RULE OF LAW – ROLE OF LAW IN THE SOUTH PACIFIC

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The rule of law is a concept introduced to countries in the Pacific at the end of the colonial era and as an aspect of their independence constitutions. It therefore reached the South Pacific as a new and alien idea at a time when the concept had in Europe achieved maturity and was flourishing.

This presentation traces the origins and nature of the rule of law and considers its application in Pacific island countries. The rule of law is not flourishing in the countries of the South Pacific, and is currently often compromised elsewhere. It is therefore here proposed that the focus in governance and other debates shifts from the very general and fluid concept of the rule of law to a much more practical focus on the role of law and specific goals to be achieved by the use of legislation by the states.

La notion de règle de droit est un concept qui a été introduit dans les pays du Pacifique à la fin de l'époque coloniale et qui apparaît comme un des éléments caractéristiques des constitutions votées par les petits pays insulaires du Pacifique Sud après leur accession à l'indépendance.

Alors qu'il avait atteint son apogée en Europe, ce concept nouveau dans le Pacifique Sud, a longtemps été considéré comme un corps étranger.

Cet article rappelle les origines et la nature de la règle de droit et la manière dont elle a été mise en oeuvre dans les petits Etats insulaires du Pacifique Sud. L'auteur constate que cette notion n'a pas toujours le succès escompté dans les pays du Pacifique Sud et s'interroge sur les raisons de cette méfiance. Il préconise d'abandonner la notion classique de la règle de droit qui reste étroitement liée au concept trop général et trop souple de bonne gouvernance, pour privilégier l'apparition de nouveaux percepts répondant à des objectifs spécifiques, clairement indiqués et intégrés dans les lois votées par les parlements des Etats des pays insulaires du Pacifique.

This paper is concerned with the rule of law and the role of law in the South Pacific and with the ways in which the law may be strengthened in order to better protect persons and property in the countries of the South Pacific. The view presented is that the law needs much strengthening in the South Pacific countries and that considerable advantage could be taken by the law from the example of the customary systems which are of long-standing and which continue to operate in the countries of the Pacific. The proposition is supported by a consideration of the nature of custom and the points of contrast between it and the law.[1] A number of suggestions are

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1 "Custom" is here used to refer to the rules of social ordering of community origin as distinct from the "the law" which is used to refer to the rules created or applied by governments following colonial models of social ordering. In other

made as to the ways in which the law could become more effective. The conclusion is that not only must societies adapt to the law but also that the law must be adapted to the social and economic circumstances of the specific environment into which it has been imported. Before the rule of law and its promise can be realised,[2] the law itself and its role in society must obtain broad acceptance.

The paper begins with some introductory discussion of the ideas involved:

- What is the law?
- What is the rule of law?
- What is the role of law?

I THE ELEMENTS

A The Law

The law, in the usual sense of its use in the developed world, is a publicly established body of rules whose application when disputed is justiciable before an independent judiciary. This description identifies the law as something accessible and known in advance of particular events, and which is enforced without bias.

The law is a foreign concept for the Pacific. It is not part of the pre-colonial tradition. It is alien and frequently marked expressly as

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words the distinction made for the purpose of this paper is between "customary law" and "state law".

2 Considerable amounts of aid money have been expended worldwide on developing the rule of law with little to show for the investment. This is noted eg in Tamanaha *On the Rule of Law* (Cambridge University Press, 2004) at 2-4; and by Ringer "Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice" (2007)10 Yale HR & Dev LJ at 178, 179.

In the emphemeral literature see "The Economist" Vol 386 January 19 2008 "When freedom stumbles", at 56.

such by words which are not part of the traditional language.[3] For instance *turei* in Maori is and was used for the law of English origin as distinct from *tikanga* which are the rules of Maori social origin. This had the result of distinguishing the English law from Maori custom in the Maori language in the same way the English language distinguished law from the custom of the Maori. The reverse situation also exists for instance in the use of the word *tulafono* in Tokelauan to refer to any set of social norms whether they be the law of Moses, the rules of cricket or an Act of parliament. The consequence of this latter usage is a levelling one: The law of the government is not distinct from custom. When an occasion arises where it is necessary to distinguish, qualifiers distinguish by source.

Most Pacific countries inherited English law. Some of that law is statutory but much is not in a statutory form. In England access is made possible by extensive law reporting, textbooks, and encyclopaedias; the law is the product of a long and continuing development of the rules in the context of a specific community. The English law was definitely not an export model. The French could export their Codes. The British could not; instead they exported government and administrators. They left, wherever possible, existing laws in place in the countries colonised and over time made and promulgated codes of law in key areas of government – most notably criminal law.[4] Ultimately the British exported codes of government, in the form of written entrenched constitutions, though they had no such documents in England.

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3 Where translation proves difficult the English is retained eg "loia" for lawyer. Even more difficult for translation can be abstractions such as "justice".

4 The draft Criminal Code prepared by the Criminal Code Commission 1878 was not enacted in England but was promulgated widely throughout the Empire and is eg the basis of Crimes laws in the South Pacific. The other notable statutes were the Evidence Acts, the Contract Acts, and the little disseminated Civil Wrongs Act.

A lesson here for the Pacific may be that English law developed by experience out of local custom and in response to local circumstances. That is seen as the reason for the strength of English law. It is practical, pragmatic and ever-evolving.

The wholesale importation of English law into Pacific countries has meant for them:

- A new system of government
- A new system of rules
- Rules adopted which were developed for different political and social circumstances
- Rules in a foreign language
- Rules that are inaccessible in any ready physical sense.

The rules of English law are inaccessible because frequently there are no books; the locally made laws are not published; the laws are not known and where they are directly inherited, the nature of any adaptation that needs to be made to local circumstances is uncertain.[5] The English law in Pacific countries is therefore not the same as English law in England.

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5 Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (Routledge-Cavendish, 2007).

Typical of an extension provision is "(1) Subject to the provisions of subsection (2), the common law, the rules of equity and the statutes of general applications as in force in and for England for the time being shall be in force in the Islands.

(2) All the laws of England extended to the Islands by subsection (1) shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances."

Qualitatively, it has a different origin (imposed not evolved) and a different social position (national governance not social ordering).

Quantitatively, few people know it (for reasons of language and territorial reach). Nobody has complete access. Access is frequently very difficult and in some cases impossible. In such circumstances the administrators and the judges improvise. The arbiters the judges are often remote.[6] The very concept of law is compromised. The laws are not clearly pre-established, the judiciaries are fragile, and many legislatures do little more than deal with budget and other recurring financial matters.

There has been no Pacific Hammurabi, Justinian or Napoleon.[7] It may pertinently be asked whether the Pacific countries need the law or such a person.

Internally, for many of the countries there is no particular need. This is because mostly society works perfectly smoothly without an active legislator, without an ubiquitous police force, and without an accessible and regularly functioning court system. The reason for this is the strength of custom and, for the bulk of the population, the custom is all that matters.

Externally, the situation is quite different. The governments of the Pacific actively seek international relationships, they rely on foreign aid and investment, they wish to be part of the global community, and also they interact in important ways with their diaspora. All these things create demands for the law: Foreign governments and organisations expect, and often demand, that Pacific governments

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6 In some countries the courts sit only sporadically; many courts are staffed by foreigners who do not speak the vernacular and who have limited knowledge of the local situation.

7 Bernard Narokobi was a committed, but one of very few, supporters of law that responds to local conditions. See, for instance, *The Melanesian Way* (IPS, Suva, 1980 (repr 1983)).

enact laws to bring their countries within an internationally inspired and monitored network of rules; Investors want certainty of rules and internationally recognisable agencies for law enforcement.

The Pacific countries therefore do need the law. There is a role for law and the countries need to develop the law to suit their needs. Indeed in most countries the contest between the law and custom is over - custom is in decline and is not supported by national governments.[8]

The law is a political reality for all Pacific countries. It is now an essential aspect of participation in the international community. The law in Pacific countries does not operate as it does in the countries of its historical inspiration. To achieve the rule of law, the law must first be well established; without the law there is no rule of law.[9]

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8 On this as a universal trend see Tamanaha *A General Jurisprudence of Law and Society* (Oxford University Press, London, 2001).

9 For a neat encapsulation of the idea: "My conception of the rule of law involves taking seriously the words of the phrase itself. Underlying almost every definition of the rule of law, and core to the ordinary meaning of the phrase itself, is the notion that there is some distinctly separate or objective meaning to law that has independent existence. It must possess certainty and freedom from arbitrariness in its application. This requires that the meaning of a law must, to some extent, be independent: independent of those that make the law, independent of those who apply it, independent of those to whom it is applied, and independent of the time at which it is applied. Such independence of meaning is inherent, given changes in actors, subjects, and contexts over time, but is also necessary to the rule of law. It is law itself, given such independent meaning, that rules, and that should rule. Using this conception, it becomes clear that the separation of powers is a necessary (though not sufficient) condition for the rule of law. Law exists independently of the lawmaker once it takes on its own written expression. Yet if the lawmaker has the unilateral and untrammelled power to change the law, or to apply it in a particular case, then the law has no expression independent of the intention of the lawmaker. Law, in those circumstances, does not exist and cannot rule. The rule of law is only upheld when the lawmaker is not free to apply, and thereby determine the meaning of, the law in a particular case." – Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565, 587.

The idea of the law is a relatively recent import, it has few local roots, it is not as well developed in the Pacific as in its countries of provenance, its role is not well understood, and its use to date has not been seen to promote specific local concerns. The related and dependent idea of the rule of law is an even more recent import than the law.

B The Rule of Law

1 The idea

The rule of law is a Western European concept.[10] A comparison of ideas can be made with the notion of rule by a person (a dictatorship), rule by law (a system that uses the form of law to provide for government but which does not necessarily aspire to the application of the law to all equally nor to the idea that even the ruler is subject to the law), and the notion of the rule of law. Typically in the Common Law world, the rule of law indicates that government is by law, that the law applies equally to all[11] and that the ruler is also subject to the law.[12] In the last half century there has also increasingly been an acceptance of the idea that the rule of law indicates reasonable accessibility for all to the processes of the law.

The notion of the rule of law is antithetical to parliamentary sovereignty but closely related to the separation of powers.[13] The

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10 Its early origins in Aristotle's *Politics* and its European development is traced in Tamanaha *On the Rule of Law* (Cambridge University Press, 2004) Ch 1 and 2.

11 This idea is echoed in the ICCPR article 14.

12 See the *Prohibitions del Roy* (1607) 12 Co Rep 63: "quod Rex non debet esse sub homine, sed sub Deo et lege".

13 The usual starting-point for discussion of the separation powers is Montesquieu but it is also clear that the notion of the separation of powers operates differently, for instance, in France from in the United Kingdom. For the Marxist, the separation of powers is simply a bogus principle to defeat the implementation of the will of the people.

notion is somewhat uncertain at the fringes and is hard to translate into languages other than English.[14] For instance to say in French *régle de droit* could simply mean a legal rule. More commonly used is the phrase *principe de légalité*. That, however, literally might be "the principle of legality" which, in a different context, is the idea attributed to Beccaria that in the criminal law sphere there should be "no crime without a law" and "no punishment without a law".[15] Aside from the translation difficulty, the term "rule of law" is meaningless outside of the courts. It is not a feature of the South Pacific tradition where the pattern is usually rule by law or often rule by man.

The rule of law is difficult to define. Many claim to understand the concept and most states claim to abide by it. There is however also general agreement that the notion has no fixed meaning. Certainly it can range from meaning "ruling by means of the law" through to a much broader notion which embodies ideas of human rights and democracy.[16]

> The rule of law is a fundamental philosophical concept which has attracted much interest and controversy in the globalisation debate. Its specific interpretation and application in civil society is far from generally accepted. It appears in the context of many disciplines, including political science, institutional economics, and regulation, and has a central place in various jurisprudential considerations,

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14 D Cao in *Translating Law* (Multilingual Matters, Clevedon, 2007) raises this point on page 1: "Examples of similar difficulties abound in the translation of basic legal concepts between most languages. And for instance we may ask: are the English "Rule of Law"; the French *Etat de droit* and the German *Rechtsstaat* equivalent?" Note also the potential difficulties of Mandarin translation where "fa zhi" is both rule by law (法 制) and the rule of law (法 治).

15 See now ICCPR article 15.

16 From the pamphlet advertising the symposium "The Rule of Law: International and Comparative Perspectives" held in August 2008 at the University of Oxford.

> including constitutional and administrative law, criminal law and economic law. Indeed, the relationships among national rule of law concepts remain varied and unresolved. For instance, the European Court of Justice has in its decisions listed the term in different languages, including, "the rule of law, état de droit, rechtstaat," and others. As a result, the concept has been accorded a range of meanings.

Discussion of the contemporary rule of law usually begins with Dicey and the description of the rule of law that he presented in 1885 in his *Introduction to the Study of the Law of the Constitution.*[17] The rule of law in English constitutional history has a long lineage but it was Dicey who put a particular stamp on it and made his thought the point of reference for subsequent debate:

> We mean in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. [page 188]
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> We mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[page 193]
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> There remains yet a third and a different sense in which the "rule of law" or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that a constitution is pervaded by the rule of law on the ground that the

17 Quoting from the 10th edition, Macmillan and Co, London, 1959.

> general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; [page 195].

Speaking, in their modern commentary, on the rule of law in England, Turpin and Tomkins state:[18]

> The rule of law is both a legal rule and a political idea or principle of governance comprising values that should be reflected in the legal system and should be respected by those concerned in the making, development, interpretation and enforcement of the law.

The authors see the focus as being on a limiting of discretion and the avoidance of arbitrariness. They discuss on the one hand an equal subjection to the law, and on the other salutary examples of breaches of the rule of law in the United Kingdom and the consequent upholding of the rule of law by the British courts.[19]

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18 Turpin and Tomkins *British Government and the Constitution* (6 ed, Cambridge University Press, London, 2007) 76.

19 Ibid pages 83-89. In *R (Karas) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin) without warning a couple were detained at 8.30pm one night for deportation at 7.45am the following day. On challenge of the immigration action the couple were awarded damages and the High Court declared that the facts showed "at best an unacceptable disregard by the Home Office of the rule of law, at worst an unacceptable disdain by the Home Office for the rule of law, which is as depressing as it ought to be concerning".

In a case involving the illegal detention of a foreign citizen abroad for forcible removal to England, where on arrival in England he was arrested for alleged criminal offences in the United Kingdom, Lord Bridge said "There is, I think, no principle more basic to any proper system of law than the maintenance of rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has not only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of court, I think that respect for the rule of law demands that the court take cognisance of that circumstance." *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42.

2 In the Pacific

The notion is a development of Western European constitutional thought. It reached the Pacific states by virtue of colonisation particularly through colonisation by the British.[20]

Colonial government itself was not a good example of the rule of law because colonial government was typically that of a Governor who was clearly privileged in terms of the colonial constitutional hierarchy and who typically also embodied the fullest of executive, legislative, and judicial powers. It was therefore primarily in the context of development of internal self-government that the notion of the rule of law became part of the constitutional discourse in respect of the current Pacific states. The independence constitutions implicitly[21] confirmed the rule of law for the Pacific states as being similar to Western Europe.

The importation of the idea of rule of law into the Pacific is a result of colonialism. It became a clear goal with the independence of judiciary and human rights. The idea is perpetuated in the Pacific island countries by external agencies in particular. The governance

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In *M v Home Office* [1994] 1 AC 377, a citizen of the Democratic Republic of Congo was about to be removed from the UK when his case for judicial review of the removal order was adjourned on the condition that M not be removed till a case was heard. In the event M was removed. The judge then ordered that the Home Secretary arrange for M's return. The Home Secretary decided that M should not be bought back to England. A contempt order was than made against the Home Office and the Home Secretary.

20 "The idea of the rule of law is rooted in the history of European political thought and constitutionalism …. Edward McWhinney rightly sees the English version of the concept as a "historically received notion" and says that is, in essence, "a distillation of English common law legal history from the great constitutional battles of the seventeenth century onwards"". Turpin and Tomkins *British Government and the Constitution* (6 ed, Cambridge University Press, London, 2007) 76.

21 Few (eg Fiji 1970, Papua New Guinea 1975, and Tuvalu 1978) did so explicitly.

rhetoric of recent decades focuses extensively on the notion of the rule of law.

The rule of law is therefore by definition an alien idea.[22] It is not a local Pacific concept nor is it of long standing in the Pacific.

The rule of law also assumes an infrastructure which in practice does not exist in the Pacific countries. Most Pacific countries do have rule by law and the law does bind all. Access to justice however assumes equality and rights which in a Western sense are not fully enjoyed.

Pacific states cannot and do not practise the rule of law. The emphasis should therefore be at a more basic and achievable level, that of rule by law. The goal should be to achieve security through predictability of rules and their non-arbitrary application.[23] A second

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22 "The rule of law to Fijians is an arcane concept that they perceive is a foreign idea imported to subvert their way of life. It is for them an obstacle to their aspirations. It is because they conceive of indigenous rights as superior to and beyond the rule of law. Fijian rights in this scenario can only be secured by force. In these circumstances, the critical element is political control and domination of the state apparatus. However, the problem with this state of affairs is that force and political power per se are notoriously fickle instruments".

Ratu Joni Madraiwiwi, "Tensions and the Rule of Law" Siwatibau Memorial Lecture, 16 September 2004. <www.pacificmagazine.net>.

A leading 20th century commentator on the rule of law said: "If it is believed that the individual finds his greatest happiness, or best develops his soul, in a strong and powerful State, and that government implies not the chaos of competing interests stimulated by self-seeking demagogues but the unity of the nation behind a wise and beneficent leader, the rule of law is a pernicious doctrine. Or, even if it is believed that there are no universal principles of government, and that each nation must achieve its destiny by methods which suit the spirit and the ethos of its history, the rule of law, which may perhaps be regarded as suitable for Anglo-Saxons and Frenchmen, is not a product capable of export. Like good wine, it does not travel." Jennings *The Law and the Constitution* (5ed, University of London Press, London, 1961) at 46.

23 "Strong, stable institutions allow the rule of law to flourish, just as the rule of law is a foundation for fair and stable governance." – Rt Hon Helen Clark in her

and later step would be to proceed to implement rule of law principles.[24]

C The Role of Law

The concept of the rule of law is unhelpful for development. A better approach would be to focus on the role of the law, which now has an established place in the operation of governments in the Pacific countries, and then to indicate the goals that are to be achieved by the use of the law. Those goals may be predictability of outcome of government administration, acceptability of the outcome, achieving harmony in society, or protection of persons and property.

Law in itself[25] is almost content neutral. It provides a tool for social regulation. The state deploys the law to achieve its policy goals, whether they be the betterment of individuals and the protection of the persons and their property, the building of communism, or the preparation of humanity for paradise. Each society therefore needs to identify its goals and then deploy the law to help achieve them.

The law inherited by the countries of the South Pacific and being developed by them, is by nature outward-looking and internationalist. The focus tends to be on the individual vis-à-vis the state and the law proclaims an objectivity and independence in its approach to dispute resolution. Whether these are the features that the law should be promoting needs to be addressed specifically. Whatever the answer in a given society, an exploration of the rule systems that are functional and that have strong local roots in the

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address to the Australian New Zealand Society International Law conference, June 2006 (see LawTalk 671, 31 July 2006).

24 In Europe it took centuries to evolve to the point of a commitment to the rule of law.

25 And thence the rule of law.

Pacific may be of assistance in making the operation of the law more effective than at present.

II THE CURRENT SITUATION

A General

The features of the Pacific island legal systems are that they have written entrenched constitutions based on the separation of powers doctrine. They all, except Niue, have a Bill of Rights which is entrenched in the constitution. The consequence of these constitutional arrangements, which are continental European rather than British in nature, is that there is judicial supremacy in constitutional matters. There is judicial review of the exercise of parliamentary legislative authority. Few however balance this shift, from parliamentary sovereignty to judicial sovereignty, by any form of democratic control such as is done by Japan.[26] The rule of law is an aspirational concept: Fiji and New Zealand both proclaim the rule of law and both depart from it to a greater or lesser degree.

The international aid effort has in recent times been substantially focused on governance. That meant initially a focus on constitutional process. The focus then shifted to economic and financial accountability matters, and currently to emphasis on the strengthening of the judiciary in the Pacific countries.

The concern of the international community with matters of governance, of human rights, or of the developing of the market economy frequently distracts attention from or ignores the law.[27]

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26 For an extended discussion on these issues see Christopher F Zurn *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, New York, 2007).

27 For instance in the Tuvalu case *Teonea v Kaupule* [2005] TVHC 2 (Ward, CJ) where the law was arguably clear (and was so held by the court) but was the subject of adverse comment from a specific human rights viewpoint. See eg Dejo Olowu "When Unwritten Customary Authority Overrides the Legal Effect

Why is the rule of law aspirational only? Where is the failure? The rule of law indicates that all are subject to the law and that all are equal before the law.

All may be subject to the law but in those circumstances where parliament has delegated a broad discretion to an executive agency or officer the focus shifts from the control of the law by parliament to the exercise of the discretion by the delegate. In that case the law experience shows that there is not equality before the law and that the application of an equal law can be unequal. The practice of delegation and the practice of unequal application mean there is a greater concentration of power in the executive. When this happens in an extreme way there is frequently a judicial reaction by way of correction and that judicial reaction often stretches the law in order to stabilise the situation. At that point the judicial will replaces the executive will.

The failure to achieve the idea of the rule of law is highlighted in the areas of access to justice and human rights. In those areas the law is either not applied or is weak or non-existent. A better and more productive approach to the matter would be to consider what is known in the Pacific states and to build on that to develop the state government.

B Custom

What is known is the custom. Its particular characteristics are: the people to whom it applies know it, it is local and adapted to the local circumstances, there are outcomes that can be predicted in the local circumstance, there is frequently no notion of separation of powers,

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of Constitutional Rights: A Critical Review of the Tuvaluan Decision in *Mase v Pule o Kaupule & Another*" (2005) 9 (2) JSPL.

In other examples where the commodification of land is promoted there is arguably a denial of the facts of the situation.

there is a known and functioning dispute resolution system. The law, because of its familiarity to all, is unwritten and its focus is on the domestic situation of those in that customary community. Customary law therefore is local rather than national. The goal should be to translate the customary law strengths to make a 21st century tool that can deal similarly (in the sense of being known, having predictable outcomes and being adapted to the local situation) with the problems of the nation and thence international relations.

The relationship of custom to physical conditions – some suggestions of a typical case:[28]

Physical conditions	→ **Social conditions**	→ **Social regulation**	→ **The law**
Small	Communal living	Self-contained	Externally referenced Colonial Global
Isolated	Inward looking	Consensual	Democratic process for the creation of law Episodic or isolated dispute resolution
Limited resources	Cooperative	Group oriented	Individualistic
Simple technology	Skills valued	Age gives status	Age no particular relevance
Vulnerable	Nature dominates	Respects natural cycle	No particular relevance
Land = non-perishable	Land-based	Focus on land	Operates best with individualised interests. In relation to communal ownership – often tries to intervene, often avoids

28 This table was based on the analysis in Bernard Narokobi *Lo Bilong Yumi Yet* (USP, Suva, 1989) Ch 3.

David Rene in *Major Legal Systems in the World Today* (3ed, Stevens, London, 1985) identified as the features of customary law: continuance (not change), harmony (not finality), group orientation (not individual), orality (not written), sharing (not money economy).

involvement by deferring to custom, sometimes seeks to control

The comparison shows that custom is different from law both in form and in structure.

The main difference of form is in the written or oral nature of the rules. This relates to knowledge of or access to the rules and to predictability of behaviour. In a small familial grouping the oral nature of laws does not preclude knowledge of them nor the possibility of predicting consequences if the rules are followed or if they are not followed. A large community (or several communities interacting where they do not have a common language) cannot have the same knowledge or possibility to predict outcomes unless the rules are retained in a permanent form such as by writing.

In the contemporary Pacific state, orality is not an adequate form for the national law. The law needs to be written. That directs the attention immediately to the question of language. For oral rules at the local level, the language is common to those affected. Extending the audience for law effectively means finding a common language.

The consequence of colonialism is that the language of the law is almost exclusively English.[29] English is not the vernacular for most in Polynesia: it will be a second language for many (but not all); for

29 Many Pacific constitutions are not available in the vernacular. Even when the law indicates they should be (eg the Cook Islands, Vanuatu).

Of general interest is Ian Fraser "Forgiveness is Melanesian for Individualism – and other Bad Translations" (2008) 14 RJP at 43 "Melanesian traditions and ways of doing politics did not inform the organisation of the new governments. Government is organised as it was in colonial times and proceeds as it did then. And although it operates informally in … the linguae francae, it continues to operate formally in English and remains oriented to the metropolitan models. ... The demands and ways of Melanesian governments are still easier to understand, and use, for foreigners of the anglophone West and than they are for the people the governments serve and represent".

most in Melanesia English will be a third or fourth language. Even for those with English as a second language and as their language of education, the level required to access the law will rarely be attained. The law, and critically the constitution, therefore is the domain of a political and legal elite in a way that it is not for instance in Australia or New Zealand. One way to address this problem of form is to translate or make the law in vernacular.[30] The added task here is to develop the vernacular to accommodate the ideas of law.[31] The alternative is to extend English language education.

The structure of English law texts is particular to itself.[32] By its very nature, the law in English is not accessible to the uninitiated.[33] Attention needs to be directed therefore not only to the language used but also to its use for writing law (plain language drafting codes). Substantively the law needs to be written or adapted to reflect local social attitudes, and in particular to reflect the communal familiarity with custom and desire for harmony, in priority to the vindication of individualism.

In the customary setting, the judges are likely to be interested parties and be persons who in a Western legal sense are likely to have a conflict of interest. This is seen as a particular strength of the system, rather than a weakness, somewhat in the sense that the early juries of the Common Law were witnesses rather than judges. In both the English jury sense and in the Pacific customary sense, the general

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30 Christian missionaries understood this very well.

31 A very difficult and extended task at any time but one that may not be feasible in Melanesia.

32 Compare Dale *Legislative Drafting: A New Approach* (Butterworths, London, 1977); see also Cao using the same analysis, above n 15, at 103-114.

33 The Wills Act 1837 of the UK was the law in most Pacific states, and still is in some cases. It is a typical if somewhat extreme example of English law. It is not easy to read. Section 1 of the 1852 amendment in one sentence of more than 300 words enacts what "at the end of" a will means!

involvement of the members of the community gave credibility to the judgment and made it acceptable. The law clearly has a depersonalising role.[34]

The feature of accessibility is not an issue when the matter involves members of the same customary community. However the customary rules typically remain inaccessible to the outsider. In this the law and custom differ. The law achieves some universality by being written and by being in a publicly accessible form.

III A PRESCRIPTION

The customary systems have a place in the communities which is much like English law in its setting of origin. England built its law from the centre outwards using the material provided by the communities.[35] Pacific countries should do the same so that the laws would reflect their culture and needs as English law reflects England. The task is a big one but the prognosis is good. The alternative present approach is not notably successful, has shallow reach, and tends to be alienating.

The proposition is then that the development of the law, whether or not foreign inspired, be informed by local circumstances.

The law should be written and preferably in the vernacular. Being in the vernacular will greatly facilitate the move from oral to written rules, though access to the law and its acceptability in any language is highly dependent on education, literacy and understanding.

Custom differs from law in form and purpose. A comparison can also be made in relation to subject-matter. From a law point of view key areas are property, personal relations, obligations and social

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34 See David Mummery "Law, Science and Society" (1990) 20 VUWLR at 111.

35 It was a conquering of the local by central government.

order.[36] In all these areas the spirit of the law runs counter to the spirit of custom.

A consideration of custom against that taxonomy is informative. In the Pacific the taxonomy would be different. Pacific customary systems rules about property deal almost exclusively with land. The rules relating to land are probably the strongest of all customary rules but in the current international climate perhaps also the most vulnerable. The land systems are under threat. International trade, globalisation and international development finance are all creating substantial pressure on Pacific communities to make land available as security for commercial purposes. This has the potential to take the bulk of the land out of customary communal ownership into law-governed systems and to individualise interests in land.[37] Reform in the land and property area are typically driven by commercial interests and equally typically by the commercial interests of persons outside the particular community.

In the field of property the tendency of the law is to generalise. What distinguishes land from other types of property is mobility not use. The concern of the law is more to identify the owner of property or rights in it for the protection of transactions than the protection of continuing communal interests.

The rules of custom on family relations are equally clearly developed but are perhaps now in a state of decline. The reasons for weakening of the family customs is that there are parallel systems. The law has a system and that system frequently allows for the operation of custom in the fields of marriage, divorce and adoption. Nevertheless the state law system is in part responsible for the

36 This is according to a conceptualisation which goes back at least to Roman times.

37 Eg Land Titles Registration Act 2008 (Samoa).

interest of members of the community in using the law rather than custom. There may for instance be better provision available under state pension systems for those married in accordance with the law, and the law may provide better welfare provision for instance for persons who have been married. The state may not be able to take full credit for this use of the law because in many communities the churches, which are often a stronger community force than the state, insist that members of a particular church order their family relations not only in accordance with religious requirements but also in accordance with the law. In the family relations area the law reforms are mainly driven by international human rights concerns.

The rules on social ordering are even more compromised in many countries than the rules relating to family relations. Beyond the range of the state institutions, custom remains very strong and the well-developed rules on social order are enforced. In the urban settings of post-colonial times the social ordering systems of custom are particularly weak and have been displaced in large part by the law which is enforced by the institutions of the state. Where however an offender against custom returns to the area where the custom is still operative, or when they are forcibly removed to that area by members of their custom group, the rules of custom are enforced against that individual. The rules of social ordering in custom are now weakening, but the state system is not yet strong. Therefore in the areas where the reach of the state is limited, neither custom nor the law may be very effective.

From an outsider's point of view the law of obligations in custom is not visible or exists only in an undeveloped state. This may have direct relationship to the amount of disposable property that individuals have or it may relate to the impact of a money economy. Whatever the reason, in many custom contexts the notion of a civil obligation (whether in contract or in tort) is unknown. The distinction is not made between criminal and civil obligations. The

duties, however the outsider may categorise them, are simply duties owed in the community or to the community in accordance with custom. The enforcement of civil obligations therefore is something which in custom is typically addressed in respect of the rules relating to land, family relationships, and social order.[38]

Another important area is that of national government - the so-called public law domain. At a custom level the public/private law divide is not one that is known. However there is little custom in the field of national government because the modern states are the products of colonialism and of international law. The potential for competition or conflict therefore in the field of government at the national level is likely to be limited: National elections for instance run according to electoral rules under the law; there is typically no competing custom in respect of the national leadership positions.[39] The national law of government is therefore an area of relatively free rein for the law, and therefore a good area for the operation of the rule of law.

In the fields of property, family relations, social ordering and civil obligations there is much food for thought for those who wish to develop the law. Undoubtedly the law will be more acceptable, more readily followed and therefore more successful if it takes account of indigenous attitudes. In the constitutional field much greater attention should be given to indigenous dispute resolution systems and to the application of custom where that is provided for in the law.

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38 See Bernard Narokobi (*Lo Bilong Yumi Yet*, ch 12) for a discussion of a civil/criminal dichotomy.

39 This of course makes it easier for those without status according to custom to achieve leadership positions under the law. See Fraser, above n 29, "Because of the misfit of these institutions to Melanesian societies, a kind of individualism, taking advantage of unaccustomed institutional openings, thrives."

IV A CONCLUSION

The state should focus on state business; the state should legislate the law; it should use the language of the people, and the legislated law should be compatible with (and not contradictory of) local norms. The state system should accept and encourage alternative dispute resolution systems. The state legislation should also defer to custom as much as possible.[40]

Achieving the rule by law nationally would mean the fulfilment of the goals of national government by predictable outcomes from known rules. Legislation is clearly a useful tool in this context.[41]

Emphasis needs to be altered too so that attention is placed on infrastructure matters such as the administrative personnel and systems that provide for the enforcement of the legislation.

The rule of law arose out of the Western European political experience. It is important to identify in the Pacific the influence that would inform the creation of a governance concept of an equivalent

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40 As for instance Samoa has done with its Village Fono Act and as Tokelau has done in respect of land matters in Constitution rule 15. Apposite from an earlier era are the comments reported by Sir William Martin (an early Chief Justice of New Zealand) in *The Taranaki Question (*The Melanesian Press, Auckland, 1860) at 100. It was stated that it was not reasonable to expect that the indigenous people should be able "to adopt *per saltum* the complex institutions of a free British Colony. … the civilisation, which is expected to lead to the adoption of British Law, can itself only be obtained through the medium of fitting institutions; institutions which, take the actual condition of the Aboriginal population as the point of departure, provide for its present necessities and for its transition state, and are capable of expanding, in their ultimate developement, into the full measure of British liberty".

41 Japan, Turkey, Ethiopia, and more recently China are well documented examples of this.

nature to the rule of law or alternatively the influences that will create a Pacific oriented rule of law.[42]

The prescription would be more legislation, better legislation, fewer consultants, less hurry to emulate systems that have evolved in other cultural settings. The Pacific states are young states. The emphases should be on assisting them "to be themselves" as they address the challenges of their post-colonial circumstance and to engage with the globalisation movement.[43]

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42 The comments of Tamanaha are apposite: "Outside of these situations, especially in non-liberal societies and cultures, the question of the applicability of formal legality must be examined closely. Formal legality – rule by rules – is counter-productive in situations that require discretion, judgment, compromise or context-specific adjustments. It may have limited application to the family realm and little if any to the sphere of community activities. Often orientations other than formal legality will be less disruptive of existing relationships and social bonds. Strict adherence to the dictates of formal legality can be alienating and destructive when it clashes with surrounding social understandings, particularly when there are strongly shared communitarian values and when everyone expects justice to be done. An emphasis on formal legality potentially creates particular difficulties in situations where a substantial bulk of the law and legal institutions is transplanted from elsewhere, as is common in post-colonial societies, for the reason that the legal norms and institutions may clash with local norms and institutions. Especially complex problems will arise in hybrid situations, where both liberal and non-liberal orientations circulate. Here the mix must be determined following negotiation among the interests involved. Blanket "all or nothing" strategies should be avoided. The proper application of formal legality can be determined only in the context at hand, by the people involved. Otherwise it will fail, or inflict harm." (Tamanaha *On the Rule of Law* (Cambridge University Press, 2004) at 140)).

See also Ringer "Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice" (2007)10 Yale HR & Dev LJ 178. Windybank "Trilateralism and the South Pacific" in *Asia-Pacific Security* (Routledge, London, 2007) at 112, 118 referred also, in a slightly different context, to "What is needed is the political will to act".

43 It would also help if the major nations of the world provided good role models. The Guantanamo Bay example or the procedures put in place in recent years in some countries in relation to processing particular migration applications all

To date legislation has been promoted internationally on the basis of "be like us", and internally on the basis of "let's be like them". This is primarily to advance globalisation.[44] The legislation is typically not focused internally on strengthening the local systems and is often not accessible. It is therefore not possible to speak of the rule of law in functional terms because the basic component, "law", is weak.

The reasons for resistance to the law and for suspicion of it are patent. The time of the law has come, but to achieve the ideal of the rule of law the law must be strengthened. It could be strengthened by continuing in the present fashion which substantially relies on following external models without any special regard to local circumstances. It could be strengthened by countries engaging in the vernacularising of the law, using a process similar to that which created the law of England; it can be strengthened by taking a middle path which requires local governments to engage with custom as they develop the law at the same time as extending English language education and inculcating an understanding of the nature of the law and its processes. All but the current method will require external governments and agencies to talk less and listen more, to spend more time on observing and listening than on writing reports, and to refrain from addressing each new Pacific law issue with an externally produced model law.

All but the current method will require Pacific governments to develop an interest in the role of law beyond satisfying external conditionalities and the maintenance of central government power.

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provide examples of a sacrifice of principle to political expediency. The mentors of the Pacific states should not be providing negative examples.

44 The example is clear in respect of the anti-terrorism and off-shore banking laws. If the external promoters and enforcers of these international legislative movements focused attention on some of the developing states involved they would see the irrelevance/futility of these legislative endeavours.

The international community has a significant part to play. Ultimately each Pacific national government has the responsibility and the choice.