village courts. In Vanuatu, Article 50 of the Constitution required the establishment of island courts with jurisdiction over customary matters. Legislation to this effect was introduced in 1983.³⁸

In Fiji, there have been recent proposals to reintroduce the Fijian courts, partly because of an alarming decline in law and order in the villages, partly to make the legal system more responsive to the Fijian way of life, and partly as a result of a general programme to decentralise.³⁹ So the trend in the Pacific, in contrast to Africa, has been to embrace a system of lay, customary, local-level courts as an aspect of decolonisation rather than to reject it as a symbol of

colonial rule. The forces at work and the results may be seen in the operation of the village courts of Papua New Guinea.

B A NEW VILLAGE JUSTICE INSTITUTION FOR PAPUA NEW GUINEA

I Background

The impetus for the introduction of village courts in Papua New Guinea came from a number of different directions. The first was the widespread acknowledgement that justice at the village level was maintained not by the relatively remote state court system but by an extensive network of unofficial courts. Previously the Administration had treated this situation with disapproval. With the achievement of self-government in 1973, the unofficial courts gained an autochthonous validity. It was sought to make them the basis of the judicial administration of an independent Papua New Guinea.

Secondly, the blueprint for the administration of justice which had been espoused by the Australian Administration on the basis of the Derham Report 1960⁴⁰ had envisaged a unified court structure, staffed by indigenous Papua New Guineans but operating on Western lines. Derham was sceptical about the applicability of custom in state courts:⁴¹

... It has been argued that the native communities ought to be encouraged to conduct their own judicial functions according to their own customs in all respects where it is possible to do so consistently with ultimate central control of law and order. But that argument rests on two assumptions: (1) that the customs of the indigenous communities are able to meet the needs of these communities not only as they are now but as they will be; and (2) that the customary rules exist and can be known and applied by a system of courts that extends over the whole Territory. The first of those assumptions is false; and the second is true only to a very limited extent.

The resulting legislation included the Local Courts Ordinance 1963, establishing a unified Western-style court structure of local and district courts, and the Native Customs (Recognition) Ordinance 1963, which as has been seen in Chapter IIIAii, closely limited the classes of case in which custom could be admitted. Although a training programme for Papua New Guinean magistrates was instituted, the local courts were initially staffed by the magistrates of the Courts for Native Affairs. They remained remote from the village and were not

seen by villagers as an appropriate forum for resolving civil disputes. A further official report in 1971⁴² admitted that the withdrawal of the colonial system of *kiaps* had left a gap in the maintenance of law and order at the village level which was not adequately met by the local courts. It recommended the introduction of village courts but still envisaged this as the extension of state control over the unofficial tribunals and as the education of the villager into the standards of Western justice.

The third impetus for the village courts came from the increase in tribal fighting, especially in the Highlands, and the recommendations for the prevention of it proposed by the Paney Committee in 1973.⁴³ The Paney Committee argued that the introduced court system had failed to settle the disputes which commonly led to tribal fighting. State courts were too remote from the village community; the laws administered by them did not meet the needs and concerns of villagers; their procedures were alien; penalties did not respond to the root cause of the dispute because they emphasised individual rather than group liability. Recommendation 5 of the Committee was thus that:

A system of village courts should be introduced as soon as possible which can dispense justice based on local customs and sanctions and which will have the full legal backing of the government.

The Committee then went on to propose Village Law Officers to carry out a supportive policing role for the village courts. Further, it tied many of its recommendations on specific causes of tribal fighting to the village courts. Thus, for instance, it recommended that the village courts have jurisdiction over cases of insulting language, land, sorcery, bride price, pig stealing and trespass. It stressed the role of mediation, the ability to order compensation payments and the inquisitorial role of the proposed courts in cases of tribal fighting.

II Structure

Many of these recommendations were reflected in the structure of the Village Courts Act Ch.44. The Act provides that village courts may be established in any area and that village magistrates shall be appointed by the Minister on the advice of the

Provincial Supervising Magistrate after consultation with the relevant Local Government Council (section 4). According to section 16:

The primary function of a Village Court is to ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of disputes.

The procedure of the courts is to be flexible and established by the village magistrates themselves (sections 11, 28 and 36). In addition to a mediatory jurisdiction, the courts have a preventive jurisdiction (section 15) and two courts may sit jointly to deal with disputes spanning more than one area (section 14). The courts are supported by Village Peace Officers, exercising policing functions in the village area (Part VI).

The courts have a broad civil jurisdiction over private disputes arising in their area or concerning parties from their area (sections 1, 12 and 20). The only two areas of civil jurisdiction exempted from their purview are disputes over the ownership of land (although they may make temporary use and occupation orders) and disputes involving the driving of a motor vehicle (section 20). The courts' criminal jurisdiction is limited to a set of prescribed offences (section 22 and the Village Courts Regulations):

- (a) taking or keeping, without the consent of the owner, the property of another to a value not exceeding K100.00; or
- (b) striking another person without reasonable cause; or
- (c) using insulting words or conduct; or
- (d) using threatening words or conduct; or
- (e) using offensive words or conduct; or
- (f) intentional damage to trees, plants or crops belonging to another person; or
- (g) intentional damage to trees, plants or crops belonging to the defendant and another person; or
- (h) intentional damage to any other property belonging to another person; or
- (i) making a false statement concerning another person that offends or upsets him; or
- (j) spreading false reports that are liable to cause alarm, fear or discontent in the village community; or
- (k) conduct that disturbs the peace, quiet and good order of the village, or of a resident of the village; or
- (l) drunkenness in the Village Court area; or
- (m) carrying weapons so as to cause alarm to others in the Village Court area; or
- (n) failure to perform customary duties or to meet customary obligations after having been informed of them by a Village Magistrate; or

- (o) failure to comply with the direction of a Village Magistrate with regard to hygiene or cleanliness within a Village Court area; or
- (p) sorcery, including -
- i practising or pretending to practise sorcery; or
 - ii threatening any person with sorcery practised by another; or
 - iii procuring or attempting to procure a person to practise or pretend to practise, or to assist in, sorcery; or
 - iv the possession of implements or charms used in practising sorcery; or
 - v paying or offering to pay a person to perform acts of sorcery.

As can be seen, these offences are broadly worded and attempt to respond to customary concerns.

The law to be applied in the village courts is custom (section 26). Village court magistrates are not bound by any statutes other than the Village Courts Act and must simply exercise their jurisdiction 'in accordance with substantial justice' (section 27). The only real constraints on the village courts, and the only grounds on which an appeal may succeed, relate to the requirements of natural justice - the *audi alteram partem* and bias rules - and the administrative law ground of *ultra vires* (sections 27(2), 38 and 49). The court may hear group actions and may make orders in respect of groups (Part V). The court may make compensation orders or require the performance of specified work for an aggrieved party in civil cases (section 21); and may order a fine, community work or, in default of this, imprisonment in criminal cases (section 23 and Division 6). The Act imposes monetary limits on awards of compensation and fines.

The first village courts were established in January 1975 and, by the end of October 1986, 986 village courts had been established covering a population of 2,710,500 - about 70% of the population of the country. There are 5421 magistrates.⁴⁴ The national Village Courts Secretariat, established to guide the introduction of the courts, the training of magistrates and their ongoing progress, has worked under a policy of popular participation. Village courts have not been established unless requested by the relevant local government council and magistrates have been elected by the people of the area which they are to serve. There is a ratio of one magistrate to about 500 people and village court areas usually encompass around 2000 to

3000 people, which is more than one village but still highly localised. Although the introduction of village courts was in form participatory, in fact this was orchestrated by the Secretariat which has conducted intensive publicity campaigns to encourage communities to adopt the courts. The village courts remain a rural phenomenon, operating best in ethnically homogenous close-knit village situations. The Secretariat has experienced more difficulty implanting the courts in urban areas, despite recommendations that it should do so.⁴⁵ It has established them on a trial basis in squatter settlements (which are organised along ethnic lines) and is presently creating a number of urban village courts characterised by greater formality and professionalisation.

III Evaluation

How may the performance of the village courts be assessed? There have now been a number of studies of them⁴⁶ and some common themes emerge. The first is a persistent tendency to formalise, for the magistrates themselves to stress the connection of the village courts with state authority. There are various symptoms of this. Although the Act does not require it, many magistrates have arranged the building of courthouses for the village courts. Often these courthouses resemble those of the local courts. They serve to exclude the community from the hearing of disputes, to restrict proceedings to the parties and court personnel and to emphasise the formality of the village courts. The Village Courts Secretariat has bowed to local pressure and allowed the issuing of official uniforms and insignia for court officials. More significantly, village courts have tended to emphasise their punitive role over the achievement of consensus. In this, magistrates expressly rely on the government's law as a source of their authority independent of custom. Thus, for instance, Paliwala cites a case in which a dispute over damage to property had been settled where the magistrate still insisted on criminal punishment of the defendant.⁴⁷ Frequently, magistrates have preferred their powers to fine and, ultimately, to imprison over the making of community service orders. In other ways, too, the courts have sought to confine and define cases in a manner more consistent with their perceptions of Western legal processes. They have refused to investigate the background causes of disputes, to combine actions,

to hear various disputes not deemed important enough for a court hearing.

How may this trend towards formality be explained? It must be counterbalanced by a concomitant persistence of informal methods of dispute resolution in the village. These informal methods provide many of the avenues of mediation and flexible dispute settlement which the Act envisages for the village courts themselves. Although the magistrates draw a sharp distinction between 'formal' and 'informal' court, they are ready to recognise that some disputes are better settled by customary processes outside the court and are also much involved themselves in mediation and unofficial village hearings. This duality of process is often graphically represented by informal courts held outside the courthouse. Thus, the situation described by Strathern as operating before the introduction of the village courts has survived the injection of this new institution. The personal authority of the magistrates, an authority derived largely from their government-appointed position, enables them to act widely in the settlement of disputes in the community, just as earlier generations of state officials had done.

If part of the reason for the increasing formality of the village courts may be found in the complementary role of unofficial procedures, the reliance on state power in the courts suggests the need for some forms of external intervention in the maintenance of order in the village. It also lies in the source of authority of the magistrates themselves. Their ability to work successfully in the community depends more on their connection with the state than on their traditional authority. Often magistrates are not drawn from the class of traditional 'Big Men' but from a younger cadre of people aspiring to official positions in the community.

In some respects, the reference to state law can have beneficial effects in the village. Contrary to some estimates, the courts do not necessarily reinforce existing power relations, providing those who already exercise considerable power in the community with a further avenue for personal benefit and controlling the masses.⁴⁸ Women have been frequent - and successful - plaintiffs.⁴⁹ 'Big Men' and local government councillors have frequently been brought before village courts and punished. Thus, a degree of social distance from village politics can be useful.

This is not to suggest that village courts are unresponsive to the norms and perceptions of customary society. Gordon and Meggitt cite the testimony of one old man in Enga:⁵⁰

The Village Courts here are doing an excellent job. Most of the decisions are a compromise with the new government laws and the traditional laws. Other courts give less consideration to the customs and practices of the people, so today more court cases are heard by the Village Courts than by the Local Court in Laigam.

In contrast to the local courts, the village courts have been the forum for a host of customary disputes on matters such as the use of land, bride price, divorce, theft etc. Their popularity has been due to their accessibility; familiarity of the magistrates with the background to the dispute and the parties; ability to summon a wide range of witnesses and hear their testimony unrestricted by the rules of evidence; and appreciation of the norms of customary society and the dynamics of customary dispute settlement.

While the village courts are thus clearly a new forum for dispute settlement introduced by the state into village communities, and while they have not been immune from the contradictory tendencies of informal justice mechanisms elsewhere discussed above, they do seem to have become an accepted institution operating within and responding to the needs of customary society. Recent criticisms and proposals for reform⁵¹ have centred around improving the effectiveness of the village courts and the degree of state support accorded to them. The conflicting pressures of the state and custom - the official and the unofficial - have not prevented the village courts from operating as a successful hybrid institution.

C SPECIALIST CUSTOMARY LAND COURTS

I Disputes over Customary Land

While the Pacific experimentation with 'customary' village and island courts has been limited and occurred mostly in recent times, there has been a much longer and more widespread experience with specialist institutions to deal with customary land.⁵² Since the creation of the Maori Land Court in 1865, there has been a steady stream of new state courts in various Pacific jurisdictions,

operating to a degree separately from the ordinary court system, with the specific function of deciding disputes over customary land. In order to understand this development, one has to look first to the nature and causes of land disputing and then to the various functions which land courts have been expected to perform both in the colonial period and currently.

Land disputing is endemic in the Pacific. The root cause of land disputes may be found simply in the primary importance of land - economically, spiritually and politically - in Pacific customary societies. But a number of more recent factors may explain the growing dimensions of the problem. The first is population pressure. Most Pacific island countries are experiencing explosive rates of population growth,⁵³ much of which has to be absorbed at the village level. This puts strain on the ability of the customary land tenure system to cope and encourages individuals and groups to test boundaries and rights to uninhabited lands which might otherwise not have become the subject of contention. The second factor is the growth of the capitalist economy within the customary land tenure system.⁵⁴ This allows individuals to make profits out of land which was previously a subsistence resource. Further, cash cropping involves an intensive, organised and longterm use of land - a use which may derogate from the variety of flexible uses recognised under customary tenure. The use of modern methods increases the amount of land which individuals can cultivate and, with it, their greed for land.

While land may be the single most important cause of disputing, land disputes may be symptomatic of a wider anxiety about change in customary society. As it was put to the Papua New Guinea Commission of Inquiry into Land Matters 1973:⁵⁵

While people are ostensibly fighting about land, they are also fighting about a great deal else. As the exchange system crumbles under monetisation etc, land has become the central focus for internal politicking.

Finally, the very flexibility of customary land tenures can foster disputes. A complex, overlapping set of rights of ownership and use; succession to land rights by descent which may lie dormant until asserted by occupation; the lack of any system of mapping boundaries and registering titles - all of these factors leave the way open for disputes.

Land Customary land disputes may prove very difficult to resolve. It is a characteristic feature of such disputes in the Pacific that the mere decision of a court will not end the matter. As Daly CJ commented sardonically:⁵⁶

It is trite to say that it is a fundamental doctrine of all courts that there must be an end to litigation. In Solomon Islands there is, however, a distinct reluctance to accept that this doctrine applies to customary land cases.

Disputes frequently continue over a period of years as both parties exhaust all available avenues for redress and simply disregard adverse decisions. This situation of prolonged uncertainty can inhibit any desire to develop the land.

II The Functions of Customary Land Courts

The central importance of land and the seriousness of disputes over it gives one reason for the establishment of land courts. Thus, the Western Samoan Land and Titles Court was originally created by the German Governor, Dr Solf, in 1903 because he recognised the necessity of resolving disputes over matai titles and the tenure of land if peace and order were to prevail.⁵⁷ During the colonial period in the Pacific, land tenure was often one of the few areas where custom was expressly recognised. Thus, if land disputes were to be managed by the colonial administration at all, the procedures of the ordinary courts would hardly be appropriate. However, colonial land courts were not simply established to deal with a troublesome and complex class of disputes. They may also have had a transforming role. The Maori Land Court was created to extinguish Maori proprietary customs by transforming all land under customary tenure into freehold titles.⁵⁸ This had the further purpose of facilitating alienation to European settlers. The Cook Islands Land Court was brought into being by the New Zealand Administration in 1902 with the purposes of making land available for settlement and encouraging productivity on Maori land by breaking down communal ownership and transferring the land to individual families.⁵⁹ Tenure was therefore transformed to 'freehold' title (though it was an inalienable, managed form of freehold) and the court process had the additional aim of comprehensive registration.

Land courts presently perform a variety of functions. They may not be restricted to boundary and ownership disputes. Thus the Maori

Land Court's functions are as much social and administrative as judicial.⁶⁰ Clause 46 of the new Maori Affairs Bill 1987 sets out, for the first time, a list of the Court's general objectives, objectives which are already substantially reflected in the practice of the court.⁶¹

(1) The primary objective of the Court shall be to promote and assist in the retention of Maori land and General land owned by Maori in the hands of the owners and the effective use and management of such land by or on behalf of the owners.

(2) In exercising its jurisdiction under this Act, the Court shall seek to achieve the following objectives:

- (a) To ascertain and give effect to the wishes of the owners of any land to which the proceedings relate;
- (b) To provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal;
- (c) To determine or facilitate the settlement of disputes and other matters among the owners of any land;
- (d) To protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority;
- (e) To ensure fairness in dealings with the owners of any land in multiple ownership;
- (f) To promote practical solutions to problems arising in the use or management of any land.

In the exercise of its role of facilitating the more effective use of Maori land, the Court has promoted and developed a number of innovative legal reforms.⁶²

In Samoa, the customary land tenure system is based on the holding of chiefly estates and the performance of reciprocal rights and obligations between chiefs and commoners.⁶³ All land is appurtenant to the *pule* (authority) of a matal. The matal is elected by all the members of an extended family group acting together (the '*aiga potopoto*'). The family has a duty to render service to its matal but, in return, the matal has a duty to act in the interests of the '*aiga*' and to manage the estate for the common benefit. Thus, the focus of disputes in the Land and Titles Court is often on the rightful holder of a matal title and the extent of the rights and obligations owed within the family institution.⁶⁴ Individual land holding and use occurs within the broader framework of the family estate and is dependent on the rendering of service (*tautua*) to the

matal. Because of the way land is woven into the social fabric in Samoan custom, it would be misleading to see the court's function as restricted to 'ownership' and boundary disputes. It will often be involved in determining the appropriate use to which land should be put, the extent of service, the consequences of failure to perform service and, in extreme cases, banishment.⁶⁵ The supervision of matal titles is also important in the context of the national electoral system, as the holding of a title is a necessary qualification to vote.⁶⁶

In carrying out these varied functions, the court acts as a deliberate protector of the customary system: upholding and enforcing the authority of the matal; preserving the established hierarchy of Samoan village life; maintaining just and reasonable standards in village affairs. As such it supervises the customary system generally.

The Lands Court in Tuvalu also exercises a wide jurisdiction over customary matters which goes beyond the mere adjudication of title to customary land. The Native Lands Act Cap.22 gives the court authority over: native wills and all cases arising from the administration and partition of native estates (section 15); native adoptions and the conveyances of land which such adoptions may entail (section 16); native customary fishing rights (section 17); native leases (section 18); the paternity, maintenance and property rights of children born out of wedlock (section 20). All of these issues may affect customary proprietary rights in a system of tenure based on the membership of descent groups. But the Tuvalu example further underlines the point made in relation to the Maori and Western Samoan courts: that Pacific land courts frequently exercise an extensive protective jurisdiction.

III The State's Options

The subject of the need for specialist customary land institutions continues to be a matter of debate in the Pacific and the picture is one of divergent solutions rather than of a general trend. Thus the Lands Court of the Gilbert and Ellice Islands Colony which, as Crocombe states, 'did probably the best and cheapest job of any land court in the Pacific for the 15 or 20 years after it was set up'⁶⁷ has been continued in Tuvalu but rejected in Kiribati in favour

of the Magistrates' Court with an appeal to the High Court (although these courts are supplemented by specialist land magistrates for customary land cases).⁶⁸ The Cook Islands Land Court and the Land Appellate Court were absorbed into the ordinary court structure in 1981.⁶⁹ Land issues are now dealt with simply by a Land Division of the High Court and appeals lie to the Court of Appeal. Continuity has been maintained in Western Samoa and New Zealand, although the role of the Maori Land Court has undergone considerable transformation and its work is now supplemented by the Waitangi Tribunal.⁷⁰ In the Solomon Islands, land matters are dealt with at first instance by the local courts but, since 1975, appeals have lain to specially constituted Customary Land Appeal Courts. Although a further appeal does lie to the High Court, questions of customary law may not be reheard.⁷¹ In Papua New Guinea an unsatisfactory dispute settlement procedure by a centralised Land Titles Commission⁷² was progressively replaced from 1975 by a decentralised system of land mediators, local and provincial land courts.⁷³ These operate separately from the village courts. In Vanuatu there was a deliberate decision not to create a separate institution but to vest responsibility for land matters in the island courts with an appeal lying directly to the Supreme Court.⁷⁴

The existing practice in the Pacific reveals a range of possible options in managing land disputes:

- * leave the resolution of such disputes solely to the customary processes;
- * attempt to support the customary processes through acknowledgement of them in the state system;
- * create a new state law institution which reproduces some of the customary processes;
- * create a state law institution which operates similarly to other state courts but which applies the rules of customary land tenure;
- * leave the resolution of such disputes to the ordinary courts;
- * minimise the incidence of such disputes by comprehensive land registration and administration.

Opinion at the grass-roots level is often strongly in support of relying on the customary processes alone. Surveys of popular opinion in the Solomon Islands showed a preference for customary processes on the grounds that they were comprehensible to the people, controlled by

the people and more likely to apply customary law correctly than the introduced courts.⁷⁵ This preference was maintained even though in most areas it was admitted that the customary processes were declining in their efficacy. In Samoa, there is a strong cultural value in resolving land and titles disputes at the family or village level. Tiffany suggests three reasons for this:⁷⁶

First, villagers tend to regard local settlement as the most desirable way of dealing with conflict. Thus, chiefly appeals to avoid the publicity and shame of airing grievances in court are often effective. Second, persons who insist upon going to court will be pressured by their chiefs and 'aiga members to have the matter handled locally.... Those persisting in submitting petitions and ignoring chiefly advice are likely to be considered troublemakers, a status with potential repercussions on future relations with their matai, 'aiga, and village.... Third, a dispute will not be scheduled for formal hearing until negotiations have taken place ... and the registrar is satisfied that the issue cannot be resolved internally.

An explicit attempt to ensure that the customary processes are used is found in the Local Courts (Amendment) Act 1985 (Solomon Islands) which requires all parties to land disputes to refer their disputes to the chiefs and to prove that all traditional means of solving the dispute have been exhausted before a local court may take jurisdiction (section 8D). The local court may make extensive reference to the chiefs' decision when conducting its own hearing (section 8E), and chiefly decisions may be recorded by the local court (section 8F).

The Land Disputes Settlement Act Ch.45 (Papua New Guinea) takes up the third option of creating a new state law institution which reproduces some of the customary processes. Promulgated following the recommendations of the 1973 Commission of Inquiry Into Land Matters,⁷⁷ the Act states its purpose as:

... to provide a just, efficient and effective machinery for the settlement of disputes in relation to interests in customary land by-

- (a) encouraging self-reliance through the involvement of the people in the settlement of their own disputes; and
- (b) the use of the principles underlying traditional dispute settlement processes.

The first level of the processes introduced by the Act is mediation. Land Mediators are not to be appointed in any given area unless they

have been requested by the local people and a real need for mediation exists. The choice of mediator also depends on consultation at the local level. In boundary disputes, mediators are required to walk the boundary with the parties (section 18(2)(a)). Agreements reached may be recorded and will be binding if approved by a local land court (section 19). Proceedings before the next tier, the local land court, cannot commence until mediation has been exhausted (section 27). Local land courts enjoy considerable procedural flexibility and are governed only by the Act and any relevant custom (section 35). The courts are directed to consider the customs of the area in so far as they relate to (a) interests in land that are recognised by custom; and (b) the process by which such interests are allocated or re-allocated by custom (section 39(2)). The Act draws attention to a wide range of customary interests of a limited nature, short of exclusive use or possession, which may be taken into account (section 39(3)). Orders may be made in relation to these limited interests. The court may also require the payment of compensation or customary tribute, or the giving of a feast (section 39(5)). It has a limited power to recognise former interests on a basis of need (section 40). The final level of appeal is to a Provincial Land Court (section 60).⁷⁸

IV Conclusion: State Courts or People's Courts?

Against this background of different approaches, some themes common to the attempt to develop state-backed 'customary' institutions in general emerge from the land court experience. First, the introduction of a new institution is not the only possible state reaction. The state may leave the resolution of such disputes to customary processes. New institutions may, by providing an alternative forum, weaken customary processes and encourage people to litigate. Many land courts in the Pacific have experienced soaring increases in the number of claims brought.⁷⁹ This may be partly as a result of new pressures on customary land tenure but it may also reflect litigants' perceptions that the new court presents fresh possibilities for personal advantage.

Second, the introduction of a new state institution inevitably has a transforming effect on customary land tenure, whatever the intention or rhetoric. In part, this may be deliberate. Customary processes do not always lead to the peaceful resolution of disputes,

nor can they always cope with the pressures of change, population growth and the cash economy. The state institution may be introduced to meet shortcomings perceived in the customary system. Yet, in their administration of customary law, land courts may transform what they set out to enforce: by freezing the flexibility of custom; by standardising diverse and localised practices; by simplifying complex rights of use and occupation; by subjecting land disputes to alien procedures and requirements. For example, the Cook Islands Land Court facilitated a ruinous fragmentation of title by registering primary and secondary members of the lineage as equal owners of the land and by allowing succession to all children equally.⁸⁰ Thus were the flexible and occupation-related customary rights converted into a regime of an ever-multiplying number of owners holding rights of correspondingly decreasing utility in a host of different land parcels.

The transformation wrought by the introduction of state courts will be perceived as such by the indigenous people, though such courts may purport to apply customary law. In 1977 there were calls in the Cook Islands Legislative Assembly to abolish the Land Court altogether and to leave land issues to customary processes. One Member of Parliament claimed:⁸¹

Most of the land problems we are experiencing here today are when a decision is made by a person with altogether different customs and culture regarding land matters. These people are the Judge of the Land Court and the lawyers who twist things around so their clients will win.... The only people who can give correct boundaries are the title holders or the landowners.

Even where state resolution of customary land matters is introduced under an ethos of local participation the courts may still be perceived as alien institutions. Thus, Hogbin records in 1944, shortly after the local courts were established in the Solomon Islands, that a visiting resident commissioner:⁸²

... wondered whether he ought to refrain from putting in an appearance at the Court, thus emphasizing that the Administration looked upon it as the people's own concern, or whether he ought to attend as a gesture of politeness.... [The court president] immediately replied, 'But the Court doesn't belong to us: we never had courts before: it's a Government affair: the people would be offended if the Commissioner stayed away'.

The ideology of informal justice and participatory institutions does not make a state court into a people's court.

However, the introduction of a specialist institution staffed by indigenous people versed in custom and mindful of its processes as well as of its rules may result in decisions which are more likely to accord with customary expectations and thus resolve the dispute. The Solomon Islands Chief Justice has expressed himself in favour of the introduction of a Customary Land Appeal Court which substantially removed jurisdiction over customary land appeals from the High Court:⁸³

... It is, to my mind, a great development of the system of dealing with customary land cases that we now have a Customary Land Appeal Court. That court, through the experience of the majority of its members in custom concepts and the legal experience of its magistrate member, has the ability to participate in the welding of customary concepts and the English language in a way which will not overlay the custom with inadequately modified expressions which in time could result in the custom giving way to inappropriate and possibly undesirable concepts of received land law.

Yet the attempt to tap customary processes and expertise may result in a contrary demand for the detached qualities of the formal state justice system. Resort to mediation may be rejected by the people because customary processes have already failed to resolve the dispute with the result that the state system is called on to provide an adjudicated and enforced solution.⁸⁴ Allegations of bias are commonly made of local magistrates.⁸⁵ Although Western Samoa now has a Samoan Chief Justice, his usual complementary role as President of the Land and Titles Court has instead been filled by a New Zealand Judge seconded for the purpose.

All of this underlines the contradictions of informal justice, of the state's creation of customary courts. It also counsels against seeing the recognition of customary law solely in terms of the establishment of new structures. As the Australian Law Reform Commission notes:⁸⁶

The history of 'recognition of indigenous law' ... has largely been one of trying to establish formal 'courts' or other similar mechanisms, usually run by the indigenous people, to which authority could be transferred or which could be recognised. But if the aim is only to recognise local customary laws, then (in societies lacking courts or similar agencies and relying on less formal, less centralised procedures based on kinship and

locally-recognised power) attempts to 'find' or 'erect' official machinery are misconceived.

If the creation of customary courts is to be justified it will be not solely as a means of recognising customary law. Indeed, the effect of the introduction of such institutions will be to some extent to transform custom. Yet the evidence also shows that new institutions may be accepted by the indigenous community or at least be seen as responsive to customary needs and values, and may thus act as an effective intermediary between custom and state.

*...the sooner we get through problems and the solutions for them, the better. - Sinale Goava, Chairman, Papua New Guinea Commission of Inquiry into Land Matters 1973.*¹

A LAND TENURE AS AN EXAMPLE OF PLURALISM

1. THE SPECIAL CASE OF LAND

Land is one of the most important substantive areas for a consideration of the implications of legal pluralism and the nature of state recognition of customary law. The conflict between 'traditional custom' and 'introduced Western Law' has not been merely an issue about a legal regime for land tenure. It has been vitally concerned with the control of territory both as a resource and, in the indigenous perspective, as the basis for so much else in the customary way of life.

Yet its very importance lends land tenure a special character which marks it out from other aspects of customary law. This has been reflected in the way in which customary land tenure has been dealt with by state law and in the formulation of policy.

The burden of this chapter, complementing the discussion of customary courts in Chapter V, is to use the example of land to illustrate the basic themes and preoccupations of the thesis. While it will be necessary first to outline the special characteristics of land as an example of the recognition of customary law, Part A will then go on to demonstrate the relevance of a pluralist analysis to land issues. Land has been a powerful focus for the reassertion of autochthonous values in the Pacific which has provided the political impetus for reconsidering the role of the state in relation to custom. The translation of autochthonous values into law and practice in the

VI LAND: CUSTOM AS TITLE

Let me say at once that it is not a simple matter of traditional custom versus introduced Western Law. A discussion of land matters in these terms is utterly unhelpful.... This is perhaps understandable language in these days of decolonisation, but the sooner we get through it and get down to a more hard-headed examination of land problems and the solutions for them, the better. - *Sinaka Goava, Chairman, Papua New Guinea Commission of Inquiry into Land Matters 1973.*¹

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field of land tenure has generated much experience which can contribute to an understanding of the problems and possibilities involved in recognition generally.

The chapter then goes on to examine the dynamics of two of the most important processes in the state recognition of customary land tenure: the registration of customary land and the return of alienated land to customary ownership. Each process involves confronting the nature of customary tenures and the methodological issues raised by recognition. Given that customary tenures typically involve a complex web of individual rights and interests operating within a group framework, both processes must address the central issue of which interests to recognise.

Land may be distinguished from other aspects of the recognition of customary law on historical, policy and methodological grounds.

From the beginning, colonial law regarded land as a separate issue, although the principles developed to regulate it did operate along similar lines to those dealing with customary law generally.² By drawing a distinction between sovereignty (*imperium*) and title to territory (*dominium*), colonial law was able to accept the survival of the pre-existing aboriginal title. Land was often the subject of express guarantees upon colonisation: the Treaty of Waitangi in New Zealand, the more qualified language of the Fiji Treaty of Cession, the 'Erskine Pledge' in Papua New Guinea.³ Indeed, land issues figured large in British official intervention in the Pacific. The Imperial Government was caught between the incompatible aims of protecting indigenous land rights from the unscrupulous encroachments of European settlers and the need to foster settlement. Its response to these pressures was often the establishment of special commissions or courts to adjudicate European land claims. This was a first priority of Gordon in Fiji.⁴ Land issues were a major reason for the Berlin Conference of 1889 on Samoa, where a commission to settle land claims was also established.⁵ The Anglo-French Convention of 1906 and the subsequent Protocol of 1914 establishing condominium government over the New Hebrides were mainly concerned with the workings of a Joint Court which would adjudicate and register European land claims.⁶

One consequence of the separate treatment of land during the colonial period was that customary tenure could be preserved even though the administration accorded little other recognition to

customary law. Thus, in Papua New Guinea where the administration set its face against any general recognition of customary law throughout the colonial period, there was extensive protection of customary land tenure.⁷ The New Zealand Administration continued to provide for the survival of customary land tenure in Tokelau even after it had formally 'replaced' most other aspects of the customary system with introduced English law.⁸ The same is true in present-day Fiji where Fijian native land tenure is constitutionally entrenched but in other respects the state legal system recognises little of custom.⁹

The special case of land is reflected in the separate protection accorded to customary land tenure in many Pacific constitutions. The subject has also been treated as a distinct policy-making exercise, witness the Papua New Guinea Commission of Inquiry into Land Matters 1973¹⁰ and the Solomon Islands Special Select Committee on Lands & Mining 1976.¹¹ The Australian Law Reform Commission excluded land tenure from its report on the recognition of Aboriginal customary law because the subject was already being dealt with by other governmental bodies.¹²

As a matter of policy, this separate treatment of land is natural and inevitable. Precisely because land tenure is concerned with the regulation of a country's most basic resource, it cannot be considered in a purely 'law and justice' perspective. Land raises multiplex issues of policy about economic development and conflicting needs and uses. As Sinaka Goava pointed out, these policy issues cannot be reduced to a contest between traditional custom and introduced Western law. At any rate, as this thesis demonstrates, the interaction of custom and state law cannot be understood as a simple dichotomy. It is a complex and shifting interface of influences and interpenetrations, resistances and reactions.

Finally, land should be distinguished on methodological grounds from other aspects of law when considering the range of options open to the state in dealing with custom. As suggested in Chapter IE, land and other economic rights create different conflicts and require different solutions. More broadly, a case for the recognition of customary law was developed in the Introduction and Chapter I based on a rejection of the notion of law as necessarily applying territorially. It was suggested that the link between law and territory was part of the ideology of legal centralism which obscured

the fact that groups within a larger society had the capacity to generate their own law which applied personally to members of the group. In this way customary law was seen as the internal self-regulation of indigenous groups. State law had a duty to adjust its own operation to take account of this separate sphere. As land tenure is concerned with territory, it inherently involves different mechanisms for recognition than can be accommodated through a purely personal conception of customary law.

2 THE RELEVANCE OF A PLURALIST ANALYSIS

Despite these distinctions, land tenure in the Pacific does exhibit many of the traits of pluralism and a pluralist analysis is essential to an understanding of the forces and constraints on land policy. Customary tenures share the characteristics of customary law in general which distinguish it from state law and which constrain their commensurability. Existing approaches to recognition reflect the imprint of colonialism - a dual system of tenures divided racially, customary tenure applying to the indigenous peoples and introduced tenure applying to the European settlers. However the preservation of customary tenure, which was one of the ostensible aims of the colonial administrators, in fact masked enormous transformations. Some of these, ironically, were the direct result of the colonial state's attempts to preserve custom by registration. Others were internal transformations within indigenous societies as they responded to the new realities of colonial rule and the cash economy.

Equally, however, land tenure illustrates the persistent fact of pluralism. Customary tenures survive as an independent reality, whether recognised by the state or not. They retain an independent capacity to act and react, a capacity which may resist or subvert state law attempts at reform. Finally, in the transition to independence in the island states and in the assertions of special rights by the indigenous peoples of Australasia, land issues have been cast in terms of a reassertion of autochthonous values: custom as title.

I Distinguishing Features of Customary Tenures

Customary land tenure, like other aspects of customary law, may be distinguished from Western tenures at least in part by the simple absence of the state. As Crocombe demonstrates, the lack of a centralised administration conditioned in various ways the form of pre-contact traditional tenures.¹³ It kept people tied to their local community. War and the threat of war restricted mobility and forced groups to cooperate closely to survive. The absence of courts meant that groups had to settle their own disputes. It also meant that land allocation within the group was not simply a matter of the application of customary principles but also a reflection of political realities and power structures existing at the time. Flexibility in the application of the rules of customary land tenure was also increased by the absence of writing. There were no records of the genealogies on which a descent-based tenure system depends. Nor were there accurate methods of delimiting boundaries. Further, the theoretical range of rights which a person possessed under customary tenure were in practice limited by the need for active participation. Only some rights could thus be activated and enjoyed. Finally, customary tenures had to be flexible because all the members of the group depended on the land for their survival. They thus needed a cluster of rights to cultivate, hunt and forage over different types of land. The result was a very complex and shifting pattern of individual and family rights of use and occupation. In this situation, 'ownership' may well be a misleading concept.

In understanding the special nature of customary tenures, it is equally important to appreciate the spiritual dimension.¹⁴ The central importance of land in Vanuatu has been described in the following way:¹⁵

... custom land is not only the site of production but it is the mainstay of a vision of the world. Land is at the heart of the operation of the cultural system. It represents life, materially and spiritually. A man is tied to his territory by affinity and consanguinity. The clan is its land, just as the clan is its ancestors.

Spiritual affinity has been identified as a key element in Australian Aboriginal tenure systems.¹⁶ Elkin seeks to express this dimension:¹⁷

It is true, at least from our point of view, that members of such a local group owned their 'country'. But that is only one

aspect of the situation. A more significant aspect is that they belonged to their 'country' - that it owned them.

This spiritual dimension contributes to the difficulty of comparing indigenous and Western notions of land tenure. It also helps to explain the continued vitality of the customary system in the face of state efforts to reform it.

McHugh discusses the importance of the concept of *turangawaewae*, which expresses traditional attachment to land, to the New Zealand Maori. Although the Maori has suffered widespread alienation of customary land and the majority no longer live in their tribal areas:¹⁸

... *turangawaewae* remains a strong feature of modern Maori culture.... It represents a selfless attachment to kin and ancestors and thus provides an individual with mana, or social standing, among his own people by indicating pride and self-esteem in being Maori. *Turangawaewae* is an enduring feature of Maori society that has been greatly underestimated by the pakeha.

II The Imprint of Colonialism

State recognition of customary tenures still bears largely the imprint of colonial policies and methods. In this respect also land tenure may be equated with other aspects of customary law. Although, as has been seen, the preservation of customary tenure began from a separate set of colonial law principles, the outcome was similar: a duality of tenure systems, one reserved for the colonised and the other for the colonisers. Customary tenure existed by virtue of its recognition by the Crown. Title to alienated land existed by virtue of an express grant from the Crown.

This basic duality in most cases survived independence in the island states and indeed is reflected in constitutions and lands legislation. Thus, for example, Article 101 of the Western Samoan Constitution provides:

- (1) All land in Western Samoa is customary land, freehold land or public land.
- (2) Customary land means land held from Western Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.
- (3) Freehold land means land held from Western Samoa for an estate in fee simple.
- (4) Public land means land vested in Western Samoa being land that is free from customary title and from any estate in fee simple.

The Constitution also entrenches the inalienability of customary land, thus freezing the existing lines of division (Article 102).

Similarly in Fiji, the Native Lands Act Cap.133 preserves a category of 'native lands' which are defined as 'lands which are neither Crown lands nor the subject of a Crown grant' (section 2).

A further aspect of this duality is that, in the island states, by far the greatest proportion of land is within the customary sphere: 83% in Fiji, 97% in Papua New Guinea, 80% in Western Samoa.¹⁹ Alienated land is often the best and most productive but nevertheless customary tenure does continue to regulate most land in the Pacific islands.

While in some countries little was done during the colonial period to exert state regulation over customary tenure (this was very much the case in Papua New Guinea, Vanuatu and the Solomon Islands), there was a significant movement in colonial policy which bore fruit notably in Fiji, the Gilbert and Ellice Islands and the Cook Islands to register customary ownership.²⁰ The technique and effects of registration will be examined in Part C. For present purposes it is sufficient to stress that registration was consistent with the general colonial approach to customary law. By defining and recording rights, registration inevitably transformed those rights and exerted state control over custom. A description of such lands as held 'according to native custom' is a contradiction in terms because the process of registration divests the indigenous community of its internal capacity to regulate and apportion land rights. It also freezes a fluid reality, typically reduces local variations to a uniform model and restricts the flexibility of interests and their enjoyment which is characteristic of customary tenures. All of these trends were exemplified in the work of the Fiji Native Lands Commission²¹ and the Cook Islands Land Court.²²

The colonial period was also one of enormous internal transformations within customary tenures. These transformations are masked by the appeal to tradition inherent in the expression 'customary tenure'. As Crocombe points out: 'What appears to be, and is often believed to be, the traditional custom, operates in radically different ways when the context is changed'.²³ One major aspect of change has been the adjustment of customary tenures to the demands and rewards of production for the market. Cash cropping presents opportunities for individual enrichment. It also changes the way in

which land is used, requiring greater degrees of permanence and exclusivity than did subsistence cultivation. Customary tenures do not necessarily act as a check on this, especially if individual accumulations can be justified on the basis of an appeal to traditional principles.²⁴ Rodman, in a study of changing land distribution in Vanuatu,²⁵ has shown how the survival of customary land tenure has in fact allowed for the rise of a wealthy class of copra producers with disproportionately large estates. This has been achieved partly because of the pre-eminence accorded to 'Big Men' in Vanuatu society. But equally the customary land tenure system, because it is flexible and depends on the ability to marshal traditional arguments for land claims and to participate in ritual gift-giving on death, favours the articulate and the rich. She concludes:²⁶

The Longanan system of customary land tenure has not impeded the accretion of land in the hands of a few and the consequent accumulation of personal wealth that underlies the emergence of new forms of social inequality in the district. To the contrary, the persistence of customary land tenure has allowed the emergence of a few relatively affluent copra producers in a pattern familiar to Pacific and African anthropologists, whereby 'Indigenous institutions often serve as highly effective mechanisms for economic and political change'. Rich peasants rise by following traditional paths to wealth and power into a world of new consequences; it is the flexible resilience of these traditional paths that transforms change into an illusion of sameness. This illusion presents rich peasants as the masters of tradition, disguising the extent of social change and, in part, through this disguise itself, slowing the pace of differentiation.

III The Persistent Fact of Pluralism

Nevertheless the history of customary land tenure is not solely one of transformation: it is also one of persistence. Customary tenures continue to operate as a fact, whether or not recognised by the state. They may frustrate state efforts at reform or subvert them.

The process of recognising Aboriginal land claims in the Northern Territory has revealed that, despite two centuries of non-recognition by the state, a system of Aboriginal customary tenure has survived as a living reality within Aboriginal communities.²⁷ The grant of land rights to the Pitjantjatjara people of South Australia

was initially met with incredulity by them. They had always assumed that the land was theirs and had regulated its use according to traditional principles. As the testimony of one old Pitjantjatjara man put it:²⁸

The laws came from our grandparents. It is a strong law and we want to keep it strong. We want to keep the land, hold the land, that is our strongest desire. It is our land, it cannot be changed. We have been holding it forever. We wish to do so. It comes down through the generations to be passed on from one generation to the other. We cannot change the law every year; it is one law and it is there forever. We hold the law and our beliefs in our head, not on pieces of paper.

Of course, in many places customary tenures have been far more disrupted by European settlement and the effects of change than in the central Australian desert. Nevertheless, even in a country such as New Zealand where the Maori have experienced widespread alienation and change, against a background of non-recognition of customary tenures, evidence before the Waitangi Tribunal discloses the persistence of traditional associations with land and of the exercise of customary rights to fish and forage.²⁹ These rights are perceived by the Maori as deriving their validity from customary law, although many of them are exercised contrary to state law.³⁰

In the island states, the persistence of custom constrains the possible extent of state reform. Fenbury argues that commitment to the rules and rituals of traditional society has inhibited the willingness of Papua New Guinean villagers to adopt individualised tenures.³¹ Fingleton has made a detailed analysis of the effect of the Land (Tenure Conversion) Ordinance 1963 (Papua New Guinea) which also demonstrates the persistence of customary tenures.³² The Tenure Conversion Ordinance was part of a package of legislation introduced in Papua New Guinea in the early 1960s designed to overhaul the system of customary tenure.³³ The explicit purpose of the Tenure Conversion Ordinance was to introduce throughout the Territory a single system of land holding providing for secure individual registered titles modelled on the Australian system. Upon the grant of a title, all customary interests in the land were abolished and an estate in fee simple created. A major benefit of the new individualised title was the ability to raise development finance on the basis of it. The Ordinance did incorporate some safeguards to protect community

interests at the time of conversion but the basic intent was to stimulate production through a radical transformation of the tenure system. Yet Fingleton's research in two areas where considerable conversion had occurred revealed that the legislation had not had the intended effect. While titleholders regarded themselves as holding their titles individually, they did not perceive themselves as capable of freely disposing of their blocks. Instead they accepted that on death the land would pass to their customary successors and this in fact was happening. Many titleholders continued to exercise customary rights on non-registered land and, in some cases, the former customary owners had reasserted rights over registered land.

As will be seen in the discussion of registration of customary rights, the persistence of custom in that context will frequently lead to a divergence between state law and customary practice or, to use the terms adopted in Chapter 1, 'lawyers' customary law' and 'sociologists' customary law'.

B LAND IN THE REASSERTION OF AUTOCHTHONOUS VALUES

In the transition into independence in the island states and in the claims to special rights by the indigenous peoples of Australasia, land has been seen in terms of a reassertion of autochthonous values. Thus the role of custom as a basis for entitlement and as a system of tenure has gained a renewed significance. This section assesses the place of custom in land policy as it emerged in the policy and constitution-making processes in Melanesia and the place of custom in the land rights movement in Australia.

I Commissions, Constitutions and Alternative Development in Melanesia

Independence in Papua New Guinea and the Solomon Islands was preceded by watershed exercises in lands policy.³⁴ In both cases, the committees were composed of indigenous islanders and they were populist in the sense that they consulted widely at the grassroots level and premised their recommendations on popular opinion.

The 1973 Papua New Guinea Commission was appointed in a reaction against the attempt by the Australian Administration in 1971 to

introduce a set of four land bills into the legislature which would have committed the country to a radical transformation of tenure towards individualisation on the Kenyan model. The Commission was charged with the enormous task of articulating a new policy to deal with all the intractable land problems facing Papua New Guinea and with making detailed proposals for implementing legislation.³⁵ The basic principles which guided the Commission's recommendations stress the continuing role of custom. The Commission opens by pointing out that land is a basis of social relations:

We have been conscious throughout our work that land is the basis of economic and social relations for most of Papua New Guinea. We are unable to regard land as simply a commodity or a tool. Our Report is affected not only by such questions as how to increase production, although this is a most important consideration; it is deeply concerned about what changes in society will result from changes in land tenure and the laws on land transfer (para.2.3).

It then goes on to state that it is 'building on a customary base':

The balance between community and individual rights differs between various Papua New Guinea societies but is always complex and delicate. Within limits individual members of kinship groups can compete and do business on their own. The individual must accept restraints from his group but in return he is given its support and is entitled to basic rights, including land rights as a member of the group. Although this system has its limitations, it also has many great strengths. We recognise the need to alter some customary practices to promote greater productivity from the land. But we do not think that the basic social structure of the people has to be destroyed to do this. We do not recommend a sweeping agrarian revolution and a total transformation of Papua New Guinean society. We do not recommend either collective or individualistic extremes. Our approach is rather to encourage evolution of certain existing features of our society in order to strengthen opportunities for commercial farming and permit freer transfer of rights to those who most need land (para.2.9).

This principle was carried consistently through the Report into the recommendations on registration of customary land, return of alienated land, succession, dispute settlement and forestry. Nevertheless, the Commission did recognise the ambivalent and changing nature of custom.³⁶ It signalled a tendency towards greater individualisation of land rights, especially as a result of cash cropping, although accepting that ultimate group control generally persisted (para.3.3). It justified registration of traditional rights to land in part because:

... always complex and shifting, [they] have been made more complex by new influences - population increase, movement and intermingling of people due to peace and modern communications, urbanisation and commercial agriculture (para.3.6).

The Commission also balanced the reference to custom with an emphasis on the role of the state in controlling: leases over customary land, the management and reallocation of alienated land, urban land and a residual category of national land.

The Solomon Islands Select Committee was, if anything, more forthright in its suspicion of introduced tenure systems, the role of the state and economic development. Its Report opens by asserting the original unqualified ownership of all land in the Solomon Islands by Solomon Islanders; a colonial history of alienation, often by fraudulent means; and the disruptive effects of development projects. The Select Committee then enunciated six general principles:

- 2.1 Most land in the Solomons is owned by groups: lines, tribes or clans....
- 2.2 Land should be returned to and kept under the control of groups that own it. By owning land, groups can control the effects of development on their way of life.
- 2.3 Groups may own land, but individuals use it, working either together or by themselves. Individuals using land have the right to the benefits from the development they do to the land, provided they share part of the benefits with the group that owns the land.
- 2.4 Landowning groups live longer than their individual members. Each generation is responsible for making sure that enough land will be available for the next generation.
- 2.5 Cash crops, development projects and wages are an unreliable alternative to subsistence gardening. Population growth makes it even more important to keep land available for subsistence in the future.
- 2.6 Government is often one-sided about development and registration. Government should take more time to explain the alternatives and the likely effects of different choices. Then Government should let the people themselves decide what they want to do.

The fundamental reorientation presaged by these reports has not so far been realised in practice. In Papua New Guinea, alienated land was not returned *en masse* to the customary owners. Instead the Government set in motion a plantation redistribution scheme, giving it the power to acquire plantations compulsorily and redistribute them to groups claiming traditional ownership.³⁷ The scheme resulted in only a limited amount of redistribution and was suspended in 1981 in favour

of development by non-citizens. Registration of customary land has not been generally attempted. Frustration over inactivity at the national level has led the East Sepik Provincial Government to institute its own registration programme.³⁸ In the Solomon Islands, the Government reacted cautiously to the Select Committee Report and sought to develop its own alternative proposals.³⁹ The issue of alienated land was resolved by the Land and Titles Amendment Act 1977 which converted all perpetual estates held by non-Solomon Islanders into 75 year leases held from the state. Research into registration, which has been enthusiastically carried forward by the Lands Division, has not so far borne fruit in legislation.⁴⁰ There are some signs, especially in Papua New Guinea, that the emphasis on alternative development is now being countered by advocacy of the direct intervention of the market into the customary sphere. Controversial reports by Knetsch and Trebilcock,⁴¹ and a Task Force on Customary Land Issues⁴² have advocated direct dealing in customary land.

Only in Vanuatu did the Constitution itself ensure a radical reassertion of custom as the basis for the land tenure system.⁴³ Vanuatu had experienced the most considerable land alienation during the colonial period. Land issues had been a prime focus of resistance in popular political movements. The Vanuaaku Pati, which became the Government on independence, campaigned on a lands platform (its name means literally the 'our land' party). The result was a remarkable set of provisions on land in the Constitution which have been treated as having immediate dispositive effect. Articles 71 to 73 provide:

71 *Land belongs to custom owners* All land in the Republic belongs to the indigenous custom owners and their descendants.

72 *Basis of ownership and use* The rules of custom shall form the basis of ownership and use of land in the Republic.

73 *Perpetual ownership* Only indigenous citizens of the Republic who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.

The Chapter on Land goes on to require that Parliament, after consultation with the National Council of Chiefs, provide for implementing legislation (Article 74). Article 75 gives Parliament a discretion as to the compensation of those whose interests are adversely affected by the Constitution. Article 76 allows the

Government to hold land, the customary ownership of which is in dispute, until the dispute is resolved, and to provide 'customary institutions or procedures' to resolve land disputes. Land transactions are to be controlled by the Government (Article 77) which may also own land in its own right (Article 78) and redistribute land to indigenous citizens from over-populated islands (Article 79). Redistribution is to be done in accordance with a priority for 'ethnic, linguistic, customary and geographical ties'. The process of returning alienated land to the customary owners, as required by the Vanuatu Constitution, is to be examined in Part C. Here it is necessary to highlight the ways in which these Melanesian lands developments elaborated a reassertion of autochthonous values. First the movement is not to be explained simply in terms of nationalism. True, the independence lands debate was premised on a repudiation of the colonial heritage and a desire to undo the history of alienation from Melanesians to European settlers. In these objectives custom played an important political role because it provided an autochthonous basis for land tenure connected to a pre-colonial past. It also justified the return of alienated land by rejecting the system of tenure which had facilitated and protected alienation. The question of the alienated lands did dominate the independence agenda. But the need to ensure Melanesian ascendancy over land could have been met in other ways. Indeed, it was, in part. Citizenship proved one potent device for restricting the land rights of settlers.⁴⁴ Similarly, alienated land could have been nationalised. This was the effect of the Solomon Islands Land and Titles Amendment Act 1977, although government policy, reflected in a further amendment to the Act in 1978, did facilitate redistribution of land to descendants of the customary owners.⁴⁵ Equally, the dictates of nationalism alone could have pointed to a radical restructuring of the tenure system. The starkly opposed East African models of Kenya and Tanzania,⁴⁶ models of individual and collective reform respectively, were discussed as options in Melanesia.⁴⁷ But revolutionary options were rejected.⁴⁸ The affirmation of custom in Melanesian land policy may be partly explained by the popular basis of its development. The Papua New Guinea Commission and the Solomon Islands Select Committee were composed of indigenous Melanesians. Although they were assisted by

outside experts, the Committees expressly rejected foreign blueprints. Instead they sought to reflect the views of the people. The Papua New Guinea Commission preferred village opinion to that of the elite.⁴⁹ The Solomon Islands Committee structured its report around 'what the people said'. The Vanuatu constitutional provisions on land were also in part the result of an Ad Hoc Committee on Land Reform which reflected local views.⁵⁰ This popular basis means that the appeal to custom cannot be explained as the invention of the policy-makers themselves. The policy exercise was built upon the peoples' own perceptions and priorities.

The Melanesian emphasis on custom in the land context, although imperfectly realised in practice, did mean that custom was seen as a basis of future developments and not as the inevitably outmoded legacy of the past. This forced the policy makers to confront the legal implications of the continuing role of custom by developing appropriate methodologies for state recognition.

It also signalled a determination to create an alternative development which would centre control of the development process on the people and which would build on indigenous precedent. In this way it was hoped to avoid the landlessness, growing inequalities, impoverishment and dependence on foreign capital which had been observed elsewhere in the Third World.⁵¹ The recommendations of the Papua New Guinea Commission on registration,⁵² for instance, were a genuine attempt to cut a new pattern by balancing group and individual interests, however difficult and contradictory the result.⁵³

Finally, the new role of custom in land suggested a readjustment of the relationship between the state and customary communities. By placing the responsibility for the control of the tenure system in the hands of the customary community, the state severely restricted its power over the country's major resource. It meant that a nationally unified tenure system was rejected in favour of one which was local, varied and non-bureaucratic. In this way the land provisions secured, more effectively than any other measure could have, a continuing role for the customary community within the polity of the independent state.

International Labour Organisation Convention 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries 1957⁵⁴ provides a

II Custom and Aboriginal Land Rights

The claim to land rights by the indigenous people of Australia has been, in many respects, a claim to the recognition of customary land tenure. As one Aboriginal man put it, in making submissions to the Australian Senate Standing Committee on Constitutional and Legal Affairs:⁵²

Land rights mean a lot to the Aboriginal people because they are the basis of Aboriginal customary law. The Aborigines are very close to mother earth.... They do not talk about land rights just because they want to get something back.

As has been seen, customary tenure provided both the basis for entitlement and the form of land-holding instituted under the Aboriginal Land Rights (Northern Territory) Act 1976.⁵³ The Terms of Reference for the Woodward Commission, which drafted the Act, had stressed the recognition of customary law aspect of land rights. Mr Justice Woodward was required to inquire into:⁵⁴

The appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land....

Woodward saw one of the principle objectives of the grant of land rights in the Northern Territory as:⁵⁵

the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs.

The Pitjantjatjara Land Rights Act 1981 and the Maralinga Tjarutja Land Rights Act 1984 in South Australia also premised the grant of land rights on a recognition of subsisting traditional Aboriginal interests in the land. Each Act establishes a body corporate to manage the land but a major function of that body is to discover the wishes and opinions of the traditional owners, to seek to give effect to them and to protect their interests.⁵⁶

The importance of custom in indigenous land rights is underlined by reference to developing international law on the subject.⁵⁷ The International Labour Organisation Convention 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries 1957⁵⁸ provides a

reference point as the only multilateral treaty so far to deal specifically with the position of indigenous peoples. Article 11 deals with land and expresses 'the norm around which new customary international law appears to be coalescing'.⁵⁹ It declares:

The right of ownership, collective or individual, of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Article 13 adds:

Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.

Australia has not ratified Convention 107, in part because it reflects a now outmoded assimilationist policy.⁶⁰ But the Australian Government and representatives of the Aboriginal people have been active participants in the process of the revision of the Convention. Articles 11 and 13 do not suggest the importance attached at the international law level to customary tenure as the basis of indigenous land rights.

The grant of land rights may be not simply a recognition of customary law in itself. It may also create the space for the preservation of the customary lifestyle in general, and of other aspects of customary law as part of that. This was acknowledged as a major objective of the Pitjantjatjara Land Rights Act 1981 (South Australia) by the High Court of Australia in *Gerhardy v Brown*.⁶¹ Indeed, it is possible to see the grant of land rights, especially when accompanied by a measure of local autonomy, as a method of recognising customary law.⁶²

Nevertheless, the movement to grant land rights, especially as it has developed in Australia, cannot be explained simply in terms of the recognition of custom. This aspect received prominence in the Northern Territory because much of the land had remained as Aboriginal reserves or Crown land. This meant that Aboriginal people had been able to preserve their traditional nexus with the land and that it could be returned to them without divesting anyone else of rights. Neither of these conditions is met to the same extent in the rest of

Australia.⁶³ This has led to a reformulation of land rights in terms of need or historical association. Thus Seaman, who conducted the 1984 Aboriginal Land Inquiry in Western Australia, found that:⁶⁴

a relatively small proportion of the Aboriginal population are fortunate enough to live on their traditional lands, and then will very frequently be accommodating other Aboriginal people who have been forced off other traditional lands.

He noted that:⁶⁵

In some instances, a fear was expressed that land rights legislation based upon proof of traditional ownership might force people to vacate the land with which they had formed new relationships.

This led him to reject a land claims process based on traditional ownership and to recommend a series of more flexible tests which included long association with the land claimed by residence or use and a claim of need where the claimant group could produce a specific proposal for the use of the land which was likely to provide social benefit to its members. In New South Wales, the Aboriginal Land Rights Act 1983 does not restrict claims to traditional ownership and a draft Bill in Victoria proposes to allow claims for some categories of Crown land on the basis of traditional rights, continued association, need or compensation.⁶⁶

Further, the land claims process may result in the creation of institutions and the grant of powers which have little to do with custom. Thus the Aboriginal Land Rights (Northern Territory) Act 1976 creates a regime of Land Trusts and Land Councils to hold and administer Aboriginal land. Although these bodies are composed of Aboriginals and are required to consult the traditional Aboriginal owners on various matters, they are corporate bodies created by state law. Also the Act grants powers to traditional owners over matters unknown to custom, such as mining.⁶⁷

Finally, land claims may be seen as a constitutional matter involving a readjustment of the whole relationship between an indigenous people and the state to allow for the self-determination of the indigenous people.⁶⁸ This has been characteristic of the Canadian experience.⁶⁹ It would imply a far-reaching change in focus from an approach based on the recognition of customary law.

C STATE DEFINITION OF CUSTOMARY LAND INTERESTS

This final section examines the methodologies involved in two forms of state recognition of customary tenure: the registration of customary land and the return of alienated land to the customary owners. Both methods involve a degree of state intervention in custom as they attempt to define and record customary interests in land. The intervention of the state has an inevitably transforming effect on the complex and fluid customary arrangements. In the case of registration, the process of defining customary ownership, which involves finding a balance between group and individual interests, can lead to rigid structures which bear little relation to custom and which must be subsequently circumvented either by the operation of custom itself on the ground or by further state intervention. In the case of the return of alienated land, determining who the customary owners are may be very difficult, especially after long alienation. The notion of ownership may imply a more absolute interest than any known to custom. Thus the return of land to the customary 'owners' may result in the grant of rights to some people, to the detriment of others, in a transformation of custom.

I Registration and the Extension of State Authority

The registration of customary interests in land is not the only method of recognising customary land tenure. It is a method which involves state intervention into the customary sphere in order to define and record parcels of land and the individuals or groups with interests in them. It is perceived as state intervention by the indigenous societies of the Pacific and their Governments. The Solomon Islands Select Committee on Lands and Mining discovered a considerable amount of popular suspicion of registration because it was seen as subversive of custom and as opening the way for more direct forms of intervention in the shape of development projects.⁷⁰ There has been equal caution on the part of independent governments.⁷¹

Many of the actual examples of registration in the Pacific therefore date from the colonial period. Registration was an important part of the colonial paradigm, partly because it was a means of entrenching indigenous land rights in the face of European settlement (an objective which can be secured by other means on

independence), but partly because colonial attitudes to the recognition of customary law required definitions and written records.

These policies may be seen clearly at work in the establishment of native land registration in Fiji.⁷² The basic pattern of land registration instituted by Sir Arthur Gordon upon British colonisation of Fiji remains in place today. The Native Lands Act Cap.133 provides for the tenure of native lands by native Fijians 'according to native custom as evidenced by usage and tradition', to be 'cultivated, allotted and dealt with by native Fijians amongst themselves according to their native customs' (section 3). However section 4 then goes on to establish a Native Lands Commission. Section 6 provides:

The Commission shall institute inquiries into the title to all lands claimed by *mataqali* or other divisions or subdivisions of the people and shall describe in writing the boundaries and situation of such lands together with the names of the members of the respective communities claiming to be owners thereof.

The Native Land Trust Act Cap.134 further extends state authority by vesting the administration of all native land in a Native Land Trust Board (section 4) which controls all dealings in native land by way of sale, lease or licence and the payments for such transactions.

The transformations of customary tenure effected by the registration of native land in Fiji have been discussed in Chapter II C2 iii. The imposition of a uniform pattern of communal ownership based on *mataqali* or tribal divisions was an unreal measure derived more from colonial conceptions than indigenous precedent. The evidence of the Native Lands Commission itself disclosed the diversity of pre-contact tenures; their constant state of change as a result of war and migration; and the great changes already wrought by European settlement. If there were a pattern discernible in customary tenure, it would be one of an overlapping hierarchy of rights and not of communal tenure. The family and the village exercised the most important land rights within the hierarchy. Many Fijians were not aware of their membership of a *mataqali* at all.

The imposition of *mataqali* registration was the result of a colonial model which insisted on uniformity and on tribal communalism as the basis of customary tenures generally. It was also administratively convenient because it reduced the complexity of interests requiring registration to a single large social unit.

The work of the Native Lands Commission in registering Fijian native lands was not completed until 1967, nearly a century after its commencement.⁷³ The task of keeping the *Volani Kawa*, the register of persons with interests in *mataqali* lands, is ongoing.

How has the mistaken official version of customary tenure affected the actual practice of the people? Nayacakalou discusses some of the discrepancies and inequities which have arisen and the ways in which the official system is manipulated or avoided.⁷⁴ First, the Commission registers succession to interests in *mataqali* lands by patrilineal descent. Custom would have allowed people to acquire the rights and incur the obligations of *mataqali* membership through residence and participation as well as by descent. In recent times the amount of migration within Fiji has radically increased but the limited measures in the legislation inhibit people from contracting out of the village of their fathers and into their new village.⁷⁵ They thus acquire and exercise rights by custom which are not recognised in the Commission's version of customary law and are consequently vulnerable to a strict application of the law.

More generally, the Commission's records froze the land-owning social unit and its connection to a particular plot of land at one point in time. As Nayacakalou comments:⁷⁶

But over the years these social groups have grown or decayed, moved to new locations or reconstituted themselves in response to pressures of population, conflict, rivalry or jealousy, competition for power or women, and nowadays in response to employment and other quite novel factors. The outcome of this process is a new social scene that bears little relation to the Commission's records.

In many respects the socially-relevant rules of custom persist and the technical legal situation as established by the Commission is ignored.

This pattern of informal adjustment to the false rigidity achieved by state registration of customary interests underlines the persistent fact of pluralism, that custom continues to operate in practice, reacting in its own way to the transformations effected by state law.

In many countries, the state has developed new techniques to try to overcome inflexibility and inefficiency resulting from state transformation of custom. These include individual occupation rights, as in the Cook Islands⁷⁷ and Niue,⁷⁸ and incorporations, as in New

Zealand⁷⁹ and the Cook Islands.⁸⁰ These measures are also concerned to strike a new balance between individual and group interests in customary land.

The Solomon Islands and Papua New Guinea Reports both sought to develop proposals for registration which answered some of the objections to state schemes encountered elsewhere. Both commissions saw the customary group as the main unit for registration, but saw a place for individual interests within the group framework. The Solomon Islands Committee recommended removing primary responsibility for registration from central government and placing it with the Area Committees. This would be a 'simpler and cheaper way of recording customary rights and boundaries that the people can do for themselves'.⁸¹ The Area Committees would record the outside boundaries of the group's land and the rights of members of the group to use different parts of the land. These records (based on maps drawn by the people themselves, not by government surveyors) could be used subsequently for national registration. The scheme was endorsed by the Land Research Project but has not so far borne fruit.⁸²

The Papua New Guinea Commission recommended that registration should only be introduced if there were a clear demand and need for it and a clear understanding of it among the people concerned.⁸³ It preferred an administrative approach to registration where trained specialists worked with local committees.⁸⁴ It saw the group as the main holder of title:⁸⁵

We intend basically to provide for the registration of group titles. Where a group wants to grant titles to its members, or to non-members of the group, we provide for it to grant subsidiary titles in the form of occupation rights, leases, and subsidiary rights, all of which can be registered. These new titles are not based on foreign ideas. They are based on what are, in our opinion, typical Papua New Guinean forms of organisation, so far as land rights are concerned.

It envisaged considerable flexibility in determining the relevant group for registration, which could be the family, clan or village, depending on the request of the people themselves.⁸⁶ Nevertheless, although provision has been made for the incorporation of land groups,⁸⁷ there have not yet been further national moves to implement the Commission's proposals on registration.

The movement to return land alienated to European settlers to local ownership has been very widespread in the Pacific in the wake of independence and the realisation of indigenous aspirations.⁸⁸ Where this has involved the reinstatement of the customary owners, similar problems have been encountered to those posed by registration. There is a need to identify and define the customary owners. Secondly, the process raises the question of the role of the state in relation to the protection of custom. In the Australian Northern Territory, the definition of customary ownership has been problematic.⁸⁹ However, at least there the process involves the recognition of interests in land currently exercised by the Aboriginal people and it does not require the state to mediate between settlers and traditional owners.

On independence day, the Land Reform Regulation 1980 came into force.⁹¹ It established the process for managing the return of alienated land. Settlers who had been divested of the ownership of their lands by virtue of the Constitution were given the status of an 'alienator'. Those who were actually occupying the land had a right to remain until they either entered into a lease with the custom owners or received payment for improvements (section 3). Negotiations between alienators and custom owners were regulated by the state. Alienators had to apply to the Minister of Lands for a Certificate of Registered Negotiator (section 6). In applying for a certificate the alienator had to submit a development plan for the property.⁹² The Minister of Lands, Sethy Regenvanu, identified the Government's two main aims as: 'to improve the development of land, and to increase the custom owners' benefits from the development of their land'.⁹³

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names of the custom owners in issuing the certificate (section 6(2)). The Ministry of Lands encouraged custom owners to form a 'negotiation committee' to deal with the alienator on behalf of all those with customary rights in a parcel of land. The results of the negotiation were to be recorded in an agreement signed by the custom owners and approved by the Minister. The Alienated Land Act 1982 made further provision for dealings where the custom owners could not be identified within a reasonable time. Section 26 empowered the Minister to appoint a trustee in this case who would be considered to be the custom owner for the purposes of the Act.

The main result, then, of the process was not to transfer actual occupation of alienated lands back to the custom owners but rather to convert alienated freeholds into leases from the custom owners. As Larmour comments:⁹⁴

Ideologically, there was something for everyone. The Europeans had justified their occupation of Melanesian land by their superior ability to develop it - now that ability would be tested. Custom owners had claimed their forefathers had only intended to lease the land and not to sell it, and now the title but not the land could be returned to them. And neither the Melanesian nor the metropolitan government need worry about compensation.

This regime was formalised by a comprehensive Land Leases Act 1983. The Act provides for the surveying of leasehold land and for the registration of leasehold titles. Registration ensures the security of the leasehold title. By January 1984, 120 leases had been signed in rural areas.⁹⁵

Although apparently a derogation from the principle of customary ownership, the leasehold system in fact supports it. Custom owners now control the nature and extent of development projects undertaken on their land. They also reap the profits in the shape of rents and equity participation.

Nevertheless the problem of identifying the custom owners remains. As Russell, Land Adviser in the Ministry of Lands, reports:⁹⁶

The return of all this rural land which was mostly developed or semi-developed, immediately brought the question of original ownership into issue and bitter disputes have arisen between competing claimants. These have escalated and in some areas ownership of over 90 per cent of the previously alienated land is in dispute.

Further, the system of appointing negotiating committees proved unsatisfactory, as they were alleged to be misusing funds which should have gone to the custom owners. In the result the Government was forced to intervene both to hold funds in trust and to administer plantations.⁹⁷ The creation of the regime of island courts in 1983⁹⁸ was seen first and foremost as a means of resolving disputes about the customary ownership of alienated land.

Underlying these difficulties were some persistent problems involved in defining customary ownership. The pre-contact system had been flexible and changing. In some cases customary ownership had to be determined over land which had been alienated for generations. The system of negotiating leases requires precision in the definition of boundaries, a precision which custom may not have found necessary. At any rate, the parcels of alienated land might well cut irregularly across several customary boundaries. The concept of 'custom owner' enshrined in the Constitution begs the question as to the nature of customary interests in land. If land is vested in a clan as a whole, how are rents or interests to be apportioned within the group? If, on the other hand, the land is returned to those within the local community who are regarded as the 'true custom owners', will this not result in those people receiving a more extensive title by operation of the statutory process than they would have enjoyed under custom? The new benefits to be obtained from the leasehold system also place new strains on the operation of custom.

These problems are not unique to Vanuatu. The troubled experience in the Solomon Islands with the return of some alienated land to customary ownership in the late colonial period led the official Working Party on Lands and Mining to recommend against return to customary ownership and in favour of state ownership.⁹⁹ It identified a similar range of difficulties to those discussed here.

As the examples of registration and reversion illustrate, there is a wide gap between rhetoric and reality in the recognition of custom. The practical working out of the reassertion of autochthonous values in relation to land, as in other fields, does not yield easy answers.

Throughout the focus has been on the legal issues raised by the process of recognition. Recognition, it has been argued, is itself

CONCLUSION

A THE IDEOLOGY OF CUSTOM

This thesis has sought to elaborate the legal structures and processes involved in the state recognition of customary law as exemplified in the law and practice of South Pacific jurisdictions. It began from four fundamental propositions. The first, 'the persistent fact of pluralism', envisaged state recognition as informed by an acknowledgement that legal pluralism exists and persists as a factual phenomenon, regardless of the extent of accommodation afforded to custom in the state legal system. The nature of this phenomenon and the options open to the state were explored in Chapter I. The second, 'a legacy of colonial misconceptions', argued that the paradigm for approaching questions of recognition which still dominated law and theory was a colonial one. It thus reflected the needs of colonialism and did not represent a relevant inheritance for post-colonial purposes. The colonial experience was reviewed in Chapter II. In a revision of the colonial context, Independence and the reassertion of the separate identity of the indigenous peoples of the Pacific created a fresh impetus for the recognition of customary law. This has borne fruit in many proposals and projects aimed at reforming state law. Chapters III, V and VI examined three areas in which such reform has been focused: the general incorporation of custom as underlying law, the creation of local justice mechanisms and the recognition of customary land rights. Each case furnished an opportunity to work out the legal implications of the reassertion of autochthonous values. Finally, the fourth proposition, 'justice and group identity', saw recognition of customary law as justified by the requirements of justice in relation to indigenous groups within the nation state. Chapter IV evaluated the scope for group identity within a constitutional framework of non-discrimination and the protection of individuals' human rights.

Throughout the focus has been on the legal issues raised by the process of recognition. Recognition, it has been argued, is itself

problematic. To propose the recognition of customary law is to begin, not to conclude, the inquiry. Nevertheless, the legal issues do not arise in an ideological vacuum. In the course of this work, the equally problematic ideological function of custom in state policy has been repeatedly uncovered. The ideology of custom creates the context within which custom is envisaged and thus motivates and justifies state policy in relation to it. Ideological considerations also influence the form of recognition adopted.

The first task of this Conclusion is to draw together the changing ideological functions of custom and to analyse the ways in which ideology has both shaped and distorted the process of recognition. Part B assesses the relevance of the Pacific experience for the more general study of the recognition of customary law. Finally, Part C offers some future directions based on a cooperative pluralism between state law and custom.

The question of recognition of customary law has, since the inception of the colonial period, been influenced at least as much by ideological considerations about the nature and proper direction of indigenous societies as by observation of actual problems and the search for legal solutions. At the ideological level, custom has led a separate life from its operation on the ground. Chapter II showed how, in the Pacific context, theories about the nature of customary societies generally and their fate upon colonisation had a direct influence on the form of state legal measures. European conceptions of the noble or ignoble savage and of legal evolution were debated for their application to the recognition of customary law. This was seen, for example, in the annexation and early administration of New Zealand and in the establishment of native administration in Fiji.

The colonial ideology of custom had four elements which deserve mention for their effect on the shape of recognition in the colonial period. In the first place, custom was seen as a fixed and definable set of rules which were capable of precise definition and application. Secondly, custom was unchanging, a rigid and immutable code derived from a pre-colonial past where society and its laws had achieved a settled balance. Thirdly, the image of customary societies as tribal fostered an idea of customary law as invariably communal. Rights to land, for instance, were seen as held by the tribe and worked by the tribe as a whole. Finally, customary society was believed to be

hierarchical. It was ruled by a system of chiefs who bore primary responsibility for the administration of customary law.

This colonial ideology of custom influenced the form of recognition in a number of ways. The image of an unchanging system of rules promoted an emphasis on the application of customary rules in state courts, codification and registration as methods of recognition. The notion of tribal communism fostered, as in the case of native land registration in Fiji, a search for a pattern of descent groups on to which the system of land tenure could be fixed. The importance attached to chiefly authority led to the establishment of native courts and native administration staffed by chiefs. These systems and institutions were the creations of the colonial state. They were a distortion of reality and masked the transformations which were occurring anyway in customary society and those which were effected by the colonial administration of custom. But the ideology supporting colonial systems of recognition restricted perception of these discrepancies.

In important respects, the appeal to custom by colonial authorities served economic and political objectives. It provided a method of governance through native authority, as in the case of the system of indirect rule established in Fiji. It allowed for the rigorous enforcement of paternalistic codes of behaviour under the guise of custom, as in the Gilbert and Ellice Islands. It justified the dual system of courts and laws for colonisers and colonised. Economically, as Fitzpatrick argued,¹ the 'conservation of the traditional mode' was an important colonial policy because the traditional mode subsidised and facilitated the capitalist economic objectives of the colonisers.

Yet there was also an alternative version of custom in the colonial period: as a symbol of resistance. In popular political movements resisting colonial domination, Pacific peoples stressed the importance of custom as constitutive of an autochthonous basis for law and government which could be organised in opposition to the introduced system. Custom in the resistance movements was part of a conscious attempt to fashion out of indigenous elements a different structure for society to that envisaged by colonialism, even where the colonial system did recognise its version of customary law. Thus Maasina Rule in the Solomons established its own customary courts

parallel to the Administration's native courts, which had themselves been introduced under an ethos of popular, customary justice.

The emergence into independence of the island states saw a radical reshaping of the ideological context for custom. This was part of a wider renaissance of indigenous values which was reflected in other aspects of culture as well as law. As Keesing observed of *kastom* in Melanesia: 'It is culture itself that serves as symbol'.² But law occupied a particularly important role in this reassertion of autochthonous values. As Kaputin remarked, the law introduced by the colonisers: 'denied and denigrated our culture, and sought to set us in a foreign mould, while denying us our basic humanity'.³ The legal system, then, had to be refashioned out of the material of customary law. This was endorsed in the preambles of many Pacific constitutions which pledge the new state to uphold customs and traditions and to work through indigenous social organisation.

Yet custom was not the only ideology embraced by the independence constitutions. The human rights provisions, in particular, harboured much that contradicted the appeal to custom. This potential conflict was seldom reconciled in the constitution itself and has only surfaced later as the courts have grappled with opposing objectives.

The exigencies of constitution-making inevitably left many questions unresolved. Often only a blueprint for the place of custom could be sketched, with Parliament enjoined to consider the whole question at some later date. In many ways, the general incorporation of custom as part of the underlying law reflected an ideological commitment which was not matched by practical consideration of the issues involved in recognition.

But the programmatic endorsement of custom in the constitutions indicated a much wider transformation in the ideological role of custom. This new ideological context saw custom as not merely a rejection of a colonial heritage but as a positive indigenous basis for future development. Thus, Narakobi saw Melanesian law as having the following positive and distinctive features:⁴

... mediation, consensus and compromise; popular participation in dispute settlement processes; non-violent and non-competitive methods of conflict resolution; community solidarity; harmony among conflicting parties; mutual responsibility; family

solidarity; forgiveness and mercy; sharing, interdependence, caring for the needy, and compensation rather than punishment.

In this changed context, the recognition of custom might promote forms of self-reliant development and participatory justice. These principles formed an explicit basis for the creation of local-level 'customary' courts and for the importance attached to customary tenure in independence land policy. Thus the transformation in the way custom was perceived which occurred with independence had an effect on many specific areas of the law as well as on the constitutions.

A similar transformation is occurring as part of the reassertion of the separate identity of the Maori and Aboriginal people. Drawing a link between the need to recognise customary law and an indigenous cultural renaissance, a recent report on a Maori perspective on social welfare comments:⁵

The resurgence of tribalism has come despite every obstacle. It has come not because of the law but in spite of it. Tribalism lost its land base and an alternative economic base was not found, and yet the principle survives for tribalism exists in the hearts and minds of people. It is an integral part of a Maori cultural renaissance.

In Australasia, the new social policy context for the recognition of custom is one of self-determination. This requires respect for cultural identity and for the capacity of the indigenous community to define and control its own law functions.

Nevertheless, although ideological considerations have motivated and shaped the form of recognition, they have also distorted the reality of customary practice and obscured the problems posed by the process of recognition itself. In the colonial period, the ideology of preservation and conservation masked the transformations occurring within the customary sphere as a result of the introduction of the cash economy and the manifold other influences of colonialism. The discussion of customary land tenure showed the way in which those transformations were obscured by the express appeal to custom by those who benefited from the opportunities and the legal preservation of customary tenure. Land registration in Fiji was based on an idealised model which bears little relationship to the reality of practice, despite its ideological importance at the national level. In other respects too the state administration of customary law in the colonial

period transformed custom by subjecting it to the procedures and controls of state law, while purporting to preserve it.

In the achievement of independence, custom's use as a political symbol depended on it remaining vague and imprecise. As Tonkinson comments of Vanuatu: '... *kastom* has remained undifferentiated in political discourse, because its utility as a rallying point depends heavily on its confinement to an ideological level, indivisible and unexamined'.⁶ Its unifying function as a refutation of colonialism and an assertion of autochthonous values was contradicted by the realities of custom as local, variable and resistant to state authority. In Vanuatu the divisiveness of custom was apparent even in its use as a political symbol in decolonisation. Elsewhere, the diversity and local basis of custom became apparent once it was sought to implement a policy of recognition. Where custom was generally incorporated as part of the underlying law, the judges were left with the problem of constructing a national legal system out of local custom. If, on the other hand, they were to admit local variations, this would be inconsistent with the requirements of certainty and coherence.

Further, at the operational level, custom challenges the legitimacy of the state by qualifying the state's monopoly of law-making and law-enforcement powers. State officials, whether in the legislative, executive or judicial arms of government, derive their authority from state law and not from custom. Many customary institutions, such as the Western Samoan village councils, have proved resistant to state intervention. Attempts at the comprehensive registration of customary land have also proved difficult politically because of mistrust of government's intentions at the village level. The enthusiasm to indigenise the legal system, which was generated in the approach to independence, dissipates once the ordinary business of government commences and day-to-day practical problems assume prominence.

But, most significantly in the present context, the appeal to custom at an ideological level does not in itself resolve any of the legal issues involved in recognition. The introduced legal system survived independence and was rarely comprehensively scrutinised for its appropriateness to local conditions (a task now being attempted in Tokelau and Tuvalu). Thus the significance of the incorporation of custom as part of the underlying law was greatly reduced because

inherited statutes continued to limit the possible scope of the underlying law. General incorporation has also been hampered by the ambiguous status of custom as a source of law. This fails to clarify whether its ascertainment is the responsibility of the parties or of the judge and to provide evidentiary rules and processes for its ascertainment.

Moreover the nature of custom as embedded in and responding to the social, economic and political context of indigenous communities suggests the unreality of contrasting a national legal system, whether by way of underlying law or codification, out of customary rules. This is to ignore the processes and institutions of custom and to equate systems which are quite different in nature and scale. But it was this definition and use of custom at the national level which was suggested by its ideological appeal on independence.

The true nature of the relationship between state law and custom is one of continuing pluralism, whereby custom retains an independent capacity to generate and apply rules and is not merely a source for national law. Recognition thus requires a wide-ranging inquiry into areas where state and custom may interact and conflict and an adjustment of state law to take account of custom. This process is both complex and problematic. A changed ideology of custom yields no answers in itself.

B THE PACIFIC EXPERIENCE

Despite the ideological context of colonialism and its rejection, pluralism is not unique to the Pacific jurisdictions studied here, nor to introduction of Western law in the context of the colonial encounter to non-Western indigenous societies. Rather, as argued in Chapter 1, legal pluralism offers an explanation of the operation of law in society which, by illuminating the interaction between state law and the normative orderings of semi-autonomous social groups, is of equal relevance in Western industrialised societies. Legal pluralism focuses attention on the rule generating and enforcement capacity of groups within the larger society; on the ways in which these orderings affect the implementation of state law; and on state law's capacity to take account of indigenous law.

The experience in the Pacific with the recognition of customary law contributes to an understanding of the dynamics of legal pluralism

generally. At a more specific level, Pacific precedents may prove instructive in assessing the options open to the state in recognising the customary law of indigenous peoples within its jurisdiction. In the first place, the Pacific material underlines the basic proposition that pluralism is a factual phenomenon and not dependent on the degree of recognition by the state. Thus, for example, Aboriginal customary law has persisted in Australia despite the almost complete non-recognition of it by the state since the inception of the colonial period. A consequence of legal pluralism as fact is that indigenous communities retain an independent capacity to react to state law measures. As the discussion of local justice mechanisms showed, this reaction may take the form of the resistance or avoidance of state institutions and the persistence of rival customary institutions (an aspect which also surfaced in the discussion of village councils in Chapter IV). Equally, the indigenous community might react by co-opting the forms of state law for use in its own context. The example of land also showed how customary tenures persisted despite non-recognition by the state. This persistence could operate to frustrate state law attempts at reform, the customary rules continuing to qualify state registered tenures. The studies of land and local courts also highlighted the ambiguities of the incorporation of custom into state law, ambiguities which are shared by the informal justice movement in Western societies, namely:

- the ways in which the deference to non-state alternatives may in fact disguise an extension of state control (registration of customary land tenure, introduction of local courts);
- informal justice as a conscious attempt to reinforce systems of community social control which are in fact eroding;
- the effect of such incorporation to bolster existing power relations in the community (the role of chiefs in state institutions);
- the persistent tendency of informal state-created institutions to reformatise, reprofessionalise, and rely on state authority.

However, the Pacific experience not only illustrates the problematic nature of pluralism, it also provides a range of options in the state recognition of custom which may be of comparative relevance outside the region. There has been a considerable amount of laws. A formalised version of customary law was applied through the medium of state courts.

recent experimentation in the region. The reason for this is historical. The colonial period did not generally see the creation of the formal plural legal systems which were the by-products of colonialism elsewhere and which have conditioned approaches to the problem in comparable regions such as Africa. Conversely, the continuing vitality of traditionalism - partly an ideological movement and partly a simple reflection of the factual persistence of custom - has impelled many recent reform projects.

The colonial period in the Pacific was marked by patterns for the recognition of customary law which, though influenced by general imperial principles, were nevertheless the subject of a separate dynamic. In Australia there was no recognition of indigenous sovereignty and no recognition of indigenous law. In New Zealand, the early acceptance of the imperial principles, evidenced by the Treaty of Waitangi, was succeeded by considerable debate as to the appropriate state response to custom. In the late nineteenth-century the imperial principles of common law recognition were reversed and customary land tenure was deliberately transformed through the operation of the Native Land Court.

In the Pacific Islands, the early exercise of extra-territorial jurisdiction and the subsequent creation of protectorates were both premised on the recognition of indigenous sovereignty and the survival of indigenous customary law. The transition to full colonial status was not accompanied by the formula of the express adoption of English law together with the preservation of customary law in its application to natives, which had inaugurated the plural legal systems of Africa. Indirect rule, though pioneered in Fiji, did not become a general model. In Papua New Guinea and the Solomon Islands, for instance, indirect rule was for much of the colonial period officially disapproved. The survival of customary law was ensured rather by the limited penetration of the colonial administration and the persistence of custom *extra legem*.

Thus the form of state recognition of custom remained throughout the colonial period a question to which only limited answers had been given. By contrast, in Africa, for instance, British colonial governments had constructed elaborate plural legal systems. These divided natives from colonisers through a dual system of courts and laws. A formalised version of customary law was applied through the medium of state courts.

This heritage did not exist as a focus for the reassertion of traditional values in the Pacific. Thus independence engendered a search for appropriate ways of recognising customary law. In some cases this led Pacific jurisdictions to accept models, such as village courts and the registration of customary land tenure, which were being rejected in Africa as contrary to policies of unification and modernisation. It also led to the adoption of many specific reforms of state law as well as the general incorporation of custom as part of the underlying law. Pacific jurisdictions have been concerned at least as much with the creation of processes and institutions for the recognition of customary law as with the incorporation of customary rules. These have included village and island courts; specialist institutions and processes for customary land disputes; the statutory incorporation of villages, land and business groups; the inclusion of traditional leaders in governmental structures both at the national and local level; and the conferral of a rule-making capacity on matters of custom on local government.

The search for state responses to custom is a continuing one in the island states. For example, the issue is currently being considered in Tokelau under the Tokelau Law Project; in Fiji with proposals to reintroduce the Fijian native administration and native courts and for greater recognition of customary law; in Papua New Guinea under the Law Reform Commission's Customary Law Project; and in proposals for the registration of customary land in Melanesia.

This degree of experimentation has been matched by a similar level of activity in Australia and New Zealand, reassessing the state's position in relation to Aboriginal and Maori customary law. Significant developments are:

- * the return of land to traditional ownership, a process initiated in the Northern Territory but adopted or proposed in several Australian states and in New Zealand;
- * the Australian Law Reform Commission's comprehensive Report on the Recognition of Aboriginal Customary Laws which pursues a new approach to recognition issues generally;
- * the work of the Waitangi Tribunal in assessing state law and practice against the guarantees of Maori rights enshrined in the Treaty of Waitangi;

as well as many more specific reforms or proposals on such matters as child custody and adoption; hunting, fishing and foraging rights;

local justice mechanisms; the protection of sacred sites and the cultural heritage; inclusion of indigenous values in the land use planning process; changes in court practice and procedure.

These developments are of significance outside the Pacific region in the first place because they are all contemporary responses to the continuing vitality of custom. As such, they envisage recognition not as a temporary expedient to take account of a customary law which would inevitable die out as indigenous peoples embraced Western law and Western civilisation, but as an enduring element in legal policy. This has entailed a reworking of the basis of principle for recognition in the search to create a legal system which operates justly in relation to indigenous people, which reflects indigenous values and which increases the self-regulation of indigenous communities.

The second aspect of the Pacific experience which is of general significance is the juxtaposition of states where the indigenous people exercise a political majority with those (notably Australia and New Zealand) where the indigenous people form a minority of the population. These situations create different social and political contexts for the recognition of customary law. Where the indigenous people is a minority, recognition may be seen in ethnic terms. Customary law distinguishes the indigenous people from the ambient population to whom state law applies. The recognition of customary law is perceived as enhancing self-determination. Where the indigenous people are a majority and have achieved independence, recognition issues are instead seen primarily as part of the creation of an autochthonous legal system for the new state.

The division between these two situations has been apparent in the general field of legal pluralist studies. Yet the Pacific provides an opportunity to examine the similarities as well as the differences. It has been argued from the outset that the essential problem is the same: the encounter between the state and its forms of regulation on the one hand, and the customary law of stateless indigenous societies on the other. The achievement of independence and thus of control at the national level by indigenous people does not in itself effect a resolution of that dichotomy, nor does the attempt to make custom a source of the national legal system. The state legal system continues to operate according to inherited

patterns. Relations between the state and custom in specific areas such as local-level courts and the administration of customary land continue to observe the same dynamics.

In both situations the different character of custom to state law shapes the limits of possible recognition. As the examples of the state definition of traditional ownership for the return of alienated land in the Northern Territory of Australia and in Vanuatu showed, problems and possibilities encountered at the level of technique are directly comparable.

C TOWARDS CO-OPERATIVE PLURALISM

The province of this thesis has been to provide a general framework for the state recognition of customary law and not to propose specific solutions. The extent and form of recognition in the Pacific as elsewhere must be worked out in the context of individual countries, through consultation between governments and indigenous communities, and in relation to particular subjects. Nevertheless this general investigation merits some observations which might inform specific enquiries.

In the first place, the focus on legal pluralism as a factual phenomenon as distinct from the measures introduced by state law in response to that phenomenon, the plural legal system, serves as a reminder that the state recognition of custom must be based on factual observation of the realities of the operation of custom and of the conflicts occurring between the two systems. This is less difficult in the Pacific where the absence of formal plural legal systems has meant that, in general, a synthetic 'lawyers' customary law' has not obscured direct consideration of custom. But elsewhere, in jurisdictions where there is a state administered version of customary law, this needs to be distinguished from custom on the ground. A further implication for state policy of the focus on the fact of legal pluralism is that it emphasises custom's independent capacity to change and to react to state law measures. This suggests that, even where the state purports to recognise custom rather than to transform it, introduced reforms will not necessarily have their intended effect. At any rate, reforms will need to be flexible enough to cope with changes in the customary system.

Secondly, the nature of custom also conditions the limits of what may be done in the name of recognition. Because custom is created by indigenous communities, it is inextricably embedded within the political, social, religious and economic context of such communities. This means that the attempt to distil a discrete corpus of legal rules is an artificial exercise. Such rules only have meaning because they are part of a social matrix which provides the context for which the rules are developed. In the resolution of disputes, the application of customary rules is affected by political and processual factors. The location of custom within small-scale indigenous communities may also mean that it varies considerably between communities.

In all of these respects, the attempt to create a national legal system out of custom is problematic. Chapter III illustrated the contradictory position of custom as a source of underlying law. Custom does not yield a uniform national standard. It contains no rules for many of the concerns of a national legal system. It leads an artificial existence in the alien procedural context of the national court system. Similarly, codification operates as a transformation rather than simply a recognition of custom. It abstracts rules of customary law from their social and processual context. It reduces the flexibility in their application and the potential for change. It frequently standardises local variations. By contrast, as Chapter V discussed, the use of custom in local-level justice mechanisms may respond more adequately to these concerns. Institutions such as the village and island courts and some of the land courts are still the creations of state law and not merely recognitions of custom. But they operate at the local customary level and are staffed by persons knowledgeable in local custom. They can therefore respond more adequately to local variations than the national court system. There has also, in models developed in the Pacific, been an attempt to incorporate not merely the rules but also the processes of customary law into the operation of local justice mechanisms. Examples of this are flexibility in evidentiary requirements, a mediation jurisdiction, the power to hear group actions and make orders over groups, and the power to order the payment of compensation.

The third general observation is that the dominant approach to recognition continues to be derived from colonial models. Because

these were developed to meet the needs of colonialism, they are inappropriate in the contemporary context. Yet the persistent influence of these models restricts other creative responses. As was seen in Chapter II, the colonial paradigm was characterised by the administrative need to govern through native institutions, most fully developed in the policy of indirect rule. In this the intention was not simply to recognise custom but also to subject indigenous peoples to colonial control. Further, the colonial system for recognising customary law was built upon a racial compartmentalisation of 'natives' and Europeans. The interpersonal conflict of laws was the technical branch of colonial law which defined *a priori* to which group a person belonged and thus which system of laws and courts applied. In this, Private International Law furnished an influential analogy. Yet this was to treat customary law as operating in a similar way to a national legal system. It also resulted in the prior definition of the subject areas in which custom could be recognised. Finally, the colonial paradigm emphasised the incorporation of custom into state law through its administration in state courts, through the deliberate creation of structures of native administration, and through methods of codification and registration.

As the classification of state responses to indigenous law in Chapter I E showed, recognition by incorporation is only one option. Incorporation inevitably involves some element of transformation of custom. But custom can also be recognised through the acknowledgement of autonomy. This approach starts from the fact that custom is a separate field of regulation to state law. The role of state law is thus to adjust itself to take account of this autonomous sphere and not to co-opt customary rules and institutions. As was demonstrated, this could be achieved either through the general exclusion of state law or the general grant of autonomy to an indigenous community, or by more specific exclusions of state law from the customary sphere or the acknowledgement of independent legislative or norm-applying powers.

Further, as the Australian Law Reform Commission has shown through its concept of 'functional recognition', it may be possible to take account of customary norms in a wide variety of contexts in the operation of the state law system without requiring the creation of a state defined and administered corpus of customary law. In this way, many of the distorting effects of the colonial approach are avoided.

Custom retains an independent capacity to operate and to change. The incidence of conflict between custom and state law can be assessed as it actually arises, rather than by means of a prior classification of people into different categories to which a certain system of laws automatically applies. This approach requires a comprehensive reassessment of the role of state law in relation to custom across the wide range of areas where conflicts actually occur and where the non-recognition of custom causes injustice. As the example of the proposed recognition of Aboriginal customary marriage discussed in Chapter IV illustrated, functional recognition is a matter of increasing the flexibility in the state law system to ensure that it operates fairly in the light of a coexisting indigenous system of regulation.

Finally, considering the points of articulation between state law and custom, the nature of custom as generated by indigenous groups within the national context has suggested the need for a reorientation of state law to take account of group identity. Chapter IV showed the direct conflicts which could arise between customary concepts of group decision-making and responsibility and individual rights and freedoms. Thus the communal decisions of the village councils in Western Samoa and Kiribati did not prevail against individual entrepreneurial activity which received protection under the Bill of Rights. Customary concepts of group responsibility in intergroup fighting did not prevail against the constitutional presumption of the innocence of the individual. The principle of non-discrimination, as applied by the High Court of Australia to Aboriginal land rights, was seen as resistant to acknowledging the continuing separate identity of indigenous groups.

It was argued in Chapter IV that there was no necessary conflict between human rights provisions and the norms and structures of customary societies. The recognition of customary law was not in itself discriminatory. Indeed, in many cases, human rights standards might require the recognition of custom. Nevertheless the human rights context does highlight the preoccupation of the Western legal systems inherited in the Pacific with the individual, the citizen-isolate, rather than with the group.

Pacific constitutions and legal systems have gone some way towards redressing this balance. Constitutional preambles stress the

importance of village and island communities and the need to preserve and strengthen them. The Tuvalu Constitution attempts a more comprehensive redefinition of the balance between individual and group interests. Recent reports have drawn attention to the need to respect and accommodate group decision-making, in the tenure of land and in other aspects of social life.⁷ There have been measures for the statutory incorporation of customary kin groups and villages.

Yet the ideology of legal centralism continues to restrict the extent to which the state can accept group identity. Because it insists on a necessary connection between law, state and territory, legal centralism denies the significance of customary law which is neither generated nor enforced by the state, and furthermore neither territorial nor unified in operation. Thus the recognition of customary law involves modification of basic premises of state law in the acceptance of the separate identity of indigenous groups and the personal application of laws.

7 Griffiths 'What is legal pluralism?' 1980, 6.

8 Hooker *Legal Pluralism* 1975.

9 Fison 'Anthropology' 1992, 143.

10 Bennett *Application of Customary Law in Southern Africa* 1985, 9.

11 Father Walter Lini, Prime Minister of Vanuatu, cited in Fingleton 'Pacific values and economic development?' 1982, 323.

12 Ghai 'Constitutional issues in the transition to independence' 1983, 55-6.

13 Narakobi 'In search of a Melanesian jurisprudence' 1986, 226-7.

14 New Zealand Law Society 'NZLS joins legal services debate' 1987.

15 Fiji Report of the Royal Commission on Treatment of Offenders 1981, 31. These recommendations are repeated in Fiji, Law Reform Commission *An examination of the Laws and Practice relating to Penal Policy in Fiji* 1986, and Fiji *The Fijian Provincial Administration: A Review* 1985.

16 Australia, Law Reform Commission 1985.

17 Papua New Guinea, Law Reform Commission *The Role of Customary Law in the Legal System* 1977.

18 New Zealand Report of the Royal Commission on the Electoral System 1986, 1-2.

19 See Bennett *Aboriginal Rights in International Law* 1978 and

FOOTNOTES

INTRODUCTION

- 1 See generally Lawrence 'The state versus stateless societies in Papua and New Guinea' 1969.
- 2 David 'Sources of law' 110.
- 3 Woodman 'Ghana reforms the law of intestate succession' 1985, 128. The reference is to Act II, Scene 6 *Le Médecin malgré lui*.
- 4 Rawls 'The idea of an overlapping consensus' 1987, 4.
- 5 Stanner *White Man Got No Dreaming* 1979, 43.
- 6 Bohannon 'The differing realms of law' 1965.
- 7 Griffiths 'What is legal pluralism?' 1986, 6.
- 8 Hooker *Legal Pluralism* 1975.
- 9 Fison 'Anthropology' 1892, 148.
- 10 Bennett *Application of Customary Law in Southern Africa* 1985, 9.
- 11 Father Walter Lini, Prime Minister of Vanuatu, cited in Fingleton 'Pacific values and economic development?' 1982, 323.
- 12 Ghal 'Constitutional issues in the transition to independence' 1983, 55-6.
- 13 Narakobi 'In search of a Melanesian jurisprudence' 1986, 226-7.
- 14 New Zealand Law Society 'NZLS joins legal services debate' 1987.
- 15 Fiji *Report of the Royal Commission on Treatment of Offenders* 1981, 31. These recommendations are repeated in Fiji. Law Reform Commission *An examination of the Laws and Practice relating to Penal Policy in Fiji* 1986, and Fiji *The Fijian Provincial Administration: A Review* 1985.
- 16 Australia. Law Reform Commission 1986.
- 17 Papua New Guinea. Law Reform Commission *The Role of Customary Law in the Legal System* 1977.
- 18 New Zealand *Report of the Royal Commission on the Electoral System* 1986, 112.
- 19 See Bennett *Aboriginal Rights in International Law* 1978 and

- 37 Independent Commission on International Humanitarian Issues
Indigenous Peoples 1987.
- 20 Sack 'Law and "custom" in Papua New Guinea' 1986, 18.
- 21 Australia. Law Reform Commission 1986, para 1037.
- 22 On the former, refer Rawls 'The idea of an overlapping
consensus' 1987. On the latter, see *infra* Chap I D i.
- 23 Eggleston *Fear, Favour or Affection* 1976, 305. Elizabeth
Eggleston pioneered work on Aborigines and the State legal
system.
- 24 Ghai 'Reference on customary law' (internal memo, PNG Law Reform
Commission, 1977).
- 25 Australia. Law Reform Commission 1986, para 209.
- 26 See on the general subject of legal anthropology Lloyd & Freeman
Lloyd's Introduction to Jurisprudence 1985, Chap 10; Snyder
'Anthropology, dispute processes and law' 1981; and Twining 'Law
and anthropology' 1973.
- 27 Roberts *Order and Dispute* 1979, Preface.
- 28 Allott *New Essays in African Law* 1970.
- 29 Hooker *Legal Pluralism* 1975.
- 30 For example, Bennett *Application of Customary Law in Southern
Africa* 1985, and Pearl *Interpersonal Conflict of Laws in India,
Pakistan and Bangladesh* 1981.
- 31 See Vitta 'The conflict of personal laws' 1970, and Lipstein &
Szasz 'Interpersonal conflict of laws'.
- 32 For example, Nygh 'Malaysia, Singapore, Australia and Papua New
Guinea' 1972, and Haynes 'Succession to land in Papua New
Guinea' 1981.
- 33 These theories are discussed in Chap II C 'The "fatal impact"
theories'.
- 34 See Chanock 'Neither customary nor law' 1987.
- 35 See, on the French approach generally, Hooker *Legal Pluralism*
1975, Chap IV; and, on the Pacific, Agniel 'New Caledonia' 1986;
Crocombe *Land Tenure in the Pacific* 1971, 43-59, 227-47; Larmour
& Qalo *Decentralisation in the South Pacific* 1985, Chaps 2 and
15; Powles & Pulea *Pacific Courts and Legal Systems* (in press),
Chaps 37 and 48.
- 36 See King 'Federated States of Micronesia' 1986, and Chap III A v
infra.

- 37 See McBride 'The application of the American constitution to American Samoa' 1974; Chang 'American Samoa' 1986; Van Dyke *Human Rights, Ethnicity and Discrimination* 1985, 93-4.
- 38 See Gris 'Ten years of regional cooperation' 1981. The Forum met for the eighteenth time in Apia, Western Samoa, 29-30 May 1987. At that meeting it welcomed two non-Commonwealth states to full membership: the Federated States of Micronesia and the Republic of the Marshall Islands.
- 39 South Pacific Nuclear Free Zone Treaty (1985) 24 ILM 1440; and see also Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 (1987) 26 ILM 38.
- 40 See principally *Pacific Perspective, Oceania, Pacific Islands Monthly, Journal of Pacific History, Journal of the Polynesian Society*.
- 41 Pacific Islands Law Officers' Meeting Report 1983.
- 42 The first, at which the writer was present, was held in Western Samoa, August 1986.
- 43 See notably *Pacific Courts and Justice* 1977; Powles & Pulea *Pacific Courts and Legal Systems* (in press); Larmour & Qalo *Decentralisation in the South Pacific* 1985; Crocombe *Land Tenure in the Pacific* 1971; Sack *Pacific Constitutions* 1982; Pulea *Family, Law and Population in the Pacific Islands* 1986.
- 44 Chanock 'Neither customary nor law' 1987, 1.
- 45 See infra Chap I F iii and Chap V A iii.
- 46 See infra Chap I F iii.
- 47 See Krygier 'Law as tradition' 1986.
- I LEGAL PLURALISM AND LEGAL THEORY
- 1 Snyder 'Anthropology, dispute processes and law' 1981, 156.
- 2 Griffiths 'What is legal pluralism?' 1986, 4.
- 3 Australia. Law Reform Commission 1986, para 167.
- 4 Kuhn *The Structure of Scientific Revolutions* 1970.
- 5 For a recent explicit statement of this see Brookfield 'Maori fishing rights and the Fisheries Act' 1987.
- 6 Powles 'General report' 1986, 3.
- 7 Roberts 'Introduction' In *Law and the Family in Africa* 1977, 2.

- 8 Griffiths 'What is legal pluralism?' 1986, 2-3. of *Ethnic and Cultural Minorities* (Vancouver, 1983);
- 9 Galanter 'Justice in many rooms' 1981, 19. *Security* (Tutzing, 1982);
- 10 Belley 'L'état et la régulation juridique des sociétés globales' 1986. *Paraspective* (Sydney, 1986).
- 11 Fitzpatrick 'Law, plurality and underdevelopment' 1983, 161. This article is Fitzpatrick's consideration of legal pluralism in a Third World context. He has further considered legal pluralism in a First World context in Fitzpatrick 'Marxism and legal pluralism' 1983 and 'The rise and rise of informalism' (in press). The issue of law and historical transition in Marxist theory is also discussed by Snyder '"Folk law" and historical transitions' 1985. See also Diamond 'The rule of law versus the order of custom' 1973.
- 12 See McLachlan 'The new Hague Sales Convention and the limits of the choice of law process' 1986 and the references cited therein.
- 13 See Moore 'Law and social change: the semi-autonomous social field as an appropriate subject of study' in *Law as Process* 1978; Arthurs 'Understanding labour law' 1985; Henry *Private Justice* 1983.
- 14 Cf. Vanderlinden *ibid* 19: 'Le pluralisme juridique est une société déterminée, de mécanismes juridiques différents s'appliquent à des situations identiques'.
- 15 *Ibid* vii-viii, 96.
- 16 Woodman 'Unification or continuing pluralism in family law' 1983.
- 17 Arthurs 'Understanding labour law' 1985, 102.
- 18 Pospisil *Anthropology of Law* 1971, 97. Griffiths 'What is legal pluralism?' 1986 provides a critique of Pospisil. *On Stairways to Consensus* 1984. The theoretical aspects are drawn together in F
- 19 *Ibid* 107. Beckmann 'Why law does not behave' 1983.
- 20 For a discussion of the relevance of Gurvitch, Ehrlich and Weber to legal pluralism see Griffiths 'What is legal pluralism?' 1986, Belley 'L'état et la régulation juridique' 1986 and Henry *Private Justice* 1983, Chap 2.
- 21 Malinowski *Crime and Custom in Savage Society* 1926, 14. See
- 22 Moore *Law as Process* 1978, 55-6. *in African Law* 1960, 81.
- 23 *Ibid* 57. *Order and Dispute* 1979, 27.
- 24 *Ibid* 58, 78. *Love, Fear or Affection* 1979, 273.
- 25 Renamed in 1981, continues *African Law Studies*. 1974, 12.
- 26 Established in 1978 and based at the Institute of Folk Law, Nijmegen, affiliated to the International Union of
- 27 Anthropological and Ethnological Sciences. The Commission has now held four symposia:
- 28 (1) 'State Institutions and Their Use of Folk Law' (Bellagio, 1981);

- 44 (ii) 'The Actual and Legal Position of Ethnic and Cultural Minorities' (Vancouver, 1983);
- 45 (iii) 'Formal and Informal Social Security' (Tutzing, 1986);
- (iv) 'Folk Law and Indigenous Rights - A Comparative Perspective' (Sydney, 1986).
- 25 Allott & Woodman 'Introduction' in *People's Law and State Law* 1985.
- 47 Roberts *Order and Dispute* 1979, 36.
- 26 Abel 'The contradictions of informal justice' 1982.
- 48 Ibid 100-7. The classic such works are Schapera's *A Handbook of*
- 27 Ibid 267-8. and *Custom* 1938 and Cory *Sukuma Law and Custom* 1953.
- 28 Hooker *Legal Pluralism* 1975. *their Law* 1953.
- 29 Ibid 4. 'Legally induced culture change in New Guinea' 1978.
- 30 Ibid 56. volume was Cotran *Kenya I: The Law of Marriage and Divorce* 1965.
- 31 A similar ambiguity in approach is found in Gilissen 'Introduction à l'étude comparée du pluralisme juridique' 1971 and Vanderlinden 'Le pluralisme juridique: essai de synthèse' 1971.
- 52 Ibid 'Codification of customary law' 1980 and Roberts *Order and Dispute* 1979, 194-5.
- 32 Cf Vanderlinden Ibid 19: 'Le pluralisme juridique est l'existence, au sein d'une société déterminée, de mécanismes juridiques différents s'appliquent à des situations identiques'.
- 53
- 33 Woodman 'Unification or continuing pluralism in family law' 1987.
- 34 See especially F von Benda-Beckmann *Property in Social Continuity* 1979, K von Benda-Beckmann *The Broken Stairways to Consensus* 1984. The theoretical aspects are drawn together in F von Benda-Beckmann 'Why law does not behave' 1983. *Notes on the Practice of the Court* 1951.
- 50
- 35 Ibid 241.
- 57 Scaglion 'Introduction' in *Customary Law in Papua New Guinea*
- 36 Ibid 242.
- 37 Malinowski *Crime and Custom in Savage Society* 1926, 14. See also on this theme Allott *Essays in African Law* 1960, 61. of a highly organised state system, see Comaroff & Roberts
- 38 Roberts *Order and Dispute* 1979, 27.
- 39 Eggleston *Fear, Favour or Affection* 1976, 278. iv, citing Retu Bonaville's evidence on the position of the
- 40 Epstein 'Introduction' in *Contention and Dispute* 1974, 12.
- 41 Moore *Law as Process* 1978, 81. 'And! Abolish conflict management' 1981.
- 42 Australia. Law Reform Commission 1986, para 99.
- 51 See for example Cotran & Mangili *Law and Order in the New Guinea*
- 43 Hart *The Concept of Law* 1961, 89-91. 'customary law' option'.

- 44 Ibid 244. *Official and Unofficial Courts* 1972, 1.
- 45 This point, which it would be beyond the ambit of the present work to expand, is discussed by Martin Krygier in 'Law as tradition' 1986 and 'Critical legal studies and social theory' 1987. *For example* *Uganda: A Study in Customary Law* 1974, 93.
- 46 See Allott *The Limits of the Law* 1980, 49-67. 2.
- 47 Roberts *Order and Dispute* 1979, 28. *Mission to Inquire into and Report upon the Organization of District and Village Government*
- 48 Ibid 192-7. The classic such works are Schapera *A Handbook of Tswana Law and Custom* 1938 and Cory Sukuma *Law and Custom* 1953.
- 49 Pospisil *Kapauku Papuans and their Law* 1958.
- 50 Pospisil 'Legally induced culture change in New Guinea' 1979.
- 51 The first volume was Cotran *Kenya I: The Law of Marriage and Divorce* 1968.
- 52 See especially Twining *The Place of Customary Law in the National Legal Systems of East Africa* 1963 and also Bennett & Vermeulen 'Codification of customary law' 1980 and Roberts *Order and Dispute* 1979, 194-5.
- 53 See Woodman 'How state courts create customary law in Ghana and Nigeria' 1983.
- 54 See *infra* Chapter II 3 vi 'Fiji-Gordon & a model chiefly oligarchy'.
- 55 See *infra* Chapter II 3 vii 'The Gilbert & Ellice Islands -Paternalism Rampant'.
- 56 Marsack *Land and Titles Court of Western Samoa. Notes on the Practice of the Court* 1958.
- 57 Scaglione 'Introduction' in *Customary Law in Papua New Guinea* 1983.
- 58 See Roberts *Order and Dispute* 1979, Chap 8 and, for a more detailed investigation of Tswana law as representative of a highly organised quasi-state system, see Comaroff & Roberts *Rules and Processes* 1981.
- 59 France *The Charter of the Land* 1969, xiv, citing Ratu Bonaveidogo of Macuata giving evidence on the position of the Tui Macuata FO 58/108.
- 60 See for example Scaglione 'Samukundi Abelam conflict management' 1981.
- 61 See for example Gordon & Meggitt *Law and Order in the New Guinea Highlands* 1985, esp Chap 7 'The "customary law" option'.

- 62 Strathern *Official and Unofficial Courts* 1972, 1.
- 63 See for example Reay 'Changing conventions of dispute settlement in the Minj area' 1974, 198.
- 64 See for example Epstein 'Moots on Matupit' 1974, 93.
- 65 Angelo 'Customizing the law of Tokelau' 1986, 2.
- 66 Western Samoa. *Report of the Commission to Inquire into and Report upon the Organization of District and Village Government* 1950.
- 67 Crawford & Hennessy *Cases on Traditional Punishments and Sentencing* 1982.
- 68 Unrep, NTSC, 30 June 1980, 29-30.
- 69 Australia. Law Reform Commission 1986, para 233.
- 70 Ibid para 236.
- 71 See Hickson 'Hierarchy, conflict, and apology in Fiji' 1979 and Arno 'A grammar of conflict: informal procedure on an island in Lau, Fiji' 1979.
- 72 *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur 72.
- 73 *Samoan Public Trustee v Annie Collins* (1961) [1960-9] WSLR 52.
- 74 (1971) 17 FLR 141 (NTSC) per Blackburn J.
- 75 Ibid 266.
- 76 The test proposed by the Privy Council in *In re Southern Rhodesia* [1919] AC 211, 233.
- 77 (1971) 17 FLR 141, 267.
- 78 Ibid 268.
- 79 46. 1910 American Samoa Code Annotated 1981.
- 80 *Lemalu v Jessop* [1969] WSLR 214. See Powles *The Status of Customary Law in Western Samoa* 1973, 42-5.
- 81 Papua New Guinea *Report of the Committee Investigating Tribal Fighting* 1973. This Report and its downstream effects are further discussed in Chapter IV E 2 i.
- 82 Strathern *Report on Questionnaire Relating to Sexual Offences* 1975.
- 83 Ibid 16.
- 84 Australia. Law Reform Commission 1986, Part VII.

- 85 Ibid Chapter 16.
- 86 This development is fully reviewed in *Huakina Development Trust v Waikato Valley Authority* (unrep, M 430/86, 2 June 1987, High Court, Chilwell J).
- 87 Kuhn *The Structure of Scientific Revolutions* 1970.
- 88 Diamond 'The rule of law versus the order of custom' 1973.
- 89 (1971) 17 FLR 141, 272-3.
- 90 Australia. Aboriginal Land Rights Commission 1974, 1.
- 91 Ibid 135-6.
- 92 Section 50(1).
- 93 Section 48(a), s 68(2)(a).
- 94 Section 3(1).
- 95 See Maddock *Anthropology, Law and the Definition of Australian Aboriginal Rights to Land* 1980; Maddock 'Wairipiri land tenure' 1981; Maddock '"Owners", "managers" and the choice of statutory traditional owners' 1983; Gumbert 'Paradigm lost' 1981.
- 96 Pitjantjatjara Land Rights Act 1981 (SA); Maralinga Tjarutja Land Rights Act 1984 (SA).
- 97 Seaman *Aboriginal Land Inquiry Report* 1984.
- 98 See Roberts 'Introduction' 1977, 7-8; Australia. Law Reform Commission 1986, Chaps 12-14.
- 99 See Draft Aboriginal Customary Laws (Recognition) Bill 1986 clauses 10-14.
- 100 Eggleston *Fear Favour or Affection* 1976, 277.
- 101 Sack 'Legal pluralism: introductory comments' 1986, 6.
- 102 Morse & Woodman 'Introductory essay: the state's options' (in press).
- 103 Bartholomew 'Private interpersonal law' 1952.
- 104 Allott *New Essays in African Law* 1970, 115-9.
- 105 Tier 'The relationship between conflict of personal laws and private international law' 1976.
- 106 Savigny *System of Modern Roman Law* 1840.
- 107 Dicey *Conflict of Laws* 1896. See generally Graveson 'Philosophical aspects of the English conflict of laws' 1977.

- 108 Hart *The Concept of Law* 1961.
- 109 On the philosophical basis of the conflict of laws see McLachlan 'Reforming New Zealand's conflicts process: the case for internationalisation' 1984.
- 110 See Morris *The Conflict of Laws* 1984, Chap 31 'Characterisation'.
- 111 Ibid Chap 3 'Proof of foreign law'.
- 112 Australia. Law Reform Commission 1986, para 631.
- 113 See further Chap III D.
- 114 Morris *The Conflict of Laws* 1984 Chap 4 'The exclusion of foreign law'.
- 115 See further Chap IV, especially Part D iii 'Repugnancy, public policy and the conflict of laws'. Poulter also makes this connection in 'Ethnic minority customs, English law and human rights' 1987 and in 'African customs in an English setting' (in press).
- 116 Morris *The Conflict of Laws* 1984, Chap 33 'The time factor'.
- 117 Vitta 'The conflict of personal laws' 1970; Pearl *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh* 1981, Chap 2 'Historical background to the interpersonal conflict of laws'.
- 118 See Pearl ibid 15 and the references he cites in fn 62.
- 119 Pearl ibid 23.
- 120 See the discussion in Chap II B 3 iii and the references cited at fn 110.
- 121 See Vitta 'The conflict of personal laws' 1970 and Lipstein & Szasz 'Interpersonal conflict of laws' in *International Encyclopedia of Comparative Law*.
- 122 See Pearl *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh* 1981.
- 123 See generally Hooker *Legal Pluralism* 1975.
- 124 Illustrative discussions of these types of issues are to be found in Pearl *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh* 1981, Allott *New Essays in African Law* 1970 and Bennett *Application of Customary Law in Southern Africa* 1985.
- 125 See for example Zimbabwe's experience discussed by Galen 'Internal conflicts between customary law and general law in Zimbabwe' 1983-4 and Seidman 'Rules of recognition in the primary courts of Zimbabwe' 1983.

- 126 Australia. Law Reform Commission 1986, para 95: 'The application of the Commission's recommendations in appropriate cases is to be achieved by the substantive requirements of the provision in question, and by related evidentiary requirements. Indeed, there may be cases where it is appropriate that provisions for the recognition of Aboriginal customary laws should apply to persons who are not Aborigines. These questions have to be considered on their merits, and cannot be resolved through the adoption of any more-or-less restrictive definition of "traditional Aborigine"'.
138
- 127 See 'Custom and usage' *Halsbury's Laws of England* vol 12, paras 401-44; *Allen Law in the Making* 1964, 112-60.
139
- 128 *Chapman v Smith* (1754) 2 Ves Sen 506; see *Halsbury* *ibid* para 407.
139
- 129 *Halsbury* *ibid* para 412.
139
- 130 (1608) *Dav* 1r 28.
139
- 131 The common law rule is enunciated in *R v Mills* (1844) 10 Cl & F 534 as modified by *Wolfenden v Wolfenden* [1946] P 61 and *Penhas v Tan Soo Eng* [1953] AC 304. For its application in Canada see *R v Nan-e-quis-a-ka* (1899) 1 Terr LR 211 and generally *Sanders Family Law and Native People* 1975.
139
- 132 See *Re Deborah* (1972) 5 WWR 203, 209:
141 Custom has always been recognised by the common law and while at an earlier date proof of the existence of a custom from time immemorial was required, *Tindal* CJ in *Bastard v Smith* (1838) 2 Mood & R 129, 136, 174 ER 238 points out that such evidence is not longer possible or necessary and that the evidence extending 'as far back as living memory goes, of a continuous peaceable and uninterrupted user of the custom' is all that is now required. Such proof was offered and accepted in this case.
141
- 133 *Welbeck v Brown* (1882) Sarbah FCL 185 (Gold Coast) applied the 1189 rule but this was not subsequently followed and long usage was regarded as sufficient. See *Allott New Essays in African Law* 1970, Chap 8.
143
- 134 *McHugh The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 167.
144
- 135 *Allott New Essays in African Law* 1970, 256.
144
- 136 For recent attempts to rework the common law rules in Australasia see Chap III E.
147
- 137 See *Poulter English Law and Ethnic Minority Customs* 1986; *Pearl Family Law and the Immigrant Communities* 1986; *Poulter 'Ethnic minority customs, English law and human rights'* 1987, and *Poulter 'African customs in an English setting'* (in press). Cf an earlier recognition of Hindu customary law for Indian
149

- migrants in other parts of the Empire: Hooker *Legal Pluralism* 1975, 81-4.
- 138 This policy was first enunciated by Roy Jenkins in 1966:
Integration is perhaps rather a loose word. I do not regard it as meaning the loss, by immigrants, of their own national characteristics and culture. I do not think that we need in this country a 'melting pot', which will turn everybody out in a common mould, as one of a series of carbon copies of someone's misplaced vision of the stereotyped Englishman I define integration, therefore, not as a flattening process of assimilation but as equal opportunity, coupled with cultural diversity, in an atmosphere of mutual tolerance.
Essays and Speeches 1967, 267.
- 139 Thus Samuels comments:
What society has not yet thought through and resolved as a matter of moral and ethical and social policy is whether the pressure, social and legal, is to be towards conformity or diversity But the present policy of drift, of response to random pressures, cannot be right. Society should make up its mind what it wishes to do in respect of the plural dimension.
'Legal recognition and protection of minority customs in a plural society in England' 1981.
- 140 See Pearl *Family Law and the Immigrant Communities* 1986, 43-5; Poulter *English Law and Ethnic Minority Customs* 1986, para 1.04.
- 141 Pearl *Family Law and the Immigrant Communities* 1986 is especially useful on the immigration perspective. A recent example of response by way of amendment to the immigration rules is a refusal to admit spouses under the age of 16, following two cases in 1986, one from Iran and the other from Oman, of child wives coming to Britain.
- 142 See notably United Kingdom. Law Commission *Polygamous Marriages* 1985.
- 143 Motor Cycle Crash Helmets (Religious Exemption) Act 1976.
- 144 See Pearl *Family Law and the Immigrant Communities* 1986, 84-6 for a discussion of the unreported cases. See also Poulter 'African customs in an English setting' (in press).
- 145 Prohibition of Female Circumcision Act 1985.
- 146 *Shahnaz v Rizwan* [1965] 1 QB 390, 401.
- 147 *Hirani v Hirani* (1983) 4 FLR 232 (CA).
- 148 See Australia. Law Reform Commission 1986, paras 163-4.
- 149 Durie 'Part II and Clause 26 of the Draft New Zealand Bill of Rights' 1985, 188.

- 150 One of the few attempts is Morse & Woodman 'Introductory essay: the state's options' (in press).
- 151 See Chap III.
- 152 See references cited supra n 52.
- 153 See supra Part D III and Chap II B 3 III.
- 154 See Chap V.
- 155 Australia. Law Reform Commission 1986, para 209.
- 156 Ibid paras 198-209.
- 157 Morse & Woodman 'Introductory essay: the state's options' (in press). Morse and Woodman blur two separate notions in Hart's work. The first is the distinction between imperative and power-conferring rules, a distinction which is relevant here and which Hart uses to criticise a theory of law based solely on commands. The second distinction, between primary and secondary rules, which Morse and Woodman appear to suggest is synonymous with this, is rather a device to distinguish between substantive rules and those rules of recognition (for creation, change and adjudication) whose presence Hart requires for the existence of a legal system.
- 158 Hart *The Concept of Law* 1961, 26-41.
- 159 For discussion of negative measures see Morse & Woodman 'Introductory essay: the state's options' (in press), 4-7. In the context of imperative norms see Australia. Law Reform Commission 1986, para 402.
- 160 See Papua New Guinea. Law Reform Commission *Adultery* 1977. Action was taken in Vanuatu to remove this conflict by making adultery also an offence under state law: Penal Code (Amendment) Act 1982.
- 161 Strathern *Report on Questionnaire Relating to Sexual Offences* 1975.
- 162 See Australia. Law Reform Commission 1986, Chap 14 and the discussion infra Chap IV E 2 II.
- 163 For an illustrative case see *Teitinnang v Arlong* [1987] LRC (Const) 517 (Kiribati HC); see infra Chap IV E 1 II. For efforts to deal with this problem see Business Groups Incorporation Act Ch 144 and Land Groups Incorporation Act Ch 147 (Papua New Guinea) and Tokelau Village Incorporation Regulations 1986 (NZ SI 1986/319).
- 164 See Australia. Law Reform Commission 1986, Chap 16.
- 165 This argument has been made in relation to Fiji. See Prasad 'Self-regulation in the Fijian village' 1985; Nadakuitavuki

- 184 'Fijian magistrates - an historical perspective' (in press);
Cole, Levine & Matahau *The Fijian Provincial Administration: A*
185 *Review* 1985. See also the arguments made in the Australian
context in Australia. Law Reform Commission 1986, para 108.
- 166 See the discussion of the Western Samoan village councils in
Western Samoa *Report of the Commission to Inquire into and*
187 *Report upon the Organization of District and Village Government*
1950 and infra Chap IV E 1 i.
- 167 See supra Part C iii and iv and infra Chap III E.
- 168 The position is qualified by s 13 Fisheries Act Cap 158 Ed 1978.
- 169 Papua New Guinea Law Reform Commission. *Sorcery* 1977.
- 170 Niue (Amendment) Act 1968 (NZ) s 92.
- 171 Cook Islands Act 1915 (NZ) s 456.
- 172 Maori Affairs Act 1953 (NZ) ss 78 and 79.
- 173 Maori Affairs Act 1953 (NZ) s 155. This restriction is to be
dropped under the new Maori Affairs Bill 1987.
- 174 Cf Village Courts Act Ch 44 (Papua New Guinea) ss 26 and 27.
- 175 Constitution of Western Samoa Part IX.
- 176 Subsidiary Legislation to the Native Lands Act Cap 61 1977 Ed.
- 177 Native Lands Act s 8(1).
- 178 For example *Native Lands Act* Cap 133 Ed 1978 (Fiji) and,
generally, Chap VI.
- 179 Fisheries Act Cap 158 Ed 1978 (Fiji) ss 13-20.
- 180 The Islanders Marriage Act Cap 47 (Solomon Islands) ss 18 and 19
contains an optional provision for the registration of customary
marriages.
- 181 Western Samoan Constitution Art 100. This provision is
qualified by a further phrase '... and with the law relating to
Samoan custom and usage'. The Samoan Status Act 1963 restricts
the holding of *matai* titles to Samoans. Section 2 of that Act
provides 'the provisions of this Act are hereby declared to be
in accordance with Samoan custom and usage'. The Land and
Titles Court exercises jurisdiction over *matai* titles.
- 182 Tokelau Village Incorporation Regulations 1986 (NZ SI 1986/319)
s 2.
- 183 *Te Weehi v Regional Fisheries Officer* (1986) 6 NZAR 114; see
further Chap III E ii.

- 184 Part C iv.
- 185 Marriage (Amendment) Ordinance 1981 (Tuvalu); Tokelau Marriage Regulations 1986 (NZ SI 1986/320).
- 186 See infra Chap IV E 3 and Australia. Law Reform Commission 1986, paras 246-53.
- 187 See Powles 'Law and government in the South and Central Pacific' 1985 where Appendix II tabulates the formal recognition of chiefly authority in Pacific jurisdictions; Powles 'Traditional institutions in Pacific constitutional systems' 1982; and Lynch 'Traditional leadership in the constitution of the Marshall Islands' 1984 which contains a valuable comparison with other Pacific jurisdictions.
- 188 See for example Vanuatu Constitution Article 28, Cook Islands Constitution Article 9.
- 189 As in Fiji, see ss 45(1)(a) and 68 of the Constitution.
- 190 As in Tonga, Arts 59, 60, 63 of the Constitution. In Fiji there are eight members of the upper house (Senate) appointed by the Great Council of Chiefs (s 45(1)(a) of the Constitution). The latter is not constituted by the Constitution but by the Fijian Affairs Act Cap 120 Ed 1978 s 3.
- 191 Discussed further in infra Chap IV C iii.
- 192 *St v Kupara* [1986] LRC (Crim) 946, 949 Kapi DCJ. See further infra Chap III B ii.
- 193 For example *Napaluma v Baker* (1982) 29 SASR 192.
- 194 For example *Rogers v Rogers and Tatana* (unrep, NZHC Whangarei A 34/81, 18 November 1982, Barker J noted in [1983] *Recent Law* 276 and [1958-1983] *Tai Whatī* 264).
- 195 See Australia. Law Reform Commission 1986, Chaps 13 and 14.
- 196 Ibid Chap 15.
- 197 Ibid Chap 36, and cf the approach to the inclusion of Maori values in environmental planning reviewed in *Huakina Development Trust* and developed also in the recommendations of the Waitangi Tribunal, see Chap III E ii. On a statutory level, s 3(1)(g) of the Town & Country Planning Act 1977 (NZ) directs that the relationship of the Maori people and their culture and traditions with their ancestral land are matters of national importance to be taken into account in the planning process.
- 198 For example the rules laid down in *R v Anunga* (1976) 11 ALR 412 for the police interrogation of Aborigines.
- 199 See generally Durham 'The Aboriginal and comparative law: a United States perspective' 1986; Hooker *Legal Pluralism* 1975, 312-31.

- 200 A notion developed by Marshall CJ of the United States Supreme Court in a series of decisions in the early nineteenth century: *Johnson v M'Intosh* (1823) 8 Wheat 543; *Cherokee Nation v State of Georgia* (1831) 5 Peters 1; *Worcester v State of Georgia* (1832) 6 Peters 515; *Mitchell v United States* (1835) 9 Peters 711.
- 201 See McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, Part I; and infra Chap II 1, 'Indigenous sovereignty and imperial expansion'. Section (vii) discusses protectorate status.
- 202 Section 71 New Zealand Constitution Act 1852 (Imperial) which is still in force.
- 203 Section 35 Supreme Court Ordinance 1874 (Fiji), which is no longer in force.
- 204 See generally Chap II 1 'Indigenous Sovereignty and Imperial expansion'.
- 205 Australia. Law Reform Commission 1986, para 195.
- 206 See for example Richstone 'The Inuit and customary law' (in press).
- 207 See Morse *Self-Government in Australia and Canada* 1984, 82.
- 208 See the discussion infra Chap IV C II 'Gerhardy v Brown: are land rights discriminatory?'.
- 209 Fisheries Act 1982 (Vanuatu) s 9(1).
- 210 Fisheries Act Cap 33 (Kiribati) s 21(1).
- 211 Islanders Divorce Act Cap 48 (Solomon Islands) s 4.
- 212 See for example Local Government Act Ch 57 (Papua New Guinea) ss 68-72, which give local councils special powers to legislate on customary matters.
- 213 NZ SI 1986/319, Regulations made pursuant to the Tokelau Act 1948.
- 214 Regulations 14 and 15.
- 215 (Unrep, Review No 1/1982, SC, Fiji, 5 January 1982, Tuivaga CJ). For comment see Maitaitoga 'Mixed civil and customary jurisdictions in Fiji' 1986.
- 216 *R v Latl*, 2.
- 217 For comment see Takoa & Freeman 'Provincial courts in Solomon Islands' (in press).
- 218 See Brown 'The Te Atatu Maori tribunal' 1985, and Hazlehurst 'Community care' 1985.

- 219 See Davidson *Samoa mo Samoa* 1967, 78-80.
- 220 See Western Samoa. *Report on Matai Titles, Customary Land and the Land and Titles Court* 1975. See also Anesi & Enari 'The land and chiefly titles court of Western Samoa' (in press).
- 221 See Powles *The Status of Customary Law in Western Samoa* 1973, Chap V, esp p51. The Court is presently governed by the Land and Titles Act 1981.
- 222 New Zealand *The Maori Land Courts* 1980, 61, 73.
- 223 See esp ss 77-83. Section 78(1), for instance, authorises a judge to apply the rules of *marae kawa* (marae protocol) to the conduct of a Maori Land Court hearing.
- 224 On which see *Infra* Chap III E II.
- 225 See Weisbrot 'Papua New Guinea's Indigenous jurisprudence' 1986, 48-9.
- 226 The Central Islands Provincial Assembly (Bride Price Control) Bye-laws 1979, LN 25/1979 made pursuant to the Local Government Act Cap 14.
- 227 See further *Infra* Chap II B 1 III and Chap III E II.
- 228 See for example Jones, 'The Bill of Rights and Te Tiriti o Waitangi' 1985 and Evans 'Is the Treaty of Waitangi a Bill of Rights?' 1985.
- 229 New Zealand *A Bill of Rights for New Zealand. A White Paper* 1985, para 5.5.
- 230 (1987) 6 NZAR 353 (CA).
- 231 On this see Woodman 'Unification or continuing pluralism' 1987 and Australia. Law Reform Commission 1986, Chap 8.
- 232 Refer *supra* Introduction Part A.
- 233 Twining *The Place of Customary Law* 1963, 34.
- 234 (1987) 6 NZAR 353, 369 per Cooke P.
- 235 Derham *Report on the System for the Administration of Justice in the Territory of Papua New Guinea* 1960. See Sack 'Law, custom and good government: the Derham report in its historical context' 1985.
- 236 Australia. Law Reform Commission 1986, paras 102, 113-26.
- 237 Allott *The Limits of the Law* 1980, 186.
- 238 Holding In (December 1986) no 23 Aboriginal Law Bulletin 5.

- 239 Ojwang 'Kenya' 1986, 16.
- 240 Frecker letter to the Law Reform Commission, 26 November 1976 (Background Papers, Underlying Law Reference, Prof Y P Ghai, U Warwick).
- 241 See infra Chap III D and the discussion of the nature of the postcolonial state in Ghai, Luckham & Snyder *The Political Economy of Law* (in press).
- 242 See Australia. Law Reform Commission 1986, para 169.
- 243 Chalmers 'A history of the role of traditional dispute settlement procedures' 1982, 177.
- 244 See infra Chap II B 3.
- 245 For a critique of the pursuit of 'development' in Papua New Guinea see Good *Papua New Guinea: A False Economy* 1986.
- 246 See infra Chap VI. For examples of this developmentalist attitude to customary tenure see Crocombe 'Customary tenures and incentives to produce' 1975, Knetsch & Trebilcock *Land Policy and Economic Development in Papua New Guinea* 1981.
- 247 See Paul & Dias *Law and Legal Resources in the Mobilization of the Rural Poor for Self-Reliant Development* 1980.
- 248 Ghai 'State, law and participatory institutions' 1982.
- 249 See infra Chap III A ii and Ghai, Gowi & Paliwala 'Preliminary report on the 1976 Dag Hammarskjöld Seminar on law and self-reliance'.
- 250 Articles 71-3. See infra Chap VI and Ghai 'Land regimes and paradigms of development' 1985.
- 251 See Abel 'The contradictions of informal justice' 1982.
- 252 See infra Chap V.
- 253 This view was strongly endorsed in relation to the Papua New Guinea village courts in Clifford, Morauta & Stuart *Law and Order in Papua New Guinea* 1984.
- 254 On this subject, the author is indebted to Benedict Kingsbury, Balliol College, Oxford who is preparing a D Phil thesis on 'Indigenous peoples in international law'. See generally United Nations *Study of the Problem of Discrimination against Indigenous Populations* 1986 and Bennett *Aboriginal Rights in International Law* 1978.
- 255 See Kingsbury 'Indigenous Peoples' and the International Community 1984, and Independent Commission on International Humanitarian Issues *Indigenous Peoples* 1987.

- 256 An exception is the complex case of Fiji on which see Chap II E ii and McLachlan 'The Fiji constitutional crisis' 1987.
- 257 See for example Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 (1987) 26 ILM 38 and the Torres Strait Treaty 1978 (1978) 18 ILM 291.
- 258 See Brownlie 'The rights of peoples' 1985 and Crawford 'Self-determination outside the colonial context' 1986.
- 259 Australia. Law Reform Commission 1986, para 5.
- 260 Ibid paras 1035-7.
- 261 See infra Chap III E ii.

II THE COLONIAL EXPERIENCE AND THE IDEA OF CUSTOMARY LAW

- 1 Forster *A Voyage Round the World, in His Britannic Majesty's Ship 'Resolution'* 1777, 1: 303, 368.
- 2 Thurston to Gordon 27 April 1879 in Stanmore *Fiji: Records of Private and of Public Life 1875-1880 1897-1912*, III: 561.
- 3 Gordon *Paper on the System of Taxation in force in Fiji* 1879, 178.
- 4 Griffiths 'What is legal pluralism?' 1986, 6.
- 5 On which see Morris & Read *Indirect Rule and the Search for Justice* 1972. Gordon's contribution in Fiji is acknowledged by Read, 256.
- 6 Ranger 'The invention of tradition in colonial Africa' 1983, 250.
- 7 See McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, which very fully discusses the developing norms of international and colonial law governing imperial expansion, British imperial practice and the common law recognition of customary law throughout the Empire and in America.
- 8 See Morse 'Indigenous law and state legal systems' 1983, 381.
- 9 See Roberts-Wray *Commonwealth and Colonial Law* 1966, Chap 14 'Sovereignty and title to land'; McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, and McHugh 'Aboriginal title in New Zealand courts' 1984.
- 10 (1847) [1840-1932] NZPCC 387, 388 (SC).
- 11 *R v Jack Congo Murrell* (1836) 1 Legge 72 (emphasis added).
- 12 McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 157.

- 13 This issue is discussed in Australia. Law Reform Commission 1986, Chaps 4 and 5. See also McHugh *ibid*; Bartlett 'Aboriginal land claims at common law' 1985; and Australia. Senate Standing Committee on Constitutional and Legal Affairs *Two Hundred Years Later* 1983.
- 14 See McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 138 for references.
- 15 (1889) 14 App Cas 286,291.
- 16 (1970) 17 FLR 141. The implications of this case for a reconsideration of common law recognition of Aboriginal customary law are much more fully considered in Chapter III E III.
- 17 *Coe v Commonwealth* (1979) 24 ALR 118.
- 18 See Australia. Law Reform Commission 1986, paras 39-48.
- 19 United Kingdom. House of Commons *Commons Committee on Aborigines (British Settlements) Report* [1837] Parliamentary Papers No 425.
- 20 *R v Jack Congo Murrell* (1836) 1 Legge 42, despite the arguments of Stephen cited in the text *supra* at n 11.
- 21 *R v Cobby* (1883) 4 LR (NSW) 355 Martin CJ.
- 22 *Milirrpum v Nabalco* (1970) 17 FLR 141 and the discussion therein on colonial land policy 242-62, as well as *Williams v Attorney-General (New South Wales)* (1913) 16 CLR 404 (HCA).
- 23 Australia. Law Reform Commission 1986, paras 41-59.
- 24 4 Geo 4 c 96.
- 25 9 Geo 4 c 83.
- 26 57 Geo 3 c 53.
- 27 See McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 67-71 and Scarr *Fragments of Empire* 1967, 6.
- 28 McHugh *ibid*, 106. The point is also eloquently made by Chief Judge Fenton in the *Kauwaeranga* judgment of the Native Land Court (1870), reported in (1984) 14 VUWLR 227.
- 29 For example, Roberts-Wray *Commonwealth and Colonial Law* 1966, 101-4 and 629-36; Adams *Fatal Necessity* 1977, 162; McClintock *Crown Colony Government in New Zealand* 1958, 62; and Foden *The Constitutional Development of New Zealand in the First Decade* 1938, 170.
- 30 The present day implications of the Treaty are more fully considered in Chap III E II where further references are cited. But see in the historical context McHugh *The Aboriginal Rights*

- 47 of the New Zealand Maori at Common Law 1987; McKenzie *Oral Culture, Literacy and Print in Early New Zealand* 1985; Victoria University of Wellington *The Treaty of Waitangi* 1972; Ross 'Te Tiriti o Waitangi' 1972; and Orange *The Treaty of Waitangi* 1987.
- 48
- 49 See Scarr *Fragments of Empire* 1967, Chap 7 'Settlement, Inter-
- 31 McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 168-9.
- 32 *Supra* n 19.
- 50 *Ibid* 209.
- 33 See discussion in McClintock *Crown Colony Government in New Zealand* 1958, 175-7, and Adams *Fatal Necessity* 1977, 92-3.
- 51
- 34 United Kingdom. Colonial Office CO 209/4: 269-70.
- 35 See Ward *A Show of Justice* 1973, 45.
- 36 Adams *Fatal Necessity* 1977, 216-7.
- 37 CO 209/8: 480, 486-7.
- 54 The clearest modern authorities on the survival of indigenous
- 38 See Roberts-Wray *Commonwealth and Colonial Law* 1966, 899-900; Scarr *Fiji: A Short History* 1984, Chap 2; France *The Charter of the Land* 1969, Chap 6; and Howe *Where the Waves Fall* 1984, Chap 12. France, 101, cites Moss's record of meeting Cakobau (Moss, *FJ A Month in Fiji by a Recent Visitor* Mullen, Melbourne 1868) 29-30:
- 55 On being introduced to him and learning we were from New Zealand, his first questions were how many Maoris were left, and how the war was going on! Among other things I mentioned the confiscation of five million acres of native land, so that the Maoris, as they would have war, might be made to pay for it.
- 56 Russell to Hobson, 9 December 1840, CO 209/8, 480.
- 39 See Adams *Fatal Necessity* 1977, 207-8.
- 57 *Ibid* 487, emphasis added.
- 40 Cf Gundara 'British extraterritorial jurisdiction in 19th century Zanzibar', and Morris 'Protection or annexation?' 1972.
- 58
- 41 See Scarr *Fragments of Empire* 1967, 29.
- 42 *Ibid* 168-70.
- 43 McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 56.
- 44 See Roberts-Wray *Commonwealth and Colonial Law* 1966, 132-3, 886-7; Woodman 'The state and customary laws' 1986, 137. The relevant legal instruments are the Letters Patent, 8 June 1888, SRO Rev 1 ed vol 1 p468 and the British New Guinea Order in Council 1888.
- 51
- 52
- 45 Land Regulation Ordinance 1888, Crown Grants Ordinance 1889, Crown Lands Ordinance 1890.
- 53
- 46 (1889) 81 State Papers 1058. On the history of Samoa generally see Davidson *Samoa mo Samoa* 1967.

- 47 (1961) [1960-9] WSLR 52.
- 48 See Macdonald *Cinderellas of the Empire* 1982, 114.
- 49 See Scarr *Fragments of Empire* 1967, Chap 7 'Settlement, inter-island recruiting and Anglo-French stalemate in the New Hebrides, 1877-1906'; and Chap 8 'The New Hebrides governed, 1906-1914'.
- 50 Ibid 209.
- 51 Ibid 242.
- 52 The *locus classicus* is *Campbell v Hall* (1774) 1 Cowp 204, 208-9. See generally Roberts-Wray *Commonwealth and Colonial Law* 1966, 150-85, 532-49.
- 53 McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 140.
- 54 The clearest modern authorities on the survival of indigenous customary law in settled colonies are Canadian. See esp *Calder v Attorney-General (British Columbia)* (1973) 34 DLR (3d) 145 (SCC). For Canadian cases in the family law area see Sanders *Family Law and Native People* 1975. In relation to fishing rights see McHugh 'Maori fishing rights and the North American Indian' 1985.
- 55 The Act only applied to New South Wales and Van Dieman's land. A similar position has been achieved by statute in the subsequently founded Australian states, although the exact reception date differs for each.
- 56 Russell to Hobson, 9 December 1840, CO 209/8, 480.
- 57 Ibid 487, emphasis added.
- 58 Stephen to Hope, 28 December 1843, CO 209/22: 247, 253-4.
- 59 See Ward *A Show of Justice* 1973, Chap V 'Some concessions to Maori viewpoints' and Adams *Fatal Necessity* 1977, Chap 7 'Law and custom'.
- 60 9 & 10 Vict c 103. The operative parts of the Act relating to the division of New Zealand into two provinces and the provision of representative assemblies were suspended by 11 & 12 Vict c 5 for 5 years but this did not affect s 10.
- 61 See for example the judgment of Prendergast CJ in *Rira Peti v Ngaraihi te Paku* (1888) 7 NZLR 235.
- 62 GBPP (1847) No 763, p71.
- 63 McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 175.

- 64 Now in force as s 155 Maori Affairs Act 1953. This section will be repealed by the Maori Affairs Bill 1987.
- 65 Marriage Ordinance 1847 s 44.
- 66 Maori Purposes Act 1951 s 8; Adoption Act 1955 s 18. See Hooker *Legal Pluralism* 1975, 334-5.
- 67 (1878) 3 NZ Jur (OS) 72 (SC).
- 68 Ibid 77.
- 69 Ibid 78.
- 70 Ibid 79.
- 71 *Mangakahia v NZ Timber Co* (1881-2) 2 NZLR (SC) 345; *Moore v Meredith* (1889) 8 NZLR 160; *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA); *In re the Bed of the Wanganui River* [1955] NZLR 419 (CA); *In re the Ninety Mile Beach* [1963] NZLR 461 (CA).
- 72 *Rira Peti* followed in *R v Walremu Kingi* (1909) 12 GLR 175 (SC) and later cases.
- 73 *Waipapakura v Hempton* (1914) 33 NZLR 1065; *Inspector of Fisheries v Weepu* [1956] NZLR 920; *Keepa v Inspector of Fisheries* [1965] NZLR 322. The law on this matter had been radically reconsidered by *Te Weehi v Regional Fisheries Officer* (1986) 6 NZAR 114, discussed in Chap III E II. See also McHugh 'The legal status of Maori fishing rights in tidal waters' 1984 and Brookfield 'Maori fishing rights' 1987.
- 74 [1840-1932] NZPCC 387, affirmed *In re "The Lundon and Whitaker Claims Act 1871"* [1872] 2 NZCA 41.
- 75 Especially *Kauwaeranga* judgment (1870) Chief Judge Fenton, (1984) 14 VUWLR 227; and *Omapere Lake* (unrep, 1929, Acheson J).
- 76 *Hineita Rirerire Arani v Public Trustee* (1919) [1840-1932] NZPCC 1 (customary adoption); *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371; *Wallis v Solicitor-General* [1903] AC 173 (customary land).
- 77 Roberts-Wray *Commonwealth and Colonial Law* 1966, 900-1.
- 78 See *Robertson v Hennings* (1876) 1 FIJI LR Sir William Hackett CJ.
- 79 Proclamation of 14 October 1874, confirmed by Ordinance No 1 of 1875.
- 80 A specific Act, 1875 No 16, was passed to cater for such districts but it remained in force only until 5 November 1882 and was formally repealed by 1921 No 3.

- 81 Western Pacific Order in Council 1877 ss 22-4.
- 82 See Morris 'Protection or annexation?' 1972. See also Munro & Firth 'Towards colonial protectorates' 1986.
- 83 See for example *R v Una* (1933) 3 Fiji LR 151 on appeal to the Supreme Court of Fiji from the Commissioner's court sitting in the British Solomon Islands Protectorate.
- 84 Initially under three sets of Native laws for the Gilbert, Ellice and Tokelau Islands (1894, 1912), then a proliferation of regulations followed culminating in Grimble's general set of 1930 and the Native Governments' Ordinance 1948.
- 85 Laws Repeal and Adopting Ordinance 1922.
- 86 Samoa Act 1921 (New Zealand) ss 349 and 350. The New Zealand pattern was to provide the same cut-off date for English law as applied in New Zealand, 1840. See further Powles 'The common law in the Pacific' 1986.
- 87 Niue Act 1966 s 672.
- 88 Tokelau Amendment Act 1969 s 4A; see Angelo 'The common law in New Zealand and Tokelau' 1986.
- 89 See Allott *New Essays in African Law* 1970, Chap 4.
- 90 Moore *Law as Process* 1978.
- 91 See Williams 'The recognition of "native custom" in Tanganyika and New Zealand' 1986.
- 92 Allott *The Limits of the Law* 1980, 109-120.
- 93 Seidman 'The reception of English law in colonial Africa revisited' 1968-9.
- 94 Idem.
- 95 See Kingsbury '"Indigenous peoples" and the international community' 1984, 37-47.
- 96 See Howe *Where the Waves Fall* 1984 and Smith *European Vision and the South Pacific* 1969.
- 97 Maine *Ancient Law* 1861, 99-100.
- 98 See for example Marx & Engels *The German Ideology* 1947.
- 99 Marxist theories in their application to law in the Third World are explored in Ghal, Luckham & Snyder *The Political Economy of Law* (in press). The consequences of these theories for interpretations of the recognition of customary law in the colonial period will be discussed in Part C.

- 100 Cameron *Tanganyika Territory. Native Administration Memoranda No 1* 1930, 6. See generally Morris & Read *Indirect Rule* 1972.
- 101 Ibid, Chap 8 'Patterns of indirect rule in East Africa'.
- 102 Supra n 100, 5.
- 103 France *The Charter of the Land* 1969, 124.
- 104 Malinowski 'Introduction' in *Hogbin Law and Order in Polynesia* 1934, xviii.
- 105 In *Encyclopedia of the Social Sciences* 1933, 202, reprinted in *Structure and Function in Primitive Society* 1952, Chap 12.
- 106 France *The Charter of the Land* 1969, 117-20. The text of Fison's influential lecture in Levuka, Fiji was originally published as *Land Tenure in Fiji* 1881.
- 107 See Allen *Law in the Making* 1964, 112-60 and Halsbury 'Custom and usage'.
- 108 France *The Charter of the Land* 1969, 124.
- 109 Allott *New Essays in African Law* 1970, 107-8.
- 110 See further on the interpersonal conflict of laws Vitta 'The conflict of personal laws' 1970; Lipstein & Szaszy 'Interpersonal conflict of laws'; Pearl *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh* 1981; and Bennett *Application of Customary Law in Southern Africa* 1985. Hooker *Legal Pluralism* 1975 surveys across a wide range of jurisdictions the formal structure of colonial plural legal systems.
- 111 On marriage see Bennett *idem*; Morris & Read *Indirect Rule* 1972, Chap 7; and Chanock *Law, Custom and Social Order* 1985, Part III 'Men and women'.
- 112 Sack 'Legal Pluralism: Introductory Comments' 1986.
- 113 Griffiths 'What is legal pluralism?' 1986, 7.
- 114 See Twining *The Place of Customary Law in the National Legal Systems of East Africa* 1963.
- 115 Ashley to Western Pacific High Commissioner, 22 May 1935. See Laracy 'Custom, conjugality and colonial rule in the Solomon Islands' 1980.
- 116 *Idem*. Refer: Native Courts Regulation 1942, Native Marriage Regulation 1945.
- 117 Murray 'Native custom and the government of primitive races' 1928, 2449.

- 118 Ibid 2456.
- 119 Ibid 2444.
- 120 See Ward *A Show of Justice* 1973, Chap 6. Refer: Resident Magistrates' Court Ordinance 1846.
- 121 Sewell *Journal* (20 October 1861) Vol 1, 315. See Ward *ibid*, Chap 9.
- 122 Ward *ibid* 146.
- 123 Roth *Occasional Paper* 1951, 2.
- 124 Native Lands Ordinance 1880. See generally France *The Charter of the Land* 1969; and Clammer 'Colonialism and the perception of tradition in Fiji' 1973, 199.
- 125 See Scarr *Fiji: A Short History* 1984, 86; and MacNaught 'Chiefly civil servants?' 1974.
- 126 Scarr *ibid* 90, citing Ratu Isikeli Tabakauoro.
- 127 Native Laws of the Gilbert Islands 1894; Native Laws of the Ellice Islands 1894; Native Laws of the Union Group 1912. See generally Macdonald *Cinderellas of the Empire* 1982 and Lundsgaarde 'Some transformations in Gilbertese law' 1968.
- 128 Macdonald *ibid* 78.
- 129 Native Laws of the Union Group, Law No XVIII 1.
- 130 Macdonald *Cinderellas of the Empire* 1982, 86.
- 131 See his memoirs: Grimble *A Pattern of Islands* 1952 and *Return to the Islands* 1957.
- 132 Minute, Western Pacific High Commission, WPHC 4, 939/1928.
- 133 Gilbert Islands, Island Regulations 1939; Ellice Islands, Island Regulations 1947.
- 134 Moorehead *The Fatal Impact* 1966.
- 135 See Howe *Where the Waves Fall* 1984, 349.
- 136 Ranger 'The invention of tradition in colonial Africa' 1983, 247-9.
- 137 Chanock *Law, Custom and Social Order* 1985, 9.
- 138 Twining *The Place of Customary Law* 1963.
- 139 Morris & Read *Indirect Rule* 1972, Chap 6.
- 140 Woodman 'How state courts create customary law' 1983.

- 141 Morris & Read *Indirect Rule* 1972, 183.
- 142 This argument is pursued by Diamond 'The rule of law versus the order of custom' 1973 and Fitzpatrick 'Is it simple to be a Marxist in legal anthropology?' 1985.
- 143 Fitzpatrick *Law and State in Papua New Guinea* 1980.
- 144 Ibid 247.
- 145 Snyder *Capitalism and Legal Change* 1981 and 'Colonialism and legal form' 1981.
- 146 Ranger 'The invention of tradition in colonial Africa' 1983, 254.
- 147 Chanock *Law, Custom and Social Order* 1985.
- 148 Chanock 'Neither customary nor law' 1987.
- 149 See generally Howe *Where the Waves Fall* 1984, Chaps 1 and 2.
- 150 See for instance Podelefsky's analysis of the value of intergroup marriage and exchange in 'Contemporary warfare in the New Guinea Highlands' 1984.
- 151 Cf Woodman's contention in the African context, contrary to the theories discussed above, that 'reasonably distinct societies ... can be identified ... to depict Africa, even at some time in the past, as consisting of a mass of individuals every one of whom has vastly complex and ever-changing membership of multiple groups would seem to disregard much of the evidence of culture, and especially of language'. - Woodman 'Unification or continuing pluralism in family law' 1987, 11.
- 152 Howe *Where the Waves Fall* 1984, Chap 3.
- 153 See Crocombe 'Pre-contact traditional land tenure' 1975.
- 154 The Central Highlands of Papua New Guinea were only first penetrated by colonial administrators in the 1930s and not 'pacified' until the 1960s (and even then the pacification has proved illusory).
- 155 See Crocombe 'Registration in the Pacific islands' 1984.
- 156 Kawharu *Maori Land Tenure* 1977, 15. See also Williams 'The recognition of "native custom" in Tanganyika and New Zealand' 1986.
- 157 [1870] *New Zealand Parliamentary Debates* 361.
- 158 Ward *A Show of Justice* 1973, 185-6.
- 159 *Timu Kerehi v Duff* (1902) 21 NZLR 416.

- 160 Native Lands Amendment Act 1866 (power to restrict alienation); Native Land Act 1867 (s 17 court to determine all owners); Native Land Laws Act 1883 (prior dealings a criminal offence). For comment see Ward *A Show of Justice* 1973, 214-7, 251-63, 289.
- 161 Native Lands Act 1865, s 45.
- 162 Kawharu *Maori Land Tenure* 1977, 17.
- 163 Part III (2), s 30.
- 164 See McHugh *Maori Land Laws of New Zealand* 1983 and *The Fragmentation of Maori Land* 1980.
- 165 (1867) Important Judgments Delivered in the Compensation Court and Native Land Court 19.
- 166 *Idem*.
- 167 See Kawharu *Maori Land Tenure* 1977, 105 and *Willoughby v Waihopi* (1910) 13 Gazette LR 41, 29 NZLR 1123 (SC).
- 168 See France *The Charter of the Land* 1969; Clammer 'Colonialism and the perception of tradition in Fiji' 1973; Walter 'Analysis of Fijian traditional social organization' 1978 and Nayacakalou 'Fiji: manipulating the system' 1971.
- 169 Native Lands Ordinance 1880 Preamble.
- 170 Crocombe *Land Tenure in the Cook Islands* 1964.
- 171 Crocombe 'Customary tenures and incentives to produce' 1975.
- 172 Fitzpatrick 'Law, plurality and underdevelopment' 1983, 171.
- 173 Benda-Beckmann, F von 'Why law does not behave' 1983, 241.
- 174 Kawharu *Maori Land Tenure* 1977, Chap 2 'Customary tenure and colonisation'.
- 175 Strathern *Official and Unofficial Courts* 1972.
- 176 Lundsgaarde 'Some transformations in Gilbertese law' 1968.
- 177 *Ibid* 119, 123.
- 178 Fitzpatrick *Law and State in Papua New Guinea* 1980, 104-9; Good *Papua New Guinea: A False Economy* 1986, 25-9; and Rodman 'Masters of tradition' 1984.
- 179 Strathern *Official and Unofficial Courts* 1972, 130.
- 180 Tonga did fall within the jurisdiction of the Western Pacific High Commission (see Scarr *Fragments of Empire* 1967, Chap 5) and entered into successive treaties with Britain in 1849, 1900 and 1958 (see Roberts-Wray *Commonwealth and Colonial Law* 1966,

- 909-13). Roberts-Wray comments on Tonga's constitutional status according to colonial law, 49:
 This country has always been referred to as 'the Kingdom of Tonga'. Whether there was reluctance in the past to classify it more precisely because the Crown possessed and exercised jurisdiction is of little importance. If there is such a thing as a Protected state, Tonga is one and has been one ever since it was placed under the Queen's protection. Tonga received full independence again in 1970.
- 181 See Scarr *Fragments of Empire* 1967; Howe *Where the Waves Fall* 1984, Chap 9; Latukefu *The Tongan Constitution* 1975; and Powles 'The common law in the Pacific' 1986.
- 182 Section 34(2).
- 183 Section 2.
- 184 Section 24(6) and (7).
- 185 The common law was not formally received until the Civil Law Act 1966 (as amended in 1983). Previous judicial decisions had referred to English precedent but the Tongan codes remained pre-eminent (see Powles 'The common law in the Pacific' 1986).
- 186 Hereditary Lands Act 1882; Lands Act 1927.
- 187 Howe *Where the Waves Fall* 1984.
- 188 France *The Charter of the Land* 1969, 91.
- 189 See Ward *A Show of Justice* 1973, 96-101; Sorrenson 'The Maori king movement' 1963; Sorrenson 'A history of Maori representation in Parliament' 1986.
- 190 (1912) 32 NZLR 321.
- 191 [1962] NZLR 600. The Wanganui River litigation began in the Maori Land Court in 1938, on the application of Titi Tihu. From there the claim proceeded before the Maori Appellate Court (1944), the Supreme Court (1949), a Royal Commission (1950), the Court of Appeal (1954), the Maori Appellate Court (1958) and the Court of Appeal (1962). See Durie 'Part II and Clause 26 of the Draft New Zealand Bill of Rights' 1985.
- 192 [1963] NZLR 461.
- 193 (1914) 33 NZLR 1065.
- 194 [1956] NZLR 920.
- 195 [1965] NZLR 322.
- 196 See Davidson *Samoa mo Samoa* 1967, Chap 5 'The rejection of paternalist control 1926-46'.

- 197 See Laracy 'Marching rule and the missions' 1971; Keesing 'Politico-religious movements and anticolonialism on Malaita' 1978; and Burt 'Kastom, Christianity and the first ancestor of the Kwara'ae of Malaita' 1982.
- 198 Keesing *Ibid* 50.
- 199 On the role of custom in Vanuatu immediately before and after independence see Keesing 'Kastom in Melanesia' 1982; Tonkinson 'National identity and the problem of kastom in Vanuatu' 1982; Larcom 'The invention of convention' 1982; Rodman '"A law unto themselves"' 1985; Ghai 'Land regimes and paradigms of development' 1985; Woodward 'Historical summary of constitutional advance in the New Hebrides 1954-1977' 1978; MacClancy 'Vanuatu since independence' 1984; and Weisbrot 'Vanuatu' 1986.
- 200 The rebellion, on the eve of independence, was only put down with Papua New Guinean assistance. See *Re Somare's Petition* [1985] LRC (Const) 476 (PNG Supreme Court, 1982). See also Larmour 'Federal constitutions that never were' 1982.
- 201 Lini *Beyond Pandemonium* 1980, 41.
- 202 Section 97A Penal Code, added by Penal Code (Amendment) Act 1982.
- 203 See Rodman '"A law unto themselves"' 1985.
- 204 See Larcom 'The invention of convention' 1982.
- 205 See for example Tonkinson 'National identity and the problem of kastom in Vanuatu' 1982, 311.
- 206 See Rodman '"A law unto themselves"' 1985.
- 207 See for example Island Courts Act 1983, discussed *infra* Chap V.
- 208 For further discussion of the constitutional law aspects of the coup see McLachlan 'The Fiji constitutional crisis of May 1987' 1987.
- 209 Fijian Affairs Act, Fijian Development Fund Act, Native Lands Act, Native Land Trust Act, Rotuma Act, Rotuma Lands Act, Agricultural Landlord and Tenant Act, Banaban Lands Act, Banaban Settlement Act.
- 210 See Cole, Levine & Matahau *The Fijian Provincial Administration* 1985; Prasad 'Self-regulation in the Fijian village' 1985; and Qalo 'Fiji' 1985.
- 211 Fiji. *Report of the Royal Commission on the Treatment of Offenders* 1981, paras 46-59; Fiji. Law Reform Commission 1986, paras 29-32, 191-202; and Cole et al *idem*.
- 212 'After 50 years Taveuni prepares for the chiefs' *Fiji Sunday Times* 24 August 1986.

- 213 *The Times* 18 May 1987. Committee Minutes PY/25, 30 July 1979.
- 214 Fiji. *Report of the Constitution Review Committee* 1987.
- 215 Taukei Submissions, 4.
- 216 Fiji. *Report of the Constitution Review Committee* 1987, para 8.12.
- 217 This interpretation is supported by Dr Walker, Chairman of the Auckland District Maori Council who commented 'The Alliance Party [outvoted in the 1987 elections] is an elitist party which has basically manipulated or used ethnic division as a means of maintaining power', *The Dominion* (Wellington, New Zealand) 27 May 1987.
- 218 Taukei Submissions, 5.
- 219 Fiji. *Report of the Constitution Review Committee* 1987, paras 4.58-4.65.
- 220 *Ibid*, paras 5.20-5.21.
- III CUSTOM AS A SOURCE OF UNDERLYING LAW
- 1 Somare 'Law and the needs of Papua New Guinea's People' 1974, 30.
- 2 Papua New Guinea. Constitutional Planning Committee *Final Report* 1974, 2/13.
- 3 Lynch 'The adoption of an underlying law' 1976, 37-8.
- 4 Sections 10 and 11(1).
- 5 The Law Reform Commission is established under section 21 'to assist in the development of our indigenous jurisprudence'. See also schedule 2 part 6.
- 6 The adoption of the common law is not subject to subsequent English legislative amendments (Sch.2.2(3)), thus laying to rest the controversy in New Guinea occasioned by *Booth v Booth* (1935) 53 CLR 1. See Lynch 'The adoption of an underlying law' 1976, 42. Schedule 2 part 5 provides detailed directions as to the operation of judicial precedent.
- 7 Sch.2.4.
- 8 Sch.2.5.
- 9 Sch.1.2.
- 10 Refer Chap I E III for discussion of the distinction between admission as fact and other forms of incorporation.
- 11 See for example Land Act, Ch 1986; Marriage Act, Ch 280 ss 3-5, 67, 71; Fisheries Act, Ch 214 ss 1 and 4; Adoption of Children Act, Ch 275 Part VI.

- 12 Vanuatu. Constitutional Committee *Minutes* PV/25, 30 July 1979.
- 13 See Smart 'Vanuatu' 1986, 18-22 for analysis of the content of received law.
- 14 On the meaning of 'Acts of general application' see Patchett 'Inherited imperial statutes in small jurisdictions' 1985, 61; and Roberts-Wray *Commonwealth and Colonial Law* 1966, Chap 11.
- 15 Western Samoa *Constitutional Convention Debates Official Report* 1960, 81, 777.
- 16 Powles *The Status of Customary Law in Western Samoa* 1973, 98. See also Powles 'The common law in the Pacific' 1986.
- 17 Lynch 'Traditional leadership in the constitution of the Marshall Islands' 1984, 17.
- 18 Ghal 'Constitutional issues in the transition to independence' 1983, 58.
- 19 Micronesia Constitutional Conventions Committee *Journal* 11, 821-2, cited in King 'Federated States of Micronesia' 1986.
- 20 See for example Kosrae Constitution Art VI (9); Yap Constitution Art VII (7); Pohnpei Constitution Art X (11). Refer Marksby 'Legislating social order' 1982.
- 21 See for example Village Courts Act, Ch 19 (Papua New Guinea) ss 26 and 27; Island Courts Act (Vanuatu) s 10.
- 22 See *infra* Chap V.
- 23 Solomon Islands cases are reported in annual volumes of the *Solomon Islands Law Reports* since 1980. Significant cases since 1985 appear in *Law Reports of the Commonwealth*.
- 24 [1982] SILR 94.
- 25 Cf a similar approach taken to the construction of 'property' in *Fugui v Solmac Construction* [1982] SILR 100, discussed *infra* Chap IV F.
- 26 Section 4.
- 27 [1982] SILR 12.
- 28 *Ibid* 13.
- 29 *Idem*.
- 30 [1983] SILR 223.
- 31 Customs Recognition Act, Ch 19, s 3(1)(b).
- 32 [1983] SILR 56.

- 33 [1986] LRC (Crim) 62.
- 34 Ibid 67.
- 35 Ottley & Zorn 'Criminal Law in Papua New Guinea' 1983; and
36 Weisbrot 'Papua New Guinea's indigenous jurisprudence and the
37 legacy of colonialism' 1986.
- 38 [1978] PNGLR 295.
- 39 Ibid 298 Prentice CJ.
- 40 [1981] PNGLR 265.
- 41 Ibid 288.
- 42 [1980] PNGLR 510.
- 43 Ibid 543.
- 44 [1980] PNGLR 350. See Narakobi 'In search of a Melanesian
45 jurisprudence' 1986.
- 46 [1982] PNGLR 299.
- 47 [1986] LRC (Crim) 946. But cf *St v Lipirin* [1983] PNGLR 283
48 where McDermott J awarded a reduced sentence in a case of
49 unlawful carnal knowledge on condition that traditional
50 compensation was paid to the clan of the child's mother.
51 McDermott J referred only to the Customs Recognition Act, not to
52 the development of the underlying law under the Constitution.
- 53 [1986] LRC (Crim) 946, 9.
- 54 [1978] PNGLR 241.
- 55 [1978] PNGLR 326.
- 56 Ibid 332-3.
- 57 *St v Aidou* (unrep, PNG National Court, N 518, 20 September 1985).
- 58 [1983] PNGLR 350.
- 59 Papua New Guinea. Law Reform Commission 'Declaration and
60 development of underlying law' 1976.
- 61 Papua New Guinea. Law Reform Commission *The Role of Customary Law
62 in the Legal System* 1977.
- 63 Ibid Part II 'The role of customary law in the criminal justice
64 system: criminal responsibility, punishments and other orders'.
- 65 Brunton, B J 'Comments on a working paper on the declaration and
66 development of the underlying law' (Background Papers, Underlying
67 Law Project, Prof Y P Ghai, U Warwick).

- 55 Ghai, Gowl & Paliwala 'Preliminary Report on the 1976 Dag Hammarskjöld seminar on Law and Self-Reliance'; and 'Underlying Law and Customary Law Seminar 1977' (Background Papers, Underlying Law Project, Prof Y P Ghai, U Warwick).
- 56 See Paliwala 'Review of comments' from Ghai *ibid*.
- 57 Frost letter to O'Neill (Secretary, Law Reform Commission), 7 November 1976, from Ghai *ibid*.
- 58 For example Papua New Guinea. Law Reform Commission *Customary Compensation* 1980.
73 *Cf* *Cob v Commissioner* (1978) 24 ALR 116 (HCA).
- 59 Scaglione (ed) *Homicide Compensation in Papua New Guinea* 1981; and
74 Scaglione (ed) *Customary Law in Papua New Guinea* 1983.
- 60 Papua New Guinea General Constitutional Commission *Final Report* 1983, 276.
76 David 'Sources of law', 100.
- 61 See Lynch 'The adoption of an underlying law' 1976; Wheare *The Constitutional Structure of the Commonwealth* 1960; and Sack 'Law and "custom" in Papua New Guinea' 1986.
- 62 For Papua New Guinea examples see *Johns v Thomason* [1976] PNGLR 15 (doctrine of ratification in agency law); *W A Flick & Co v Thompson* [1976] PNGLR 112 (restraint of trade). See also *Lillian v Trading Co (Solomons) Ltd (No 1)* [1983] SILR 10 (damages for employer's negligence).
79 On comparison between the situations of indigenous peoples in
80 *On comparison between the situations of indigenous peoples in*
- 63 [1984] SILR 55. *On comparison between the situations of indigenous peoples in*
81 *On comparison between the situations of indigenous peoples in*
- 64 *ibid* 58. *On comparison between the situations of indigenous peoples in*
82 *On comparison between the situations of indigenous peoples in*
- 65 See Weisbrot 'Papua New Guinea's indigenous jurisprudence' 1986; and Barton *Legal Resource Needs in Small States* 1980.
83 *On comparison between the situations of indigenous peoples in*
- 66 *Constitutional Reference No.1 of 1977* [1978] PNGLR 295, 299 Raine DCJ.
84 *On comparison between the situations of indigenous peoples in*
- 67 *Supra* n 57. See also Frost 'The use of customary law in the criminal justice system' 1976.
- 68 On ascertainment generally see Allott *New Essays in African Law* 1970, Chap 8; Australia. Law Reform Commission paras 617-26; Weisbrot 'Integration of laws in Papua New Guinea' 1982, paras 495-4110. On proof of custom in England see Halsbury 'Custom and Usage' paras 426-8. The African *locus classicus* is *Angu v Attah* (1916) Gold Coast Privy Council Judgments 43, where the Privy Council held, 44:
85 *As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.'*
86 See also Seidman 'Rules of recognition in the primary courts of Zimbabwe' 1983.
87 *On comparison between the situations of indigenous peoples in*
88 *On comparison between the situations of indigenous peoples in*

- 69 On assessors and referees see National Court Assessors Act, Ch 42 (Papua New Guinea); Weisbrot 'Integration of laws' 1982, paras 4100-3; Australia. Law Reform Commission 1986, paras 667-74; Spring 'The judicial system of Western Samoa' 1970.
- 70 Papua New Guinea *Hansard* 19 June 1980 p 28/2/3.
- 71 Tonkinson 'National identity and the problem of Kastom in Vanuatu' 1982.
- 72 Fitzpatrick *Law and State in Papua New Guinea* 1980, 254.
- 73 Cf *Coe v Commonwealth* (1979) 24 ALR 118 (HCA).
- 74 Ottley & Zorn 'Criminal law in Papua New Guinea' 1983, 299.
- 75 See supra Chap I C 'Custom, law and commensurability'.
- 76 David 'Sources of law', 109.
- 77 See Twining *The Place of Customary Law* 1964, and Comaroff & Roberts *Rules and Processes* 1981.
- 78 Ghal 'Reference on customary law' (Background Papers, Underlying Law Project, Prof Y P Ghal, U Warwick).
- 79 See infra Chap I D iv 'Custom in English law'.
- 80 On comparisons between the situations of indigenous peoples in Canada and Australasia see Morse *Aboriginal Self-Government in Australia and Canada* 1984; McHugh 'Maori fishing rights and the North America Indian' 1985, and Bartlett 'Aboriginal land claims at common law' 1985.
- 81 Roberts-Wray *Commonwealth and Colonial Law* 1966, 629, 636.
- 82 See supra Chap II B 2 ii. The terminus a quo is *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (OS) 72 (SC).
- 83 Applied in *Tamihana Korokal v Solicitor-General* (1912) 32 NZLR 321 (CA).
- 84 (1914) 33 NZLR 1065 (SC), 1071.
- 85 [1918] GLR 483, 485; applied in *In re Wi Tamahau Mahupuku* [1932] NZLR 1397.
- 86 *In re the Bed of the Wanganui River* [1955] NZLR 419 (CA); *In re the Bed of the Wanganui River (No 2)* [1962] NZLR 600 (CA); *In re the Ninety Mile Beach* [1963] NZLR 461 (CA).
- 87 *Inspector of Fisheries v Weepu* [1956] NZLR 920 (SC); *Keepa v Inspector of Fisheries* [1965] NZLR 322 (SC).
- 88 See for example Foden *The Constitutional Development of New Zealand* 1938, 170-81; McClintock *Crown Colony Government* 1958,

- 62-3; Adams *Fatal Necessity* 1977, 162; and Hooker *Legal Pluralism* 1975, 332-3.
- 89 See notably McHugh 'Aboriginal title in New Zealand courts' 1984; and McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987. This approach is adopted in the analysis supra Chap II B 1 iv and B 2 ii.
- 90 (1986) 6 NZAR 114. For comment see McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, 299-302; and Brookfield 'Maori fishing rights' 1987.
- 91 (1986) 6 NZAR 114, 126.
- 92 (Unrep, CP 553/87, NZHC, 8 October 1987, Grieg J).
- 93 (Unrep, M 430/86, 2 June 1987, NZHC, Chilwell J).
- 94 See for example *Minhinnick v Auckland Regional Water Board* (Unrep, A 119/84, Planning Tribunal). For comment see Kenderdine 'Statutory separateness' 1985.
- 95 Supra n 93, 50-1.
- 96 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC), where Cooper J recognised Maori *Tangi* (funeral) customs as legitimate expenses in the administration of an estate on the basis that the custom was general, not contrary to statute and reasonable. See also *Mullick v Mullick* (1829) 1 Knapp 245, 12 ER 312 (PC).
- 97 Supra n 93, 62.
- 98 See Williams 'New Zealand' 1986.
- 99 The Bill was introduced on 9 December 1987, following negotiations between the Crown and the New Zealand Maori Council required by the Court of Appeal in *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353.
- 100 New Zealand. Waitangi Tribunal *Te Atiawa Claim* 1983; *Kaituna River Claim* 1984; *Manukau Harbour Claim* 1985; *Te Reo Maori Claim* 1986.
- 101 See Orange *The Treaty of Waitangi* 1987, 250 for the downstream effects of the reports.
- 102 The *Te Reo Maori Claim* resulted in the Maori Language Act 1987.
- 103 See for example *New Zealand Maori Council v Attorney-General*; *Huakina Development Trust v Waikato Valley Authority*; *Te Weehi v Regional Fisheries Officer*.
- 104 See New Zealand *A Bill of Rights for New Zealand: a White Paper* 1985.
- 105 New Zealand. Waitangi Tribunal *Te Atiawa Claim* 1983, 61.

- 106 Elkind & Shaw *A Standard for Justice* 1986; Legal Research Foundation *A Bill of Rights for New Zealand* 1985.
- 107 (1987) 6 NZAR 353.
- 108 Ibid 369.
- 109 Idem.
- 110 Ibid 370.
- 111 See Chap II B 1 iv.
- 112 See *Te Reo Maori Claim* and Maori Language Act 1987.
- 113 New Zealand. Waitangi Tribunal *Manukau Harbour Claim* 1985, 48.
- 114 *Cooper v Stuart* (1889) 14 App Cas 286, 291 (PC). See supra Chap II B 1 ii.
- 115 (1836) 1 Legge 72.
- 116 Idem.
- 117 (1971) 17 FLR 141. See supra Chap I C iii on the case's acceptance of the existence of Aboriginal customary law and Chap I C iv on the incommensurability of Aboriginal and European notions of property.
- 118 (1971) 17 FLR 141, 242.
- 119 Ibid 203.
- 120 Ibid 244-5.
- 121 See, for example Hookey 'The Gove land rights case' and Bartlett 'Aboriginal land claims at common law' 1985.
- 122 See *Calder v Attorney-General (British Columbia)* (1973) 34 DLR (3d) 145 (SCC), 217; and *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513, 541.
- 123 See infra Chap I C iii and Chap VI B ii.
- 124 *Coe v Commonwealth* (1979) 24 ALR 118 (HCA), 129.
- 125 Refer Australia. Law Reform Commission 1986, para 901; and Hocking 'Australia, Torres Strait Islanders' 1986.
- 126 Australia. Law Reform Commission 1986, paras 60-8 and 894-905.
- 127 Ibid paras 67-8.
- 128 Australia. Law Reform Commission 1986. The writer is indebted to Professor James Crawford, University of Sydney, Commissioner-in-Charge of the Reference, for many invaluable discussions.

- 129 The project is coordinated by Professor Anthony Angelo, Victoria University of Wellington, with whom the writer has had many discussions. See the articles by Angelo 1986 and Kirifi 'Old and new systems of laws in Tokelau' (in press).
- 130 See supra Chap II B 1 II.
- 131 See supra Chap II B 1 x.
- 132 Union Islands (No 2) Order in Council 1925 (NZ). See Angelo 'The common law in New Zealand and Tokelau' 1986.
- 133 Section 4A, introduced by the Tokelau Amendment Act 1969.
- 134 Tokelau Amendment Act 1967 (NZ) Part II.
- 135 The Special Committee on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.
- 136 Hon R I Viner, Minister for Aboriginal Affairs, cited in Australia. Law Reform Commission 1986, para 26.
- 137 Australia. Constitution s 51(26).
- 138 Australia. Senate Standing Committee on Constitutional and Legal Affairs *Two Hundred Years Later* 1983.
- 139 Australia. Law Reform Commission 1986, paras 4, 707-12, 820-32.
- 140 Aborigines and Torres Strait Islanders (Admissibility of Confessions) Bill, introduced as a private member's Bill by Senator Bonner.
- 141 Especially *R v Sydney Williams* (1976) 14 SASR 1, discussed in Australia. Law Reform Commission 1986, para 433.
- 142 See Australia. Law Reform Commission 1980 which discusses and reflects these initial difficulties; and Kirby 'Australian Aboriginal customary law' 1985 where the first Commissioner-in-Charge, discussing progress in 1981, comments, 329:
The public debates and hearings on the discussion paper have focussed attention on a number of difficult moral, philosophical and legal questions. The Commission is not permitted to conclude that the problems are too hard. It must complete its enquiry, deliver its report, and draft any legislation it proposes.
- 143 Australia. Law Reform Commission 1986, paras 212-3.
- 144 Ibid para 95.
- 145 (NZ SI 1986/319).
- 146 Section 7(4) and (5).

147 The Tokelau Immigration Regulations 1987 allow the Administrator to grant an entry permit only where the relevant village council has provided or approved accommodation for the applicant.

148 (NZ SI 1986/320).

149 Regulation 5(4)-(7).

150 Tokelau Divorce Regulations 1987 (NZ SI 1987/28), Regs 8 and 9.

151 See Angelo 'The common law in New Zealand and Tokelau' 1986.

152 Article 70c.

153 See Angelo 'The common law in New Zealand and Tokelau' 1986.

154 Article 70c.

IV HUMAN RIGHTS AND CULTURAL RELATIVISM

155 United Nations, Trusteeship Council Report of the United Nations

1 Locke *An Essay Concerning Human Understanding* 1.11.10, quoted in Kleinig 'Cultural relativism and human rights' 1981.

2 Davidson 'The Republic of Nauru' 1986.

2 Prime Minister Mata'afa commemorating the founding of the United Nations in International Human Rights Year Savali (17 October 1968) translated by Powles 'Fundamental rights in the constitution of Western Samoa' 1970, 9.

21 Papua New Guinea Constitution, Planning Committee Final Report

3 Pollis & Schwab 'Human rights: a western construct of limited applicability' 1980, 4.

22 New Zealand Bill of Rights for New Zealand: A White Paper

4 Renteln 'The unanswered challenge of relativism' 1985. See also Teson 'International human rights and cultural relativism' 1985 and Vincent *Human Rights and International Relations* 1986.

23 See LAWASIA Conference on Prospects for the Establishment of an

5 On human rights in the Pacific see generally LAWASIA Conference on Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific 1985; O'Neill 'Human rights in the hands of judges' 1982-3; Mataitoga 'Judicial interpretation and the Bill of Rights in some South Pacific Islands constitutions' 1985.

6 See further de Smith *Micro-States and Micronesia* 1970; Nettheim

'An "alternative technology" for human rights protection' 1985; and Commonwealth Secretariat *Small States and Vulnerability* 1986.

7 On the international conventions see Sieghart *The International*

Law of Human Rights 1983.

8 999 UNTS 171.

255-7

9 993 UNTS 3.

28 See for example Nigerian Constitution 1960 s 27 regarding land;

10 660 UNTS 195.

constitution 1981 s 18(4)(c) regarding personal laws; and

generally Dale *The Modern Commonwealth* 1983, Chap 12.

11 See Commonwealth Secretariat *The Convention on the Elimination of All Forms of Discrimination Against Women* 1985.

29 [1970-75] Swaziland LR 55, discussed in Jeff 'Human rights in Africa'

12 Ghai 'Constitutional issues in the transition to independence'

1983, 58.

30 [1985] LRC (Const) 732.

- 13 See Latukefu *The Tongan Constitution* 1975. See also supra Chap II D 1 II 'Tonga - a new constitutional order'.
- 14 Roberts-Wray 'Human rights in the Commonwealth' 1968, 908.
- 15 de Smith *The New Commonwealth* 1964, Chap 5 'Bills of rights'.
- 16 Bentham 'Anarchical fallacies' in *Works* (ed Bowring) vol 2, 497, 501.
- 17 de Smith *The New Commonwealth* 1964, 210.
- 18 Article 76c.
- 19 United Nations. Trusteeship Council *Report of the United Nations Visiting Mission to the Trust Territory of Western Samoa* 1959, 11. Nauru was also part of the UN Trusteeship system. See Davidson 'The Republic of Nauru' 1968.
- 20 See Weisbrot 'Papua New Guinea's indigenous jurisprudence' 1986, 12-15.
- 21 Papua New Guinea. Constitutional Planning Committee *Final Report* 1974, Chap 5.
- 22 New Zealand. *A Bill of Rights for New Zealand: A White Paper* 1985. See Elkind & Shaw *A Standard for Justice* 1986 and Legal Research Foundation *A Bill of Rights for New Zealand* 1985.
- 23 See LAWASIA Conference on Prospects for the Establishment of an Inter-Governmental Human Rights Commission in the South Pacific 1985; and Deklin 'Towards a regional recognition of human rights in the Pacific' 1987.
- 24 'Report of the drafting committee' (unpub, 1986). For the Banjul Charter refer (1982) 21 ILM 59.
- 25 See Sieghart *The International Law of Human Rights* 1983, Chap 7; McKean *Equality and Discrimination under International Law* 1983; and Ermacora 'The protection of minorities before the UN' 1983.
- 26 Australia. Law Reform Commission 1986, para 130 and, generally, Chap 9.
- 27 McKean *Equality and Discrimination under International Law* 1983, 286-7.
- 28 See for example Nigerian Constitution 1960 s 27 regarding land; Belize Constitution 1981 s 16(4)(c) regarding personal laws; and generally Dale *The Modern Commonwealth* 1983, Chap 12.
- 29 See for example *Ross-Spencer v Master of the High Court* (1971) [1970-76] Swazi LR 58, discussed in Neff 'Human rights in Africa' 1984.
- 30 [1985] LRC (Const) 732.

- 31 Ibid 749, Spelght CJ.
- 32 See O'Neill 'The indigenous Fijians and the Fiji legal system' 1986; Van Dyke *Human Rights, Ethnicity and Discrimination* 1985, 98-108; McLachlan 'The Fiji constitutional crisis of May 1987' 1987; and Sahu-Kahn *The Constitution of Fiji* 1976. Refer supra Chap II E 11 'Fiji - the coup and a chiefly oligarchy' for discussion of the 1987 coup and the ensuing constitutional review.
- 33 Under the Fijian Affairs Act Cap 120. See Cole, Levine & Matahau *The Fijian Provincial Administration* 1985.
- 34 Section 68 entrenched the following statutes, requiring a three-quarters majority in favour of amendment in each House and the support of six of the eight representatives of the Council of Chiefs in the Senate:
- Fijian Affairs Act
 - Fijian Development Fund Act
 - Native Lands Act
 - Native Land Trust Act
 - Rotuma Act
 - Rotuma Lands Act
 - Agricultural Landlord and Tenant Act
 - Banaban Lands Act
 - Banaban Settlement Act
- 35 Section 15(3)(d).
- 36 Tonga entered an identical reservation.
- 37 United Nations. *Report of the Committee on the Elimination of Racial Discrimination* 1982, 31.
- 38 (1983) 49 ALR 169 (SASC, Millhouse J); (1985) 57 ALR 472 (HCA). See Sadurski 'Gerhardy v Brown v the concept of discrimination' 1986; Australia. Law Reform Commission 1986, paras 153-7; Brownlie 'The rights of peoples' 1985; United Nations. Committee on the Elimination of Racial Discrimination *Fifth Periodic Report: Australia* (1985) CERD/C/115 Add 3, paras 18-30.
- 39 On Aboriginal land rights see *Infra* Chap VI B 11.
- 40 (1985) 57 ALR 472, 527.
- 41 Norfolk Island *The Position of the Norfolk Island Government on the Australian Bill of Rights Bill* 1985, paras 11-34, esp paras 18 and 19.
- 42 *Supra* n 38, 3.
- 43 On positive discrimination, see Dworkin *Taking Rights Seriously* 1977, Chap 9.
- 44 See Australia. Law Reform Commission 1986, para 149; United Nations. Committee on the Elimination of Racial Discrimination *Fifth Periodic Report: Australia* 1985, para 28.

- 45 This is, it is submitted, a flaw in Sadurski 1986. The issues in *Gerhardy v Brown* were not really about positive discrimination.
- 46 Sadurski 'Gerhardy v Brown v the concept of discrimination' 1986.
- 47 Brownlie 'The rights of peoples' 1985.
- 48 For example (1985) 57 ALR 472:
 Recourse to the notion of traditional ownership may readily be had to effect the most obnoxious discrimination. On the one hand, members of a particular race may be confined to one area, not, it may be said, because of their race, but because it is their traditional homeland; on the other hand, the right to own land may be conferred only on members of a favoured race, not, it may be said, because they belong to that race, but because they are the traditional owners. I see no distinction between the effects of ss 18 and 19 of the Act, and that of a law which provides as follows: white men and women who are the traditional owners of land in a particular town have unrestricted rights of access to that town; no-one else may enter it without their permission.
- 49 Brownlie 'The rights of peoples' 1985, 112.
- 50 Australia. Law Reform Commission 1986, para 155.
- 51 *Idem.*
- 52 (1984) 14 VUWLR 275 (Cooke P, Mills and Keith JJ) on appeal from the decision of St John CJ (Unrep, WSSC, 5 April 1982). For comment see Arthur 'The significance of twenty years' 1984.
- 53 *Ibid* 4.
- 54 *Ibid* 12.
- 55 *Ibid* 13.
- 56 P Hastings *Sydney Morning Herald* 12 May 1982, quoted in O'Neill 'Human rights in the hands of judges' 1982-3, 210.
- 57 See Powles 'Legal systems and political cultures' 1986.
- 58 (1984) 14 VUWLR 293.
- 59 See Powles 'Legal systems and political cultures' 1986; Powles 'The status of customary law in Western Samoa' 1973, Chap II; and Freeman *Margaret Mead and Samoa* 1984, Chap 9.
- 60 See further Powles 'Traditional institutions in Pacific constitutional systems' 1982; Harrison 'The adaptation of the political system in the development process under limited suffrage' 1978; and Western Samoa *Report of the Committee Appointed by Cabinet to Investigate the Election of Members of Parliament* 1979.

- 61 United Nations. *Report of the Trusteeship Council covering the work of its Twenty-First and Twenty-Second Sessions* vol 1 (UN Doc A/3822) 62.
- 62 Western Samoa. *Constitutional Convention Debates Official Report* 485-500.
- 63 United Nations. *Report of the United Nations Plebiscite Commissioner for Western Samoa* 1961.
- 64 McKay 'Western Samoa's plebiscite on independence' 1961.
- 65 Powles 'Fundamental rights in the Constitution of Western Samoa' 1970, 3.
- 66 Supra n 60.
- 67 See [1981-2] Vol 2 *Western Samoa Hansard* for discussion of the Report.
- 68 Brownlie 'The rights of peoples' 1986, 111.
- 69 Supra n 52, 13.
- 70 See for example the European Jurisprudence cited in Sieghart *The International Law of Human Rights* 1983, 363-6.
- 71 Woodman 'Unification or continuing pluralism in family law' 1987, 40.
- 72 Australia. Law Reform Commission 1986, para 165.
- 73 It was an element in the debate over New Zealand's ratification of CEDAW. See Loncar 'The United Nations Convention on the Elimination of all Forms of Discrimination Against Women' 1985, 327ff.
- 74 See especially the *Tyrer* case ECHR Ser A vol 26 (1978) which did arise under the provisions of Article 63(3) and which involved the punishment of birching in the Isle of Man. See generally Australia. Law Reform Commission 1986, paras 186-90. Mr Sisarich of the Fiji Law Reform Commission commented in LAWASIA 1985, 22:
We must be very careful not to apply European standards to the Pacific. For instance, we have recently experienced difficulty on the question of a ruling made by the European Court concerning inhuman or degrading punishment. Flogging was declared to be such a punishment. In Fiji flogging is accepted as not being a degrading punishment. If agreement is reached upon drawing up a charter for the establishment of a South Pacific Human Rights Commission we must be careful not to import the terminology of other Commissions.
- 75 United Nations. *Report of the Human Rights Committee* 1985, 79, 82.
- 76 Tongatule 'Niue' 1986, 7, 10.

- 77 See supra Chap III F II for discussion of the Tokelau Law Project.
- 78 Angelo 'Tokelau' ('The Aborigine in comparative law') 1986, 6.
- 79 Supra n 3.
- 80 LAWASIA 1985, 2.
- 81 Supra n 5, 159, 168-70.
- 82 Vanuatu. Constitutional Committee *Minutes* 1979, PV/6, 17 April 1979.
- 83 Davidson *Samoa mo Samoa* 1967, 369.
- 84 Western Samoa. *Constitutional Convention Debates* 1960, 99.
- 85 Ibid 159.
- 86 Ibid 135.
- 87 Ibid 164.
- 88 Ibid 144, Hon Tualaulelei M.
- 89 Section 43(2)(e). See also Solomon Islands Constitution s 6(3)(e).
- 90 Section 45(5). See also Vanuatu Constitution Art 5(1).
- 91 Section 37(21)(b) and (22).
- 92 Sections 18(2)(b)(vii) and 23(7)(a) and (b).
- 93 Section 26(3)(d)(v).
- 94 Section 27(7).
- 95 See Morris *The Conflict of Laws* 1984, 42-8.
- 96 See Allott *New Essays in African Law* 1970, 158-75; and Hooker *Legal Pluralism* 1975, 129-35.
- 97 Chanock *Law, Custom and Social Order* 1985, 73.
- 98 (1938) 1 TLR (R) 403.
- 99 See *Oppenheimer v Cattermole* [1976] AC 249 (HL); *Buttes Gas & Oil Co v Hammer* [1982] AC 888 (HL); *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] 2 WLR 24 (HL); *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA ('The Playa Larga')* [1983] 2 Lloyd's Rep 171 (CA).
- 100 Poulter *English Law and Ethnic Minority Customs* 1986. See also supra Chap I D v 'Ethnic minorities in England' and the references there cited.

- 101 Para 2.24 (arranged and forced marriages); para 3.13 (polygamy); para 5.33 (unilateral divorce); para 6.27 (female circumcision).
- 102 Buzacott & Barff *Journal* (1834, LMS Archives) cited in Freeman *Margaret Mead and Samoa* 1984, 329.
- 103 Davidson *Samoa mo Samoa* 1967, 262.
- 104 Keesing, F & M *Elite Communication in Samoa* 1956, 18.
- 105 Davidson *The Government of Western Samoa* 1947, 2.
- 106 See generally Larmour & Qalo 'Decentralisation in the South Pacific' 1985 on local and provincial government, and infra Chap V on local courts.
- 107 Powles *The Status of Customary Law in Western Samoa* 1973, 17.
- 108 Western Samoa *Report of the Commission to Inquire into and Report upon the Organization of District and Village Government in Western Samoa* 1950; and see comments in United Nations. Trusteeship Council *Report of the United Nations Visiting Mission to the Trust Territory of Western Samoa* 1959, para 106.
- 109 Western Samoa *Resolutions adopted by the Constitutional Convention of Western Samoa* 1960, 13-14.
- 110 Western Samoa *Report of the Commission on Pulenu'u and Local Government* 1971.
- 111 For background to this Act see Western Samoa 'Western Samoa proposal to confer judicial authority on village councils' 1977; Pacific Islands Law Officers' Meeting *Report* 1983, 31-2; and Thomas 'Western Samoa' 1985.
- 112 Freeman *Margaret Mead and Samoa* 1984, 194-5.
- 113 Powles *The Status of Customary Law in Western Samoa* 1973, 119.
- 114 *Inspector of Police v Tagaloa* [1927] WSLR 18.
- 115 Unrep, 17 December 1980. Cf the decision of Marsack CJ in *Mose v Masame* (1948) WSHC.
- 116 See Powles 'Fundamental rights' 1970, 23 and Western Samoa *Report of the Commission to Inquire into and Report upon the Organization of District and Village Government in Western Samoa* 1950, para 96.
- 117 Pages 6-7.
- 118 In discussion at the First South Pacific Law Conference (25-29 August 1986, Apia, Western Samoa).
- 119 Thomas 'Western Samoa' 1985, 230-1.

- 120 11-12 quoted in Bayne 'Judicial technique and the interpretation of Pacific Island constitutions' 1982.
- 121 Powles *The Status of Customary Law in Western Samoa* 1973, 117.
- 122 Article 100.
- 123 Article 103.
- 124 [1987] LRC (Const) 517.
- 125 See Larmour 'Kiribati' 1985 and Macdonald *Cinderellas of the Empire* 1982.
- 126 [1987] LRC (Const) 517, 529.
- 127 Ibid 530.
- 128 On the application of human rights to private persons and acts generally see Drzemczewski *European Human Rights Convention* 1983, Chap 8; and Forde 'Non-governmental interferences with human rights' 1985.
- 129 See for example *Shelley v Kraemer* 334 US 1 (1948).
- 130 [1979] AC 385, 396.
- 131 *Thornhill v Attorney-General of Trinidad and Tobago* [1981] AC 61, 73 (PC).
- 132 *Alonzo v Development Finance Corporation* [1985] LRC (Const) 359 (CA).
- 133 [1986] LRC (Crim) 62.
- 134 See supra Chap III B 1.
- 135 [1986] LRC (Crim) 62, 70-1.
- 136 Refer authorities cited at fn 128.
- 137 Elkind & Shaw *A Standard for Justice* 1986, 26-30.
- 138 See s 34 Papua New Guinea Constitution; s 12 Tuvalu Constitution.
- 139 Australia. Law Reform Commission 1986, 192, 447.
- 140 Clifford, Moruata & Stuart *Law and Order in Papua New Guinea* 1984, 110-11.
- 141 [1978] PNGLR 421.
- 142 See for example Gordon & Meggitt *Law and Order in the New Guinea Highlands* 1985 and Podolefsky 'Contemporary warfare in the New Guinea Highlands' 1984.

- 143 Papua New Guinea *Report of the Committee Investigating Tribal Fighting in the Highlands* 1973.
- 144 Recommendations 43-7.
- 145 See Gordon & Meggitt *Law and Order in the New Guinea Highlands* 1985, 31-4. Cf the discussion of Article 7(2) of the African Charter ('Punishment is personal and can be imposed only on the offender') in Neff 'Human rights in Africa' 1984, 340-5.
- 146 Australia. Law Reform Commission 1986, paras 447-53.
- 147 See Australia. Law Reform Commission 1980.
- 148 Australia. Law Reform Commission 1986, para 503.
- 149 H C Coombs, submission, Australia. Law Reform Commission 1986, para 184. Cf the attitude taken by the Botswana Court of Appeal to corporal punishment in traditional manner with traditional instrument in *St v Petrus* [1985] LRC (Const) 699.
- 150 Australia. Law Reform Commission 1986, paras 512-6. *R v Sydney Williams* (1976) 14 SASR 1 was widely misinterpreted as involving this form of incorporation, para 492.
- 151 Para 503.
- 152 (Unrep, NTSC, 28 May 1984, Muirhead J).
- 153 Ibid 19-20.
- 154 Paras 162, 449.
- 155 Para 508.
- 156 Refer: Islanders Marriage Act Cap 47 (Solomon Islands) ss 4, 18 and 19; Marriage Act, Ch 280 (Papua New Guinea) ss 3-5; Matrimonial Causes Act 1986 (Vanuatu) s 4. On Papua New Guinea see McRae 'Reform of family law in Papua New Guinea' 1982.
- 157 See generally Pulea *The Family, Law and Population in the Pacific Islands* 1986, Chap IX. Note however that some jurisdictions have amended their rules of consanguinity and affinity to accord with customary values. For example, Marriage (Amendment) Ordinance 1981 (Tuvalu), Tokelau Marriage Regulations 1986.
- 158 Maori Affairs Act 1953 ss 78 and 79. See criticism of this in New Zealand *Puao-te-ata-tu* 1986, 10 and Appendix 23.
- 159 Australia. Law Reform Commission 1986, Chaps 12-14.
- 160 Para 233.
- 161 Cf the position in Canada discussed in Sanders *Family Law and Native People* 1975.

- 162 (1883) 4 LR (NSW) 355, 6.
- 163 Para 239.
- 164 Paras 234, 261.
- 165 Para 256.
- 166 Paras 258-64.
- 167 Para 261.
- 168 [1982] SILR 100.
- 169 Ibid 113.
- 170 Bell 'Aboriginal women and the recognition of customary law in Australia' 1983, 510.
- 171 Chanock 'Neither customary nor law' 1987, 3.
- 172 Powles, letter to the writer, 24 October 1986. See also Powles 'Traditional Institutions in Pacific constitutional systems' 1982.
- 173 See Tönnies *Gemeinschaft und Gesellschaft* 1887, and Tay 'China and legal pluralism' 1986.
- 174 (1985) 57 ALR 472, 521-2.

V DISPUTES: CUSTOM AS PROCESS

- 1 Llewellyn & Hoebel *The Cheyenne Way* 1941, 29; and see Epstein *Contention and Dispute* 1974.
- 2 The Ifoga, see supra Chap I C iii and Powles *The Status of Customary Law in Western Samoa* 1973, 42-5.
- 3 The I soro, see supra Chap I C iii and Hickson 'Hierarchy, conflict and apology in Fiji' 1979.
- 4 See Scaglione *Homicide Compensation in Papua New Guinea* 1981.
- 5 See supra Chap IV E 1 'The village council as autonomous republic: banishment and state control' for a discussion of the operation of village councils in Western Samoa.
- 6 See supra Chap III F for discussion of the place of the Tokelau village councils in the Tokelau Law Project.
- 7 Epstein 'Moots on Matupit' 1974.
- 8 Australia. Law Reform Commission 1986, paras 692-70.

- 9 See the classification of conflicts in Chap I E ii and the discussions of a 'customary law defence' in Australia. Law Reform Commission 1986, paras 442-53; and Papua New Guinea Law Reform Commission 1977, Part II 'The role of customary law in the criminal justice system: criminal responsibility, punishments and other orders', recommending a new offence of diminished responsibility killing and a wide range of customary law defences.
- 10 See supra Chap IV E 1 ii.
- 11 Strathern *Official and Unofficial Courts* 1972.
- 12 Ibid 149.
- 13 Ibid 45-51; and Chalmers 'A history of the role of traditional dispute settlement procedures in the courts of Papua New Guinea' 1982.
- 14 Australia. Law Reform Commission 1986, paras 723-46. The courts are presently governed by the Community Services (Aborigines) Act 1984 (Qld).
- 15 Ibid para 741.
- 16 See the general discussion of these themes, supra Chap I F iii.
- 17 Abel 'The contradictions of informal justice' 1982, 267.
- 18 Clifford, Moruata & Stuart *Law and Order in Papua New Guinea* 1984.
- 19 Ibid 253.
- 20 Australia. Law Reform Commission 1986, paras 689-90.
- 21 Ibid paras 809-11.
- 22 New Zealand. Advisory Committee on Legal Services *Te Whainga i Te Tika: In Search of Justice* 1986, 46.
- 23 Ghal, Gowi & Paliwala 'Preliminary report on the 1976 Dag Hammarskjöld Seminar on law and self-reliance' 1-2.
- 24 See [1982] *Third World Legal Studies* symposium on 'Law in alternative strategies of development'; and Baxi 'Popular justice, participatory development and power politics' 1985.
- 25 Morris 'Native courts: a corner-stone of indirect rule' in Morris & Read *Indirect Rule* 1972, Chap 5. Interestingly, on the establishment of the village courts in Papua New Guinea, Morris was commissioned to produce *A Digest of Material on Customary Courts in Commonwealth Countries in Africa* 1975.
- 26 Tanganyika Territory. Native Administration Memorandum No 2 *Native Courts* 1930, para 3.

- 27 See for example Morris 'Two early surveys of native courts in Uganda' 1967.
- 28 The issue of whether the native courts should be supervised by administrative officers or by the judiciary was hotly debated in the interwar period. See Morris 1972, *supra* n 25.
- 29 'Record of judicial advisers' conference 1953'; 'Record of judicial advisers' conference 1956'; Conference on the Future of Law in Africa, London 1960; African Conference on Local Courts and Customary Law, Dar es Salaam 1963.
- 30 The Fijian Affairs Regulations 1948 were repealed in 1966 and the Criminal Offences Code in 1967. See Nadakuitavuki 'Fijian magistrates - an historical perspective' (in press).
- 31 Native Courts Regulation 1942. See Laracy 'Custom, conjugality and colonial rule in the Solomon Islands' 1980, 145.
- 32 Local Courts Act Cap 46. See Takoa & Freeman 'Provincial courts in Solomon Islands' (in press).
- 33 See *supra* Chap II B 3 vii.
- 34 Island Courts Ordinance 1965. See Barwick *Island Courts in the Gilbert and Ellice Islands Colony* 1965.
- 35 Section 16(2).
- 36 Island Courts Act Cap 3 1978 Ed (Tuvalu) but cf Magistrates' Courts Act (1977) Cap 52 (Kiribati) and see Quinn *The Magistrates' Courts Handbook* 1979.
- 37 See Chalmers 1982 and Sack 'Law, custom and good government' 1985.
- 38 Island Courts Act 1983.
- 39 Fiji. Royal Commission on Crime 1976; Fiji. *Report of the Royal Commission on Treatment of Offenders* 1981; Cole, Levine & Matahau *The Fijian Provincial Administration* 1985; Fiji. Law Reform Commission 1986. See Nadakuitavuki (in press) and Prasad 'Self-regulation in the Fijian village' 1985.
- 40 Derham *Report on the System for the Administration of Justice in the Territory of Papua and New Guinea* 1960. See Sack 'Law, custom and good government' 1985.
- 41 Derham 'Law and custom in the Australian territory of Papua and New Guinea' 1963, 505.
- 42 Curtis & Greenwell *Report on the System of Courts in Papua and New Guinea* 1971.
- 43 Papua New Guinea. *Report of the Committee Investigating Tribal Fighting in the Highlands* 1973. For discussion of other aspects

- of the Report, see Chap II E 2 i 'Inter-group fighting in Papua New Guinea'.
- 44 Keris 'Village courts in Papua New Guinea' (in press).
- 45 See Clifford, Moruata & Stuart *Law and Order in Papua New Guinea* 1984, 259.
- 46 See notably Warren 'A new village court in Papua New Guinea' 1977; Paliwala 'Law and order in the village' 1982; and Gordon & Meggitt *Law and Order in the New Guinea Highlands* 1985, Chap 8 'The rise of the village courts'. Other studies include Westermarck 'Village courts in question' 1978 and Scaglione 'Formal and informal operations of a village court in Maprik' 1979.
- 47 Paliwala 'Law and order in the village' 1982, 205.
- 48 Fitzpatrick *Law and State in Papua New Guinea* 1980, 139-44 adopts this view.
- 49 Clifford, Moruata & Stuart *Law and Order in Papua New Guinea* 1984 cites Law Reform Commission data as establishing that, 182:
Women were plaintiffs in 32 per cent of village court cases in the study and were less frequently defendants (22 per cent of cases). Thus the courts were more often used by women in complaints against men than vice versa'.
- 50 Gordon & Meggitt *Law and Order in the New Guinea Highlands* 1985, 221.
- 51 A revision of the Act to improve the efficacy of the courts is currently under discussion. See Australia. Law Reform Commission 1986, para 779.
- 52 See Crocombe 'Land courts' 1977, 70.
- 53 See Pulea *The Family, Law and Population in the Pacific Islands* 1986, Chap 3 'The population question'.
- 54 On the economic causes of land disputing, see Heath *Land Research in Solomon Islands* 1979, section 2 'Land disputes'; Ogan 'Nasiol land tenure' 1971; Orken 'They fight for fun' 1974.
- 55 Papua New Guinea. *Report of the Commission of Inquiry into Land Matters* 1973, 109.
- 56 *Talasasa v Pala* [1980-1] SILR 93, 99-100 (HC) Daly CJ.
- 57 Davidson *Samoa mo Samoa* 1967, 78.
- 58 See supra Chap II C 2 II.
- 59 Crocombe *Land Tenure in the Cook Islands* 1964, Chap 10.
- 60 See the discussion and criticism of this varied role in New Zealand. *The Maori Land Courts* 1980, esp 79-83.

- 61 Recent decisions of the Maori Land Court are published in New Zealand *Tai Whati*. The present governing Act is the Maori Affairs Act 1953.
- 62 See McHugh *Maori Land Laws of New Zealand* 1983, esp 71-9.
- 63 See Powles *The Status of Customary Law in Western Samoa* 1973, esp Chaps II and V; and Marsack *Land and Titles Court of Western Samoa* 1958.
- 64 The Land and Titles Court was the subject of an extensive review in 1975: *Western Samoa Report on Matai Titles, Customary Land and the Land and Titles Court* 1975. It is presently governed by the Land and Titles Act 1981 (as amended 1983).
- 65 See Tiffany 'Politics of land disputes in Western Samoa' 1980.
- 66 See supra Chap IV C iii and Powles 'Legal systems and political cultures' 1986, 191.
- 67 Crocombe 'Land courts' 1977; and see also Crocombe 'Observations on land tenure in Tarawa, Gilbert Islands' 1968.
- 68 Magistrates' Courts Act 1977, Part VI 'Land Causes and Matters'. On the special composition of the court see ss 7(4) and 76.
- 69 Constitution Amendment (No 9) Act 1980-81.
- 70 As to which see supra Chap III E ii.
- 71 Land and Titles Act Cap 93. On the ambit of the appeal to the High Court see s 231B(3). See generally Takoa & Freeman 'Provincial courts in Solomon Islands' (in press); Smiley 'Settling land disputes in the Solomon Islands' 1980; Tiffany, W W 'Disputing in customary land courts' 1979; and Tiffany, S W 'Customary land disputes, courts, and African models in the Solomon Islands' 1982.
- 72 Land Titles Commission Act 1962-1971. See Zorn 'The Land Titles Commission and customary land law' 1974.
- 73 Land Disputes Settlement Act Ch 45. See Zorn 'Fighting over land' 1976.
- 74 Island Courts Act 1984, ss 8 and 22(1)(a). See Russell 'Preparing for land disputes in the Vanuatu island courts' (in press). For a view that specialist institutions should be developed, cf Bakeo 'Land disputes in Vanuatu' (in press).
- 75 See Solomon Islands Special Select Committee on Lands and Mining Report 1976, 12-16 and Heath *Land Research in Solomon Islands* 1979.
- 76 Tiffany, S W 'Politics of land disputes in Western Samoa' 1980, 185.

- 77 Papua New Guinea *Report of the Commission of Inquiry into Land Matters* 1973, Chap 8.
 - 78 Subject to the National Court's inherent power of judicial review, *St v District Land Court, Kimbe, ex p Null* [1981] PNGLR 192; *St v Giddings ex p Koan* [1981] PNGLR 423. See Eaton 'Customary land dispute settlement' 1983.
 - 79 For Western Samoa, see Tiffany, S W 'Politics of land disputes in Western Samoa' 1980; for Solomon Islands see Smiley 'Settling land disputes in the Solomon Islands' 1980.
 - 80 Crocombe *Land Tenure in the Cook Islands* 1964, Chap XII.
 - 81 [1977] 9 Cook Islands Legislative Assembly Debates 775, cited in Donne 'The South Pacific courts' 1986, 2.
 - 82 Hobgin 'Native councils and native courts in the Solomon Islands' 1944, 266.
 - 83 *Lilo v Ghomo* [1980-1] SILR 229, 234 Daly CJ.
 - 84 See Colquhoun-Kerr & Lakau 'Land tenure and land dispute settlement in Enga' 1983.
 - 85 See for example *Kerisi v Talasasa* [1983] SILR 87; *Manedetea v Kulagre* [1984] SILR 20.
 - 86 Australia. Law Reform Commission 1986, para 690.
- VI LAND: CUSTOM AS TITLE
- 1 Goava 'Address to the seventh Waigani seminar' (Unpub) 1973, cited in Sack *Problem of Choice* 1974, 3.
 - 2 A detailed examination of the doctrine of aboriginal title is beyond the scope of this thesis. See McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* 1987, Part III; McHugh 'Aboriginal title in the New Zealand courts' 1984; Roberts-Wray *Commonwealth and Colonial Law* 1966, Chap 14.
 - 3 The pledge made by Commodore Erskine on the proclamation of a protectorate over Papua in 1884. See Jinks, Biskup & Nelson *Readings in New Guinea History* 1973, 38.
 - 4 Land Claims Ordinance 1879. See France *The Charter of the Land* 1969, 114-23.
 - 5 Final Act of the Conference on the Affairs of Samoa, Berlin (1889) 81 State Papers 1058, Art IV 'A declaration respecting titles to land in Samoa, and restraining the disposition thereof by natives; and providing for the investigation of claims thereto, and for the registration of valid titles'.
 - 6 See supra Chap II B 1 xi and Van Trease 'The history of land alienation' 1984.

- 7 See supra Chap II B 1 vii. This point is underlined by Woodman 'The state and customary laws' 1986, 140-1. On German New Guinea, see Sack *Land Between Two Laws* 1973.
- 8 Customary land tenure is preserved in Tokelau by virtue of s 20 Tokelau Amendment Act 1967 which remained in force, despite the addition, by the Tokelau Amendment Act 1969, of a new s 4A to the principal Act making English law the basic law of Tokelau.
- 9 See supra Chap II E ii. The Native Lands Act Cap 133, which is entrenched by virtue of s 68 of the Constitution, provides for a category of native lands to be held by native Fijians according to native custom (s 3). The Native Land Trust Act Cap 134 provides that native land is alienable only to the Crown (s 5).
- 10 Papua New Guinea *Report of the Commission of Inquiry into Land Matters* 1973.
- 11 Solomon Islands *Report: Special Select Committee on Lands & Mining* 1976.
- 12 Australia. Law Reform Commission 1986, para 212.
- 13 Crocombe 'Pre-contact traditional land tenure' 1975. See also Lundsgaarde *Land Tenure in Oceania* 1974 for anthropological analyses of land tenure in the Pacific.
- 14 See for instance Burton-Bradley 'The psychological dimension' 1974.
- 15 Bonnemaïson 'Social and cultural aspects of land tenure' 1984.
- 16 See supra Chap I C iv.
- 17 Elkin 'Aspects of Australian aboriginal philosophy' 1969, 96.
- 18 See Thomas 'Society, land and law' 1985.
- 19 Larmour 'Alienated land and independence in Melanesia' 1984 provides detailed information on the extent of land alienation in Melanesia.
- 20 See generally Crocombe 'Registration in the Pacific Islands' 1984.
- 21 See supra Chap II C 2 ii and France *The Charter of the Land* 1969.
- 22 See supra Chap V C and Crocombe *Land Tenure in the Cook Islands* 1964.
- 23 Crocombe 'Overview: the patterns of change in Pacific land tenures' 1971, 16.
- 24 Fitzpatrick *Law and State in Papua New Guinea* 1980, 106-9.
- 25 Rodman 'Masters of tradition' 1984.

- 26 Ibid 78.
- 27 See supra Chap I C iii and the references cited therein.
- 28 Evidence of Billy Kayipipi to the Select Committee on Pitjantjatjara Land Rights Bill, Minutes of Evidence p 95, cited in Edwards 'Pitjantjatjara land rights' 1983, 303.
- 29 See especially New Zealand *Finding of the Waitangi Tribunal on the Kaituna Claim* 1984; and New Zealand *Finding of the Waitangi Tribunal on the Manukau Claim* 1985.
- 30 For an argument to the contrary based on the doctrine of Aboriginal title see McHugh 'Aboriginal servitudes and the Land Transfer Act 1952' 1986.
- 31 Fenbury 'The cultural squeeze' 1974.
- 32 Fingleton 'Customary land registration as an instrument of socio-economic change' 1981.
- 33 The other two principal ordinances were the Land Titles Commission Ordinance 1962 and the Lands Registration (Communally Owned Land) Ordinance 1962. For general discussion see James 'Unalienated' land policies' 1983; James *Land Law and Policy in Papua New Guinea* 1985.
- 34 Papua New Guinea *Report of the Commission of Inquiry into Land Matters* 1973; Solomon Islands *Report: Special Select Committee on Lands and Mining* 1976.
- 35 For background to the work of the Commission see Ward 'The Commission of Inquiry into land matters 1973' 1983.
- 36 For a critique of the Report on the basis that the appeal to custom was a 'massive evasion' of the inequities inherent in the customary system which had been exacerbated by the increasing role of the capitalist economy see Fitzpatrick 'The knowledge and politics of land law' 1983.
- 37 The implementing legislation is the Land Acquisition (Development Purposes) Act Ch 192, the Land Redistribution Act, the Land Groups Incorporation Act Ch 147 and the Land Trespass Act Ch 271. See James *Land Law and Policy in Papua New Guinea* 1985, Chap 7; and Fingleton 'Plantation redistribution among the Tolai' 1983.
- 38 Papua New Guinea, East Sepik. Customary Land Registration Act 1987.
- 39 See Larmour 'Alienated land and Independence in Solomon Islands' 1984.
- 40 See Solomon Islands *Report of Regional Conference on the Future of Customary Land Registration in Melanesia* 1978; Heath *Land Research in Solomon Islands* 1979; Larmour 'Solomon Islands customary land registration policy' 1984.

- 41 Knetsch & Trebilcock *Land Policy and Economic Development in Papua New Guinea* 1981.
- 42 Papua New Guinea *Report of the Task Force on Customary Land Issues* 1983.
- 43 See Ghai 'Land regimes and paradigms of development' 1985; Fingleton 'Pacific values and economic development?' 1982; Hakwa 'The land provisions of the independence constitution' 1984.
- 44 See Fingleton 'Pacific values and economic development?' 1982; Ghai 'Constitutional issues in the transition to independence' 1983, 52-3; Ghai 'The making of the independence constitution' 1983.
- 45 Larmour 'Alienated land and independence in Solomon Islands' 1984, 117.
- 46 On Kenya see Allott *The Limits of the Law* 1980, 209-14; Coldham 'Land control in Kenya' 1978 and 'The effect of registration of title upon customary land rights in Kenya' 1978.
- 47 See for example Bredmeyer 'The Kenyan model' 1973.
- 48 See for example Papua New Guinea. *Report of the Commission of Inquiry into Land Matters* 1973. Para 2.7 discusses the choice of land policies:
 - 61 In theory this could range from a system of individual small farms as in Kenya or Taiwan to a system of co-
 - 62 See operative or communal farms as in Israel or Tanzania. In practice the choice is more limited.
- 49 Ward 'The Commission of Inquiry into land matters' 1983, 3-4:
 - 63 ... the Commission was always glad of the stimulus of public hearings.... [The] witnesses who offered the most helpful and reasonable submissions and discussions, showing
 - 64 an appreciation of the difficulties of choice while quietly (Comm) arguing their point of view, proved to be the leaders in remote villages.... Sadly, the converse was often true of
 - 65 the organised political movements ... and also of the formally educated people detached from village culture
 - 66 with, at best, rather half-baked notions of land problems in their own country and elsewhere.
- 50 Larmour 'Alienated land and independence in Melanesia' 1984, 22-4.
- 51 See for example Papua New Guinea. *Report of the Commission of Inquiry into Land Matters* 1973, para 2.10; Ghai 'Land regimes and paradigms of development' 1985, 395-7.
- 52 Evidence of Mr Nelson Gavenor. Australia. Senate Standing Committee on Constitutional and Legal Affairs 1983, 10.
- 53 Supra Chap I C III.

- 54 Australia. Aboriginal Land Rights Commission *Second Report* 1974, 1.
- 55 Ibid 2.
- 56 Section 6(1) Pitjantjatjara Land Rights Act 1981 (South Australia).
- 57 On this the author is indebted to Benedict Kingsbury (Balliol, Oxford) and has read in draft the chapter on 'Land rights of indigenous peoples' in his D Phil thesis on 'Indigenous peoples in international law'.
- 58 328 UNTS 247.
- 59 Affidavit of B Kingsbury in *New Zealand Maori Council v Attorney-General* (1987) 6 NZAR 353, affidavit p. 15.
- 60 See statement of Senator F M Chaney, Commonwealth of Australia 95 Parl Debs (Sen) (25 August 1982) 517, cited in Australia. Law Reform Commission 1986, para 173:
there are a number of outmoded concepts in Convention No 107. The Convention's emphasis on 'integration' does not for example accord with the Government's policy of recognising the fundamental right of Aboriginals to retain their identity and traditional life style where desired.
- 61 (1985) 57 ALR 472, see supra Chap IV C ii.
- 62 See supra Chap I E iv.
- 63 See Maddock *Anthropology, Law and the Definition of Australian Aboriginal Rights to Land* 1980, Chap 6; Trigger 'Land rights legislation in Queensland' 1983; Moore 'The Victorian aboriginal land council' 1983.
- 64 Australia. Western Australia *The Aboriginal Land Inquiry* (Commissioner: Paul Seaman QC, 1984) para 3.35.
- 65 Ibid 3.34.
- 66 Netthelm 'Australia - Aboriginals' 1986, 11-12.
- 67 Section 48. See Maddock *Anthropology, Law and the Definition of Australian Aboriginal Rights to Land* 1980, 98-103.
- 68 See supra Chap I F iii for discussion of the relationship between self-determination and the recognition of customary law.
- 69 See Morse *Aboriginal Self-Government in Australia and Canada* 1984; Australia. Law Reform Commission 1986, para 1036.
- 70 Solomon Islands. *Report: Special Select Committee on Lands and Mining* 1976, 52-3, 62.
- 71 Saemala 'General comments on the land research project' 1978.

- 72 See supra Chap II B 3 vi and Chap II C 2 iii.
- 73 Nayacakalou 'Fiji: manipulating the system' 1971, 208.
- 74 Idem. See also Nayacakalou *Leadership in Fiji* 1975.
- 75 Section 18(1) of the Native Lands Act does allow the Commission to allot land to 'dependants' with the consent of the Fijian owners, but this cannot be done if the dependant retains customary ownership elsewhere (subsection (3)). Although a member of a *mataqali* may be divested of ownership after two years' absence (s 20(1)), in practice forfeiture is rarely requested by the *mataqali* and so the unreal situation persists.
- 76 Nayacakalou 'Fiji: manipulating the system' 1971, 213.
- 77 See Crocombe *Land Tenure in the Cook Islands* 1964; Crocombe 'The Cook, Niue and Tokelau Islands' 1971; David 'Cook Islands' 1984; Matalo 'Cook Islands' 1984.
- 78 See Crocombe 'The Niue alternative' 1974.
- 79 See McHugh *Maori Land Laws of New Zealand* 1983, 62-79.
- 80 See Matalo 'Cook Islands' 1984.
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- 82 See Larmour 'Solomon Islands: customary land registration policy' 1984, 79-80.
- 83 Papua New Guinea. *Report of the Commission of Inquiry Into Land Matters* 1973, Recommendation 6(A).
- 84 Ibid para 3.15.
- 85 Ibid para 3.22.
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- 87 Land Groups Incorporation Act Ch 147.
- 88 See Crocombe 'Land reform' 1971, 392; Larmour 'Alienated land and Independence in Melanesia' 1984.
- 89 See supra Chap I C iii.
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- 91 The Regulation was supplemented by the Alienated Land Act 1982.
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- 94 Larmour 'Alienated land and independence in Melanesia' 1984, 30.
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CONCLUSION

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- 3 Kaputin 'The Law: a colonial fraud?' 1975, 4-5.
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- 5 New Zealand *Puao-te-ata-tu* 1986, Appendix, 21.
- 6 Tonkinson 'National identity and the problem of kastom in Vanuatu' 1982, 310.
- 7 See for example New Zealand *Puao-te-ata-tu* 1986; Papua New Guinea *Report of the Committee Investigating Tribal Fighting* 1973; Papua New Guinea *Report of the Commission of Inquiry into Land Matters* 1973.

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