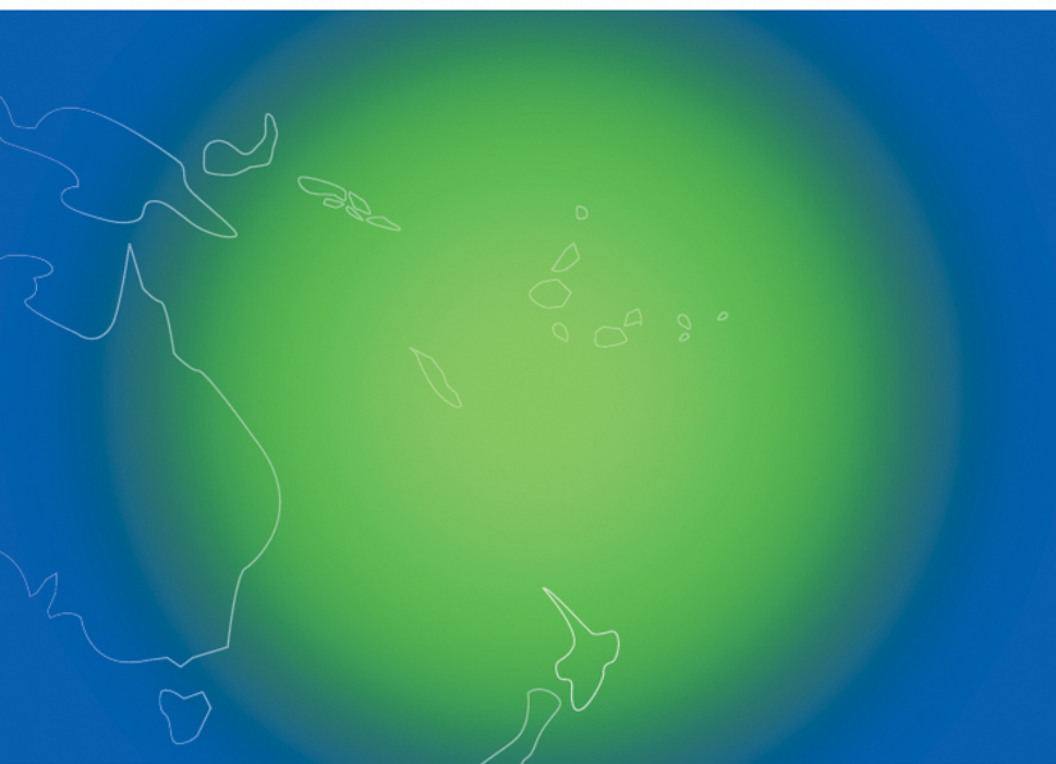


INTRODUCTION TO SOUTH PACIFIC LAW

Second edition



Jennifer Corrin and Don Paterson

Introduction to South Pacific Law

Second edition

Introduction to South Pacific Law provides an overview of the origins and development of law and legal systems in the South Pacific. It sets out the framework of the legal systems of the region and looks at both state laws and customary laws in operation. The text covers public and private law and highlights the distinguishing features of the substantive law in force in the South Pacific.

This text is a unique combination of information, not only on South Pacific legal systems generally, but also on substantive areas of law. The constitution and jurisdiction of state courts in the region are also covered. Extensive reference is made to legislative provisions of individual jurisdictions and cases decided by the courts of the region.

It is an essential resource for all those interested in the law of the South Pacific Islands region.

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Jennifer Corrin and Don Paterson

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Preface

This book is published as the second edition of *Introduction to South Pacific Law*. However, in some respects it is more than a new edition. There is a new chapter on family law and the chapter on procedure is no longer included, so the focus is on the substantive law of the countries which are included. Further, many chapters have been extensively revised, and the chapter on criminal law is completely new. Like the first edition, this book is intended to be an introduction to the law and legal systems of the South Pacific. The book covers 11 of the 12 member countries of the University of the South Pacific. These countries are Cook Islands, Fiji Islands (formerly 'Fiji'), Kiribati, Nauru, Niue, Samoa (formerly 'Western Samoa'), Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. There is some reference to the law of Marshall Islands, which is a member of the University of the South Pacific, but this country has not been covered comprehensively as its legal system is based on the American model and it does not fit well within the parameters of this text. Reference is also made, from time to time, to the law of our near neighbour, Papua New Guinea, which has the advantage of extensive published material.

The University of the South Pacific first offered courses in law in 1985, when the certificate in law was offered by extension through the Pacific Law Unit. This was followed shortly afterwards by a diploma in law. Don Paterson was the director of the Pacific Law Unit throughout its existence. It was not until 1994 that the Department of Law was established and the LLB commenced. Two years later, in 1966, the Department became a School of Law, and then, 10 years later, in 2006, following a re-organisation of the structure of the University, the School became part of the Faculty of Arts and Law. Some 400 students have now graduated with law degrees and have dispersed to their various countries to join the legal professions, and also government administrations and business organisations of those countries. The School of Law now offers Masters degree and PhD programmes. The focus of the University of the South Pacific's law programmes lies on the law of the countries of the region. The development of these programmes and the growth of the School of Law prompted the publication of the first edition of

Introduction to South Pacific Law as an introductory text to South Pacific law. Like its predecessor, the second edition is primarily designed to meet the needs of students in those programmes. However, the text was always intended to be of use to others, both within and outside the region, including students, practitioners, academics and others, interested in acquiring a foundation in South Pacific law.

The authors also hope that this book will stimulate interest and research in South Pacific law, and indirectly promote the development of law and national jurisprudence in the member countries of the University, reflecting the indigenous values proclaimed in many independence constitutions. Perhaps, in the longer term, a sub-regional or regional jurisprudence in areas where common values exist, may also emerge. It is also hoped that this book will stimulate interest in the neighbouring South Pacific country of Papua New Guinea, which has a very similar legal system, and in the neighbouring francophone countries of French Polynesia and New Caledonia. Establishing closer links with those countries and with other countries of the South Pacific, such as American Samoa, and of the North Pacific, such as Federated States of Micronesia and Marshall Islands, whose legal systems are founded upon the American model, but do have a common source and tradition would seem to be a very worthwhile aim.

There is still a shortage of textbooks on South Pacific law. However, apart from those which have been published in-house, there now exists a strong foundation of works in a number of areas of law, published by Cavendish Publishing. The authors are very pleased that Routledge-Cavendish has decided to continue to publish works on South Pacific law. Thanks are due to Miranda Forsyth for her contributions to the criminal law chapter and to Lauren Zanetti for her research assistance and relentless pursuit of the truth relating to South Pacific family law! We should also like to thank the other student research assistants who have worked on this project, either directly or indirectly. Finally we should like to thank our colleagues at Emalus Campus and at the Centre for Public, International and Comparative Law in the TC Beirne School of Law for their support and encouragement.

Jennifer Corrin

Don Paterson

21 December 2006

Authors' note

The reader's attention is drawn to changes in country names:

- Western Samoa is now Samoa (Constitution Amendment Act (No 2) 1997)
- Fiji is now Fiji Islands (Constitution (Amendment) Act 1997).

The new country names have been used except where the context demands otherwise.

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Glossary

The terms listed here are considered to be of particular use in relation to Law in the South Pacific region.

<i>Aiga</i>	Family group (Samoa)
<i>Alii ma faipule</i>	Chiefly heads of families (Samoa)
<i>Ariki</i> land	Chiefly land (Cook Islands)
Chapter	A main division of a book or document; a word used to describe an Act of Parliament of the United Kingdom when Acts were all written in one document.
Charter	A written grant of rights usually given by the head of state.
Colony	A term designating the political status of a country in which the land and the people are under the control of another power.
Common law and equity	The principles that form the core of the English legal system. They are embodied in decisions of the courts and have been applied to or adopted in British dependencies where they are applicable to the circumstances of the jurisdiction.
Consolidation Act	An Act that consolidates or gathers together into one Act a number of different statutory provisions relating to the same subject but does not amend the provisions.
Constituent laws	The laws which establish the structure of government. During a period of dependency such laws will be enacted by the imperial government; at independence such structures are usually contained in a written Constitution.

Condominium	A term referring to the joint control over a country exercised by two separate political powers.
Council	A gathering or assembly, usually of advisers.
Customary law	The local rules, regulations, procedures and conventions governing rights and relationships in certain areas of life. Some aspects of customary law were recognised by colonial powers during the period of dependency.
Dependency	A general term referring to a country that is under the political control of another power whether as a colony, a protectorate, a protected state or condominium.
Dominion	A term given to a British colony or protectorate which has acquired full internal self-government and, in practice, a large amount of control over foreign affairs.
Executive Council	A council of principal executive officers established in British colonies to advise a Governor.
<i>Fa'amasimo fesoasoani</i>	Assistant magistrate (Samoa)
<i>Fono</i>	A village council in Samoa.
Governor	The representative of a head of state, usually in a colony.
Governor-General	The representative of a head of state, usually in a fully independent country.
Imperial country	Strictly speaking, a country that has an empire of colonies but the term is used more generally to refer to a country that exercises some form of political control over another country or countries.
Judicial Committee	The Committee of the Privy Council of the United Kingdom made up of senior judges drawn from Britain and the Commonwealth to hear appeals from some Commonwealth countries.
Letters patent	Literally: open letters. A document of a public nature signed by the monarch of the United Kingdom.
<i>Matai</i>	The head of a family (Samoa).
Order-in-Council	An order made by the head of state following consultation with an advisory council.

Ordinance	A law made by the Governor of a colony or provincial council.
Protected state	A term designating the political status of a country in which there is already a government in place and the protecting power largely exercises control in respect of foreign affairs and defence issues only.
Protectorate	A term designating the political status of a country in which the people but not ownership of the land is under the control of another power. In reality, there is very little difference between a colony and a protectorate.
Privy Council	A council that is advisory to a monarch in some countries such as Tonga or the United Kingdom; sometimes used in a legal context to refer to the Judicial Committee of the Privy Council.
Proclamation	A public statement made by the head of state or a high official.
Protocol	The record of proceedings of an international conference, signed by the delegates.
<i>Tautua</i>	Service or homage (Samoa)
Village <i>fono</i>	See 'Fono' above.

Abbreviations

AC	Appeal Cases
BCR	British Columbia Reports
Civ App	civil appeal case
Civ Cas	civil case
CLR	Commonwealth Law Reports, Australia
Crim Cas	criminal case
Crim App	criminal appeal case
Cooks	Cook Islands
Fiji	Fiji Islands
Fiji LR	Fiji Law Reports
FSM Intrm	Federated States of Micronesia, Interim Reports
IPS	Institute of Pacific Studies, USP
JPacS	Journal of Pacific Studies
LN	Legal Notice
MLR	Melanesian Law Journal
NZ	New Zealand
Sch	Schedule
SI	Solomon Islands
SILR	Solomon Islands Law Reports
SPLR	South Pacific Law Reports
Tonga LR	Tonga Law Reports
Tongan LR	Tonga Law Reports (second series)
UK	United Kingdom
UCQB	Upper Canada (Ontario) Queen's Bench Reports
USP	University of the South Pacific
Van	Vanuatu
Van LR	Vanuatu Law Reports
WSLR	Western Samoan Law Reports
WWR	Western Weekly Reports, Canada

South Pacific law and jurisprudence

Origins of South Pacific legal system

For many centuries, the different island groups in the South Pacific Ocean have been inhabited by three broad racial groups: the shorter, darker, curly haired Melanesians in the western and central islands now known as Fiji Islands, New Caledonia, Solomon Islands and Vanuatu; the taller, lighter skinned, wavy haired Polynesians in the eastern islands now known as Cook Islands, French Polynesia, Niue, Samoa, Tokelau and Tonga; and the medium-sized, lighter skinned, straight haired Micronesians in the northern island groups now known as Kiribati and Nauru.¹ There have been some exceptions to these broad racial groupings, especially the Polynesians who were to be found in parts of the Fiji Islands, in Tuvalu, and in parts of Vanuatu, but, broadly, the indigenous people of each of the island groups of the South Pacific were people of one of these three racial categories. Although the indigenous inhabitants of each island group in the South Pacific were basically of the same racial category, there was no concept within each island group of a unified society, let alone a unified state. Within each island group, people tended to live in separate communities under the control of separate leaders and chiefs. Each community regulated itself in accordance with its own traditions and practices and in accordance with the wishes and policies of its leaders, and, on occasions, its paramount chiefs. Moreover, since there was no knowledge of writing or printing, the regulation of social order was entirely unwritten and communicated solely by word of mouth and actions. It would be a mistake to assume that these communities lived

1 For further, and more detailed, description of the development of the socio-political systems of countries in the South Pacific, see Campbell, IC, *A History of the Pacific Islands*, 1992, Christchurch: Canterbury UP; Crocombe, RG, *The South Pacific, An Introduction*, 5th edn, 1989, Suva: IPS, USP; Oliver, DL, *The Pacific Islands*, rev. edn, 1977, Honolulu: Hawaii UP; Oliver, DL, *Oceania: The Native Cultures of Australia and Pacific Islands*, 1989, Honolulu: Hawaii UP; Scarr, D, *The History of the Pacific Islands*, 1990, Melbourne: Macmillan; Spate, OHK, *Paradise Found and Lost*, 1998, Minneapolis: Minnesota UP.

in an atmosphere of peace, tranquillity and stability. Again and again, social relationships were disrupted by discord from within the communities, and by natural and man-made disturbances from outside the communities. Social order in such communities was, therefore, based partly upon community practices and usages, and partly upon the dictates of leaders and paramount leaders, but subject always to dislocation or displacement produced by national catastrophes, such as volcanic eruptions, tidal waves, floods and landslides, or man-made disturbances, such as inter-tribal wars, the demands of paramount chiefs and the obligations of shifting allegiances with other chiefs.

As the 19th century progressed, the leaders of some communities were able to establish their control throughout much of their island group. The establishment of rule throughout much, or the whole, of the country necessitated the introduction of laws which would apply uniformly throughout the country, regardless of the particular customs of individual communities, and the dictates of individual chiefs. The emerging rulers followed the models suggested by some of the European settlers, whose advice was frequently sought on matters of government, and they produced written constitutions and written laws to control their newly expanded territories. Written laws were promulgated in 1850 and 1860 for Tonga by George Tupou after he took the title of king of Tonga in 1845, and these were followed by further written laws and a written constitution in 1875. Written constitutions were issued in Fiji in 1867, 1871 and 1873 and were accompanied by written laws, promulgated by Seru Cakobau after he asserted his claim to be king of Fiji in 1852, and rival written constitutions and laws were issued in 1867 by the paramount chiefs of Bua, Cakaudrove and Lau, and again in 1871 by the *Tui Lau* and the *Tui Nayau*. In Niue also, Mataio Tuitaga, one of the chiefs of the island who was elected king in 1876, issued written laws for the whole island, a practice which was followed by his successors until the island was annexed by Britain in 1900 and attached to New Zealand in 1901. In the 1880s, after Malietoa's claim to be king of Samoa was recognised by Britain, Germany and the United States, written laws were issued in his name to control his kingdom. Thus, in some countries of the region, written laws, including written constitutions, made their appearance in the second half of the 19th century to supplement the customs and practices of communities, and the verbal orders of their leaders, as a form of social control, even before the countries fell under the control of European countries.

When all countries of the region, except Tonga, did eventually fall under the full control of European governments in the later 19th century, as colonies or protectorates, the reliance upon written laws increased as the European governments and administrators used the laws as a means of asserting their control throughout their dependencies. The more important written laws, that is, the constituent laws establishing the structure of government, and the laws where uniformity, or at least consistency, with metropolitan law

was desired, were enacted by the legislatures of the controlling countries.² The less important laws, which were concerned with the day-to-day administration of the dependent countries, were enacted by legislatures which were set up in those countries by the controlling countries.³ In addition to the written laws made by the metropolitan legislatures and by the resident colonial legislatures, the unwritten principles of English common law and equity were introduced into countries of the region during this period of dependency; they were either applied by the metropolitan legislatures or adopted by the colonial legislatures. These principles, however, were stated to operate only so far as appropriate to the circumstances of each country, a limitation which was not often applied.⁴

The colonial administrators permitted most indigenous customs to continue to be applied by customary leaders to people of their communities as forms of social control. However, they did not originally make any provision for customs to be applied or enforced by the courts as part of the legal system, except for determining title to customary land.⁵ As the 20th century unfolded, the governments of some countries in the region allowed a greater role for customs in the legal system of the country. Native courts were established in Fiji,⁶ New Hebrides⁷ and British Solomon Islands Protectorate.⁸ The native courts in Fiji, while not expressly authorised to apply Fijian customs, were given jurisdiction to enforce native regulations, which incorporated some Fijian customs;⁹ the native courts of British Solomon Islands Protectorate¹⁰ and New Hebrides¹¹ were expressly authorised to apply native customs. In the Gilbert and Ellice Islands Colony, island courts were established, which were required to apply the written laws of England and of the colony and also the common law, but not so as to deprive a person of the benefits that he or she would receive under custom.¹² In Nauru also, the

2 See, further, Chapter 2.

3 See, further, Chapter 3.

4 See, further, Chapter 4.

5 Cook Islands Act 1915 (NZ), ss 421 and 422, also in force in Niue until 1966; Gilbert and Ellice Islands Order 1915 (UK), cl VIII; Laws Repeal and Adopting Ordinance 1922–36 (Nauru), ss 9 and 10; Tokelau Amendment Act 1967 (NZ), s 20. Because Solomon Islands was only a protectorate, not a colony, Britain and the British administration in Solomon Islands laid no claim to ownership of the land.

6 Regulation of Native Affairs Ordinance 1876, s 10.

7 Protocol Respecting the New Hebrides between the Governments of United Kingdom and France (6 August 1914), Art 8.

8 Native Courts Ordinance 1942.

9 Native Courts Regulations 1927, replaced by Fijian Affairs (Criminal Offences Code) Regulations 1948.

10 Native Courts Ordinance 1942, s 10.

11 Protocol Respecting the New Hebrides between the Governments of United Kingdom and France (6 August 1912), Art 8.

12 Island Courts Ordinance 1965, s 16.

customs and usages of Nauruans were permitted to continue to exist so long as they were not inconsistent with the written law and with the general principles of humanity.¹³

As the dependent countries became more politically mature, a greater share in the control of government was handed over to local leaders, and internal self-government was introduced into most of the countries in the region. To provide for this, it was the practice of the British government to enact written constitutions to serve both as a framework for the new form of government and also as a symbol of the new status of the countries. So, written constitutions were enacted by Britain for Fiji in 1963 and 1966,¹⁴ for British Solomon Islands Protectorate¹⁵ in 1960, 1964, 1967, 1970 and 1974, for Gilbert Islands¹⁶ and Tuvalu¹⁷ in 1975, to make legal provision for their advancing self-governance. This practice was not followed in the Anglo-French condominium of New Hebrides, no doubt because of delays and difficulties in obtaining agreement between Britain and France as to the degree of autonomy that should be provided. Nor was the British practice followed by the British colonies of Australia and New Zealand, which preferred to provide for the expanding self-government of their dependencies by legislation enacted by their legislatures.

To make provision for independence or full internal self-governance in all countries of the region, a written constitution was enacted which was stated to be the supreme law.¹⁸ Sometimes, this constitution was enacted by the departing colonial power, as in the case of Cook Islands,¹⁹ Fiji,²⁰ Kiribati,²¹ Niue,²² Solomon Islands²³ and Tuvalu,²⁴ or by the departing colonial powers, as in the case of Vanuatu.²⁵ In Nauru and Samoa, however, the written constitution providing for independence was enacted by a Constitutional Convention established within the country.

13 Laws Repeal and Adopting Ordinance 1922–36, s 10.

14 Fiji (Constitution) Order 1963; Fiji (Constitution) Order 1966 (UK).

15 British Solomon Islands (Constitution) Order 1960; British Solomon Islands Order 1964; British Solomon Islands Order 1967; British Solomon Islands Order 1970; British Solomon Islands Order 1974 (UK).

16 Gilbert Islands Order 1975 (UK).

17 Tuvalu Order 1975 (UK).

18 See, further, Chapter 2.

19 Cook Islands Constitution Act 1964; Cook Islands Constitution Amendment Act 1965 (NZ).

20 Fiji Independence Order 1970 (UK).

21 Kiribati Independence Order 1979 (UK).

22 Niue Constitution Act 1974 (NZ).

23 Solomon Islands Independence Order 1978 (UK).

24 Tuvalu Independence Order 1978 (UK).

25 Exchange of Notes between Governments of the United Kingdom and France (23 October 1979).

After regional countries gained independence or self-governance, many of them gave a larger role to custom and customary law. The Constitution of Samoa provided in 1962 that customs were part of the law of the country, so far as they had been endorsed by the courts or the legislature.²⁶ The Constitutions of Solomon Islands²⁷ and Vanuatu²⁸ provided in 1978 and 1980, respectively, and so also the Constitution of Fiji for a brief period (1990–8),²⁹ that customary law was part of the law of the country to be applied by all courts. In 1971, 1987 and 1989, respectively, legislation was enacted in Nauru,³⁰ Kiribati,³¹ and Tuvalu³² that provided that customary law was to be applied by all courts in relation to certain specified matters, subject to certain qualifications.

Thus, today, all countries in the region have several different kinds of laws deriving from several different sources: a written constitution which is stated to be the supreme law; written legislation enacted by the legislature of the country either during the period of dependency or since independence or self-governance, and subsidiary legislation authorised by that legislation; written legislation enacted by the legislature of the metropolitan country and applied to, or adopted by, the dependent country, and subsidiary legislation authorised by that legislation; unwritten rules of custom and customary law and unwritten rules of common law and equity. In Tokelau, there is no written constitution, but the other kinds of laws exist.

South Pacific law and jurisprudence

None of the different kinds of laws that exist in the region today is static or immovable. They can all be amended or abolished. Even the written constitutions, and the unwritten common law, equity, customs and customary laws, which are sometimes spoken of in terms which suggest that they are unchanging and incapable of change, are susceptible to change.

Moreover, these different kinds of laws originate from different sources: the constitutions, legislation and subsidiary legislation enacted from outside the country reflect the views of governments of former controlling countries; the constitutions, legislation and subsidiary legislation enacted from within the country are based on the policies of governments of the country; the principles of common law and equity derive from the practices of English people and English judges and the unwritten customs and customary law derive from the usages and practices of communities within the country.

26 Constitution of Samoa, Art 111.

27 Constitution of Solomon Islands, Sched 3, para 3.

28 Constitution of Vanuatu, Art 95(3).

29 Constitution of Fiji, 1990, s 100(3).

30 Custom and Adopted Laws Act 1971, s 3.

31 Laws of Kiribati Act 1987, s 5.

32 Laws of Tuvalu Act 1989, s 5.

From this mixture of laws, which allow for change and development, a national jurisprudence, typical of each country in the region can be expected to emerge. It is possible also, further down the pathways into the future, that there may develop a broader sub-regional jurisprudence based upon the Melanesian, Micronesian and Polynesian cultures and societies. Perhaps, even further into the future, a regional jurisprudence drawing from the anglophone, and possibly also the francophone, countries of the South Pacific may evolve. In the lead-up to and the aftermath of independence many countries of the region experienced a great upsurge of interest in national identity, and everything that emphasised it, such as culture, custom and traditions. The preambles to the independence constitutions of Kiribati, Samoa, Solomon Islands, Tuvalu and Vanuatu all emphasised the importance of the culture and traditions of each country. This search for national identity has had its counterpart in the field of law, and, in many countries in the region, statements have been made as to the importance of developing a national jurisprudence.

Typical of these are the comments made by the current Chief Justice Lunabek of Vanuatu, at the time when he was a senior magistrate, in *Waiwo v Waiwo and Banga*.³³ This case was concerned with whether the provision in the Matrimonial Causes Act 1986 of Vanuatu authorising a petitioner to obtain an award of damages against a person who had committed adultery with the respondent should be interpreted as including an award of punitive or exemplary damages, as well as an award of compensatory damages. In the magistrates' court,³⁴ Lunabek SM held that the provision should be interpreted as allowing awards of punitive damages since this was in accordance with widespread custom in Vanuatu:

Thus, custom must be discovered, adopted and enforced as law. This case is the testing point of this process, bearing in mind the fact that Vanuatu jurisprudence is in its infancy and we have to develop our own jurisprudence.³⁵

On appeal to the Supreme Court,³⁶ Vaudin d'Imecourt CJ disagreed with the senior magistrate's interpretation that the provision allowed the award of punitive damages, but supported his call for a national jurisprudence:

The learned senior magistrate was right in saying that we have to create our own jurisprudence, without necessarily following to the letter

33 This case is discussed by Corrin, J, in 'Bedrock and steel blues: finding the law applicable in Vanuatu' (1998) 24 CLB 594.

34 *Waiwo v Waiwo* [1996] VUMC 1.

35 *Ibid.*

36 *Banga v Waiwo* [1996] VUSC 5. It is somewhat ironical that, although the Chief Justice agreed with the senior magistrate as to the necessity of creating a national jurisprudence, the effect of his decision was to reinforce the English interpretation of the provision in dispute.

interpretations given in Britain to Acts of Parliament. We come from many different backgrounds, and live in quite different circumstances.³⁷

From a country on the other side of the region, Samoa, Aisata Vaai³⁸ describes a similar quest for the incorporation of indigenous values into the jurisprudence of that country:

In (Western) Samoa, aspirations for the homegrownness of its Constitution were encapsulated in the notion of *Samoa mo Samoa*. Constitutional Conventions were convened to facilitate the emergence of a Constitution that constituted a free political act of the Samoan people. The Working Committee decided 'that the legal authority in the new State should not derive, directly or indirectly, from the law of a foreign country, but from the act of the people's representatives in adopting the Constitution'.³⁹ Incorporation of indigenous aspirations in the Constitutions was, therefore, achieved through specific measures relating to the original holder of the office of the head of State, with special general provisions relating to customary land and titles, and maintenance, for Samoan constituencies, of an election based on the matai system. A general statement of intention of the homegrownness of the Constitution, which was enacted and adopted on 28 October 1960, was incorporated in the preamble, where the Constitutional Convention declared the new State to be 'based on Christian principles and Samoan custom and tradition' and the Constitution to be the document 'wherein the integrity of Western Samoa, its independence and rights, should be safeguarded'.⁴⁰

It is probably in the neighbouring Melanesian country of Papua New Guinea that there has been the most concerted pressure for the development of a national jurisprudence. The Constitution of Papua New Guinea (Scheds 2.3 and 2.4) specifically authorised and required both the courts and the Law Reform Commission to develop an underlying law of Papua New Guinea which would reflect an indigenous jurisprudence adapted to the changing circumstances of Papua New Guinea. The Law Reform Commission moved with considerable vigour and speed, producing a draft bill in 1977 to establish the underlying law of Papua New Guinea. The Law Reform Commission, in its introductory statement to the bill, noted: 'It was hoped that the common law of Papua New Guinea would quickly develop.

³⁷ *Ibid.*

³⁸ Vaai, AVS, 'The idea of law' (1997) 21 *JPacS* 225.

³⁹ Davidson, JW, *Induced Cultural Change in Pacific Political Organisation: The Transition to Independence*, 1961, Canberra: ANU, p 34.

⁴⁰ *Ibid*; Vaai, fn 38, pp 241–2.

Unfortunately, this has not happened.⁴¹ As Nonggorr commented in 1993: 'These observations were made in 1977, two years after independence. Over 15 years on, the situation has changed little.'⁴² In 2000, the Underlying Law Act was finally passed. However, there were a number of amendments made to the draft put forward by the Law Reform Commission and there were numerous problems with the Act.⁴³ A survey of case law to date reveals that it has had little impact; Nonggorr's words still hold true and little 'has changed'.

In *Lash v Law Society of PNG*,⁴⁴ Amet J blamed the failure to develop an indigenous jurisprudence on foreign lawyers. He considered that foreigners should be required to sit an exam before being admitted to practice. Without 'real knowledge, let alone experience, in Papua New Guinea customary law, land law and, importantly, constitutional law' they would be of no 'assistance in the aspiration of ... developing an indigenous jurisprudence which is more responsive, applicable and appropriate to the circumstances of this country'. Weisbrodt has listed five factors which have inhibited the growth of a local jurisprudence in Papua New Guinea: the wane of anti-colonial, pre-independence zeal; preoccupation with economic concerns; technical problems with interpretation of more idealistic mandates for constitutional change; lack of political will; and lack of reformist activity by lawyers or judicial activism by the judges.⁴⁵

Wherever the fault lies, it is clear that the development of a truly national jurisprudence is not an easy task, nor one that can be expected to be accomplished quickly or without considerable effort and perseverance. Even more difficult must be the development of a sub-regional jurisprudence based on broader Melanesian, Micronesian or Polynesian cultural values. In his book, *Lo Bilong Yumi Yet*,⁴⁶ Bernard Narokobi of Papua New Guinea urges the development of a contemporary Melanesian jurisprudence, which is based upon classical Melanesian jurisprudence, but with some innovations. Narokobi refers to a number of concepts which he considers are basic elements of the Melanesian way of life and jurisprudence, such as even-handedness, balance, harmony, doing good, sympathy, sharing, affinity,

41 Papua New Guinea Law Reform Commission Report No 7, p 10.

42 Nonggorr, J, 'Development of customary law: replacing the Customs Recognition Act' (1995) 21 *Melanesian LJ* 49, p 50.

43 For a detailed discussion of the Underlying Law Act 2000 and the draft bills which preceded it, see Zorn, J and Corrin, J, 'Everything old is new again: the Underlying Law Act of Papua New Guinea' (2002) *LAWASIA Journal*, p 61.

44 [1993] PNGLR 53.

45 Weisbrodt, D, 'Papua New Guinea's indigenous jurisprudence and the legacy of colonialism' (1988) 10 *UHawLRev* 1, pp 30–1.

46 Narokobi, B, *Lo Bilong Yumi Yet*, 1989, Goroka: USP/Melanesian Institute for Pastoral and Socio-Economic Service.

honour and respect, consent, trusteeship, eldership, work, leisure, restraint, control and discipline, and urges that these should be used as bases or focal points in the search for a jurisprudence or philosophy of law in Melanesia.⁴⁷ So far, there has been little reaction or response to this call from the neighbouring Melanesian countries in the region, that is, Fiji Islands, Solomon Islands and Vanuatu. The Melanesian Spearhead Group⁴⁸ has shown how there can be co-operation between Melanesian countries at a high political and administrative level on matters of economy and trade, but the contacts in the field of law have been of a much more limited and pragmatic nature, for example, legal assistance from Papua New Guinea for the drafting of the original Ombudsman Act 1995 in Vanuatu; secondment of a magistrate from Papua New Guinea to Solomon Islands and to Vanuatu; and exchange of judges to sit in the Courts of Appeal of Melanesian countries.

Even in Papua New Guinea, where the concept of a Melanesian jurisprudence has been so strongly advocated, the difficulties facing the development of such a concept have been frankly acknowledged. In 1995, Ntummy concluded his analysis of the efforts to make the dream of a Melanesian jurisprudence become a reality in these words:

To the extent that the dream of a Melanesian jurisprudence represents the popular aspiration to, and demand for, the realisation of the national Goals and Directive Principles, it is politically imperative to pursue its ideals and goals. The analysis above, however, indicates that, at present, the basic tenets of the concept of Melanesian jurisprudence are founded on, and distorted by, many faulty legal philosophical premises. If the concept is to emerge as a viable jurisprudential alternative, it will be necessary to develop it through a systematic approach that is backed by doctrine and philosophy.⁴⁹

From Samoa has come not only a recognition of the possibility of a wider regional Pacific jurisprudence, but also an awareness that this is in its very formative stages. Maxwell CJ, in the course of his judgment in *Laufofo Meti Properties v Morris Hedstrom Samoa Ltd*,⁵⁰ said:

traditionally, jurisprudential development has been along the Westminster line, with emphasis on legal thinking in New Zealand

47 *Ibid*, chapter 4.

48 The name given to the grouping of the Melanesian countries to promote solidarity and co-operation between the independent Melanesian countries of Fiji, Papua New Guinea, Solomon Islands and Vanuatu, the Melanesian Kanak Movement in New Caledonia having observer status.

49 Ntummy, M, 'The dreams of a Melanesian jurisprudence', in Aleck, J and Jackson, R, *Custom at the Crossroads*, 1995, Port Moresby, Law Faculty, UPNG, p 17.

50 [1980-93] WSLR 348.

appellate courts. Let me say that I agree with a regional development to take account of Pacific jurisprudence. However, such an approach is in its infancy.⁵¹

Clearly, it is too early to speak even of a national jurisprudence, let alone a sub-regional, or regional jurisprudence, and the words of Ntuny with regard to the development of a Melanesian jurisprudence must serve as a warning, and, also, as a challenge, to the present and the future generations of lawyers, and those concerned about the development of the law, in countries of the region.

⁵¹ *Ibid*, p 363.

State laws

Introduction

State laws are laws made by organs of the state, as distinct from customary laws which are made by traditional customary social institutions. In all countries of the region the laws of the state consist of the constitution (or constituent laws in the case of Tokelau),¹ legislation, subsidiary legislation, and common law and equity. Some of these state laws were made during the colonial period by the colonising states and have been accepted and retained in the former colonised territories when they became independent and self-governing states. Many state laws have been made locally by organs of the state, both before and after independence or self-governance. So essentially state laws include both laws made by the current state and laws made by the colonising states and retained by the current states, but to an increasing extent, state laws are laws that have been made by the state since independence or self-governance.

Constitution

The constitution of a country is the law or laws that establish the main organs of government and define the relationship of people of that country to those organs. In most countries in the world, and also in the region, there is one law that establishes the main organs of government of a country, and also, usually defines the rights and freedoms of people of that country in relation to those organs of government. That law is often called a written constitution, and there is such a constitution in all countries in the region except Tokelau. Countries where the constitution of the country is not to be found in one law but is to be found in a number of laws, such as Tokelau, are said, somewhat misleadingly, to have an unwritten constitution.

The organs of government that are established by written constitutions of countries in the region, with the exception of Tokelau, are the head of state

¹ Tokelau Act 1948 (NZ). See, further, Chapter 5.

and representative of the head of state; the legislature or law-making body; the political executive, that is, the ministers, who are authorised to ensure that the laws made by the legislature are carried out; the administration, usually called the public service, which is authorised to carry out the actual day-to-day implementation of the legislation enacted by the legislature; the police, whose duty is to apprehend and bring before the courts people who do not comply with the laws enacted by the legislature; and the main courts, that is, the High Court or Supreme Court and the Court of Appeal, whose function is to determine whether there has been a breach of the laws of the country. The provisions in the constitution establishing these organs of government are usually expressed in general terms, and often the more detailed operations of these organs of government are spelled out in more detailed terms in legislation or subsidiary legislation. It is also important to recognise that a written constitution establishes only the main organs of government, not all the organs of government. So, for example, it does not usually establish the organs of local government, such as city, town and provincial councils, nor does it usually establish the subordinate courts, such as magistrates' courts, island courts and local courts.

The rights and freedoms that people of a country can exercise in relation to the organs of government are also usually stated in a written constitution. They are usually the right to life, to liberty, to freedom from inhuman and degrading punishment, to privacy of the home and correspondence, to protection of the law and fair trial, to protection of property, and to the freedoms of movement, association and assembly, speech, conscience and religious belief, and freedom from non-discrimination. As with the provisions establishing the organs of government, the provisions that establish the rights and freedoms of people are usually expressed in general terms. Unlike the provisions relating to the organs of government, however, the provisions relating to rights and freedoms have not usually been complemented by more detailed legislation. The High Court or Supreme Court is expressly authorised to provide relief for contraventions of the rights and freedoms set out in the constitution, and because of the general nature of the provisions, the courts have been required to make some important decisions interpreting the detailed effect of these provisions.

Because the written constitution of a country is regarded as the primary law for the establishment of the organs of government and the relationship of the people to those organs of government, it is usually stated to be the supreme law. As the supreme law, a written constitution cannot be altered like other laws by a simple majority of members of the legislature. Instead some special procedure is required to change a written constitution. This means that any other law, and also any executive or administrative or judicial action, that does not follow the prescribed procedure for changing the constitution must be void and of no legal effect to the extent that it is inconsistent with the constitution. A written constitution, therefore, has very important

implications for other laws and for the operation of all the organs of government. Because of their importance, constitutions are discussed separately and more fully in Chapter 4.

Legislation

Introduction

Legislation is the name given to the laws which are made by the person or body authorised to make laws for a country. The person or body authorised to make laws for a country is technically termed the legislature of that country, or less technically, the law maker of that country. The legislature of a country may be, and usually is, located within the country. But the legislature of a country may sometimes be situated outside the country for which it is authorised to make legislation, as is the case today with Tokelau for which the New Zealand Parliament is authorised to make legislation, and as was the case, in earlier times, with the British Solomon Islands Protectorate, Gilbert and Ellice Islands Protectorate and Colony, and New Hebrides, when they were under the control of Britain. At that time the British high commissioner of the Western Pacific, who was located in Fiji until 1950, and then in Solomon Islands, was authorised to make laws for those countries.

In addition to the legislation made by the legislature of a country, there may be in force in a country the legislation of another country. This frequently happens during periods of dependency when some of the legislation of the controlling country may be in force in the dependent country as well as the legislation made by the legislature of that country. Thus, the people of the British dependencies, Fiji, Gilbert and Ellice Islands, and British Solomon Islands, were subject to legislation made not only by the British governor or high commissioner of the Western Pacific but also by the British Parliament. Similarly the people of Cook Islands and Niue, which were in 1901 annexed as part of New Zealand, were subject not only to legislation made by the legislative assembly in Cook Islands but also to legislation made by the New Zealand Parliament.

The legislation which is made by the legislature of a country is often described as local or locally enacted legislation, although these terms are slightly misleading in respect of those countries the legislatures of which are located outside the country. The legislation that is made by a legislature other than the legislature of the country, but which is in force in the country, is usually termed introduced or received legislation.

These two categories of legislation, local or locally enacted legislation, and introduced or received legislation, will now be considered in more detail.²

2 For a detailed account of the development of legislatures in countries in the region, see Roberts-Wray, K, *Commonwealth and Colonial Law*, 1966, London: Stevens, pp 138–295, and appendices – Notes on individual countries, Oceania, pp 871–913.

Local or locally enacted legislation

When a country is a dependent country, the law-making person or body is usually appointed and controlled by the controlling country, but once a country becomes independent or self-governing, the law-making person or body is solely controlled by the people of that country. Accordingly, there is a great difference as to who is the law-making person or members of the law-making body of a country when it is controlled by another country, and when the country becomes independent or self-governing. It is logical, therefore, to divide a discussion of locally enacted legislation into two parts: legislation that was made before independence and self-governance and legislation that was made after independence and self-governance.

Local legislation before independence and self-governance

Before independence or self-governance, the legislatures of the following island countries of the South Pacific were appointed by the government of Britain: Fiji Colony, the Gilbert and Ellice Islands Protectorate (after 1916, Colony), the British Solomon Islands Protectorate, and by the governments of Britain and France in the case of the New Hebrides, which was a joint sphere of influence of those two countries. The government of Australia appointed the legislature of Nauru, and the government of New Zealand was in control of the legislatures of Cook Islands, Niue and Western Samoa. Because the practices of the different controlling countries varied, it is probably easier to consider the island countries in categories according to their controlling country.

BRITISH DEPENDENCIES – FIJI, GILBERT AND ELLICE ISLANDS,

BRITISH SOLOMON ISLANDS PROTECTORATE, NEW HEBRIDES, AND TONGA

The normal British practice with regard to colonies was to appoint a principal representative of the British government in the colony, who was called a governor, and he was authorised to make laws which were called *ordinances*. Usually he was required to act with the advice and consent of a legislative council, which was composed initially of other British officials in the colony. Later the official element was reduced and replaced by local residents, at first usually appointed Europeans, but later appointed indigenous people, and, still later, elected indigenous people. This practice was followed when *Fiji* became a colony in 1874 and was continued until the country became independent in 1970, with the governor making legislation, called *ordinances*, with the advice and consent of a legislative council the composition of which changed over the period to include more and more elected Fijians and Indians. When *Gilbert and Ellice Islands* became a colony in 1915 this practice was not followed, probably because those islands were not seen as a very significant colony, and legislation for that country continued to be

made by the British high commissioner of the Western Pacific, who was stationed in Fiji until 1950, and thereafter in Solomon Islands. However, in recognition of the fact that the islands were now a colony, the legislation, instead of being called the *king's (or queen's) regulations*, as they were known previously when it was a protectorate, were called *ordinances*. Such legislation was not required to be made with the advice and consent of any legislative council, but was usually made, in practice, on the advice of the resident commissioner. In the 1960s Britain started to prepare Gilbert and Ellice Islands for independence, and authorised the resident commissioner to make laws for that colony, which were called *ordinances*, with the advice and consent of an advisory council, and later a governing council. When Ellice Islands withdrew from the colony in 1975 and was established as a separate colony of Tuvalu, a queen's commissioner was appointed to lead the colony to independence in 1978, and he was authorised to make laws, which were also called *ordinances*, with the advice and consent of an elected House of Assembly. In the remaining colony of Gilbert Islands, the resident commissioner was authorised to make laws, called *ordinances*, with the advice and consent of an elected House of Assembly, until the country achieved independence as Kiribati in 1979.

British Solomon Islands Protectorate was not a colony of Britain, but a protectorate, and although a resident commissioner was appointed to represent the British government in the protectorate, he was not authorised to make laws. The power to make legislation for the protectorate, as well as for other British dependencies outside Fiji, was centralised in the hands of the British high commissioner for the Western Pacific, who, as mentioned above, was stationed in Fiji until 1950, and then in Solomon Islands until the high commission was dissolved in the early 1970s as the countries subject to it became independent. The laws made by the British high commissioner were called the *queen's or king's regulations*, and were made without the advice or consent of any legislative council, but in practice were made on the advice of the resident commissioner in Solomon Islands. When in the 1960s Britain started to prepare the country for independence, the high commissioner was authorised to make laws with the advice and consent of a legislative council, later a governing council. These laws were called *ordinances*. In 1974 the British representative in Solomon Islands was elevated to the position of governor, and made laws, called *ordinances*, with the advice and consent of a legislative council until the country acquired independence in 1978.

New Hebrides was a region of joint influence under the joint control of Britain and France, and the British and French high commissioners were authorised to make laws, called *joint regulations*, which could apply to any resident in the country. In addition, Britain and France retained control over their own nationals, and such other persons, other than New Hebrideans who chose or opted to be regulated by their laws, and could make laws, called *national laws*, for these people. For British subjects and optants, these

laws were made by the British high commissioner of the Western Pacific, stationed in Fiji until 1950, and thereafter in Solomon Islands (see above), and were called *queen's or king's regulations*. For French subjects and optants, these laws were made by the French high commissioner in New Caledonia.

Tonga was a protected state of Britain from 1900 until 1970. This status meant that the country retained its own legislature, the king and Legislative Assembly, which had power to make legislation originally called *laws*, and after 1917, *acts*. In addition, the king, acting with the advice and consent of the Privy Council, had power under the constitution to make laws, called *ordinances*, although that power was not exercised between 1927 and full independence in 1970. The British high commissioner of the Western Pacific was authorised to make *queen's or king's regulations* which applied to Tonga, but because of the status of that country as a protected state, *queen's or king's regulations* were made only with regard to foreign affairs and defence, for example, Tonga Treaty of Peace (Amendment) (No 2) Regulation 1922.

AUSTRALIA DEPENDENCY – NAURU

Nauru, which had previously been a German colony, was first placed under the control of Australia by the League of Nations as a mandate after the defeat of Germany in World War I, and then after World War II by the United Nations as a trusteeship. Legislation, called *ordinances*, was enacted originally by the Australian administrator on his own judgment, but after 1966 until independence in 1968 by the Legislative Council with the consent of the administrator.

NEW ZEALAND DEPENDENCIES – COOK ISLANDS, NIUE, WESTERN SAMOA AND TOKELAU ISLANDS

The *Cook Islands*, which then included Niue, were annexed to New Zealand in 1901, and legislation, called *ordinances*, was enacted by the island councils with the assent of the New Zealand resident commissioner from 1901 until 1946, and by the Legislative Council (later the Legislative Assembly) with the assent of the resident commissioner, from 1947 until self-governance in 1965.

Niue was originally part of the Cook Islands, and legislation for the island, called *ordinances*, were, like other islands of the group, made by an island council with the assent of the resident commissioner. After 1959, legislation, still called *ordinances*, was made by the Niue Island Assembly with the assent of the resident commissioner, until the island achieved self-governing status in 1974.

Western Samoa, which had been a German colony since the beginning of the 20th century, was first placed under the control of New Zealand by the League of Nations as a mandate after the defeat of Germany in World War I, and then after World War II by the United Nations as a trusteeship. Legislation,

called *ordinances*, was made by the New Zealand administrator with the advice and consent of the Legislative Council until 1947. In that year, the first steps were taken towards independence, and the administrator was replaced by a high commissioner, and the Legislative Council by a Legislative Assembly, which enacted *ordinances*, with the assent of the New Zealand high commissioner until independence in 1962.

Tokelau Islands were originally a British protectorate, and then part of the British colony of Gilbert and Ellice Islands, and were finally annexed to New Zealand in 1948. When the islands were under the control of Britain, legislation, called *ordinances*, was made by the British high commissioner of the Western Pacific, and after they came under New Zealand control and were re-named Tokelau, legislation, called *Acts of Parliament*, was enacted for the islands by the New Zealand Parliament.

Local legislation after independence or self-governance

After the island countries of the region achieved independence or self-governance, they did not repeal all, or indeed most, of the legislation made during the period of dependency, but instead chose to retain in force most of the existing local legislation that had been made during their period of dependency, and enacted additional legislation to amend the existing legislation or complement it. Accordingly, after independence or self-governance, the legislation of island countries of the region comprised the following two categories.

EXISTING LOCAL LEGISLATION RETAINED IN FORCE

This was the legislation that had been made by the legislatures appointed by the controlling country, Britain, France, Australia or New Zealand, most of which were considered to be acceptable to the newly independent and self-governing country and were maintained in force. The main changes that were made to the existing legislation were in relation to those laws relating to the legislature itself – its composition and powers. But the laws regulating the ordinary ways of life of people of the countries were left mainly unchanged.

ADDITIONAL LOCAL LEGISLATION ENACTED

Although the majority of the legislation made during the period of dependency was retained, obviously there was a need to provide further local legislation beyond that which had been left by the departing controlling countries. For example, in Samoa, 25 acts were enacted in 1976, some 14 years after independence, and 24 acts were enacted some 20 years later, in 2004, and in Vanuatu 42 acts were enacted by Parliament in 1980, the first year of independence, and some 20 years later, in 2001, 54 Acts of Parliament were enacted. All the island countries chose to model their legislatures on the Parliament

in England, that is, a Parliament enacting legislation called Acts of Parliament with the assent of the head of state. There have been some modifications, however. *Fiji* chose to have a bicameral legislature, with an elected and an appointed house, as in England, whereas the others preferred an elected unicameral house. In *Kiribati* and *Nauru*, the head of state is also the head of government, and is a member of the legislature. In *Cook Islands*, *Fiji*, *Nauru*, *Solomon Islands*, *Tuvalu* and *Vanuatu*, the elected legislature is called a Parliament, and the legislation is called *Acts of Parliament*, but in *Kiribati* the elected legislature is called the *maneaba ni maungatabu*, and in *Western Samoa* (later called *Samoa*) and *Tonga*, the legislature is called the legislative assembly, and the legislation in all three countries are called *Acts*. Although most countries have adopted the common electoral roll and qualifications for candidates used in England, *Fiji* has adopted separate electoral rolls based on ethnic lines, *Tonga* has adopted separate electoral rolls based on social lines and *Samoa* has provided that only certain social leaders, called *matai*, can stand as candidates for election to the legislature. In *Tokelau*, which has not yet achieved self-governance, the elected unicameral Parliament of New Zealand has continued to make laws, called *Acts of Parliament*, for the three islands.

Introduced legislation

As explained earlier, introduced legislation is legislation which has not been enacted by the legislature of a country, but is legislation that has been enacted by the legislature of another country which is then either applied or extended by that legislature to be in force in the country in question, or is adopted by the legislature of the country in question to be in force in that country.

The advantage of introduced legislation for the country in which it is introduced is that it is legislation that has already been drafted and prepared. It does not need to be prepared by the officials of the country in which it is introduced. Also it is legislation which has been in force in the other country, and it has been tried and tested there; any difficulties should have been detected. So in countries where legal resources are limited, introduced legislation is seen to be useful. The advantage of introduced legislation from the view of the country whose legislation is introduced into another country is that it allows that country to exert some influence over the legal system of the country into which the legislation is introduced, and ensure that the legal systems of the two countries are compatible. There are, however, disadvantages to introduced legislation. It may not be completely suitable for the circumstances and conditions of the country into which it is introduced, and may give rise to uncertainties and difficulties of interpretation and application. That is why often the introduced legislation is stated to be in force only so far as appropriate to the circumstances of the country in which it is introduced. Introduced legislation may also give the appearance, and sometimes the reality, of domination by the country from which the legislation is introduced.

The application or adoption of the legislation of another country may be particular and specific, and may apply or adopt certain specifically designated legislation, for example, Property Law Act 1908 (NZ). Alternatively, the application or adoption of legislation of another country may be general and non-specific, for example, 'the law of England' or 'statutes of general application'. Both methods of application and adoption have been used in island countries of the South Pacific, as will now be described in more detail.

Introduced legislation before independence or self-governance

The introduction of legislation made by some legislature other than the legislature of the country concerned into the island countries of the South Pacific occurred mostly during the period of dependency. It is helpful, therefore, to adopt the same approach adopted with regard to locally enacted laws before independence or self-governance.

BRITISH DEPENDENCIES – FIJI, GILBERT AND ELLICE ISLANDS, BRITISH SOLOMON ISLANDS PROTECTORATE, NEW HEBRIDES, AND TONGA

In all these countries there was a general introduction, either by application or adoption, of English statutes as at a particular date, followed by the application of specific English statutes to each country. In *Fiji*, 'the statutes of general application which were in force in England at ... the second day of January 1875' were adopted by s 35 of the Supreme Court Ordinance 1875. These English statutes of general application were followed by specific applications of individual named Acts of the British Parliament. In the *Gilbert and Ellice Islands* and in the *British Solomon Islands Protectorate*, 'the substance of the law for the time being in force in England' was first applied by s 20 of the Pacific Order in Council 1893 (UK), and later 'the statutes of general application in force in England on the 1st day of January 1961' were applied by s 15 Western Pacific (Courts) Order 1961 (UK). These English statutes of general application were complemented by a number of specific applications to the two countries of named statutes of the British Parliament.

In the *New Hebrides*, after the Anglo-French Convention relating to the New Hebrides was signed in 1906, s 20 of the Pacific Order in Council 1893 (UK) applied to British nationals and optants 'the substance of the law for the time being in force in England', and later 'the statutes of general application in force in England on the 1st day of January 1961' were applied by s 15 Western Pacific (Courts) Order 1961 (UK). This latter date of application of English statutes of general application was later extended to the first day of January 1976 by s 3 of the High Court of the New Hebrides Regulation 1976. These English statutes of general application were complemented by a number of specific British statutes that were individually applied to New Hebrides. In *Tonga*, 'the substance of the law for the time being in force in England' was

applied by s 20 of the Pacific Order in Council 1893 (UK), and then after that order was revoked in 1961, the legislature of Tonga enacted the Civil Law Act 1966 which adopted the ‘the statutes of general application in England at the date on which this Act shall come into force’ which was 18 October 1966. In 1983 the words defining the date of the adopted statutes were deleted, allowing for a continuing adoption of English statutes of general application. It is important to note that in all the British dependencies, the English statutes of general application that were applied were expressly stated by both the Pacific Order in Council 1893 (UK) and the Western Pacific (Courts) Order 1961 (UK) to be applied to those countries only ‘so far as circumstances admit’.³

AUSTRALIAN DEPENDENCY – NAURU

In *Nauru*, the Laws Repeal and Adopting Ordinance 1922–36 specifically adopted a number of named Acts of Parliament of the Commonwealth of Australia and of the State of Queensland, and ordinances of Papua New Guinea. It also adopted generally ‘those portions of the Acts, Statutes and laws of England that are in force in the State of Queensland at the commencement of this Ordinance’. These laws of England that were generally adopted in Nauru were expressly stated to be adopted only ‘so far as the same are applicable to the circumstances of the Island’.⁴

NEW ZEALAND DEPENDENCIES – COOK ISLANDS, NIUE, TOKELAU AND WESTERN SAMOA

In New Zealand dependencies, the practice of the New Zealand government was to introduce generally the law of England as it was at the time New Zealand became a British colony, that is, 14 January 1840, but not to introduce New Zealand law generally – only specific named Acts of the New Zealand Parliament. So in Cook Islands (including Niue until 1966), Niue (after 1966), Tokelau and Western Samoa, ‘the law of England as existing on the fourteenth day of January eighteen hundred and forty’ was stated to be in force.⁵ This general application of English law was expressly stated, however, to be ‘save so far as ... inapplicable to the circumstances of’ those countries.⁶ In addition, certain specified Acts of Parliament of New Zealand were applied to those territories at the time that they came under New Zealand control, and also from time to time after that time until

3 Pacific Order in Council 1893 (UK), s 20; Western Pacific (Courts) 1961 (UK), s 15.

4 Laws Repeal and Adopting Ordinance 1922–36, s 14.

5 Cook Islands Act 1915 (NZ), s 615; Niue Act 1966 (NZ); Tokelau Act 1848 (NZ), s 4A; Samoa Act 1921 (NZ), s 349(1).

6 *Ibid.*

Cook Islands and Niue acquired self-governance in 1965 and 1974, respectively, and Western Samoa acquired independence in 1962.

Introduced legislation after independence and self-governance

After the island countries of the region acquired independence or self-governance, they, as already mentioned, did not at once discard or cancel all the legislation that had been brought into force during the dependency period, but retained most of it, and, over time, enacted local legislation to amend or replace some of the introduced laws. As a result, after independence or self-governance, there were two categories of introduced legislation.

EXISTING INTRODUCED LEGISLATION RETAINED IN FORCE

The introduced legislation that was in force in the countries of the region at the time of independence or self-governance was retained as part of the existing law that was continued in force. However, over time, these were replaced by locally made legislation. Thus, in Samoa, by 1977, only one British Act of Parliament – the Wills Act 1837 (UK) – and three New Zealand Acts of Parliament – Bankruptcy Act 1908, Companies Act 1955 and Property Law Act 1952 – and three sections of another act, the Samoa Act 1921, that is, ss 360, 362 and 367, were stated to be in force.⁷ Also in Tonga in 2003, the general adoption of all English statutes of general application was terminated, so that from that date onwards no such legislation is to be applied by the courts in Tonga.⁸ In Niue, all introduced English legislation was repealed in 2004 by s 37(4) of the Interpretation Act 2004, and in Tokelau all introduced English legislation was repealed in 1977 by the Repeal of Laws Rules 1977.

ADDITIONAL OVERSEAS LEGISLATION INTRODUCED

After independence and self-governance, the island countries of the South Pacific preferred, where possible, to rely upon laws enacted by their own legislatures. Further, after independence and self-governance, the former controlling countries in most cases no longer had the legal power to apply their own legislation to their former dependencies. As a result, since the countries acquired independence or self-governance, there has been a very great reduction in the application or adoption of introduced legislation in those countries. In only three of the independent or self-governing countries of the South Pacific, *Cook Islands*, *Nauru* and *Niue*, has there been an

⁷ See notes to the Reprint of Statutes Act, 1972 in Revised Statutes of Samoa, 1977.

⁸ Civil Law Amendment Act 2003.

introduction of legislation from other countries, and what introduction of overseas legislation there has been, has been by adoption or application by request and consent of the legislature of the country into which the legislation was introduced. In *Cook Islands*, after obtaining self-governance in 1965, New Zealand Laws Acts were passed by the Cook Islands Parliament in 1966, 1967, 1968, 1969, 1970, 1973(2) and 1979 which adopted approximately 60 specific Acts of Parliament of New Zealand. In *Nauru*, the Custom and Adopted Laws Act 1971 provided for a general adoption of 'the statutes of general application ... which were in force in England on the thirty-first day of January 1968', subject to a number of general exceptions listed in the first schedule to the act. In *Niue*, the constitution that provided for the country to have self-governing status, provided also that the Parliament of New Zealand had power to continue to make legislation with effect in Niue if that was done at the request of, and with the consent of, the Niue Assembly, and a small number of Acts of the New Zealand Parliament have been introduced in that way – Misuse of Drugs Act 1975 (NZ), Citizenship Act 1977 (NZ).

Subsidiary legislation

Subsidiary legislation is the term usually used to describe the laws that are made by some person or body authorised to do so by legislation enacted by the legislature. Sometimes the terms delegated legislation or subordinate legislation are used to describe such laws. The legislation which authorises the making of subordinate legislation is sometimes called the authorising act or the parent act. Subordinate legislation, which is very common nowadays, serves several purposes. First, they enable detailed and unimportant aspects of the legislation, such as the form of documents, the fees for filing documents, the times for doing certain things, to be dealt with separately, so as not to overload and complicate the text of the parent act. Second, they enable matters which are not exactly known or worked out at the time that the legislation is enacted to be dealt with at a later date.

Subsidiary legislation can be divided into several different categories: those which apply to the general public or broad sectors of the public, which are usually called regulations (if made by organs of national government) ordinances (if made by provincial government) or bylaws (if made by local authorities); those that apply to particular persons or groups of persons, which are usually termed orders; those that relate to the internal organisation of a body, which are usually termed rules; and those that give notice of some action or decision, which are usually termed notice or proclamation.

Subsidiary legislation may be made by a person or body within the country, in which case it is called local or locally made subsidiary legislation. Alternatively, as with legislation, subsidiary legislation can be made by some person or body outside the country, and then applied to, or adopted by,

another country, in which case it is called introduced subsidiary legislation. As with legislation, application of subsidiary legislation to, or adoption of subsidiary legislation by, another country may be general, and refer to a general category of subsidiary legislation, or it may be particular and specific, and refer to specific named subsidiary legislation.

Local or locally made subsidiary legislation

When a country is under the control of another country, the government of the controlling country will usually wish to ensure that subsidiary legislation is made by officials in the controlled country appointed by it, and bodies controlled by it, and also that subsidiary legislation made in the controlling country by its own officials is introduced into the controlled country. But when the country becomes independent or self-governing, the government of the former controlling country will no longer be able to appoint or control the persons or bodies authorised to make subsidiary legislation, nor will it be able to introduce subsidiary legislation into the former controlled country, and instead the government of the newly independent or self-governing country will wish to ensure that officials appointed by it and bodies controlled by it make the subsidiary legislation that is to be in force in that country. It is logical therefore, as with legislation, to consider separately the making of local subsidiary legislation before independence or self-governance, and then after independence or self-governance.

Local subsidiary legislation before independence or self-governance

Before the islands of the South Pacific acquired independence or self-governance it was not unusual for subsidiary legislation to be made by officials of the controlling country stationed in the dependent country. Considering first the *British dependencies*, in *Fiji* the ordinances made by the governor of Fiji with the advice and consent of the legislative council quite frequently authorised the governor to make *regulations* or *orders* to give effect to those ordinances. The king's or queen's regulations made by the high commissioner of the Western Pacific as legislation for the *British Solomon Islands Protectorate* and *New Hebrides*, and the ordinances made by him as legislation for the *Gilbert and Ellice Islands*, not uncommonly authorised the high commissioner, but more usually the resident commissioners in those dependencies, to make, amend and revoke *orders* and *rules* to give effect to those regulations and ordinances. In the *New Zealand dependencies* of *Cook Islands*, *Niue*, *Tokelau* and *Samoa*, the legislation in force in *Samoa* not uncommonly authorised the administrator, and later the high commissioner, to make *regulations* and *orders*, but subsidiary legislation was not so often authorised to be made by the resident commissioners of *Cook Islands* and *Niue* or the administrator of *Tokelau*. In the *Australian*

dependency of *Nauru*, also, there appear to have been few occasions when subsidiary legislation was made in those countries before independence or self-governance.

Local subsidiary legislation after independence or self-governance

As mentioned earlier, in relation to legislation, when the island countries of the region acquired independence or self-governance, they did not attempt to erase all the laws left by the former controlling country, and kept most of those laws, but subsequently made additional laws to amend or complement the existing laws. The same process occurred with regard to local subsidiary legislation, so that there were two different categories of local subsidiary legislation.

EXISTING LOCAL SUBSIDIARY LEGISLATION RETAINED IN FORCE

After the island countries of the South Pacific acquired independence or self-governance, they chose to retain most of the locally made subsidiary legislation in existence at the time of independence or self-governance.

ADDITIONAL SUBSIDIARY LEGISLATION MADE LOCALLY

After the island countries of the South Pacific acquired independence or self-governance, the authorisation of, and the making of, subsidiary legislation by persons or bodies in the country, appears to have increased as more and additional legislation was enacted to deal with extending economies and changing societies of those countries. For example, in Vanuatu in 1980, the first year of independence, 24 orders and other forms of subsidiary legislation were published, while in 2004, some 42 orders and other forms of subsidiary legislation were published.

Introduced subsidiary legislation

As explained earlier, introduced subsidiary legislation is subsidiary legislation which has not been made by some person or body in the country in question, but has been made by some person or body in some other country, usually in the controlling country, which is applied to, or adopted by, the dependent country. Again, as has been explained earlier, subsidiary legislation, like legislation, may be applied or adopted either generally, by reference to a general category of subsidiary legislation, or specifically, by reference to the names of the individual subsidiary legislation. During the period that a country is controlled by another country, it is likely that there will be much more subsidiary legislation introduced from the controlling country than when the country secures independence or self-governance. It is logical, therefore, to consider first the period of dependency, and then the period of independence or self-governance.

Subsidiary legislation introduced before independence and self-governance

While the island countries of the South Pacific were under the control of European countries, Australia and New Zealand, a number of kinds of subsidiary legislation made in the controlling country were applied to, or adopted by, the dependent country. Looking first at the *British dependencies* of *Fiji*, *Gilbert and Ellice Islands*, *British Solomon Islands Protectorate*, *New Hebrides* and *Tonga*, it is clear that in each of these countries a number of individual named regulations and orders made in Britain were specifically applied to each of them. Presumably from 1893 until 1961 there was a general application of British subsidiary legislation as part of 'the law for the time being in force in and for England' that was applied to all of these countries by s 20 of the Pacific Order in Council 1893, but when this was revoked in 1961 and s 15 of the Western Pacific (Courts) Order 1961 (UK) provided that 'the statutes of general application in force in England' were to be applied in those countries, it is less clear whether these 'statutes' would have included subsidiary legislation. The question seems, however, never to have been determined (see later). In the *Australian dependency* of *Nauru*, the Laws Repeal and Adopting Ordinance 1922–36 did not specifically adopt any named subsidiary legislation from Australia, Queensland or Papua New Guinea, from which countries it did specifically adopt, as discussed earlier, some named individual legislation. Presumably subsidiary legislation made in Britain would, however, have been included within 'the laws of England that are in force in the State of Queensland' which were generally adopted by s 14 of that ordinance. In the *New Zealand dependencies* of *Cook Islands (including Niue)*, *Tokelau* and *Western Samoa*, there was a general application of 'the law of England as existing on the fourteenth day of January in the year eighteen hundred and forty', which presumably included subsidiary legislation. There was no general application of all the subsidiary legislation of New Zealand to these countries, but in respect of all Acts of the New Zealand Parliament that were specifically applied to these countries, there was a general application of 'all existing or future regulations, rules, Orders in council, and acts of authority in force under such Act'.⁹ Whether any other forms of subsidiary legislation were specifically applied to these countries is now difficult to determine.

Introduced subsidiary legislation after independence or self-governance

As with legislation and locally made subsidiary legislation, there was no wholesale repeal of all introduced subsidiary legislation, at the time that the island countries acquired independence or self-governance, but in most countries, but not in all, there was a cessation of the introduction of further, additional

⁹ Cook Islands Act 1915 (NZ), s 619(1); Tokelau Act 1948 (NZ), s 7; Samoa Act 1921 (NZ), s 354.

subsidiary legislation. Accordingly, after independence or self-governance, there are two categories of introduced subsidiary legislation to be considered.

EXISTING INTRODUCED SUBSIDIARY LEGISLATION RETAINED IN FORCE

When the island countries of the South Pacific acquired independence or self-governance, they, as mentioned previously, did not attempt to abolish all the existing laws that had been made or introduced in those countries during the period of dependency. So almost all existing introduced subsidiary legislation was continued in force. In Samoa, for example, some 21 regulations and orders made in New Zealand and applied or adopted in Samoa before independence in 1962 were stated to be in force in 1977.¹⁰ In Niue, all introduced English subsidiary legislation was repealed in 2004 by s 37(4) of the Interpretation Act 2004, and in Tokelau all introduced English subsidiary legislation was repealed by the Repeal of Laws Rules 1997.

ADDITIONAL INTRODUCED SUBSIDIARY LEGISLATION

After the island countries of the South Pacific acquired independence or self-governance, there was, as with legislation, a marked reduction in the introduction of subsidiary legislation from the controlling country, or other countries. This was because it was no longer legally possible for the former controlling country to apply subsidiary legislation to the now independent or self-governing country, and because the now independent or self-governing country wished to have the subsidiary legislation which was in force in that country made in that country. However, in those countries, that is, *Cook Islands*, *Niue* and *Nauru*, which adopted some legislation from the former controlling country after independence or self-governance, it might be expected that there would be some adoption also of some subsidiary legislation after independence or self-governance. In *Cook Islands*, the New Zealand Laws Acts 1966, 1967, 1968, 1969, 1971, 1973 and 1979 enacted by the Parliament of Cook Islands adopted some 56 regulations and orders made in New Zealand. The Custom and Adopted Laws Act 1971 enacted by the Parliament of Nauru provided for the general adoption of 'the statutes of general application, including all rules, regulations and orders of general application made thereunder, which were in force in England on the thirty-first day of January 1968' except those relating to certain topics specified in the first schedule to the act. In *Niue*, there does not appear to have been, since self-governance in 1974, any adoption of subsidiary legislation made in New Zealand or any other country.

10 See notes to Reprint of Statutes Act, 1972 in Revised Statutes of Samoa, 1977.

Common law and equity

Introduction

Common law refers to the rules of law that were originally evolved by the judges of the original three main courts of the king of England – the courts of common pleas, exchequer and queen’s bench – and were based upon the common or general practices and customs of the people of the kingdom, as distinct from the local practices and customs of individual communities. Later these practices and customs were modified by the judges in the light of the practices and customs of European merchants, principles of Roman law, principles of logic and reasonableness, and considerations of practical convenience. The rules of equity on the other hand were the rules developed by the lord chancellors of England when decisions of the three common law courts were referred to them by the king for review, after dissatisfied litigants in the common law courts of the king appealed to the king to reverse those decisions. Because the lord chancellors, who were the king’s chief ministers in mediaeval times, were usually high officials of the Roman Catholic Church, they based their decisions on principles of honesty and fairness and good conscience, and the rules that they developed were called rules of equity, meaning fairness. When the common law judges protested about the interventions of the lord chancellors, the king, James I, ruled in favour of the lord chancellors and the court that they had established, the court of chancery. The principles of common law and equity were held to be subject to Acts of Parliament, and to subsidiary legislation authorised by Acts of Parliament. By the time of the establishment of British control over island countries of the South Pacific in the early 19th century the rules of common law and equity had become very well established in England, and it was inevitable that they would be introduced into the small island countries of the South Pacific that were under the control of Britain, and also those that were under the control of the British colonies of Australia and New Zealand. This process will now be considered in more detail, looking first at the time before independence or self-governance, and then the period after independence or self-governance.

Common law and equity before independence or self-governance

When Britain and the British colonies of Australia and New Zealand acquired control of the island countries of the South Pacific, they did not attempt to use the common customs and practices of the indigenous peoples of those countries as the basis of common law for the courts of those countries, nor did they attempt to use the customary principles of reciprocity and fairness and respect of the indigenous peoples as the basis for principles of equity. No doubt this was because they knew so little about those customs and practices and customary principles, and what they did know, seemed to them to

indicate practices and values that were so different from those to which they were accustomed, and from what was appropriate for a commercial economy.

Introduced English common law and equity

Accordingly there was a general application or adoption of the principles of common law and equity of England in all countries of the region. As with regard to introduced legislation and subsidiary legislation, it is most convenient to consider these countries in relation to their controlling country, and, since they were the most numerous, to consider first the countries that were *British dependencies*, that is, *the colony of Fiji, the British Solomon Islands Protectorate, the Gilbert and Ellice Islands Protectorate* (after 1916, Colony), *the New Hebrides joint sphere of influence* and *the protected state of Tonga*. In *Fiji*, s 35 of the Supreme Court Ordinance 1875 provided that ‘the common law, the rules of equity and the statutes of general application ... shall be in force within the colony’. In the *British Solomon Islands Protectorate, Gilbert and Ellice Islands Colony, New Hebrides* and *Tonga* the common law and equity of England were introduced first by s 20 of the Pacific Order in Council 1893 (UK) as part of ‘the substance of the law for the time being in force in and for England’, and then later by s 15(1) of the Western Pacific (Courts) Order 1961 (UK) as part of ‘the substance of the English common law and doctrines of equity’ which was required to be applied by the courts of those countries. In the *Australian dependency of Nauru*, ‘the principles and rules of common law and equity that for the time being are in force in England’ were adopted by s 16 of the Laws Repeal and Adopting Ordinance 1922–36. In the *New Zealand dependencies of Cook Islands (including Niue), Tokelau* and *Western Samoa*, the rules of common law and equity were applied as part of the ‘the law of England as existing on the fourteenth day of January in the year eighteen hundred and forty’, which was stated by New Zealand legislation to be in force in those countries.¹¹ It is important to notice that the rules of common law and equity were stated to be subject, as in England, to legislation, and, further, like the introduced legislation and subsidiary legislation, they were stated to be in force in all countries only so far as they were not inapplicable to the circumstances of the country.

Common law and equity after independence and self-governance

After the dependent island countries of the South Pacific acquired independence or self-governance in the latter half of the 20th century, as has been mentioned on several occasions already, they did not attempt to remove all

11 Cook Islands Act 1915 (NZ), s 615; Tokelau Act 1948 (NZ), s 4A; Samoa Act 1921 (NZ), s 349(1).

the laws that had been made or introduced during the period of dependency, but retained them, subject to selected amendments, repeals and additions. Likewise, the rules of common law and equity were basically retained with some modifications.

Introduced common law and equity retained

When the island countries of the region acquired independence or self-governance, the constitutions that provided that status always also provided that the existing laws in the country were to continue in force subject to the constitution, until changed by legislation. In all countries of the region, the English common law and equity have continued to be retained, except in Niue where in 2004, the rules of common law and equity introduced from England were, by ss 4(e) and 37(4) of the Interpretation Act 2004, abolished and replaced by the common law of Niue. In two countries, however, the rules of common law and equity have been stated to be generally subject to the customs of the indigenous people of those countries. In *Nauru*, ss 3 and 4 of the Custom and Adopted Laws Act 1971 provided that the common law was adopted as part of the laws of Nauru, but subject to the customs and usages of Nauruans with regard to title to and interests in land, rights of Nauruans to dispose of their property, real and personal, *inter vivos* or by will or succession, and any matters affecting only Nauruans. In *Solomon Islands*, the principles of common law and equity are stated by the constitution to have effect, 'save in so far as ... in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter'. In two other countries, that is, *Kiribati* and *Tuvalu*, legislation has provided that the rules of common law and equity are in force, except where, in respect of certain specified matters, a rule of common law or equity 'in its application to any particular matter it is inconsistent with customary law in respect of that matter'. In two other countries, that is, *Samoa* and *Vanuatu*, where customary law is expressly recognised as part of the legal system, but with no express statement by the constitution or legislation as to the relationship between the customary law and the rules of common law and equity, it will be necessary for the courts to endeavour to determine the relationship between them. In those remaining countries of the region where customary law is not expressly recognised as part of the legal system, that is, *Cook Islands*, *Fiji*, *Tokelau* and *Tonga*, presumably this question will not arise. In all countries of the region in which the rules of English common law and equity have been retained, that is, all countries of the region except Niue, they are stated to be in force only to the extent that they are not inappropriate to the circumstances of the country, which would seem to allow a court to hold that a particular rule of common law or equity is not in force because it is inconsistent with a rule of custom which is part of the circumstances of the country. This does not seem, however, to have occurred.

Additional common law and equity

One might have thought that the courts of the island countries of the South Pacific, when those countries acquired independence or self-governance, might have decided to make some changes to the rules of common law and equity which had been introduced during the period of dependency. In fact this has hardly happened.

Some issues with regard to state laws

In the preceding sections of this chapter, there has been a general description of the laws of the state which are in force in countries of the region – the constitutions, legislation, subsidiary legislation, and common law and equity. In this section a number of legal issues with regard to particular aspects of these laws will be discussed in more detail than was convenient during the course of the general description in the previous sections. Many of these issues are issues which relate only to introduced laws, that is, introduced legislation, subsidiary legislation, and common law and equity, and will become of less practical significance as the years pass, and as introduced legislation and subsidiary legislation are replaced by locally made legislation and subsidiary legislation.

The issues which arise and will be discussed are

- 1 What is meant by the term ‘statutes of general application’, and do they have to be proved or can they be assumed by judicial notice?
- 2 What is meant by ‘the common law and equity’, and is it confined to the common law and equity as evolved by the courts of England?
- 3 Are the rules of common law and equity subject to a ‘cut-off date’, in the same way as introduced legislation?
- 4 How do the courts determine whether an introduced law is inappropriate to the circumstances of the country?
- 5 Are introduced laws automatically in force in a country, or do they have to be declared to be in force by the legislature or the courts?
- 6 Where different laws have been introduced from different countries to apply to different sections of the public, as in New Hebrides, to whom do they relate after independence, and if they are in conflict, how is that to be resolved?
- 7 What is the relationship between custom and customary law and the rules of common law and equity?
- 8 Is custom and customary law to be regarded as state law?

These issues will now be discussed in the order indicated above.

1 What is meant by the term ‘statutes of general application’? As discussed earlier, this phrase was usually used by the British government to indicate

the legislation that was generally introduced into British dependencies. Thus, there were introduced into the British colony of Fiji 'the statutes of general application which were in force in England' on 2 January 1875, into the British colony of Gilbert and Ellice Islands and the British protectorate of British Solomon Islands Protectorate, 'the statutes of general application in force in England' on 1 January 1961, and into the Anglo-French joint sphere of influence of the New Hebrides, 'the statutes of general application in force in England' on 1 January 1976. The term was also used by s 4(1) of the Custom and Adopted Laws Act 1971 of Nauru which provided that 'the statutes of general application ... which were in force in England' on 31 January 1968 were to be in force in Nauru.

Several questions arise with regard to this phrase, 'statutes of general application':

- (a) First, with regard to the word 'statutes', does it include subsidiary legislation made under those statutes, or only the statutes themselves? One would think, as a matter of common sense, that legislation would carry with them the subsidiary legislation made under their authority, but no case seems to have had to consider or determine this question.
- (b) Second, what is meant by the phrase, 'of general application'? This phrase is not defined in any of the laws in which it is used, but has been considered by courts in Fiji,¹² Solomon Islands,¹³ Tuvalu¹⁴ and Vanuatu¹⁵ and, most recently, by the Privy Council.¹⁶ The following definition of a statute of general application enunciated by the High Court of the Solomon Islands in *R v Ngena*¹⁷ and endorsed by the High Court of Tuvalu in *In re the Matter of the Constitution of Tuvalu and of the Laws of Tuvalu Act 1987*,¹⁸ appears to be the most helpful: 'one that regulates conduct or conditions which exist among humanity generally, and in a way applicable to humanity generally', as distinct from a statute that is 'restricted to regulating conduct or conditions peculiar to or in a way applicable only to persons, activities or institutions in the United Kingdom'.
- (c) Third, is the question of whether being a statute 'of general application' is a matter of fact to be proved to the court, and, if so, upon whom the burden of proof lies, or whether it is a matter of judicial notice about which parties may argue but no proof is necessary, and, if so, upon

12 *Indian Printing and Publishing Co v Police* (1932) 3 FLR 142.

13 *R v Ngena* [1983] SILR 1.

14 *In re the Matter of the Constitution of Tuvalu and of the Laws of Tuvalu Act 1987*, High Court, Tuvalu, Civ Cas 4/1989 (unreported).

15 *Freddy Harrisen v John Patrick Holloway* (1980–8) 1 Van LR 147.

16 *Christian and others v R* [2006] PNPC 1.

17 [1983] SILR 1.

18 High Court, Tuvalu, Civ Cas 4/1989 (unreported).

whom the burden of satisfying the court lies. This question does not seem to have been expressly argued or decided by courts in the region, but, as a matter of practice, the courts, both the High and Supreme Courts, and the Court of Appeal, in Solomon Islands¹⁹ and Vanuatu,²⁰ seem to have operated on the basis that the question was one of judicial notice and did not require proof. As a matter of logic it would seem that the burden of satisfying the court that judicial notice should be taken of a statute as a statute of general application would seem to lie upon the party who is alleging that the statute is in force in the country by virtue of being a statute of general application, but judicial decisions are unclear about this.

- (d) Finally, is it possible for part of a statute to be introduced, such as a section or group of sections, but not the whole statute? On the face of it, the term ‘statutes of general application’, would seem to preclude the introduction of parts of a statute. But, as will be discussed in more detail shortly, all introduced laws are stated to be in force only so far as not inappropriate to the circumstances of the country into which they are introduced, and courts in Solomon Islands²¹ and Vanuatu²² have held that the effect of this limitation is that those parts of statutes of general application which are inappropriate to the circumstances of the country into which they are introduced shall not apply, leaving those parts of such statutes which are appropriate to the circumstances of the country in force. Accordingly, at least in those two countries of the region, it is accepted that parts of statutes of general application may apply in those countries.

2 Is it only the ‘common law and equity’ of England that has been introduced? The provisions of the laws that introduced the common law and equity into Cook Islands, Fiji, Kiribati, Nauru, Niue, Tokelau and Tonga expressly qualify this introduction by phrases such as ‘of England’ or ‘in force in England’, and the provisions of the laws that introduce the common law and equity into Samoa, Tuvalu and Vanuatu expressly qualify it by the adjective ‘English’. These qualifying words would seem to mean that it is only the rules of the common law and equity as evolved in England that has been introduced. This view was not accepted in the only decisions that have considered the term ‘common law’ in these countries. In *Opeloge Olo v Police*²³ the

19 *Buchanan v Wilikai* [1982] SILR 123; *KHY Co (SI) v Ling Kun Xiang* [1988–9] SILR 63; *Allardye Lumber Co Ltd v Attorney-General* [1988–9] SILR 78.

20 *Freddy Harrison v John Patrick Holloway* (1980–8) 1 Van LR 147; *Clements v Hong Kong and Shanghai Banking Corporation* (1980–8) 1 Van LR 416; *Boe and Taga v Thomas* (1980–8) 1 Van LR 293.

21 *Aseri Harry v Kalena Timber Co* [2001] 3 LRC 24; *Korean Enterprises Ltd v Shell Co (Pacific Islands) Ltd* [2002] SBCA 1.

22 *Joli v Joli* [2003] VUCA 27.

23 [1992] WSSC 1.

Supreme Court of Samoa held that these qualifying words are ‘descriptive of a system and body of law which originated in England’, and not to the law currently applied in England. This statement has been approved by the Court of Appeal, although as a matter of practice, the courts of Samoa have usually followed English decisions as to the rules of common law and equity without reservation. Whether the courts of the other countries will interpret these qualifying words in the same way remains to be seen.

In Solomon Islands, unlike the other countries in the region, the provision of the constitution introducing the common law and equity into Solomon Islands refers only to ‘the principles and rules of the common law and equity’. It was originally held by the High Court that the common law and equity referred to was not necessarily that applied by the courts in England, but could be gathered from other Commonwealth countries.²⁴ This view was, however, later rejected by the Court of Appeal in *Cheung v Tanda*,²⁵ when it held that it was the common law and equity as applied in England that was introduced into Solomon Islands. This ruling was largely based on the fact that the constitutional provision introducing the common law and equity, that is, para 2(1) of Sched 3 of the constitution, was followed by para 2(2), which provides:

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

The Court of Appeal pointed out that this paragraph would have no significance or relevance if it was not the common law and equity of England that applied in Solomon Islands. Because of its reliance upon para 2(2) of Sched 3 of the Constitution, this decision seems to be of significance only in Solomon Islands.

In those countries in which it is held that it is the principles of the common law and equity of England that have been introduced, this will mean that the courts must apply the law as determined by courts in England, even though those English courts have no jurisdiction in these countries. Thus, if a court of one of those countries, even the Court of Appeal, when purporting to apply the common law or equity of England, in fact misunderstands the common law or equity of England and misapplies it, that court is in error, and may be corrected on appeal. A striking example of this, from a neighbouring Commonwealth country, occurred when the Privy Council overturned a judgment of the Court of Appeal of New Zealand because it had misunderstood and misapplied what

24 *Official Administrator for Unrepresented Deceased Estates v Allardyce Timber Co Ltd* [1980–1] SILR 66.

25 [1984] SILR 108.

the Privy Council held to be the settled rules of common law and equity with regard to the contractual capacity of a mentally disabled person.²⁶

It is to be remembered, however, that, in all countries of the region, there are provisions of the written law which place important limits upon the application of the principles of common law and equity, especially those which apply a cut-off date for the application of these principles, and those which allow for the non-application of these principles on the ground of inappropriateness to the circumstances of the country into which they are introduced. These limitations will shortly be considered in more detail.

3 Is there a 'cut-off date' for common law and equity? In some countries of the South Pacific, the written law that introduces the common law and equity explicitly states the date on which they are introduced. Thus, in Cook Islands, Niue and Tokelau, 'the law of England as existing on the fourteenth day of January in the year eighteen hundred and forty' is stated to be in force,²⁷ and, in Nauru, 'the common law and the statutes of general application ... which were in force on the thirty-first day of January 1968 ... and the rules of equity which were in force in England on the thirty-first day of January 1968 are hereby adopted'.²⁸ In these countries, it follows that changes to the common law and equity that occur in England or elsewhere after that date are not binding, although, no doubt, still highly persuasive. This date is usually referred to as 'the cut-off date'.

Conversely, in some countries, the written law that introduced the common law and equity explicitly stated that there is no cut-off date. Thus, in Samoa, the written constitution provides that it is the common law and equity 'for the time being' which is in force in the country,²⁹ thereby making it clear that it is the common law and equity as it continues from time to time which is in force in that country, without a cut-off date.

In Fiji Islands, s 35 of the Supreme Court Ordinance 1875, the provision relating to a 'cut-off date' is ambiguous in relation to the common law and equity: it provides that 'the common law, the rules of equity and the statutes of general application which were in force in England ... on the second day of January 1875, shall be in force within the colony'. It is not clear whether the phrase providing the cut-off date relates only to the English statutes of general application, to which it is most closely attached, or whether it applies also to the common law and equity. This provision, which Roberts-Wray, in *Commonwealth and Colonial Law*, describes as a 'typically ambiguous phrase',³⁰ has been interpreted by the courts in Fiji Islands³¹ as providing

26 *Hart v O'Connor* [1985] AC 1000; see also *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] 1 AC 1.

27 Cook Islands Act 1915 (NZ), s 615; Tokelau Act 1948 (NZ), s 4A.

28 Custom and Adopted Laws Act 1971, s 4.

29 Constitution of Samoa, Art 111(1).

30 *Commonwealth and Colonial Law*, 1966, London: Stevens, p 545.

31 Eg, *Victor Jiwan Raju v Reginam* (1977) 23 FLR 1, p 5.

a cut-off date for both statutes of general application and the principles of common law and equity, which seems a sensible approach, although it is not beyond argument.

No cut-off date has been expressly provided in the written laws of Kiribati, Solomon Islands, Tonga, Tuvalu and Vanuatu. This seems to suggest that, in these countries, it is the common law and equity as it continues to evolve from time to time which applies, as is expressly provided to be the case in Samoa. This interpretation seems to be the correct one in Tonga in view of the legislative history of s 35 of the Civil Law Act 1966. When originally enacted in 1966, this section concluded with the words 'at the date on which this Act shall come into force'. These words were repealed in 1983, and the purpose of that repeal must surely have been to remove the cut-off date and, thus, to allow for the continuing application of the principles of common law and equity in Tonga. So, also, in Vanuatu, the clear distinction that is made in Art 15(1) of the constitution between (i) English statutes of general application for which there was a cut-off date prescribed, that is, 1 January 1961 and (ii) English common law and equity for which no cut-off date was prescribed, clearly indicates an intention that there should be no cutting-off of common law and equity, and that they should continue to apply.

In Kiribati, Solomon Islands and Tuvalu, there is a complication, in that the written law of these countries provides that the courts shall not be bound by any decision of a court of another country given after the date when those written laws came into effect.³² Early decisions of the High Court of Solomon Islands regarded this provision, which appears in Sched 3 of the constitution, as merely confirming that Solomon Islands was not to be bound by a foreign court such as the Privy Council after 7 July 1978, and as not affecting the continuing application of common law and equity.³³ However, the Court of Appeal of Solomon Islands, in *Cheung v Tanda*,³⁴ held that such a provision is to be interpreted as providing a cut-off date of 7 July 1978 for common law and equity. There is no indication, yet, as to whether the similarly worded provision in the Laws of Kiribati Act 1989 and the Laws of Tuvalu Act 1987 will be interpreted in the same way.

In countries where there is a cut-off date provided in the written law, that is, Cook Islands, Niue, Solomon Islands and Tokelau, and possibly also Fiji Islands, Kiribati and Tuvalu, this would seem to mean that any subsequent changes made to the common law and equity in England after the cut-off date would not be binding in the country, though, no doubt, very persuasive. This, indeed, as mentioned in the preceding paragraph, is expressly provided

32 Laws of Kiribati Act 1989, s 13(2); Constitution of Solomon Islands, Sched 3, para 4(1); Laws of Tuvalu Act 1987, s 13(2).

33 *Official Administrator for Unrepresented Estates v Allardyce Lumber Co Ltd* [1980-1] SILR 66; *Tanda v Cheung* [1983] SILR 193.

34 [1984] SILR 108.

in relation to Kiribati and Tuvalu by s 13(2) of the Laws of Kiribati Act 1989 and by s 13(2) of the Laws of Tuvalu Act 1987, respectively. However, in *Cheung v Tanda*³⁵ (above), following earlier decisions in Papua New Guinea, namely, *The State v Pokia*³⁶ and *Vian Guatal v PNG*,³⁷ the Court of Appeal of Solomon Islands held that, although there was a cut-off date for the application of English common law, this was to be interpreted as not applying to subsequent decisions of English courts which overruled decisions of English courts before the cut-off date on the ground that those earlier decisions were incorrect applications of the common law and equity. On the other hand, English decisions made after the cut-off date, which overruled earlier decisions before the cut-off date on the ground that the law as stated in these decisions should be further developed or changed so as to make new law, were not binding as part of the common law and equity of those countries. The effect of this approach was summarised by Kapi J.A. in the following words:

In Solomon Islands, if, after 7 July 1978, the House of Lords declares that a lower court in England wrongly decided a principle of law before independence, the law that is applicable in Solomon Islands under para 2(1) of Sched 3 is the House of Lords' decision even though it is decided after independence. However, if the House of Lords, after independence, further develops the law, as in *Donoghue v Stevenson*,³⁸ the decisions after independence are not relevant. The law to be applied in these circumstances is the decisions in England before independence.³⁹

The distinction between decisions which merely correct the reasoning of an earlier decision and decisions which make new law is not an easy one. Moreover, such an exception seems to fly in the face of the terms of the written law, and also of the basic principle of common law that court decisions do not operate retrospectively. It will be interesting to see whether in other countries the courts interpret the provisions prescribing a cut-off date in the same way.

Thus, in Cook Islands, Nauru, Niue, Solomon Islands and Tokelau, it is clear that there is a cut-off date for the principles of common law and equity to be binding, and, probably, there is a cut-off date also in Fiji Islands, Kiribati and Tuvalu. In these countries where there is a cut-off date, the common law and equity as evolved elsewhere after the cut-off date is not binding, but, no doubt, highly persuasive. On the other hand, in Samoa, the courts continue to be bound by the common law and equity evolved elsewhere,

³⁵ *Ibid.*

³⁶ [1980] PNGLR 230.

³⁷ [1980] PNGLR 97.

³⁸ [1932] AC 562.

³⁹ [1984] SILR 108, pp 126–7.

unless they are considered inappropriate to the circumstances of the country (see below).

4 How do courts determine whether introduced law, that is, introduced legislation, introduced subsidiary legislation and common law and equity, are inapplicable to the circumstances of the country, and what is the effect of such inapplicability? As described in the first part of this chapter, the law of England that was introduced into the Cook Islands, Niue, Tokelau and Samoa, the common law, rules of equity and statutes of general application which were introduced into Fiji, British Solomon Islands Protectorate (later Solomon Islands), Gilbert and Ellice Islands Colony, New Hebrides and Nauru, were all stated to be in force so far only as not inappropriate to the circumstances of the particular country, or words to that effect. Several questions arise:

- (a) Is the appropriateness to the circumstances of a country a matter of law to be established by judicial notice and argument, or is it a matter of fact to be established by evidence? This question does not seem to have been debated or determined in courts of the region, but it seems, in practice, usually to have been treated as a matter of judicial notice and argument. In *Freddy Harrisen v John Patrick Holloway*,⁴⁰ judicial notice was taken of the differences between the various police forces in the United Kingdom and the single force in Vanuatu. In *Clements v The Hong Kong and Shanghai Banking Corpn*,⁴¹ the Court of Appeal held itself to be satisfied that the English Bankruptcy Act 1914 was an act of general application, but gave no reason for this. In *KHY Co (SI) Ltd and Kwan v Ling Kun Xiang, Zhao Li Oin, Guangnan Hong Co Ltd and Guangdong Enterprises (Holdings) Ltd*,⁴² it was held that the Debtor's Act 1869 (UK) applied in Solomon Islands, but no evidence was called for from the parties. Similarly, in *Allardyce Lumber Co Ltd, Bisili, Roni, Sakiri, Hiele, Sasae, Poza, Zongahite, Daga, Pato and Zingihite v Attorney General, Commissioner of Forest Resources, Premier of the Western Province and Paia*,⁴³ the Trustee Act 1925 (UK) was held to apply, without reference to any evidence. Equally, the Partnership Act 1890 (UK) has been applied in Solomon Islands without evidence being adduced.⁴⁴ In a similar fashion, in Vanuatu, the Fatal Accidents Act 1846 (UK) and the Law Reform (Miscellaneous Provisions) Act 1934 (UK) were held to be of general application in *Boe and Taga v Thomas*.⁴⁵

40 (1980–8) 1 Van LR 147.

41 (1980–8) 1 Van LR 416.

42 [1988–9] SILR 63.

43 [1988–9] SILR 78, p 97.

44 *Buchanan v Wilikai* [1982] SILR 123.

45 (1980–8) 1 Van LR 293.

- (b) Who bears the onus of proving that an introduced law is not inappropriate to the circumstances of a country? A related question arises as to who bears the burden of proof in relation to applicability. Is it assumed that a statute is applicable until proved otherwise, or does a party seeking to rely on an imperial statute bear the burden of proof? To put it another way, is there a general presumption in favour of general applicability, which throws the burden of proof onto the party disputing this? In Fiji Islands, the case of *Mohammed Isaac v Abdul Kadir*⁴⁶ supports the latter view. In that case, the Supreme Court stated that it was prepared to assume that the Forfeiture Act 1870 (UK) was a statute of general application in force in that country.

The willingness of the courts to apply English statutes without supporting evidence, and without giving reasons, demonstrated by the cases referred to earlier, appears to support the contention that there is a general presumption, and that the onus of proof rests on a party trying to show inapplicability.⁴⁷

- (c) May an introduced law be regarded as inappropriate in part, but not in whole, so that part of the introduced law may apply but not the whole law? The words 'in force so far only' which was frequently used would seem to suggest that part of an introduced law may be held to be appropriate and in force in a country, although the remainder was not in force. This was the view taken by the Court of Appeal of Vanuatu in *Joli v Joli*,⁴⁸ which held that the sections of the Matrimonial Causes Act 1973 (UK) relating to grounds for divorce were inappropriate in Vanuatu because the Matrimonial Causes Act Cap 192 of Vanuatu made provision for grounds of divorce and nullity, but on the other hand that s 24 of the Matrimonial Causes Act 1973 (UK), which provided for the disposition of matrimonial property upon a divorce, was not inappropriate to the circumstances of Vanuatu because there was no section in the Matrimonial Causes Act of Vanuatu which made provision for the disposition of matrimonial property. This was the view also, although obiter, of the Court of Appeal of Solomon Islands in *Korean Enterprises Ltd and the Premier of Guadalcanal Province v Shell Company (Pacific Islands) Ltd*,⁴⁹ when concluding that s 2 of the Prescription Act 1832 (UK) was not in force in Solomon Islands. It was the view also of the High Court of

46 (1962) 9 FLR 152.

47 See, to the contrary, *op cit*, fn 27, p 555, where Sir Kenneth Roberts-Wray extracted from Canadian cases the principle that English statutes did not apply unless shown to be suitable as opposed to the common law, which applied unless shown to be unsuitable. However, he conceded that this might not be the case in a jurisdiction where common law and statute were given effect subject to exactly the same qualifications for local circumstances. Unfortunately, he did not go on to say what he considered the test would be in that case.

48 [2003] VUCA 27.

49 [2002] SBICA 1.

Solomon Islands in *Aseri Harry v Kalena Timber Co Ltd*⁵⁰ when it held that a subsection of the Law of Property Act 1925 (UK) was in force in Solomon Islands.

5 Are introduced laws automatically in force in the country in question, or must they be declared to be in force by the legislature or a court of that country? In most countries of the region, phrases such as ‘in force’ or ‘part of the law’ make it clear that introduced laws are automatically in force in the country to which they have been applied or in which they have been adopted. However, in Tuvalu, where the application of British legislation stems from s 15 of the Western Pacific (Courts) Order 1961 (UK), the position is not so straightforward. That section states:

the civil and criminal jurisdiction of the High Court shall, so far as circumstances admit, be exercised upon the principles of and in conformity with:

- (a) the statutes of general application in force in England on the first day of January 1961.

This section is no longer in force in Solomon Islands, Kiribati or Vanuatu, but it remains in force in Tuvalu, where a similarly worded provision is contained in s 21(1) of the Magistrates’ Courts Act (Cap 2).

The proper interpretation of s 15 fell for consideration in *In re the Constitution of Tuvalu and the Laws of Tuvalu Act 1987*.⁵¹ Donne CJ pointed out that the proviso to s 15(1) of the 1961 Order directs the court to apply the law to Tuvalu only to the extent that

- (a) the circumstances of Tuvalu and its inhabitants permit it;
- (b) the limits of the jurisdiction of government permit it;
- (c) it is in accord with any qualifications rendered necessary by local circumstances.

His lordship held that these matters had to be considered, and any necessary adaptations made before English statutes could be applied. Consequently,

unless an imperial law has been either expressly adopted by the Parliament of Tuvalu or the court has applied it as such by declaring it, it does not have effect as part of the law of Tuvalu.

This approach is diametrically opposed to the general presumption in favour of applicability discussed above. In addition to making the application of

⁵⁰ [2001] 3 LRC 24.

⁵¹ High Court, Tuvalu, Civ Cas 4/1989 (unreported).

imperial laws conditional upon local adoption or declaration, this approach severely limits the number of English statutes of general application in force.

The same issue can arise with regard to the principles of common law and equity. In Cook Islands, Fiji Islands, Nauru, Niue, Tokelau and Samoa, it is made tolerably clear by the written law that the common law and equity are automatically in operation in the countries in which they are introduced because they are stated to be 'in force' in these countries. But in Kiribati, Tonga, Tuvalu and Vanuatu, the position is not so clear whether the principles of common law and equity are automatically in force, or whether, instead, they are in force only as and when determined by the courts. In Kiribati and Tuvalu, the common law of these countries is stated by the written law to comprise the English common law and equity 'as applied in the circumstances pertaining from time to time in these countries'. It is open to argument that the effect of this provision is that the English common law and equity is only in force as and when it is applied by the courts. In Tonga, s 3 of the Civil Law Act 1966 states that courts of Tonga 'shall apply the common law of England and the rules of equity', and, in Vanuatu, s 15(1) of the Western Pacific (Courts) Order 1961 provided that the jurisdiction of the High Court of the Western Pacific, which was later replaced by the High Court of the New Hebrides, and later by the Supreme Court of Vanuatu, 'shall be exercised upon the principles of and in conformity with ... (b) the substance of the English common law and doctrines of equity'. If the decision of the High Court of Tuvalu in *In re the Constitution of Tuvalu and the Laws of Tuvalu Act 1987*,⁵² discussed above, that s 15(1) of the Western Pacific (Courts) Order 1961 is to be interpreted as providing that English statutes of general application are not automatically in force in Tuvalu, but only as and when they are recognised by the High Court of Tuvalu or by the legislature, is correct, it would be strong and persuasive authority for saying that the introduction of common law and equity in Tuvalu is likewise conditional on acceptance by the courts. The same argument could also be used in Tonga and Vanuatu, where the terms of the written law are in very similar terms.

In substance and in practical terms, of course, because the principles of common law and equity do not have a separate existence apart from the decisions of the courts, it makes very little difference whether the principles of common law and equity are regarded as automatically in force, or only when declared by the courts, so that the significance of the ruling in *In re the Constitution of Tuvalu and the Laws of Tuvalu Act 1987* (above) is not so great in relation to the common law and equity as it is in respect of legislation and subsidiary legislation.

6 Where different laws have been introduced from different countries to apply to different sections of the public, as in New Hebrides, to whom do

⁵² High Court, Tuvalu, Civ Cas 4/1989 (unreported).

they relate after independence, and if they are in conflict, how is that to be resolved? In most countries of the South Pacific, there is no doubt that the principles of common law and equity apply to all persons subject to the jurisdiction of the courts. No exception or limitation is made by the written law as to the persons to whom the common law and equity is to apply.

In Vanuatu, however, there is some room for doubt. Under the protocol entered into between Britain and France in 1914 and ratified in 1922, the two metropolitan countries were authorised to apply their own laws only to their own respective citizens and optants (i.e., those citizens of other countries who opted or chose to come under the jurisdiction of one of the two metropolitan countries). During the condominium, the British laws (including the common law and equity) applied only to British citizens and optants, and the French laws applied only to the French citizens and optants. There was no provision for the British laws to apply to French citizens and optants or to New Hebrideans. Likewise, there was no provision for the French laws to apply to British citizens and optants or to New Hebrideans.

Since independence, the constitution has provided, by Art 95(2), that ‘the British laws and the French laws in force at the time of the commencement of the Constitution shall continue in force’. But what the constitution does not say is to whom the British and French laws apply. Does it apply the citizens of Britain and France, respectively, as before (the status of optant having disappeared with the revocation of the protocol at the time of independence)? Or does it apply to all inhabitants of Vanuatu, regardless of whether or not they were, in condominium times, British citizens or optants or French citizens or optants, or are now British citizens or French citizens?

This issue was discussed at some length in the case of *Banga v Waiwo*.⁵³ The senior magistrate (who is now the chief justice) held that, since the Matrimonial Causes Act 1965 (UK) applied only to British citizens and optants, and not to New Hebrideans prior to independence in 1980, therefore, provisions in the Matrimonial Causes Act 1986 of Vanuatu, which were modelled on the British Act, were not applicable to ni-Vanuatu. On appeal, the chief justice differed and held that, after independence, all French laws and all English laws ‘applied to everyone in Vanuatu, irrespective of nationality, and irrespective of whether they were indigenous ni-Vanuatu or not’. According to this judgment, ni-Vanuatu and other people of Vanuatu may now be subject to both a French law and an English law dealing with the same topic – a situation of some legal curiosity.

7 What is the relationship between custom and customary law on the one hand, and common law and equity on the other? There are some countries in the region where customary law is stated to be part of the law of the country, that is, Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu.

In some of these, the relationship between the common law and equity is clearly stated. In Kiribati, Nauru, Solomon Islands and Tuvalu, as discussed in the first part of this chapter, it is expressly stated in the written laws introducing the principles of common law and equity that those principles are subordinate to the rules of customary law where they apply to the same matter.

In Samoa and Vanuatu, however, the relationship between common law and equity and custom and customary law is not so clear. In Samoa, s 111(1) of the constitution provides that

In this Constitution, unless otherwise provided or the context otherwise requires:

‘Law’ means any law for the time being in force in Western Samoa; and includes . . . the English common law and equity for the time being in so far as they are not excluded by any other law in force in 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 as court of competent jurisdiction.

This provision appears to indicate that once a custom has acquired the force of law, it overrides and abolishes or modifies the principles of common law and equity, but it is not free from argument.

In Vanuatu, Art 95(3) of the constitution provides that customary law ‘shall continue to have effect as part of the law of the Republic’, but it does not specify its relationship with the other parts of the law of the country. The only other reference in the constitution to the application of customary law is in Art 45(1) which provides:

The function of the judiciary is to resolve proceedings according to law. 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.

This indicates that the courts are to determine matters according to law. Although the term ‘law’ is not defined, it would appear to include the common law and equity, but not custom. If this is so, it must mean that it is only if there is no rule of law applicable to a matter, that custom is to be applied. This will place customary law as subordinate to common law and equity, and only to be resorted to in the absence of an applicable law, including common law and equity, a situation which may well not have been the intention of those who drafted and approved the constitution.

8 Does the application of custom or customary law by state courts or other institutions make it part of state law? In all countries of the region, rights to customary land are required to be determined by the appropriate organ of government in accordance with the customs of the indigenous people of

those countries. In addition, in Kiribati, Nauru and Tuvalu, custom or customary law are required by legislation to be applied by the courts with regard to the determination of certain specified matters, and in Samoa, Solomon Islands and Vanuatu, custom or customary law is stated by the constitution to be part of the law of the country to be applied by the courts, but the matters to which, and the persons to whom, it is to be applied are not specified. Also in Kiribati, Solomon Islands, Tuvalu and Vanuatu, the magistrates' courts, island and local courts are required by the legislation establishing those courts to apply the customary law prevailing in their district. This might suggest that in these countries, that is, Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu, customary law is part of state law. While that is technically so, the fact remains that the body of custom and customary law that is to be applied by the institutions of the state is so little made or modified by the state, that, at least at this point in time, it is generally regarded as a separate body of law, and will be treated in more detail in a separate chapter.

Proposals for reform

The clear intention of the countries of the region on attaining independence was that new laws would be made locally. Introduced laws were only saved as a transitional step, to avoid a vacuum, while the new legislatures had the chance to enact laws suited to local circumstances. This is no doubt why a cut-off date was inserted for legislation, after which legislation passed overseas was not part of the law. However, while local legislation is gradually replacing introduced legislation, in most cases, this is a slow process. Further, cut-off dates mean that advantage cannot be taken automatically of English legislative reforms in the interim. Thus, one encounters outdated and inappropriate laws, such as the Matrimonial Causes Act 1950 (UK), applying to expatriates and indigenous people married to expatriates in Solomon Islands. The uncertainties surrounding the exact ambit of English legislation in force also leaves a wide scope for litigation.⁵⁴

Given the common problems and the lack of resources available to any one country, perhaps a regional approach to solving the problems highlighted would have merit. The starting point suggested by the Solomon Islands reference,⁵⁵ that is, the identification of acts in force, would obviously

54 As Sir Kenneth Roberts-Wray observed, *op cit*, fn 27: 'The qualifications, referable to local circumstances, subject to which English law is applied generally, leave a wide field for litigation.'

55 See the Law Reform Commission of Solomon Islands, *Annual Report (No 2) 1996*, Honiara, pp 10–11. This reveals that no work has been done on the 1995 reference to the commission, requesting a report on the acts applying and the need for modernisation due to 'lack of research officers'.

involve some individual consideration, but there would probably be a considerable overlap, particularly in the groupings referred to above. Once the identification process was completed, or even simultaneously with the identification process, the task of regional reform could be carried out. Again, local circumstances would, of course, have to be taken into account, including different customs and cultures. However, the supersession of outdated introduced laws by regional codes, covering areas where there are common values, would have the advantage of expediting a long and expensive procedure. It would also introduce uniformity within the region for the first time.

Customary law

Introduction

Custom and customary law

The term ‘custom’ derives originally from the Latin word *consuetudo* which means a habit or a usage, coming to the English language through the French word *coûtume*, and is defined as meaning the ‘usual way of behaving or acting; established usage as a power or as having force of law’.¹ The dictionary definition of custom points out the two-fold nature of custom. On the one hand, custom can be merely a practice or usage, that is, what is actually done by people. On the other hand, it can also be a practice or usage that is required to be done. The practice or usage becomes a rule or a law, and people will be penalised for failing to observe that custom. For example, there are practices and usages in most South Pacific communities as to the way in which houses are built, or mats are woven or food is cooked. But, people are not normally penalised if they do not observe these practices. On the other hand, there are other practices and usages, such as those relating to the inheritance of land, to the maintenance of social order and social relations and to the contribution to community activities. For breaches of these customs, people will normally be punished. There has been much dispute amongst anthropologists and jurists as to whether customs of the first kind should be regarded as having the force of law and should be regarded as customary law. This is not purely an academic dispute because it may affect the extent to which customs are applied in those countries where the term customary law is used to describe the customs that are to be applied.

Further, although the generic terms ‘custom’ and ‘customary law’ are often used in relation to the legal systems of countries of the region, the use of these generic terms tends to conceal the fact that, especially in Melanesian countries, there is great diversity and variety in custom and customary laws. In Solomon Islands and Vanuatu, there are great variations between the customs of

1 *Oxford Dictionary of Current English*, 1984, Oxford: OUP, p 179.

different communities, even on the same islands. In the Micronesian and Polynesian countries, these differences are not so marked and, in Samoa and Tonga, many customs are uniform throughout the country. Thus, one can often speak accurately of a Samoan custom and a Tongan custom, whereas that is seldom accurate in Melanesian countries.

Statutory definitions

In most countries of the region the terms ‘custom’ or ‘customary law’ are not defined. In Kiribati² and Tuvalu,³ however, customary law is defined as meaning ‘the customs and usages, existing from time to time, of the natives of Kiribati [or Tuvalu]’. A rather more problematic definition has been provided by legislation in Cook Islands, where s 2 of the Cook Islands Act 1915 (NZ), defines ‘native custom’ as ‘the ancient custom and usage of the Natives of the Cook Islands’.⁴ A literal interpretation of this definition would disqualify more recent customs and usages, and invites questions as to the meaning of ‘ancient’. A similar problem is produced by s 3(1) of the Custom and Adopted Laws Act 1971 of Nauru, which provides that ‘the customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall ... be accorded recognition by every Court and have full force and effect of law’. It is interesting to compare these definitions and descriptions of custom with that contained in the Constitution of Papua New Guinea, which defines customs to mean ‘the customs and usages of the 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’.⁵

Recognition of customary law

In all countries of the region except Tonga, the written law makes express provision for customs or customary law to be used as the basis for determining rights to customary land, that is, land owned in accordance with custom, by those courts or tribunals which are authorised to make such determinations. In Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu, the written law goes further and makes express provision for customs or customary law to be applied as part of the law of the country by all courts. In Tonga, however, there is no express provision for custom or customary law to be applied by any court or for any purpose in the legal system. Table 3.1 summarises the

2 Laws of Kiribati Act, 1989, s 5(1).

3 Laws of Tuvalu Act, 1987, s 5(1).

4 Cook Islands Act 1915 (NZ), s 2(1).

5 Constitution of Papua New Guinea 1975 (PNG), Sched 1.2(1).

Table 3.1 Provisions for the recognition of customary law

Country	Provision
Cook Islands	Cook Islands Act 1915, s 422: 'Every title to, and interest in, customary land shall be determined according to the ancient custom and usage of the natives of the Cook Islands.'
Fiji Islands	Native Lands Act, Cap 133, s 3: 'Native lands shall be held by native Fijians according to native custom as evidenced by usage and tradition.'
Kiribati	Laws of Kiribati Act 1989, s 4(2): 'In addition to the constitution, the Laws of Kiribati comprise ... (b) customary law'; Laws of Kiribati Act 1989, Sched 1, paras 3 and 4 specify that the courts must take customary law into account when considering specified matters in criminal and civil proceedings, respectively.
Nauru	Custom and Adopted Laws Act 1971, s 3: 'The institutions, customs and usages of the Nauruans ... shall be accorded recognition by every Court, and have full force and effect of law' to regulate the matters specified in the act.
Niue	Niue Amendment Act (No 2) 1968 (NZ), s 23: 'Every title to and estate or interest in Niuean land shall be determined according to Niuean custom and any Ordinance or other enactment affecting Niuean custom.'
Samoa	Constitution of Samoa 1962, Art 111(1): '"Law" ... means ... any custom or usage which has acquired the force of law in Samoa, or any part thereof, under the provisions of any Act or under a judgment of a court of competent jurisdiction.'
Solomon Islands	Constitution of Solomon Islands 1978, Sched 3, para 3: 'Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.'
Tokelau	Tokelau Amendment Act 1967 (NZ), s 20: 'The beneficial ownership of Tokelauan land shall be determined in accordance with the customs and usages of the Tokelauan inhabitants of Tokelau.'
Tuvalu	Laws of Tuvalu Act 1987, s 4(2): 'In addition to the Constitution, the Laws of Tuvalu comprise ... (b) customary law'. Laws of Tuvalu Act 1987, Sched 1, paras 3 and 4 specify that the courts must take customary law into account when considering specified matters in criminal and civil proceedings, respectively.
Vanuatu	Constitution of Vanuatu 1980, Art 47(1): 'If there is no rule of law applicable to a matter before it, a court shall determine a matter according to substantial justice and whenever possible in conformity with custom.' Constitution of Vanuatu 1980, Art 95(3): 'Customary law shall continue to have effect as a part of the law of the Republic.'

extent of provision for the direct application of custom or customary law in countries of the region. It is important, however, to recognise that customs and customary law may be applied indirectly, whether or not there is any express authorisation to apply them. This is because they may be taken into account by a court as a factor when exercising its discretion, or when

interpreting ambiguous terms in a statute. It is also important to be conscious of the fact that, regardless of whether express provision is made by the written law for the application of customs or customary law, they will in practice continue to be applied by customary chiefs and leaders as methods of social control of members of their communities, except to the extent that they have been prohibited by the written law.

Express provision for application of customs or customary law

Title to customary land

As indicated earlier, in all countries of the region except Tonga, there is express provision in the written law for the application of customs or customary law by the courts or tribunals authorised to determine rights to customary land.⁶ The decisions made by the courts or tribunals at first instance are not published, but, in Nauru, Solomon Islands and Vanuatu, reports of the decisions of the High Court or Supreme Court on appeal have been published. A survey of these cases reveals only a minority of instances where there was real controversy about what was the applicable custom or rule of customary law. Thus, in Nauru, in *Demaure v Adumo*,⁷ the Nauru Lands Committee, which is the statutory successor to the chiefs of Nauru, held that a child who was adopted by a man from outside his family did not have the same rights to succeed to land, in custom, as natural children. In the Supreme Court, however, the chief justice disagreed with the committee's assessment of custom, and held that any adopted child, whether from within the family or outside, had the same rights of succession as a natural child. Again, in Solomon Islands, the case of *Maerua v Kahanatarau*⁸ disclosed that land in Makira Island had been awarded in 1975 on the basis of patrilineal succession, but in 1982 this was held to be incorrect, and the rules of matrilineal succession were applied.

More problematic for courts and tribunals applying customs or customary law has been the application to the facts of one of the most common rules of custom about rights to ownership of land, that is, that the first person to occupy the land is the original custom owner. This rule, which appears in many countries of the region, has been difficult for the courts to implement

6 Cook Islands Act 1915 (NZ), ss 421, 422; Native Lands Act, Cap 133 (Fiji), s 3; Magistrates' Courts Act, Cap 52 (Kiribati), s 58; Custom and Adopted Laws Act 1971 (Nauru), s 3; Niue Amendment Act 1968 (NZ), ss 22, 23; Constitution of Samoa, Art 101(2); Land and Titles Act, Cap 133 (Solomon Islands), s 219; Tokelau Amendment Act 1967 (NZ), s 20; Native Lands Ordinance, Cap 22 (Tuvalu), s 12; Constitution of Vanuatu, Arts 71–3.

7 *Nauru Law Reports*, 1969–82, Pt B, 96.

8 [1983] SILR 95.

on occasions because of the passage of time, with resultant changes to, and, sometimes, disappearance of, topographical features, and blurring of human memories. Thus, in *Detsiyogo v Degoregore*,⁹ the Supreme Court of Nauru, after examining the evidence for and against certain claims which had been decided in favour of some of the claimants by the Nauru Lands Committee, said:

In a case such as this, certainty is impossible. There is no reliable evidence of the identity or ownership of the land ... In these circumstances, the Nauru Lands Committee had to weigh the other evidence before it, nebulous and unreliable as that evidence undoubtedly was, and to decide the identity and boundaries of the land. That is what it did. No one can possibly say with certainty that its decision was correct. But it is equally impossible to say that it was wrong.¹⁰

Again, in *Marie and Kaltabang v Kilman*,¹¹ the chief justice of Vanuatu, when considering an appeal from a decision of an island court which declared that the descendants of a particular man were the current custom owners, said:

Regarding the first persons to arrive on the land and build a nasara, I am of the opinion that, as there is proof that the three ancestors of the three parties were alive in 1883 and were instrumental in selling the land to the French company, I should hold that the three parties are equally the custom owners of the land. The question of who arrived first and built a nasara has not been proved to my satisfaction and, therefore, I cannot hold that the appellant's ancestors were, in fact, the first persons to arrive and build a *nasara* there.¹²

The decisions of the courts and tribunals responsible for applying custom and customary law to determine interests in customary land (see above) in other countries in the region have not been published, but the opinions of researchers and commentators indicate that in Cook Islands,¹³ Fiji Islands,¹⁴ Kiribati,¹⁵

⁹ *Nauru Law Reports*, 1969–82, Pt B, 139.

¹⁰ *Nauru Law Reports*, 1969–82, Pt B, 139, pp 141–2.

¹¹ (1988) 1 Van LR 343.

¹² *Ibid*, p 352.

¹³ Crocombe, RG, 'The Cook Islands', in *Land Tenure in the Pacific*, Crocombe, RG (ed.), 3rd edn, 1997, Suva: IPS, USP, pp 60–1.

¹⁴ France, P, *The Charter of the Land*, 1969, Melbourne: OUP, pp 172–3.

¹⁵ Atanraoi, P, 'Customary tenure and sustainability in an atoll nation: the case of Kiribati', in *Customary Land Tenure and Sustainable Development – Complementarity or Conflict*, Crocombe, RG (ed.), 1995, Noumea: SPC, pp 60–5.

Niue¹⁶ and Tuvalu,¹⁷ serious misunderstandings of what was the appropriate custom occurred, at least in earlier times, and also that there were serious difficulties in applying some of the rules of custom to the evidence produced to those bodies.

Matters other than customary land

In Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu, the written law provides for the application of customs or customary law to matters other than customary land. In Kiribati, Nauru and Tuvalu, the legislature has been specific as to the matters that are to be regulated by custom.

In Nauru, the situations when the ordinary courts are authorised to apply 'the institutions, customs and usages of the Nauruans' are specifically when cases involving the following issues are heard before them:

- title to, and interests in, land, except leasehold;
- disposition of property, both real and personal, either *inter vivos* or upon death, by will or intestacy; and
- any matter affecting Nauruans only.¹⁸

Two customs have, however, been abolished by this legislation, that is:

- customary right to take or deal with property of another person without that person's consent; and
- customary right to deprive a parent of the custody and control of a child, without the consent of the parent.¹⁹

In Kiribati and Tuvalu, legislation specifies in more detail the matters to which courts shall apply customary law. The legislation states that courts

16 Crocombe, RG, 'Current problems and attempted solutions', in Crocombe, RG (ed.), *Land Tenure in Niue*, 1977, Suva: IPS, USP, p 51.

17 Leupena, T and Lutelu, K, 'Providing for the multitude', in Crocombe, RG (ed.), *Land Tenure in the Atolls*, 1987, Suva: IPS, USP, pp 143, 153–4.

18 Custom and Adopted Laws Act 1971 (Nauru), s 3. This provision replaced the more generally worded provision in Laws Repeal and Adopting Ordinance 1922–36, s 10, which stated:

The institutions, customs and usages of the aboriginal natives of the island shall not be affected by this ordinance, and shall, subject to the provisions of the ordinances of the island from time to time in force, be permitted to continue in existence in so far as the same are not repugnant to the general principles of humanity.

19 Custom and Adopted Laws Act 1971 (Nauru), s 3(2).

shall take account of customary law in criminal proceedings in relation to the following matters:

- the existence or otherwise of a certain state of mind;
- the reasonableness or otherwise of action or inaction of a person;
- whether or not a conviction should be entered against a guilty person;
- what penalty, if any, should be imposed on a guilty person; and
- any other matter where an injustice would be done if custom was not considered.²⁰

In civil proceedings, the legislation requires that courts take account of customary law with regard to the following matters:

- ownership or possession of land, lagoons, reefs, the seabed and water;
- administration, devolution or partition of customary land;
- defamation;
- legitimacy, legitimisation or adoption of children;
- custody and guardianship of children;
- rights arising from marriage or termination of marriage;
- rights of support from other members of a family;
- duty of members of a community to contribute to projects for the welfare of the community;
- any transaction that was intended by the parties, or which justice requires, to be regulated by custom;
- reasonableness of any action or inaction by a person;
- existence of a state of mind of a person; and
- any other matter where the court considers that an injustice may be done if customary law is not taken into account.²¹

The legislation of Kiribati and Tuvalu makes it clear that customary law is to prevail over the principles of common law and equity,²² and provides, in particular, that it is to prevail over the principles of common law in relation to the legitimacy, legitimation and adoption of children, and in relation to the custody or guardianship of children.²³ This latter provision is of particular significance in view of the reluctance of courts in other countries to apply customs or customary law in cases relating to the custody and guardianship of children, preferring instead to follow the common law and British statutory rule that the welfare of the children should be the predominant

20 Laws of Kiribati Act 1989, Sched 1, para 3; Laws of Tuvalu Act 1987, Sched 1, para 3.

21 Laws of Kiribati Act 1989, Sched 1, para 4; Laws of Tuvalu Act 1987, Sched 1, para 4.

22 Laws of Kiribati Act 1989, s 6(3)(b); Laws of Tuvalu Act 1987, s 6(3)(b).

23 Laws of Kiribati Act 1989, Sched 1, para 5; Laws of Tuvalu Act 1987, Sched 1, para 5.

consideration in such cases.²⁴ The legislation of Kiribati and Tuvalu also makes it clear that customary law is not to be applied if it is inconsistent with the constitution or with legislation enacted by the legislature of either country, or with British legislation or subsidiary legislation in force in either country,²⁵ or where the application of custom 'would result, in the opinion of the court, in injustice or would not be in the public interest'.²⁶ The legislation deals with situations where it is uncertain which of two or more customary laws should prevail. In such situations, the court may adopt such rules of customary law or of the common law, with such modifications 'as the justice of the case requires'.²⁷

In contrast with the detailed directions given by the legislature as to the application of customs or customary law in Kiribati, Nauru and Tuvalu, in the other three countries where custom or customary law is authorised to be applied to matters in addition to customary land, that is, Samoa, Solomon Islands and Vanuatu, the legislature has given much less guidance to the courts as to the situations when custom or customary law is to be applied.

In Samoa, Art 111(1) of the constitution states that:

'law' means any law for the time being in force in Samoa; and includes ... any custom or usage which has acquired the force of law in Samoa, or any part thereof, under the provisions of any Act or under a judgment of a court of competent jurisdiction.

This provision raises two problems with regard to the application of custom. First, does it recognise as law only those customs which had acquired the force of law by legislation or judicial decision at the time the constitution came into force in 1962, or is it to be interpreted as always speaking? If the former interpretation is adopted, then this would seem to allow for very limited recognition of Samoan customs. Prior to 1962, there was only one published judgment recognising Samoan custom, that is, *Samoa Public Trustee v Annie Collins*,²⁸ where it was held that Samoan custom regulating the validity of marriage and the legitimacy of children was to be recognised as the law governing such matters in the early 1870s, when there was no written law in force in Samoa regulating marriage and legitimacy.

Second, if the provision is to be interpreted as always speaking, it provides no criteria for the courts to apply in deciding whether custom is to be given the force of law. In *Mauletaua v Fata*,²⁹ the court refused to recognise a custom

24 See later, pp 54–5.

25 Laws of Kiribati Act 1989, s 5(2); Laws of Tuvalu Act 1987, s 5(2).

26 Laws of Kiribati Act 1989, Sched 1, para 2; Laws of Tuvalu Act 1987, Sched 1, para 2.

27 Laws of Kiribati Act 1989, Sched 1, para 6; Laws of Tuvalu Act 1987, Sched 1, para 6.

28 [1930–49] WSLR 70.

29 [1930–49] WSLR 144.

of a village because it was contrary to a more widespread custom throughout Samoa. Similarly, in *Mose v Mosame*,³⁰ it declined to apply a custom that allowed a villager to be punished by the village *fono* (council) without the opportunity to defend himself because it was contrary to well-established principles of natural justice. In the latter case Marsack CJ said:

Notwithstanding the realisation of the injustice of their action, the chiefs and orators proceeded to condemn the plaintiff without hearing him, and to execute the penalty without telling him what it was or why it was imposed. This is so gross a violation of the elementary principles of justice that the court cannot possibly support their action. It may make for discipline and peace in the village that the *matais* should take effective steps to punish an affront to their dignity; but the courts cannot lend their approval to any custom, however ancient, which denies to an accused person a right which is freely available to the lowliest member of a civilised Christian community. I must not be understood as saying that Samoan custom will not be recognised. The court realises that custom and law can exist side by side, and the court will not interfere with any custom which is just and in the best interests of the community. But there must always be a right to appeal to the law, and, if the court finds that a custom is working injustice, the court will not uphold it. That is the case here.³¹

These judgments would suggest that a custom in Samoa is not to be applied if it is inconsistent with common law notions of justice or with more widespread customs.

In Solomon Islands, para 3(1) of Sched 3 of the constitution states that 'customary law shall have effect as part of the law of Solomon Islands'. This is, however, qualified by para 3(2), which states that para 3(1) 'shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament'. The term 'Act of Parliament' has been held to mean 'Act of Parliament of Solomon Islands', not 'Act of Parliament of the United Kingdom'.³² Paragraph 2(1)(c) of Sched 3 also makes it clear that the principles of common law and equity are not to apply 'if they are inconsistent with customary law applying in respect of the matter'. As a result of these provisions, it is quite clear that customary law is subordinate to the Constitution and to Acts of Parliament of Solomon Islands, but overrides common law and equity to the extent that it applies 'in respect of the matter'. In *Sasango v Beliga*,³³ where there was a claim by the widow of a deceased man to recover four *tafuliae* (strings of shell money) and 1000

30 [1930–49] WSLR 140.

31 *Ibid*, p 142.

32 *R v Ngena* [1983] SILR 1; *K v T* [1985/86] SILR 49; see, further, Chapter 4.

33 [1987] SILR 91.

porpoise teeth from the brother of her deceased husband, customary law was relied upon by the court. All persons involved were Solomon Islanders, and the widow based her claim on a rule of custom that the items were her personal property, and that the brother of her deceased husband was not entitled to them in custom, whereas the brother-in-law claimed that he was entitled to the items in custom. The senior magistrate rejected the brother-in-law's claim on the ground that 'there is no impartial evidence of customary law before me to prove that a widow must give up all her personal property to the husband's brothers'.³⁴

There is one area of the law where the courts in the Solomon Islands have shown themselves unwilling to apply customary law, and that is in relation to cases involving custody of children. In at least four reported cases, that is, *Sukutaona v Houanihou*,³⁵ *In re B*,³⁶ *K v T*³⁷ and *Sasango v Beliga*,³⁸ it has been held that the custom rights of custody were subordinate to the welfare of the children, which was the paramount consideration. That the welfare of the children must be given paramount consideration in custody cases does not, however, appear in the Constitution of Solomon Islands or in any Act of Parliament of Solomon Islands. This principle derives from principles of common law and equity³⁹ which were given statutory form in England in s 1 of the Guardianship of Infants Act 1925.⁴⁰ This act is a statute of general application which was in force in England on 1 January 1961 and, so, is in force in Solomon Islands by virtue of para 1 of Sched 3 of the constitution. At first sight, therefore, it might be thought that the rejection of customary law could be justified on the basis that it was inconsistent with a British Act of Parliament in force in the country. However, as indicated in the preceding paragraph,

34 *Ibid*, p 94.

35 [1982] SILR 12.

36 [1983] SILR 223.

37 [1985/86] SILR 49.

38 [1987] SILR 91. See also the description of the case above.

39 *R v Gyngall* [1893] 2 QB 232.

40 Guardianship of Infants Act 1925, s 1:

Principle on which questions relating to custody, upbringing, etc of infants are to be decided:

Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act 1866) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application, is superior to that of the mother, or the claim of the mother is superior to that of the father.

See, further, Chapter 7.

the courts in Solomon Islands have held that the term 'Act of Parliament', as used in para 3(1), refers only to Acts of the Parliament of Solomon Islands, not of the Parliament of Great Britain. Although the desire of the courts to protect the welfare of children can be readily understood, at least by European observers, there is no obvious legal basis for denying the application of custom in custody disputes.

In Vanuatu, Art 95(3) of the constitution expressly states that 'customary law shall continue to have effect as part of the law of the Republic', and does not expressly state any limitations upon the application of customary law. It is clear, however, that there must be some limitations on its application in Vanuatu. In the first place, the constitution is stated by Art 2 of the constitution to be the supreme law of Vanuatu, so customary law must be subject to the provisions of the constitution, including those in Art 5 relating to fundamental rights and freedoms. On two occasions, the Supreme Court of Vanuatu has held that the provision in Art 5 that 'all persons are entitled to the following fundamental rights and freedoms of the individual, without discrimination on the grounds of ... sex' prevails over and displaces the rights which customary law in many islands of Vanuatu affords to males over females. In *Noel v Toto*,⁴¹ the Supreme Court held that men and women were equally entitled to a share in the proceeds from land, which customary law did not allow, and, in *Public Prosecutor v Kota*,⁴² the Supreme Court held that it was unlawful for a chief and others, after a matrimonial dispute between a husband and wife, to require the wife to return to her island, but not the husband. The case of *Public Prosecutor v Kota* is also significant in that the court held that it was unlawful for the chiefs and others to send a woman back to her island, since it was in breach of the freedom of movement enshrined in Art 5(1)(i) of the constitution, even though such action was in accordance with the customary law of that island.

Second, since the constitution authorises the making of laws by Parliament, customary law may be viewed as subordinate to the provisions of Acts of Parliament of Vanuatu. This is obviously the view taken by the courts as, on several occasions, defendants have been convicted of offences created by legislation, even though their actions were justifiable under customary law. *Public Prosecutor v Kota*⁴³ was one such a case, where the chiefs and others were convicted of offences under the Penal Code⁴⁴ relating to kidnapping, even though their actions were justifiable under customary law. In *Public Prosecutor v Silas*,⁴⁵ a man was convicted of abducting his sister and forcing

41 [1995] VUSC 3.

42 (1993) 2 Van LR 661.

43 *Ibid.*

44 Cap 135.

45 (1993) 2 Van LR 659.

her to go and live with another man, which was an offence under the Penal Code,⁴⁶ even though justifiable under custom. This also was the view of the Court of Appeal in *Pentecost Pacific Ltd and Phillipe Pentecost v Palene Hnaloane*,⁴⁷ where the Court of Appeal decided a case involving a contract of employment between two ni-Vanuatu, solely on the basis of the Employment Act⁴⁸ enacted by the Parliament of Vanuatu without any regard to custom, despite strenuous arguments by the plaintiff that their relationship should be determined by custom.

Article 95(1) of the Constitution of Vanuatu states that, until otherwise provided by Parliament, all joint regulations and subsidiary legislation made thereunder which were in force immediately before the day of independence shall continue in operation, as if they had been made in pursuance of the constitution. This provision clearly gives this 'colonial' legislation, enacted in New Hebrides during condominium times, the same status as acts enacted by Parliament, so, again, customary law may be viewed as subordinate to colonial legislation. What is more problematic is the relationship between customary law and the legislation of Britain and France, and also the common law and equity of England. Article 95(2) of the constitution states:

Until otherwise provided by Parliament, the British and French laws in force, or applied in the New Hebrides immediately before the day of Independence, shall on and after that date continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu, and wherever possible taking due account of custom.

There are two possible interpretations of the mandate to take custom into account 'wherever possible'. Viewed restrictively, it could mean that custom is to be taken into account only where there is a gap or ambiguity in the British or French laws. Alternatively, given a broad interpretation, it could mean that custom is to be taken into account whenever it would apply to the situation. The position is not made much clearer by the part of Art 47(1) of the constitution which relates to the judiciary, where it is stated:

The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter accounting to substantial justice, and, whenever possible, in conformity with custom.

Again there are two possible interpretations of this provision: first, that it is only where there is no rule of law (excluding custom) applicable to a matter,

46 Cap 135.

47 (1994) 1 Van LR 134.

48 Cap 160.

and, where substantial justice permits, that custom is to be applied; second, that decisions are to be made in conformity with custom. One would suspect that the second possible interpretation of the two provisions would be what the members of the Constitutional Drafting Committee would have intended if their attention had been drawn to this issue. However, the placement of the phrases ‘whenever possible in accordance with custom’ and ‘wherever possible in accordance with custom’ at the end of each provision suggests that it was perhaps ‘tacked on’ at the end, as an afterthought, and without adequate attention to its relationship and integration with the preceding words in the provisions.

This view is supported, indirectly, by several decisions which the Supreme Court has given in relation to the custody of children. In *Toma v Charley*,⁴⁹ *M v P*⁵⁰ and *G v L*,⁵¹ all cases relating to who should have custody of a child, the Supreme Court stated that it must give paramount consideration to the welfare of the child, even if this was not in accordance with custom. In these cases, the court did not explain why it must give paramount consideration to the welfare of the child regardless of the custom rights of a parent (usually the father), but since there is no provision to this effect in the Constitution or legislation of Vanuatu, then the court must have been relying either upon the principle of common law which so requires, for example, *R v Gyngall*,⁵² or upon the statutory endorsement of the principle in s 1 of the Guardianship of Infants Act 1925 (UK),⁵³ which would appear to be in force in Vanuatu as a statute of general application in force in England on 1 January 1976.⁵⁴ Unfortunately, the question of the relationship between customary law and the applied British statutes and English common law and equity, as well as the relationship between customary law and the applied French statutes, is one which has not been directly considered by the courts of Vanuatu, and so, until the courts have spoken, it is not possible to express any firm view about the relationship between custom and the British and French statutes, and the English principles of common law and equity.⁵⁵

Issues in relation to application of customs or customary law

From this survey of the provisions expressly authorising the application of customs and customary laws in the region, various issues arise.

49 Supreme Court, Vanuatu, Civ Cas 37/1985 (unreported) (15 April 1985).

50 (1988) 1 Van LR 333.

51 (1990) 2 Van LR 486.

52 [1893] 2 QB 232.

53 See above fn 42.

54 See, further, Chapter 4.

55 For further discussion of the relationship between customary law and the other laws in force in Vanuatu, see Corrin, J, ‘Bedrock and steel blues: finding the law applicable in Vanuatu’ (1998) 24 *CLB* 594.

*Is it necessary to plead custom and customary law and how it is to be proved?*⁵⁶

In some countries of the region, in which custom or customary law is part of the legal system, it appears that customs and customary law are considered to be matters of fact. This is expressly provided by legislation enacted in Solomon Islands, but not yet brought into force.⁵⁷ In Solomon Islands and Vanuatu, it is not expressly provided by legislation, but the civil procedure rules expressly require that custom must be pleaded, in the same way as matters of fact.⁵⁸ In these countries also the courts have held that customs and customary law must be proved by evidence, in the same way as matters of fact. Consequently, if parties or their counsel do not produce evidence, then the court can make no finding of custom. It may sometimes be difficult to produce witnesses who are knowledgeable about custom, but do not have a personal interest in the outcome of the case. This is illustrated by the following extract from the judgment of the principal magistrate in *Sasango v Beliga*:⁵⁹

I can only give a decision on the basis of customary law if that law is proved by evidence of the relevant custom. Such evidence should be impartial and unbiased. In this case, the defendant has not produced any such evidence. He did call a number of his brothers as witnesses, who all said that in custom the husband's property must pass to them, not the widow ... However, it is not the plaintiff's case that the property belonged to her husband. She says it was her own personal property, except for two *tafuliae*. There is no impartial evidence of customary law before me to prove that a widow must give up all her personal property to the husband's brothers.⁶⁰

On the other hand, it can be argued that customs, or at least customary laws, are a form of law. Although law need not normally be pleaded, it is good practice to refer to any law relied on that might take the other side by surprise, and this is sometimes prescribed by the civil procedure rules.⁶¹ As mentioned above,

56 See further Zorn, J and Corrin, J, *Proving Customary Law in the Common Law Courts*, 2002, London: British Institute of International and Comparative Law.

57 Customs Recognition Act 2000 (SI), see Corrin, J and Zorn, J, 'Legislating for the application of customary law in Solomon Islands' (2005) 34(2) *Common Law World Review*, pp 144–68.

58 High Court (Civil Procedure) Rules 1964 (UK), O21 r30, applying in Kiribati, Tuvalu, Solomon Islands; Civil Procedure Rules 2002 (Vanuatu), R4.2(1)(d).

59 [1987] SILR 91.

60 *Ibid*, p 106.

61 See, eg, High Court Rules 1988 (Fiji), O18 r7; High Court (Civil Procedure) Rules 1964 (UK), O21 r6, applying in Kiribati, Tuvalu, Solomon Islands; Civil Procedure Rules 2002 (Vanuatu), R4.7(c).

in Kiribati, Tuvalu, Solomon Islands and Vanuatu custom must always be pleaded.⁶² If customary law is recognised as law, it should not need to be proved by evidence. Instead, a court should make itself aware of them as it does with other laws, that is, by reading authentic statements of them, and by hearing argument as to the meaning of these statements. This method, which is technically termed ‘judicial notice’, is expressly provided by legislation in Kiribati and Tuvalu for use by courts in those countries. The legislation states that questions as to the existence and applicability of customary law are to be determined as matters of law, and that courts may consult reported cases, treatises, works of reference or official reports and statements made by local government councils, and may admit and consider such evidence, including hearsay evidence and expressions of opinion, and otherwise inform themselves as they think fit, without being bound by strict legal procedure or the technical rules of evidence.⁶³ As mentioned above, however, the civil procedure rules in these two countries, which date from ‘colonial’ times, do require that custom must be expressly pleaded, in the same way as matters of fact.⁶⁴ It is interesting to note that customary law is also treated as a matter of law in Papua New Guinea, where detailed provision has been made for how it is to be proved.⁶⁵ In Solomon Islands, however, the Customs Recognition Act 2000 provides for customary law to be determined as a matter of fact rather than law, but that act has yet to be brought into force and, given the difficulties surrounding its provisions, is unlikely to be.⁶⁶

Are customs and customary laws to be applied to all matters involving indigenous people?

Customs and customary laws were traditionally concerned with regulating matters of personal status and relationships within a family and a community, and also with regulating transactions relating to land and simple forms of exchange and barter. Modern day commercial and financial transactions were outside their scope, as were relationships of employment and of trust.

The question arises as to what extent customs and customary laws should be applied to modern day commercial transactions and relationships. This is a question that has not received much attention by the courts of the region, at least in reported cases. Perhaps some indication of the approach that will

62 High Court (Civil Procedure) Rules 1964 (UK), O21 r30, applying in Kiribati, Tuvalu, Solomon Islands; Civil Procedure Rules 2002 (Vanuatu), R4.2(1)(d).

63 Laws of Kiribati Act 1989, Sched 1, para 1; Laws of Tuvalu Act 1987, Sched 1, para 1.

64 High Court (Civil Procedure) Rules 1964 (UK), O21 r6, which still apply in Kiribati and Tuvalu.

65 Underlying Law Act 2000.

66 For a detailed discussion of the problems surrounding the Customs Recognition Act 2000 (SI), see Corrin, J and Zorn, J, ‘Legislating for the application of customary law in Solomon Islands’ (2005) 34(2) *Common Law World Review*, pp 144–68.

be adopted appears from decisions of the Supreme Court of Nauru. Although the legislation of Nauru expressly states, as indicated earlier, that the ‘customs, institutions and usages of Nauruans’ are to be applied not only to land matters, but also to ‘any matter affecting Nauruans only’, yet, in the few reported cases involving Nauruans only, other than land cases, there has been no mention of custom. In *Audoa v Capelle*,⁶⁷ there was a claim for the recovery of money due under a contract for the sale and return of a car, and, in *Demaure v Nauru Local Government Council*,⁶⁸ there was a claim by a widower against the driver of a truck whose negligent driving caused the death of his wife, but in neither case is there any mention of custom. In *Pentecost Pacific Ltd and Phillipe Pentecost v Palene Hnaloane*,⁶⁹ the Court of Appeal was dealing with a breach of a contract of employment between two ni-Vanuatu and it specifically rejected an argument that the relationship between the parties was regulated by custom, although, in that case, there was legislation enacted by the Parliament of Vanuatu that regulated employment matters. In both Solomon Islands⁷⁰ and Vanuatu,⁷¹ the courts have rejected arguments that damages in civil proceedings should be assessed against a person on the same basis as fines imposed under custom for the same or similar actions.

Are all customs or customary laws to be applied to indigenous people?

There are some customs and customary laws that may, in modern times, be considered by the courts to be so repugnant to basic moral or legal concepts that the courts may be very reluctant to apply them, even though they are not inconsistent with terms of the constitution or of legislation in force in the country. It will be recalled that, in Samoa, the Supreme Court, in *Mose v Masame*⁷² (see above), declined to accept a custom that allowed a person to be convicted and penalised for an offence without any opportunity to defend himself.

It will also be recalled that, in Solomon Islands⁷³ and Vanuatu,⁷⁴ the courts have consistently refused to recognise the rights of fathers under customary law to the custody of their children, despite the fact that those rights were not in conflict with the written constitution or with the legislation of the country.

67 *Nauru Law Reports*, 1969–82, Part A, 51.

68 *Ibid*, 189.

69 (1993) 2 Van LR 661.

70 *Longa v Solomon Taiyo Ltd* [1980/81] SILR 239, p 259.

71 *Boe and Taga v Thomas* (1987) 1 Van LR 293.

72 [1930–49] WSLR 140.

73 *Sukutaona v Houanihou* [1982] SILR 12; *In re B* [1983] SILR 223; *K v T* [1985/86] SILR 49; *Sasango v Beliga* [1987] SILR 91.

74 *Toma v Charley*, Supreme Court, Vanuatu, Civ Cas 37/1985 (unreported) (15 August 1985); *M v P* (1988) 1 Van LR 333; *G v L* (1990) 2 Van LR 486.

While the motives of the courts in refusing to apply custom or customary law in these circumstances are understandable, and, at least to many western observers, very creditable, these decisions must raise questions about whether it is the courts or the legislature who should determine the appropriateness or acceptability of customary law in a country. As noted earlier, in Nauru, the legislature has specifically abolished two customs which were no longer considered appropriate, that is, the custom allowing a Nauruan to take the property of another Nauruan without permission, and the custom allowing a Nauruan to take custody of other children of the Nauruans without permission.⁷⁵

In Kiribati and Tuvalu, the legislation provides a more general power for the courts to refuse to apply custom where this 'would result, in the opinion of the court, in injustice or would not be in the public interest'.⁷⁶ While this provision does allow the courts a fairly broad power to refuse to apply custom, at least the criteria to be applied by the courts are set out in the legislation and the courts are not called upon to exercise an uncontrolled judgment as to when customs or customary law should not be applied.

Are customs or customary law to be applied to persons of other communities?

This issue arises in two different contexts. First, it arises with regard to the application of customs or customary law of one indigenous community (which recognises one set of customs or customary laws) in a country to members of other indigenous communities in the country (which recognise other customs or customary laws). This is really a situation of conflict of customary laws. Surprisingly, given the great variety and diversity of customs and customary laws, there are few reported cases on point. In Vanuatu, in *Waiwo v Waiwo and Banga*,⁷⁷ Senior Magistrate Lunabek, as he then was, gave detailed consideration to the point, although his views are obiter. The senior magistrate was of the view that when both parties to a case are ni-Vanuatu but come from areas with different customs the court should search for a 'common basis or foundation' and turn that shared foundation into a rule.⁷⁸ Unfortunately, this decision was reversed on appeal.⁷⁹ In Kiribati and Tuvalu, legislation has addressed the question and has provided that where it is uncertain which of two or more customary laws should be applied, the court may adopt such rules of customary law or of the common law, with such modifications 'as the justice of the case requires'.⁸⁰

75 Custom and Adopted Laws Act 1971 (Nauru), s 3(2).

76 Laws of Kiribati Act 1989, Sched 1, para 2; Laws of Tuvalu Act 1987, Sched 1, para 2.

77 [1996] VUMC 1. See, further, Corrin, J, 'Bedrock and steel blues: finding the law applicable in Vanuatu' (1998) 24 *CLB*, p 594.

78 [1996] VUMC 1, 5.

79 *Banga v Waiwo* [1996] VUSC 5.

80 Laws of Kiribati Act 1989, Sched 1, para 6; Laws of Tuvalu Act 1987, Sched 1, para 6.

The second context in which this question can arise is in relation to the application of customs of indigenous communities to non-indigenous communities in the country, for example, Chinese, Europeans and Indians. There is surprisingly little authority within the region on whether customary law applies to non-indigenous people. However, it has been discussed in Solomon Islands in a case relating to marriage laws. In *Rebitai v Chow and Others*,⁸¹ the question arose as to whether customary marriage laws could apply to a person of Chinese descent. Kabui J held that there was nothing in custom that prohibited a customary marriage between an indigene and a person of another race. It was also discussed in *Semens v Continental Airlines*,⁸² a decision of the Supreme Court of the Federated States of Micronesia, rather than that of a regional court, where the court was called on to consider whether the law applied in a claim for damages for personal injuries suffered by a sub-contractor when unloading cargo at Pohnpei airport. The chief justice held that he was under no obligation to search for an applicable custom or tradition and gave as one reason for his decision the fact that three of the four defendants were not Micronesians.

In Kiribati and Tuvalu, as mentioned above, legislation does expressly provide that a court has a general power not to apply customary law where this 'would result, in the opinion of the court, in injustice or would not be in the public interest'.⁸³ These are issues which should be specifically addressed by the legislature in other countries, so that the courts are not left to grapple with such fundamental issues without guidance from the elected representatives of the community.

Customary law and gender issues

Reported cases in the region reveal serious conflict between women's human rights and customary law. In some cases, this conflict has been resolved in favour of upholding human rights. For example, in *Noel v Toto*,⁸⁴ the respondent's sister's son applied for a declaration that land in Santo, Vanuatu, was held by the respondent in a representative capacity and that the benefits arising from the land had to be accounted for and shared with the applicant. The evidence as to customary ownership included evidence indicating that women who married would be deprived of rights to property, whereas men who married would not. Kent J stated that Art 5 of the Constitution of Vanuatu was clearly intended to guarantee equal rights for women. However, he noted that this conflicted with Art 74, which provided that custom should

81 [2002] 4 LRC 226.

82 2 FSM Intrm. 131 (Pn. 1985).

83 See above, fn 70.

84 [1995] VUSC 3.

form the basis of ownership and use of land in Vanuatu. His lordship concluded that the fundamental rights recognised in Art 5 apply to prevent the application of customary law that discriminates against women in respect of land rights, as the constitution clearly aimed to give equal rights to women. His lordship stated that it would 'be entirely inconsistent with the Constitution and the attitude of Parliament to rule that women have less rights with respect to land than men'. His lordship stressed that customary law would still provide the basis of determining ownership of land, but the customary rule discriminating against women in land matters would be disregarded.

Another example, arising in the private sphere in Vanuatu, is *Public Prosecutor v Walter Kota and 10 Others*.⁸⁵ This case illustrates conflict between customary law, on the one hand, and both the right to equality and the right to freedom of movement, on the other. The case arose after a matrimonial dispute between the first accused and his wife. A meeting of chiefs from Tanna, the couple's home island, was called to try to resolve the problem. The wife was forced to go to the meeting by the police. After the wife refused a reconciliation, the chiefs decided to send her back to Tanna, which they did, against her will. The defendants, who included the custom chiefs, were charged and convicted of inciting the offence of kidnapping under ss 35 and 105(b) of the Penal Code.⁸⁶ Downing J said:

A significant number of cases that come before this court are as a direct result of the failure to treat women equally, and, therefore, in so treating women as property, as [*sic*] a substantial breach of the Constitution. The Constitution, by Art 5(1)(b), provides for the liberty of people. It also, by Article 5(1)(i), provides for the freedom of movements [*sic*] ... Whilst I appreciate in this case that the chiefs were trying to resolve a problem, they did so from a very biased point of view. It was from a man's point of view and not from the woman's point of view.⁸⁷

In other cases, the judiciary has allowed customary law to override the right to equality. For example, in *The Minister for Provincial Government v Guadalcanal Provincial Assembly*,⁸⁸ the Court of Appeal was called on to consider whether the Provincial Government Act 1996 was unconstitutional. The act replaced the system of elected provincial government members with a system whereby members were indirectly elected by area assemblies. Area assemblies consisted of 50% elected members and 50% non-elected chiefs and elders. Although the grounds of the constitutional challenge to the act did not include discrimination, Williams and Goldsborough JJA noted that

85 (1989–94) 2 Van LR 661.

86 Cap 135.

87 [1989–94] 2 Van LR 661, p 664.

88 [1997] SBCA 1.

only males could be ‘traditional chiefs’.⁸⁹ This meant that one-half of the members of the area assembly would be male. Therefore, the right to elect provincial government members would be heavily biased in favour of males. The act, therefore, effectively denied females equal opportunity. Their lordships concluded that the constitution recognised that ‘traditional chiefs’ should play a role in government at provincial level and thereby recognised the imbalance or discrimination that would remain until the role of ‘traditional chiefs’ under the constitution was re-evaluated.⁹⁰

Reconciliation of fundamental principles of human rights and customary law is not an easy task. Unfortunately, constitutional provisions governing these matters within the region do not set out clear principles governing conflicts. Examples of countries with constitutions where customary law may be allowed to override anti-discrimination provisions are Fiji Islands⁹¹ and Solomon Islands.⁹² Ultimately, it is a question for the courts. As illustrated by the decisions discussed above, such conflicts are usually resolved in favour of individual rights. However, it should not be assumed that this will always or should always be the case. The balancing exercise must take account of the circumstances of the region of the country, including the emphasis on individual responsibility⁹³ and other aspects of its cultural heritage.

Application of customs or customary law by the courts without express authorisation

Regardless of whether or not there is express authorisation for the courts to do so, there are some situations where the courts will apply custom or customary law.

One situation where the courts have little choice but to apply custom, even though not expressly authorised to do so, is a situation which arose relatively frequently in earlier times, but does not often arise nowadays, that is, when the court is dealing with events which occurred in the period before written laws or introduced laws existed. In such situations, in order to provide some legitimacy to relationships and transactions, a court must rely upon customs or customary law. In *Samoan Public Trustee v Annie Collins*,⁹⁴ the Supreme Court of New Zealand, on appeal from the High Court of Samoa, held, long before there was any constitutional authorisation for courts to recognise customs, that an American citizen, who, in the early 1870s, before the advent of written laws in Samoa, lived with a Samoan woman, in accordance with

89 *Ibid.*

90 See Constitution of Solomon Islands, s 114.

91 Constitution of Fiji Islands, ss 38(8)–(10).

92 Constitution of Solomon Islands, s 15(5)(d). See also s 15(5)(c).

93 See, eg, Constitution of Vanuatu, Art 7, which lays down basic social obligations.

94 [1930–49] WSLR 70.

Samoaan custom, was validly married to her, and their children were legitimate and could succeed to his intestate estate. Again, in Tonga, in *Nainoa v Vaha'i*,⁹⁵ the land court held that a Tongan high chief and a Tongan woman of chiefly rank, who were living together and had children, before any written laws regulating marriage had been enacted, must be presumed to have been married according to Tongan custom, and, therefore, was 'convinced that [they] were, in accordance with the customs and practices then prevailing in Tonga, considered as man and wife, and their children were legitimate'.⁹⁶

Other situations where the courts have applied customs or customary laws without express authorisation to do so are indirect or, as it may be said, interstitial applications, that is, where custom or customary law is taken into account as a factor within the terms or scope of an existing law. For example, where a court is provided by the written law with discretion to exercise, a custom or a customary law may often be a very relevant factor to take into account in exercising that discretion. Thus, when exercising discretion as to the punishment to be imposed upon a convicted offender, the courts have taken into account customary apologies;⁹⁷ when exercising discretion as to how much a man should pay for the maintenance of an illegitimate child, customary gifts and payments made to the mother by the man were taken into consideration, but not payments made to her father in substitution for bride price;⁹⁸ and when exercising discretion as to whether an eviction order should be issued in Tonga against the widow of the applicant's elder brother, the fact that Tongan custom requires that a man must give respect and assistance to the widow of the elder brother was a factor which influenced the court not to exercise its discretion in favour of the applicant.⁹⁹

Again, where a court is called upon to interpret ambiguous words in a written constitution or in legislation or subsidiary legislation, customs or customary law may be factors which are appropriate to take into account as part of the surrounding context of the written law. Thus, in *Grundler v Namaduk*,¹⁰⁰ where the Supreme Court of Nauru was called upon to interpret the word 'child', as used in the Administration Order No 3 of 1938, it took into account the fact that in 1938 it was well established in Nauruan custom that an adopted child was entitled to the same rights of succession to the adoptive parent, as a natural child. The court held, accordingly, that the word 'child' should be interpreted to include both natural and adopted children. In Samoa on two occasions, that is, *Attorney General v Saipai'ia (Olomalu)*¹⁰¹

95 (1926) II Tongan LR 22.

96 *Ibid*, p 24.

97 *Leota v Faumuina* [1988] SPLR 1; *Hala v R* [1992] Tonga LR 7; *R v Vodo Vuli* Supreme Court, Fiji, Rev Cas 6/1981 (unreported) (14 August 1981).

98 *K v B* [1985/86] SILR 39.

99 *Tu'iha'ateiho v Tui'iha'ateiho* [1962-73] Tongan LR 22.

100 *Nauru Law Reports*, 1969-82, Part B, 96.

101 [1970-9] WSLR 68.

and *Italia Taamale v Attorney General*,¹⁰² the Court of Appeal has taken into account Samoan customs: in the first case, the social dominance of *matai*; in the second, the customary exercise of the power of banishment. The Court of Appeal has also adopted an interpretation of articles in the Constitution of Samoa which supports these customs. In Samoa, the courts have, also, on several occasions, taken into account Samoan custom to determine who was a *matai*, at a time when only *matai* could stand and vote at elections to the Legislative Assembly.¹⁰³ In Vanuatu, in *Waiwo v Waiwo and Banga*,¹⁰⁴ the magistrates' court took into account a widespread custom rule that adultery was regarded as a punishable offence, when interpreting s 17(1) of the Matrimonial Causes Act,¹⁰⁵ which provided that 'a petitioner may, on a petition for divorce, claim damages from any person on the ground of adultery with the respondent'. Taking this custom into account, the magistrates' court held that the word 'damages' should be interpreted as including punitive or exemplary damages as well as compensatory damages. This decision was, however, reversed on appeal by the Supreme Court, where the chief justice held that the word 'damages' must be interpreted to conform with the Matrimonial Causes Act 1965 (UK), upon which the Vanuatu Act was based, and which did not provide for exemplary damages.

Another way in which a custom or customary law may be used indirectly or interstitially by a court occurs with regard to the assessment of evidence. When assessing evidence which is evenly balanced or inconclusive, a court may well give greater weight to the evidence which is in accordance with customs or customary law, in preference to evidence which is not, since it is more likely to have happened. Thus, in Tonga, the Land Court, in *Nainoa v Vaha'i*,¹⁰⁶ had to determine whether or not a Tongan man and woman had been living together as a married couple in accordance with custom. There was no direct evidence of a marriage, but the court took account of the fact that the man was a high chief and the woman was of high chiefly rank, and that 'it is most improbable that a woman of this rank would have lived as man and wife ... if she was not married to him in accordance with the customs and practices of Tonga'.¹⁰⁷

102 [1980–93] WSLR 41.

103 *Re Fa'asaleleaga* (No 2) *Territorial Constituency, Laupepa v Eikeni* [1970–9] WSLR 254; *Re Individual Voters' Roll* [1970–9] WSLR 245; *Re Aleipala (Itupa I Lalo) Territorial Constituency* [1970–9] WSLR 247; *In re Palauli (Le Falefa) Territorial Constituency* [1970–9] WSLR 259; *In re Vaisigano (No 1) Territorial Constituency* [1960–9] WSLR 179.

104 [1996] VUMC 1; reversed on appeal, *Banga v Waiwo* [1996] VUSC 5. These cases are discussed in Corrin, J, 'Bedrock and steel blues: finding the law applicable in Vanuatu' (1998) 24 *CLB*, p 594.

105 Cap 192.

106 (1926) II Tongan LR 22.

107 *Ibid*, p 24.

Again, in Samoa,¹⁰⁸ Solomon Islands¹⁰⁹ and Tuvalu,¹¹⁰ the courts have, on a number of occasions, taken into account customary practices with regard to hospitality in assessing evidence suggesting bribery, treating or undue influence at elections.

Application of customs and customary law by customary leaders

So far in this chapter, the focus of discussion has been on the application of customs and customary laws in the legal systems of countries of the region. But, this would provide quite an unbalanced picture of the role of customs and customary law in countries of the region today, if there was not also some mention of the application of customs and customary laws by customary leaders. This is because, in every country of the region, customary leaders continue to apply customs and customary law to the members of their community as a form of social control, regardless of whether such customs or customary laws have also been incorporated into the legal system of the country.

The matters in respect of which customs or customary law may be applied by the customary leaders vary considerably. They may relate to the personal affairs of individual members of the community, for example, marriage, separation, divorce and adoption of children. They may relate to the physical

108 In two cases, *In re Gaifomauga (No 2) Territorial Constituency* [1960–9] WSLR 169 and *Re Fa'asaleleaga (No 2) Territorial Constituency, Laupepa v Eikeni* [1970–9] WSLR 254, it was held that the provision of foodstuffs and gifts of money were normal occurrences in accordance with *fa'a Samoa*, or Samoan custom, and did not constitute bribery or treating. On the other hand, in *In re the Individual Voters' Roll, Moore v Lober* [1970–9] WSLR 245, *In re Aleipata (Itupa I Lalo) Territorial Constituency, Kalolo v Tamatoa* [1970–9] WSLR 247, and *In re Palauli (Le Falefa) Territorial Constituency, Palenato v Pita* [1970–9] WSLR 258, it was held that the gifts and presentations went well beyond what was appropriate under Samoan custom, and constituted the offences of bribery or treating.

109 In *Thugea v Paeni* [1985/86] SILR 22, the successful candidate was able to satisfy the High Court that some gifts of money and a clock were payments made in accordance with custom and not for the purpose of influencing voters. In *Alisae v Salak* [1985/86] SILR 31, the respondent was able to satisfy the court that a payment of \$100 to the daughter of a chief was compensation in custom for bringing strangers to the chief's house late at night, but the court held that 10 cartons of beer given to a friend of the respondent who was also his political agent were intended by the respondent to be used by the friend to influence voters in the village. In *Haomae v Barlett* [1988/89] SILR 35, the High Court held that 'the giving and receiving of gifts, including payment of cash, is part of the custom of Small Malaita', and so a gift of \$5 was not bribery.

110 In *Alama v Tevasa* [1987] SPLR 385, the High Court of Tuvalu held that the feasts provided by some matai and their advice to their communities was in accordance with their traditional role as leaders of their people, and did not amount to treating or undue influence as these terms were used in the Electoral Provisions (Parliament) Ordinance 1980, Cap 102.

well-being of the community, for example, the planting, harvesting or storage of food, the construction or demolition of houses, the provision of footpaths or drains or water supplies. They may relate to social relationships, for example, the imposition of curfews, or the punishment of offences, such as trespass, noisy disturbances or illicit sexual relations.

The frequency and regularity with which traditional leaders exercise these forms of social control vary greatly, depending partly upon the size of the community and partly upon its location and homogeneity. In rural areas where the community is large, there will normally be a regular meeting on a certain day of the week. In urban areas where the community is more dispersed, and in rural areas where the communities are small, chiefs will meet with their people to exercise social control only as and when required.

In most countries, written laws have left the traditional leaders to continue to apply custom or customary law to the members of their communities outside the legal systems established by the written laws. In Samoa, however, an effort has been made by the legislature to integrate the application of custom by traditional leaders into the legal system. The Village Fono Act 1990 validates the powers of village *fono*¹¹¹ to deal with matters and residents of the village in accordance with the customs and usages of that village. In addition, the act provides that every village *fono* shall have power to make rules 'for the maintenance of hygiene', for 'governing the development and use of village land for the economic betterment of the village', and 'shall have power to direct that any work be done which is required under these rules'.¹¹² The act expressly provides that a village *fono* shall have power to impose any punishment permitted by custom, and also to impose a fine of money or other goods, and to order that an offender do work on village land.¹¹³ There is a right of appeal from decisions of the *fono* to the land and titles court, which brings its decisions within the control of the legal system.

Conclusion

From this survey of the application of customs and customary law in the region, it is evident that there is express provision for customs or customary law to be applied for the determination of rights to customary land in all countries except Tonga. There is express authorisation for customs or customary law to be applied to other matters specified by legislation in Kiribati, Nauru and Tuvalu, and there is express authorisation for customs or customary law to be applied to other matters more generally and without specification in Samoa, Solomon Islands and Vanuatu. In addition to these express authorisations to apply customs or customary law, there is, in all countries,

111 Village Fono Act 1990, s 5.

112 *Ibid*, s 6.

113 *Ibid*, s 11.

opportunity for the courts to apply custom or customary law directly to situations arising in times when no written laws existed, and also indirectly or interstitially within the context of existing written laws, as, for example, in the interpretation of ambiguous terms in the written law, the exercise of discretion provided by the written law, and the assessment of the credibility or veracity of witnesses.

It should also be mentioned that some countries have sought to incorporate customary law into state law by enacting legislation which attempts to reduce custom to statutory form or even to codify it. This is discussed in Chapter 2. Finally, it is always important to remember that, as explained in the previous section of this chapter, customs and customary law have an important role to play outside the legal system when they are applied by the traditional chiefs and leaders to members of the communities under their leadership as a form of social control.

Constitutional law

Introduction

Constitutional law, in its widest sense, comprises all those laws, both written and unwritten, that provide for the establishment and functioning of the government of a country. Some would also argue that established practices relating to the operation of government, often called constitutional conventions, are part of the constitutional law of a country in its widest sense.

In all countries of the region except Tokelau,¹ most of the principal laws relating to the government of the country are to be found collected in one law called the constitution. In Tokelau, there is no written constitution, and the basic laws establishing the government of Tokelau are to be found in legislation enacted by the Parliament of New Zealand and subsidiary legislation made under the authority of such legislation.

It is important to remember that, although the written constitution of a country is expressed to be ‘the Constitution’, and is usually also stated to be the supreme law of the country, it may not contain all the principal written laws relating to the government of the country, and it will not contain any of the principles of common law nor any of the established conventions which relate to the government of the country. Thus, the constitutional law of the country may extend beyond its written constitution. The written constitution normally contains most of the principal written laws relating to the government of the country, but usually not all of these written laws, and certainly none of the unwritten principles of common law or customary law, nor any constitutional conventions.

In this chapter, after a short historical background, attention is given first to written constitutions and then to those aspects of the constitution that

1 A referendum was held in February 2006 to decide whether Tokelau would enter into a relationship of free association with New Zealand, in which case it would have had its own constitution (a draft constitution had already been prepared – see further Council of Ongoing Government of Tokelau web site: <http://www.tokelau.org.nz/>). However, the two-thirds majority required to make the change was not obtained, although 60% of voters were in favour.

are provided in legislation, subsidiary legislation, common law and constitutional conventions.

Historical background

Pre-dependency

Of all the island countries in the Pacific Ocean, it was in the large volcanic islands of the northern Pacific, now known as the islands of Hawaii, that a unified government first asserted itself. In the last years of the 18th century the great warrior chief of Hawaii, Kamekameha the First, forged the neighbouring islands into the kingdom of Hawaii, and promulgated a written constitution to regulate the government of that kingdom. In the southern Pacific it was not until the middle of the 19th century that similar developments occurred. Prior to that time, there were no countries in the region in which a government for the whole country, or even for a significant part of the country, had been successfully achieved. At that time, the countries of the region were inhabited by many separate communities, which, although usually of the same racial origin, were ruled by their individual leaders or chiefs. These communities were regulated partly by the customs and practices which had become well established in these communities, and partly by the orders and commands of their leaders, subject always to disruption, from time to time, by natural catastrophes and man-made disasters. Between the leaders of various communities, there often developed allegiances and alliances of an impermanent nature, but these did not purport to provide a structure or framework of government. They provided arrangements for mutual assistance and co-operation, especially in times of emergencies, but little more. In some countries, however, as the 19th century advanced, leaders of exceptional prowess and intelligence managed to assert their dominance so effectively over large areas of the country that they could claim that these areas were subject to their governance. To maintain their control over such extended areas, often these dominant or paramount leaders felt that they could not rely solely upon the customs and practices of individual communities, nor upon the goodwill of individual chiefs and oral arrangements made with individual chiefs. Many of the dominant chiefs sought the advice and assistance of European missionaries and businessmen, and followed their suggestions to record in writing the major laws that were to apply throughout the territory under their control.

In Fiji, written constitutions and laws were issued in 1867 both by Seru Cakobau, paramount chief of *Bau* and much of *Viti Levu*, and by the paramount chiefs of *Bua*, *Cakaudrove* and *Lau*. In 1871, Seru Cakobau issued a more ambitious written constitution which purported to be for all of the Fiji Islands, while the *Tui Lau* and the *Tui Nayau* promulgated a rival written constitution for the chieftdom of Lau in the eastern islands of the group. In 1873,

Seru Cakobau enacted a further written constitution for the whole country, but this proved to be as short lived as its predecessor, coming to an end when the country was ceded to Great Britain as a colony on 10 October 1874.

In Samoa in 1873, seven paramount chiefs or *tumua* of the islands of Savaii and Upolo of Samoa met and approved a written constitution for the two islands. This was followed, in 1875, by another written constitution which made provision for a kingship, to rotate between the two princely families of Malietoa and Tupoa, and for a premiership, to be held by Albert Steinberger, a talented but self-seeking American adventurer. Written laws were issued in the name of the first king, Malietoa, but, in 1876, the consuls of Britain, Germany and the United States brought pressure to bear on the king to order the deportation of Steinberger, and the government disintegrated. Another written constitution was promulgated in 1881, providing for a king and a deputy king, but this disappeared when Samoa fell, first, as a condominium under the control of the three overseas powers in 1889 and, later, as a protectorate of Germany in 1900.

In Tonga, there also emerged a leader of sufficient stature – Taufa’ahau, later King George Tupou I – to assert his control over, first, part and, later, all of the islands of Tonga. In 1839, he issued a written code of laws for the northern islands of Vava’u, and later, in 1850 and in 1862, he promulgated written codes of laws for the whole country, which were followed in 1875 by a written constitution for Tonga. This constitution, although frequently amended, was never replaced, even when Tonga became a protected State of Britain at the end of the 19th century, since British control was mainly confined to defence, foreign affairs and judicial proceedings against non-Tongans inside the country.

In the other countries of the region, before they came under the control of European governments, constitutions were not enacted to regulate the government of the whole country or an identifiable unit of that country because government was not established on such an extended scale. In the countries that were to become the British Solomon Islands Protectorate, Cook Islands Protectorate, Gilbert and Ellice Islands Protectorate, Nauru and New Hebrides Condominium, the individual communities were regulated by custom and the orders of their individual chiefs until they fell under the control of European governments. Although in Niue the kingship of the whole island was revived in 1876, it appears that it did not result in any written constitution for the island.

Dependency

As countries in the region fell under the control of European powers during the 19th century, constituent laws for these countries were enacted by the legislatures of these European countries. The controlling countries did not enact a written constitution for the countries under their control since that might

have suggested a degree of autonomy and independence that was not appropriate for a colony or a protectorate. In the countries falling under the control of Great Britain, that is, British Solomon Islands,² Fiji,³ and Gilbert and Ellice Islands,⁴ constituent laws were enacted in Letters Patent, Orders in Council, and Royal Instructions issued by the British Crown.⁵ In the Anglo-French condominium of New Hebrides,⁶ the constituent laws of that country were provided by the Convention of 1906 and the Protocol of 1922, made by the governments of Great Britain and France. In the countries which came under the control of New Zealand, that is, Cook Islands,⁷ Niue,⁸ Samoa⁹ and Tokelau,¹⁰ legislation was enacted by the Parliament of New Zealand to provide the constituent laws for those countries, and when Nauru¹¹ passed into the control of Australia, legislation enacted by the Parliament of Australia provided the constituent laws of that country.

Any changes to the constituent laws of countries controlled by Britain during this period were made by amendments to, or replacements of, the Letters Patent, Orders in Council and Royal Instructions issued by the British Crown in respect of the British Solomon Islands Protectorate¹² and the colonies of Fiji¹³ and Gilbert and Ellice Islands.¹⁴ Likewise, changes to the constituent laws of Nauru were made by amendments to, or replacements of, the legislation enacted by the Parliament of Australia,¹⁵ and changes to the constituent

2 Pacific Order in Council 1893; Western Pacific (Courts) Order 1961 (UK).

3 Royal Charter establishing the Colony of Fiji (2 January 1875); Letters Patent and Royal Instructions 1880.

4 Pacific Order in Council 1893 (UK); Gilbert and Ellice Islands Order 1915 (UK).

5 These were issued both under the legal authority granted by the common law to the British Crown to make constituent laws for overseas territories not settled by British citizens, and also under the legal authority provided by the Pacific Islanders' Protection Acts 1872 and 1875, and the Foreign Jurisdiction Act 1890 (UK).

6 Convention between the Governments of the United Kingdom and France (20 October 1906); Protocol respecting the New Hebrides between the Governments of the United Kingdom and France (6 August 1912).

7 Cook and Other Islands Government Act 1901; Cook Islands Government Act 1908; Cook Islands Act 1915 (NZ).

8 *Ibid.*

9 Samoa Act 1921 (NZ).

10 Tokelau Act 1948 (NZ).

11 Nauru Island Agreement Act 1919–32 (Aust).

12 Eg, Pacific (Amendment) Order in Council 1953; Pacific (Amendment) Order in Council 1958.

13 Eg, Letters Patent (9 February 1929); Letters Patent (26 November 1930); Letters Patent (24 March 1932); Letters Patent (19 July 1935); Letters Patent (15 July 1936); Letters Patent (2 April 1937); Letters Patent (1 February 1943); Letters Patent (18 May 1944); Royal Instructions (31 January 1914); Royal Instructions (9 February 1929); Royal Instructions (2 April 1937).

14 Eg, Gilbert and Ellice Islands Order 1975; Gilbert and Ellice Islands (Amendment) Order 1977; Gilbert and Ellice Islands (Amendment) (No 2) Order 1977 (UK).

15 Eg, Nauru Island Agreement Act 1919–32; Nauru Act 1965 (Aust).

laws of Cook Islands,¹⁶ Niue,¹⁷ Samoa¹⁸ and Tokelau¹⁹ were made by legislation enacted by the Parliament of New Zealand. In the condominium territory of New Hebrides, changes to the constituent laws were made by way of amendments to the protocol, which were agreed to from time to time by the British and French governments.²⁰

In the later period of dependency, when it became obvious that the dependent country was destined to achieve self-governance or independence, then the objection to a written constitution – that it would have been inappropriate to the status of the country – fell away. So, in many of the countries of the region in the later stages of their dependencies, written constitutions were provided by the controlling countries for the countries under their control. As the British colonies of Fiji and Gilbert and Ellice Islands and the British Solomon Islands Protectorate moved towards independence in the 1960s and 1970s, Britain enacted written constitutions to increase the extent of autonomy. For Fiji, written constitutions were enacted in 1963 and 1966 by British Orders in Council to provide increasing self-government in that colony.²¹ For British Solomon Islands Protectorate, Britain enacted written constitutions in 1960, 1964, 1967, 1970 and 1974 to provide the basis for the different forms of self-government that were tried during this period.²² When the Ellice Islands and the Gilbert Islands expressed a wish to sever their connection with each other, written constitutions were enacted by British Orders in Council in 1975 to provide the constituent laws for the two separate colonies of Tuvalu²³ and Gilbert Islands.²⁴ These were amended by Britain from time to time as the countries advanced towards independence.

In Nauru, which was under the control of Australia, and in Cook Islands, Niue, Tokelau and Western Samoa, which were under the control of New Zealand, there was no attempt by the controlling countries to enact a written constitution during the period of dependency. Provision for increasing

16 Eg, Cook Islands Amendment Act 1946; Cook Islands Amendment Act 1957.

17 *Ibid*; Niue was still part of the Cook Islands at that time.

18 Samoa Amendment Act 1952; Samoa Amendment Act 1956; Samoa Amendment Act 1957.

19 Tokelau Amendment Act 1967; Tokelau Amendment Act 1969; Tokelau Amendment Act 1970; Tokelau Amendment Act 1971.

20 Eg, the various Exchanges of Notes between the Governments of United Kingdom and France ((4 September 1930); (31 January 1935); (24 November and 5 December 1939); (8 December 1939); (20 April 1951); (26 January 1959)).

21 Fiji (Constitution) Order 1963; Fiji (Constitution) Order 1966.

22 British Solomon Islands (Constitution) Order 1960; British Solomon Islands Order 1964; British Solomon Islands Order 1967; British Solomon Islands Order 1970; British Solomon Islands Order 1974.

23 Tuvalu Order 1975; Tuvalu (Amendment) Order 1977; Tuvalu (Amendment) (No 2) Order 1977; Tuvalu (Amendment) Order 1978.

24 Gilbert Islands Order 1975; Gilbert Islands (Amendment) Order 1976; Gilbert Islands (Amendment) Order 1977; Gilbert Islands (Amendment) (No 2) Order 1977.

self-government for Cook Islands,²⁵ Niue,²⁶ Samoa²⁷ and Tokelau²⁸ was made by way of legislation enacted by the Parliament of New Zealand, and for Nauru, by legislation enacted by the Parliament of Australia.²⁹

In Tonga, as mentioned earlier, a written constitution was enacted in 1875 by King Tupou I, and when Tonga became a protected state of Britain after the death of King Tupou I, Treaties of Friendship were entered into which enabled the British Government to control the foreign affairs and defence of Tonga and also to provide for the trial of non-Tongans in the high commissioner's court in Tonga, but no change was made to the constitution which remained in place. During this period the Treaties of Friendship were held to override the constitution where they were in conflict.³⁰

Independence

To bring a country to independence and, to a lesser extent, to self-governance, important changes normally have to be made to the structure of government, and, therefore, some substantial modifications have to be made to the constituent laws. These changes may be made by way of legislation or subsidiary legislation enacted by the controlling country, as before, or they may be made by a written constitution. The advantage of the latter over the former is that a written constitution symbolises and expresses, both to people within the country and to people outside, the very important changes that have been made to the government of the country, and enhances the status and the national identity of the newly emerged state. Not surprisingly, in all countries in the region, the constituent laws designed to provide for independence or self-governance were set out in a written constitution, except in Tonga where, as mentioned earlier, the 1875 Constitution, which was enacted when the country was independent, remained throughout the period of dependency until the country achieved complete independence in 1970 by amendments to the Treaty of Friendship.

A constitution to provide for independence may be made in various ways. One method of making a written constitution is enactment of the new constitution by the legislature of the former controlling country as its last act before relinquishing its reins of control. The advantage of this method of

25 Cook Islands Amendment Act 1946; Cook Islands Amendment Act 1957.

26 Cook Islands Amendment Act 1957; Niue Act 1966; Niue Amendment Act 1968; Niue Amendment Act 1971.

27 Samoa Amendment Act 1952; Samoa Amendment Act 1956; Samoa Amendment Act 1957; Samoa Amendment Act 1959.

28 Tokelau Amendment Act 1967; Tokelau Amendment Act 1969; Tokelau Amendment Act 1970; Tokelau Amendment Act 1971; Tokelau Amendment Act 1982.

29 Nauru Act 1965.

30 *Cameron v Tonga Ma'a Tonga Kautaha* [1914] 1 Tonga LR 18.

enacting the constitution for independence, at least as far as the former controlling country is concerned, is that it can still exert some influence over the shape and content of the constituent laws. Such a method of enactment also has an advantage for the emerging independent country, in that it can rely upon the greater legal and administrative resources of the controlling country to produce the new constituent laws. The former controlling country is also more likely to be sympathetic to requests for assistance and support of various kinds – administrative, financial, legal and technical, both immediately and in the longer term – if it has been able to have some say in the design of the constituent laws of the former subordinate country. This was the path that was followed to provide the constituent laws to provide for the independence of the former British dependencies of Fiji,³¹ Solomon Islands,³² Kiribati³³ and Tuvalu.³⁴ The constituent laws for these countries as they became independent were contained in written constitutions that were drafted in London by British officials, after extensive discussion with local leaders, and brought into force by an Order in Council made by the Queen. This same path was followed to provide for the self-governance of Cook Islands³⁵ and Niue.³⁶ Written constitutions were enacted by the Parliament of New Zealand, after extensive discussions with leaders of each country.

In the Anglo-French condominium of New Hebrides, because independence required the revocation by Britain and France of the protocol respecting the New Hebrides which had provided the constituent laws of the country since 1922, it was also necessary that the constitution for independence be approved by Britain and France, and so it was formally brought into force by an Exchange of Notes between the two European powers, although they largely accepted a draft constitution that had been prepared by a Constitutional Committee appointed by a New Hebridean Government of National Unity in 1979.³⁷

Another method that may be adopted to provide the constitution for independence is to have it enacted by a locally convened assembly or convention which is given power by the outgoing controlling country to enact a written constitution for the country. This was the path that was followed in Nauru and Samoa, where constitutional conventions were established by the controlling countries, Australia and New Zealand, respectively, comprising members of the legislature and other community leaders, and these approved

31 Fiji Independence Order 1970 (UK).

32 Solomon Islands Independence Order 1978 (UK).

33 Kiribati Independence Order 1979 (UK).

34 Tuvalu Independence Order 1978 (UK).

35 Cook Islands Constitution Act 1964; Cook Islands Constitution Amendment Act 1965 (NZ).

36 Niue Constitution Act 1974 (NZ).

37 Exchange of Notes between the Governments of United Kingdom and France (23 October 1979).

and enacted written constitutions for these countries in 1968 and 1960, respectively.

The third path that may be followed to provide the constitution for independence is to rely upon an existing constitution, with or without some modification. This was the path that was followed in Tonga. As mentioned earlier, the Treaties of Friendship between the United Kingdom and Tonga between 1900 and 1970 that provided for Tonga to be a protected state were mainly designed to enable Britain to control the foreign affairs and defence relationships of Tonga. Therefore, they did not involve direct interference with the framework of government of the country and the constitution remained intact, so that when Tonga became fully independent in 1970 it was not necessary to make any changes to the constitution to allow for the transition to full independence. All that was done was to revoke the relevant clauses in the Treaty of Friendship.³⁸

Written constitutions

As discussed above, there has been considerable diversity as to the way in which the written constitutions of countries in the region have been made. As explained earlier,³⁹ when a country is independent, it will normally choose to bring into force a written constitution and it will normally choose to do this by legislation enacted by the usual legislature. Although a special constitution-making body may be established to enable a wider representation of public opinion than is possible under the normal electoral system for a legislature, in practice, on all occasions that a written constitution has been made by an independent country in the region, it has been made by the normal legislature of that country.⁴⁰

When a country is legally dependent upon another country, as all the countries of the region were at one time, then the controlling country will normally wish to enact the constitution of the dependent country to ensure that it can exert sufficient control over the contents of that constitution. When the dependent country is not politically developed, a written constitution is usually considered inappropriate, since it might suggest a status and importance for the controlled country which it does not have. Instead, the controlling country normally provides for the structure of government of the dependent country by legislation enacted by its legislature⁴¹ or by subsidiary legislation

38 Exchange of Letters between the Governments of the United Kingdom and Tonga (19 May 1970).

39 See Chapter 2.

40 Eg, Constitutions of 1871 and 1873, 1990 and 1997 of Fiji; Constitutions of 1873, 1875 and 1881 of Samoa; Constitution of 1875 of Tonga; Constitution of 1986 of Tuvalu.

41 Eg, Cook Islands Acts 1908 and 1915 (NZ); Nauru Island Agreement Acts 1919 and 1932 (Aust); Niue Act 1966 (NZ).

made by its officials.⁴² As, however, the dependent country approaches independence or internal self-government, the controlling country may be prepared to enact a written constitution for the dependent country, to lead it to independence, as did Britain with regard to the colonies of Fiji,⁴³ Gilbert Islands⁴⁴ and Tuvalu,⁴⁵ and the protectorate of British Solomon Islands,⁴⁶ and as did New Zealand with regard to Cook Islands⁴⁷ and Niue.⁴⁸

In the case of Nauru and Western Samoa, Australia and New Zealand, respectively, went further and allowed for the written constitution providing for independence or self-governance of the former dependent country to be made by a special constitution-making body, a constitutional convention, in that country – although in the case of Nauru the draft for the constitution-making body to consider was prepared by the controlling country. In the case of New Hebrides, Britain and France permitted the written constitution for independence to be drafted by a committee of persons drawn from within the controlled country, but subject to approval and amendment by the controlling countries, which then formally enacted it into law.⁴⁹

Structure and format of written constitutions

At one time, there was a very marked similarity in the format and style of some constitutions of the region by virtue of the fact that they originated from the same source. The pre-independence and independence constitutions of Fiji, Kiribati, Solomon Islands and Tuvalu were very similar in that they had been drafted by officials of the Foreign and Commonwealth Office of the British Government and enacted by the British Privy Council. The current constitutions providing for the self-governing status of the Cook Islands and

42 Eg, in relation to Fiji: Royal Charter (2 January 1875); Letters Patent (17 December 1880; 9 February 1929; 26 November 1930; 19 July 1935; 15 July 1936; 2 April 1937; 1 February 1943; 18 May 1944); Royal Instructions (31 January 1914; 9 February 1929; 2 April 1937). Eg, in relation to Gilbert and Ellice islands: Pacific Order in Council 1893; Gilbert and Ellice Islands Order 1915; Western Pacific (Courts) Order 1961. Eg, in relation to British Solomon Islands Protectorate: Pacific Order in Council 1893; Western Pacific (Courts) Order 1961. Eg, in relation to New Hebrides: Pacific Order in Council 1893; Anglo-French Convention 1906; Anglo-French Protocol 1914; Western Pacific (Courts) Order 1961.

43 Fiji (Constitution) Order 1963; Fiji (Constitution) Order 1966.

44 Gilbert Islands Order 1975.

45 Tuvalu Order 1975.

46 British Solomon Islands (Constitution) Order 1960; British Solomon Islands Order 1964; British Solomon Islands Order 1967; British Solomon Islands Order 1970; British Solomon Islands Order 1974.

47 Cook Islands Constitution Act 1964 (NZ).

48 Niue Constitution Act 1974 (NZ).

49 Exchange of Notes between Governments of the United Kingdom and France (23 October 1979).

Niue also had similarities of structure and style because they were drafted by persons commissioned by the External Affairs department of the New Zealand Government, and enacted by the New Zealand Parliament. This degree of similarity was broken both when the legislatures of Fiji Islands and Tuvalu repealed their constitutions and replaced them with constitutions drafted by persons commissioned specially for the purpose, and when the Constitution of Cook Islands was substantially amended by the Parliament of that country. There is still a degree of similarity in format and structure of some of the constitutions of the region, but not as great as before.

The written Constitutions of Fiji Islands, Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu commence with a prefatory provision that describes some important events in the history of the country and/or the basic values upon which the constitution is based. The enacting parts of these constitutions commence with some general provisions about the nature of the state and the status of the constitution. In Tonga, such provisions are to be found later in the constitution. The Constitutions of Fiji Islands, Kiribati, Nauru, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu then set out the fundamental rights and freedoms of individuals in the country and rights to citizenship. In Cook Islands, the provisions relating to fundamental rights and freedoms, which were added some years after the enactment of the constitution, are to be found later in the constitution. All written constitutions of the region contain provisions establishing the executive, legislative and judicial branches of government, and, also, except for Tonga, the public service and public finances. The Constitutions of Samoa, Solomon Islands, Tonga and Vanuatu contain express provisions about land.

In all constitutions of the region, there are provisions regulating the amendment of the constitution, and the Constitutions of Cook Islands, Fiji Islands, Kiribati, Niue, Samoa, Solomon Islands and Tuvalu contain provisions regulating the repeal of the constitution, and, also, except for Cook Islands, the suspension of the constitution. There are, also, in all constitutions except for that of Tonga, transitional provisions providing for the continued existence of laws and public officers and institutions, despite their non-compliance with the constitution, with certain specific exceptions. These provisions are examined in detail later in this chapter, but first there will be a consideration of the principles developed by the courts in the region for the interpretation of written constitutions.

Interpretation of written constitutions

Initially courts in the region considered that written constitutions should be interpreted in the same way as ordinary legislation or subsidiary legislation.⁵⁰

⁵⁰ *R v Talai* (1975) 21 FLR 105; *Veitata v R* (1977) 23 FLR 294; *In re Ubenide Election* Nauru Law Reports, 1969 to 1982 Part A, 5.

This was not altogether surprising because the early constitutions were enacted as a schedule to legislation or subsidiary legislation, for example, Fiji Independence Order 1970, Kiribati Independence Order 1979, Solomon Islands Independence Order 1978, Tuvalu Independence Order 1978, or were enacted by members of the legislature, sitting as a constitutional convention, for example, Nauru Constitutional Convention 1968, Samoa Constitutional Convention 1960.

However, after the Privy Council in the early 1980s emphasised first that the fundamental rights provisions in the written constitutions should be regarded as *ejusdem generis* and be given a generous and flexible meaning,⁵¹ and then that this interpretation was also to be applied to other provisions in written constitutions,⁵² the courts in the region followed the lead set by the Privy Council and have held that all provisions in written constitutions, both those relating to fundamental rights and freedoms,⁵³ and those relating to the structure of government,⁵⁴ should be interpreted flexibly, unless the terms of the provisions are precise and unambiguous.

When interpreting the words of a constitution flexibly, the courts have had regard not only to the substantive terms of the constitution, but also to the terms of the preamble, if any, of the constitution. While the words of a preamble of a constitution are not expressed to enact anything, they are descriptive and indicate matters that were regarded by the drafters of the constitution as significant background to the constitution. They therefore can be, and have been, taken into account to determine the meaning of the terms of the substantive provisions of the constitution when those terms are ambiguous.⁵⁵ The courts have also stressed the importance of the circumstances in which the constitution was brought into force as a factor to be considered when interpreting the meaning to be given to words in a constitution.⁵⁶

51 *Minister of Home Affairs v Fisher* [1980] AC 319; *Ong Ah Chuan v Public Prosecutor* [1981] AC 648.

52 *Attorney-General of Fiji v Director of Public Prosecutions* [1983] 2 AC 672.

53 *Sundarjee Bros v Coulter* (1987) 33 FLR 74; *Attorney General v Saipa'ia (Olomalu)* [1980–93] WSLR 41; *Director of Public Prosecutions v Kimisi* [1991] SILR 82; *Kenilorea v Attorney-General* [1984] SILR 179; *Loumia v Director of Public Prosecutions* [1985–6] SILR 158; *Tuitavake v Porter* [1988] Tonga LR 14; *Touliki Trading v Fokofonua* [1996] TOCA 1; *In re Broadcasting Bill* [1989–94] 2 Van LR 679; *Bill Willie v Public Service Commission* [1989–94] 2 Van LR 696; *Utoikamanu v Lali Media Group Ltd* [2003] TOCA 6; *Taione v Kingdom of Tonga* [2004] TOSC 48.

54 *Henry v Attorney-General* [1985] LRC (Const) 1149; *In re Reference by Queen's Representative* [1985] LRC (Const) 56; *Ah Koy v Registration Officer* (1995) 39 FLR 191; *The State v Registration Officer* (1995) 41 FLR 204; *The Speaker v Danny Philip* (1990) SILR 227; *Finau v Alafouki* [1989] Tonga LR 66; *Fuko v Vaikona* [1990] Tonga LR 14; *Tukuafu v Latu* [2005] TOCA 12.

55 *Attorney General v Saipa'ia (Olomalu)* [1980–93] WSLR 41.

56 See, eg, *Attorney General v Saipa'ia (Olomalu)* [1980–93] WSLR 41; *Tuitavake v Porter* [1988] Tonga LR 14; *In re Constitution, Pita v Attorney-General* [1995] WSCA 6; *Touliki Trading Enterprises v Fakafanua* [1996] Tonga LR 145; *Tukuafu v Latu* [2005] TOCA 12.

There has been some discussion by courts in the region as to whether account should be taken of the views of the persons who were members of the body that drafted or approved the constitution as to the meaning of words in the constitution which are ambiguous. In some cases the court has been prepared to do so.⁵⁷ However, if the views are only those of individual members, rather than of the body as a whole,⁵⁸ especially if they are conflicting,⁵⁹ the court is not likely to give them much weight. Even without these factors, in Cook Islands⁶⁰ and in Samoa⁶¹ the courts of appeal have been willing to consider the views of the constitution makers only after the court has made its own decision as to the meaning of the words.

If the terms of the provisions of a written constitution are clear and precise and do not lend themselves to any flexibility, then they must be given their normal dictionary meaning.⁶²

Fundamental rights and freedoms

The written constitution of each country of the region, except Niue, describes and protects fundamental rights and freedoms of the people of the country. In the Constitutions of Cook Islands and Vanuatu, the provisions of the constitution follow the model of the Canadian Bill of Rights and, therefore, describe both the rights and freedoms, and also the exceptions, in very general terms. In the Constitutions of Fiji Islands, Kiribati, Nauru, Samoa, Solomon Islands and Tuvalu, the provisions follow the style of the Universal Declaration of Human Rights made by members of the United Nations in 1948, and of the European Convention for the Protection of Human Rights and Fundamental Freedoms made by the Council of Europe in 1950, and, therefore, express both the rights and freedoms, and also the exceptions to them, in detailed terms. As mentioned earlier, in the early 1980s the Privy Council held that fundamental rights provisions based on the Universal Declaration and the European Convention should be given a generous and flexible interpretation unless the words are too precise and exact to allow any flexibility. These principles have been expressly recognised and adopted

57 *In re the Constitution of Nauru*, Nauru Law Reports, 1969 to 1982, Part A, 11.

58 *Vohor v Attorney-General* [2004] VUCA 22.

59 *In re Constitutional Reference No 3 of 1977*, Nauru Law Reports, 1969 to 1982, Part A, 83.

60 *In re Reference of Queen's Representative* (1985) LRC (Const) 56.

61 *Attorney General v Saipia'ia (Olomalu)* [1980–93] WSLR 41.

62 *Attorney-General of Fiji v Director of Public Prosecutions* [1983] 2 AC 672; *In re Reference by Queen's Representative* [1985] LRC (Const) 56; *Fuko v Vaikuna* [1990] Tonga LR 148; *Minister for Provincial Government v Guadalcanal Provincial Assembly* [1997] SBCL 1.

by the Courts of Appeal of Cook Islands,⁶³ Samoa,⁶⁴ Solomon Islands,⁶⁵ Tonga⁶⁶ and Vanuatu.⁶⁷

The fundamental rights and freedoms that are recognised by the Constitutions of Cook Islands, Fiji Islands, Kiribati, Nauru, Samoa, Solomon Islands, Tuvalu and Vanuatu comprise the rights to

- life, liberty and freedom from slavery and forced labour;
- freedom from torture and inhuman and degrading treatment;
- freedom from compulsory acquisition or deprivation of property; freedom from search and entry;
- the protection of the law in various specific respects;
- freedom of conscience, expression, assembly and association, and movement; and
- freedom from discrimination and inequality of treatment on certain grounds.

All of these rights and freedoms, except the freedom from torture, are stated to be subject to exceptions which are specified in the provisions.

One issue of a general nature, which is very basic to the application of the provisions protecting fundamental rights and freedoms, is whether the fundamental rights and freedoms described in the constitutions are to be observed by, and are therefore enforceable against, the state, or private individuals, or both. In the Constitution of Fiji Islands, it is expressly stated that the fundamental rights and freedoms provisions bind only the legislative, executive and judicial branches of government and all persons holding public office.⁶⁸ On the other hand, the Constitution of Tuvalu states that the provisions apply between individuals as well as between government bodies and individuals.⁶⁹ In other countries of the region, the constitutions do not contain any express statement. The Privy Council has, on several occasions, asserted that the fundamental rights and freedoms provisions in written constitutions of Caribbean countries are to be observed only by the state and not by private individuals.⁷⁰ This view has been followed by the High Court of Kiribati,⁷¹

63 *Clarke v Karika* [1985] LRC (Const) 732.

64 *Attorney General v Saipa'ia (Olomalu)* [1980–93] WSLR 41.

65 *Kenilorea v Attorney General* [1984] SILR 179; *Loumia v DPP* [1985–6] SILR 158.

66 *In re Broadcasting* [1989–94] 2 Van LR 679; *Bill Willie v Public Service Commission* (1989–94) 2 Van LR 634.

67 *Tu'itavake v Porter* [1981] Tonga LR 14.

68 Constitution of Fiji Islands, s 21(1).

69 Constitution of Tuvalu, s 12(1).

70 *Maharaj v Attorney General of Trinidad and Tobago* [1979] AC 385; *Thornhill v Attorney General of Trinidad and Tobago* [1981] AC 61; *Attorney General of Trinidad and Tobago v Whiteman* [1992] 2 AC 240.

71 *Teitinnong v Ariong* [1987] LRC (Const) 517.

and by the majority of the Court of Appeal of Solomon Islands.⁷² On the other hand, Samoa⁷³ and Vanuatu⁷⁴ courts of first instance have, on several occasions, but without, it would seem, full argument, held that the fundamental rights and freedom provisions apply to, and are to be observed by, private individuals. More recently, the Court of Appeal of Solomon Islands has suggested that some fundamental rights provisions may be enforceable only against the state whereas others may be enforceable against private individuals as well.⁷⁵

Another problem of a general nature regarding the interpretation and application of fundamental rights provisions in the Constitutions of Kiribati, Nauru and Solomon Islands is that they are preceded by an introductory section stating that 'whereas' the people of the country are entitled to certain specified rights and freedoms, 'therefore' the provisions which follow in the remainder of the part are designed to protect these rights and freedoms. There was a similar provision in the 1970 Constitution of Fiji. The legal significance of this introductory section is not altogether clear. It contains the word 'whereas', which is usually used in preambles rather than substantive enacting provisions, and it states the purpose of the provisions that follow it, and these two features would suggest that the provision is only a preamble to the sections that follow, and not an enacting section, so that it does not add to, or detract from, them. On the other hand, this provision is set out like a separate section, with a separate number, amongst the substantive enacting sections, which would suggest it is designed to have effect as a substantive enactment. A diversity of judicial view appears in the region as to the effect of this introductory provision in the part relating to fundamental rights and freedoms. In *Jeremiah v Nauru Local Government Board*,⁷⁶ the introductory provision was held to be only a preamble and to have no enacting effect, so that a right to 'family life' which was referred to in the introductory section, but not in the specific provisions that followed, did not exist in Nauru. On the other hand, in *Fiji Waterside Workers Union v Reginam*,⁷⁷ the Supreme Court (now the High Court) of Fiji held that the introductory provision which appeared in the 1970 Constitution was enacting, and so added a limitation to the fundamental freedom of expression in respect of 'the public interest' which was not contained in the specific section protecting freedom of expression. A similar diversity appears in decisions of the Privy Council as to the effect of such a

72 *Loumia v DPP* [1985-6] SILR 158.

73 *Tuivaiti v Sila* [1980-93] WSLR 17; *Mauga v Leituala*, Court of Appeal, Samoa (unreported) (9 December 2005).

74 *Noel v Toto* [1995] VUSC 3; *Public Prosecutor v Kota* (1989-93) 2 Van LR 661.

75 *Ulufa'alu v Attorney-General* [2005] 1 LRC 698.

76 *Nauru Law Reports* [1969-84] Part A, 11.

77 (1977) 23 FLR 196.

provision in constitutions in other parts of the world. In *Olivier v Buttigieg*,⁷⁸ the Privy Council described it as ‘a prefatory or explanatory note in regard to the sections which are to follow’. On the other hand, in *Société United Docks v Government of Mauritius*,⁷⁹ the Privy Council held it to be ‘an enacting section’ which affected the meaning of the provisions that followed.

The Constitution of Niue does not contain any provisions which relate to fundamental rights and freedoms. The Constitution of Tonga contains provisions which relate to most fundamental rights and freedoms, but not, in express terms, to the right to freedom from torture or inhuman or degrading treatment, nor to the right to freedom of movement, nor to some aspects of the right to the protection of the law.

There have been a number of reported judicial decisions in the region which have discussed various aspects of the fundamental rights and freedoms provisions of the constitutions, but they cannot be described in detail in a book of this size: right to life;⁸⁰ right to property;⁸¹ right to independent and unbiased tribunal;⁸² right to a fair trial within a reasonable time;⁸³ right to hearing in public;⁸⁴ right to legal counsel;⁸⁵ right to examine witnesses;⁸⁶ right to equality and freedom from discrimination;⁸⁷ right to freedom of expression;⁸⁸ right to freedom of movement;⁸⁹ right to freedom of assembly

78 [1967] 1 AC 115.

79 [1985] AC 585.

80 *Loumia v DPP* [1985–6] SILR 158.

81 *Fugui v Solmac Construction Co* [1982] SILR 231; *Touliki Trading Enterprise v Fakafanua* [1996] Tonga LR 145.

82 *Veitata v R* (1977) 23 FLR 294; *Manedetea v Kulagoe* [1984] SILR 20; *Kenilorea v Attorney General* [1984] SILR 179; *Taurii v Kerehote* [1985] SILR 80; *Qalo v Kebaku* [2004] SBCA 5.

83 *Kimisi v DPP* [1990] SILR 82; *Police v Faulkner* [2005] WSSC 4; *Police v Ropati* [2005] WSSC 8; *Toailoa Law Office v Duffy* [2005] WSSC 7.

84 *DPP v Sanau and Hou* [1977] SILR 1; *Prasad v The Queen* (1978) 24 FLR 63.

85 *Police v Puila* [1980–93] WSLR 311; *Advisory Opinion on the Constitution (Legal Aid)* [1980–93] WSLR 555; *Police v Tutakiau* [2000] CKHC 1; see also *Amasone v Attorney-General* [2003] TVHC 4 – right of child to presence of parents.

86 *Police v Stehlin* [1980–93] WSLR 568.

87 *Attorney General v Saipa'ia (Olomalu)* [1980–93] WSLR 41; *Chu Ling v Bank of Western Samoa* [1980–93] WSLR 258; *Clarke v Karika* [1982] LRC (Const) 732; *Tu'itavake v Porter* [1989] Tonga LR 14; *R v Bowie* [1988–9] SILR 113; *R v Musuota*, High Court, Solomon Islands, Civ Cas 41/96 (unreported) (14 March 1997); *Mulitalo v Attorney-General* [2001] WSCA 8.

88 *Fiji Waterside Workers' Union v R* (1977) 23 FLR 196; *Sope v Attorney General* (1980–8) 1 Van LR 411; *Namoa v Attorney-General* [2000] TOCA 14; *Utoikamanu v Lali Media Group* [2003] TOCA 6; *Tukuafu v Lata* [2005] TOCA 12.

89 *Jamakana v Attorney General* [1983] SILR 127; *Tong v Attorney General* [1985–6] SILR 112; *Sundarjee Bros v Coulter* (1987) 33 FLR 74; *Teitinnong v Ariong* [1987] LRC (Const) 517; *Mahdi and ors. v Director of Police*, Supreme Court, Nauru (unreported) (27 May 2003); *Amiri v Director of Police* [2004] NRSC 1.

and association;⁹⁰ right to freedom of worship;⁹¹ right to marry;⁹² and the jurisdiction of the High Court or Supreme Court to enforce constitutional rights and freedoms.⁹³

There are, however, two general comments that may be made with regard to interpretation and application by the courts of the fundamental rights provisions of constitutions of the region. First, it is clear that the power of the courts to imply into these provisions words which are not expressly stated in the text of the provisions is becoming very significant. On several occasions, the courts have held that some of the fundamental rights provisions are subject to implied limitations which the courts have read into the text of the provisions, partly on the basis of the circumstances in which the constitution was brought into force and partly on the basis of international treaties relating to human rights.⁹⁴ Conversely, rights provisions relating to treatment by the police have been interpreted widely to include implied requirements that the police inform the person concerned of those rights, even though these are not expressly stated in the text of the constitutional provisions.⁹⁵

Second, the relationship between fundamental rights and customary law is an issue which is increasingly coming to the fore in countries of the region. In some countries of the region, that is, Cook Islands, Kiribati, Niue and Tonga, the constitutions do not expressly recognise custom as a formal source of law, so the fundamental rights which are recognised by those constitutions must have priority over custom. The position in Fiji Islands is generally the same, but there are limits on right to equality before the law, which include a limitation in favour of certain customary laws relating to land, fishing rights and chiefly title.⁹⁶ In Solomon Islands, customary law is expressly stated to be part of the legal system of the country, but subject to

90 *Fiji Waterside Workers Union v R* (1977) 23 FLR 196; *Tri-Ed Association v SICHE* [1985–6] SILR 173.

91 *Mau Sefo and Others v The Attorney-General and the Alii and Faipule of Saipipi* [2003] WSSC 8; *Lafaiialii v Attorney-General* [2000] WSSC 18.

92 *Jeremiah v Nauru Local Government Board*, *Nauru Law Reports*, 1969–84, Pt A, 11.

93 *Fugui v Solmac Construction Co* [1982] SILR 231; for further discussion of fundamental rights provisions, see Corrin, J, 'Conflict between customary law and human rights in the South Pacific', 1999, vol 1 Commonwealth Law Conference Papers, Kuala Lumpur, pp 251–72, <http://www.lexisnexis.com.my/articles/JenniferCorrin-Care.htm>. Farran, S, 'Customary law and the protection of human rights; conflict or compromise' (1997) 21 *JPacS* 103; Malifa, LT, 'The reception of judges' rules and the right to counsel in Western Samoa' (1997) 21 *JPacS* 161.

94 Equality of treatment – *Attorney General v Saipa'ia (Olomalulu)* [1980–93] WSLR 41; *Tu'itavake v Porter* [1989] Tonga LR 14. Freedom of expression – *Namoa v Attorney-General* [2000] TOCA 14; *Utoikamanu and the Kingdom of Tonga v Lali Media Group* [2003] TOCA 6; *Taione v Kingdom of Tonga* [2004] TOSC 48.

95 Right to counsel – *Police v Tutakiau* [2000] CKHC 1; right to have parents present – *Simona v The Crown* [2002] TVHC 1.

96 Constitution of Fiji Islands 1997, s 38(8).

the constitution.⁹⁷ As the constitution enshrines fundamental rights, customary law is subject to fundamental rights, except in the right to freedom of discrimination which is expressly stated to be subject to law which provides 'for the application of customary law'.⁹⁸ In Samoa, the courts are authorised by the constitution to recognise custom as having the force of law,⁹⁹ but presumably that would have to be subject to the constitution as the supreme law.

In two countries of the region, however, the situation is different. In Tuvalu the constitution contains an express provision for the protection of Tuvaluan values¹⁰⁰ in the exercise of fundamental rights and this provision was relied upon by the High Court of Tuvalu when it declined to uphold a claim by a preacher that he was entitled to introduce a new religion into an island community of Tuvalu, comprising some 800 people.¹⁰¹ In Vanuatu, the constitution recognises both fundamental rights¹⁰² and customary law,¹⁰³ but does not say that one is subordinate to the other. The courts in Vanuatu seem to have assumed that customary law is subordinate to fundamental rights,¹⁰⁴ but there appears to have been no argument by counsel on the question and the issue appears to be open to further debate.

Head of state

In some countries of the region, the written law provides for the head of state to control the government of the country: to be an executive head of state, like the president of the United States of America. The presidents of Kiribati and Nauru fall into this category, since they are vested with powers to appoint and dismiss ministers of government, assign their responsibilities and to convene and preside at meetings of cabinet to determine government policy.¹⁰⁵ Indeed, the president of Kiribati is expressly described as 'the head of government' in the constitution.¹⁰⁶ The presidents of Kiribati and Nauru are not executive heads of state completely in the US model, however, because they are parliamentary presidents. The president of Kiribati is elected directly by the electorate, but from a panel of three or four persons drawn

97 Constitution of Solomon Islands, Sched 3, para 3.

98 Constitution of Solomon Islands, s 15(d)(d). The interpretation of this paragraph is itself open to question: see, further, Corrin, J, 'Reconciling customary law and human rights in Melanesia' (2003) 4 *Hibernian Law Journal* 53, p 58.

99 Constitution of Samoa, art 111(1).

100 Constitution of Tuvalu, s 29.

101 *Teonea v Kaupule* [2005] TUHC 2.

102 Constitution of Vanuatu, art 5.

103 Constitution of Vanuatu, art 95.

104 *Public Prosecutor v Kota* (1989–93) 2 Van LR 661; *Noel v Toto* [1995] VUSC 3.

105 Constitution of Kiribati, ss 39–48; Constitution of Nauru, ss 18–23.

106 Constitution of Kiribati, s 30(2).

from and approved by the legislature,¹⁰⁷ and the president of Nauru is elected by and from the legislature.¹⁰⁸ Both presidents are members of the legislature and can be removed from office by a vote of no confidence in the legislature.¹⁰⁹

The Crown of Tonga is hereditary, and the line of succession is prescribed in detail in the constitution.¹¹⁰ The sovereign is provided with extensive powers to control the government of the country. The sovereign is empowered to appoint and dismiss the prime minister, ministers and also members of the Privy Council, which is the sovereign's advisory body, and the two governors of Ha'apai and Vava'u, as he or she thinks fit.¹¹¹ The prime minister, however, presides at meetings of cabinet to determine policies of government, and review the administration of the government,¹¹² so that the sovereign's function is more that of supervision of the government of the country, rather than direct participation in it.

In the other countries of the region, the head of state is designated by the constitution to play a less active, and more honorific and ceremonial, role. In Cook Islands, Niue, Solomon Islands and Tuvalu, Queen Elizabeth II is stated by the constitution to be the head of state.¹¹³ In Fiji Islands and in Vanuatu, an elected president is the head of state: in Fiji Islands, the president is elected by the Great Council of Chiefs¹¹⁴ after consultation with the prime minister; and, in Vanuatu, the president is elected by an electoral college comprising the members of Parliament and the chairpersons of the provincial councils.¹¹⁵ In Samoa, the first two persons to jointly hold the office of head of state were named in the constitution, but, after the death of the survivor, the head of state will be elected by the legislature.¹¹⁶

In those countries where the constitution provides that the Queen is head of state, that is, Cook Islands, Niue, Solomon Islands and Tuvalu, the powers expressly provided by the constitution for the head of state are very limited. In Niue, the Queen is not provided by the constitution with any specific powers, and, in Cook Islands and Solomon Islands, the powers of the Queen provided by the constitutions are limited to the appointment and removal of a personal representative in the country; in Solomon Islands, this is required

107 *Ibid*, ss 32–3.

108 Constitution of Nauru, s 16.

109 Constitution of Kiribati, s 33; Constitution of Nauru, s 24. For a decision on the interpretation of s 24, see *In re Article 55 of the Constitution* [2003] NRSC 2.

110 Constitution of Tonga, cl 32.

111 *Ibid*, cll 50–54.

112 *Ibid*, cl 51.

113 Constitution of Cook Islands, Art 2; Constitution of Niue, Art 1; Constitution of Solomon Islands, s 1; Constitution of Tuvalu, s 48.

114 Constitution of Fiji Islands, s 90.

115 Constitution of Vanuatu, Art 34.

116 Constitution of Samoa, Art 17.

to be done in accordance with a resolution of Parliament,¹¹⁷ and in Tuvalu, with the advice of the prime minister after confidential consultation with the members of Parliament.¹¹⁸ Under the common law, the Queen is recognised as having some special prerogative powers which are not provided by the written law and can be exercised by her without any express legislative authorisation. Of these, probably the most important are the power to appoint persons to carry on the business of government; the power to conduct foreign relations with other countries and the power to take any reasonable action necessary to restore order and peace in a time of national emergency.¹¹⁹ The Constitution of Tuvalu expressly states¹²⁰ that the Queen has no functions other than those that are prescribed, thereby expressly excluding the common law prerogative powers of the Queen, but, in the other countries where the constitution provides that the Queen is head of state, that is, Cook Islands, Niue and Solomon Islands, it is still open to argument that the Queen can exercise the prerogative powers provided by the common law.

In Fiji Islands, Samoa and Vanuatu, the role of head of state, although basically honorific, and, so, usually required to be performed in accordance with advice or recommendations from ministers or other specified persons, is not entirely so. In each of those countries, the head of state is provided by the constitution with some powers which can be exercised in his or her own judgment. In Fiji Islands, the president is authorised to act on his or her own judgment in selecting as prime minister the person who, in the opinion of the president, can form a government that has the confidence of the House of Representatives,¹²¹ and, also, in selecting a person to act as alternative prime minister if the prime minister is defeated in the House of Representatives and requests a dissolution of the House of Representatives,¹²² and appointing a caretaker prime minister to advise a dissolution of Parliament if a prime minister is defeated in the House and does not resign or obtain a dissolution of Parliament.¹²³

The head of state of Samoa is required to appoint as prime minister the person who commands the support of the Legislative Assembly.¹²⁴ This provision, which is expressed as an obligation, does not expressly include any personal assessment or judgment on the part of the head of state, but in some circumstances some exercise of personal judgment may have to be made as to who commands the support of the Legislative Assembly. The head of

117 Constitution of Solomon Islands, s 27.

118 Constitution of Tuvalu, s 55.

119 Discussed in *Mitchell v Director of Public Prosecutions* [1985] LRC (Const) 127; see, below, p 94.

120 Constitution of Tuvalu, s 51(1).

121 Constitution of Fiji Islands, s 98.

122 *Ibid*, s 108.

123 *Ibid*, s 109.

124 Constitution of Samoa, Art 33.

state is expressly given the discretion to determine whether or not to accept a prime minister's request for dissolution.¹²⁵ A significant power which is vested in the personal discretion of the head of state, but which is, in fact, rarely exercised, is the power provided by Art 40 of the constitution to require the cabinet to meet with him as the Executive Council of Samoa to discuss a decision of the cabinet. If, however, the cabinet affirms its decision, there is nothing more that the head of state can do. Another power of some importance is vested in the head of state by Art 63 of the constitution, which empowers the head of state in his or her own discretion to dissolve the Legislative Assembly if the position of prime minister is vacant and it has not been possible after a reasonable time to find a person who has the confidence of the Legislative Assembly.

In Vanuatu, the constitution provides the president with some powers that are not required to be exercised on advice. One such power which is of some importance, and which has been exercised several times, is the power of the president, conferred by Art 16 of the constitution, to refer to the Supreme Court any bill presented for assent which he considers is inconsistent with the constitution.¹²⁶ Another important power of the president which the courts have held can be exercised in the discretion of the president is the power provided by Art 28(3) of the constitution, on the advice of the council of ministers, to dissolve Parliament.¹²⁷ The constitution provides that the president may appoint a caretaker prime minister, if the prime minister dies and there is no deputy prime minister.¹²⁸ The president is also authorised to appoint the members of the public service commission, after consultation with, but not on the advice of, the prime minister,¹²⁹ and to appoint the ombudsman, after consultation with, but again not on the advice of, the prime minister, speaker of Parliament, leaders of political parties, the president of the National Council of Chiefs, the chairpersons of provincial councils and the chairpersons of the public service and of the judicial service commissions.¹³⁰ A power of personal judgment is also provided by the constitution for the president to pardon convicted persons.¹³¹ The exercise of this power by the president has in recent times caused considerable public controversy, and even to judicial proceedings.¹³²

125 *Ibid*, Art 63(3).

126 See *Re President's Reference, President v Attorney General* [1993] LRC (Const) 141; *Re President's Referral, President v Attorney General*, Supreme Court, Vanuatu, Civ Cas 169/1997 (unreported) (5 June 1998); *Re the President's Referral, President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43.

127 *President of Vanuatu v Korman* [1998] VUCA 3; *Vohor v Abiut* [2004] VUCA 1.

128 Constitution of Vanuatu, Art 44.

129 *Ibid*, Art 59.

130 *Ibid*, Art 61.

131 *Ibid*, Art 38.

132 *Attorney General of Vanuatu v President of Vanuatu* [1994] VUSC 2.

In countries where the Queen of England is head of state, that is, Cook Islands, Niue, Solomon Islands, Tokelau and Tuvalu, the constitution or, in the case of Tokelau, legislation, provides that she shall be represented in these countries by a personal representative, called a governor-general in Solomon Islands and Tuvalu, a Queen's Representative in Cook Islands and the governor general of New Zealand in Niue and Tokelau. In Solomon Islands and Tuvalu, the governor general is appointed by, and may be removed by, the Queen in accordance with a resolution of the Parliament in Solomon Islands,¹³³ and in Tuvalu on the advice of the prime minister after consultation in confidence with members of Parliament in Tuvalu.¹³⁴ In Cook Islands, the constitution states that the Queen's Representative shall be appointed by the Queen for a period of three years, but does not specify on whose recommendation.¹³⁵

In Solomon Islands, the appointment of a governor general was successfully challenged in the High Court in *In re application by Hon Andrew Nori*,¹³⁶ on the ground that the person appointed was not qualified by the terms of the constitution in that he was still, at the time of appointment, a member of the public service, although he had submitted his resignation some time before. The fact that the governor-general was not validly appointed was held, however, not to render invalid the actions taken by the governor-general, including, in particular, his appointment of a prime minister. On this aspect, the High Court relied upon a principle dating back to medieval times known as the principle of *de facto sed non de jure*, that is, actions by a person holding a public office who is generally believed to have been properly appointed to office are to be regarded as valid, even though in law that person's appointment is not valid.¹³⁷

In Cook Islands, Niue, Solomon Islands and Tuvalu, the constitutions provide that the position of the representative of the Queen is an honorific one. Not only are the functions allocated by the constitution for the governor-general to perform very limited, but also very few are authorised to be performed in his or her personal discretion or judgment. In Cook Islands, the constitution requires the Queen's Representative to appoint as prime minister a member of Parliament who commands the confidence of a majority of the members of Parliament when Parliament is sitting, but, if Parliament is not in session, the Queen's Representative is empowered to appoint as prime minister the person who in his or her opinion is likely to command the support of the majority.¹³⁸ If Parliament has been dissolved, but general elections

133 Constitution of Solomon Islands, s 27.

134 Constitution of Tuvalu, s 55.

135 Constitution of Cook Islands, Art 3.

136 [1988-9] SILR 99.

137 See, further, Corrin, J, 'Constitutional challenges in Solomon Islands' (1989) 5 *QUTLJ* 145.

138 Constitution of Cook Islands, Art 14.

have not been held, the Queen's Representative may appoint as prime minister the person who is likely to have commanded the support of the majority before the dissolution.¹³⁹ The Queen's Representative is given the power in his or her discretion to dissolve Parliament if the office of prime minister is vacant and if, after a reasonable time, there is no member who can command the support of Parliament.¹⁴⁰ The Queen's Representative is also given discretion to refuse a request from the prime minister for a dissolution of Parliament, unless he or she is satisfied that that request has the support of a majority of members of Parliament.¹⁴¹ The Constitution of Niue does not provide the governor-general with any powers which can be exercised in his or her personal discretion. The only occasions when the Constitution of Solomon Islands expressly provides that the governor-general may exercise a personal discretion are, first, with regard to the appointment of a caretaker prime minister upon the death of a prime minister until a new prime minister is elected by Parliament;¹⁴² second, with regard to the appointment of a tribunal to investigate the removal of a judge for inability or misbehaviour, and the suspension of a judge pending investigation by such tribunal.¹⁴³ However, the High Court has held that if it is clear to the governor-general that the cabinet of ministers does not have the support of the members of Parliament, even though Parliament is not meeting to allow a motion of no confidence to be passed, the governor-general is entitled to act without, or in disregard of, the advice of cabinet and summon a meeting of Parliament.¹⁴⁴

The Constitution of Tuvalu provides the governor-general with power in his or her own deliberate judgment to appoint two medical practitioners to examine the capacity of the prime minister, and, after receiving their report, to remove the prime minister,¹⁴⁵ and, pending such report, to suspend the prime minister.¹⁴⁶ If the prime minister dies, and there is no deputy prime minister, the governor-general may exercise the power to appoint a caretaker prime minister until a new prime minister is elected.¹⁴⁷ The Constitution of Tuvalu provides the governor-general with a general reserve power to act without the advice of ministers, and without consultation, when these are required by the constitution, provided that the governor-general 'certifies in writing that he ... is satisfied that it is impracticable in the circumstances to comply',¹⁴⁸ and this has been held to enable the governor-general to summon

139 *Ibid*, Art 14.

140 *Ibid*, Art 37(2).

141 *Ibid*, Art 37(3).

142 Constitution of Solomon Islands, s 34(5).

143 *Ibid*, s 80(5)–(8).

144 *Ulufa'alu v Governor-General* [2001] 1 LRC 425.

145 Constitution of Tuvalu, s 64.

146 *Ibid*, s 65.

147 *Ibid*, s 71.

148 Constitution of Tuvalu, Sched 1, para 17.

Parliament when cabinet had refused to advise him to do so, and the governor-general was satisfied that cabinet did not have the support of the majority of members of Parliament.¹⁴⁹

Other powers conferred by the constitutions in Cook Islands, Niue, Solomon Islands and Tuvalu upon the governor-general or Queen's Representative are required to be exercised in accordance with the advice of ministers or some other prescribed body. There is in the constitution of each of these countries a provision which purports to exclude the jurisdiction of the courts from determining whether the representative of the head of state has in fact acted in accordance with advice. For example, s 31(3) of the Constitution of Solomon Islands states: 'where the governor general is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law'. The High Court of Solomon Islands held in *Kenilorea v Attorney General*¹⁵⁰ that the terms of this provision which purport to oust the jurisdiction of the court should be given a restrictive interpretation, and do not exclude the jurisdiction of the court to determine whether advice had been given to the governor-general by the prescribed person or body. Accordingly, in that case, the High Court examined to see whether advice as to the granting of pardons to convicted criminals had been given to the governor-general by a Committee on the Prerogative of Mercy which contained the members prescribed by the terms of the constitution, and, finding that it had not, the court made a declaration that the committee was not properly constituted, and that the grant of any pardon by the governor-general on the advice of such body was null and void. This was taken a step further in 2004 when the High Court held that a person who submits a petition to the governor general for exercise of the power of mercy has a legitimate expectation that that petition will be considered by the Committee on the Prerogative of Mercy. If it is not, a declaration may be made that the committee should be convened to consider the petition.¹⁵¹

Finally, it should be noted that elsewhere in the Commonwealth it has been held that the governor-general is authorised by the general terms of appointment by the Queen to exercise the prerogative powers which the common law confers upon the Queen to take whatever action is reasonable and necessary to cope with a national emergency.¹⁵² Presumably, this would also have authorised the governor-general of Fiji Islands to make the emergency

149 *Amasone v Attorney-General* [2003] TVHC 4; cf *Ulufa'alu v Governor-General* [2001] 1 LRC 425.

150 [1983] SILR 61.

151 *Maniau v Governor-General* [2004] SBHC 118.

152 *Mitchell v Director of Public Prosecutions* [1985] LRC (Const) 127.

proclamations¹⁵³ and regulations¹⁵⁴ which he issued immediately after the military coup in that country on 14 May 1987. The governor-general had, in fact, purported to be acting in accordance with the provisions of the Constitution of 1970, but the constitution required that he act in accordance with the advice of ministers, which at that time was not possible since they had been detained by military forces. The legality of these acts of the governor-general was never adjudicated in any reported decision.

Executive government

The written constitutions of Cook Islands, Fiji Islands, Nauru, Niue, Samoa, Solomon Islands, Tuvalu and Vanuatu provide for an executive government on the model evolved in England, often called the ‘Westminster’ model. Ministers of government are appointed by, and dismissible by, a prime minister, who must have the support of the legislature. The prime minister and ministers are drawn from, and remain, members of the legislature, and they are ultimately responsible to the legislature, which can remove them by a vote of no confidence,¹⁵⁵ although the precise numbers of the majority necessary to pass a motion of no confidence are not the same in every country.¹⁵⁶

As might be expected, however, in several countries of the region, there are some variations on the classic Westminster model of executive government. In Fiji Islands, the constitution provides for a multi-party cabinet. The constitution requires that the prime minister must invite all political parties which comprise at least 10% of the members of the House of Representatives to be represented in the cabinet in proportion to their numbers in the House. If a party chooses not to be represented in cabinet, then the cabinet positions to which it would have been entitled are distributed amongst the other parties, including the prime minister’s own party, which are in the cabinet.¹⁵⁷ In Kiribati and Nauru too, there is a variation in that

153 Proclamation of Public Emergency (14 May 1987); Proclamation of Dissolution of Parliament and Vacation of all Ministers and Leader of Opposition (19 May 1987); Proclamation of Amnesty (22 May 1987).

154 Public Emergency Regulations 1987.

155 Constitution of Cook Islands, Arts 13–14; Constitution of Fiji Islands, ss 97–109; Constitution of Nauru, Arts 16–24; Constitution of Niue, Arts 2–7; Constitution of Samoa, Arts 2–3; Constitution of Solomon Islands, ss 33–8; Constitution of Tuvalu, ss 62–7; Constitution of Vanuatu, Arts 37–44.

156 See *Tokataake v Attorney-General* [2003] KICA 4; *In re Article 55 of the Constitution, Constitutional Reference No 01 of 2003* [2003] NRSC 1.

157 Constitution of Fiji Islands, s 99. There has been controversy as to the correct interpretation and application of these provisions: *President of the Republic of Fiji Islands v Kububola* [1999] FJSC 8; *Re the President’s Reference on the Interpretation of sections 64 and 69 of the Constitution* [2002] FJSC 11; *Qarase v Chaudhry* [2003] FJSC 1; *Re the President’s Reference, Qarase v Chaudhry* [2004] FJSC 1.

the ministers are appointed by, and dismissible by, a president, not a prime minister.¹⁵⁸ However, as mentioned earlier, the president in both countries must be a member of the legislature and remains a member of the legislature, the difference being that in Nauru the president is elected directly from, and by, the legislature, whereas in Kiribati the president is elected by the electorate from a panel of three or four persons selected from, and by, the legislature.

In Tonga, the executive is partly a parliamentary executive and partly a non-parliamentary one. The prime minister and the ministers of government are appointed by the king from inside or outside the legislature, as he pleases, and are dismissible by him, as he pleases.¹⁵⁹ The legislature is provided with no power to remove them by a vote of no confidence. On the other hand, the prime minister and ministers are required to sit in the legislature,¹⁶⁰ to answer all questions put to them by the Legislative Assembly concerning their departments,¹⁶¹ and to account to the legislature for the use of public monies,¹⁶² and they are subject to impeachment by the legislature.¹⁶³ In Tokelau, there are wider variations from the Westminster model, but these are provided by legislation, not by a written constitution, and so will be dealt with later in this chapter.

In all countries of the region, ministers are responsible for those aspects of government which are placed in their control by the prime minister, president, king or representative of the Queen, as the case may be. This responsibility of ministers is enforced most immediately by the person who appoints them, but it is also enforceable by a vote of no confidence by the legislature in Cook Islands, Fiji Islands, Kiribati,¹⁶⁴ Nauru,¹⁶⁵ Niue, Samoa, Solomon Islands, Tuvalu and Vanuatu, and by impeachment by the legislature in Tonga, and ultimately by vote of the electorate in all countries of the region. The action of ministers acting individually has been held on many occasions to be subject to judicial review by the courts.¹⁶⁶ It has been more rarely that the actions or decisions of ministers acting collectively in cabinet has been challenged, but in Tuvalu decisions of cabinet have been successfully challenged by judicial review in one case on the ground that they were contrary

158 Constitution of Kiribati, ss 30–6 and 39–41; Constitution of Nauru, Arts 16–19.

159 Constitution of Tonga, cl 51.

160 *Ibid*, cl 51.

161 *Ibid*, cl 51.

162 *Ibid*, cll 51 and 53.

163 *Ibid*, cl 75.

164 *Tokataake v Attorney-General* [2003] KICA 4.

165 *In re Article 55 of the Constitution, Constitutional Reference No 01 of 2003* [2003] NRSC 1.

166 See, eg, *Korovulavula v Public Service Commission and Minister for Communications, Works and Transport* Civ Ap No 6 of 1994 (Fiji).

to the constitution,¹⁶⁷ and in the other case on the ground that they were unauthorised and ultra vires the relevant legislation.¹⁶⁸

Legislature

All regional written constitutions provide for an elected legislative body, which is authorised to make laws.¹⁶⁹ In Cook Islands, Fiji Islands, Nauru, Solomon Islands, Tuvalu and Vanuatu, this body is called a Parliament. In Samoa and Tonga, it is called a Legislative Assembly, in Kiribati, it is called the *Maneaba ni Maungatabu*, and, in Niue, the Niue Assembly. In Tokelau, where there is no written constitution, the law-making bodies are established by legislation enacted by the New Zealand Parliament and will be discussed later in this chapter.

The size of the elected legislature and the basis of election for the legislature vary considerably. The smaller legislatures are Tuvalu (12), Niue (21), Cook Islands (24) and Tonga (25). Amongst the larger legislatures are Kiribati (36), Solomon Islands (47), Samoa (52) and Fiji Islands (71). In Cook Islands, Nauru, Niue, Solomon Islands, and Tuvalu, there is a simple electoral system: one member per constituency and one electoral roll. In other countries, the constitutions provide separate electoral rolls and constituencies based on ethnicity, that is, Fiji Islands and Kiribati, or, in Tonga, on social stratification; in one country, Vanuatu, the constitution requires that the electoral system 'includes an element of proportional representation'.¹⁷⁰ The details of the electoral systems of such countries are provided in legislation. In Samoa, the electoral system is entirely omitted from the constitution and is solely provided by legislation, that is, the Electoral Act 1963, which prescribes that only *matai* are allowed to stand for election to the Legislative Assembly, although all adults can vote.

In Fiji Islands, the legislature comprises not only an elected body, the House of Representatives, but also an appointed body, the Senate, which has 32 members. Appointments to the Senate are made by the president on the advice of the prime minister, the leader of the opposition, the Great Council of Chiefs (*Bose Levu Vakaturanga*) and the Council of Rotuma.¹⁷¹ The Senate has the power to delay, but not to reject or veto, legislation which has been approved by the House of Representatives, except amendments to certain

167 *Lautasi v R* [2003] TVHC 24.

168 *Lautasi v Attorney-General* [2003] TVHC 26.

169 Constitution of Cook Islands, Arts 27–46; Constitution of Kiribati, ss 52–79; Constitution of Nauru, Arts 26–47; Constitution of Niue, Arts 16–36; Constitution of Samoa, Arts 42–64; Constitution of Solomon Islands, ss 46–74; Constitution of Tonga, cll 56–82; Constitution of Tuvalu, ss 81–118; Constitution of Vanuatu, Arts 15–21.

170 Constitution of Vanuatu, Art 17(1).

171 Constitution of Fiji Islands, s 64.

entrenched legislation relating to Fijian affairs and land, Rotuma and the Banaban settlement in Rabi Island, all of which require the support of at least 9 of the 14 members of the Senate appointed on the advice of the Council of Chiefs.¹⁷² From 1970 to 1998, amendments to the constitution also required the support of a special majority of the members of the Senate appointed by the Great Council of Chiefs,¹⁷³ but this restriction has been omitted in the current constitution.

The powers of the legislature to make legislation are, in almost all countries in the region, very wide and are limited only by the provisions of the constitution, which is the supreme law, and so overrides all other laws and renders them void to the extent of any inconsistency. In most countries, however, the constitution provides that bills for legislation to raise taxes or to expend public money cannot be debated unless they have been endorsed by the government.¹⁷⁴ In Kiribati, legislation relating to Banaba must be supported by the nominated member representing Banaba.¹⁷⁵ In Niue, certain legislation cannot be debated unless reports from appropriate authorities have been tabled in the assembly.¹⁷⁶ In Tonga, bills relating to the king or the royal family or to the estates and titles of nobles can be voted on only by the nobles' representatives in the Legislature Assembly.¹⁷⁷ In most countries, the constitutions also provide that special majorities of the legislature are required to approve amendments to the constitution. This will be discussed more fully later.¹⁷⁸

In Cook Islands, Fiji Islands, Kiribati, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, the assent of the head of state or the representative of the head of state is required in order for a bill which has been approved by the legislature to become law. In Tonga, the king has the power to assent or refuse assent as he pleases;¹⁷⁹ in Cook Islands and Samoa, the Queen's Representative and head of state, respectively, may assent or refuse assent as advised by the prime minister;¹⁸⁰ in Fiji Islands, Solomon Islands and Tuvalu, the

172 *Ibid*, ss 47–9 and 185.

173 Constitution of Fiji 1970, s 67; Constitution of Fiji 1990, s 77.

174 Constitution of Cook Islands, Art 43; Constitution of Nauru, Art 59; Constitution of Niue, Art 30; Constitution of Samoa, Art 59; Constitution of Solomon Islands, s 60; Constitution of Tuvalu, s 111; Constitution of Vanuatu, Art 23.

175 Constitution of Kiribati, s 124. At the time of the independence of Kiribati, many people of Banaba (formerly, Ocean Island and part of Kiribati, but geographically distant from the main islands of Kiribati) wished to secede. Special provisions were included in the Constitution of Kiribati to protect the position of Banabans, including the one mentioned in the text.

176 Constitution of Niue, Arts 31–3.

177 Constitution of Tonga, cl 67.

178 See below pp 106–7.

179 Constitution of Tonga, cl 56.

180 Constitution of Cook Islands, Art 44; Constitution of Samoa, Art 60.

president or governor-general must assent¹⁸¹ and, in Kiribati and Vanuatu, the head of state must assent unless he or she refers the bill to the courts to determine its constitutionality.¹⁸² In Nauru, the speaker must certify that a bill has been enacted by Parliament,¹⁸³ and, in Niue, the speaker of the assembly is required to certify and seal a bill before it becomes law.¹⁸⁴

In Cook Islands, Kiribati, Nauru, Samoa and Vanuatu, legislation to amend certain sections in the constitution,¹⁸⁵ and, in Niue, to amend any of the sections in the constitution,¹⁸⁶ requires endorsement by the electorate. In Vanuatu, a simple majority of voters in a referendum is sufficient,¹⁸⁷ but, in Cook Islands, Kiribati, Nauru and Samoa, a special majority of two-thirds of voters is required to endorse an amendment to the constitution.¹⁸⁸ In Niue, a special majority of two-thirds of voters is required to approve certain amendments to the constitution, while other amendments require only a simple majority.¹⁸⁹ In Tonga, bills to amend the constitution require the unanimous approval of the Privy Council.¹⁹⁰

The law-making function is the most obvious function of the legislatures of countries of the region, but equally important is their function of controlling the executive. As mentioned earlier, the constitutions of Cook Islands, Fiji Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tuvalu and Vanuatu all provide for the legislature to have the power to remove the executive by passing a motion of no confidence in the executive.¹⁹¹ It is important to notice, however, that the number of members required to pass a motion of no confidence is not the same in each country. In Nauru,¹⁹² at least half the total number of members is sufficient; in Fiji Islands¹⁹³ a majority of the members present and voting; in Cook Islands,¹⁹⁴

181 Constitution of Fiji Islands, s 46(2); Constitution of Solomon Islands, s 59(2); Constitution of Tuvalu, s 86(2).

182 Constitution of Kiribati, s 66(3)–(6); Constitution of Vanuatu, Art 16(4).

183 Constitution of Nauru, Art 47.

184 Constitution of Niue, Art 34.

185 Constitution of Cook Islands, Art 41; Constitution of Kiribati, s 49; Constitution of Nauru, Art 84; Constitution of Samoa, Art 109; Constitution of Vanuatu, Art 86.

186 Constitution of Niue, Art 35.

187 Constitution of Vanuatu, Art 86.

188 Constitution of Cook Islands, Art 41(2); Constitution of Kiribati, s 69(3); Constitution of Nauru, Art 84(3).

189 Constitution of Niue, Art 35(1)(b).

190 Constitution of Tonga, cl 79.

191 Constitution of Cook Islands, Arts 13–14; Constitution of Fiji Islands, ss 97–109; Constitution of Nauru, Arts 16–24; Constitution of Niue, Arts 2–7; Constitution of Samoa, Arts 2–3; Constitution of Solomon Islands, ss 33–8; Constitution of Tuvalu, ss 62–7; Constitution of Vanuatu, Arts 37–44.

192 Constitution of Nauru, Art 24(1), see *In re Article 55 of the Constitution, Constitutional Reference No 01 of 2003* [2003] NRSC 1.

193 Constitution of Fiji Islands, s 69.

194 Constitution of Cook Islands, Art 34(2).

Niue¹⁹⁵ and Samoa¹⁹⁶ a majority of the members present; in Kiribati¹⁹⁷ and Tuvalu,¹⁹⁸ a majority of all of the members; in Solomon Islands¹⁹⁹ and Vanuatu,²⁰⁰ an absolute majority of the members of the legislature is required to pass a motion of no confidence.

There has been a number of occasions when courts in the region have had to determine whether, and, if so, to what extent, they should intervene to judicially review decisions and actions of members of the legislature. The courts have accepted the basic principle enunciated in England in *Bradlaugh v Gossett*²⁰¹ that courts should not intervene in the internal procedures of the legislature,²⁰² but they have stressed that this exemption does not apply to decisions made by speakers of the legislature outside the legislative chamber,²⁰³ and they have also held that the common law exemption is subject to the terms of the constitution which is the supreme law of the countries of the region, but which does not exist in England, so that breaches of the fundamental rights provisions of the constitution,²⁰⁴ and also breaches of the provisions of the constitution relating to the machinery of government,²⁰⁵ which occur within the legislative chamber are reviewable by the courts.

Judiciary

The superior courts of all countries in the region are established by the written constitution and, therefore, have the protection of the supreme law, except in Tokelau, where there is no written constitution. The structure and jurisdiction of the superior courts is fully described in Chapter 11 of this book and so will not be repeated here.

The terms of appointment of judges of the High Court or Supreme Court vary. In Vanuatu, the constitution states that all judges are to hold office

195 Constitution of Niue, Art 22(3).

196 Constitution of Samoa, Art 58(1).

197 Constitution of Kiribati, s78(1); see *Takataake v Attorney-General* [2003] KICA 4.

198 Constitution of Tuvalu, Art 63(2)(f).

199 Constitution of Solomon Islands, s 34(1).

200 Constitution of Vanuatu, Art 43(2).

201 (1884) 12 QBD 271.

202 See, eg, *Madhavan v Falvey* (1973) 19 Fiji LR 140; *Fotofili v Siale* [1987] SPLR 339; *Sanft v Fotofili* [1987] SPLR 354; *Ah Chong v Legislative Assembly of Western Samoa* [1996] WSCA 2.

203 *Attorney-General v Jimmy* [1996] VUCA 1; *Teangana v Tong* [2004] KICA 17; *Lini v Speaker of Parliament* [2004] VUSC 42.

204 *Robati v Privileges Standing Committee of Cook Islands Parliament* [1991–5] Cook Islands Judgments 122.

205 *Danny Philip v Speaker of the National Parliament* [1990] SILR 227; *Minister of Police v Moala* [1997] TOCA 1; *Takataake v Attorney-General* [2003] KICA 4; *Natapei v Tari (No 1)* [2001] VUSC 29; *In re Article 55 of the Constitution, Constitutional Reference No 01 of 2003* [2003] NRSC 1.

until retirement, but, in Cook Islands, Samoa, Solomon Islands and Tuvalu, the constitutions expressly provide for judges of the High Court or Supreme Court to be appointed for a limited term, if they are not citizens,²⁰⁶ and, in Fiji Islands, all judges may be so appointed.²⁰⁷ The Constitution of Kiribati seems to allow that judges of the High Court or the Supreme Court may be appointed for a limited term,²⁰⁸ and the Constitutions of Niue and Tonga allow for the appointment of temporary or acting judges for a limited period.²⁰⁹ The reason for this authorisation for limited terms of appointment is that, in most countries of the region, judges of the High Court or Supreme Court are still recruited from overseas on the basis of a contract for a specified period.

Because the Courts of Appeal of Cook Islands, Fiji Islands, Kiribati, Niue, Samoa, Solomon Islands and Tonga are not continuously in session, but usually sit only two or three times a year or, in the smaller countries, only once a year, and because their membership is normally drawn from outside the country in which the Court of Appeal is established, the constitution usually expressly provides that members of the Court of Appeal may be appointed for a limited term²¹⁰ – in practice, often only for a single session of the court. So, also, for the same reasons, members of the Supreme Court of Fiji Islands are authorised by the constitution to be appointed for a limited term.²¹¹ As explained in Chapter 11, the Constitution of Nauru does not establish a Court of Appeal in that country, but provides, instead, for legislation to be enacted to provide for appeals to be determined by a court of another country, and legislation has been enacted to provide for them to be heard by the High Court of Australia,²¹² and, in Tokelau, legislation provides for appeals from the High Court of New Zealand in respect of Tokelau to be determined by the Court of Appeal of New Zealand.²¹³ Accordingly, the tenure of office of members of the appellate courts of Nauru and Tokelau is determined by the legislation of Australia and New Zealand, respectively.

Judges of the High Court or Supreme Court and Court of Appeal are protected by the constitutions from removal before the expiry of their term.

206 Constitution of Cook Islands, Art 53(2); Constitution of Samoa, Art 68(2); Constitution of Solomon Islands, s 80(2); Constitution of Tuvalu, s 126(1).

207 Constitution of Fiji Islands, s 134(2).

208 Constitution of Kiribati, s 83(1).

209 Constitution of Niue, Art 47; Constitution of Tonga, cl 88.

210 Constitution of Cook Islands, Art 56(6); Constitution of Fiji Islands, s 137(2); Constitution of Kiribati, s 91(2); Constitution of Samoa, Art 75(5); Constitution of Solomon Islands, s 87(2); Constitution of Tonga, cl 87.

211 Constitution of Fiji Islands, s 137(2).

212 Appeals (Amendment) Act 1974 (Nauru). This was complemented by Australian legislation: Nauru (High Court Appeals) Act 1976 (Clth) which was argued to be unconstitutional in *Ruhani v Director of Police* (2005) 219 ALR 199, but was upheld by the High Court of Australia.

213 Tokelau Amendment Act 1986, s 4 (NZ).

In Cook Islands, Fiji Islands, Kiribati, Solomon Islands and Tuvalu, judges of the High Court or Supreme Court can be removed before the expiry of their term only on the recommendation of an independent tribunal of inquiry, and only on grounds of incapacity, or inability to perform the functions of office, or misbehaviour.²¹⁴ In Fiji Islands, Kiribati and Solomon Islands, the same protection is provided for judges of the Court of Appeal.²¹⁵

In Kiribati, Nauru, Niue, Samoa and Tuvalu, a judge of the High Court or Supreme Court can be removed only upon a resolution of the legislature,²¹⁶ which, in the case of Kiribati and Tuvalu, must be preceded by a recommendation from an independent tribunal.²¹⁷ In Vanuatu, a judge may only be removed from office if convicted and sentenced on a criminal charge, or if found guilty by the Judicial Service Commission of gross misconduct, incapacity or professional incompetence.²¹⁸ It has been held in Vanuatu that the principles of natural justice must be observed when removing a judge of the Supreme Court. In *d'Imécourt v President of Vanuatu*,²¹⁹ the removal of the chief justice of Vanuatu by the Judicial Services Commission without providing him with adequate opportunity to respond to allegations against him was held to be unauthorised and unlawful.

In some countries of the region, there is power to suspend a judge from office. In Cook Islands, Fiji Islands, Kiribati, Solomon Islands and Tuvalu, a judge may be suspended as soon as the question of his or her removal from office has been submitted to the independent tribunal of inquiry,²²⁰ and, in Samoa, a judge may be suspended if the Legislative Assembly is not sitting.²²¹ The Privy Council has held that the suspension of a judge of a superior court has such grave consequences, both for the judge and for the administration of justice, that it must be made in accordance with the principles of natural justice, even though the judge will later have an opportunity to make submissions to an independent tribunal: *Rees v Crane*.²²² The same approach is likely to be adopted by courts in the region.

In all countries of the region, except Cook Islands, Niue and Tokelau, there are subordinate courts called magistrates' courts or, in Samoa, district courts,

214 Constitution of Cook Islands, Art 54; Constitution of Fiji Islands, s 138; Constitution of Kiribati, s 83; Constitution of Solomon Islands, s 80; Constitution of Tuvalu, s 127.

215 Constitution of Fiji Islands, s 138; Constitution of Kiribati, s 93; Constitution of Solomon Islands, s 87.

216 Constitution of Kiribati, s 83; Constitution of Nauru, Art 51; Constitution of Niue, Art 49; Constitution of Samoa, Art 68(5); Constitution of Tuvalu, s 127(2).

217 Constitution of Kiribati, s 83; Constitution of Tuvalu, s 127.

218 Constitution of Vanuatu, Art 45(3).

219 Supreme Court, Vanuatu, Civ Cas 140 and 144/1996 (unreported) (25 September 1998).

220 Constitution of Cook Islands, Art 54(6); Constitution of Fiji Islands, s 138(4); Constitution of Kiribati, s 83(5); Constitution of Solomon Islands, s 80(7); Constitution of Tuvalu, s 128.

221 Constitution of Samoa, Art 68(6).

222 [1994] 2 AC 173.

but these are not established by the constitution. Instead, they are established by legislation, and will be discussed later in this chapter.

The Constitution of Fiji Islands contains an express statement that the judges of the superior courts are to function independently from the other branches of government.²²³ The other written constitutions in the region contain no such express statement, but, clearly, the purpose of the provisions which restrict the grounds of removal of judges, and regulate the process by which judges may be removed, discussed above, is to enable them to act independently. Moreover, in most constitutions, one of the aspects of the right to the protection of the law which is provided for in the constitution is a right to an 'independent and impartial' tribunal.²²⁴ Accordingly, the Court of Appeal of Solomon Islands held, in *Kenilorea v Attorney General*,²²⁵ that a section in an act of Parliament of Solomon Islands was void as contrary to the constitution when it provided that courts must dismiss any proceedings challenging action taken to enforce certain price orders which had been made unlawfully, but which had been validated by that legislation. This section, the Court of Appeal held, was a directive by the legislature to the courts as to what decision they must make in a particular case, and was, therefore, an interference with the independence of the judiciary which was guaranteed by the constitution. The Court of Appeal followed the decision of the Privy Council in *Liyanage v The Queen*,²²⁶ where the Privy Council held that certain legislation passed after an unsuccessful coup d'état so restricted the operation of the courts as to amount to a direction to them to convict the accused and, so, constituted an interference with the independence of the courts in Sri Lanka, which the Privy Council held was to be implied from the constitution.

In Samoa and Tonga, the constitutions establish a separate court to determine disputes about the ownership of customary land: Land and Titles Court,²²⁷ and Land Court,²²⁸ respectively. In Cook Islands²²⁹ and Niue,²³⁰ the constitutions provide for disputes about customary land to be determined by the Land Division of the High Court with appeal to the Court of Appeal of each country. In Fiji Islands, Kiribati, Solomon Islands and Tuvalu, the courts or tribunals to determine rights to customary land are established by legislation, and will be discussed later in this chapter.

223 Constitution of Fiji Islands, s 118.

224 Constitution of Cook Islands, Art 56(i)(e); Constitution of Fiji Islands, s 29(2); Constitution of Kiribati, s 10(1); Constitution of Nauru, Art 10(2); Constitution of Samoa, Art 9(1); Constitution of Solomon Islands, s 10(1); Constitution of Tonga, cl 15, 95; Constitution of Tuvalu, s 22(2); Constitution of Vanuatu, Art 5(2)(a).

225 [1987] SILR 179.

226 [1966] 1 All ER 650.

227 Constitution of Samoa, Art 103.

228 Constitution of Tonga, cl 84.

229 Constitution of Cook Islands, Arts 47 and 60.

230 Constitution of Niue, Arts 37 and 55A.

Public administration

The written constitutions of Cook Islands, Fiji Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tuvalu and Vanuatu²³¹ contain a chapter which establishes legal provisions to regulate the public service. These constitutions provide, with certain specified exceptions, that appointments to, and dismissals from, the public service, and, also, disciplinary control over the public service, is to be exercised by an independent commission or commissioner. In some countries, that is, Cook Islands, Nauru and Samoa, the constitutions also provide for appeals to a public service appeal board,²³² and, in Fiji Islands and Tuvalu, legislation to establish a public service appeal board is expressly authorised by the constitutions.²³³

The purpose of these provisions is to prevent political interference with the public service, and to create an independent, politically neutral, technically competent and efficient public service. Because the government has the power to appoint and remove the public service commission or commissioners, and because government ministers frequently try to ensure that their supporters are benefited, and, conversely, that their enemies are disadvantaged, it has not always been possible to prevent political influences in the selection and disciplining of the public service in the region. Judicial decisions, such as *Korovulavula v Public Service Commission*²³⁴ in Fiji Islands, *Vermuelen v Attorney General*²³⁵ in Samoa, *Taurakoto v Batic*²³⁶ and *Public Service Commission v Bill Willie*²³⁷ in Vanuatu, and the reports of the ombudsman in Vanuatu²³⁸ testify to the continuing endeavours of politicians in the region to influence appointments to, and dismissals from, the public service.

In Fiji Islands, Solomon Islands and Vanuatu, the constitutions also contain provisions which establish an ombudsman whose function is to investigate

231 Constitution of Cook Islands, Arts 72–5; Constitution of Fiji Islands, ss 142–51; Constitution of Kiribati, ss 98–105; Constitution of Nauru, Arts 68–9; Constitution of Niue, Arts 68–9; Constitution of Samoa, Arts 83–8; Constitution of Solomon Islands, ss 115–32; Constitution of Tuvalu, ss 137–53; Constitution of Vanuatu, Arts 55–8.

232 Constitution of Cook Islands, Art 76; Constitution of Nauru, Art 70; Constitution of Samoa, Art 89.

233 Constitution of Fiji Islands, s 151; Constitution of Tuvalu, s 151.

234 Court of Appeal, Fiji, Civ App 6/1988 (unreported) (23 August 1994).

235 [1980–93] WSLR 105.

236 [1989–94] 2 Van LR 620.

237 [1989–94] 2 Van LR 673.

238 Public Report on the Appointment of the Deputy General Manager of the Vanuatu National Provident Fund (15 November 1996); Public Report on the Appointment of Maurice Michel to the Public Service and to the Position of Auditor General (6 March 1997); Public Report on Improper Appointments and Promotions of Health Workers in November 1995 (17 April 1998); Public Report on Improper Appointment of Male Nurse, Peter Yunak (11 June 1998); Public Report on Improper Appointment of Senior Public Works Department Staff (11 March 1999).

and report upon administrative action taken by central, provincial and local government, and also by statutory bodies and other public officials.²³⁹ In Cook Islands and Samoa, the office and functions of an ombudsman are established by legislation,²⁴⁰ but the jurisdiction and powers are basically similar to those provided in Fiji Islands and Solomon Islands. In Vanuatu, the constitution provides that the ombudsman has an additional task of investigating complaints that a person has not received the services of the state ‘in the official language that he uses’,²⁴¹ and legislation also authorises the ombudsman to investigate breaches of the Leadership Code.²⁴²

Public finance

All written constitutions of countries of the region, except Nauru, provide that taxation cannot be imposed except by legislation.²⁴³ All the constitutions in the region, except those of Tonga and Vanuatu, also provide that all money raised or received for the purposes of government shall be paid into one central fund, called the Consolidated, Government, or Treasury Fund, or the Government Account.²⁴⁴ The importance of this provision was stressed by the Court of Appeal of Solomon Islands when it held that a proposal by the parties to proceedings before a customary land appeal court to fund the sitting of the court themselves, when it could not sit because of a lack of government funding, was unconstitutional. The money would be received for the purposes of government and therefore had to be paid into the consolidated fund rather than paid directly to the members of the court.²⁴⁵ Payments out of the central fund, technically termed ‘appropriations’, are generally only authorised if they are made within the terms of an Appropriation Act passed by the legislature or if they are authorised by the constitution as a standing appropriation. The constitutions of the region require that the minister of Finance must submit annual estimates of revenue and expenditure for approval by the legislature, and it is on the basis of these that the

239 Constitution of Fiji Islands, ss 157–65; Constitution of Solomon Islands, ss 96–9; Constitution of Vanuatu, Arts 59–61.

240 Ombudsman Act 1984 (Cook Islands); Komesina o Salufaiga (Ombudsman) Act 1988 (Samoa).

241 Constitution of Vanuatu, Art 62.

242 Ombudsman Act 1998 (Vanuatu), s 12.

243 Constitution of Cook Islands, Art 68; Constitution of Fiji Islands, s 175; Constitution of Kiribati, s 106; Constitution of Niue, Art 56; Constitution of Samoa, Art 91; Constitution of Solomon Islands, s 106; Constitution of Tuvalu, s 165; Constitution of Vanuatu, Art 23(2).

244 Constitution of Cook Islands, Art 69; Constitution of Fiji Islands, s 176; Constitution of Kiribati, s 107; Constitution of Nauru, Art 58; Constitution of Niue, Art 57; Constitution of Samoa, Art 92; Constitution of Solomon Islands, s 100; Constitution of Tuvalu, s 167.

245 *Qalo v Kebaku* [2004] SBCA 5.

legislature approves the appropriation of public money from the central fund for each year.²⁴⁶ Supplementary estimates and appropriations can be approved by the legislature if the original estimates and appropriations were insufficient. The Constitution of Tonga requires that the treasurer must present to the Legislative Assembly accounts for all money received and spent since the last meeting of the assembly.²⁴⁷

In addition, the constitutions of all countries in the region, except Tonga, Tuvalu and Vanuatu, provide for the cabinet or the minister of Finance to approve the withdrawal of a certain amount of money from the central fund before the Appropriation Act is passed in any particular year.²⁴⁸ In Kiribati, the minister of Finance is authorised to approve the withdrawal of a certain amount of money from the central fund if the Appropriation Act has not come into force in a particular year,²⁴⁹ and, in Solomon Islands, if Parliament is dissolved before such act is passed.²⁵⁰ In Tonga, the treasurer is authorised to approve the withdrawal of money from the Treasury in times of war, rebellion, dangerous epidemic or similar emergency.²⁵¹

In Fiji Islands, Kiribati, Nauru, Samoa, Solomon Islands and Tuvalu, the constitution provides that some expenses shall be standing charges on the central fund, and so they do not require specific legislative or ministerial approval, for example, debt charges, pension benefits and salaries of constitutional office holders.²⁵²

The written constitutions of all countries in the region, except Tonga and Vanuatu, require that all public funds and accounts must be audited, and they establish a constitutional officer who is responsible for doing this independently and without direct control by government.²⁵³ This officer, who is usually called auditor general, is required to submit reports to the legislature for scrutiny and corrective action.

246 Constitution of Cook Islands, Art 70; Constitution of Fiji Islands, s 178; Constitution of Kiribati, s 109; Constitution of Niue, Art 58; Constitution of Solomon Islands, s 103; Constitution of Tonga, cl 78; Constitution of Tuvalu, s 165(2); Constitution of Vanuatu, Art 23(1).

247 Constitution of Tonga, cl 53.

248 Constitution of Cook Islands, Art 70(3); Constitution of Fiji Islands, s 178; Constitution of Kiribati, s 109; Constitution of Nauru, Art 61; Constitution of Niue, Art 59(4); Constitution of Solomon Islands, s 103.

249 Constitution of Kiribati, s 110.

250 Constitution of Solomon Islands, s 104.

251 Constitution of Tonga, cl 19(a)(iii).

252 Constitution of Fiji Islands, s 184; Constitution of Kiribati, ss 112–13; Constitution of Nauru, Art 65; Constitution of Samoa, Art 94(4); Constitution of Solomon Islands, ss 105 and 107; Constitution of Tuvalu, s 169.

253 Constitution of Cook Islands, Art 71; Constitution of Fiji Islands, ss 166–8; Constitution of Kiribati, s 114; Constitution of Nauru, Art 66; Constitution of Niue, Art 60; Constitution of Solomon Islands, s 108; Constitution of Tuvalu, ss 170–2.

Land

In the Constitutions of Samoa, Solomon Islands, Tonga and Vanuatu, there are express provisions about land. In the Constitutions of Samoa and Solomon Islands, these provisions are quite brief. In Samoa, they provide that there can be no alienation of customary land, that all land below high water mark is public land, and that there shall be a Land and Titles Court with such jurisdiction in relation to *matai* titles and customary land as may be provided by act.²⁵⁴ In Solomon Islands, the constitution provides that only a Solomon Islander, or such other person as may be prescribed by Parliament, may acquire a perpetual interest in land, that Parliament may make certain provisions for alienated land, and that Parliament shall make certain provision in relation to the compulsory acquisition of customary land.²⁵⁵ In Tonga²⁵⁶ and Vanuatu,²⁵⁷ the provisions in the constitutions about land are much more detailed and set out many of the basic principles of land law in these countries.²⁵⁸

Amendment, suspension and repeal of constitution

All written constitutions in the region provide that all their provisions may be amended by the legislature, except the Constitution of Tonga, which provides that ‘such amendments shall not affect the law of liberty, the succession to the Throne and the titles and hereditary estates of the nobles.’²⁵⁹ In Cook Islands, Fiji Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tuvalu and Vanuatu,²⁶⁰ a special majority of two-thirds of the legislature is required. Some provisions of the Constitution of Solomon Islands, however, cannot be amended without a three-quarters majority of the legislature.²⁶¹ In Tonga, no special majority of the legislature is required, but any Bill to amend the constitution must have the unanimous support of the Privy Council of Tonga and the approval of the king.²⁶² In Fiji Islands, amendments to the sections of the constitution prescribing the number of members elected by voters registered as Fijians, Indians and Rotumans require the support of a special majority of the members in the House of Representatives elected by

254 Constitution of Samoa, Arts 102–4.

255 Constitution of Solomon Islands, ss 110–13.

256 Constitution of Tonga, cl 104–14.

257 Constitution of Vanuatu, Arts 71–9.

258 See, further, Chapter 10.

259 Constitution of Tonga, cl 79.

260 Constitution of Cook Islands, Art 41; Constitution of Fiji Islands, ss 190–1; Constitution of Kiribati, s 69; Constitution of Nauru, Art 84; Constitution of Niue, Art 35; Constitution of Samoa, Art 109; Constitution of Solomon Islands, s 61; Constitution of Tuvalu, s 7; Constitution of Vanuatu, Arts 82–4.

261 Constitution of Solomon Islands, s 61.

262 Constitution of Tonga, cl 79.

such voters, that is, at least 15 of the 23 members elected by Fijians, 13 of the 19 members elected by Indians, and 2 of the 3 members elected by Rotumans.²⁶³ Amendments to the sections of the constitution entrenching certain legislation relating to Fijian affairs and land, Rotuma and the Banaban settlement require the support of 9 of the 14 members of the Senate appointed by the Great Council of Chiefs.²⁶⁴

As indicated earlier, in Cook Islands, Kiribati, Nauru, Samoa and Vanuatu, certain amendments, and, in Niue, all amendments of the constitution which have been passed by the legislature cannot take effect unless they have been endorsed by the electorate – by a simple majority in Vanuatu, but a special majority of two-thirds in Cook Islands, Kiribati, Nauru, Niue and Samoa, and a special majority of two-thirds for some amendments and a simple majority for other amendments in Niue.²⁶⁵ The requirement as to endorsement by a referendum has been held to be mandatory in Vanuatu by the Court of Appeal which declared void and of no legal effect, an act which had been passed by Parliament, signed by the president and published as an act in the official gazette, but not submitted to a referendum as required by the constitution.²⁶⁶ The prohibition in Tonga of amendments affecting the law of liberty, the succession to the throne, and the titles and hereditary estates of nobles has been upheld in *Taione v Kingdom of Tonga*²⁶⁷ which held unconstitutional certain legislation-making amendments to clause 7 relating to freedom of the press which had the effect of very severely restricting that freedom.²⁶⁸ In the Constitutions of Cook Islands, Fiji Islands, Kiribati, Niue, Samoa, Solomon Islands and Tuvalu, there is provision for the constitutions to be repealed by the same process as for amendment, and, also, except for Cook Islands, to be suspended by the same process as for amendment.²⁶⁹

Transitional provisions

Very important from the point of view of orderly constitutional and legal development, but not perceived by the ordinary citizen as of much interest or importance, are the transitional provisions. These are provisions that are inserted in all constitutions of the region, except Kiribati, Solomon Islands and Tonga, to ensure that the governmental institutions and offices, and also the laws, that were in existence before the constitutions came into force, will

263 Constitution of Fiji Islands, s 192(1)–(3).

264 *Ibid*, s 192(4).

265 Constitution of Cook Islands, Art 41(2); Constitution of Kiribati, s 69(3); Constitution of Nauru, Art 84(3)–(5); Constitution of Niue, Art 35(1)(b); Constitution of Samoa, Art 109(1); Constitution of Vanuatu, Art 86.

266 *Vohor v Attorney-General* [2004] VUCA 22.

267 [2004] TOSC 48.

268 Act of Constitution Amendment Act 2003, Media Operators Act 2003 and Newspaper Act 2003.

269 See fn 260, above.

continue to exist, subject to any necessary modifications, except where it is expressly provided that they shall cease to exist.²⁷⁰ In the case of Kiribati and Solomon Islands, the transitional provisions were contained in the order of the Privy Council which enacted these constitutions.²⁷¹ Transitional provisions, which are usually to be found towards the end of a constitution, ensure that a constitutional and legal hiatus is avoided, and the orderly development of the country can continue, except where it is expressly provided that some immediate change is to be made upon the coming into force of the constitution.

Judicial enforcement of constitutions

In Fiji Islands, Kiribati, Nauru, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu the High Court or Supreme Court is expressly authorised by the constitution to interpret the constitution and grant remedies for its breach. In Cook Islands and Niue, the High Court would appear to have such jurisdiction as part of its general jurisdiction to administer the laws of the country. Several issues have arisen with regard to the application of the constitution by the courts.

Non-justiciability

In some constitutions of the region, for example, Samoa (article 18 – election of head of state), Solomon Islands (section 31 – advice to governor-general; schedule 2 – election of prime minister), Tuvalu (section 58 – advice to governor-general) and Vanuatu (article 7 – fundamental duties), it is expressly stated that certain provision are not to be questioned in any court proceedings. The enforcement of such provisions is thus taken out of the hands of the courts. For example, in *Ulufa'ala v Attorney-General*,²⁷² where the Court of Appeal of Solomon Islands held that it had no jurisdiction to examine whether or not the election of the prime minister was in accordance with the requirements of the constitution.

In England there is a long-established rule of common law that the courts will not intervene to examine the legality of the internal proceedings of the two houses of parliament.²⁷³ In Fiji Islands, the Court of Appeal held that this practice should be continued, and a provision of the constitution regulating

270 Constitution of Cook Islands, Arts 77–86; Constitution of Fiji Islands, s 195; Constitution of Nauru, Arts 85–100; Constitution of Niue, Arts 71–81; Constitution of Samoa, Arts 114–24; Constitution of Tuvalu, Sched 5; Constitution of Vanuatu, Arts 85–93.

271 Kiribati Independence Order 1979 (UK), ss 5–7; Solomon Islands Independence Order 1978 (UK), ss 5–13.

272 [2005] 1 LRC 698.

273 *Bradlaugh v Gossett* (1884) 12 QBD 271.

who should preside in the House of Representatives was interpreted by the court as including an implied term that this provision was non-justiciable.²⁷⁴ As discussed earlier, a more robust approach has been adopted by the courts of Cook Islands,²⁷⁵ Kiribati,²⁷⁶ Nauru,²⁷⁷ Solomon Islands,²⁷⁸ Tonga²⁷⁹ and Vanuatu,²⁸⁰ which have held that they will intervene in matters occurring within Parliament if a breach of the constitution is established, and they do not interpret such provisions as subject to any implied term of non-justiciability.

Non-compliance in times of emergency

On two occasions in Fiji, the courts have accepted that executive, administrative and legislative action taken by government officials, which is not in accordance with the constitution, may nevertheless be upheld by the courts as having legal effect if it was taken in a time of actual or threatened emergency. In *Republic of Fiji v Prasad*,²⁸¹ the Court of Appeal of Fiji held that although the purported abrogation of the constitution by the military commander was illegal and invalid, the decrees, executive acts and decisions of administrations that occurred between the date of the unlawful abrogation and the decision of the Court of Appeal were to be recognised as valid. In *Yabaki v The President*²⁸² the High Court held that the same principle could be used, after the constitution had been restored, to validate the refusal of the president to re-convene the parliament that was sitting, and re-appoint the Indian prime minister who was in office, at the time of the unlawful abrogation of the constitution, because of the real threat that this would lead to another Fijian uprising.²⁸³

274 *Madhavan v Falvey* (1973) 19 Fiji LR 140.

275 *Robati v Privileges Standing Committee of Cook Islands Parliament* [1991–5] Cook Islands Judgments 122.

276 *Tokataake v Attorney-General* [2003] KICA 4.

277 *In re Article 55 of the Constitution, Constitutional Reference No 01 of 2003* [2003] NRSC 1.

278 *Danny Philip v The Speaker of the National Parliament* [1990] SILR 227.

279 *Fotofili v Siale* [1988] LRC (Const) 102; *Sanft v Fotofili* [1988] LRC (Const) 110 – although in both cases no breach of the constitution was established; *Minister of Police v Moala* [1997] TOCA 1.

280 *In re the Constitution, Jimmy v Attorney-General* [1996] VUCA 1; *Natapei v Tari (No 1)* [2001] VUSC 29.

281 [2000] FJCA 2.

282 [2001] FJHC 156.

283 An appeal from this judgment was dismissed on the ground that the issue was by then moot, because elections had been held and a prime minister appointed, so that the applicant could not show sufficient interest in the proceedings: *Yabaki v The President* [2003] FJCA 3.

Unlawful abrogation of a constitution

In 1987 and 2000, the constitutionally elected government of Fiji Islands was overthrown by groups of armed men, claiming to be acting to protect the interests of indigenous Fijians, the elected governments having allegedly failed to do so. On both occasions, the constitution was expressly abrogated by the insurgents. On the first occasion, this abrogation was not challenged in the courts. The country was governed without a constitution until a replacement was enacted in 1990 by the president acting with the advice of cabinet.

On the second occasion, a legal challenge was promptly mounted, *Republic of Fiji v Prasad*,²⁸⁴ and heard with the co-operation of the government, which believed that the challenge would not be successful. The legal challenge was, however, upheld by the Court of Appeal, which was composed entirely of judges brought in from neighbouring countries. The court held that, having regard to the principles that had been developed by courts of various countries of the Commonwealth, an unlawful abrogation of a constitution should be held to be valid only if it was clearly shown to the court, first, that the overthrow was effective in the sense that there was no rival government in the country claiming still to be the legitimate government, and, second, that the overthrow was approved by the majority of the people of the country. In the view of the Court of Appeal the purported abrogation of the constitution in 2000 failed on both counts, and the constitution of 1997, which had been purportedly abrogated, was held to be still in force.

In December 2006, the military forces of Fiji, under the command of commodore Voreqe (Frank) Bainimarama, took over control of the government of Fiji, and ousted the prime minister and ministers, who had been elected in May 2006, and also certain officials, including the chief justice and chief magistrate. This action was claimed to be justified by the failure of the elected government to remove certain ministers who had been involved in earlier coups and the need to eradicate extensive corrupt practices which were claimed to exist. The constitution was not formally abrogated or suspended. As at the time of writing, no legal challenge to this action by the military had been mounted.

Informal withdrawals from a constitution

Another aspect of the dissatisfaction of some sectors of the populations of countries of the region with the constitutional arrangements enshrined in the constitutions of their countries are the movements of people to take themselves outside the ambit of the constitution of their country. Sometimes this takes the form of emigration from the country to some other country, and Cook Islands, Fiji, Niue, Samoa and Tonga have all developed extensive diaspora of their nationals in Australia, New Zealand and the United States.

But it is not just emigration that bears witness to the desire of many to take themselves out of the reach of the constitutional arrangements of their countries. Within Solomon Islands and Vanuatu, there have developed significant movements of people who wish to eschew all the trappings of modern life, including constitutions and modern governments, and return to traditional custom. In Solomon Islands, the *Moro* movement on Guadalcanal, and in Vanuatu, the John Frum and Fred Nasse movements in Tanna, the *Nagriamel* movement in Santo, and the Indigenous Nation movement in Pentecost, all comprise significant sections of the populations who wish to return to custom and escape the application of the provisions of the constitutions of their countries.

Legislation and subsidiary legislation

This chapter has focused, until now, upon the written constitutions of countries of the region because it is in these that the main legal provisions relating to the structure and functioning of government are to be found, and where they are given special protection from amendment and repeal. However, it must not be overlooked that some of the legal provisions relating to the structure and government of all countries in the region are to be found not in the written constitution, but in legislation and subsidiary legislation.

This is especially true with regard to Tokelau, where there is no written constitution. All the legal provisions for the government of the islands of Tokelau have been made by legislation or subsidiary legislation, or, in earlier times, prerogative instruments. Since 1948, the Tokelau Act 1948 (NZ) has provided that Tokelau is annexed as part of New Zealand.²⁸⁵ Consequently, Queen Elizabeth II as Queen of the realm of New Zealand is head of state of Tokelau, and her representative in New Zealand, the governor-general, is also her representative for Tokelau.²⁸⁶ As part of New Zealand, Tokelau is subject to the law-making power of the New Zealand Parliament, but acts of the New Zealand Parliament do not apply to Tokelau unless expressly stated to do so.²⁸⁷ The Parliament of New Zealand has enacted the Tokelau Act 1948 and several important amending acts²⁸⁸ to establish most of the basic features of government of Tokelau. The governor-general of New Zealand is also authorised by the Tokelau Act 1948 to make regulations for

285 Tokelau Act 1948 (NZ), s 3.

286 Letters Patent, 31 October 1983, SR 1983/225, para I(d). The Letters Patent were amended by Letter Patent Amendments, 31 December 1986 (SR 1987/8) and 7 August 2006 (SR 2006/219).

287 Tokelau Act 1948 (NZ), s 6.

288 Especially, Tokelau Amendment Act 1967 (NZ); Tokelau Amendment Act 1970 (NZ); Tokelau (Territorial Sea and Fishing Zone) Act 1976 (NZ); Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 (NZ); Tokelau Amendment Act 1982 (NZ); Tokelau Amendment Act 1986 (NZ); Tokelau Amendment Act 1996 (NZ).

the peace, order and good government of Tokelau, and has exercised that power on a number of occasions with regard to the government of Tokelau. In 1996, the Tokelau Amendment Act authorised the General *Fono*, which is not established by legislation, to make rules for the peace, order and good government of Tokelau,²⁸⁹ subject to disallowance by the administrator, and subject also to New Zealand legislation in force in Tokelau, regulations made by the governor-general, and any international obligation of Tokelau or applying in respect of Tokelau.²⁹⁰ This power to make rules has not been often exercised.²⁹¹ Much of this legislation would have been replaced by a constitution if Tokelau had voted to enter into a relationship of free association with New Zealand in the recent referendum. However, the vote was defeated.²⁹²

The executive government of Tokelau is, by virtue of s 9 of the Tokelau Act 1948, under the ultimate control of the minister of Foreign Affairs of New Zealand, but the Tokelau Administration Regulations 1980 provided for the minister's powers to be delegated to the administrator of Tokelau. The Tokelau Administration Regulations 1993 authorised the administrator's functions to be delegated to the General *Fono* when in session and to the Council of *Faipule* when not in session. The Council of *Faipule* consists of three *Faipule* elected every three years, one from each island, and they are appointed as ministers and collectively form a cabinet. The council's leadership rotates, each *Faipule* serving one year as *Ulu o Tokelau* or head of the government and chairperson of the Council of *Faipule*.²⁹³

The court structure of Tokelau is, as described in Chapter 11, established by the Tokelau Amendment Act 1986. The High Court of New Zealand is provided with jurisdiction to deal with all civil and criminal proceedings, and appeals are to be heard by the Court of Appeal of New Zealand.²⁹⁴ A Tokelauan is also authorised to be appointed on each island as commissioner with jurisdiction to deal with minor civil claims (i.e., where the amount claimed does not exceed \$1,000) and minor criminal offences (i.e., offences punishable only by a fine or by imprisonment for a period not exceeding one year), subject to appeal to the High Court of New Zealand.²⁹⁵

289 Eg, Tokelau Islands Administration Regulations 1949; Tokelau Islands Finance Regulations 1967; Tokelau Islands (New Zealand Laws) Regulations 1969; Tokelau Village Incorporation Regulations 1986; Tokelau (Exclusive Economic Zone) Fishing Regulations 1988; Tokelau Customs Regulations 1991.

290 Tokelau Amendment Act 1996, s 3.

291 Eg, TELETOK Rules 1996; TRANSTOK Rules 1997; Income Tax Rules 1997; Administrative Devolution Rules 1997.

292 See above, p 71 fn 1.

293 For further discussion of these developments, see Angelo, AH, 'Tokelau constitutional development' (1995) 8 *Otago LR* 413; 'Healthy, wealthy and wise: the National Government of Tokelau after 150 years' (1997) 21 *JPacS* 2151.

294 Tokelau Amendment Act 1986, ss 3 and 4.

295 *Ibid*, ss 5–10.

The public service of Tokelau was authorised by the Tokelau Islands Amendment Act 1967 to be administered by the State Services Commission of New Zealand, but it was authorised to delegate its functions, which it did in 1993, appointing two Tokelau Public Service commissioners. Public finances are regulated by the Tokelau Finance Regulations 1967 which require that all revenues and all subsidies and grants from New Zealand must be paid into the Tokelau Administration Account. Only the administrator, or an officer authorised by him, is authorised to operate that account, and all expenditures must be in accordance with estimates approved by the minister. Accounts and statements must be supplied to the minister as required, and must be audited by the Audit Office of New Zealand.

In other countries of the region which do possess a written constitution, there are some important laws relating to the government of the country, although not as many as in the case of Tokelau, that are not found in the written constitution, but are provided for in legislation or subsidiary legislation. In the case of Cook Islands and Niue, the legal provisions that provide that those countries are not legally independent, but self-governing in free association with New Zealand, which acts on their behalf in matters of defence and external affairs, and that their citizens are entitled to New Zealand citizenship, are contained not in their written constitutions, but in legislation of the New Zealand Parliament.²⁹⁶

In most countries of the region, there are subordinate courts which are established by legislation, not by the written constitution, that is, magistrates' courts in Fiji Islands,²⁹⁷ Kiribati,²⁹⁸ Solomon Islands,²⁹⁹ Tuvalu³⁰⁰ and Vanuatu,³⁰¹ island courts in Tuvalu³⁰² and Vanuatu;³⁰³ local courts in Solomon Islands,³⁰⁴ Fijian courts in Fiji Islands,³⁰⁵ and district courts³⁰⁶ and *fono* in Samoa.³⁰⁷ Although the Constitution of Tonga recognises the existence of magistrates' courts,³⁰⁸ it does not provide for their composition

296 Cook Islands Constitution Act 1964 (NZ), ss 5 and 6; Niue Constitution Act 1974 (NZ), ss 5 and 6.

297 Magistrates' Courts Act, Cap 14.

298 Magistrates' Courts Act, Cap 52.

299 Magistrates' Courts Act, Cap 20.

300 Magistrates' Courts Act, Cap 2.

301 Courts Act 1980, Cap 122.

302 Island Courts Ordinance, Cap 3.

303 Island Courts Act, Cap 167.

304 Local Courts Act, Cap 19.

305 Fijian Affairs Act, Cap 120 (Fiji), ss 16–20; Fijian Affairs (Courts) Regulations 1948 (Fiji); Fijian Affairs (Appeals) Regulations 1948 (Fiji) (revoked 1967).

306 District Courts Act 1969.

307 Village Fono Act 1990 (Samoa).

308 Constitution of Tonga, cl 84.

or jurisdiction, which are, instead, provided in legislation.³⁰⁹ In Fiji Islands,³¹⁰ Kiribati,³¹¹ Solomon Islands,³¹² Tuvalu³¹³ and Vanuatu,³¹⁴ the courts or tribunals which are authorised to deal with matters relating to customary land are established by legislation and not by the written constitution.

In Fiji Islands,³¹⁵ Solomon Islands³¹⁶ and Vanuatu,³¹⁷ there are extensive legal provisions regulating local or provincial government, but these are contained in legislation and subsidiary legislation, not in the written constitutions. In Samoa, the entire electoral system is provided for in legislation rather than the written constitution,³¹⁸ and, in the other countries of the region, the details of the electoral system are contained in legislation,³¹⁹ although the basic principles are set out in the written constitution. In Tonga³²⁰ and Vanuatu,³²¹ all the legal provisions regulating public finance are to be found in legislation and subsidiary legislation, not in the written constitution.

Common law

The common law provided the British monarch with extensive powers of government, before legislation was enacted by Parliament to regulate, and restrict, although in some cases to extend, the common law powers of the Crown. These common law powers, which are vested only in the Crown, are usually called prerogative powers and they provide the Crown with the powers necessary to govern the country, for example, power to appoint and dismiss ministers and other employees at pleasure, power to conduct negotiations with foreign countries, power to confer nationality, power to coin money, power to take reasonable action to cope with a national emergency.³²²

309 Magistrates' Courts Act, Cap 11 (Tonga).

310 Native Lands Act, Cap 133 (Fiji).

311 Magistrates' Courts Act, Cap 52 (Kiribati), Pt VI.

312 Land and Titles Act, Cap 133 (Solomon Islands), ss 254–7.

313 Native Lands Ordinance, Cap 22 (Tuvalu), Pt IV.

314 Land Reform Act, Cap 123, s 5 (Vanuatu); Island Courts Act, Cap 167 (Vanuatu), s 22.

315 Local Government Act, Cap 125 (Fiji).

316 Local Government Act, Cap 117 (Solomon Islands); Provincial Government Act, Cap 118 (Solomon Islands).

317 Decentralisation Act 1994 (Vanuatu).

318 Electoral Act 1963 (Samoa).

319 Electoral Act 1966 (Cook Islands); Electoral Act, Cap 4 (Fiji Islands); Election of Beretitenti Act, Cap 29A and Elections Act, Cap 29B (Kiribati); Electoral Act 1965–73 (Nauru); National Parliament Electoral Provisions Act, Cap 87 (Solomon Islands); Legislative Assembly Act, Cap 4 (Tonga); Electoral Provisions (Parliament) Act, Cap 102 (Tuvalu); Representation of People Act, Cap 146 (Vanuatu).

320 Public Revenue Act, Cap 64 (Tonga); Public Revenue Regulations 1984 (Tonga).

321 Public Finance Act, Cap 117 (Vanuatu).

322 For further discussion about the prerogative powers of the British Crown, see *Halsbury's Laws of England*, 4th edn, 1996, London: Butterworths, vol 5(2), paras 367–80; Barnett, H,

Like all principles of common law, these common law powers of the Crown are subject to modification or abolition by the written law, either in terms which expressly so state or in terms which clearly indicate such intention.

In countries in which Queen Elizabeth II is head of state, that is, Cook Islands, Niue, Solomon Islands and Tuvalu, it would seem that the Queen would possess the same prerogative powers in these countries except to the extent that they have been removed by the written law. Thus, in *In re Hasmat Ali*,³²³ the Supreme Court of Fiji held, at the time that the Queen was still head of state of that country after the enactment of the written constitution of 1970, that the prerogative powers of the Queen to appoint and dismiss employees at pleasure remained unabated by the constitution. Likewise, in Tuvalu, the High Court held, in *Toafa v Attorney General*,³²⁴ that the Queen possessed the common law powers of appointment and dismissal unabated by the written constitution of 1978. In fact, in both those countries, since those decisions, the common law powers of the Queen no longer exist by virtue of changes in the written law, that is, abolition of the Queen as head of state in Fiji Islands,³²⁵ and the abolition of all the Queen's powers outside the constitution in the case of Tuvalu.³²⁶ But the two decisions do provide authority for the proposition that, despite the enactment of a written constitution and the establishment of the Queen as head of state by that constitution, the common law powers of the Queen remain undiminished unless there are clear provisions in the written law to the contrary. Elsewhere in the Commonwealth, it has also been held that the Queen's Representative, the governor-general, by virtue of the general terms of his or her appointment, does have authority to exercise the common law prerogative powers of the Crown without specific authorisation from the Queen.³²⁷

In Tonga, the Supreme Court has held, in *Tuakai v Deputy Premier*,³²⁸ that the king does possess the same power to appoint and dismiss employees, including members of the police, at pleasure, as possessed by the Queen in England. This power seems to have been regarded as conferred by the principles of common law, not by the provisions of the constitution.

Constitutional and Administrative Law, 2nd edn, 1998, London: Cavendish, chapter 6; de Smith, SA and Brazier, R, *Constitutional and Administrative Law*, 7th edn, 1994, London: Penguin, chapters 6 and 7; Hood-Phillips, O and Jackson, P, *Constitutional and Administrative Law*, 7th edn, 1987, London: Sweet & Maxwell, chapter 14; Wade, ECS and Bradley, AW, *Constitutional and Administrative Law*, 10th edn, 1987, Harlow: Longman, chapter 13.

323 Supreme Court, Lautoka, Fiji, Civ App Cas 254/1972 (unreported) (23 August 1972).

324 [1987] SPLR 395.

325 Head of State and Executive Authority of Fiji Decree 1988.

326 Constitution of Tuvalu, s 51(1).

327 *Mitchell v Director of Public Prosecutions* [1985] LRC (Const) 127.

328 (1958) II Tongan LR 196.

Constitutional conventions

It is usual in textbooks relating to countries such as Britain, where there is no written constitution, and to countries such as the United States of America, where there is a written constitution which has been in existence for a long time, to devote some attention to established practices or usages which have developed with regard to the main organs of government. These established practices are usually called constitutional conventions.³²⁹

Although constitutional conventions, like other practices and usages, do not have the force of law, they are normally respected and followed, and they may also be endorsed by the courts, and form the basis for implying a term into the constitution or for evolving a principle of common law. Thus, in *Tuita v Minister of Lands*,³³⁰ the Supreme Court of Tonga, when interpreting cl 104 of the constitution, which stated that ‘The King ... may at pleasure grant to the nobles ... one or more estates to become their hereditary estates’, took into account the established practice of the kings of Tonga to make such grants only on the advice and consent of the Privy Council or cabinet, as one of the factors indicating that the clause should be interpreted as meaning that ‘The King may make grants of land with the advice and consent of the Privy Council or Cabinet’. Consequently, a grant of land that was made by the king without the advice and consent of either body was held to be unauthorised and void.

In countries of the region, there is little indication of the development of constitutional conventions. In most countries, there are written constitutions, the terms of which are usually designed to be sufficiently detailed as to avoid the necessity of relying upon constitutional conventions. Moreover, those constitutions have been in existence for such a short period that, even where opportunities exist for constitutional conventions to develop to supplement their terms, there has not been a sufficient number of occasions to have arisen for practices to have been established. It may be, however, as time passes, that gaps or lacunae in the provisions of the written law of some countries in the region may allow for the development of some constitutional conventions.

329 For further discussion about constitutional conventions, see *op cit*, *Halsbury's Laws of England*, fn 211, vol 8(2), paras 14–22; *op cit*, de Smith and Brazier, fn 211, pp 27–48; *op cit*, Hood Phillips and Jackson, fn 211, chapter 6; *op cit*, Wade and Bradley, fn 211, pp 19–30.

330 (1926) 11 Tongan LR 18.

Administrative law

Introduction

Administrative law, in its widest sense, comprises all the provisions of the written law and the principles of the unwritten law which provide for the review of action taken by any person in the governmental administration of a country. The term ‘administrative law’ is often used in a narrower sense, however, to refer to the principles of the unwritten law which provide for the superior courts to exercise judicial review over public administration. In this chapter, the wider meaning will be adopted, so it will consider all aspects of the legal regulation of governmental administration, including, but not limited to, the principles of judicial review.

Judicial review

Introduction

‘Judicial review’ is the term now largely used throughout the region, as in England, to describe the inherent powers of the superior courts to determine and control the legal validity of decisions and actions taken in the governmental administration of a country. Most of these powers originally derived from the powers exercised in medieval times by the royal common law courts in England, especially the Court of King’s Bench, to issue writs, now termed orders, on the application of the king’s attorney-general to control the governmental administration of the kingdom. Those which have survived into modern times are certiorari (order to quash or set aside an invalid decision), prohibition (order not to proceed to make, or to enforce, an invalid decision), mandamus (order to perform a public duty); habeas corpus (order to release a person unlawfully detained) and quo warranto (order to relinquish a public office unlawfully held).

Because they were originally made available primarily to the sovereign, these orders were termed ‘prerogative’ orders or writs. This is how they are described in the High Court (Civil Procedure) Rules,¹ which are still in force

1 High Court (Civil Procedure) Rules 1964, (UK), Order 61.

in Kiribati, Solomon Islands and Tuvalu, whereas in Samoa² they are described as 'extraordinary remedies'. The rules of civil procedure in Fiji,³ Tonga⁴ and Vanuatu⁵ now refer them by the term adopted in England of 'judicial review'.⁶

In addition, the royal Court of Chancery provided the remedy of injunction (order not to do something unlawful), and the remedy of declaration (formal statement of legal rights and obligations), which were originally issued in respect of actions and decisions by private individuals, but were later made available against actions and decisions of public officials.

The jurisdiction of these royal courts was transferred to the High Court of England in 1873, when that court was established to replace the original royal courts of common law and equity. The superior courts of Fiji Islands, Kiribati, Solomon Islands, Tuvalu and Vanuatu have inherited from their predecessors the same jurisdiction as the High Court of England.⁷ In Cook Islands, Samoa, Tokelau and Tonga, the superior court, although not expressly stated to have the same jurisdiction as the High Court of England, has been stated to have jurisdiction in terms which are wide enough to include the powers of the High Court of England to exercise judicial review.⁸

In the exercise of their jurisdiction to control the validity of governmental action, the courts of the region have followed closely the principles of common law and equity evolved by the courts in England. Even in those countries where there is a cut-off date for the introduction of principles of common law and equity,⁹ the principles applied by the courts in England with regard to judicial review after the cut-off date have been consistently adopted by the courts.

Action which is subject to judicial review

Until the latter half of this century, a rather limited view was taken by the courts in the region, as in England, as to the kinds of governmental action that was subject to control by the prerogative remedies. Nowadays, the scope of some of these remedies has been greatly enlarged, although there is still a small number of governmental activities that are not subject to judicial review.

2 Supreme Court (Civil Procedure) Rules 1980 (Samoa), Part XIX.

3 High Court Rules 1988 (Fiji), Order 53.

4 Supreme Court Rules 1991 (Tonga), Order 27.

5 Civil Procedure Rules 2002 (Van), Art 17.4.

6 The civil procedure rules of Cook Islands, Nauru and Niue make no express provision for judicial review under any name.

7 Supreme Court Ordinance 1875 (Fiji), Pt XXIII; Western Pacific (Courts) Order 1961 (UK), s 14.

8 Constitution of Cook Islands, Art 47; Judicature Act 1961 (Samoa), s 31; Tokelau (Amendment) Act 1986 (NZ), s 3; Constitution of Tonga, cl 9. See, further, Chapter 11.

9 See, further, Chapter 3.

It is clear that courts in the region have taken the view, as in England, that an official of central or local government who acts in breach of a public duty can be ordered by the order of mandamus to act in accordance with that duty. The jurisdiction of the Supreme Court (now the High Court) of Fiji Islands to do this was upheld in *Native Land Development Corporation v Labasa Town Council*.¹⁰ In that case, mandamus was issued to compel a local authority to advertise changes to its town plan; the plan had been approved by the director of Town and Country Planning, and the local authority was required to advertise the changes to it, but the authority refused to do so because it wished to use the land in question for another purpose, that is, as a car park.

The jurisdiction of the Supreme Court of Tonga to issue mandamus was fully discussed in *Afuha'amango v Minister of Finance*,¹¹ where mandamus was sought against the treasurer of Tonga for failing to pay sitting allowances of £50 to members of the Legislative Assembly as authorised by the estimates, but was refused by the Supreme Court, on the ground that the treasurer was required by regulation to make payments 'under authority of the Premier', and the premier had directed that payments of only £25 be made to members.

In situations where there is no public duty or breach of such duty, the courts of the region have, as in England, long held that they could issue prohibition, to prevent, and certiorari, to quash or set aside, decisions or acts of a judicial nature.¹² In determining which bodies were to be regarded as capable of taking action of a judicial nature, the courts of the region relied upon the classic words of Atkin LJ in *R v Electricity Commissioners ex p London Electricity Joint Committee Co (1920) Ltd*:¹³ 'any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially.' Applying this test, the Court of Appeal of Fiji, in *Re Satish Chandra*,¹⁴ held that *certiorari* could be issued to quash the decision of the permanent arbitrator established by the Trade Disputes Act,¹⁵ to determine disputes between employers and employees.

In England in the early 1980s, the notion that the prerogative orders of certiorari and prohibition were confined to governmental actions of a judicial nature was exploded by the House of Lords, at first *obiter* in *O'Reilly v Mackman*,¹⁶ and later directly in *Council of Civil Service Unions v Minister of State for the Civil Service*.¹⁷ A series of cases in English courts and the

10 Supreme Court, Fiji, A826/1981 (unreported).

11 (1954) 1 Tongan LR 70.

12 *David v Rashid* (1922) 2 Fiji LR 92; *OB Krouse Ltd v Sunia Toakai* (1936) 1 Tongan LR 32.

13 [1924] 1 KB 171, p 205.

14 (1980) 32 Fiji LR 16.

15 Cap 97 (Fiji).

16 [1983] 2 AC 237.

17 [1985] AC 374.

Privy Council have held that, nowadays, the prerogative orders of certiorari and prohibition may be applied to quash or prohibit action by officials of government and of public statutory authorities which is of an executive nature. Such action includes decisions of executive policy;¹⁸ of a legislative nature, that is, making of rules, regulations and bylaws;¹⁹ of an administrative nature²⁰ and of a business or commercial nature.²¹

The courts in England have gone further and made it clear that action will be regarded as governmental, and therefore subject to the expanded scope of the orders of *certiorari* and prohibition, not only when the action is taken by officials of government or of statutory bodies, but also when the action is taken by private persons, if those persons are acting as an integral part of a framework of governmental control. Thus, the decisions and recommendations by a panel of businessmen from the City of London with regard to proposed mergers and takeovers of companies was held to be subject to certiorari because they formed part of a legislative framework for the control of takeovers and mergers and provided the basis for enforcement action by government departments.²² On the other hand, action by private persons, such as disciplinary action taken by sporting bodies²³ and religious leaders,²⁴ is not regarded as governmental, if it is taken on the basis of contractual or consensual association, and not within a governmental framework.

The courts in the region have followed the expansion of the boundaries of judicial review undertaken by the courts in England. There are several cases from within the region, mostly from Fiji, where the courts have had to decide whether actions or decisions that have been taken have a sufficient governmental or public law element to be subject to judicial review. In *The State v Minister for Communications, Works and Energy*²⁵ the Supreme Court of Fiji held that a decision made by a minister to increase the fee payable under a contractual licence to broadcast television issued under the terms of legislation had a sufficiently governmental or public element to be subject to judicial review. Further, in *The State v Arbitration Tribunal*²⁶ the Supreme Court of Fiji held that an arbitration tribunal which had been

18 *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374; *R v Foreign and Commonwealth Secretary ex p Rees-Mogg* [1985] 1 QB 657.

19 *R v Secretary of State for Social Services ex p Metropolitan Authorities Association* [1986] 1 WLR 1; *R v Secretary of State for Health ex p Tobacco International* [1991] 3 WLR 529.

20 *Attorney General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.

21 *Mercury Energy Ltd v New Zealand Electricity Corporation* [1994] 1 WLR 521.

22 *R v Panel on Takeovers and Mergers ex p Datafin* [1987] QB 815.

23 *R v Disciplinary Committee of the Jockey Club ex p Aga Khan* [1993] 1 WLR 909.

24 *R v Chief Rabbi ex p Wachmann* [1992] 1 WLR 1036.

25 (1999) 45 FLR 229.

26 (1992) 38 FLR 234.

established by legislation to arbitrate in disputes between employees and employers in the private sector had sufficient public element to be subject to judicial review. In one decision in 1992²⁷ the High Court of Fiji appeared to consider that a decision of a sporting body would be subject to judicial review. However, that was before decisions to the contrary in England, referred to in the preceding paragraph, had been reported, and it may need to be reconsidered.

The fact that a decision of a governmental nature is not a final decision has been held not to exclude it from judicial review, and so a decision to suspend a person pending further disciplinary action has been held to be reviewable.²⁸ On the other hand, the fact that a decision is able to be appealed to another body has been held to exclude judicial review, unless there is some exceptional reason why that right of appeal should not be exercised. Accordingly a decision to suspend a football player, which could be appealed under the rules of the football league;²⁹ a decision by a magistrate's court to award worker's compensation to an employee injured in the course of employment, which could have been appealed to the High Court if the appeal had been lodged in time;³⁰ a decision by a magistrate's court to commit a person for trial by the High Court, which decision could have been appealed to the High Court;³¹ decisions to appoint certain persons as university staff, which could be appealed to the visitor of the university;³² a decision by a medical council not to register two overseas doctors as medical practitioners, which could be appealed under the relevant legislation,³³ were all, in the absence of any exceptional reason, held to be immune from judicial review.

There are still some kinds of action by some governmental officials that are not subject to judicial review by the superior courts. It is obviously not appropriate that a decision of a judge of a court which is of the same status as, or a higher status than, the High Court or Supreme Court should be subjected to review by that court. Thus, a decision of a commissioner of the High Court of Solomon Islands was held by a judge of the High Court not to be subject to judicial review, since a commissioner had the same status as a judge of the High Court.³⁴ The internal proceedings of the legislature in the region are also regarded, as in England, as being outside the jurisdiction of the High Court or Supreme Court to undertake judicial review, unless

27 *The State v Mohammed Sabu Khan* (1992) 38 FLR 83.

28 *The State v Permanent Secretary for Education, Women and Culture* (1997) 43 FLR 91.

29 *The State v Mohammed Sabu Khan* (1992) 38 FLR 83.

30 *Civil Aviation Authority of Fiji v Labour Officer* (1994) 40 FLR 112.

31 *Makarava v Director of Public Prosecutions* (1998) 44 FLR 222.

32 *Muma v University of the South Pacific* (1995) 41 FLR 101.

33 *The State v Fiji Medical Council* [2000] 1 FLR 98.

34 *Sia v Amasia* [1980-1] SILR 150.

there has been a breach of the constitution.³⁵ On the other hand, the head of state of Vanuatu³⁶ and the representative of the head of state of Solomon Islands, that is, the governor-general,³⁷ have been held not to be immune from the jurisdiction of the superior courts.

Some governmental action has been stated by provisions in the written law to be immune from challenge or question in the courts. The effect of these exclusionary or privative provisions has been discussed on a number of occasions by courts in the region. Usually, the courts in the region, as in England, have interpreted such provisions of the written law as not totally excluding their powers of review, but as excluding only judicial review on the ground of error of law on the face of the record of the decision, which does not involve an excess of jurisdiction. Exclusionary provisions have been interpreted, therefore, as not excluding the power of the superior courts to exercise judicial review on the ground of lack of or excess of jurisdiction, and breach of principles of natural justice and fairness. Thus, in Fiji Islands, the courts have, on a number of occasions, interpreted exclusionary or privative provisions in legislation purporting to prevent any questioning or challenging of the decisions of the Public Service Appeal Board, the minister of Immigration and the Agricultural Tribunal as not excluding their power to set aside such decisions of those bodies as were without jurisdiction or in breach of natural justice.³⁸ In Solomon Islands, the Court of Appeal has taken a similar view,³⁹ and so, also, has the Supreme Court of Vanuatu.⁴⁰

However, in relation to decisions about matters of custom, courts in the region have been more willing to interpret generally worded privative clauses as completely excluding their jurisdiction. In Fiji Islands, the Court of Appeal, in *Ratu Nacanieli Nava v Native Lands Commission*,⁴¹ appeared to consider that its jurisdiction to review decisions of the Native Lands Commission on matters of custom was completely excluded by a general provision in the 1990 constitution stating that decisions of the native land commission could

35 *Madhavan v Falvey* (1973) 19 F LR 190; *Philip v Speaker of National Parliament* [1990] SILR 227.

36 *Attorney General of Vanuatu v President of Vanuatu*, Supreme Court, Vanuatu, Civ Cas 124/1994 (unreported).

37 *Billy Hilly v Pitaka* [1994] SBCA 1.

38 *Schramm v Attorney General* (1981) 27 FLR 125, considering Fiji Citizenship Act 1971, s 18; *Re Manoa Bale* (1985) 31 FLR 89 and *Tuberi v Attorney General* (1987) 27 Fiji LR 30, considering Public Service Act, Cap 74, s 14(11); *Venkatama v Ferrier-Watson*, Supreme Court, Fiji, CBV 0002/92 (unreported) and *Ponsami v Reddy*, Supreme Court, Fiji, Civil Appeal CBV 0001/96 (unreported), considering Agricultural Landlord and Tenant Act, Cap 270 (Fiji), s 61(1).

39 *Governor General v Mamaloni* [1993] SBCA 1.

40 *Coombe v Minister of Home Affairs* (1980–8) 1 Van LR 74; *In re Coombe* (1980–8) 1 Van LR 383.

41 Court of Appeal, Fiji Civ App 55/1993 (unreported) (11 November 1994).

not be challenged in a court of law.⁴² This decision was followed by the High Court in *Ratu Isireli Namulo v Native Lands and Fisheries Commission*⁴³ (although an appeal against the decision was allowed by consent: *Ratu Isireli Rokomatu v Native Lands and Fisheries Commission*),⁴⁴ but was not accepted in *The State v Native Lands Commission ex p Ratu Akuila Koromata*,⁴⁵ where the High Court held that the jurisdiction of the court would not be excluded if there had been a breach of natural justice. The provision of the constitution giving rise to these conflicting decisions has now been repealed. In Samoa, also, the Supreme Court held, in *Alaelua v Land and Titles Court*,⁴⁶ that its jurisdiction to review decisions of the Land and Titles Court was completely excluded by a provision that the decision could not be questioned or challenged in any court, although an appeal that was allowed by consent has made the position rather unclear.⁴⁷ This decision has, however, not been followed in cases where the decision of the Land and Titles Court is in breach of Part II of the Constitution of Samoa which recognises fundamental rights and freedoms.⁴⁸

Grounds of judicial review

The superior courts in the region have adopted the same grounds of judicial review as have been employed by the courts in England and Wales, that is, refusal to perform a public duty, lack or excess of jurisdiction (*ultra vires*), breach of principles of natural justice and fairness, error of law on the record, and fraud. Examples of these appear in the sections that follow.

Refusal to perform a public duty

On several occasions, superior courts of the region have issued mandamus to compel officials of central or local government to perform public duties which the officials had refused to fulfil. In *Native Land Development Corporation v Labasa Town Council*,⁴⁹ the Supreme Court of Fiji issued *mandamus* to compel a local authority to advertise changes to its town plan which had been made by the director of Town Planning, as it was required to do by the Town Planning Act,⁵⁰ and which it had refused to do.

42 Constitution of Fiji Islands, 1990, s 100(4).

43 High Court, Fiji, JRHBJ 0002/95 (unreported) (4 December 1995).

44 High Court, Fiji, ABV 0007/1965 (unreported) (6 February 1997).

45 [1997] FJHC 49.

46 [1980–93] WSLR 507.

47 *Alaelua v Land and Titles Court* [1980–93] WSLR 531.

48 *Sefo v Land and Titles Court* [2004] WSSC 46; *Peniamina v Land and Titles Court* [2004] WSSC 12.

49 Supreme Court, Fiji, A826/1981 (unreported).

50 Cap 159.

In *Kaupai v Principal Magistrate (Malaita)*,⁵¹ mandamus was issued by the High Court of Solomon Islands to require a magistrate, in his capacity as clerk of the Malaita Customary Land Appeal Court, to accept an appeal to the court which had been made within the three months prescribed by s 231 of the Land and Titles Act,⁵² but which he had mistakenly considered had been filed out of time. In *Luifaufao'oa v Malaita Customary Land Appeal Court*,⁵³ mandamus was issued by the High Court of Solomon Islands to order a Customary Land Appeal Court to consider and determine the various items of costs submitted by the party in whose favour it had made a general order for costs.

Lack or excess of jurisdiction (ultra vires)

The superior courts of the region have accepted, as in England, that, even in the absence of a public duty, they may set aside or prohibit action which is without legal authority, or, as it is more technically termed, is without jurisdiction. This concept is sometimes expressed in Latin as *ultra vires* (meaning, literally, 'beyond the powers'). There are various ways in which action of a governmental nature may be considered to be without legal authority, that is, because it is made by a person not authorised to make it, or by a process that is not authorised, or because it is of a kind or effect that is unauthorised, or because it is made for a purpose that is not authorised, or upon the basis of a consideration that is not authorised or because it was patently unreasonable.

Lack of jurisdiction arising from the fact that governmental action was taken by a person unauthorised to take it was the ground upon which a recommendation made by the Committee on the Prerogative of Mercy of Solomon Islands to the governor-general was held to be unauthorised and invalid because the committee was not constituted as required by s 45 of the constitution.⁵⁴ It is important to note that the courts have held that when functions are required by legislation to be carried out by a minister of government this should be interpreted as meaning not only the minister personally, but also appropriate officials under the minister's charge, so that such officials may carry out the functions of the minister. This is not delegation, and so does not depend upon any express or implied words of delegation by the minister. Rather it is expansion of the term 'minister' to include appropriate officials acting in the name of the minister – what is sometimes described as devolution of function. Thus, in Tonga it was held that the

51 [1985–6] SILR 95.

52 Cap 133.

53 [1988–9] SILR 70.

54 *Kenilorea v Attorney General* [1983] SILR 61.

power of suspension of a school pupil conferred by legislation upon the minister of Education could be exercised by a school principal.⁵⁵

Lack of jurisdiction, or *ultra vires*, arising from a failure to comply with the process prescribed by law for taking governmental action has been the basis of decisions in several countries in the region that governmental action was unauthorised and invalid. In Solomon Islands⁵⁶ and in Vanuatu,⁵⁷ decisions made by the Public Service Commission were set aside by *certiorari* because the procedure prescribed by statute for the conduct of disciplinary inquiries was not complied with. In Samoa, an appointment to the public service made by the Public Service Commission was held to be unauthorised and invalid because of failure to follow the prescribed procedures for advertising the position.⁵⁸ In Fiji Islands, a decision of a Transport Licensing Authority was quashed due to the failure of the authority to comply with the prescribed statutory requirements.⁵⁹ In Vanuatu, a decision by the president to dissolve Parliament was declared to be unauthorised and of no legal effect because the prior advice of the Council of Ministers had not been given, as required by the constitution.⁶⁰

Lack or excess of jurisdiction, or *ultra vires*, deriving from the fact that the action taken was not of the kind that was authorised to be taken has also featured in a number of decisions in the region. In Fiji Islands, the Supreme Court quashed a decision by a hotel licensing body to reject an application for a guest house because the sections of the act authorising the body to determine such applications had not come into force.⁶¹ Also in Fiji, a direction given by a minister to a Transport Licensing Authority to grant a taxi licence to a particular individual was held to be unauthorised and invalid because the transport licensing legislation did not authorise any such direction.⁶² Similarly, in Samoa, directions given by ministers to the Public Service Commission as to the appointment of a particular person were held to be unauthorised and invalid because there was no provision for them in the constitution or the legislation.⁶³ In Solomon Islands, the appointment of the governor-general by the Queen was declared to be unauthorised and invalid because the person appointed was disqualified from appointment by the constitution since he was still a member of the public service.⁶⁴

55 *Tukuafu v Kingdom of Tonga* [1999] TOCA 2.

56 *R v Public Service Commission ex p Tiare* [1984] SILR 80.

57 *Kalo v Public Service Commission* (1980–8) 1 Van LR 305.

58 *Salope v Public Service Commission* [1980–93] WSLR 38.

59 *Akbar Buses Ltd v Transport Control Board* [1984] FJCA 6.

60 *In re Application by the Speaker of Parliament* (1980–8) 1 Van LR 393.

61 *Tam Chung Hoi v Hotel Licensing Board* (1975) 21 FLR 195.

62 *Korovulavula v Public Service Commission* [1994] FJCA 43.

63 *Vermuelen v Attorney General* [1980–93] WSLR 105.

64 *In re an Application by Hon Andrew Nori* [1988–9] SILR 99.

UNAUTHORISED PURPOSES AND CONSIDERATIONS

The courts in England have made it clear that the principle of lack of authority applies not only to the substance of the action or decision that has been taken by a public official, but also to the purposes for which the official took the action or decision, and the considerations or factors taken into account by the official when taking it.⁶⁵ Accordingly, if an action or decision, although in substance authorised, is taken for a purpose or upon considerations that are not authorised, the action or decision is considered to be unauthorised.

This approach has been followed in the region. In Fiji Islands, a minister's decision to terminate the appointment of a man as a member of the Transport Licensing Authority, and the Public Service Commission's decision to terminate the appointment of the same man as road traffic controller, were held by the Court of Appeal in *Korovulavula v Public Service Commission* to be unauthorised and invalid because both decisions were taken in order to punish the officer for refusing to comply with unauthorised directions from the minister to grant a taxi licence to a particular individual, which was not a purpose that was authorised by the relevant legislation.⁶⁶ Also in Fiji Islands, decisions of the Public Service Appeal Board were quashed by certiorari since they had been made without taking into consideration relevant information relating to the public servants concerned which was contained in files not made available to the Appeal Board.⁶⁷ In Vanuatu, a decision by the Public Service Commission to compel a public servant to take early retirement was held to be unauthorised and invalid because it was made on the grounds that the public servant was believed to be a supporter of the opposition political party which was not a purpose that was authorised by the terms of the constitution that provided for compulsory retirement.⁶⁸

UNREASONABLENESS

The courts in England have also held that normally they will imply into the terms of authorising legislation a requirement that authorised action or decision must not be unreasonable. Most of the early decisions in England related to action and decisions by local government, and for some years, it was unclear whether the courts in the region would hold that actions or decisions by officials of central government were invalid, on the ground

65 *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 – a decision which has been described as 'the high water mark of judicial review': Wade, HWR and Forsyth, CF, *Administrative Law*, 7th edn, 1994, Oxford: OUP, p 735.

66 Court of Appeal, Fiji, Civ App 6/1994 (unreported) (23 August 1994).

67 *R v Fiji Public Service Appeal Board ex p Thoman*, High Court, Lautoka, Fiji, JR 3/1984 (unreported).

68 *Public Service Commission v Bill Willie* (1993) 1 Van LR 673.

that they were unreasonable. On several occasions, it was denied that courts could hold that regulations were invalid on the ground of unreasonableness.⁶⁹ In 1965, however, the Fiji Court of Appeal, in *Attorney General v International Woods Ltd*,⁷⁰ although in the context of a statutory appeal, stated that an exercise of discretion by a public official, in that case, the Collector of Customs, would be invalid if it were shown to have been based upon irrelevant considerations or to be clearly unreasonable. Since then there have been several cases in which decisions of governmental officials have been held to be clearly unreasonable and invalid on that account: a decision by a director of economic development not to advertise an application for a tax incentive for a company to manufacture beer and soft drinks because, it would not affect an existing soft drink company, when clearly that company would be directly affected;⁷¹ a decision by a minister to increase the fee for a licence to broadcast television from \$1,100 to \$275,000;⁷² a decision by a transport licensing board not to renew a licence of an operator to service resort hotels on the ground that there was no public need for a transport service when clearly there was such a need;⁷³ a decision by a police service commission to recommend a person to the head of state for appointment as commissioner of police when the procedure followed for the short listing and interviewing of the applicants degenerated into a procedural 'mess', and a person was recommended who had not been short listed or interviewed for the position.⁷⁴

NON-INVALIDATING FAILURE TO COMPLY WITH LEGAL PROVISIONS

The courts have shown an unwillingness to allow the principle of *ultra vires* to be used to strike down action or decisions by public officials because of non-compliance with legal provisions that have not caused any significant harm, especially when it is the provisions of subordinate legislation that have not been followed. Sometimes this is rationalised by holding that the provisions that have been breached are to be interpreted as directory, rather than mandatory; sometimes by interpreting the provisions as waivable and sometimes by interpreting them as non-invalidating. *Luba v Fijian Affairs Board*⁷⁵ is a good example of this kind of approach. There, the court held that the failure by a statutory board to follow the exact words of its standing orders when demoting and transferring an employee did not invalidate

69 *Police v Tui* [1930–49] WSLR 125; *Shiu Ram v Reginam* (1964) 10 FLR 48.

70 (1965) 11 FLR 104.

71 *Apia bottling Co v Attorney-General* [1970] WSLR 227.

72 *The State v Minister for Communications, Works and Energy* (1999) 45 FLR 229.

73 *The State v Transport Control Board* (1992) 38 FLR 33.

74 *Apisai v Simon* [2002] VUCA 42.

75 (1996) 42 FLR 8.

that demotion and transfer, because the employee must have been well aware of the matters which were raised against him. Another example is to be seen in the decision of the Kiribati Court of Appeal in *Nakau v Attorney-General*⁷⁶ where the breach of a provision in legislation requiring the presence of all claimants to land at a sitting of a land court was held not to invalidate decisions made in the absence of the persons in whose favour they were made.

Breach of natural justice and fairness

An important ground of judicial review by courts of countries of the region is breach of the principles of natural justice and fairness. Two elements to these principles have been recognised: that there must not be actual or likely bias and that an opportunity must be given to answer charges or allegations made against a person before action is taken against that person.

BIAS

A likelihood of bias was recognised by the Supreme Court of Fiji, in *R v Resident Magistrate ex p Veitata*,⁷⁷ as a ground for prohibiting a magistrate from considering a criminal charge, although the court considered that it was not likely that the magistrate would be biased against the defendant merely because he had dealt with him before in another criminal case. In that case, the court referred to the fact that, in England, two rather different tests of likelihood of bias had emerged, that is, real likelihood of bias and reasonable appearance of bias, but it found it unnecessary to decide which test should be preferred because whichever test was adopted, there was no likelihood of bias in that case. Subsequently, the House of Lords has held, in *R v Gough*,⁷⁸ that courts in England should apply a test of 'real danger of bias', meaning real likelihood or possibility of bias. On the other hand, the High Court of Australia, in *Webb v R*,⁷⁹ has refused to adopt this test for bias, and has firmly endorsed earlier decisions of Australian courts which have favoured the reasonable appearance of bias test. In Fiji Islands the Court of Appeal enunciated in 1984 a test which tries to provide an amalgam of both the real likelihood test and the reasonable suspicion test: 'would the circumstances cause a reasonable onlooker to think there was a real likelihood of bias, that is, not proof of same, but a reasonable suspicion?'⁸⁰

76 [2005] KICA 8.

77 (1977) 23 FLR 171.

78 [1993] AC 646.

79 (1994) 122 ALR 41.

80 *Latchan Bros v Sunbeam Transport* (1986) 32 FLR 127.

This test, which was restated by the Court of Appeal in 1995,⁸¹ still appears to be the test applied by the courts of Fiji Islands.⁸²

CLOSED MIND

In *Franklin v Minister of Town and Country Planning*,⁸³ the House of Lords ruled that bias was a ground of review which was confined to decisions of a judicial nature, and it was not to be used by courts as a basis for reviewing decisions of an executive or administrative nature, but this did not mean that an official who was performing such action and required by written law to consider objections or representations must not genuinely consider these objections or representations. This has subsequently been explained as meaning that an official who is performing functions which are not of a judicial nature must not have a mind that is closed to alternative proposals.⁸⁴ No occasion appears to have been reported in which courts of the region have had to consider either of these issues, that is, whether bias is a ground for judicial review of action by officials who are not performing functions of a judicial nature, and whether officials who are performing non-judicial functions must not have a mind that is closed to alternative proposals.

AUDI ALTERAM PARTEM – HEAR THE OTHER SIDE

It has long been recognised by courts in the region that natural justice and fairness require that the person against whom adverse allegations have been made should be given a reasonable opportunity to respond to those allegations and to give his or her account of the events or circumstances in question. This is often referred to by the Latin term *audi alteram partem* which literally means ‘hear the other party’. Although this is not quite an accurate description because it is not always necessary to hear the other side, it may be sufficient to read the written account given by the other party. For many years it was believed that this principle applied only to officials who were performing functions of a judicial nature, but in 1967 the High Court in England held that although the strict principle of *audi alteram partem* applied only to such officials, nevertheless all officials are required to treat people fairly, and fairness required that the person against whom an adverse decision may be made must be allowed to give his or her explanation of the material events or circumstances before such decision is made against that person.

81 *Sunbeam Transport Ltd v Pacific Transport Ltd* [1995] FJCA 43.

82 *The State v Transport Control Board* [2000] 1 FLR 6.

83 [1948] AC 87.

84 *Lower Hutt City v Bank* [1974] 1 NZLR 545; see also *CREEDNZ v Governor-General* [1981] 1 NZLR 172.

It has become clear over the years that there are two essential steps that must be taken in order to comply with this *audi alteram partem* rule of natural justice and fairness.

Adequate notice The first requirement of natural justice and fairness is that the person against whom an adverse decision or action is being considered must be given adequate notice of what is being alleged or considered against that person. One of the earliest decisions of judicial review reported in the region is *In re Ratu Savanaca Radomadomo*,⁸⁵ where the Supreme Court of Fiji held, in 1902, that an order made by the governor of Fiji for the confinement of a Fijian chief was invalid because the chief had not been informed of the charges against him upon which the confinement order was based, and it issued a writ of habeas corpus to release him.

Courts in the region have held, as in England, that, in order for there to have been an adequate opportunity to respond, not only must a person be adequately informed of any adverse charges or allegations, but that person must also be adequately informed of the material or evidence which has been given in support of these charges or allegations. So, in Fiji Islands, a decision by a Civil Aviation Appeals Tribunal was set aside for failure to disclose to an appellant a file compiled by the Civil Aviation Authority which contained criticisms of the appellant;⁸⁶ a decision by a Transport Licensing Authority was set aside by certiorari because of failure to disclose a report made to it by transport officers⁸⁷ and a decision by a university disciplinary committee was quashed by *certiorari* for failure to allow the student who was charged with a disciplinary offence to be present when other students gave evidence against him.⁸⁸ Likewise, in Samoa, a recommendation by a Commission of Inquiry that a public servant should be demoted was quashed by certiorari because the commission had not allowed the public servant to be present at times when witnesses gave evidence against him.⁸⁹

Natural justice and fairness do not require, however, that the notice of matters being considered against a person must take a particular form, so long as, in substance, they provide adequate information to the person concerned. So, in *Luba v Fijian Affairs Board*,⁹⁰ the High Court held that although a memorandum to an employee of a statutory board enclosing an adverse audit report did not comply with the requirements of the standing orders of the body, the information provided was sufficient to make the employee aware of the matters alleged against him, and so the demotion and transfer that followed were valid.

85 (1902) 3 FLR 43.

86 *R v Public Service Board of Appeal ex p Abdul Hannif* (1986) 32 FLR 172.

87 *Latchan Bros Ltd v Transport Control Board* (1986) 32 FLR 127.

88 *R v University of South Pacific ex p Tuiulupona* (1985) 31 FLR 81.

89 *Vermuelen v Attorney General* [1980–93] WSLR 105.

90 (1998) 42 FLR 8.

Adequate opportunity to respond Once a person has been informed of what is being alleged or considered against him or her, natural justice and fairness require that that person must be allowed an adequate opportunity to respond, and give his or her side of the story. In Solomon Islands, on two occasions, decisions made by school disciplinary committees to expel students for misbehaviour were held to be invalid because the students were not told where and when they could speak to the committees to give their versions of the incidents;⁹¹ on one occasion, a decision of a Customary Land Appeal Court was quashed by certiorari because the court proceeded in the absence of the appellant and did not allow her an opportunity to reply to the evidence against her.⁹² In Fiji Islands a decision by the public service commission to dismiss a public servant was set aside because the commission, although notifying him of the offence of which he was charged, had failed to allow him an opportunity to make representations as to whether he had committed the offence or as to the appropriate penalty that should be imposed if he were guilty.⁹³

Natural justice and fairness do not, however, necessarily require that an opportunity to respond to adverse charges or allegations must take any particular form. It is not always necessary that a hearing be held and that oral evidence be given. It may be sufficient if an opportunity to respond in writing is allowed, provided that it is adequate. Thus, in *Talasasa v United Church*,⁹⁴ the High Court of Solomon Islands held that there was no breach of natural justice or fairness when a church pastor was informed by letter of allegations made against him, and allowed to respond only by letter. Also, provided an adequate opportunity to respond is given, it is not necessary that another or further opportunity be given,⁹⁵ or that the person concerned did avail himself of that opportunity.⁹⁶

The courts have stressed that they should not dissect the procedural steps that have been taken to reach the decision too closely, but should look at the procedures which have been taken in their entirety, in the round, in order to determine whether there has been procedural fairness overall.⁹⁷ If, however, something has been said or done to give a person a legitimate expectation that certain procedures will be followed, for example, a public hearing,⁹⁸ or an opportunity to make oral submissions,⁹⁹ or that he or she

91 *Kakano v Attorney General* [1992] SBHC 16; *Nimepo v Premier of Guadalcanal Province* [1996] SBHC 35.

92 *Siope v Malaita Customary Land Appeal Court* [1985–6] SILR 255.

93 *Permanent Secretary for Public Service Commission v Lagiloa* (1997) 43 FLR 303.

94 [1993] SBHC 12.

95 *Matatolu v Attorney General* (1977) 23 FLR 6; *Tukuafu v Kingdom of Tonga* [199] TOCA 2.

96 *R v Arbitration Tribunal ex p Transport Workers' Union* (1984) 30 FLR 7.

97 *Tukuafu v Kingdom of Tonga* [1999] TOCA 2.

98 *The State v Transport Control Board* [2000] 1 FLR 105.

99 *The State v Transport Control Board* (1992) 38 FLR 33.

will be treated in the same way as others,¹⁰⁰ natural justice and fairness will require that those procedures must be followed, and, if they are not, the decision or action which has been made after non-compliance with those procedures will be held to be invalid. A legitimate expectation as to the procedures to be followed may arise from some express assurance or representation made by governmental officials,¹⁰¹ or from an established practice which has been followed in similar situations in the past.¹⁰²

REASONS FOR DECISION

Courts in the region have accepted that the principles of natural justice and fairness do not require that reasons must always be given for governmental action. Consequently, a decision by a minister of Immigration in Fiji not to give reasons for refusing a work permit to a Dutch national was, in the absence of any exceptional circumstances, held to be valid.¹⁰³

However, exceptionally, there may be situations where natural justice and fairness do require that reasons must be given for governmental action or, alternatively, that if reasons are not given, it will be presumed that there are no valid reasons for such action. The fact that a government department had initially granted a work permit to a foreigner and had later given some reasons in correspondence for refusing to renew the permit was held to create an exceptional situation where failure to provide reasons for refusing to renew the work permit was unfair.¹⁰⁴ On two occasions, the courts in Fiji have held that governmental decisions were, in the circumstances, so surprising that reasons should have been given. These include a decision by a licensing authority to decline an unopposed application made by a company for a bus licence and to grant the licence instead to a company which had not applied for it,¹⁰⁵ and a decision by a registrar of industrial unions to refuse an application for registration of a trade union of public servants.¹⁰⁶ The Court of Appeal of Fiji has also held that reasons must be given for recommendations made by magistrates to the High Court as to what matrimonial remedies should be granted because it is only the magistrates' court that sees and hears the witnesses, although it is the High Court that makes the final decree or order.¹⁰⁷

100 *The State v Suva City Council* (1997) 43 FLR 129.

101 *The State v Transport Control Board* [2000] 1 FLR 105.

102 See the full discussion of the circumstances in which a legitimate expectation may arise in *The State v Suva City Council* (1997) 43 FLR 129, pp 134–5.

103 *Kaisiepo v Minister of Immigration* [1996] FJHC 150.

104 *The State v Minister of Immigration* (1991) 37 FLR 113.

105 *Akbar Buses Ltd v Transport Control Board* [1984] FJHC 6.

106 *Fiji Public Service Association v Registrar of Trade Union* [1984] FJCA 8.

107 *Nath v Lata*, Court of Appeal, Fiji, Civ App 11/1984 (unreported) (13 July 1984).

EXCEPTIONS TO REQUIREMENTS OF NATURAL JUSTICE AND FAIRNESS

It has been recognised by courts in the region, as in England, that there are some exceptional situations where, although governmental action is taken against a person in breach of the *audi alteram partem* principle of natural justice and fairness, the action should not be invalidated. One such situation recognised in England and in the region is where the action is of a legislative nature, that is, making rules, regulations or bylaws. Thus, in *Minister of Finance and Economic Planning v Western Wreckers Ltd*,¹⁰⁸ it was held that regulations made by the minister of Finance in Fiji Islands, which prohibited the importation of used motor vehicles, were not invalid because of failure to consult used vehicle dealers whose business would be seriously affected by the import ban.

Another exceptional situation is where the governmental action that is taken does not affect any legal rights or legitimate expectations of the person applying for judicial review. Thus, in Fiji Islands, the *audi alteram partem* principle of natural justice was held not to apply to decisions not to appoint a person to the public service made by the Public Service Commission¹⁰⁹ and Public Service Appeal Board,¹¹⁰ nor to decisions made by the minister of Immigration not to grant citizenship to a person,¹¹¹ because, in all these cases, the person had no legal right or legitimate expectation to receive such appointment or grant. Likewise, in Tuvalu, it has been held that a decision of the Public Service Commission to dismiss a public servant was not invalid because of a failure to inform a public servant of the allegations made against him because, under the common law, an employee of the Crown has no right or legitimate expectation to continue to be employed by the Crown.¹¹² For basically the same reason, the Fiji Court of Appeal held that there was no need for a motor dealer to be given an opportunity to make representations to the minister, before the dealer was sent a letter correcting an error in earlier correspondence. The error related to the number of vehicles that the dealer was permitted to import and, in the circumstances, the dealer must have been aware of the error in the earlier letter.¹¹³

Finally, the principles of natural justice, like all principles of common law, are subject to modification and abrogation, express or implied, by legislation passed by the legislature, or by subsidiary legislation authorised by the legislature to be made by officials. One important instance of this is in

108 High Court, Fiji, Civ App 63/1991 (unreported) (19 November 1993).

109 *In re Hasmat Ali*, High Court Fiji, Civil 254/1972 (unreported) (23 August 1974).

110 *Public Service Appeal Board v Mahendra Singh*, Court of Appeal, Fiji, Civ App 63/1981 (unreported) (2 April 1982); *R v Public Service Appeal Board*, High Court, Fiji, Civ Cas 254/1972 (unreported).

111 *Schramm v Attorney General* (1981) 27 FLR 125.

112 *Toafa v Attorney General* [1987] SPLR 395.

113 *Western Wreckers Ltd v Comptroller of Customs and Excise* (1992) 38 FLR 96.

relation to what is described as political and departmental bias. If legislation authorises a minister to take action it is understood that the minister will have certain political policies, and these cannot disqualify the minister from acting. Likewise, officials of a government department will have in their minds the policies of the department. These must be regarded as impliedly authorised and recognised by the legislation and subsidiary legislation which authorise the minister and departmental officials to make decisions and take actions. Accordingly, taking these policies into account cannot disqualify or invalidate the decision or action. Thus, the decision of a minister of Labour and Industrial Relations to refer claims by a trade union of public servants to compulsory arbitration was held not to be invalidated by the fact that the minister, as a member of government, held certain views against the claims.¹¹⁴

Error of law in the record

Courts in Fiji Islands have held, following the decision of the English Court of Appeal in *R v Northumberland Corporation Appeal Tribunal ex p Shaw*,¹¹⁵ that decisions of a judicial nature may be set aside by certiorari if the record of the decision discloses that it was based upon an error or misunderstanding of the law. In *R v Arbitration Tribunal ex p CAAF*,¹¹⁶ the Supreme Court accepted that it could issue *certiorari* to quash a decision by the Arbitration Tribunal if an error of law was apparent in the record of the decision, but since the error that appeared in the record was an error of fact, not law, *certiorari* was not issued. In *Re Manoa Bale*,¹¹⁷ the Supreme Court held that an error of law was disclosed in the record of the decision by the Public Service Appeal Board, but that the court's jurisdiction to issue certiorari on the ground of error of law had been removed by a provision in the legislation excluding its jurisdiction to issue certiorari, except where there had been an excess of jurisdiction or a breach of the principles of natural justice.¹¹⁸

Fraud

Fraud, or the procuring of a decision by fraudulent evidence, has been recognised in the region, as in England, as a ground of judicial review. In *R v Customary Land Appeal Court (Western) ex p Pitakaka*,¹¹⁹ a decision of a Customary Land Appeal Court awarding land to a man was quashed by

114 *CEO for Labour, Industrial Relations and Productivity v Fiji Public Service Association* [2005] FJCA 66.

115 [1952] 1 KB 338.

116 (1985) 31 FLR 166.

117 (1985) 31 FLR 89.

118 See, above, p 122.

119 [1985-6] SILR 69.

certiorari because a witness called by the man claimed that his father was dead and that he would give evidence on behalf of his deceased father, but, in fact, it was later established that the father was alive.

Court's discretion to decline judicial review

All the remedies that are available for judicial review in the region are discretionary; that is to say, the High Court or Supreme Court has a discretion to decline to grant judicial review even if grounds for judicial review have been proved by an applicant. There are essentially three sets of circumstances which the courts have considered entitle them to decline a remedy of judicial review, although grounds for it have been established: delay or other undeserving conduct by the applicant, the existence of satisfactory alternative remedies and hardship that will be caused to the defendant or to others.

The main instance of undeserving conduct by the applicant which has been held to disentitle an applicant for judicial review who might otherwise be successful, has been delay in applying for judicial review. When leave of the court is necessary before commencing an application for judicial review, delay in making the application for leave, or delay in filing the application for judicial review once leave has been granted, will ensure that the proceedings are struck out at that early stage.¹²⁰ When leave of the court is not necessary,¹²¹ or when it has been obtained, but there is subsequent delay before the case is heard and judgment given,¹²² the passage of time since the date of the action or decision which is challenged, will be a ground upon which the court may decline to grant any remedy. In Solomon Islands, a delay of nine months in applying for an order of certiorari to quash a decision of a local court was held to disentitle an applicant, even though the High Court had power, under its rules of procedure, to extend the period of six months prescribed by the rules,¹²³ and a delay of five months and one week was held to disentitle an applicant, even though the application was made within the prescribed period of six months.¹²⁴ In both cases, the High Court took account of the fact that a statutory right of appeal was also available to the applicant and the prescribed period for that was three months. Closely linked with the question of delay, is the issue of mootness, that is, that the issue to be decided by the court has ceased to be a live or real issue. Traditionally the courts have been reluctant to make decisions upon matters that have ceased to be of any practical significance, but in

120 See, below, Procedure for applying for judicial review.

121 *Apia Bottling Co Ltd v Attorney-General* [1970-9] WSLR 227; *Luba v Fijian Affairs Board* (1996) 42 FLR 8.

122 *Korovulavula v Public Service Commission* [1994] FJCA 43.

123 *Re Kalasoa's Application* [1983] SILR 174.

124 *R v Public Service Commission ex p Tiare* [1984] SILR 80.

recent years the courts have held that they will grant a remedy, especially a declaration, where the issue is one of general or public importance. Thus, the Fiji Court of Appeal held that proceedings for a declaration as to the powers of a minister to issue directions to a television company that it must broadcast a particular rugby match live on its free channel, and not just on its pay channel, could continue, even although the date of the particular rugby match was long past, because of the public importance of the issue as to the minister's powers to issue such directions.¹²⁵

The existence of an alternative remedy, by way of appeal, will, as mentioned earlier,¹²⁶ be regarded as rendering the action or decision inappropriate for judicial review, unless there is some exceptional reason why that appeal could not be availed of. A right of appeal which had not been availed of by the applicant was also a factor which was considered in the two decisions in Solomon Islands referred to in the preceding paragraph.¹²⁷ In *Matatumua v Public Service Commission*,¹²⁸ the Supreme Court of Samoa held that an award of exemplary damages was a more satisfactory alternative to an order setting aside an unlawful decision to dismiss a public servant. Hardship that would be caused to others was the factor that the Supreme Court of Samoa held justified it to decline to make a declaration that a government grant of a tax incentive to a company to erect a factory to manufacture beer and soft drinks was unauthorised and invalid because, by the time the decision was made by the court, the company had nearly completed the construction of the factory.¹²⁹

Procedure for applying for judicial review¹³⁰

The procedure for applying for judicial review is, in some countries of the region, the same as that which is required to be adopted for ordinary civil proceedings, but in most countries special procedures are required to be followed which are different from those applying to ordinary civil proceedings.

No special procedures for judicial review In Cook Islands, Nauru and Niue, the codes of civil procedure of the superior courts contain no express provisions relating to judicial review, so presumably proceedings for judicial review in those countries are to be brought like other civil proceedings, that is, by filing of summons and statement of claim without prior leave of the Court.

125 *Naidu v Attorney-General of Fiji* [1999] FJCA 55.

126 See, above, Action which is subject to judicial review.

127 See, above, fn 123 and 124.

128 [1980–93] WSLR 295.

129 *Apia Bottling Co Ltd v Attorney General* [1970–9] WSLR 227.

130 For further discussion, see Ahmadu, M and Nand, N, *Judicial Review Applications in Fiji: Principles and Practice*, 2001, Suva: IJALS, USP. See also, mainly with regard to Papua New Guinea, Ntumu, *Leave Applications for Judicial Review: Law and Practice*, 1996, Port Moresby: Universal Press.

Special procedures for judicial review

In most countries of the region special procedures are required to be followed for judicial review, and because these are of considerable practical importance they will be considered in some detail.

LEAVE TO COMMENCE PROCEEDINGS

In Fiji,¹³¹ Kiribati,¹³² Solomon Islands,¹³³ Tonga,¹³⁴ Tuvalu¹³⁵ and Vanuatu,¹³⁶ leave is, as in England,¹³⁷ but not in Scotland, New Zealand and many Australian states,¹³⁸ required to be obtained from the superior courts before a substantive application for judicial review is filed. Application for leave may be made *ex parte*, that is, without notice to the proposed defendant, and must be accompanied by a supporting statement setting out the relief that is sought, and the grounds for that relief, which must be verified by affidavit, in Fiji, Kiribati, Solomon Islands, Tonga and Vanuatu, and, in Tonga, must be accompanied by a copy of the proposed writ and statement of claim.

TIME FOR FILING APPLICATION FOR LEAVE

In all six countries where leave is required, the rules of procedure stress the importance of applying for leave quickly and without delay, but not always in the same terms. In Fiji Islands, if leave for order of certiorari is not sought within three months, or if there has been 'undue delay' in seeking leave for any other relief, the court may decline leave if the granting of the relief sought would cause substantial hardship to, or substantially prejudice the rights of, any person, or be detrimental to good administration. In Kiribati, Solomon Islands and Tuvalu, leave to apply for certiorari must be filed within six months of the decision, but nothing is said about other forms of relief. In Tonga applications for leave are required to be made 'promptly and in any event within three months from the date when the grounds for the application first arose, unless the Court considers that there are good reasons for extending that period.' In Vanuatu, the application for leave must be made within six months of the decision, although the time may be

131 High Court Rules 1988, Order 53.

132 High Court (Civil Procedure) Rules 1964 (UK), Order 61.

133 *Ibid.*

134 Supreme Court Rules 1991, Order 27.

135 High Court (Civil Procedure) Rules 1964 (UK), Order 61.

136 Civil Procedure Rules 2002 (Van), Part 17.

137 Rules of the Supreme Court (UK), Order 53, replaced in 2000 by Civil Procedure Rules 2000 (UK), Part 54.

138 See comment in *Naidu v Attorney-General* [1999] FJCA 55.

extended if the court is satisfied that substantial justice so requires. While the courts of the above countries do have a general power to enlarge times prescribed by the rules, the courts have tended to be unwilling to use that power in relation to proceedings for judicial review. It follows that an applicant must lodge the application for leave as soon as possible, and must also explain the reasons for any delay. Failure to do so will result in the application for leave being dismissed.¹³⁹

STANDING OF APPLICANT FOR LEAVE

The rules of Fiji, Kiribati, Solomon Islands, Tonga, Tuvalu and Vanuatu expressly state that the court must be satisfied that the applicant has sufficient standing to bring the proceedings before granting leave. In Fiji, Kiribati, Solomon Islands, Tonga and Tuvalu, the rules require that the court must be satisfied that the applicant has 'sufficient interest' in the matter to which the application relates. In England, where there is a similar requirement, the House of Lords¹⁴⁰ has ameliorated this requirement by holding that a final decision as to whether an applicant has sufficient interest may be postponed until the end of the proceedings, and that the sufficiency of the interest may depend on the extent and the magnitude of the actions of decisions that are sought to be reviewed, so that, for example, where a decision of a public official affected only one person, only that person would have sufficient interest, but a decision of a public official which affected many people, either directly or as taxpayers, could be challenged by persons and groups speaking for the wider community.¹⁴¹ This view has been adopted in Fiji Islands¹⁴² and Tonga.¹⁴³ It is, thus, sufficient if a *prima facie* case of standing is made out at the time of the application for leave to issue proceedings. The result of this is that the High Court of England has accepted applications for judicial review which were made by interest groups,¹⁴⁴ by public spirited taxpayers concerned at the expenditure of public moneys,¹⁴⁵ and by journalists concerned about official practices as to the non-disclosure of information.¹⁴⁶ On the other hand, the courts have held that taxpayers do

139 *In re Kalasoe's Application* [1983] SILR 174; *R v Public Service Commission* [1984] SILR 80; *The State v Public Service Commission* (1997) 43 FLR 283.

140 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

141 See, eg, *R v Her Majesty's Treasury* [1985] 1 QB 657; *R v Foreign and Commonwealth Secretary* [1995] 1 WLR 386.

142 *Iniasi Tuberi v Attorney General* (1987) 33 FLR 30; *Naidu v Attorney-General* [1999] FJCA 55.

143 *Akau'ola and the Kingdom of Tonga v Pohiva* [1990] Tonga LR 159.

144 *R v Foreign and Commonwealth Secretary ex p Rees-Mogg* [1994] QB 552.

145 *R v Felixstowe Justices ex p Leigh* [1987] QB 582.

146 *R v IRC ex p National Federation of Self-Employed and Small Businesses* [1982] AC 617.

not have standing to apply for the judicial review of the assessment by the revenue authorities of other taxpayers,¹⁴⁷ and that a client of a solicitor does not have standing to apply for the judicial review of a decision by the legal aid officials as to the grant of costs to those solicitors.

Within the region, these decisions are directly relevant only in Fiji Islands and Tonga, where the rules of procedure, as mentioned earlier, have been changed to follow the rules of procedure of the High Court of England. In other countries of the region, the principles of common law and equity still remain, although it is possible that they may be influenced by the liberalising effect of the English decisions.

In Vanuatu, the rules of procedure require that the applicant for judicial review must be 'directly affected' by the decision which he or she is challenging.¹⁴⁸ This appears to provide a stricter test as to the interest of the applicant than that which is required in the other five countries of the region where leave is required to apply for judicial review.

DISCRETION OF COURT TO GRANT OR REFUSE LEAVE TO COMMENCE PROCEEDINGS FOR JUDICIAL REVIEW

The rules of civil procedure in Fiji, Kiribati, Solomon Islands, Tonga and Tuvalu, like the rules of civil procedure in England, confer a discretion upon the courts as to whether or not to grant leave to commence proceedings for judicial review, but they do not expressly state the grounds upon which that discretion is to be exercised.

The courts in England have held that the purpose of the rule requiring leave, and in particular the purpose of the requirements of a supporting statement showing the grounds on which the application is made and the verification of that statement by affidavit, is to screen out frivolous and unsustainable claims and ensure that proceedings for judicial review are not commenced unless there is an arguable case.¹⁴⁹ This has been followed by courts in the region, and accordingly failure to provide sufficient detail of an arguable case will result in the application being refused.¹⁵⁰ In Vanuatu, the rules of civil procedure expressly state that the court must be satisfied that the applicant has an arguable case.¹⁵¹

Although the rules of civil procedure state that leave is not to be granted if the conditions referred to above have not been fulfilled, the rules do not state that leave must be granted if the conditions are fulfilled. Accordingly,

147 *R v Legal Aid Board ex p Bateman* [1992] 1 WLR 711.

148 Civil Procedure Rules 2002 (Van), Part 17.8 (3).

149 *R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

150 *The State v Permanent Arbitrator* (1997) 43 FLR 123, 254.

151 Civil Procedure Rules 2002 (Van), Part 17.8 (3)(a).

the court has a residual or ultimate discretion as to whether it will grant leave. An interesting example of the exercise of that ultimate discretion against an applicant was a decision by the High Court of Fiji not to grant leave to commence proceedings because 'even if judicial review were to be granted to the applicant, it will achieve nought.'¹⁵²

STAY OF ACTION OR DECISION WHICH IS CHALLENGED

The rules of civil procedure of Fiji, Kiribati, Solomon Islands and Tuvalu provide that where leave is sought to apply for certiorari or prohibition, the grant of leave shall, if the court so directs, operate as a stay of the proceedings in question until the hearing of the application for judicial review or until the court orders. Originally, the courts in Fiji, on the basis of the decision of the House of Lords in *Factortame Ltd v Secretary of State for Transport*,¹⁵³ held that no stay order could be issued against the state, since it had the same effect as an injunction which could not be made against the Crown.¹⁵⁴ Later, however, after the House of Lords in *M v Home Office*¹⁵⁵ held that injunctions could be made against the Crown, courts in Fiji accepted that stay orders may be made against the state.¹⁵⁶

As a matter of practice, the courts in Fiji have held that stays should not be granted against deportation orders, except in very exceptional cases, and that pending court proceedings do not usually constitute exceptional circumstances.¹⁵⁷

It has also been held in Fiji that a stay order may, in circumstances of extreme urgency, be made as soon as the application for leave has been filed, and before it has been heard.¹⁵⁸

FILING OF PROCEEDINGS FOR JUDICIAL REVIEW

If leave to issue proceedings for judicial review is granted in Fiji, Kiribati, Solomon Islands, Tonga, Tuvalu and Vanuatu, then the proceedings for judicial review may be commenced. In Fiji this may be done by originating motion or originating summons for judicial review; in Kiribati, Solomon Islands and Tuvalu by notice of motion for mandamus, prohibition or certiorari; in Tonga by writ and statement of claim for judicial review; in Vanuatu by claim for judicial review.

152 *The State v Director of Public Prosecutions* (1998) 44 FLR 252.

153 [1990] 2 AC 85.

154 *Lagiloa v Public Service Commission* (1994) 40 FLR 237.

155 [1994] 1 AC 377.

156 *Cantiia v Director of Immigration* (1997) 43 FLR 6; *The State v Minister of Immigration* (1995) 41 FLR 26.

157 *The State v Fiji Medical Council* [2000] 1 FLR 98.

158 *The State v Transport Control Board* (1995) 41 FLR 267.

In Fiji, the rules of procedure require that the motion for judicial review must be entered for hearing within 14 days after the grant of leave. Failure to do so will result in the proceedings being struck out.¹⁵⁹

In Samoa, where leave to commence the proceedings is not required, the proceedings are commenced by motion, accompanied by statement of claim and supporting affidavit, for certiorari, mandamus, prohibition or injunction. In Cook Islands, Nauru and Niue, where no special procedure is provided for judicial review, the proceedings are commenced by way of writ of summons and statement of claim for certiorari, prohibition, mandamus or injunction.

Proceedings for declaration and injunction

The rules of civil procedure of Fiji, Kiribati, Solomon Islands, Tuvalu and Vanuatu do not expressly state whether a declaration or an injunction against a decision or action of a public official must be made by the same procedure as judicial review. If they were not required to be made by the same procedure, they would, of course, escape the requirements about obtaining leave, about being made promptly, and about sufficient interest for the applicant, which apply to applications for judicial review. In England the House of Lords in 1982¹⁶⁰ appeared to consider that it would be an abuse of the process of the court to allow proceedings to challenge the validity of the decisions or actions of public officials, otherwise than by judicial review, and subject to the requirements attaching to such applications. In 1984 the House of Lords indicated a greater flexibility,¹⁶¹ and the courts of Fiji have followed this less strict approach and on several occasions have accepted an originating summons for a declaration as to the invalidity of decisions or actions of public officials.¹⁶² In Tonga, however, the rules of civil procedure expressly state that no application for judicial review, including injunction or declaration against a public official, shall be made without the leave of the court given in accordance with those rules, which seems to exclude in that country the possibility of alternative procedures for declaration or injunction against a public official.

Statutory powers of review

The principles of judicial review discussed in the preceding section were evolved by the superior courts as part of the rules of common law and

159 *Waqaitanoa v Commissioner of Prisons* (1997) 43 FLR 245; *The State v Attorney-General of Fiji* (1998) 44 FLR 95.

160 *O'Reilly v Mackman* [1983] 2 AC 237.

161 *Davy v Spelthorne Borough Council* [1984] 2 AC 262.

162 *Rama Gopal v Attorney-General* (1992) 38 FLR 211; *Luba v Fijian Affairs Board* (1996) 42 FLR 8.

equity to enable them to control the legal validity of action of a governmental nature. While judicial review by the superior courts has certain advantages for the control of the administration of government, particularly with regard to independence of decision making and knowledge about legal matters, it also has certain disadvantages, particularly with regard to expense and delays and lack of knowledge about non-legal matters. Accordingly, in most countries of the region, the legislature has intervened to provide methods which are more simple, speedy and cheap and less legalistic for controlling the many governmental decisions. The most usual of these alternative methods of control are described in the following sections.

Appeal

The most common type of control provided in countries of the region by the written law over action of a governmental nature is a reconsideration of the matter by another official which is made on the initiative of a person dissatisfied with the original decision. This form of reconsideration is generally termed an appeal. In many countries of the region, a right of appeal is provided by the written law from decisions of subordinate courts, from assessments of income tax, from disciplinary decisions in the public service and from decisions as to the ownership of customary land. In some countries, appeals are provided from decisions refusing or cancelling licences to carry on certain professions, such as those for doctors, dentists, lawyers, accountants and nurses, and the more important kinds of businesses, such as banking and insurance.

In the region, there is much variation as to the persons or bodies authorised to determine appeals – courts of law, tribunals, government officials, ministers of government. Each has advantages and disadvantages in respect of speed of decision, ease of access, cost, expertise and independence from political control. Thus, an appeal from one government official to another government official, such as is provided from an immigration officer to a principal immigration officer in many countries of the region, has the advantages of ease and cheapness of access, and speed of decision making, but the disadvantage of lack of independence, or perceived lack of independence. The same is true with regard to appeals to ministers of government, which are often provided in the region for appeals from decisions of some government officials, for example, principal immigration officers, and from disciplinary decisions in police forces. Appeals to courts have the advantage of independence and expertise in law, but disadvantages in respect of difficulties of access, expense and delays in decision making.

When the written law authorises an official to determine an appeal, it may often specify the grounds upon which the appellate official is to act. Sometimes, the grounds may be expressed in very wide terms to enable appellate officials to substitute their own views for the original decision.

Thus, s 70(9) of the Income Tax Act¹⁶³ of Fiji Islands provides that 'the [Discretion Review] Board may substitute its own discretion for the Commissioner [of Inland Revenue]', and s 26(1) of the Courts Act¹⁶⁴ of Vanuatu provides that 'the appellate court shall be entitled to substitute its own judgment or opinion'. Sometimes, the grounds of appeal may be expressed in terms that are much more narrow and restricted. Frequently, appeals to superior courts are restricted to matters of law, where it is only if the original decision is erroneous in law that the appellate court is authorised to act. Thus, in Fiji Islands and Tuvalu, a person aggrieved by a decision of a liquor licensing tribunal or committee may appeal to the High Court or senior magistrates' court, respectively, on the ground that the decision is 'erroneous in point of law'.¹⁶⁵ In Vanuatu, the Criminal Procedure Code¹⁶⁶ provides that the public prosecutor may appeal 'on a point of law' from a decision of the magistrates' court to the Supreme Court, and from a decision of the Supreme Court to the Court of Appeal.

Often, however, the written law does not specify the grounds upon which the appellate body is to act. In such cases, the courts have held that the appellate body does have power to substitute its own decision for the original decision, but it must take account of the original decision and should not lightly interfere with a decision made by an official who has greater experience and knowledge of the subject matter than the appellate body. Thus, in *Director of Mines v Manganex Ltd*¹⁶⁷ and in *Director of Mines v Sita Ltd*,¹⁶⁸ the Supreme Court of Fiji held that the Mining Appeals Board had acted wrongly in reversing decisions of the director of Mines to refuse to renew, and refuse to grant, respectively, a prospecting licence, without proper regard for the director's expertise.

The advantage of appeal as a form of control of action of a governmental nature is that it can be undertaken whenever a person affected by a decision is dissatisfied with that decision and, so, is not dependent upon an initiative being taken by the appellate official. The disadvantage is that errors may go unchecked if they are not observed by a person who is entitled to appeal or, even if they are observed by such person, that person chooses not to appeal. Appeals also often have a disadvantage with regard to matters of fact. Unless appellate officials have the power to rehear all the witnesses and reconsider all the material and do exercise their powers, they will have to rely either upon the records of the evidence which have been taken by the

163 Cap 201.

164 Cap 122.

165 Liquor Act, Cap 192 (Fiji Islands), s 27(1); Liquor Act, Cap 69 (Tuvalu), s 36.

166 Cap 136.

167 (1976) 22 FLR 8.

168 (1982) 28 FLR 50.

official whose decision is being appealed or upon a statement of facts (often called a 'case stated') which has been provided by the official subject to appeal. Consequently, appellate officials will usually be unable to form an independent view about the facts and will have to accept the findings of fact made by the official whose decision is being appealed.

Revision

A form of control of decision making which has been adopted in several countries of the region enables one official to call for, and examine, decisions made by another official, and then to revise and correct them. This form of reconsideration is often called 'revision' or, sometimes, 'review'.

Decisions of subordinate courts are often made subject to this form of review. Thus, in Fiji Islands, Solomon Islands, Tuvalu and Vanuatu, the superior courts are authorised to call for and revise decisions of magistrates' courts in criminal cases, and, in Kiribati, the High Court is authorised to revise decisions of magistrates' courts in both civil and criminal cases.¹⁶⁹ Again, in Solomon Islands, Tuvalu and Vanuatu, magistrates' courts are authorised to call for and revise decisions of island courts or local courts,¹⁷⁰ and, in Fiji Islands, magistrates may call for, and examine, the record of criminal proceedings in a magistrates' court of a subordinate level.¹⁷¹ To assist this process, in some countries, for example, Kiribati, Solomon Islands and Tuvalu, regular monthly returns of the decisions subject to revision must be made to the revising court.¹⁷²

When the written law authorises an official to revise the decision of another, it sometimes specifies the grounds upon which the revised decision is to be amended or corrected. Thus, in Fiji Islands, the High Court is authorised to satisfy itself as to the correctness, legality or propriety of any findings, sentence or order, and as to the regularity of any proceedings of magistrates' courts,¹⁷³ and, in Vanuatu, the Supreme Court is authorised to revise decisions of magistrates' courts if it is 'of opinion ... that a miscarriage of justice has, or may have, occurred'.¹⁷⁴ More usually, however, the written law does not specify the grounds upon which the revising official may intervene. Thus, in Kiribati, Solomon Islands, Tuvalu and Vanuatu,

169 Criminal Procedure Code, Cap 21 (Fiji Islands), s 323; Magistrates' Courts Act, Cap 52 (Kiribati), s 81; Magistrates' Courts Act, Cap 20 (Solomon Islands), s 44; Magistrates' Courts Act, Cap 2 (Tuvalu), s 45; Courts Act, Cap 122 (Vanuatu), s 18.

170 Local Courts Act, Cap 19 (Solomon Islands), s 21; Island Courts Ordinance, Cap 3 (Tuvalu), s 37; Island Courts Act, Cap 167 (Vanuatu), s 21.

171 Criminal Procedure Code, Cap 21 (Fiji Islands), s 324.

172 Magistrates' Courts Act, Cap 52 (Kiribati), s 81; Magistrates' Courts Act, Cap 12 (Rev. 1961) (Solomon Islands), s 43; Magistrates' Courts Act, Cap 14 (Fiji Islands), s 45.

173 Criminal Procedure Code, Cap 21 (Fiji Islands), s 323.

174 Courts Act, Cap 122 (Vanuatu), s 18.

the legislation does not specify the grounds upon which decisions of magistrates' courts, island courts and local courts may be revised.

The advantages of revision as a form of control are that the full record can be read by the revising official, it can be undertaken on the initiative of the revising official, and it can be effected very easily and cheaply. The disadvantage is that it is dependent on the initiative taken by the revising official, and, in practice, this may not happen very often, or very regularly, with the result that this kind of corrective mechanism may not operate as efficiently as it should. Also, the record of the proceedings may be very brief, with the result that the revising official will then be at a disadvantage in understanding the facts.

Rehearing

Occasionally, the written law provides for the official who has made a decision to consider it again, to correct any errors that may have been made in the original decision. This form of reconsideration is usually called a 'rehearing'. An example is contained in the Code of Civil Procedure of the High Court of Cook Islands 1981, which states that the High Court 'shall in every proceeding have power to order a rehearing' by the judge who made the original decision or, if he is not available, by some other judge.¹⁷⁵ When the written law authorises an official to rehear a matter, it does not usually specify the grounds upon which the official undertaking the rehearing is to act. That official is left entirely free to form a fresh opinion on the facts and on the law, as seems appropriate.

The advantage of this type of provision is that the official who is reconsidering the matter can rehear all the evidence and reconsider all the material again, and will probably still be very familiar with the facts and the issues. The disadvantage, however, is that it may be difficult for a person who has already made a decision to recognise that there are any errors in it or that it could be improved in any way. Consequently, this is a form of control that is not often found in the region, or in other parts of the Commonwealth.

Ombudsman

In Cook Islands, Fiji Islands, Samoa, Solomon Islands and Vanuatu, the written law provides for action of governmental bodies to be reviewed by an ombudsman, who is empowered to make recommendations for corrective measures. In Cook Islands and Samoa, the office of ombudsman is

175 Code of Civil Procedure of the High Court 1981 (Cook Islands), r 221.

established solely by legislation.¹⁷⁶ In Fiji Islands, Solomon Islands and Vanuatu, reconsideration by an ombudsman is provided for, and protected by, the constitution,¹⁷⁷ and these constitutional provisions are supplemented by legislation.¹⁷⁸

In all five countries, the appointment of the ombudsman is to be made in a way which emphasises both the importance and status of the office and also its independent and non-political nature. Thus, in Cook Islands and Samoa, the ombudsman is appointed by the Queen's Representative and by the head of state, respectively, on the recommendation of the legislature.¹⁷⁹ In Fiji Islands, the ombudsman is to be appointed by the Constitutional Offices Commission;¹⁸⁰ in Solomon Islands, he or she is to be appointed by the governor-general after consultation with the speaker of Parliament and the chairpersons of the Public Service Commission and Judicial and Legal Services Commission;¹⁸¹ in Vanuatu, the ombudsman is appointed by the president after consultation with the prime minister, leader of opposition, speaker of Parliament and the chairpersons of the Public Service Commission, Judicial Service Commission, National Council of Chiefs and Provincial Government Councils.¹⁸²

The jurisdiction of ombudsmen in most countries of the region extends generally to action, inaction and decisions by members of government departments, statutory bodies, and provincial and local government bodies, but there are some specific exceptions. In Vanuatu, the constitution provides the ombudsman with additional jurisdiction to investigate a complaint by a citizen of a failure by the republic's administration to provide its services 'in the official language that he uses'.¹⁸³ The Ombudsman Act 1998 of Vanuatu also authorises the ombudsman to investigate breaches of the chapter in the constitution which prescribes a Leadership Code.¹⁸⁴ The constitutionality of a provision to the same effect in the former Ombudsman Act 1985, which was replaced by the (current) Ombudsman Act 1998, was challenged in the Supreme Court, but was upheld by the court in *Virelala v Ombudsman*.¹⁸⁵

176 Ombudsman Act 1984 (Cook Islands); Komesina o Sulufaiga (Ombudsman) Act 1988 (Samoa).

177 Constitution of Fiji Islands, chapter 11, Pt 2; Constitution of Solomon Islands, chapter IX; Constitution of Vanuatu, chapter 9, Pt 2.

178 Ombudsman Act, Cap 3 (Fiji Islands); Ombudsman (Further Provision) Act 1980 (Solomon Islands); Ombudsman Act 1998 (Vanuatu).

179 Ombudsman Act 1984 (Cook Islands), s 3; Komesina o Sulufaiga (Ombudsman) Act 1988, s 2.

180 Constitution of Fiji Islands, s 163.

181 Constitution of Solomon Islands, s 96.

182 Constitution of Vanuatu, Art 61.

183 *Ibid*, Art 64.

184 Ombudsman Act 1998 (Vanuatu), s 12.

185 [1997] VUSC 35.

Investigations by an ombudsman may be commenced by a complaint made by any person or body affected by the action, inaction or decision which is the subject of the complaint, but, in Fiji Islands, complaints may not be made by a public body.¹⁸⁶ In all five countries, ombudsmen are not obliged to investigate all complaints that are made; rather, they have a discretion to decline to investigate a complaint upon specified grounds. Alternatively, investigations may be commenced on the initiative of the ombudsman without receipt of a complaint (often described as 'own motion investigations'). In Cook Islands and Samoa, a committee of the legislature may refer a matter to the ombudsman for investigation¹⁸⁷ and so also may the prime minister.¹⁸⁸

The basic aspects of the procedure to be followed by the ombudsman when conducting an investigation are similar in all five countries. Notice in writing must be given to the head of the body being investigated; the ombudsman may require all relevant material to be provided; investigations are to be conducted in secret and an opportunity to respond must be given to a person who will be the subject of an adverse comment or criticism. There is, however, no obligation on the ombudsman to hold a hearing. A breach of the requirement that an opportunity to respond must be provided by the ombudsman was held by the Supreme Court of Vanuatu to require the withdrawal of a report and recommendations made by the ombudsman,¹⁸⁹ and the report had to be re-issued the following year.

The grounds upon which an ombudsman may make an adverse recommendation are also similar in all five countries. An adverse recommendation may be made in Cook Islands, Fiji Islands and Samoa on the ground that the action is contrary to law, based on a mistake of fact or law, unreasonable, unjust, oppressive, improperly discriminatory or wrong.¹⁹⁰ In Solomon Islands, an adverse recommendation may be made on the ground that the action is contrary to law, based wholly or partly on a mistake of fact or law, unreasonably delayed or manifestly unreasonable.¹⁹¹ In Vanuatu, the ombudsman is authorised to make an adverse report on the ground that the action was oppressive or improperly discriminatory, based wholly or partly on improper motives or irrelevant considerations, contrary to natural justice, or given without reasons when reasons should have been given.¹⁹²

186 Constitution of Fiji Islands, s 158.

187 Ombudsman Act 1984 (Cook Islands), s 11; Komesina o Sulufaiga (Ombudsman) Act 1988 (Samoa), s 11.

188 *Ibid.*

189 *Willie Jimmy v The Ombudsman*, Supreme Court, Vanuatu, Civ Cas 112/1995 (unreported).

190 Ombudsman Act 1984 (Cook Islands), s 19; Constitution of Fiji, s 161; Komesina o Sulufaiga (Ombudsman) Act 1988 (Samoa), s 19.

191 Ombudsman (Further Provision) Act 1980 (Solomon Islands), s 16.

192 Ombudsman Act 1998 (Vanuatu), s 12.

In all five countries, the ombudsmen are required to report their recommendation to the head of the department or body which has been investigated. In some countries, ombudsmen are also required to forward copies of their reports to the prime minister: in Cook Islands and Samoa, only if a satisfactory response is not made by the department or body;¹⁹³ in Vanuatu, if conduct is contrary to the requirements of Art 63(2) of the constitution, or if a law or administrative practice is defective, or if a practice is discriminatory.¹⁹⁴ Ombudsmen are also required to communicate the results of their investigations to the complainant. In Vanuatu, the ombudsman is required to make reports public, unless this would be contrary to 'public security or public interest',¹⁹⁵ and, in Cook Islands, the ombudsman may require the publication of a summary of his or her report.¹⁹⁶ In Fiji Islands, Samoa and Solomon Islands, there is no similar provision for the ombudsmen to publicise their reports. Ombudsmen are authorised, in all five countries, to make special and annual reports to the legislature.

The advantages of a reconsideration by an ombudsman include the fact that it can be commenced either at the request of a person dissatisfied with the original decision, or on the initiative of the ombudsman. Also, the ombudsman is entitled to examine all relevant material, and conduct hearings on oath where these are thought to be desirable. Reconsideration by an ombudsman is also very cheap for the complainant, since no fees are charged. The main disadvantage of reconsideration by the ombudsman as a form of statutory control of governmental action is that the ombudsman has powers of recommendation only: the ombudsman cannot compel governmental bodies to act. This means that, ultimately, it is for the government or other body to decide whether or not it will accept, and abide by, the ombudsman's recommendations and, if it chooses not to do so, there is nothing that the ombudsman can do to compel it to accept these recommendations.¹⁹⁷

Referral or reservation

Finally, mention should be made of a power which is not strictly a power of review, but is designed to achieve the same basic purpose, that is, a correct decision. This is the power that is sometimes conferred on a person exercising a governmental function to reserve for, or refer to, another official some

193 Ombudsman Act 1984 (Cook Islands), s 19; Komesina o Salufaiga (Ombudsman) Act 1988 (Samoa), s 19.

194 Ombudsman Act 1998 (Vanuatu), s 29.

195 *Ibid*, s 34(2).

196 Ombudsman Act 1984 (Cook Islands), s 20.

197 For further discussion about operation of ombudsmen in the South Pacific, see Satyanand, A, 'Growth of the ombudsman concept' (1999) 3 *JSPL* 1.

matter that is within his or her authority to decide, so that the other official may decide it.

This power is quite often provided for subordinate courts, to enable such courts to refer some difficult point of law to a higher court for decision. In Fiji Islands, Kiribati, Solomon Islands, Tuvalu and Vanuatu, the magistrates' courts are authorised to reserve a matter of law for determination by the High Court or Supreme Court.¹⁹⁸

The advantage of this type of provision is that it provides an official with an opportunity to avoid making an error. The disadvantage is that it is left to the official to decide whether some assistance should be sought from another body and, human nature being what it is, it may not be easy to recognise that the opinion of another body would be desirable. For this reason, sometimes, as in Kiribati, legislation provides that the power of reservation may be exercised by an official either on his or her own initiative or on the request of an interested party.¹⁹⁹

198 Magistrates' Courts Act, Cap 14 (Fiji), s 37; Magistrates' Courts Act, Cap 3 (Solomon Islands), s 80; Magistrates' Courts Act, Cap 2 (Tuvalu), s 41; Courts Act, Cap 122 (Vanuatu), s 11.

199 Magistrates' Courts Act, Cap 52 (Kiribati), s 80.

Criminal law

Introduction

Initially the colonial administrations in control of Cook Islands, British Solomon Islands, Fiji, Gilbert and Ellis Islands, Nauru, New Hebrides, Niue, Solomon Islands and Tonga relied upon the laws of the controlling countries to provide the basic legal provisions relating to criminal offences, and enacted local laws only to punish particular forms of misconduct peculiar to the country, which were not included in the introduced law.

Some countries of the region, that is, Nauru,¹ and Niue² still rely upon the general criminal legislation of their former controlling countries, Australia and New Zealand. The general criminal legislation in force in Nauru, the Queensland Criminal Code Act 1899, which was prepared by Sir Samuel Griffiths, who was then chief justice of Queensland, and later the first chief justice of Australia, has the distinction of being by far the most lengthy general criminal legislation in force in the region, containing as it does 545 sections, relating to substantive criminal offences, and another 161 sections relating to criminal procedure. In Niue, basic criminal offences are provided by 117 sections contained in the Niue Act enacted by the New Zealand Parliament in 1966 before Niue acquired self governance in 1974. Until 2003, these were also in force in Tokelau by virtue of the Tokelau Crimes Regulations 1975, made by the governor-general of New Zealand, but since 2003 they have been replaced by the Crimes, Procedure and Evidence Regulations 2003, made by the General *Fono* of Tokelau, under powers conferred by s 3A of the Tokelau Act 1948 (NZ).

During the course of the 20th century, most of the other countries in the region, that is, Cook Islands,³ Fiji Islands,⁴ Kiribati,⁵ Samoa,⁶ Solomon

1 Criminal Code Act 1899 (Qld), adopted by the Laws Repeal and Adopting Ordinance 1922–36.

2 Niue Act 1966 (NZ), ss 129–246.

3 Crimes Act 1969.

4 Penal Code, Cap 17, enacted in 1945.

5 Penal Code, Cap 67, enacted in 1965.

6 Crimes Act 1961.

Islands,⁷ Tonga,⁸ Tuvalu⁹ and Vanuatu,¹⁰ enacted their own criminal legislation which replace those of their former controlling country, and early in the 21st century, Tokelau¹¹ enacted its own general criminal legislation which replaces that previously applied to those islands by New Zealand.¹² The general criminal laws of the four countries which were colonies or protectorates of Britain, that is, Fiji Islands, Kiribati, Solomon Islands and Tuvalu, have a basic similarity in format, content and length. They are all described as codes; all contain basically the same offences, and contain between 380 and 390 sections, basically in the same order.¹³ The Crimes Act 1969 of Cook Islands, the Crimes Act 1961 of Samoa and the Crimes, Procedure and Evidence Rules 2003 of Tokelau are more closely based in content upon the Crimes Act 1908 of New Zealand, which administered those countries until self-governance or independence. However, they differ considerably in length: the Crimes Act 1969 (Cook Islands) has 347 sections, while the Crimes Act 1961 (Samoa) has 116 sections, and the Crimes, Procedure and Evidence Rules 2003 (Tokelau) contain 82 sections relating to criminal offences. In Tonga, basic criminal offences are dealt with partly in the Criminal Offences Act, Cap 18, enacted in 1926, which contains 200 sections, and partly in the Order in Public Places Act, Cap 37, enacted in 1921, and the Public Order (Preservation) Act, Cap 38, enacted in 1970, which contain, respectively, 5 and 7 sections, relating to substantive criminal offences. The Penal Code Act, Cap 135, of Vanuatu, which was enacted in 1981, is *sui generis*, having been drafted in the late 1970s for the Anglo-French condominium of New Hebrides as it was about to achieve independence by a professor of comparative law from the University of London.¹⁴

Statutory basis of criminal law

In all the countries of the region now, therefore, there is in force legislation which provides generally for the principal criminal offences and the general

7 Penal Code, Cap 26, enacted in 1963.

8 Criminal Offences Act, Cap 18, enacted in 1926.

9 Penal Code, Cap 8, enacted in 1965.

10 Penal Code Act, Cap 135, enacted in 1981.

11 Crimes, Procedure and Evidence Rules 2003.

12 Niue Act 1966, ss 129–246, applied to Tokelau by the Tokelau Crimes Regulations 1975 (NZ).

13 These criminal codes are based upon the draft criminal code prepared by Sir James Stephen for England, which was not adopted there, but formed the basis for the general criminal laws of many British colonies and protectorates.

14 Professor A.G. Chloros, King's College, University of London. See Colvin, E, 'Criminal responsibility under the South Pacific codes', *Law Papers*, Bond University, 2002, for a detailed discussion of the history and analysis of the penal legislation of South Pacific countries.

defences to criminal liability. The question then arises as to whether there is any room for common law principles or customary law principles of criminal liability, or defences to criminal liability.

Common law principles of criminal liability and defences

In some countries the answer to the question of the role of common law is very clear. In Cook Islands,¹⁵ Niue,¹⁶ Samoa¹⁷ the legislation, following the precedent provided by the Crimes Act 1908 of New Zealand, which was formerly in legal control of those countries, expressly excludes liability for any criminal offence at common law, although it does preserve all defences available under the common law. To the same effect is the Criminal Code Act 1899 of Queensland¹⁸ which is in force in Nauru. On the other hand, in Fiji Islands,¹⁹ Kiribati,²⁰ Solomon Islands²¹ and Tuvalu,²² the general criminal legislation expressly preserves liability for 'offences against the common law', although in practice this exception seems very little to be relied upon, and judges sometimes seem to regard the legislation as exhaustive of criminal liability and defences to criminal liability.²³

In Tokelau, Tonga and Vanuatu, the general criminal legislation makes no express mention of offences or defences under the common law. Although the common law has been introduced into these countries, this is subject to local circumstances, and it could well be argued that the criminal law legislation in force in those countries has impliedly excluded principles of common law, with regard to both liability and defences.

In Fiji Islands, Kiribati, Solomon Islands and Tuvalu, the general criminal legislation also provides for another role for the common law of England, in that it states that the words in the legislation shall be presumed, unless expressly stated otherwise or inconsistent with the context, to have 'the meaning attaching to them in English criminal law'. This in *Hassan Mohammed v Reg*²⁴ the Court of Appeal of Fiji held this to require a court to give to words in the legislation the same meaning that courts in England have given to those words, even although that is not the meaning that the court itself would give, or that which courts in other Commonwealth countries have given.

15 Crimes Act 1969, ss 8, 23.

16 Niue Act 1966 (NZ), ss 239, 238.

17 Crimes Act 1961, ss 7, 9.

18 Criminal Code Act 1899 (Qld), s 5.

19 Penal Code, Cap 17, s 2(a).

20 Penal Code, Cap 69, s 2(a).

21 Penal Code, Cap 26, s 2(a).

22 Penal Code, Cap 8, s 2(a).

23 See *Teriteria v R* [1987] SILR 4, 30, per Kapi JA, and *R v Wong Chin Kwee* [1983] SILR 78, 81, per Daly CJ.

24 [1975] 21 FLR 12.

Customary law

In Cook Islands, Fiji Islands, Niue, Tokelau and Tonga, custom is not recognised either by the constitution or by legislation as having the status of law, and as being part of the legal system, except in relation to title to customary land in Cook Islands, Fiji Islands, Niue and Tokelau. In these five countries, custom accordingly cannot be applied by the courts in relation to criminal liability or defence, although it may be considered as a relevant factor when a court is exercising its discretion to assess what sentence is appropriate.²⁵ Indeed, in Tonga, custom is expressly excluded as a defence to theft of property belonging to a relative.²⁶

In Kiribati, Nauru and Tuvalu, custom is established by legislation as part of the law of those countries in respect of certain specified matters. In Nauru²⁷ these matters are stated to be title to land, rights of Nauruans to dispose of their property, succession to the estate of Nauruans who die intestate and matters affecting Nauruans only. Only the very last of these could possibly relate to criminal law, but there does not appear to be any case when an attempt has been made to persuade the court to apply custom in the context of criminal law. In Kiribati²⁸ and Tuvalu²⁹ legislation provides that customary law shall be taken into account in a criminal case only for the purpose of ascertaining the state of mind of a person, deciding the reasonableness or otherwise of an act or omission, or of an excuse, deciding whether to proceed to the conviction of a guilty person, and determining the penalty to be imposed on a guilty party. This legislation seems to have been very little relied upon in Kiribati, at least in cases coming before the Court of Appeal.³⁰

In Samoa,³¹ the courts are given the power to recognise custom as law, but so far they have exercised that power very little, and not at all to create criminal liability that is not provided for in the legislation, nor to provide defences to criminal liability. In Solomon Islands, customary law is stated by the constitution to have effect as part of the law of Solomon Islands, except to the extent that it is inconsistent with the provisions of the constitution and an act of Parliament.³² The result of the exception in favour of

25 See, eg, *R v Naburogo*, Supreme Court, Fiji, Review No 2/1981 (unreported); (19 March 1981) *R v Vuli*, Supreme Court, Fiji, Rev Cas 6/1981 (unreported) (14 August 1981).

26 Criminal Offences Act, Cap 18, s 147.

27 Custom and Adopted Laws Act 1971, s 3(1).

28 Laws of Kiribati Act 1989, s 5, Sched 1, para 3.

29 Laws of Tuvalu Act 1987, s 5, Sched 1, para 3.

30 In *Kaieua v The Republic* [1997] KICA 21 there was discussion as to whether a trespass and cutting down of a hammock was sufficient in custom to provoke a reasonable person to lose self-control, but no mention was made of the provisions about custom in the Laws of Kiribati Act, 1989.

31 Constitution of Samoa, Art 111(1).

32 Constitution of Solomon Islands, Sched 3, para 3.

the constitution is to drastically limit the scope of custom in the criminal law because the constitution contains provisions recognising the right to life and personal liberty, and these have been held to exclude the application of custom as a defence to the intentional killing of a person to avenge the killing of a relative.³³

In Vanuatu, also, the constitution expressly states that 'customary law shall continue to have effect as part of the law of the republic of Vanuatu'.³⁴ The constitution does not expressly state whether customary law is subject to the other provisions in the constitution or to legislation, but so far it has been assumed by the courts, although without much argument, that customary law is subject to the constitution, including the provisions relating to human rights, and to legislation, and cannot provide any defence to criminal liability imposed by legislation unless the constitution or legislation provides otherwise.³⁵ One occasion where the legislation does expressly provide otherwise is in relation to island courts. These courts, but only these courts, are expressly authorised by legislation to apply the customary law prevailing within the district of the court, unless inconsistent with any written law or contrary to justice, morality and good order. In reality, however, the island courts do not have any significant opportunity to apply customary law because their jurisdiction does not include any customary offences at all, and is confined to minor statutory criminal offences, where customary law can only be used as a relevant factor in exercising discretion to assess the appropriate sentence. All courts in Vanuatu are authorised to have regard to any customary settlement when considering the appropriate penalty to impose upon a person who has been convicted.³⁶

The present position with regard to the role of custom in relation to criminal liability, and defences to criminal liability, may thus be summarised as very insignificant, even in those countries where customary law is stated to be part of the law of the country.

Classification of criminal offences

In some countries, criminal offences are classified into different categories. Sometimes this classification is made on the basis of the seriousness of the offence. The common law in England developed a distinction between serious criminal offences, which were called felonies, and other less serious criminal offences, which came to be called misdemeanours. The concept of felony developed during feudal times and was applied to describe breaches

33 *R v Loumia* [1984] SILR 51.

34 Constitution of Vanuatu, Art 95(3).

35 *Public Prosecutor v Kota* (1993) 2 Van LR 659; *Public Prosecutor v Silas* (1994) 1 Van LR 134.

36 Criminal Procedure Code, Cap 136, s 119.

of the oath of fealty or faithfulness which would be given to a feudal lord by a supporter who wanted the protection of the feudal lord and gave in exchange his promise of loyalty. The penalty for a breach of an oath of fealty was the forfeiture of all the property of the betrayer, and if he had no property, then death. In England, the concept of felony was extended to other criminal offences which were regarded as very serious and punishable by forfeiture of property or death, whereas the less serious offences came to be called misdemeanours.³⁷ Eventually, however, the distinction between felony and misdemeanour was abolished in England in 1967.³⁸ In the Penal Codes of Fiji Islands, Kiribati, Solomon Islands and Tuvalu, the term felony is used to describe criminal offences punishable by imprisonment for three years or more. In the criminal legislation in force in Nauru, the Queensland Criminal Code Act 1899, criminal offences are divided into crimes, misdemeanours and simple offences, according to the seriousness of the offence.

On the other hand, the Crimes Act 1969 of Cook Islands, the Crimes Act 1961 of Samoa and the Crimes, Procedure and Evidence Rules 2003 make no such distinction, and nor do the Criminal Offences Act 1988 of Tonga or the Penal Code Act, Cap 135, of Vanuatu. The sections of the Niue Act 1966 (NZ) which create criminal offences not only make no distinction as to the kinds of offences, but they expressly abolish the distinction between felony and misdemeanour.³⁹

The legislation relating to criminal procedure usually makes a distinction between criminal offences on the basis of whether or not a person who is believed by a police officer to have committed, or to be committing, such offence can be arrested without a warrant of arrest issued by a court, which offences are usually called cognisable or arrestable offences, while other offences are called non-cognisable. A list of which offences are cognisable and which are non-cognisable is often contained in the legislation relating to criminal procedure. The legislation also usually makes a distinction between offences which can be tried by a subordinate court, such as a magistrate's court, island court or local court, which are often called summary offences, and offences which can only be tried in a superior court, such as a High Court or Supreme Court, which are often described as indictable offences. These distinctions as to arrest and trial are based not only mainly on the need for the speedy detention and trial of the suspected offender, but also partly upon the complexity and difficulty of proof of the offence and partly upon the seriousness of the offence.

37 For further discussion see Kenny, CS, *Outlines of Criminal Law*, 19th edn, 1966, Cambridge: CUP, pp 122–3; Plucknett, T, *A Concise History of the Common Law*, 5th edn, 1956, London: Butterworths, pp 442–56.

38 Criminal Justice Act 1967 (UK).

39 Niue Act 1966 (NZ), s 249.

Territorial application of legislation

The general legislation relating to criminal offences in force in Nauru, Niue, Tokelau and Tonga contains no express statement as to the territorial extent of the application of the legislation, so the common law presumption would apply that the legislation applies only to offences committed wholly within the territorial boundaries of those countries.⁴⁰

In Cook Islands,⁴¹ Fiji Islands,⁴² Kiribati,⁴³ Samoa,⁴⁴ Solomon Islands⁴⁵ and Tuvalu,⁴⁶ the legislation makes it clear that it extends to offences which are committed wholly or partly within the country. In Cook Islands⁴⁷ and Samoa⁴⁸ the legislation also extends the scope of the legislation to offences on Commonwealth ships and aircraft in certain circumstances. The Penal Code of Vanuatu has the widest territorial scope, in that it is stated to extend not only to offences that are committed wholly or partly within the country,⁴⁹ but also to conduct offences committed wholly outside Vanuatu which, if it had occurred within Vanuatu would have been an offence under the law of Vanuatu, if such conduct would have constituted a corresponding offence under the law of the country where it was committed⁵⁰ and also to the international offences of piracy, hijacking of aircraft, traffic in persons, slave trading and traffic in narcotics committed within or beyond Vanuatu.⁵¹

General principles of criminal responsibility

Most of the general legislation relating to criminal offences in the region begin with a series of provisions relating to general principles of

40 Apart from those exceptional cases in which specific provision is made with regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England, per Viscount Simonds, *Cox v Army Council* [1963] AC 48, 67.

41 Crimes Act 1969, s 6.

42 Penal Code, Cap 17, s 6.

43 Penal Code, Cap 67, s 6.

44 Crimes Act 1961, s 5.

45 Penal Code, Cap 26, s 6.

46 Penal Code, Cap 8, s 6.

47 Crimes Act 1969, s 7.

48 Crimes Act 1961, s 6.

49 Penal Code Act, Cap 135, s 2.

50 Penal Code Act, Cap 135, s 4. This is subject to certain limitations, ie, that no prosecution can proceed in Vanuatu if there has already been a prosecution in the other country, whatever the outcome, and no penalty can be imposed in Vanuatu which is more severe than the penalty prescribed by the law of the other country.

51 Penal Code Act, Cap 135, s 5. This is subject to the limitation that no foreigner may be tried for such offence in Vanuatu unless he or she has been arrested in Vanuatu, no extradition proceedings have been commenced by another country and the attorney-general has given consent to such trial.

criminal responsibility. In Niue, the legislation expressly preserves the rules of the common law relating to defences to criminal offences.⁵²

Ignorance of the law

In all countries, except Niue, Tokelau and Tonga, it is expressly provided that ignorance of the law shall be no excuse for a criminal offence.⁵³

Mistake of fact

In Fiji Islands,⁵⁴ Kiribati,⁵⁵ Solomon Islands,⁵⁶ Tuvalu⁵⁷ and Vanuatu⁵⁸ it is provided that an honest or genuine mistake of facts which, if they had existed, would have rendered the conduct innocent, constitutes a defence to criminal responsibility, but only if that mistaken belief is 'reasonable'.

On the other hand, the position would appear to be different in Cook Islands,⁵⁹ Niue⁶⁰ and Samoa⁶¹ where the legislation in force relating to criminal offences makes no express mention of mistake of fact, but preserves the defences available under the common law which include honest, but not necessarily reasonable, mistake of fact. In Tokelau there is no reference in the Crimes, Procedure and Evidence Rules 2003 to mistake of fact as a defence, nor any general saving of the defences available under the common law.

Age of criminal responsibility

In many countries in the region, the general legislation relating to criminal offences expressly states that children below a certain age are not criminally responsible. The age of criminal responsibility is 7 in Tonga,⁶² 8 in Samoa⁶³ and Solomon Islands,⁶⁴ and 10 in Cook Islands,⁶⁵ Fiji Islands,⁶⁶

52 Niue Act 1966 (NZ), s 238.

53 Cook Islands – Crimes Act 1969, s 28; Fiji – Penal Code, Cap 17, s 7; Kiribati – Penal Code, Cap 67, s 7; Nauru – Queensland Criminal Code Act 1899, s 22(1); Samoa – Crimes Act 1961, s 10; Solomon Islands – Penal Code, Cap 26, s 7; Tuvalu – Penal Code, Cap 8, s 7; Vanuatu – Penal Code Act, Cap 135, ss 11(1).

54 Penal Code, Cap 17, s 10.

55 Penal Code, Cap 69, s 10.

56 Penal Code, Cap 26, s 10.

57 Penal Code, Cap 8, s 10.

58 Penal Code (Amendment) Act 1989.

59 Crimes Act 1969, s 23.

60 Niue Act 1966 (NZ), s 238.

61 Crimes Act 1961, s 9.

62 Criminal Offences Act, Cap 18, s 16.

63 Crimes Act 1961, s 11.

64 Penal Code, Cap 69, s 14. Penal Code, Cap 69, s 14.

65 Crimes Act 1969, s 24.

66 Penal Code, Cap 17, s 14.

Kiribati,⁶⁷ Nauru,⁶⁸ Tokelau,⁶⁹ Tuvalu⁷⁰ and Vanuatu.⁷¹ In Niue, the legislation does not expressly state the age when a child is relieved of all criminal responsibility, but the general preservation of the common law defences in Niue⁷² would appear to protect a child in that country from criminal responsibility until the age of seven years, which was the age of criminal responsibility at common law.

In most countries, there is also a rebuttable legislative presumption that children over the age of criminal responsibility but below a certain age do not have the capacity to know that what they did was wrong. This age is 12 in Fiji Islands,⁷³ Kiribati,⁷⁴ Solomon Islands,⁷⁵ Tokelau,⁷⁶ Tonga⁷⁷ and Tuvalu;⁷⁸ 14 in Cook Islands⁷⁹ and Samoa;⁸⁰ 15 in Nauru.⁸¹ In Niue, the legislation does not expressly contain any such provision, but the general preservation of the common law defences in that country⁸² would appear to preserve the common law rule that children aged between 10 and 14 are presumed not to know that their actions are wrong, unless it is proved otherwise.⁸³

Insanity and mental abnormality

Insanity

In Cook Islands,⁸⁴ Fiji Islands,⁸⁵ Kiribati,⁸⁶ Nauru,⁸⁷ Samoa,⁸⁸ Solomon Islands,⁸⁹ Tonga⁹⁰ and Tuvalu,⁹¹ the general legislation relating to criminal

67 Penal Code, Cap 26, s 14.

68 Queensland Criminal Code Act 1899, s 29.

69 Crimes, Procedure and Evidence Rules 2003, r 114(1).

70 Penal Code, Cap 8, s 14.

71 Penal Code Act, Cap 135, s 17.

72 Niue Act 1966 (NZ), s 238.

73 Penal Code, Cap 17, s 14.

74 Penal Code, Cap 69, s 24.

75 Penal Code, Cap 26, s 14.

76 Crimes, Procedure and Evidence Rules 2003, r 114(2).

77 Criminal Offences Act, Cap 18, s 16.

78 Penal Code, Cap 8, s 14.

79 Crimes Act 1969, s 23.

80 Crimes Act 1961, s 12.

81 Queensland Criminal Code Act 1899, s 29.

82 Niue Act 1966 (NZ), s 238.

83 *C v DPP* [1996] 1 AC 1.

84 Crimes Act 1969, s 26.

85 Penal Code, Cap 17, s 12.

86 Penal Code, Cap 67, s 12.

87 Queensland Criminal Code Act 1899, s 27.

88 Crimes Act 1961, s 13.

89 Penal Code, Cap 26, s 12.

90 Criminal Offences Act, Cap 18, s 17.

91 Penal Code, Cap 8, s 13.

offences expressly states that accused persons shall be presumed to be sane, but that if they are able to prove that at the time of the commission of the offence, they were affected by a disease of the mind to such extent that they did not know what they were doing or did not know that they should not do what they were doing, then they are not criminally responsible for their actions or omissions. These provisions appear to be based closely upon the famous formulation of the rules of common law by the judges in England in *R v M'Naghten*⁹² that an accused should not be held responsible if the 'accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong'.⁹³ In Niue the legislation does not expressly contain any express provision relating to insanity, but the general preservation of the common law defences in that country⁹⁴ would appear to preserve the *M'Naghten* rules with regard to the effect of insanity in those countries also. In Tokelau,⁹⁵ the legislation provides that every person shall be presumed sane, and no person shall be convicted of an offence if at the time of the commission he or she was insane, but no explanation is given as to what is meant by the term 'insane'.

In Vanuatu the Penal Code contains an express provision which is similar to those of other countries in the region, but does not seem to be of identical effect, in that it provides that every accused person is presumed to be sane, but it shall be a defence to criminal responsibility if 'the accused was at the time in question suffering from a defect of reason, due to a disease of the mind, which rendered him incapable of appreciating the probable effects of his conduct'.⁹⁶

Mental abnormality

Mental abnormality not amounting to insanity was not recognised by the common law as a defence to any crime, but in 1957 s 2 of the Homicide Act 1957 (UK) introduced the concept of abnormality of the mind in England as a factor diminishing responsibility for intentional killing from murder to manslaughter. This provision has been followed in Kiribati,⁹⁷ Nauru,⁹⁸ Solomon Islands⁹⁹ and Tuvalu,¹⁰⁰ where the legislation in force relating to

92 (1843) 10 Cl & Fin 200.

93 (1843) 10 Cl & Fin 200, 210.

94 Niue Act 1966 (NZ), s 238.

95 Crimes, Procedure and Evidence Rules 2003, s 116(1)(i).

96 Penal Code Act, Cap 135, s 20(2).

97 Penal Code, Cap 67, s 196.

98 Queensland Criminal Code Act 1899, s 304A, as inserted by Criminal Code and Other Acts (Amendment) Act 1961 (Qld).

99 Penal Code, Cap 26, s 196.

100 Penal Code, Cap 8, s 196.

general criminal responsibility expressly provides that abnormality of the mind, whether arising from arrested or retarded development or induced by disease or injury, reduces or diminishes responsibility for intentional killing of another person from murder to manslaughter. In Vanuatu,¹⁰¹ mental abnormality is a factor which is stated by the legislation to diminish responsibility for all offences, not just murder.

In Cook Islands, Fiji Islands, Niue, Samoa, Tokelau and Tonga, however, the legislation makes no express reference to abnormality of the mind, and since this is not a factor recognised by the common law, it is not preserved by the provisions of the legislation in Cook Islands, Niue and Samoa which save common law defences to criminal responsibility. The Court of Appeal of Fiji Islands has made it clear in *Babkobau v The State*¹⁰² that diminished responsibility is not a defence to criminal responsibility in that country. It is possible that mental abnormality may be relied upon in Tonga if s 2 of the Homicide Act 1957(UK), which introduced the concept of abnormality of the mind in England, were to be regarded as a statute of general application which is in force in Tonga, but that seems doubtful, with regard to the existing provisions relating to murder and manslaughter in the Criminal Offences Act of that country.

Intoxication

In Fiji Islands,¹⁰³ Kiribati,¹⁰⁴ Solomon Islands,¹⁰⁵ Tonga¹⁰⁶ and Tuvalu,¹⁰⁷ the legislation provides that intoxication is not a defence to criminal liability, unless it is such as to cause the accused not to know what he or she is doing or not to know that it is wrong, and the intoxication was involuntary (was caused by some malicious or negligent act of another person) or was such as to cause permanent or temporary insanity. However, the legislation also expressly provides that intoxication shall be taken into account to determine whether the accused had formed any intention, specific or otherwise, which is an ingredient of the offence. Accordingly, intoxication may operate to exclude criminal liability if the court is satisfied that the accused did not have any intention that was an ingredient of the offence, or, as was said in *R v Toma*,¹⁰⁸ did not have 'any conscious intent'. This, as the High Court of

101 Penal Code Act, Cap 135, 25.

102 [2001] FJCA 23.

103 Penal Code, Cap 17, s 13.

104 Penal Code, Cap 67, s 13.

105 Penal Code, Cap 26, s 13.

106 Criminal Offences Act, Cap 18, s 21.

107 Penal Code, Cap 8, s 13.

108 [2000] TOSC 51.

Solomon Islands observed in *R v Kauwai*,¹⁰⁹ means that the law in these countries is different from the common law in England as expounded by the House of Lords in *DPP v Beard*¹¹⁰ and *DPP v Majewski*,¹¹¹ where it was held that intoxication is only able to be taken into account to determine specific intention, not basic intention.

The legislation in force in Nauru¹¹² and Vanuatu¹¹³ follows the English approach, and only allows for intoxication to be taken into account to determine specific intent. Moreover, in Vanuatu the burden of proving that intoxication deprived the accused of any necessary intent placed upon the accused.

In Cook Islands,¹¹⁴ Niue¹¹⁵ and Samoa¹¹⁶ the legislation is silent as to the effect of intoxication upon criminal liability, but it does preserve the common law defences to criminal liability. In Samoa, this has been held by the Supreme Court in *Olo v Police*¹¹⁷ to mean the common law as determined by the courts of Samoa which are free to derive their sources of common law from any courts in the Commonwealth, and not merely from England. Consequently the court held that intoxication may operate to exclude liability for any criminal offence if it negates any intention that is an ingredient of that offence, as declared by the High Court of Australia in *R v O'Connor*,¹¹⁸ in contradistinction to the common law of England as expounded by *Beard* and *Majewski* (above). The result of *Olo* would seem to be that the effect of intoxication under the common law of Samoa is similar to the effect achieved by legislation in the countries considered in the preceding paragraphs.

On the other hand, in Tokelau¹¹⁹ the legislation states baldly that intoxication is not a defence to criminal liability, but makes no provision for it to negate any relevant intent and does not preserve the common law defences. In view of the fact that this legislation is to be applied by commissioners' courts, presided over by persons with no legal knowledge and experience, it seems unlikely that the legislation would be regarded as meaning anything other than that intoxication has no effect upon criminal liability.

109 [1980] SBHC 1.

110 [1920] AC 479.

111 [1977] AC 443.

112 Queensland Criminal Code Act 1899, s 28.

113 Penal Code Act, Cap 135, s 21.

114 Crimes Act 1969, s 23.

115 Niue Act 1966 (NZ), s 238.

116 Crimes Act 1961, s 9.

117 [1992] WSLR 1.

118 (1980) 29 ALR 449.

119 Crimes, Procedure and Evidence Rules 2003, r 82.

Compulsion and coercion

Compulsion

In Fiji Islands,¹²⁰ Kiribati,¹²¹ Solomon Islands¹²² and Tuvalu¹²³ the legislation provides that compulsion is a defence to criminal liability of a person if that person is committing an offence with two or more other offenders, and during the whole time that the offence was being committed, the person was compelled to commit the offence by threats of instant death or grievous bodily harm made by the other offender(s), but threats of future injury are not sufficient. The Court of Appeal of Solomon Islands has held in *Kejoa v Regina*¹²⁴ and *Hesse v Regina*,¹²⁵ that this provision, similarly to the common law in England,¹²⁶ does not operate to provide a defence to persons who voluntarily join organisations that they know engage in violent activities. Provisions to much the same effect are to be found in the legislation in force in Cook Islands,¹²⁷ Nauru¹²⁸ and Samoa,¹²⁹ except that it is stressed that the person making the threat must be actually present, and that the defence cannot be invoked in respect of treason, murder and certain other specified criminal offences. In Tokelau,¹³⁰ the legislation states, more briefly and without qualification, that no person shall be convicted of an offence if at the time of the commission that person 'acted under duress'. In Niue,¹³¹ no express mention is made of compulsion as a defence, but the preservation of the common law defences in those countries allows for the common law rules regarding duress as a defence to criminal liability as discussed by the House of Lords in *R v Howe*,¹³² to be applied.

In Vanuatu,¹³³ compulsion is not a defence to criminal liability, but it is a factor which diminishes responsibility and so is a factor, like provocation, to be taken into account in reducing the punishment. In Tonga, no mention is made in the general legislation relating to criminal offences of compulsion as a defence to criminal responsibility, or as factor to diminish responsibility and punishment.

120 Penal Code, Cap 17, s 16.

121 Penal Code, Cap 67, s 16.

122 Penal Code, Cap 26, s 16.

123 Penal Code, Cap 8, s 16.

124 [2006] SBCA 6.

125 [2006] SBCA 7.

126 *R v Hasan* [2005] 2 AC 467.

127 Crimes Act 1951, 27.

128 Queensland Criminal Code Act 1899, s 31.

129 Crimes Act 1961, s 14.

130 Crimes, Procedure and Evidence Rules 2003, r 116(1)(i).

131 Niue Act 1966 (NZ), s 238.

132 [1987] AC 755.

133 Penal Code Act, Cap 135, s 26.

Coercion

The common law in England considered that a wife could be under the coercion of her husband, even if there had been no threats of instant death or serious bodily harm so as to constitute compulsion, and that such coercion should be a defence to criminal responsibility on her part, except in respect of treason, murder and possibly manslaughter and robbery. The common law went further and developed a presumption that if a woman committed an offence in the presence of her husband she was acting under his coercion.¹³⁴ This presumption of coercion was abolished by legislation in England in 1925, but the legislation confirmed that it was still a good defence for a wife to prove that she committed the offence in the presence of, and under the coercion of, her husband, except for treason and murder.¹³⁵ This position was followed by the legislation in force in Fiji Islands,¹³⁶ Kiribati,¹³⁷ Nauru,¹³⁸ Solomon Islands¹³⁹ and Tuvalu,¹⁴⁰ which expressly states that a married woman is not free from responsibility for an offence which she commits in the presence of her husband, but it shall be a good defence if she proves that the offence was committed in the presence of, and under the coercion of, her husband, except for the offences of treason and murder. In Cook Islands¹⁴¹ and Samoa,¹⁴² it is expressly provided that the fact that a married woman commits an offence in the presence of her husband does not give rise to a presumption of compulsion by him. In Vanuatu,¹⁴³ coercion by a spouse, and also by a parent, employer or other person having actual or moral authority over a person committing an offence is stated not to be a defence, but to be a factor which diminishes responsibility, like compulsion. In Tokelau, there is no express mention of coercion as a defence, but as mentioned earlier, the legislation in Tokelau does provide that no person shall be convicted of an offence if at the time that person 'acted under duress'¹⁴⁴ – the term duress is not defined, but it would seem to be wide enough to include all kinds of coercion. In Niue and Tonga, no express mention is made of compulsion or coercion as a defence to criminal responsibility, although in Niue,¹⁴⁵ they

134 See Smith J, *Smith & Hogan, Criminal Law*, 10th edn, 2002, London: Butterworths, pp 264–6.

135 Criminal Justice Act 1925, s 47.

136 Penal Code, Cap 17, s 19.

137 Penal Code, Cap 67, s 19.

138 Queensland Criminal Code Act 1899, s 32.

139 Penal Code, Cap 26, s 19.

140 Penal Code, Cap 8, s 19.

141 Crimes Act 1969, s 27(3).

142 Crimes Act 1961, s 14(3).

143 Penal Code Act, Cap 135, s 26(1)(b).

144 Crimes, Procedure and Evidence Rules 2003, r 116(1)(i).

145 Niue Act 1966 (NZ), s 238.

are probably available as defences as part of the common law defences which are generally preserved by the legislation in force in that country.

Provocation

In Cook Islands,¹⁴⁶ Fiji Islands,¹⁴⁷ Kiribati,¹⁴⁸ Nauru,¹⁴⁹ Solomon Islands,¹⁵⁰ Tokelau,¹⁵¹ Tonga¹⁵² and Tuvalu,¹⁵³ legislation provides for provocation to reduce responsibility for unlawful killing from murder to manslaughter. Provocation is defined as some act which would deprive an ordinary man of self-control, and did in fact deprive the accused of self-control. In Fiji Islands and Nauru, the legislation requires that the provoking action must have been done to the accused, or in the presence of the accused to some person under his or her immediate care, or a spouse, parent, child, sibling or employee of the accused, but there is no such limitation in the other five countries. In Fiji Islands the legislation specifies that the provocation must have been done by the person who is attacked by the accused, but there is no such limitation in the legislation of the other countries mentioned.

In Vanuatu¹⁵⁴ provocation to the accused, or in his or her presence to the spouse, descendant, ascendant, brother, sister, employer or employee, or any minor or incapable person under his or her charge, is stated to be a factor diminishing responsibility for all criminal offences, but only if the reaction of the accused to the provocation is not disproportionate to the provoking action.

The legislation in Niue¹⁵⁵ and Samoa¹⁵⁶ does not contain any express provision about provocation, but the provisions which preserve the common law defences to criminal liability in those countries may allow for the common law rules regarding provocation, as enunciated in *R v Duffy*,¹⁵⁷ to be used to diminish responsibility for unlawful killing from murder to manslaughter.

Defence of person or property

In Cook Islands¹⁵⁸ the legislation relating to criminal offences provides that everyone is justified in using in defence of himself or another such force as

146 Crimes Act 1969, s 189.

147 Penal Code, Cap 17, ss 203–5.

148 Penal Code, Cap 27, ss 197, 198.

149 Queensland Criminal Code Act 1899, ss 268, 269.

150 Penal Code, Cap 26, ss 197, 198.

151 Crimes, Procedure and Evidence Rules 2003, r 7.

152 Criminal Offences Act, Cap 18, ss 86, 89.

153 Penal Code, Cap 8, ss 197, 198.

154 Penal Code Act, Cap 135, s 27.

155 Niue Act 1966 (NZ), s 238.

156 Crimes Act 1961, s 9.

157 [1949] 1 All ER 932n.

158 Crimes Act 1969, s 50, as inserted by the Crimes Amendment Act 1981, s 3.

is reasonable in the circumstances as he believes them to be, but no provision is made for the protection of property. In Nauru¹⁵⁹ and Samoa,¹⁶⁰ the legislation in force contains specific provisions justifying the use of reasonable force for defence of self against an unprovoked assault and a provoked assault, and for defence of land or a building in his or her possession against trespass, and, in Samoa, for defence of a person under the protection of the accused against an assault, and for defence of a dwelling-house in the possession of the accused against breaking and entering. In Tokelau,¹⁶¹ acts taken to prevent serious harm to property or persons are a defence to criminal responsibility for all offences except murder, provided that the harm prevented is greater than that resulting from the offence and that it could not have effectively been prevented by lesser means. In Vanuatu,¹⁶² the legislation provides that no criminal responsibility shall attach to a person in respect of an act taken in defence of that person or another against an unlawful act provided that the act taken was not disproportionate to the seriousness of the unlawful action threatened. This is also the case in respect of an act done in necessary protection of any right of property, again provided that the act taken was not disproportionate to the severity of the harm threatened.

In Fiji Islands,¹⁶³ Kiribati,¹⁶⁴ Solomon Islands¹⁶⁵ and Tuvalu,¹⁶⁶ the legislation provides that 'criminal responsibility for the use of force in defence of person or property shall be determined by the principles of English common law'. These have been recently discussed by the Privy Council and the House of Lords in *Palmer v The Queen*¹⁶⁷ and *R v Clegg*,¹⁶⁸ respectively.

In Niue and Tonga, the legislation makes no express reference to defence of person or property as a defence to criminal liability, but in Niue¹⁶⁹ the general provisions saving common law defences would seem to preserve in that country defence of person or property as a defence to criminal responsibility to the extent allowed by the common law.

159 Queensland Criminal Code Act 1899, ss 271, 272, 277.

160 Crimes Act 1961, ss 15–19.

161 Crimes, Procedure and Evidence Rules 2003, r 116(2).

162 Penal Code Act, Cap 135, s 23(1)–(3).

163 Penal Code, Cap 17, s 17.

164 Penal Code, Cap 67, s 17.

165 Penal Code, Cap 26, s 17.

166 Penal Code, Cap 8, s 17.

167 [1971] AC 814.

168 [1995] 1 AC 482.

169 Niue Act 1966 (NZ), s 238.

Inchoate offences

Conspiracy

In Cook Islands,¹⁷⁰ Fiji Islands,¹⁷¹ Kiribati,¹⁷² Nauru,¹⁷³ Niue,¹⁷⁴ Solomon Islands,¹⁷⁵ Tonga¹⁷⁶ and Tuvalu¹⁷⁷ the legislation provides that it is a criminal offence to conspire to commit a criminal offence within the country, or to commit an act overseas which, if it had been committed within the country, would have been a criminal offence, regardless of whether the offence is actually committed. In Fiji Islands,¹⁷⁸ Kiribati,¹⁷⁹ Solomon Islands¹⁸⁰ and Tuvalu,¹⁸¹ the legislation also provides that it is an offence to conspire to carry out an unlawful purpose or to carry out a lawful purpose by unlawful means. In Tokelau,¹⁸² the legislation provides that it is an offence for a person to conspire with another to commit an offence, but does not expressly state whether the offence which was the subject of the conspiracy must have been within the country, or must have been committed. In Samoa¹⁸³ and Vanuatu¹⁸⁴ the legislation does not provide a general offence of conspiracy, but provides specific forms of conspiracy, for example, conspiracy to defeat justice, conspiracy to murder, conspiracy to defraud.

Under the common law it was not possible for a husband and wife to be guilty of conspiring between themselves alone.¹⁸⁵ This position has been expressly maintained in Nauru¹⁸⁶ and Vanuatu,¹⁸⁷ and it may also have been preserved in Niue¹⁸⁸ by the provision which saves common law defences, but it has been expressly abolished in Cook Islands,¹⁸⁹ and it would seem

170 Crimes Act 1969, s 333.

171 Penal Code, Cap 17, ss 385, 386.

172 Penal Code, Cap 67, ss 376, 377.

173 Queensland Criminal Code Act 1899, s 541.

174 Niue Act 1966 (NZ), s 228.

175 Penal Code, Cap 26, ss 383, 384.

176 Criminal Offences Act, Cap 18, s 15.

177 Penal Code, Cap 18, ss 376, 377.

178 Penal Code, Cap 17, s 387.

179 Penal Code, Cap 67, s 378.

180 Penal Code, Cap 26, s 385.

181 Penal Code, Cap 8, s 378.

182 Crimes, Procedure and Evidence Rules 2003, r 79.

183 Crimes Act 1961, ss 38, 69, 97.

184 Penal Code Act, Cap 135, s 79.

185 *Mawji v R* [1957] AC 216.

186 Queensland Criminal Code Act 1899, s 33.

187 Penal Code Act, Cap 135.

188 Niue Act 1966 (NZ), s 238.

189 Crimes Act 1969, s 69.

also in Samoa.¹⁹⁰ In Nauru¹⁹¹ and Vanuatu,¹⁹² a person cannot be prosecuted for conspiracy without the written consent of the attorney-general or public prosecutor, respectively.

Attempts

In Cook Islands,¹⁹³ Fiji Islands,¹⁹⁴ Kiribati,¹⁹⁵ Nauru,¹⁹⁶ Niue,¹⁹⁷ Samoa,¹⁹⁸ Solomon Islands,¹⁹⁹ Tokelau,²⁰⁰ Tonga,²⁰¹ Tuvalu²⁰² and Vanuatu,²⁰³ the legislation relating to criminal offences provides that an attempt to commit a criminal offence is itself a criminal offence. The legislation emphasises that preparation to commit the offence is not an attempt, and it is only when the actions that are taken can be regarded as immediately or proximately connected with the intended offence that they constitute an attempt. Under the rules of common law of England it was considered not possible to be guilty of an attempt to commit an offence if, for some reason, it was impossible for the offence to be committed,²⁰⁴ but this was expressly reversed in England by legislation in England in 1981,²⁰⁵ and has been expressly reversed by the legislation in force in the countries of the region.

Incitement

Under the common law in England it was a criminal offence in the form of a misdemeanour to incite a person to commit an offence, whether or not the offence was actually committed.²⁰⁶ The common law position is expressly provided for by legislation in Tokelau,²⁰⁷ Tonga²⁰⁸ and Vanuatu,²⁰⁹ which

190 Crimes Act 1961, s 24.

191 Queensland Criminal Code Act 1899, s 541.

192 Penal Code Act, Cap 135, s (5).

193 Crimes Act 1969, ss 74, 344(1).

194 Penal Code, Cap 17, s 380.

195 Penal Code, Cap 67, s 221.

196 Queensland Criminal Code Act 1899, s 535.

197 Niue Act 1966 (NZ), s 535.

198 Crimes Act 1961, s 27(1).

199 Penal Code, Cap 26, s 220.

200 Crimes, Procedure and Evidence Rules 2003, r 80.

201 Criminal Offences Act, Cap 18, s 5.

202 Penal Code, Cap 8, s 371.

203 Penal Code, Cap 135, s 28.

204 *Haughton v Smith* [1975] AC 476.

205 Criminal Attempts Act 1981 (UK).

206 *R v Higgins* (1801) 2 East 5.

207 Crimes, Procedure and Evidence Rules 2003, r 80.

208 Criminal Offences Act, Cap 18, s 8.

209 Penal Code Act, Cap 135, s 35.

expressly states that it is an offence to encourage or incite a person to commit a criminal offence, even though the offence is not committed. The position would appear to be the same in Cook Islands,²¹⁰ Fiji Islands,²¹¹ Kiribati,²¹² Niue,²¹³ Solomon Islands,²¹⁴ Tokelau²¹⁵ and Tuvalu.²¹⁶ In Nauru²¹⁷ and Samoa,²¹⁸ however, it appears that incitement to commit an offence is only a criminal offence if the offence that is incited is in fact committed.

Parties to criminal offences

In Cook Islands,²¹⁹ Fiji Islands,²²⁰ Kiribati,²²¹ Nauru,²²² Niue,²²³ Samoa,²²⁴ Solomon Islands,²²⁵ Tokelau,²²⁶ Tonga,²²⁷ Tuvalu²²⁸ and Vanuatu,²²⁹ the legislation provides that responsibility for the commission of a criminal offence extends to the person who actually committed the offence, and also any person who does anything to enable or aid another person to commit the offence, any person who aids or abets another person in committing the offence, and any person who counsels or procures another person to commit the offence.

The legislation makes it clear that a person is liable for counselling the commission of an offence by another person even if the offence is not committed in the way that was counselled, provided that the commission of the offence was a likely or probable consequence of the counselling, but there is no liability if the commission of the offence was not a probable consequence of the counselling.

210 Crimes Act 1969, s 68(d).

211 Penal Code, Cap 17, s 383.

212 Penal Code, Cap 67, s 374.

213 Niue Act 1966 (NZ), s 232.

214 Penal Code, s 381.

215 Crimes, Procedure and Evidence Rules 2003, r 81.

216 Penal Code, s 374.

217 Queensland Criminal Code Act 1899, s 7.

218 Crimes Act 1961, s 23(d).

219 Crimes Act 1969, s 68.

220 Penal Code, Cap 17, s 21.

221 Penal Code, Cap 67, s 21.

222 Queensland Criminal Code Act 1899, s 7.

223 Niue Act 1966 (NZ), s 233.

224 Crimes Act 1961, s 23.

225 Penal Code, Cap 26, s 21.

226 Crimes, Procedure and Evidence Rules 2003, r 113(1)(i)–(iv).

227 Criminal Offences Act, Cap 18, s 8.

228 Penal Code, Cap 8, s 21.

229 Penal Code Act, Cap 135, s 30.

A person is also responsible as an accessory after the fact in respect of a criminal offence, in Cook Islands,²³⁰ Fiji Islands,²³¹ Kiribati,²³² Nauru,²³³ Niue,²³⁴ Samoa,²³⁵ Solomon Islands,²³⁶ Tokelau,²³⁷ Tuvalu²³⁸ and Vanuatu,²³⁹ if, knowing that another person has committed an offence, he or she receives, comforts or assists that person, or tampers with or suppresses any evidence against that person. In Tonga²⁴⁰ there is a somewhat similar offence of harbouring criminals. An exemption from responsibility is provided in Kiribati and Tuvalu in the case of a wife who assists her husband; in Cook Islands, Fiji Islands, Nauru, Niue, Samoa and Solomon Islands, this exemption is extended to include a husband or a wife of the person assisted; and in Vanuatu, it is extended further to include not only either spouse, but also an ascendant, descendant, sibling of the person assisted. In Tokelau and Tonga, there is no such exemption from responsibility.

Particular criminal offences

In a work of this size it is not possible to deal in any detail with all the criminal offences that are contained in the general legislation relating to criminal offences in countries of the region, but some of the main points will be highlighted.

Offences against the state

The traditional crimes against the state and public order, that is, treason and sedition,²⁴¹ unlawful assembly and riot,²⁴² are to be found in all countries of

230 Crimes Act 1969, s 73.

231 Penal Code, Cap 17, s 388.

232 Penal Code, Cap 67, s 379.

233 Queensland Criminal Code Act 1899, s 10.

234 Niue Act 1966 (NZ), s 236.

235 Crimes Act 1961, s 26.

236 Penal Code, Cap 26, s 386.

237 Crimes, Procedure and Evidence Rules 2003, r 113(1)(v).

238 Penal Code, Cap 8, s 379.

239 Penal Code Act, Cap 135, s 34.

240 Criminal Offences Act, Cap 18, s 13.

241 Cook Islands – Crimes Act 1969, ss 75, 83; Fiji – Penal Code, Cap 17, ss 50–4, 66; Kiribati – Penal Code, Cap 67, ss 47, 66; Nauru – Queensland Criminal Code Act 1899, ss 37, 52; Niue – Niue Act 1966 (NZ), s 129; Samoa – Crimes Act 1961, ss 28, 29; Solomon Islands – Penal Code, Cap 26, s 48; Tokelau – Crimes, Procedure and Evidence Rules 2003, rr 70, 71; Tonga – Criminal Offences Act, Cap 18, ss 44, 47; Tuvalu – Penal Code, Cap 8, ss 47, 46; Vanuatu – Penal Code Act, Cap 135, ss 59, 63–7.

242 Cook Islands – Crimes Act 1969, ss 88, 89; Fiji – Penal Code, Cap 17, ss 87–8; Kiribati – Penal Code, Cap 67, ss 47, 66; Nauru – Queensland Criminal Code Act 1899, ss 62–3; Samoa – Crimes Act 1961, ss 30, 31; Solomon Islands – Penal Code, Cap 26, ss 74, 75; Tonga – Criminal Offences Act, Cap 18, s 74; Vanuatu – Penal Code Act, Cap 135, ss 69, 70.

the region, and incitement to mutiny²⁴³ is to be found in many. The traditional criminal offences of perjury and acts to pervert the course of justice also appear in the legislation in all countries.²⁴⁴ The more modern phenomena of official corruption and abuse of office²⁴⁵ are also stated to be criminal offences in most countries, supplemented in Fiji Islands,²⁴⁶ Kiribati,²⁴⁷ Nauru,²⁴⁸ Solomon Islands²⁴⁹ and Tuvalu²⁵⁰ by additional provisions relating to secret commissions and corrupt practices.

Offences against persons

With regard to offences against the person, the common law divisions of culpable homicide and non-culpable homicide, and of culpable homicide into murder and manslaughter, are retained in all countries of the region, except Vanuatu²⁵¹ where the code makes a distinction between causing death intentionally and causing death unintentionally, through recklessness, negligence or unlawful act, and then between causing death intentionally which is premeditated and that which is unpremeditated. In Fiji Islands,²⁵² Kiribati,²⁵³ Solomon Islands²⁵⁴ and Tuvalu,²⁵⁵ the division between murder

243 Cook Islands – Crimes Act 1969, s 79; Fiji – Penal Code, Cap 17, ss 55–7; Kiribati – Penal Code, Cap 67, ss 52–4; Nauru – Queensland Criminal Code Act 1899, s 41; Solomon Islands – Penal Code, Cap 26, s 54; Tuvalu – Penal Code, Cap 8, s 52; Vanuatu – Penal Code Act, Cap 135, s 60.

244 Cook Islands – Crimes Act 1969, ss 119, 124–8; Fiji – Penal Code, Cap 17, ss 117, 129–36; Kiribati – Penal Code, Cap 67, ss 96, 102–15; Nauru – Queensland Criminal Code Act 1899, ss 123, 126–40; Niue – Niue Act 1966 (NZ), ss 181, 182–3; Samoa – Crimes Act 1961, ss 36, 37–8; Solomon Islands – Penal Code, Cap 26, ss 102, 110–25; Tokelau – Crimes, Procedure and Evidence Rules 2003, rr 75, 76; Tonga – Criminal Offences Act, Cap 18, ss 63, 65; Tuvalu – Penal Code, Cap 8, ss 96, 104–16; Vanuatu – Penal Code Act, Cap 135, ss 74, 77–82.

245 Cook Islands – Crimes Act 1969, ss 110–17; Fiji – Penal Code, Cap 17, ss 106–11; Kiribati – Penal Code, Cap 67, ss 85–90; Nauru – Queensland Criminal Code Act 1899, ss 87–97; Niue – Niue Act 1966 (NZ), s 180; Samoa – Crimes Act 1961, s 35; Solomon Islands – Penal Code, Cap 26, ss 91–6; Tokelau – Crimes, Procedure and Evidence Rules 2003, rr 72, 73; Tonga – Criminal Offences Act, Cap 18, ss 50–3; Tuvalu – Penal Code, Cap 8, ss 85–95; Vanuatu – Penal Code Act, Cap 135, ss 73.

246 Penal Code, Cap 17, ss 375–9.

247 Penal Code, Cap 67, s 366.

248 Queensland Criminal Code Act 1899, ss 442A–M.

249 Penal Code, Cap 26, ss 373–7.

250 Penal Code, Cap 8, ss 366–70.

251 Penal Code Act, Cap 135, ss 106, 108(2).

252 Penal Code, Cap 17, ss 199, 202.

253 Penal Code, Cap 67, ss 193, 195.

254 Penal Code, Cap 26, ss 200, 202.

255 Penal Code, Cap 8, ss 193, 195.

and manslaughter is expressly based upon the existence or otherwise of ‘malice aforethought’, which is defined to mean an intention to cause death or grievous harm to any person, or a knowledge that the act will probably cause death or grievous harm to any person, even although by mistake some other person is killed, thus corresponding broadly to express and implied or transferred malice under the common law. In Cook Islands,²⁵⁶ Niue,²⁵⁷ Samoa,²⁵⁸ Tokelau²⁵⁹ and Tonga,²⁶⁰ a more extended definition of criminal intent for murder is adopted, which includes not only intention to cause death or grievous harm to any person, and knowledge that the act will probably cause death or grievous harm to any person, even although by mistake the act causes the death of the deceased person, but also, except in Tokelau, intention to include grievous bodily injury in the course of committing certain specified criminal offences, which broadly corresponds to the concept of constructive malice under the common law.

The legislation of all countries provides for the sexual offences of incest,²⁶¹ sexual intercourse without consent²⁶² and sexual intercourse with a girl under the age of consent,²⁶³ which in most countries is placed at 16 years, but in Vanuatu is placed at 15 years, and in Tonga is placed at 12 years. In Niue, Tokelau, Tonga and Vanuatu the consent of the girl and reasonable belief that she was over the age of consent are not defences to responsibility for sexual intercourse with a girl under 16 years, but in Cook Islands, Fiji Islands, Kiribati, Nauru, Samoa, Solomon Islands and Tuvalu reasonable belief that

256 Crimes Act 1969, ss 187, 188.

257 Niue Act 1966 (NZ), ss 134, 135.

258 Crimes Act 1961, ss 63, 64.

259 Crimes, Procedure and Evidence Rules 2003, r 4.

260 Criminal Offences Act, Cap 18, s 87(1), (2).

261 Cook Islands – Crimes Act 1969, s 143; Fiji Islands – Penal Code, Cap 17, ss 178, 179; Kiribati – Penal Code, Cap 67, s 156; Nauru – Queensland Criminal Code Act 1899, ss 222, 223; Niue – Niue Act 1966 (NZ), s 172; Samoa – Crimes Act 1961, s 49; Solomon Islands – Penal Code, Cap 26, ss 163, 164; Tokelau – Crimes, Procedure and Evidence Rules 2003, r 38; Tonga – Criminal Offences Act, Cap 18, ss 132–3; Tuvalu – Penal Code, Cap 8, s 156; Vanuatu – Penal Code Act, Cap 135, s 95.

262 Cook Islands – Crimes Act 1969, s 141; Fiji Islands – Penal Code, Cap 17, ss 149, 150; Kiribati – Penal Code, Cap 67, ss 128, 129; Nauru – Queensland Criminal Code Act 1899, ss 212, 216; Niue – Niue Act 1966 (NZ), s 162; Samoa – Crimes Act 1961, s 47; Solomon Islands – Penal Code, Cap 26, ss 136, 137; Tokelau – Crimes, Procedure and Evidence Rules 2003, r 19(1)(i)(I); Tonga – Criminal Offences Act, Cap 18, s 118; Tuvalu – Penal Code, Cap 8, ss 128, 129; Vanuatu – Penal Code Act, Cap 135, ss 90, 91.

263 Cook Islands – Crimes Act 1969, ss 145–7; Fiji Islands – Penal Code, Cap 17, ss 155–7; Kiribati – Penal Code, Cap 67, ss 134–5; Nauru – Queensland Criminal Code Act 1899, ss 212, 216; Niue – Niue Act 1966 (NZ), ss 163, 164; Samoa – Crimes Act 1961, ss 51, 53; Solomon Islands – Penal Code, Cap 26, ss 142, 143; Tokelau – Crimes, Procedure and Evidence Rules 2003, r 19(1)(i)(II); Tonga – Criminal Offences Act, Cap 18, s 121; Tuvalu – Penal Code, Cap 8, ss 134, 135; Vanuatu – Penal Code Act, Cap 135, s 97.

the girl is over the age of consent is a defence, provided that the girl was of or over 12 years, and in Samoa, that the male was under 21 years. The term 'sexual intercourse' has been held by the Court of Appeal in Vanuatu²⁶⁴ not to include penile penetration of the anus, and so such penetration, even although undertaken without consent of a woman, is not rape. Adultery by a married person is a criminal offence in Samoa,²⁶⁵ and Tokelau,²⁶⁶ but not in the other countries of the region, although it was a criminal offence in Vanuatu²⁶⁷ from 1982 to 1986. Living together as man and wife when not married is expressly stated to be a criminal offence in Tokelau,²⁶⁸ but not in the other countries of the region. Sodomy and indecent practices between males are prohibited in all countries,²⁶⁹ except in Tokelau, and to a limited extent in Vanuatu, where acts of indecency with another person under the age of 13 years, and homosexual acts with a person of the same sex under the age of 18 years are prohibited. These legislative provisions have given rise to constitutional problems in some countries. In Fiji Islands, Kiribati, Niue, Solomon Islands, Tonga and Tuvalu the legislation prohibits indecent acts between males only, and the High Court of Solomon Islands held that it was discriminatory on grounds of sex, but since it was only the word 'male' that was discriminatory in the provision, that word could be severed and struck out, which had the effect of widening the scope of the section to include all persons, both males and females.²⁷⁰ In Fiji Islands,²⁷¹ the legislative provision prohibiting indecent practices between males has also been held to be discriminatory on grounds of sex, but instead of striking out the discriminatory word 'male' as had been done in Solomon Islands,²⁷² the High Court held that the whole section was void. In addition the High Court held that the provision prohibiting sodomy was inconsistent with the right to privacy protected by the constitution of that country, and therefore void to the extent that the provision applied to acts in private. In Vanuatu,²⁷³ the provision prohibiting homosexual acts is not

264 *Vere v Public Prosecutor* [2006] VUCA 15.

265 Crimes Act 1961, s 53.

266 Crimes, Procedure and Evidence Rules 2003, r 22.

267 Penal Code (Amendment) Act 1982, which was repealed by the Penal Code (Amendment) Act 1986.

268 Crimes, Procedure and Evidence Rules 2003, r 23.

269 Cook Islands – Crimes Act 1969, ss 154–5; Fiji Islands – Penal Code, Cap 17, ss 175–7; Kiribati – Penal Code, Cap 67, ss 153–5; Nauru – Queensland Criminal Code Act 1899, ss 208–11; Niue – Niue Act 1966 (NZ), ss 170, 171; Samoa – Crimes Act 1961, ss 51, 53; Solomon Islands – Penal Code, Cap 26, ss 160, 162; Tonga – Criminal Offences Act, Cap 18, ss 136, 138; Tuvalu – Penal Code, Cap 8, ss 153, 155.

270 *R v Bowie* [1988–9] SILR 113.

271 *Nadan v The State* [2005] FJHC 257. It is understood that this decision is under appeal.

272 The decision in *R v Bowie*, above, fn 266, was not referred to by the High Court of Fiji in *Nadan v The State*, above, fn 267.

273 Penal Code Act, Cap 135, s 99.

restricted on grounds of gender, but is restricted to acts with persons who are under the age of 18 years. Bigamy and fraudulent or feigned marriage are prohibited in all countries,²⁷⁴ except Nauru,²⁷⁵ Niue,²⁷⁶ Tokelau,²⁷⁷ Tonga²⁷⁸ (bigamy only) and Vanuatu (neither offence is prohibited). Abortion is prohibited in all countries, but subject to express exceptions. In Cook Islands,²⁷⁹ Fiji Islands,²⁸⁰ Samoa,²⁸¹ Solomon Islands²⁸² and Tuvalu,²⁸³ the exception is if the act is done in good faith to preserve the life of the mother. In Nauru,²⁸⁴ Niue²⁸⁵ and Tokelau²⁸⁶ the exception is provided by the adverb 'unlawfully'. In Vanuatu²⁸⁷ there is an exception if the act was taken 'for good medical reasons'. Also in Vanuatu,²⁸⁸ the written approval of the public prosecutor is required prior to a prosecution for abortion. There is no such requirement in the other countries of the region.

Offences against reputation

Defamation, which is a civil wrong giving rise to liability to pay damages to the person defamed in all countries of the region, is also a criminal offence in most countries of the region, but subject to various modifications. In Cook Islands,²⁸⁹ Nauru²⁹⁰ and Niue²⁹¹ criminal responsibility attaches to all defamatory statements, both written (libel) and oral (slander), but only in the case of spoken words if the oral words are spoken within the hearing of at least 12 members of the public, and justification or truth is no defence unless it was also in the public interest that the defamatory material was published, and, in Cook Islands, no prosecution for a defamation can be commenced without the leave of a High Court judge.

274 Cook Islands – Crimes Act 1969, ss 227–9; Fiji – Penal Code, Cap 17, ss 184–6; Kiribati – Penal Code, Cap 67, ss 162–4; Samoa – Crimes Act 1961, ss 74A–C; Solomon Islands – Penal Code, Cap 26, ss 169–71; Tuvalu – Penal Code, Cap 8, ss 162–4.

275 Queensland Criminal Code Act 1899, s 360. This section was replaced in 1963 by the Marriage Act 1961 (Cth), s 94.

276 Niue Act 1966 (NZ), s 169.

277 Crimes, Procedure and Evidence Rules 2003, r 26.

278 Criminal Offences Act, Cap 18, s 79.

279 Crimes Act 1929, s 202.

280 Penal Code, Cap 17, s 221.

281 Crimes Act 1961, s 73.

282 Penal Code, Cap 26, s 221.

283 Penal Code, Cap 8, s 214.

284 Queensland Criminal Code Act 1899, s 224.

285 Niue Act 1966 (NZ), s 166.

286 Crimes, Procedure and Evidence Rules 2003, r 24.

287 Penal Code Act, Cap 135, s 117.

288 *Ibid*, s 117(4).

289 Crimes Act 1969, ss 233–8.

290 Queensland Criminal Code Act 1899, ss 355–89.

291 Niue Act 1966 (NZ), s 187.

In Kiribati,²⁹² Samoa²⁹³ and Solomon Islands,²⁹⁴ it is only defamatory statements which are written (libel) that give rise to criminal responsibility, and justification or truth is not a defence by itself, but only, as in Cook Islands, Nauru and Niue, if the publication of the defamatory matter was in the public interest. In Tonga,²⁹⁵ it is only defamatory words spoken or written about the king, members of the privy council, ministers, governors, nobles, magistrates, or ordained ministers of religion, that give rise to criminal responsibility, and, again, truth is no defence by itself, but only if the publication of the defamatory material was in the public interest. In Tokelau,²⁹⁶ it is a criminal offence to spread any untrue report which is likely to cause any other person to suffer in reputation, so that truth is a complete defence in that country. In Tuvalu²⁹⁷ and Vanuatu,²⁹⁸ it is a criminal offence to make any defamatory statement, by spoken or written words, about any person, alive or dead, and no defences are expressly mentioned in the legislation.

Offences involving property

Criminal offences involving property, such as theft, conversion, robbery, extortion, burglary, arson, obtaining property by false pretences, obtaining credit by false pretences, fraudulent statements, receiving property known to be stolen, trespass with intent to commit a crime, malicious damage to property and related interferences with property are prohibited in all countries.²⁹⁹ Forgery of documents, counterfeiting and uttering of forged documents and counterfeit currency also are prohibited in all countries.³⁰⁰

292 Penal Code, Cap 67, s 2 184–91.

293 Crimes Act 1961, s 84.

294 Penal Code, Cap 126, ss 194–8.

295 Criminal Offences Act, Cap 18, ss 3–8.

296 Crimes, Procedure and Evidence Rules 2003, r 42.

297 Penal Code, Cap 8, s 120.

298 Penal Code Act, Cap 135, s 120.

299 Cook Islands – Crimes Act 1969, ss 239–85, 316–28; Fiji – Penal Code, Cap 17, ss 258–316; Kiribati – Penal Code, Cap 67, ss 250–324; Nauru – Queensland Criminal Code Act 1899, ss 390–435; Niue – Niue Act 1966 (NZ), ss 188–205; Samoa – Crimes Act 1961, ss 85–115; Solomon Islands – Penal Code, Cap 26, ss 257–331; Tokelau – Crimes, Procedure and Evidence Rules 2003, rr 27–38; Tonga – Criminal Offences Act, Cap 18, ss 155–77; Tuvalu – Penal Code, Cap 8, ss 250–324; Vanuatu – Penal Code Act, Cap 135, ss 122–46.

300 Cook Islands – Crimes Act 1969, ss 286–315; Fiji – Penal Code, Cap 17, ss 335–68; Kiribati – Penal Code, Cap 67, ss 325–9; Nauru – Queensland Criminal Code Act 1899, ss 149–63, 484–513; Niue – Niue Act 1966 (NZ), ss 207–11; Samoa – Crimes Act 1961, ss 107–11; Solomon Islands – Penal Code, Cap 26, ss 332–66; Tokelau – Crimes, Procedure and Evidence Rules 2003, rr 32, 33; Tonga – Criminal Offences Act, Cap 18, ss 59–62; 170–2; Tuvalu – Penal Code, Cap 8, ss 325–59; Vanuatu – Penal Code Act, Cap 135, ss 139–42.

Public order offences

With regard to public order offences, there is, as might be expected, a considerable degree of variation between the different countries of the region. Several examples can be given. First, loitering or soliciting in a public place for the purposes of prostitution is an offence in Cook Islands,³⁰¹ Fiji Islands,³⁰² Niue³⁰³ and Tokelau,³⁰⁴ but in Nauru,³⁰⁵ Samoa,³⁰⁶ Solomon Islands,³⁰⁷ Tuvalu³⁰⁸ and Vanuatu,³⁰⁹ living off the earnings of prostitution is an offence, but not loitering or soliciting in a public place for prostitution. Again, all forms of witchcraft or sorcery are an offence in Cook Islands,³¹⁰ Nauru,³¹¹ Niue³¹² and Tokelau,³¹³ but in Fiji Islands,³¹⁴ Kiribati,³¹⁵ Solomon Islands,³¹⁶ Tuvalu³¹⁷ and Vanuatu,³¹⁸ it is only witchcraft or sorcery that is designed or believed to harm another person that is designated a criminal offence. Further, in Cook Islands,³¹⁹ Fiji Islands,³²⁰ Kiribati,³²¹ Nauru,³²² Solomon Islands,³²³ Tuvalu³²⁴ and Vanuatu,³²⁵ disturbance of religious gatherings is a specific criminal offence, but not in Niue, Samoa and Tokelau. Finally, in Samoa,³²⁶ personation of a female is a criminal offence, but not in any of the other countries of the region.

301 Crimes Act 1969, s 163.

302 Penal Code, Cap 17, s 168.

303 Niue Act 1966 (NZ), s 220.

304 Crimes, Procedure and Evidence Rules 2003, r 25.

305 Queensland Criminal Code Act 1899, s 217.

306 Crimes Act 1961, s 58L.

307 Penal Code, Cap 126, s 153.

308 Penal Code, Cap 8, ss 145, 146.

309 Penal Code, Cap 135, s 101.

310 Crimes Act 1969, s 165.

311 Queensland Criminal Code Act 1899, s 432.

312 Niue Act 1966 (NZ), s 199.

313 Crimes, Procedure and Evidence Rules 2003, r 65.

314 Penal Code, Cap 17, s 232.

315 Penal Code, Cap 67, s 183.

316 Penal Code, Cap 26, s 190.

317 Penal Code, Cap 8, s 183.

318 Penal Code, Cap 135, s 151.

319 Crimes Act 1969, s 100.

320 Penal Code, Cap 17, s 146.

321 Penal Code, Cap 67, s 124.

322 Queensland Criminal Code Act 1899, s 207.

323 Penal Code, Cap 26, s 132.

324 Penal Code, Cap 8, s 124.

325 Penal Code Act, Cap 135, s 89.

326 Crimes Act 1961, s 58N.

Revision of criminal laws

As indicated at the beginning of this chapter, the legislation relating to criminal offences in almost all countries of the region has been in force for many years, and many criminal laws date from the time when the countries were colonies or protectorates of Britain, Australia or New Zealand. It is therefore now appropriate to consider a revision of those laws to ensure that they are adequate for the modern day, and also that they correctly reflect the current values of those countries. In 2006, the Law Reform Commission of Fiji undertook a wholesale revision of the Penal Code of that country, and it may be expected that in the near future other countries in the region will likewise undertake a review of their criminal laws.

Family law

Introduction

There are no fixed boundaries to the topic of family law. Neither is there a statutory or common law definition of ‘the family’. As understood by most people, family law includes the rules surrounding the creation of a marriage, its termination and financial relief. It also includes the law relating to children.¹ These matters form the subject matter of this chapter. Family law may also include the law of unmarried relationships, but that topic is not covered here.

Family laws are personal in nature and, consequently, this is an area where there is a great deal of applicable customary law. For this reason, it is also the area where there is possibly the most overlap between state law and customary law, and where conflicts have arisen between the two.

It is also an area where a considerable amount of introduced law has been continued in force. This means that in some countries there are three regimes, or even, in the case of Vanuatu, four, applying to family matters.

The countries of the region have been slow to enact local legislation. This may be partly because family matters are regarded as best dealt with by customary law. It may also be partly due to the strong church influences in the region, which do not favour divorce reform. However, it is probably mainly due to the same forces that inhibit reform in other areas of law, which were discussed in Chapter 1. The only country of the region which has a locally drafted and enacted modern statute on family law is Fiji Islands, which has passed the Family Law Act 2003.

Even where local legislation has been introduced, it has tended to reflect colonial attitudes and strong Christian influences, particularly in relation to divorce.² However, in some cases local legislation reflects local culture and

1 For useful background on family law in the South Pacific region, see Pulea, M, *The Family, Law and Population in the Pacific Islands*, 1986, Suva: USP. See also Jalal, I, *Law for Pacific Women – A Legal Rights Handbook*, 1998, Fiji Islands: Fiji Women’s Rights Movement.

2 See, eg, Matrimonial Causes Act, Cap 192 (Vanuatu), s 5.

customary practices.³ Also many local enactments governing divorce have failed to provide adequately for division of property. This leaves applicants with unsatisfactory options of arguing that the relevant provisions of foreign acts of general application still apply or trying to persuade the courts to take a constructive approach to the common law on point.⁴

Marriage

In all countries of the region, marriage is regulated by statute. In some countries, such as Fiji Islands,⁵ Samoa⁶ and Tonga,⁷ there is only one marriage regime, provided by state law.⁸ In others, such as Solomon Islands⁹ and Kiribati,¹⁰ there are two statutory regimes of marriage. Marriage between indigenous parties, or in the case of Solomon Islands any person domiciled in the country,¹¹ is governed by local legislation.¹² Marriage between expatriates on the other hand is still governed by colonial orders, made in England expressly for overseas colonies and protectorates.¹³

In some countries of the region, customary marriage is also recognised and this is discussed further below under the heading of customary marriage. In countries where customary marriage is recognised it may provide a second marriage regime or in countries, such as Solomon Islands, where two statutory regimes exist, it constitutes a third.

Requirements of a valid marriage

In *Hyde v Hyde & Woodmansee*,¹⁴ marriage was defined as ‘the voluntary union for life of one man and one woman to the exclusion of all others’.

3 In Samoa, eg, provision is made for maintenance of ‘near relatives’: Maintenance and Affiliation Act 1967 (Samoa), ss 5, 6 and 7.

4 See, eg, *Chow v Chow* [1991] SBHC 34.

5 Family Law Act 2003.

6 Marriage Ordinance 1961 (Samoa).

7 Births, Deaths and Marriages Registration Act.

8 In Vanuatu, the Joint Regulations regulating marriage have been amended to apply to any person.

9 Islanders’ Marriage Act, Cap 171 (Solomon Islands); Pacific Order 1893 (UK) and Pacific Islands Civil Marriages Order 1907 (UK).

10 Marriage Ordinance, Cap 54 (Kiribati); Pacific Order 1893 (UK) and Pacific Islands Civil Marriages Order 1907 (UK). The Marriage Ordinance, Cap 54, does not explicitly exclude expatriates from its ambit, but in practice they seem to have a choice between the local act and the colonial orders.

11 *Mahlon v Mahlon*; *Reid v Reid* [1984] SILR 86.

12 Islanders’ Marriage Act, Cap 171 (Solomon Islands).

13 Pacific Order 1893 (UK) and Pacific Islands Civil Marriages Order 1907 (UK) (applying in Solomon Islands and Kiribati).

14 (1866) L.R. 1 P.&D 130, per Lord Penzance. See also *Corbett v Corbett* [1970] 2 All ER 33.

The only regional statute to specify that a marriage must be between a man and a woman is the Marriage Act of Fiji.¹⁵ In most countries of the region, the marriage ceremony may be performed either in a civil ceremony or in a religious one.

There are several prerequisites to the formation of a valid marriage and a set of very rigid formalities. When considering the requirements of a valid marriage, it is necessary to distinguish between essential requirements and formalities. The former are normally regulated by the law of the domicile of the parties while the latter are normally regulated by the law of the country where the marriage takes place. There are exceptions at common law where it is impossible to comply with the law¹⁶ or where the matter involves a person domiciled in England.¹⁷ It has not yet been determined whether these exceptions apply within the region.

The most common requirements for a valid marriage within the region are as follows.

Marriageable age and consent

In all countries of the region the parties to a marriage are required to have reached a minimum age at the time of the ceremony. In Fiji Islands,¹⁸ Samoa¹⁹ and Vanuatu,²⁰ males must be at least 18 and females must be at least 16 years old. In Solomon Islands²¹ and Tonga²² both parties must be at least 15. In Solomon Islands expatriates must both be 16 years old.²³ In Tuvalu the marriageable age is 16 years.²⁴ In Kiribati it has been increased to 18 years.²⁵

In Fiji Islands,²⁶ Samoa²⁷ and Tuvalu,²⁸ a person under 21 must have the consent of one parent or guardian, or in Kiribati²⁹ and Vanuatu³⁰ both

15 Cap 50, s 15.

16 *Taczanowska v Taczanowski* [1957] P 301.

17 *Sottomayor v De Barros* (No. 2) (1879) LR 5 P 94.

18 Marriage Act, Cap 50 (Fiji), s 12.

19 Marriage Act 1961 (Samoa), s 9.

20 Control of Marriage Act, Cap 45 (Vanuatu), s 2.

21 Islanders' Marriage Act, Cap 171 (Solomon Islands), s 10.

22 Births, Deaths and Marriages Registration Act, Cap 42 (Tonga), s 6.

23 Age of Marriage Act 1929 (UK).

24 Marriage Act, Cap 29 (Tuvalu), s 5.

25 Marriage Act, Cap 54 (Kiribati), s 5, as amended by Marriage (Amendment) Act 2002 (Kiribati), s 2.

26 Marriage Act, Cap 50 (Fiji), s 13.

27 Marriage Act 1961 (Samoa), s 10. In the case of a woman consent is only necessary where she is under 19.

28 Marriage Act, Cap 29 (Tuvalu), s 7.

29 Marriage Act, Cap 54 (Kiribati), s 7, as amended by Marriage (Amendment) Act 2002 (Kiribati), s 3.

30 Control of Marriage Act, Cap 45 (Vanuatu), s 3.

parents must consent to the marriage. In Tonga³¹ and Solomon Islands,³² a person under 18 must have consent. In Fiji Islands, Vanuatu and Samoa, a court may grant consent if the parents or guardians refuse to do so and in Kiribati and Tuvalu the registrar-general may give consent.³³

Prohibited relationships

In Kiribati, Samoa, Tonga and Tuvalu, it is expressly provided that parties within close blood relationships (consanguinity) or closely related by marriage (affinity) may not marry. The forbidden relationships are set out in the Marriage Acts.³⁴ However, in Samoa the Supreme Court may give consent to the marriage of persons who are within the prohibited degrees of affinity (but not consanguinity).³⁵ In Fiji Islands, Solomon Islands and Vanuatu, the Marriage Acts do not mention prohibited relationships, but the Family Law Act of Fiji Islands and the matrimonial causes legislation of the other countries mentioned provides that a marriage shall be void if the parties are within the prohibited degrees of relationship. Those degrees of relationship are specified in the Fiji Act as being marriages 'between a person and an ancestor or descendant of the person' or 'between a brother and a sister (whether of the whole blood or the half-blood)'.³⁶ The relationships are not specified in the Solomon Islands or Vanuatu legislation, so the relationships would appear to be those specified in the introduced law.³⁷

Bigamy

As mentioned above, under the common law, stemming from Christian traditions, marriage must be between one man and one woman.³⁸ In most countries of the region legislation prescribes that a statutory marriage will be void if one of the parties was, at the time of the marriage, already married to someone else who was still alive.³⁹

31 Births, Deaths and Marriages Registration Act, Cap 42 (Tonga), s 6.

32 Islanders' Marriage Act, Cap 171 (Solomon Islands), s 10(3).

33 Marriage Act, Cap 50 (Fiji), ss 13 and 14; Marriage Act, Cap 54 (Kiribati), s 7; Marriage Act, Cap 29 (Tuvalu), s 7.

34 Marriage Act, Cap 54 (Kiribati), s 4 and Sched 1, as amended by Marriage (Amendment) Act 2002 (Kiribati) s 5; Marriage Ordinance 1961 (Samoa), s 7; Births, Deaths and Marriages Registration Act, Cap 42 (Tonga), ss 7 and 8; Marriage Act, Cap 29 (Tuvalu), s 4 and Sched 1.

35 Marriage Act 1961 (Samoa), s 7(2).

36 Family Law Act 2003 (Fiji), s 32(3).

37 Marriage Acts 1949 (UK). However, it should be noted that the 1949 Act has been held not to apply in Solomon Islands: *Mablon v Mablon* [1984] SILR 86. However, the Marriage (Prohibited Degrees of Relationship) Act 1931 may apply, and is to like effect.

38 *Hyde v Hyde & Woodmansee* (1866) L.R. 1 P.&D.

39 See, eg, Islanders' Divorce Act, Cap 170 (Solomon Islands), s 12.

In all countries of the region apart from Nauru⁴⁰ and Vanuatu, the position under the matrimonial causes legislation is supported by legislation which renders bigamy a criminal offence.⁴¹

In Samoa, a polygamous marriage entered into by the parties in accordance with custom was recognised as valid by the courts.⁴² In Papua New Guinea the courts have recognised polygamous marriages, but confirmed that if the second marriage is preceded or followed by a statutory marriage the offence of bigamy is committed.⁴³

Formalities

The most common formalities required for a valid marriage within the region are as follows.

NOTICE

In most countries written notice is required in advance by the persons proposing to marry.⁴⁴ The notice of marriage must be in the prescribed form and it must be filed with the appropriate officer. It will normally contain a declaration that there is no impediment to the marriage. Notices are required to be displayed for a prescribed period of time. For example, in Fiji Islands, Kiribati and Tuvalu, 21 days' notice is required.⁴⁵ The parties are also usually required to obtain a licence.⁴⁶ In Solomon Islands, there is no requirement of written notice for marriage of non-islanders.

CELEBRANT

The legislation in all countries prescribes who may perform the marriage ceremony. In some countries only ministers of religion whose names are

40 Queensland Criminal Code Act 1899, s 360. This section was replaced in 1963 by the Marriage Act 1961 (Cth), s 94.

41 Crimes Act 1969 (Cook Islands), ss 227–9; Penal Code, Cap 17 (Fiji), ss 184–6; Penal Code, Cap 67 (Kiribati), ss 162–4; Niue Act 1996 (NZ), s 169; Crimes Act 1961 (Samoa) ss 74A–C; Penal Code, Cap 26 (Solomon Islands), ss 169–71; Crimes, Procedure and Evidence Rules 2003 (Tokelau), r 26; Criminal Offences Act, Cap 18 (Tonga), s 79; Penal Code, Cap 8 (Tuvalu), ss 162–4.

42 *Samoan Public Trustee v Annie Collins & Others* [1960–9] WSLR 52.

43 See, eg, *Kunjil v Monpi* [1995] PNGLR 281; *R v Gugu* [1981] PNGLR 5.

44 Marriage Act, Cap 50 (Fiji), ss 16–18.

45 Marriage Act, Cap 50 (Fiji), s 19; Marriage Act, Cap 54 (Kiribati), Part III; Marriage Act, Cap 29 (Tuvalu), Part III.

46 See, eg, Births, Deaths and Marriages Act, Cap 42 (Tonga), s 10.

registered with the appropriate government official or a district registrar.⁴⁷ In Samoa, any fit and proper person may be appointed by the head of state to solemnise marriages.⁴⁸ Ministers who solemnise marriages in Tonga must be registered.⁴⁹

PLACE, TIME AND FORM OF MARRIAGE

In some countries, a marriage must be held in a particular place and between particular times. In Solomon Islands and Vanuatu, for example, it must be held in public in the office of the district registrar or in the church outside which the notice was posted. In Samoa a marriage ceremony is required to be held with open doors.⁵⁰ In Solomon Islands the ceremony must be held between 6 am and 6.30 pm in a church or between 10 am and 4 pm in the district registrar's office.⁵¹ In Fiji Islands and Tonga the ceremony is not required to be at a particular place or time. In most jurisdictions the form of words to be used by the celebrant is prescribed.⁵²

In Fiji Islands,⁵³ Kiribati,⁵⁴ Samoa,⁵⁵ Solomon Islands,⁵⁶ Tuvalu,⁵⁷ Tonga⁵⁸ and Vanuatu there must be two witnesses to the ceremony.

REGISTRATION

In Fiji Islands,⁵⁹ Kiribati,⁶⁰ Solomon Islands,⁶¹ Tonga⁶² and Tuvalu,⁶³ marriages celebrated under formal law must be registered on the applicable register, established by legislation.

47 Marriage Act, Cap 50 (Fiji), Part II; Marriage Act, Cap 54 (Kiribati), s 3; Marriage Act, Cap 29 (Tuvalu), s 3.

48 Marriage Act 1961 (Samoa), s 6.

49 Births, Deaths and Marriages Act, Cap 42 (Tonga), s 12.

50 Marriage Act 1961 (Samoa), s 15.

51 Islanders Marriage Act, Cap 171, s 8.

52 Marriage Act, Cap 50 (Fiji), s 23; Marriage Act, Cap 54 (Kiribati), s 14; Marriage Act, Cap 29 (Tuvalu), s 14.

53 Marriage Act, Cap 50 (Fiji), s 25(1).

54 Marriage Act, Cap 54 (Kiribati), s 14.

55 Marriage Act 1961 (Samoa), s 15(2).

56 Islanders Marriage Act, Cap 171, s 7.

57 Marriage Act, Cap 29 (Tuvalu), s 15.

58 Births, Deaths and Marriages Act, Cap 42 (Tonga), s 14.

59 Marriage Act, Cap 50 (Fiji), s 25; Births, Deaths and Marriages Registration Act, Cap 49 (Fiji), s 3.

60 Births, Deaths and Marriages Registration Act, Cap 5 (Kiribati), s 33; Marriage Act, Cap 54 (Kiribati), s 17.

61 Islanders Marriage Act, Cap 171, ss 15, 17.

62 Births, Deaths and Marriages Registration Act, Cap 42, s 14(2).

63 Marriage Act, Cap 29, s 17.

In Vanuatu, the parties to a customary marriage must have their marriage registered⁶⁴ and in Solomon Islands they may elect to do so.⁶⁵

Failure to comply with prescribed formalities

In general, the consequences of failure to comply with the formalities prescribed by statute in relation to marriage are governed by common law.⁶⁶ The failure will only render the marriage void if the statutory requirement is mandatory and requires strict compliance. If the requirement is only directory and does not require strict compliance, failure to comply will not affect the validity of the marriage. In Vanuatu, however, the Matrimonial Causes Act says that a marriage will be void if it 'was not celebrated in due form'.⁶⁷

In some cases regional statutes specifically provided that certain breaches of formalities will not affect the validity of the marriage. For example, in Fiji Islands,⁶⁸ Solomon Islands⁶⁹ and Vanuatu,⁷⁰ a marriage is expressly stated to be valid even if it was not solemnised by a registered marriage officer, provided that both parties believed in good faith that they were before a registered marriage officer. In Samoa it is provided that no marriage shall be void by reason of any error in the notice or declaration before the solemnisation.⁷¹ The marriage will also be valid when parties are married in the absence of a marriage officer, or married a person within the prohibited degrees of relationships, unless any of the parties knows about these defects and 'wilfully' proceeds.⁷²

The Tongan legislation relating to marriage is silent as to the effect of non-compliance with the prescribed formalities. There is also no provision in Tonga as to the circumstances in which a marriage may be declared void.

Where a marriage is void or voidable for failure to observe the requirements of a valid marriage the court may grant a decree of nullity and this is discussed further below.

Customary marriage

In some countries of the region, such as Solomon Islands, there is specific statutory recognition of customary marriage.⁷³ In some other regional

64 Marriage Act, Cap 60, s 15. The bridegroom, the head of the family of either party, or the chief of the village of either party, must forward details of the marriage to the district registrar: s 15(2).

65 Islanders Marriage Act, Cap 171 (Solomon Islands), s 18.

66 *Montreal Railways Co. v Normandin* [1917] AC 170.

67 Cap 192 (Vanuatu), s 1(d).

68 Marriage Act, Cap 50 (Fiji), s 22(1).

69 Births, Marriages and Deaths Act, Cap 169 (Solomon Islands), s 8.

70 Marriage Act, Cap 60 (Vanuatu), s 3(3).

71 Marriage Ordinance 1961 (Samoa), s 13.

72 Marriage Ordinance 1961 (Samoa), s 7(4).

73 Islanders' Marriage Act, Cap 171 (Solomon Islands), s 18.

countries recognition of customary marriages results from the general constitutional recognition of customary law.⁷⁴ By contrast to the strict formalities required by the statutory marriage regimes, the customary marriage process is not defined in terms of strict rules or processes. The preliminaries and finalisation of a customary marriage, on the other hand, entail a much more fluid process and it is not always easy to say exactly when the marriage relationship is formed. The form of the marriage depends on the customary area in which it takes place. However, common requirements are that the marriage is a public affair and that food, bride price and other items are exchanged between the parties' families.⁷⁵ In the Solomon Islands case of *Rebitai v Chow and Others*,⁷⁶ the relevant factors in deciding whether a marriage existed were viewed as being

- agreement of the parties to live together as husband and wife
- confirmation of this agreement by the parties actually living together and having children and grandchildren
- acceptance of the parties as married by the customary community.

In many parts of Melanesia, a further important factor will be the payment of bride price, which is almost invariably part of the marriage ceremonies.⁷⁷

In Solomon Islands it has been held that a customary marriage may take place between an islander and a non-indigenous person.⁷⁸

Nullity, dissolution and separation

Nullity

Nullity refers to the situation where a marriage is invalid or unlawful from the outset. Public policy applying throughout the region supports the sanctity of marriage and the common law presumption of marriage applies whether the marriage was celebrated pursuant to statute⁷⁹ or customary law.⁸⁰ Accordingly, where nullity is alleged, the burden of proof is on the

74 See, further, Chapter 3.

75 See, further, Corrin, J, and Brown, K, 'For better or worse: marriage and divorce laws in Solomon Islands', in Bainham, A (ed.), *International Survey of Family Law*, 2005, Bristol: Jordan Publishing, pp 483 at 489.

76 [2002] 4 LRC 226.

77 See, further, Corrin, J and Brown, K, 'Marit Long Kastom: Customary marriage in Solomon Islands' (2004) 18(1) *International Journal of Law Policy and the Family* 52; Jolly, M, *Women of the Place*, 1994, Philadelphia: Harwood Academic Publishers, 133.

78 *Rebitai v Chow* [2002] 4 LRC 226.

79 See, eg, *Salumata v Kelly* [1999] SBHC 129; *Koru v Official Administrator of Unrepresented Estates* [1985/6] SILR 132; *Gavin v Gavin* [1990] SILR 160.

80 See, eg, *Rebitai v Chow and Others* [2002] 4 LRC 226.

person alleging it and clear evidence of the defect is required. Nullity falls into two categories: marriages falling into the first category are void from the outset; marriages falling into the second category are voidable at the instance of one of the parties.

Grounds for declaring a marriage void

The most common grounds which will render a marriage void are

- bigamy
- duress or mistake
- insanity
- parties are too closely related
- lack of form.⁸¹

The factors relevant to these grounds were discussed above under the heading 'Requirements of a valid marriage'. As discussed above, the lack of formalities will not always render a marriage void. For example, in Solomon Islands it has been held that lack of a valid marriage certificate will not render a marriage void.⁸²

An example of the stringent approach taken by the court in Fiji to proof of duress can be seen in *Nisha v Aziz*.⁸³ In that case, the petitioner went through an arranged marriage but subsequently applied to have it set aside on the basis that she had been forced to enter in to the marriage. The court refused the application on the basis that she was financially independent and there had been no physical violence towards her.

Grounds for declaring a marriage voidable

The most common grounds of application for a declaration that a marriage is void are

- refusal or inability to consummate on the part of the respondent⁸⁴
- unsound mind or recurrent fits of insanity or epilepsy
- the respondent was suffering from venereal disease in a communicable form at the time of the marriage
- the respondent was pregnant by a person other than the petitioner at the time of the marriage.⁸⁵

81 See, eg, Islanders' Divorce Act (Solomon Islands), s 12.

82 *Mahlon v Mahlon* [1984] SILR 86.

83 High Court, Fiji Islands, SCA 293/1981 (unreported) (2 July 1982).

84 In Kiribati this is a ground for divorce: Native Divorce Act, Cap 60, s 4(d).

85 For example, Islanders' Divorce Act, Cap 170 (Solomon Islands), s 12.

The factors relevant to these grounds were discussed above under the heading of marriage.

In some countries the marriage is rendered voidable if a wife is pregnant at the time of her marriage by some person other than the petitioner.⁸⁶

Divorce

Grounds for divorce

Countries of the region can be divided into those where only fault-based divorce is available (Vanuatu⁸⁷ and divorces involving expatriates in Kiribati⁸⁸); those with a mixed system, where divorce may be fault based or based on a no-fault ground (Cook Islands,⁸⁹ Nauru,⁹⁰ Niue,⁹¹ Solomon Islands,⁹² Tokelau,⁹³ Tonga,⁹⁴ Tuvalu⁹⁵ and divorce between i-Kiribati⁹⁶) and the regime in Fiji Islands where only no-fault divorce is available.⁹⁷

THE MAIN FAULT BASED GROUNDS

There are a number of grounds on which a fault-based divorce petition may be based.⁹⁸ The most common grounds are adultery,⁹⁹ cruelty¹⁰⁰ and desertion,¹⁰¹ and these will be considered in turn.

Adultery To establish adultery it must be proved that voluntary sexual intercourse took place with another person of the opposite sex during the subsistence of the marriage.¹⁰² Adultery is a ground for divorce in all

86 Eg, Matrimonial Causes Act, Cap 192 (Vanuatu), s 2(1)(d).

87 Matrimonial Causes Act, Cap 192, s 5.

88 Matrimonial Causes Act 1950 (UK), s 4.

89 Matrimonial Proceedings Act 1963 (NZ), s 21(1).

90 Matrimonial Causes Act 1973 ss 8, 9.

91 Niue Act 1966 (NZ), s 534(3).

92 In Solomon Islands, no-fault divorce is available where the divorce is under the Islanders' Divorce Act, Cap 170, as amended by the 1998 Islanders' Divorce (Amendment) Act, ss 2, 3, but not where it is under the Matrimonial Causes Act 1950 (UK), which applies mainly to divorce proceedings between expatriates.

93 Divorce Regulations 1987, reg 3.

94 Divorce Act, Cap 29, s 3.

95 Matrimonial Proceedings Act, Cap 21, ss 8, 9.

96 Native Divorce Act, Cap 60, s 4.

97 Family Law Act 2003, s 30(1).

98 Hicks, N, 'Divorce in paradise – a South Pacific perspective', in Bainham, A (ed.), *The International Survey of Family Law*, 1997, Bristol: Jordan Publishing Limited, p 379.

99 See, eg, Islanders' Divorce Act, Cap 170 (Solomon Islands), s 5(1)(a).

100 *Ibid*, s 5(1)(c).

101 Native Divorce Act, Cap 60 (Kiribati), s 4.

102 *Coffey v Coffey* [1898] P 169.

jurisdictions except for Nauru, Tuvalu and Fiji.¹⁰³ In Tuvalu, adultery may constitute evidence of irretrievable breakdown of the marriage.¹⁰⁴

In some countries damages may be claimed for adultery. Some statutes only allow such a claim against a co-respondent.¹⁰⁵ In Solomon Islands, Tonga and Vanuatu the claim may be against any person.¹⁰⁶ In Solomon Islands and Kiribati (where expatriates may claim damages) only petitioner husbands may apply for damages for adultery.¹⁰⁷ The amount of damages which may be claimed is not prescribed, except in Tonga.¹⁰⁸ In Vanuatu the measure of damages was discussed in *Banga v Waiwo*.¹⁰⁹ At first instance, the magistrates' court interpreted 'damages' in the light of a widespread rule of customary law, by which adultery justified serious punishment. Accordingly, the court held that 'damages' included exemplary damages. On appeal to the Supreme Court, the Chief Justice held that damages should be assessed in conformity with the Matrimonial Causes Act 1965 (UK), on which the Matrimonial Causes Act of Vanuatu was based, rather than with customary law.¹¹⁰

Where damages are not available, the court may order an adulterer to pay costs.¹¹¹

Cruelty Cruelty is a ground for divorce in all countries of the region¹¹² except Cook Islands, Fiji, Nauru, Niue, Samoa and Tonga. In Tuvalu

103 Matrimonial Proceedings Act 1963 (NZ), s 21(1) (in force in Cook Islands); Native Divorce Act, Cap 60 (Kiribati), s 4(a); Matrimonial Causes Act 1950 (UK), s 1 (governing marriages between expatriates in Kiribati); Niue Act 1966 (NZ), s 534(3)(a); Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 7(1)(a); Islanders' Divorce Act, Cap 170 (Solomon Islands), s 5(1)(a); Matrimonial Causes Act 1950 (UK), s 1(a) (governing marriages between expatriates in Solomon Islands); Divorce Regulations 1987 (Tokelau), reg 3(i); Divorce Act, Cap 29 (Tonga), s 3(1)(a); Matrimonial Causes Act, Cap 192 (Vanuatu), s 5(a)(i).

104 Matrimonial Proceedings Act, Cap 21, s 9(2)(a).

105 See, eg, Matrimonial Proceedings Act 1963 (NZ), s 36 (in force in Cook Islands); Matrimonial Causes Act 1950 (UK), s 30 (in force in Kiribati); Matrimonial Causes Act 1950 (UK), s 30 (in force in Solomon Islands).

106 Islanders' Divorce Act, Cap 170 (Solomon Islands), s 18(1); Divorce Act, Cap 29 (Tonga), s 13(1); Matrimonial Causes Act, Cap 192 (Vanuatu), s 17.

107 Islanders' Divorce Act, Cap 170 (Solomon Islands), s 18(1); Matrimonial Causes Act 1950 (UK), s 30 (governing marriages between expatriates in Solomon Islands and Kiribati).

108 Divorce Act, Cap 29, s 13(1). See *Afa v Tali & Sika* [1990] TLR 185.

109 [1996] VUSC 5.

110 See, further, Corrin, J, 'Reconciling customary law and human rights in Melanesia' (2003) 4 *Hiberian Law Journal* 53, 61.

111 See, eg, Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 21.

112 Matrimonial Causes Act 1950 (UK), s 1(1)(c), which applies to expatriates in Solomon Islands and in Kiribati; Native Divorce Act, Cap 60 (Kiribati), s 4(c); Islanders' Divorce Act, Cap 170, s 5(1)(c) (Solomon Islands); Divorce Regulations 1987 reg 3(ii) (Tokelau); Matrimonial Causes Act, Cap 192, s 5(a)(iii) (Vanuatu).

evidence of cruelty can be taken into account to demonstrate a complete breakdown of the marriage.¹¹³ In Vanuatu, cruelty must be 'persistent'.¹¹⁴ In some countries of the region the courts have taken a very narrow view of what amounts to cruelty. In the Solomon Islands case of *Valenti v Valenti*,¹¹⁵ the High Court held that punching and kicking the wife on three occasions were not sufficient. Similarly, in *Sesebo v Laloga*,¹¹⁶ the court refused a petition founded on cruelty as the 'slappings' were not serious.

The courts in the region have also been slow to accept that cruelty includes psychological cruelty. However, there are indications that attitudes are gradually changing. For example, in Solomon Islands, in *Bui v Makasi*,¹¹⁷ the court was faced with conflicting evidence regarding physical violence, but was prepared to grant a divorce on the basis of threats of violence, which caused the petitioner 'much fear and apprehension'.

Cruelty is further defined in Tokelau where it is specified that the cruelty may be directed to the applicant or 'a child of the applicant'.¹¹⁸

Although cruelty alone is not a ground for divorce in Cook Islands, Niue and Samoa, it may constitute divorce if it is coupled with habitual drunkenness.¹¹⁹ However, in Samoa this is only a ground for petition for the wife.¹²⁰

In disputed adultery cases, formal proof is usually required and regional courts have indicated that since a finding of adultery leads to serious consequences they should only make such a determination if the offence was clearly proved.¹²¹

Desertion Desertion is a ground for divorce in all countries of the region where grounds are exclusively or partly fault based except Tokelau. The minimum period of desertion required to found a ground of divorce varies between two (Cook Islands,¹²² Nauru¹²³ and Tonga¹²⁴) and three

113 Matrimonial Proceedings Act, Cap 21, s 9(2)(c).

114 Matrimonial Causes Act, Cap 192, s 5(a)(iii).

115 [1985/86] SILR 204.

116 [1994] SBHC 34.

117 [1993] SBHC 3.

118 Divorce Regulations 1987 (Tokelau), reg 3 (ii).

119 Matrimonial Proceedings Act 1963, s 21(e) (Cook Islands); Niue Act 1966 (NZ), s 534(3)(d); Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 7(1)(c).

120 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 7(1)(c).

121 See, eg, *J v S* [1985/1986] SILR 209 following *Blyth v Blyth* [1966] 1 All ER 524.

122 Matrimonial Proceedings Act 1963 (NZ), s 21, as amended by the Matrimonial Proceedings Amendment Act 1968, s 2(a). The status of the amending act in Cook Islands is somewhat unclear.

123 Matrimonial Causes Act 1973, ss 9(1)(a)(ii), 12(3).

124 The Divorce Act, Cap 29, s 3(1)(c).

years (Kiribati,¹²⁵ Niue,¹²⁶ Samoa,¹²⁷ Solomon Islands¹²⁸ and Vanuatu¹²⁹). In Tuvalu wilful desertion is evidence of a complete breakdown in marriage; however, no required period of desertion is specified.¹³⁰

If the behaviour of one party to the marriage forces the other to leave the matrimonial home, this may amount to constructive desertion.¹³¹

ADDITIONAL FAULT-BASED GROUNDS

In most countries, a petition may also be based on refusal to consummate, being of unsound mind, habitual drunkenness or habitual intoxication, presumption of death or a conviction for one of a number of specified criminal offences. These grounds will now be considered in turn.

Refusal to consummate Refusal to consummate the marriage is dealt with in some jurisdictions as a ground for divorce.¹³² In Tuvalu, a wilful refusal to consummate does not go to evidence that there has been a complete breakdown in the marriage but rather is a ground for divorce.¹³³ In other countries, including Cook Islands,¹³⁴ Nauru,¹³⁵ Samoa,¹³⁶ Solomon Islands¹³⁷ and Vanuatu,¹³⁸ it renders the marriage voidable.

In Kiribati it is a ground for divorce if the respondent has either wilfully refused or is incapable of consummating the marriage.¹³⁹ In Tonga, the statutory provision is more specific and provides a ground for divorce if the respondent is incapable of consummating the marriage by reason either of some incurable 'structural defect in the organs of generation' rendering 'complete intercourse impracticable' or of some 'incurable mental or moral disability resulting in an invincible repugnance to sexual intercourse with the petitioner'.¹⁴⁰

125 Native Divorce Ordinance, Cap 60 (Kiribati), s 4(b); Matrimonial Causes Act 1950 (UK), s 1(b).

126 Niue Act 1966, s 534(3)(c).

127 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 7(1)(b).

128 Islanders' Divorce Act, Cap 170, s 5(1)(b); Matrimonial Causes Act 1950 (UK), s 1(1)(b).

129 Matrimonial Causes Act, Cap 192, s 5(a)(ii).

130 Matrimonial Causes Act, Cap 21, s 9(2)(b).

132 But see *Begum v Hussein*, magistrates' court, Fiji Islands, Civil Case 198/1989 (unreported), where a wife was refused a divorce on the grounds of constructive desertion and cruelty when she left the matrimonial home as she could not put up with her mother in law's presence.

133 See, eg, Native Divorce Act, Cap 60 (Kiribati), s 4(d).

134 Matrimonial Proceedings Act, Cap 21, s 8(a).

135 Matrimonial Proceedings Act 1963 (NZ), s 18(2)(a).

136 Matrimonial Causes Act 1973, s 22(e).

137 Divorce and Matrimonial Causes Ordinance 1961, s 9(3)(a).

138 Islanders' Divorce Act, Cap 170, s 13(1)(a); Matrimonial Causes Act 1950 (UK), s 8.

139 Matrimonial Causes Act, Cap 192, s 2(1)(a).

139 Native Divorce Act, Cap 60, s 4(d).

140 Divorce Act, Cap 29, s 3(1)(e).

In Fiji Islands, wilful and persistent refusal to consummate was a ground for divorce, but this ground has been abolished by the Family Law Act 2003. In Tokelau a failure to consummate is neither a ground for divorce nor a fact rendering a marriage voidable.

*Being of unsound mind*¹⁴¹ In many countries of the region, there will be grounds for divorce if the respondent is mentally ill. In most countries the term ‘unsound mind’ is used to describe the required state of mind.¹⁴² The minimum time for which the illness must have existed differs from country to country, as do the conditions about the possibility of recovery. Some jurisdictions require the respondent to have been receiving treatment for five years continuously prior to the presentation of the petition.¹⁴³ Niue and Samoa also provide for the possibility of respondents being of unsound mind intermittently over a number of years.¹⁴⁴ Respondents must be either unlikely to recover¹⁴⁵ or their condition must be incurable.¹⁴⁶ Some legislative provisions make specific reference to the applicable mental health legislation. In Solomon Islands, for example, the respondent must be of incurably unsound mind and have been detained under the Mental Treatment Act.¹⁴⁷ Samoa and Tongan legislation covers the possibility of confinement in another country.¹⁴⁸ In Fiji Islands, mental illness is not a ground for divorce, but may go to proof that the marriage has broken down irretrievably (the sole ground for dissolution of marriage).¹⁴⁹

Being of unsound mind is not a ground for divorce in Nauru or Tokelau. However, in Nauru it does render the marriage voidable.¹⁵⁰

141 See, eg, Islanders’ Divorce Act, Cap 170, ss 5(1)(d) and (2).

142 See, eg, Matrimonial Causes Act, Cap 192, s 5(a)(iv).

143 Native Divorce Ordinance, Cap 60 (Kiribati), s 4(e); Matrimonial Causes Act 1950 (UK), s 1(d) (governing marriages between expatriates in Kiribati); Divorce and Matrimonial Causes Ordinance 1961 (Samoa), ss 7(f), (g); Islanders’ Divorce Act, Cap 170 (Solomon Islands), s 5(1)(d); Matrimonial Causes Act 1950 (UK), s 1(d) (governing marriages between expatriates in Solomon Islands); Divorce Act, Cap 29 (Tonga), s 3 (1)(d); Matrimonial Causes Act, Cap 192 (Vanuatu), s 5(a)(iv).

144 Niue Act 1966 (NZ), ss 534(3)(i), (j) and (k) (Niue); Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 7(f).

145 See, eg, Niue Act 1966 (NZ), ss 534(i), (j), (k) (Niue); Divorce and Matrimonial Causes Ordinance 1961 (Samoa), ss 7(f), (g).

146 See, eg, Native Divorce Ordinance, Cap 60 (Kiribati), s 4(e); Matrimonial Causes Act 1950 (UK), s 1(d) (governing marriages between expatriates in Kiribati); Islanders’ Divorce Act, Cap 170, s 5(1)(d) (Solomon Islands); Matrimonial Causes Act 1950 (UK), s 1(d) (governing marriages between expatriates in Solomon Islands); Divorce Act, Cap 29 (Tonga), s 3(1)(d); Matrimonial Causes Act, Cap 192 (Vanuatu), s 5(a)(iv).

147 Islanders’ Divorce Act, Cap 170, ss 5(1)(d), 5(2).

148 Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 7(1)(g); Divorce Act, Cap 29 (Tonga), s 3(3)(b)(ii).

149 Family Law Act 2003, s 30(1).

150 Matrimonial Causes Act 1973, s 22(b)(ii).

Habitual drunkenness or habitual intoxication Drunkenness is a ground for divorce in Cook Islands, Niue and Samoa,¹⁵¹ the exact requirements differ from country to country, although Cook Islands, Niue and Samoan acts have very similar provisions. In Samoa, drunkenness alleged against a husband must be coupled with either cruelty or leaving the wife without sufficient means of support. If it is alleged against a wife, it must be coupled with habitual neglect of domestic duties.¹⁵²

In Cook Islands and Niue the relevant section is in similar terms. In Niue the conduct must have endured for three years.¹⁵³ The husband must have been a habitual drunkard or drug addict and either have left his wife without means of support or been habitually cruel to her.¹⁵⁴ A wife must have been similarly addicted and either have habitually neglected her domestic duties or have been habitually cruel towards her husband.¹⁵⁵

Presumption of death In some countries in the region it is a ground for divorce if there are reasonable grounds for presuming the respondent to be dead. In Samoa, five years absence is required¹⁵⁶ and in Nauru and Vanuatu the period is seven years.¹⁵⁷ In the Cook Islands and under the UK legislation, which applies mainly to divorcing expatriates in Kiribati and Solomon Islands, the period is also seven years. The legislation in Cook Islands and the legislation governing expatriates in Kiribati and Solomon Islands provides for a decree of presumption of death and dissolution of marriage rather than a divorce.¹⁵⁸

Criminal convictions Criminal convictions provide a ground for divorce in some countries. For example, in Samoa where the respondent is convicted of any crime and has been sentenced to imprisonment for at least seven years or in Tonga, for at least 5 years, it is a ground for divorce.¹⁵⁹ Serious offences against the petitioner (or a child of the petitioner) are also specifically provided as grounds for divorce in some countries.¹⁶⁰ Other examples of criminal

151 Matrimonial Proceedings Act 1963 (NZ), s 21(1)(e) (Cook Islands); Niue Act 1966 (NZ), s 534(3)(d) (Niue); Divorce and Matrimonial Causes Ordinance 1961, s 7(1)(c) (Samoa).

152 Divorce and Matrimonial Causes Ordinance 1961, s 7(1)(c) (Samoa).

153 Niue Act 1966 (NZ), s 534(3)(d)(i) (Niue).

154 *Ibid.*

155 Niue Act 1966 (NZ), s 534(3)(d)(ii) (Niue).

156 Divorce and Matrimonial Causes Ordinance 1961, s 8.

157 Matrimonial Causes Act 1973, s 29 (Nauru); Matrimonial Causes Act, Cap 192, s 13 (Vanuatu).

158 Matrimonial Proceedings Act 1963 (NZ), s 19 (Cook Islands); Matrimonial Causes Act 1950 (UK), s 16 (Kiribati and Solomon Islands).

159 Divorce and Matrimonial Causes Ordinance 1961, s 7(1)(l) (Samoa); Divorce Act, Cap 29, s 3(1)(a) (Tonga).

160 See, eg, Attempted murder: Matrimonial Proceedings Act 1963 (NZ), s 21(1)(f) (Cook Islands); Attempted murder and grievous bodily harm: Niue Act 1966 (NZ), s 534(3)(e) (Niue); Attempting to murder, wounding, actual bodily harm, discharging a firearm with

convictions which will present grounds for divorce in countries of the region are rape, sodomy or bestiality on the part of the respondent husband (in Cook Islands, Samoa, Solomon Islands and for expatriates in Kiribati).¹⁶¹ Conviction for rape or an 'unnatural offence' by the husband is a ground for divorce in Vanuatu.¹⁶²

In some countries there are additional grounds which are rarely, if ever, relied on. These include a failure to comply with a decree for the restitution of conjugal rights for two years or more,¹⁶³ one party to the marriage suffering from a venereal disease¹⁶⁴ or recurrent epilepsy.¹⁶⁵ Kiribati has the additional grounds of the marriage having been induced by duress or mistake¹⁶⁶ and parties being within prohibited degrees of consanguinity or affinity.¹⁶⁷ Other jurisdictions generally categorise such issues as rendering a marriage void or voidable.¹⁶⁸ Similarly, in Tonga it is ground for divorce if a respondent has a former spouse still living¹⁶⁹ whereas in other countries this situation renders a marriage void.¹⁷⁰ The Cook Islands and Niue¹⁷¹ provide that a husband can file for a divorce if without his consent his wife has been 'artificially inseminated with the semen of some man' other than himself.

NO-FAULT GROUNDS

The common basis on which a no-fault divorce is granted is that the marriage has irretrievably broken down. Irretrievable breakdown is usually established by evidence that the parties have lived apart for a continuous period of time immediately preceding the presentation of the petition. The minimum period required varies. It is two years in Nauru¹⁷² and Tonga;¹⁷³

intent to maim, disfigure, disable or cause grievous bodily harm: Divorce and Matrimonial Causes Ordinance 1961, s 7(d) (Samoa).

161 Matrimonial Proceedings Act 1963, (NZ), s 21(1)(h) (Cook Islands); Divorce and Matrimonial Causes Ordinance 1961, s 7(1)(k) (Samoa); Islanders' Divorce Act, Cap 170, s 5(1); Matrimonial Causes Act 1950 (UK), s 1 (Solomon Islands and Kiribati).

162 Matrimonial Causes Act, Cap 192, s 5(b).

163 Matrimonial Proceedings Act 1963 (NZ), s 21(1)(d) (Cook Islands).

164 Native Divorce Ordinance, Cap 60, s 4(g).

165 Native Divorce Ordinance, Cap 60, s 4(f).

166 Native Divorce Ordinance, Cap 60, s 4(h).

167 Native Divorce Ordinance, Cap 60, s 4(i).

168 See, eg, Family Law Act 2003, s 32 (Fiji).

169 The Divorce Act, Cap 29, s 3(1)(b).

170 See, eg, Family Law Act 2003, s 32(2)(a) (Fiji); Islanders' Divorce Act, Cap 170, s 12(a) (Solomon Islands); Matrimonial Causes Act 1973, s 21(a) (Nauru); Divorce and Matrimonial Causes Ordinance 1961, s 9(2)(a) (Samoa).

171 Matrimonial Proceedings Act 1963 (NZ), s 21(1)(b) (Cook Islands); Niue Act 1966 (NZ), s 534(3)(b) (Niue).

172 Matrimonial Causes Act 1973, ss 9, 10, 12.

173 Divorce Act, Cap 29, s 3(1)(f).

three years in Tokelau¹⁷⁴ and four years in Cook Islands.¹⁷⁵ In Samoa and Solomon Islands the minimum period is five years¹⁷⁶ and in Niue it is seven years.¹⁷⁷ In some countries two different time periods are prescribed. The shorter time period will be a ground for divorce and that the marriage has irretrievably broken down if both parties consent. If one party does not consent, the party seeking the divorce will have to wait until the longer period expires before filing for divorce, assuming there are no other available grounds. For example, in Nauru a divorce may be granted on the basis of irretrievable breakdown where the parties have been separated for two years and both parties consent or, in the absence of such consent, where they have been separated for five years.¹⁷⁸

In Tuvalu, the only ground for divorce is that the marriage has ‘completely broken down’,¹⁷⁹ unless one party to a marriage has wilfully refused to consummate it, or the marriage was induced by fraud, duress or mistake. Although the main ground for divorce is not fault based, it is specifically stated that fault-based conduct, that is, adultery, desertion, cruelty, being of unsound mind or conduct making it unreasonable to expect one party to continue in the marriage may be accepted as evidence that the marriage has broken down.¹⁸⁰ However, the ground is not limited to such cases and the court may determine that the marriage has completely broken down even if there is no fault on either side.

In Kiribati irretrievable breakdown is a not a ground for divorce, but i-Kiribati parties may divorce on the basis that the temperaments of the parties are incompatible.¹⁸¹

Bars to divorce

Collusion is a fraudulent secret understanding between the parties and forms one of the discretionary bars to a grant of divorce in some courts in the region, particularly where the petition for divorce is sought on the ground of adultery.¹⁸² Condonation or connivance or conduct inducing or

174 Divorce Regulations 1987, reg 3 (iii).

175 Matrimonial Proceedings Act 1963 (NZ), s 21(1)(o) (Cook Islands), as amended by Matrimonial Proceedings Amendment Act 1968, s 2(f).

176 Islanders’ Divorce Act, Cap 170, s 5(d), as amended by the Islanders’ Divorce (Amendment) Act 1998, s 2 (Solomon Islands); Divorce and Matrimonial Causes Ordinance 1961, s 7(1)(j) (Samoa).

177 Niue Act 1966, s 534(3)(n).

178 Matrimonial Causes Act 1973, ss 9, 10, 12.

179 Matrimonial Proceedings Act, Cap 21, s 9.

180 *Ibid.*

181 Native Divorce Ordinance, Cap 60, s 4(j).

182 See, eg, Matrimonial Proceedings Act 1963 (NZ), ss 29, 31 (Cook Islands); Niue Act 1966 (NZ), s 536 (Niue); Divorce and Matrimonial Causes Ordinance 1961, s 13 (Samoa); Islanders’ Divorce Act, Cap 170, s 8(2) (Solomon Islands); Divorce Act, Cap 29, ss 5(3), 11

contributing to the wrong complained of may also act as a bar to the relief sought by the petitioner.¹⁸³ In Tuvalu while these traditional bars to divorce have been abolished, the legislation provides that they may be considered relevant to establishing a ground for divorce.¹⁸⁴ The Native Divorce Act (Cap 60) governing divorce between i-Kiribati is silent as is the legislation in Nauru, Tokelau and Fiji Islands.

PROCEDURE

Adulterers must be joined as co-respondents in proceedings for divorce on the basis of adultery¹⁸⁵ in most jurisdictions unless they are excused by the court on special grounds.¹⁸⁶ Proceedings against co-respondents may be dismissed by the court if there is insufficient evidence against them.¹⁸⁷

REGISTRATION

Decrees terminating a marriage must be registered on the applicable register, established by legislation.¹⁸⁸

Judicial separation

Judicial separation is an authorising of the parties to a marriage to live apart. Judicial separation was introduced in England at a time when marriage could only be terminated on the grounds of nullity or the death of one

(Tonga); Matrimonial Causes Act, Cap 192, s 9 (Vanuatu); Islanders' Divorce Act, Cap 170, s 8(2) (Solomon Islands); Matrimonial Causes Act 1950 (UK), s 4 (applying to expatriates in Kiribati and Solomon Islands).

183 Matrimonial Proceedings Act 1963 (NZ), ss 29, 31 (Cook Islands); Islanders' Divorce Act, Cap 170, s 8(2) (Solomon Islands); Divorce and Matrimonial Causes Ordinance 1961, s 14 (Samoa); Divorce Act, Cap 29, s 5(3) (Tonga); Matrimonial Causes Act, Cap 192, s 9 (Vanuatu); Matrimonial Causes Act 1950 (UK), s 4 (applying to expatriates in Kiribati and Solomon Islands).

184 Matrimonial Proceedings Act, Cap 21, s 16.

185 See, eg, Matrimonial Proceedings Act 1963 (NZ), s 22 (Cook Islands); Matrimonial Causes Act 1950 (UK), s 3 (Kiribati and Solomon Islands); Islanders' Divorce Act, Cap 170, s 7 (Solomon Islands); Divorce and Matrimonial Causes Ordinance 1961, (Samoa) s 11; Divorce Act, Cap 29, s 4 (Tonga); Matrimonial Causes Act, Cap 192, s 8 (Vanuatu).

186 See, eg, Matrimonial Proceedings Act 1963 (NZ), s 22 (Cook Islands); Matrimonial Causes Act 1950 (UK), s 3 (Kiribati and Solomon Islands); Islanders' Divorce Act, Cap 170, s 7 (Solomon Islands); Divorce Act, Cap 29, s 4 (Tonga); Matrimonial Causes Act, Cap 192, s 8 (Vanuatu).

187 See, eg, Matrimonial Proceedings Act 1963 (NZ), s 22(3) (Cook Islands); Islanders' Divorce Act, Cap 170, s 9 (Solomon Islands); Divorce Act, Cap 29, s 6 (Tonga); Matrimonial Causes Act, Cap 192, s 8 (Vanuatu).

188 See, eg, Family Law Act 2003, s 37 (Fiji).

of the parties.¹⁸⁹ The parties may also separate by contractual agreement and such an agreement does not contravene public policy.¹⁹⁰ In fact the parties to a marriage may separate without any judicial or contractual authority. All that is required is physical separation to qualify as separated. However, a decree or agreement will prevent a party being in desertion and may be desirable to govern ancillary matters. As discussed above, separation is also a ground for a no-fault divorce in some countries, but there is no need for a judicial decree, provided the parties agree that they have been separated or there is evidence to support this.

Legislative provision for judicial separation

Provision for the grant of a judicial decree is made in Cook Islands, Samoa and Solomon Islands and for expatriates living in Kiribati. In Cook Islands, jurisdiction is conferred by the Cook Islands Amendment Act 1994.¹⁹¹ In Samoa, the Divorce and Matrimonial Causes Ordinance 1961 gives the Supreme Court jurisdiction to grant a decree.¹⁹² In Solomon Islands, the Islanders Divorce Act¹⁹³ empowers the High Court to grant a decree. Expatriates in Solomon Islands and Kiribati may also apply for a decree under the Matrimonial Causes Act 1950 (UK). The magistrates' court may also grant a separation order under the Affiliation Separation and Maintenance Act 1971.¹⁹⁴

Not all countries of the region make provision for judicial separation. There is no such provision in Tonga or Vanuatu. Farran notes that in *Joli v Joli*¹⁹⁵ it was suggested that this gap in the law may be filled by recourse to English or French colonial law such as the Matrimonial Causes Act 1973 (UK)¹⁹⁶ or the French Civil Code.¹⁹⁷ In Tuvalu and Kiribati, post-independence legislation is silent on the issue of separation, but expatriates in Kiribati may obtain a decree of separation under the Matrimonial Causes Act 1950 (UK).¹⁹⁸ This act applies in the same manner as in Solomon Islands. It permits an application for judicial separation on any ground on which a petition for divorce may be presented under the act.¹⁹⁹

189 Glendon, MA, *The Transformation of Family Law – State, Law and Family in the United States and Western Europe*, 1989, USA: University of Chicago, p 28.

190 See, eg, *Gavin v Gavin* [1990] SILR 160.

191 Section 523A.

192 Sections 4 and 5

193 Cap 170, s 16.

194 Cap 1 (Solomon Islands), ss 11 and 12.

195 [2003] VUCA 27.

196 Section 17.

197 Farran, S, *A Digest of Family Law in Vanuatu*, 2003, Vanuatu: USP, 60.

198 Section 14.

199 Matrimonial Causes Act 1950 (UK), s 14.

Grounds for judicial separation

In most countries where provision is made for judicial separation, the grounds on which separation decree may be made are normally similar to the grounds for divorce.²⁰⁰ In Solomon Islands, the grounds for a decree of judicial separation under s 16 of the *Islanders' Divorce Act* are the same as the grounds for a decree of divorce. However, wider grounds are available under the Matrimonial Causes Act 1950 (UK), which apply mainly to expatriates.²⁰¹ In addition to the divorce grounds, a decree of judicial separation may be granted for failure to comply with a decree for restitution of conjugal rights, or any ground on which a divorce might have been pronounced in England before 1857 (i.e., adultery, cruelty, rape or an unnatural sexual offence by the husband). There are also different grounds applying in Solomon Islands where a separation order is sought under the Affiliation Separation and Maintenance Act.²⁰² This act provides different grounds depending on whether the applicant is the husband or the wife. The grounds are fault based and in the case of a petitioner wife grounds include adultery, persistent cruelty to the wife or her children, desertion, conviction for a serious offence, habitual drunkenness, wilful neglect to maintain the wife or children, insistence on sexual intercourse when suffering from venereal disease and conduct which compels the wife to submit to prostitution.²⁰³ The husband may obtain an order on the grounds of adultery, persistent cruelty to children or habitual drunkenness.²⁰⁴

In Samoa, there are three grounds for judicial separation, which are similar, but not identical, to the grounds for divorce: adultery, cruelty and desertion for two years or more.²⁰⁵

Thus, the parties often have the onerous task of proving fault on the part of the other party. For example, in *L v L*,²⁰⁶ the chief justice of Samoa refused a decree of judicial separation on the grounds that the petitioner husband had not established cruelty on the part of the wife by her allegations of incest which she had made against her husband to him and a number of his family members. This decision was upheld by the Court of Appeal.

However, in Cook Islands, the law was amended in 1994,²⁰⁷ to allow the court to grant an order if there is such a 'state of disharmony that it is unreasonable to require the parties to continue' to live together.²⁰⁸

200 See, eg, *Islanders' Divorce Act*, Cap 170 (Solomon Islands), s 16.

201 Section 14.

202 Cap 1, ss 11, 12.

203 Section 11.

204 Section 12.

205 *Divorce and Matrimonial Causes Act* 1961, s 4.

206 [1994] WSCA 3.

207 *Cook Islands Amendment Act* 1994, s 2.

208 *Cook Islands Act* 1915 (NZ), s 523B.

Grounds for refusal of a decree or order

There are no bars to the grant of a decree in Samoa, but in Solomon Islands the same bars apply as in a divorce case.²⁰⁹

In both Samoa²¹⁰ and Solomon Islands²¹¹ the court has the discretion to refuse an order. In Solomon Islands the grounds for the exercise of the discretion are listed and include adultery, cruelty and unreasonable delay in presenting or prosecuting the petition.²¹² In Samoa the grounds are not listed but the grounds for the exercise of a discretion to refuse a decree, that is, collusion or where the petitioner's own habits or conduct induced or contributed to the respondent's behaviour, are likely to be relevant.

A decree of judicial separation will normally come to an end if the parties recommence cohabitation.²¹³

The customary regime

The terms 'divorce', 'nullity' and 'judicial separation' have no direct equivalent in customary law. The process that leads to community acceptance of a marriage breakdown is more flexible and is likely to be multi-dimensional.²¹⁴ Marriages celebrated in accordance with custom will normally be terminated in accordance with custom and sometimes this will be expressly confirmed by statute.²¹⁵ However, if the customary marriage is registered or, as is commonly the case in urban centres, the customary union is also formally celebrated in church, they are obviously regarded as married pursuant to statute, and divorce under the statutory regime will be required to terminate the marriage.²¹⁶

The circumstances that constitute grounds for termination depend on the customs of the particular group in which the parties live. This may be a matter to be negotiated rather than a question of establishing one of a number of fixed grounds.²¹⁷ The wishes and behaviour of individual parties are

209 Islanders' Divorce Act, Cap 170, s 16(1); Matrimonial Causes Act 1950 (UK), s 14(1). See also Affiliation, Separation and Maintenance Act, Cap 1, s 17.

210 Divorce and Matrimonial Causes Act 1961, s 5.

211 Islander' Divorce Act, Cap 170, ss 8 and 16; Matrimonial Causes Act 1950 (UK) s 4.

212 Islanders' Divorce Act, ss 8, 16; Matrimonial Causes Act 1950 (UK), s 14(1).

213 See, eg, Cook Islands Act 1915, s 523D, as amended by the Cook Islands Amendment Act 1994, s 2.

214 See, further, Corrin, J and Brown, K, 'For better or worse: marriage and divorce laws in Solomon Islands', in Bainham, A (ed.), *International Survey of Family Law*, 2005, 493 at pp 498–500.

215 See, eg, Islanders' Divorce Act, Cap 170, s 4 (Solomon Islands); Matrimonial Causes Act, Cap 192, s 4 (Vanuatu).

216 See, further, Brown, K, and Corrin Care, J, 'Putting asunder: divorce and financial relief in Solomon Islands', (2005) 5(1) *OUCLJ* 85.

217 This is the case under Lau custom in Solomon Islands: *K v T and Ku* [1985–6] SILR 49.

factors likely to be taken into account, but are not decisive and are likely to be outweighed by views of relatives and tribal leaders. While behaviour may be a factor, the specific 'grounds' for divorce that must be proved in the formal system are unlikely to be pivotal to the ending of a customary marriage. In most areas of Melanesia, adultery will not necessarily result in divorce. However, compensation can be demanded by the husband (and in some areas the wife) from the adulterer.²¹⁸ Compensation will usually take the form of shell money, mats or other custom goods.²¹⁹ Today, it may also include cash. Similarly, a wife may not be entitled to terminate the marriage on the basis of physical violence.²²⁰ In some areas this may justify the wife in leaving the husband to return to live with her parents, but she may be obliged to return if the husband pays compensation to the parents.²²¹ On the other hand, extreme violence will often justify a customary divorce.²²²

In some areas, custom allows the husband to reject his wife if he discovers that she was not a virgin prior to the marriage and this fact was not disclosed during the bride price negotiations.²²³ The bride price is repayable in full, although there is some suggestion that only half should be repaid if the husband rejects the wife, rather than the wife leaving the husband.²²⁴

218 In Papua New Guinea there is evidence that death was often the punishment for adultery in customary societies: Law Reform Commission of Papua New Guinea, Report on Adultery, Report No 5, February 1977, 3.

219 This form of customary compensation is common in Solomon Islands and in Papua New Guinea. The Adultery and Enticement Act 1988 (PNG), s 17, provides that the village court may order compensation for adultery in cash, goods or a mixture of both.

220 In some areas this may be sufficient. It is sufficient in some areas of Papua New Guinea: Law Reform Commission, Customary Marriage and Divorce in Selected Areas of Papua New Guinea, Occasional Paper No 5, October 1975, 35.

221 See Bernard Narakobi, 'There's no need for women's lib here, because "Melanesian Women are already Equal"', in *The Melanesian Way*, 1980, Port Moresby: Institute of Papua New Guinea Studies, 70, 71. The authors are deeply sceptical about the view expressed in the title of this article. The statement of Los J in *State v Kopilyo Kipungi and Others*, unreported, National Court of Papua New Guinea, Los AJ, 18 October 1983; accessible via www.pacii.org: [1983] PGNC 13 that 'Although the equality of sexes is now a constitutional principle in Papua New Guinea, at this stage it is more a matter of books, rather than practice. The character of all aspects of life is male dominance', is probably a more accurate statement of the true position. See also *Habe v Melzear* [1982] SILR 1, where the wife, married under the statutory regime, ran away from her husband on five occasions due to his violence. On each occasion she was persuaded to go back to him for 'custom reasons'.

222 For an example under Papua New Guinean customary law, see *Mamando v Goiya*, unreported, National Court of Papua New Guinea, Woods J, 1 June 1992; accessible via www.pacii.org: [1992] PGNC 13 where there was a history of assaults by the husband and during the final assault he bit off his wife's nose.

223 *To'ofilu v Oimae* [1997] SBHC 33. See, further, Corrin, J, 'Case note on *John To'ofilu v Oimae*' (June 1999) 13(1) *Commonwealth Judicial Journal* 33.

224 *Ibid*. This submission was made from the bar table in the High Court, but not supported by evidence. However, this seems to have been accepted as the position by the Magistrates' Court.

In Solomon Islands and Vanuatu, where a couple has married in accordance with custom they must divorce, separate or have the marriage annulled in accordance with custom.²²⁵ However, in Solomon Islands, if the marriage is registered then statutory regime will apply to dissolution.²²⁶

Procedure

The procedure for customary termination will depend on the custom of the community in which the parties live. Termination will not usually be marked by a formal, written order or decree. This is not to suggest that the matter is taken lightly; it may be a complex and protracted process. Some type of ceremony may be required, but more frequently termination is likely to be a consequence of a number of events and protracted negotiations. In countries where bride price is paid, the return of bride price will be a strong indication of termination.²²⁷ One vital factor appears to be that the parties and their relatives accept that the marriage is at an end.²²⁸

As there is no document issued on termination, defining the exact time when it can be safely asserted that a marriage has ended may not be as straightforward in custom as it is under the formal law. In Papua New Guinea, the National Court has been prepared to find that a customary marriage had been terminated 'sometime during 1979' on the basis of an accumulation of the following evidence:²²⁹

[A]ll parties and the relatives on both sides had come to accept that it had irretrievably broken down. By the end of 1979 cohabitation and communication between the appellant and the respondent had ceased, the only child of their marriage had died, the respondent was married to another woman and they had commenced their new family. No brideprice payment had been returned but then none had ever been given. Being a customary marriage no court order was necessary in order to dissolve it.

Financial relief

When a marriage breaks down one of the important matters to decide is how the financial affairs of the parties are to be dealt with. There are two main matters to decide. The first is whether either party should pay money

225 Islanders' Divorce Act, Cap 170, s 4 (Solomon Islands); Matrimonial Causes Act, Cap 192, s 4 (Vanuatu).

226 Islanders' Divorce Act, Cap 170, s 19(1) (Solomon Islands).

227 *To'ofilu v Oimae* [1997] SBHC 33; *Mura v Gigmai* [1997] PGNC 59.

228 For a Papua New Guinean authority on point, see *Igua Nou v Karoho Vagi* [1986] PNGLR 1, 5.

229 *Aeava v Ikupu* [1986] PNGLR 65, 67.

to the other for their own living expense or those of any children. The second is whether there should be a property settlement. The law governing these two questions will now be examined.

Maintenance

The term maintenance is used to describe financial provision for spouses, former spouses and children.²³⁰ Its meaning is wide, including provision for food, clothing, housing and other living expenses, going beyond mere subsistence.²³¹

When may an application be made and by whom

Generally, an application for maintenance may be made in any proceedings for divorce, nullity or judicial separation.²³² A maintenance order may also be sought by way of principal relief, in which case the application will be to an inferior court. In most countries either the husband or the wife may apply,²³³ but in Vanuatu²³⁴ only the wife may apply. In Tonga there is provision for a wife who is deserted by her husband to bring an application to the magistrates' court for maintenance order.²³⁵ In Samoa, although a husband may apply for maintenance, such an order will only be made in special circumstances, which are discussed below.²³⁶ In Samoa it is also an offence for a father to fail to make adequate provision for maintenance for his wife and children.²³⁷

In some countries of the region, the extended meaning of family and the responsibility for supporting a wider range of people is recognised by legislation governing maintenance. In Samoa, there is a liability for maintenance of 'destitute near relatives'.²³⁸ Near relatives include parents, grandparents, and whole

230 At one time the term 'alimony' was used to refer to financial provision made while the parties were still married. This term is largely obsolete but may be found in the legislation in some regional countries, eg, Divorce and Matrimonial Causes Ordinance 1961, s 22 (Samoa) and the Matrimonial Causes Act, Cap 192, s 14 (Vanuatu).

231 *Re Borthwith (Deceased)* [1949] Ch 395.

232 See, eg, Islanders' Divorce Act, Cap 170, s 21 (Solomon Islands); Divorce Act, Cap 29, s 18 (Tonga); Matrimonial Proceedings Act, Cap 21, ss 13, 14 (Tuvalu); see also Maintenance (Miscellaneous Provisions) Ordinance, Cap 4, s 3, discussed below; In Kiribati, no specific authority to make a maintenance order is provided by the Native Divorce Act, Cap 60, but authority exists under the Maintenance (Miscellaneous Provisions) Ordinance, Cap 53, s 3; Matrimonial Causes Act, Cap 192, s 14 (Vanuatu).

233 See, eg, Divorce Act, Cap 29, s 18 (Tonga).

234 Matrimonial Causes Act, Cap 192, s 14.

235 Maintenance of Deserted Wives Act, Cap 31, s 2.

236 Maintenance and Affiliation Act 1967 (Samoa), s 17(2), as amended by the District Courts Amendment Act 1993 (Samoa), s 28.

237 Family Maintenance Act, Cap 42 (Vanuatu), s 1(a).

238 Maintenance and Affiliation Act 1967, ss 5, 6 and 7 (Samoa).

or half siblings.²³⁹ Similarly, in Kiribati²⁴⁰ and Tuvalu²⁴¹ a court may make an order for maintenance of any person if satisfied that there is a legal or customary obligation to do so.²⁴² A maintenance order or refusal to make an order may generally be reviewed on application by a party if circumstances change.

The basis for payment and the amount

In all regional countries children have a right to maintenance irrespective of the circumstances under which their parents separate or divorce. In Cook Islands, Fiji, Kiribati, Nauru, Samoa and Tuvalu, Tokelau, Tonga and Vanuatu, a spouse also has a right to maintenance whenever financial support is required; there is no requirement to prove fault on the other party.²⁴³ However, in some countries fault must be established before maintenance will be ordered by an inferior court in favour of a spouse. In Solomon Islands the court has discretion in any proceedings for divorce, nullity or judicial separation to provide for maintenance of a wife and any children to the marriage as appears just and necessary.²⁴⁴ However, where a wife is claiming maintenance under the Affiliation, Separation and Maintenance Act, Cap 1, the applicant must prove one of a number of fault-based grounds, which include adultery, desertion, persistent cruelty and wilful neglect to provide reasonable maintenance.²⁴⁵ In Niue, in order for a wife to be granted a maintenance order against her husband, it must be shown that the husband has or intends to fail to provide her with adequate maintenance.²⁴⁶ In Samoa, no maintenance orders will be made against a wife in the district court unless the failure to provide adequate maintenance was wilful and without reasonable cause.²⁴⁷ In Nauru, Solomon Islands and Tonga a wife may be disqualified from obtaining maintenance if she has committed adultery.²⁴⁸

239 Maintenance and Affiliation Act 1967, s 2 (Samoa). There are slight differences where the person is illegitimate, see, further, s 2.

240 Maintenance (Miscellaneous Provisions) Ordinance, Cap 53 (Kiribati).

241 Maintenance (Miscellaneous Provisions) Ordinance, Cap 4 (Tuvalu).

242 Maintenance (Miscellaneous Provisions) Ordinance, Cap 53 (Kiribati) and Cap 4 (Tuvalu), s 3(1).

243 See, eg, Divorce Act, Cap 29 (Tonga), s 18.

244 Islanders' Divorce Act, Cap 170, s 21.

245 Affiliation, Separation and Maintenance Act, Cap 1, s 11.

246 Niue Act 1966 (NZ), s 556(1).

247 Maintenance and Affiliation Act (Samoa) 1967, s 17(2), as amended by the District Courts Amendment Act 1993, s 28. The court must also be satisfied that the husband is a destitute person and the wife has sufficient means to pay.

248 Affiliation, Separation and Maintenance Act, Cap 1, s 17 (Solomon Islands), cf where she is claiming maintenance under the Islanders' Divorce Act, Cap 170. In Tonga this is the case where she is claiming under Maintenance of Deserted Wives Act, Cap 31 (Tonga), s 3. When granting a maintenance order under the Divorce Act, Cap 29, s 18, the court

The amount of maintenance is at the discretion of the court. Maintenance orders require payment of money, either on a regular basis ('periodic maintenance') or as a lump sum.²⁴⁹ However, in some countries such as Kiribati, Tuvalu and Vanuatu, there is no specific provision for lump sum payments.²⁵⁰ In some instances, the courts have shown a preference for awarding a lump sum, as this allows the parties to make a clean break. In the Solomon Islands case of *Cheon v Cheon*,²⁵¹ the judge declared invalid a post-divorce agreement made between the parties in which the wife had surrendered her rights, on the ground that she had not voluntarily signed this document. His lordship adopted a flexible, broad brush approach to what was reasonable and gave the wife a lump sum²⁵² or, as an alternative, periodic maintenance. He approved the grant of a lump sum settlement on the clean break principle when no children were involved. In most countries maintenance ceases on the remarriage of the recipient.²⁵³ In most countries an interim maintenance order may be made pending the determination of the proceedings in which the application is brought.

Maintenance of illegitimate children

In most countries of the region an affiliation order may be made against the father of an illegitimate child.²⁵⁴ The applicant is usually the mother or the

may consider the 'conduct of the parties' when making the order. Similarly the Matrimonial Causes Act 1973, s 31(1)(a) (Nauru), provides that the court may take into account the 'conduct of the parties' when granting a maintenance order.

249 See, eg, Divorce Act, Cap 29, s 18 (Tonga). There does not appear to be any express authority for this in Solomon Islands with respect to maintenance orders upon divorce (cf under the Affiliation, Separation Maintenance Act, Cap 1, s 13(1)(d), which pertains to maintenance during the marriage) but the courts have nevertheless made lump sum orders: see, eg, *Leong v Leong and Iro* [1990] SILR 66 where the chief justice ordered the payment of a lump sum of \$75,000 but no maintenance for the wife where the marriage was of short duration. Maintenance was ordered for the two children.

250 Maintenance (Miscellaneous) Ordinance, Cap 53, s 4(2) (Kiribati); Maintenance (Miscellaneous) Ordinance, Cap 4, s 4(2) and the Matrimonial Proceedings Act, Cap 21, s 13(3) (Tuvalu); Matrimonial Causes Act, Cap 192, s 14 (Vanuatu).

251 [1997] SBHC 16. In *Sasago v Sasago*, High Court of Solomon Islands, Ward, CJ, (unreported) (10 April 1991), the Chief Justice shaped bold orders transferring property, allowing the wife to stay in the matrimonial home and run and draw income from a family store.

252 The Islanders' Divorce Act, Cap 170, does not refer to the ordering of lump sums and as at 1961 no English legislation could have been applied as an act of general application authorising such payments; the right to claim a lump sum was only granted in England by s 5(1) of the Matrimonial Causes Act 1963 (UK).

253 See, eg, Divorce Act, Cap 29, s 18(3) (Tonga).

254 See, eg, Maintenance of Children Act, Cap 46, s 1 (Vanuatu); Maintenance and Affiliation Act 1967, s 9(1) (Samoa); Maintenance of Illegitimate Children Act, Cap 30 (Tonga).

guardian of the child if the mother is no longer alive. In Tonga, affiliation proceedings may also be commenced by a reputable person or the attorney-general if they have grounds to believe that the father has failed to provide for the adequate maintenance of the child.²⁵⁵

In most countries the application must be commenced within a specified time after the birth of the child; for example, three years in Tonga.²⁵⁶ An extension of time may be allowed in some circumstances. For example, in Tonga it may be allowed if the putative father has contributed to the maintenance of the child within 12 months preceding the complaint, or has lived with the mother since the birth of the child.²⁵⁷ Maintenance is also usually limited to children under 16,²⁵⁸ but in some countries it extends to children up to 18 years.²⁵⁹ In most countries, an order will not be made on the evidence of the mother alone; corroboration is required.²⁶⁰

Property division

Maintenance must be distinguished from property division, which alters the property interests of the parties. Further, property division order is usually final, whereas maintenance applications may be reviewed on application by either party if circumstances change. Matrimonial property is property acquired by the parties after the marriage either jointly or in their sole names.

The Family Law Act 2003 of Fiji is the most up to date and comprehensive legislation in the region. It provides that the court may declare the title or rights that a party has in respect of the property and make orders as to sale or partition and interim or permanent orders as to possession.²⁶¹ The act also specifies clearly factors which can be taken into account when altering property interests.²⁶²

The position regarding the division of matrimonial property in some countries of the region is very unclear. This is because there is either no local legislation governing the matter or such legislation is inadequate due to the wide discretion given to courts to adjust property rights without specific guidelines as to the circumstances which must be taken into account. Parties

255 Maintenance of Illegitimate Children Act, Cap 30, s 2 (Tonga).

256 Maintenance of Illegitimate Children Act, Cap 30, s 2(5) (Tonga).

257 *Ibid.*

258 See, eg, Maintenance and Affiliation Act 1967 (Samoa), ss 9(4), 12; Maintenance of Illegitimate Children Act, Cap 30, s 2(6) (Tonga).

259 See, eg, Maintenance of Family Act, Cap 42, s 1(a) (Vanuatu).

260 See, eg, Maintenance and Affiliation Act (Samoa) 1967, s 10(2), as amended by the District Courts Amendment Act 1993, s 28; Affiliation, Separation and Maintenance Act, Cap 1, s 5(2) (Solomon Islands); Maintenance of Illegitimate Children Act, Cap 30, s 2(6) (Tonga). See also *Prasad v Disaurara* (1983) 29 FLR 78.

261 Family Law Act 2003, s 160 (Fiji).

262 Family Law Act 2003, s 162 (Fiji).

are often forced to rely on the common law and or introduced law, which have their own shortcomings. A typical example is in Solomon Islands, where the only formal legislation governing property is the Married Woman's Property Act 1882 (UK). However, this act does not give the court power to change defined rights. In theory, this reduces parties seeking property division to invoking the aid of equitable doctrines such as the constructive trust to obtain redress.²⁶³ However, some Solomon Islands courts have implicitly interpreted the 1882 Act as conferring wider powers, in order to divide property between the parties. For example, in *Kuper v Kuper*,²⁶⁴ the wife was given a half share in a registered estate held in the husband's name. However, more recently, in *Pusau v Pusau*,²⁶⁵ Kabui J, acknowledged the jurisdictional difficulties when he observed that he was unable to make a 'clean break' order as there was no legislative authority for him to do so. However, even though he found that he could only proceed under the 1882 Act, he ordered that the wife be given a half share of the former matrimonial home held in the husband's sole name. This action appears to have been taken on the basis that there was a constructive trust, although the judge did not expressly say so. On the other hand, in *Tavake v Tavake*²⁶⁶ the same judge refused to make any order as the wife had made no direct financial contribution to the purchase of the matrimonial home and the intention had always been that the husband should be the sole owner of the property.²⁶⁷

In Vanuatu, the courts have confirmed that the locally enacted Matrimonial Causes Act²⁶⁸ contains no power to distribute property.²⁶⁹ However, the Court of Appeal held in *Joli v Joli*²⁷⁰ that the gap in the law relating to property division may be filled by reference to the Matrimonial Causes Act 1973 (UK), as an English act of general application. The Matrimonial Causes Act 1973 (UK) is prevented from applying in other countries where English acts of general application have been continued in force, as they all have a cut-off date which precedes its enactment.²⁷¹

263 See, further, Brown, K and Corrin, J, 'Putting asunder: divorce and financial relief in Solomon Islands', (2005) 5(1) *OUCLJ* 85, pp 101–9.

264 High Court, Solomon Islands, Ward, CJ (unreported) (18 November 1988).

265 [2001] SBHC 86.

266 High Court, Solomon Islands, Kabui, J (unreported) (19 August 1998).

267 For a discussion of the position in Vanuatu, see Farran, S, 'What is the matrimonial property regime in Vanuatu' (2001) *JSPL* 22.

268 Cap 192.

269 *Kong v Kong* [2000] VUCA 8.

270 [2003] VUCA 27. See, further, Farran, S, 'The Joli way to resolving legal problems: a new Vanuatu approach?' (2003) 7 *JSPL* 2, <http://law.vanuatu.usp.ac.fj/jspl/2003%20Volume7Number2/JoliWay>.

271 For discussion of 'cut-off' dates, see Chapter 2.

In other countries of the region, such as Samoa, the position is similar to that in Solomon Islands. Thus, in *Elisara v Elisara*,²⁷² Sapolu, CJ, said, ‘The difficulty in this area of Western Samoan law lies in its uncertainty. There is no legislative or judicial guidance so far, as to how to deal [with] matrimonial property disputes between married couples’.

Similarly in Tonga, upon a decree for divorce, s 15 of the Divorce Act, Cap 29, provides that each of the parties to the marriage retain their own property.²⁷³ In *Nakao v Afeaki*²⁷⁴ Chief Justice Ward noted that in the Divorce Act ‘there is neither further power nor guidance given in relation to matrimonial property’ and suggested that ‘it may be a reasonable interpretation of the provisions of s 15 to conclude that any joint matrimonial property should be divided in proportion to each party’s contribution’.²⁷⁵ However other than s 15 the post-independence legislation in Tonga does not make specific provision for the division of matrimonial property. Until the Civil Law Act Amendment Act 2003 was passed in Tonga, the Matrimonial Causes Act 1973 (UK), which includes wide powers to divide matrimonial property upon breakdown of marriage applied in Tonga as an act of general application.²⁷⁶ The Court of Appeal in *Halapua v Tonga*²⁷⁷ noted that:

There is now no matrimonial property legislation in the Kingdom. We appreciate that different social and economic conditions in the Kingdom may mean that the English legislative provisions are not suitable. However, it is our recommendation that the legislature should consider whether there should be legislative provisions relating to the division of matrimonial property on the breakdown of the marriage, appropriate to the social and economic conditions in Tonga. Without any such provisions, there remains the distinct possibility that one party to the marriage, usually the wife, may be unfairly disadvantaged.²⁷⁸

One of the main problems with leaving matters to be governed by common law is that it relies on the complicated notion of a constructive trust. As illustrated by *Tavake v Tavake*,²⁷⁹ this requires an actual, or at least apparent, common intention by the parties for the property to be held jointly. The concept of the constructive trust is further complicated in Samoa, where in

272 [1994] WSSC 14.

273 Divorce Act, Cap 29, s 15 (Tonga).

274 [2002] TOSC 37.

275 *Nakao v Afeaki* [2002] TOSC 37, per Ward, CJ.

276 *Halapua v Tonga* [2004] TOCA 5, at para 26.

277 [2004] TOCA 5.

278 *Halapua v Tonga* [2004] TOCA 5, at para 26–7.

279 High Court, Solomon Islands, Kabui, J (unreported) (19 August 1998).

*Elisara v Elisara*²⁸⁰ Sapolu CJ considered that there were alternatives to applying the common intention test to determine whether a constructive trust should be imposed. He considered that the options available from which to choose were ‘reasonable expectations’, ‘unconscionable conduct’, ‘unjust enrichment’ and ‘estoppel’. The chief justice expressed a preference for the unjust enrichment and the reasonable expectations tests, but said that he was not making a final decision on this.

Further, the English common law, in particular, has not given due recognition to the value of unpaid work, which contributes to the economic security of families.²⁸¹ This approach, which clearly puts women at a disadvantage, has been followed in regional cases such as *Nickel v Nickel*.²⁸² In that case the Supreme Court of Samoa was called upon to consider a spouse’s contribution to matrimonial property when determining how it should be divided. While stating that contributions might be ‘direct or indirect’ and might be ‘financial contributions or in the form of services’ Sapolu, CJ, stressed that ‘[t]o qualify contributions must assist in the acquisition, improvement or maintenance of the relevant property asset. They must clearly exceed the benefits which the relationship itself conferred upon the claimant’. The Chief Justice went on to assess contributions purely on a financial basis without taking into account the value of clearance and cultivation of the land with food crops by one party. Similarly, in *Elisara v Elisara*²⁸³ Sapolu, CJ, refused to make any order in favour of the wife even though she had carried out secretarial work in the surveying firm owned by her husband and ‘performed the normal duties of a housewife’.

Financial relief under the customary regime

Traditionally, the only item of significant value likely to have been owned by parties to a marriage was customary land. This asset does not lend itself to being divided up between individuals as it is normally communally owned and it is impossible to define the extent or value of an individual line member’s interest. The only other property resources of a divisible nature usually consisted of mats, cooking utensils, livestock, crops and other garden produce. Any dispute in respect of such property would be resolved at village level or in a forum established to deal with minor customary disputes.²⁸⁴ The outcome would, in general, be unlikely to be generous to a wife due to the male domination of both substantive law and processes.²⁸⁵

280 [1994] WSSC 14.

281 See, eg, *Gissing v Gissing* [1971] AC 889.

282 [2005] WSSC 26.

283 [1994] WSSC 14.

284 See, further, Chapters 3 and 11.

285 See Jessop, O and Luluaki, J, *Principles of Family Law in Papua New Guinea*, Papua

An example of the inequalities of substantive law can be found in the Solomon Islands case of *Sasango v Beliga*²⁸⁶ where evidence was given that under Malaitan custom a wife has no right to any property of her own. However, the court was not convinced that this was the case and ordered the late husband's brother to return the plaintiff widow's property to her. Regarding dispute resolution process, customary forums are usually constituted by chiefs or elders, who are usually men. Women may be largely excluded from the process or have no right to speak, except through a male representative.

The issue takes on a more serious aspect in modern society. The last two decades have witnessed a surge of economic growth within the region and the consequent acquisition of substantial wealth by entrepreneurs. The present regime does not allow a wife to gain a fair share of these on divorce.

Customary rules in some parts of the region deal with some of the economic issues arising from relationship breakdown as ss 6 and 7 of Art 14 of the *Custom Policy of the Malvatumauri* in Vanuatu illustrate.²⁸⁷ Section 6 of the Policy declares that if a man gives a child to a girl or woman, but does not take the child as his own for some reason (for example, if the woman wants to keep the child) the man must pay monthly maintenance, in accordance with the order of a custom court. Section 7 of the *Malvatumauri* policy declares that an illegitimate child must be given land by his father.

Children

Introduction

If the parties to a marriage have children then the most important matter to be determined on the breakdown of marriage is their living arrangements and financial support or maintenance. Maintenance has been discussed earlier in this chapter. There are three principal terms that are used in describing children's living arrangements: custody, guardianship and access. Custody is the term used to describe the day-to-day care and control of children, whereas guardianship is used to describe broader parental responsibility, involving decisions on matters such as education, religious upbringing and medical treatment.²⁸⁸ The term access is generally used to describe the

New Guinea: University of Papua New Guinea Press, 1994, pp 102–3, citing evidence and judicial comment that male dominance is omnipresent.

286 [1987] SILR 91.

287 Reproduced in Lindstrom, L and White, G (eds), *Culture, Kastom, Tradition*, 1994, Suva: IPS, USP.

288 See, further, Jalal, I, *Law for Pacific Women – A Legal Rights Handbook*, 1998, Fiji Islands: Fiji Women's Rights Movement, pp 285–6.

arrangements for a non-custodial parent to see a child. Access is a right of the child to maintain contact with a parent, rather than a right of the parent. It should be noted that, outside the region, many countries have replaced these terms.²⁸⁹ Custody and access are dealt with as ancillary matter in proceedings for separation or termination of the marriage.

Custody and access orders

On breakdown of marriage guardianship usually remains with both parents. However, a decision has to be made as to who will have the day-to-day care of the children. This will invariably be the parent with whom the child is living. Although the courts have power to make a joint custody order, it is more common for the courts in the region to make a sole custody order, with access to the non-custodial parent. Where a joint custody order is made the children will spend some time (often equal amounts) residing with each parent. This type of order may be appropriate when the parties are on good terms or are able to put aside their differences for the sake of the children.

Regional courts also have jurisdiction to make interim custody orders, pending the final outcome of the proceedings relating to the marriage. If the interim order has been in place for some time, the court may be reluctant to change the children's living arrangements,²⁹⁰ but, in theory, the interim arrangements may be changed by the main order. Custody orders are never final and may be varied whenever there is a material change in the circumstances of the parents or children.

Ideally, custody and access should be dealt with by consent. However, the court's decision on custody will be a very influential factor in the decision on maintenance.²⁹¹ This often leads to contested proceedings and exacerbation of bad relationship between the parties.

Jurisdiction of the courts

All superior regional courts are empowered to make custody orders as an ancillary to their jurisdiction in proceedings for separation, termination of the marriage and maintenance.²⁹² Superior courts also have inherent

289 See, eg, Family Law Act 1975 (Cth), s 64B, uses the term 'parenting order' to describe orders that deal with the person or persons with whom a child is to live, the time a child is to spend with another person or other persons, and the allocation of parental responsibility for a child. This terminology is reflected in the Family Law Act 2003, s 63 (Fiji).

290 See, eg, *Elisara v Elisara* [1994] WSSC 14. See further, Jalal, I, *Law for Pacific Women – A Legal Rights Handbook*, 1998, Fiji Islands: Fiji Women's Rights Movement, pp 302–4.

291 Stanford-Smith, JKR, *Children and the Law – Family and the Civil Law*, Unpublished Conference Paper, Fiji Law Society Convention, 1996.

292 See, eg, High Court under the Islanders' Divorce Act, Cap 170, s 21 (Solomon Islands); Supreme Court under the Divorce Act, Cap 29, s 19 (Tonga).

jurisdiction, inherited from the Crown, to act as *parens patriae* (guardian of all children). Most inferior courts may make a custody order in maintenance proceedings.²⁹³ The position where there are no matrimonial proceedings on foot is less clear. In Fiji Islands doubts have been removed by the High Court in *Lakhan v The Director of Social Welfare, the Attorney General and Others*,²⁹⁴ where it was held that a court always has jurisdiction to make a decision regarding children.

In Kiribati and Tuvalu there is specific legislation dealing specifically with custody. The Custody of Children Acts²⁹⁵ are in practically identical terms and they both provide that the court may make such custody order as it thinks fit on an application by any person.²⁹⁶

In some countries, 'customary courts' established by statute to deal with customary disputes are empowered to make custody orders. For example, the island courts in Tuvalu may make child custody orders.²⁹⁷

Relevant principles

The starting point in disputed cases is that both parties have an equal right to custody; there is no presumption that children should always remain in the custody of their mothers.²⁹⁸ The guiding principle in custody and access cases is known as the welfare principle. This requires that the welfare of the children be treated as of paramount importance. In most countries of the region, the principle is enshrined in local legislation,²⁹⁹ but in others it applies as part of the introduced law.³⁰⁰ The Guardianship of Infants Act 1925 (UK), s 1, states:

Principle on which questions relating to custody, upbringing, etc of infants are to be decided:

Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act 1866) the custody

293 See, eg, magistrates' court: Matrimonial Causes Act, Cap 192, s 15 (Vanuatu); Matrimonial Proceedings Act, Cap 21, s 6 (Tuvalu).

294 High Court, Fiji Islands, HBC0585/1993 (unreported) (1993).

295 Cap 21 (Kiribati); Cap 20 (Tuvalu).

296 Cap 21, s 3 (Kiribati); Cap 20, s 3 (Tuvalu).

297 Island Courts Ordinance, Cap 3 (Tuvalu) and Matrimonial Proceedings Act, Cap 21, s 5 (Tuvalu).

298 But see *Sukutaona v Houanihou* [1982] SILR 12.

299 See, eg, Custody of Children Act, Cap 21 (Kiribati), ss 3(1) and (3); Custody of Children Act, Cap 20 (Tuvalu), ss 3(1) and (3); Family Law Act 2003 (Fiji); Guardianship Act 2004 (Tonga).

300 See, eg, Guardianship Act 1968 (NZ), s 23 (Niue); s 692(1) of the Niue Act 1966 (NZ) provides that Part I and Part II of the Infants Act 1908 are in force in Niue. Part I of The Infants Act was replaced by the Guardianship Act 1968. Section 676 of the Niue Act 1966 (NZ) provides that any amendments to an act that is in force in Niue will become

or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application, is superior to that of the mother, or the claim of the mother is superior to that of the father.

This section has been held to apply in Solomon Islands³⁰¹ and would appear to be in force in other countries of the region. The welfare principle has been held to apply in Samoa, although the basis for this is not entirely clear.³⁰²

In proceedings under the Matrimonial Proceedings Act³⁰³ of Tuvalu, the welfare of the child has been relegated from paramount importance to a position at least equal to that of the parties to the marriage.³⁰⁴

The welfare principle is endorsed by International Law. The International Convention on the Rights of the Child,³⁰⁵ to which all countries in the region are parties, provides that in all actions concerning children, 'the best interests of the child shall be a primary consideration.'³⁰⁶

In Fiji Islands, the Family Law Act 2003 has expanded on the welfare principle by providing the court with some guidance on the factors they must consider when deciding what is in the best interests of the child. These can be summarized as follows:³⁰⁷

- 1 the wishes of the child, giving weight to any factors (such as the child's maturity or level of understanding) relevant to the weight that should be given to those wishes;
- 2 the relationship between the child and each of the parents and any other person;

law in Niue, though s 36 of the Constitution Act 1974 insists that any acts or amendments be in force before 1974, if they are to be applicable.

301 *Sukutaona v Houanibou* [1982] SILR 12; *In re B* [1983] SILR 223; *K v T and Ku* [1985–6] SILR 49; *Sasango v Beliga* [1987] SILR 91.

302 *Elisara v Elisara* [1994] WSSC 14.

303 Cap 21.

304 Section 12(1).

305 The Convention came into force 2 September 1990. Solomon Islands acceded 10 April 1995; Tonga acceded 6 November 1995; Vanuatu ratified 7 July 1993; Kiribati acceded 11 December 1995; Fiji ratified 13 August 1993; Nauru acceded 27 July 1994; Niue acceded 20 December 1995; Tuvalu acceded 22 September 1995; Samoa ratified 29 November 1994; Cook Islands acceded 6 June 1997.

306 Article 3.1.

307 Section 121(2).

- 3 the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either parents or any other child, or other person, with whom the child has been living;
- 4 the practical difficulty and expense of access and whether that will affect the child's right to maintain contact with both parents on a regular basis;
- 5 the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- 6 the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of the child) and any other relevant characteristics;
- 7 the need to protect the child from physical or psychological threat;
- 8 the attitude of each parent to the child and to parenting responsibilities of parenthood;
- 9 any family violence involving the child or a family member;
- 10 any family violence order that applies to a child or a member of the child's family;
- 11 any other fact or circumstances that the court thinks is relevant.

In other countries of the region, the factors to be taken into account in considering what is in the best interests of the child are left to the discretion of the court. However, the factors set out in Fiji Islands' Family Law Act 2003 are the type of factors that all regional courts would take into consideration. In *Elisara v Elisara*,³⁰⁸ for example, the Supreme Court of Samoa considered what was in the best interests of children aged 13, 9 and 7. Chief Justice Sapolu took into account that the children were currently living with the mother; the fact that the children loved their parents and were used to their company; the fact that they looked at the former matrimonial home as their home and the employment situation of each parent. In the light of these circumstances the chief justice made an order that the children remain living with the mother, with reasonable, staying access to the father.

Customary law

The approach of customary law to child custody is very different to the state law approach. The welfare of the child is not the paramount consideration, although it may be one factor to be taken into account. The applicable principles of customary law will differ between countries of the region and between different parts of regional countries, particularly in Melanesia. However, there are common themes which emerge. Given the patriarchal underpinning of customary law, the husband and his line are generally more

likely to be entitled to custody.³⁰⁹ This is particularly the case if bride price has been paid by the husband or his customary group. For example, in *Sasango v Beliga*,³¹⁰ the plaintiff claimed custody of her seven children. The defendant, who was the brother of the plaintiff's late husband argued that, according to Malaitan custom, the right to custody of the children passed to him after the death of the plaintiff's husband, as he had contributed to the bride price for the plaintiff. Lodge PM ordered custody to the mother on the basis of the welfare principle. However, customary law was said to be a factor to be taken into account. A similar approach was taken by the High Court in Solomon Islands in *Sukutaona v Houanihou*,³¹¹ which set aside the magistrates court's order awarding custody of the children to the father on the basis of customary law.

Where customary law conflicts with the welfare principle the state courts have tended to apply the welfare principle, regardless of the status of customary law in the hierarchy of laws.³¹²

Examples of the type of principles that apply in some parts of Melanesia can be found in the *Custom Policy of the Malvatumauri* of Vanuatu, which includes the following provision relating to illegitimate children in Art 14:³¹³

Section 8: Policy also declares that if an unwed mother wants to keep a daughter, this is appropriate because when the girl marries she will go live somewhere else. But if the child is a boy, policy demands that the father must take him because, if the mother kept him, he would not be able to acquire land at his mother's place. If he receives land at his mother's place, his father must settle this by custom before the boy can take the land.

Conclusion

The complex and overlapping family laws in most countries of the region highlight the problems of legal pluralism discussed in Chapter 2. Apart from Fiji Islands, reform is urgently required, particularly in those countries where more than one state law regime exists. This is an unnecessary complication, especially where there are different statutes for different aspects of

309 Brown, K, *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu*, 2005, Darwin: Charles Darwin University Press, p 153; Brown, K, 'Post-independence custody cases in Solomon Islands and Vanuatu' (1997) 21 *Journal of Pacific Studies* 83.

310 [1987] SILR 91. See also *In re B* [1983] SILR 223; *K v T* [1985/86] SILR 49.

311 [1982] SILR 12.

312 See, further, *Sukutaona v Houanihou* [1982] SILR 12; *Sasango v Beliga* [1987] SILR 91; *In re B* [1983] SILR 223; *K v T* [1985/86] SILR 49; and Chapter 2.

313 Reproduced in LL and White, G (eds), *Culture, Kastom, Tradition*, 1994, Suva: IPS, USP.

the law. A single law regulating all aspects of family law would be preferable. There is also a need to simplify the formalities surrounding marriage and to introduce a degree of flexibility to take into account the social, economic and geographical realities in the region.

Although social change has been very slow in the region, family relationships have changed dramatically since independence. Young women now pursue custody of their children on divorce; unmarried mothers claim maintenance from fathers and inter-island, and inter-ethnic, marriages are common. However, it does not follow that reforms should exclude customary law. Custom is still very strong in some areas of the region and the extended family and communal responsibilities continue to be an important part of society. Divorce reforms based on introduced norms and applied inflexibly to all marriages would lack the local resonance required to give them legitimacy, and perpetuate the type of problems that have caused dissatisfaction with other areas of law.

Contract law

Introduction

Contract law in a South Pacific context

The law of contract in the South Pacific is still dominated by English law. However, there are differences between the two. Some statutory reforms in England do not apply or only apply in some countries of the region.¹ Statutory innovations have been introduced by regional Parliaments and not all of these coincide with English legislative trends. There are also minor differences arising from regional case law, where courts have occasionally demonstrated a will to develop a law of contract more suited to local circumstances.² Further divergence within the region results from the application of customary law, which, in some countries, governs contractual relationships and contractual disputes, at least at the village level.

The sources of South Pacific contract law

Common law and equity

Contract is a common law creation. That is, it is derived from judicial decisions, as opposed to acts of Parliament. Equity also plays an important role in the law of contract. The cases that establish the principles of contract are mostly English. Although many of these principles are well established, the common law is continuing to develop, as it resolves new cases, not only in England, but also throughout the Commonwealth and in other common law countries. As discussed in Chapter 2, in theory and subject to certain conditions, English common law and equity apply throughout the region, apart from in Samoa, where it has been held that the courts are free to choose from amongst common law principles as developed throughout the

1 See Chapter 2.

2 See, eg, *Australia and New Zealand Banking Group Limited v Ale* [1980–3] WSLR 468.

Commonwealth and, possibly, Tuvalu and Vanuatu.³ Contract law derived from common law and equity may be discarded by the regional courts if it is inappropriate to the country in question. This renders the distinction between English common law and Commonwealth common law somewhat academic, because a regional court which prefers a Commonwealth authority on contract over an English authority on the same point may adopt the Commonwealth approach on the ground that it is more appropriate to local circumstances.⁴ Some countries, such as Fiji Islands, have made it clear that they are going to apply the common law principles of contract law developed in Australian or New Zealand contract law if they choose to.⁵

Statute law

FOREIGN STATUTES

Statute does play a role in the law of contract, but it is a minor role. One particular area where Parliament has intervened is consumer law. Legislation has been passed with a view to protecting consumers in their dealings with commercial bodies. The most important English legislation which applies in some countries of the region will be discussed below. Assuming that there is no regional legislation on a point, the ruling as to whether or not an English act relating to contract law applies will depend on two factors: first, whether it is well suited to the circumstances of the regional country; second, whether it was passed before or after any cut-off date applying in that country. These conditions are discussed in detail in Chapter 2.

REGIONAL LEGISLATION

There are some locally enacted statutes relating to the law of contract in the region. In addition to the main acts, many countries within the region have their own Companies Acts and Limitation Acts, which have some relevance for the law of contract. Relevant legislation will be discussed below. In Tokelau, contracts are governed by the Contract Rules 2004 (Tokelau).

Customary law

As discussed in Chapter 3, in most countries of the region, customary law continues to be recognised by those whose customs are embodied in the law.

3 *Opeloge Ole v Police* [1992] WSSC 1.

4 See Chapter 2 for examples of circumstances justifying departure from English common law on the basis of inapplicability.

5 See, eg, *Krishna Nair v Public Trustee of Fiji and Another*, High Court, Fiji Islands, Civ App 27/90 (unreported) (8 March 1996); *Attorney General of Fiji and Another v PACOIL Fiji Ltd* [1996] FJCA 9.

Accordingly, where contractual disputes arise at village level, they will be governed by customary law.

It is also necessary to consider whether customary law is relevant to contractual disputes arising outside the customary sphere, for example, those arising in a commercial setting or where one or more parties do not recognise customary law. The answer will depend on whether, and to what extent, customary law has been incorporated into the state system. As seen in Chapter 3, at independence, many countries within the region recognised customary law as a source of law within the state system, to be applied by the formal courts. However, the exact place of customary law in the hierarchy of state laws was not made clear. In particular, there is no uniformity regarding the status of customary law in relation to common law, and, in many cases, their relative positions are uncertain. This causes problems where a customary law is relevant to contract, in situations which would otherwise be governed by introduced law. In any event, the common law will often be followed without any consideration as to whether there is an applicable customary law.

This may be due to a view that customary law is inapplicable to commercial transactions and/or where expatriate parties are concerned. An example of this is the case of *Semens v Continental Air Lines*,⁶ a decision of the Supreme Court of the Federated States of Micronesia. The plaintiff in that case claimed damages for personal injuries suffered by him at Pohnpei airport, where he was employed by a sub-contractor to unload cargo from a Continental Air Lines plane. To decide the claim, interpretation of a clause of the contract was required. The court held that the constitution was the supreme law, but that it did not contain any provision relevant to the facts of the case. Customary law came next in the hierarchy. However, the chief justice held that he would only be under an obligation to search for an applicable custom or tradition if the nature of the dispute and surrounding facts indicated that it was likely that there was such a custom or tradition. His lordship felt that this was not such a case, because the business activities which gave rise to the suit were not of a local or traditional nature. Although goods handling and moving might take place in a traditional setting, baggage and freight handling at an airport were of an international, non-local nature. The chief justice used the fact that three of the four defendants were not Micronesians as a further reason for his decision. Last, he relied on the fact that the contract revealed no intention of the parties to be governed by customary law. Accordingly, the common law of the United States was applied.

This case may be contrasted with *Naiten Phillip v Paul Aldis*,⁷ which also arose in Pohnpei, and came before the Supreme Court of the Federated States of Micronesia two years later. In that case, the plaintiff and defendant entered

6 2 FSM Intrm 131 (Pn 1985).

7 3 FSM Intrm 33.

into a vehicle rental contract. After the vehicle was damaged, the plaintiff offered to sell the vehicle to the defendant for \$2,500. The defendant agreed to this, subject to finance. The defendant was unable to secure finance but remained in possession of the vehicle. Two months later the vehicle was badly damaged in an accident. A year later the plaintiff found the vehicle in a repair shop and recovered possession after paying for the repairs. He then sold the vehicle for \$1,900. The plaintiff then sued the defendant for over a year's rent plus the costs of repair. It was held that the rental agreement had been terminated by the later agreement for sale. The plaintiff's failure to repossess when the defendant was unable to secure financing and his acquiescence in the defendant's continuing possession gave rise to the customary law principle of *ke pwurohng omw umur* (you reap the fruits of your misdeeds and the consequences). This principle applied as customary law took precedence over the common law under the Constitution of Pohnpei. The plaintiff had also failed to mitigate his loss under the common law.

While these are not decisions of regional courts, they demonstrate the conflicting approaches to the application of customary law in countries with plural legal systems.⁸

Definition of a contract and the law of contract

A contract is a legally binding agreement made between two or more people who intend it to have legal effect. There are, therefore, two elements:

- an agreement
- legal enforceability.

The law of contract has been defined as

that branch of the law which determines the circumstances in which a promise shall be legally binding on the person making it.

(Per Beatson, J (ed.), *Anson's Law of Contract*,
28th edn, 2002, Oxford: OUP, p 1)

Simple contracts and contracts by deed

Contracts may be made in two different ways: simple contracts and contracts by deed. This chapter concentrates on simple contracts. These are binding contracts other than contracts by deed. A simple contract can be either oral

⁸ See also Hughes, R and Macfarlane, P, 'The application of custom in South Pacific Contract Law and as a basis for an estoppel', (2004) 20 *Journal of Contract Law* 1.

or written, or partly oral and partly written. It consists of a promise to do or refrain from doing something, in exchange for something given or promised in return. The parties must intend the agreement to be binding on each other.

A contract by deed is a promise made in a written document. The most important feature of such a contract is that it will be binding even though no consideration has been given for it. The common law required a deed to be sealed by the person making the promise, and delivered, actually or constructively, by that person to the person to whom the promise was made. In many countries legislation now provides that a deed need not be sealed or delivered, but must be signed by the person making the promise and witnessed by some other person.⁹ Deeds are often used when a greater sense of formality is required, but in some countries, legislation requires a deed to be used for certain transactions, most commonly in relation to land. Examples are the Property Law Act 1952 (NZ), which is in force in Cook Islands, Niue and Samoa, and the Property Law Act, Cap 130 (Fiji).

Formation of a simple contract

Introduction

The traditional approach to contract requires the identification of an agreement, which is constituted by an offer and the corresponding acceptance. However, it has been suggested that these principles should not be applied too rigidly, and what is really required is the essence of a contract. It is arguable that it is more profitable to look at the transaction as a whole to see whether there is a contract than to spend time analysing the mechanics by which the agreement was reached.¹⁰

There may be instances where the courts feel compelled to find that the essence of contract is present, even though it is difficult or impossible to analyse the transaction in terms of the rules discussed below. Nevertheless, the rules are still predominant, and the regional courts will usually require conventional analysis to be presented in dealing with any dispute.

The offer

The offer has been defined as

an intimation, by words or conduct, of a willingness to enter into a legally binding contract, and which, in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has

⁹ Property Law Act 1952 (NZ), s 4, which is in force in Cook Islands, Niue and Samoa; Property Law Act, Cap 130 (Fiji), s 4.

¹⁰ *New Zealand Shipping Co Ltd v AM Satterwaite and Co Ltd* [1975] AC 154, p 167.

been accepted by an act, forbearance or return promise on the part of the person to whom it is addressed.¹¹

An offer may be express or implied from the offeror's conduct. It may be written or oral, or partly written and partly oral. An offer may be made to a specified person or persons, a class or group of people, or the whole world.

Invitation to treat

A distinction must be drawn between an offer and an invitation to treat, which may resemble an offer, but does not go so far in committing the person making it. An invitation to treat is a preliminary communication that does not indicate a clear intention to be bound. Some examples of an invitation to treat are as follows.

Advertisements

Generally, an advertisement will not amount to an offer. However, if an advert includes words which demonstrate a willingness to be bound then it may be construed as an offer.¹²

The display of goods in shops

The display of goods in a shop window or in a self-service store is generally regarded as an invitation to treat.

Tenders

Calling for tenders is usually regarded as an invitation to treat. This is demonstrated by *Sivan's Transport Ltd v Nadi Town Council*.¹³ The plaintiff submitted a tender to the council for refuse collection, but said that the tender figure was open to negotiation. A committee of the defendant council resolved that the plaintiff's tender be recommended for approval by the full council, subject to further negotiation between the plaintiff and a subcommittee, with a view to reducing the costs stated in the tender. The subcommittee met with the plaintiff and persuaded him to submit a lower figure. This was referred to the full council, which rejected it. It was held that the discussions which the subcommittee had with the plaintiff did not indicate an acceptance by the subcommittee of the original tender (which, in any event, it

11 Beatson, J (ed.), *Anson's Law of Contract*, 28th edn, 2002, Oxford: OUP, p 32.

12 *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 163.

13 (1981) 27 FLR 192.

had no authority to do), but an effort to persuade the plaintiff to submit a reduced offer. Accordingly, there was no breach of contract because there was no contract.

In *Beti v Aufiu*,¹⁴ the defendant advertised property for sale by tender. The plaintiff put in an offer of \$70,000. The defendant wrote to the plaintiff informing him that the highest tenderer had changed his mind, and asked the plaintiff to confirm his offer within 20 days. The plaintiff telephoned to confirm his offer within the time limit. The defendant was subsequently offered a higher price, and sold the property to a third party. The defendant was held to be in breach of contract. Although the invitation to tender was an invitation to treat and the plaintiff's original tender was an offer, the defendant's subsequent letter was an offer which was accepted by the defendant when he telephoned within the stipulated 20 days.

Termination of the offer

An offer can be terminated at any time before it has been accepted. Once an offer has been accepted, it becomes irrevocable.¹⁵ An offer can be terminated either by revocation before it has been accepted, or by rejection of the offer, or by lapse of time, or by failure of a condition subject to which the offer was made, or by death.

Acceptance

Definition

Acceptance of an offer is the expression, by words or conduct, of agreement to the terms of the offer in the manner indicated by the offeror. Generally, an offer can only be accepted by the person to whom it is made. Acceptance must be unqualified and must correspond with the terms of the offer. A counter-offer is not an acceptance. It brings the original offer to an end, and, therefore, a contract cannot be formed until the original offeror accepts the counter-offer.¹⁶

Communication

Generally, an acceptance has no effect until it has been communicated to the offeror. In *Tonelei Development Corporation Ltd v Lucas Waka*,¹⁷ a written

¹⁴ [1991] SBHC 1.

¹⁵ *Great Northern Railway Co v Witham* (1873) LR 9 CP 16.

¹⁶ *Hyde v Wrench* (1840) 49 ER 132.

¹⁷ (1983) 10 (1&2) MLJ 175.

offer was collected from the offeror by the offeree. A written note of acceptance was hand delivered to the desk of the offeror's personal secretary. The offeror did not read it, and purported to withdraw the offer. Had the acceptance been communicated? It was held that delivery of the written note of acceptance on to the table of the offeror's personal secretary was deemed to be personal delivery to the offeror. From the fact that the offer was collected by an agent of the offeree company, it could be inferred that the offeror was inviting acceptance in the same manner.

An offeror cannot impose contractual liability on the offeree merely by proclaiming that silence shall be deemed to be consent.¹⁸ This situation arises, for example, when unsolicited goods are sent through the mail with a statement that unless they are returned they must be paid for. In Fiji Islands, ss 71–3 of the Fair Trading Decree 1992 provide that, in certain circumstances, unsolicited goods may be treated as a gift, and that threats and demands may render the supplier guilty of a criminal offence. The Unsolicited Goods and Services Act 1971 (UK), which makes similar provision, may apply in Vanuatu.

The postal rule is one important exception to the rule that acceptance must be communicated before it can take effect. Under this rule, acceptance by letter is complete when the letter is posted and acceptance by telegram is complete when the telegram is handed in.¹⁹

Revocation of acceptance

The general rule is that acceptance can be revoked at any time before it is communicated to the offeror because acceptance is not complete until communicated.

Certainty and incomplete agreements

Although parties may have reached agreement, in the sense that there appears to be a valid offer and a valid acceptance, there may still be no contract if there is uncertainty as to what has been agreed. This may occur where the terms are not definite, that is, they are vague or ambiguous or where the agreement is incomplete.

An example from the case law is *Fong Lee v Mitlal and Ram Kissum*.²⁰ Mitlal agreed to sell some land to Ram Kissum, and, in the contract, agreed to 'give the purchaser the right of first refusal' of some adjoining land. Later, Mitlal agreed to sell the adjoining land to the plaintiff. Ram Kissum objected

¹⁸ *Felthouse v Bindley* (1862) 142 ER 1037.

¹⁹ *Adams v Lindsell* (1818) 106 ER 250.

²⁰ (1966) 12 FLR 4.

to this on the grounds that he had not been given an opportunity to buy the land, in accordance with his right of first refusal. Fong Lee sought specific performance of Mitlal's agreement to sell him the land. Judgment was given for the plaintiff, on the basis that the clause giving the purchaser the right of first refusal did not determine a price at which Ram Kissum could purchase the property. There was, therefore, no concluded agreement to sell the land to Ram Kissum.

There are three sources from which a court may obtain assistance in clarifying an otherwise incomplete agreement:

- trade custom
- previous course of dealing
- statute.

An example of a statute to which recourse may be had within the region is the Sale of Goods Act, Cap 230 (Fiji). This provides that, if the missing term is as to the price of goods, then the contract will be interpreted as if the buyer had agreed to pay a reasonable price. The Sale of Goods Act 1975 (Samoa) is to the same effect.²¹ Similar terms can be found in the Sale of Goods Act 1979 (UK),²² which substantially reproduces the terms of the Sale of Goods Act 1893 (UK). If the law is unable to supply a term by reference to either a trade custom, or a previous course of dealing or statute and there is, thus, a material term missing from the agreement, then the agreement is incomplete and unenforceable.

Intention to create legal relations

The second element necessary for the formation of a contract, in addition to agreement, is an intention to create legal relations. An agreement will not constitute a binding contract unless it is one that can reasonably be regarded as having been made in contemplation of legal consequences.

The parties may expressly state that the agreement is not to affect their legal relations. If they do not, the court will have to decide this from the surrounding circumstances, using an objective test.²³ Certain guidelines have arisen from the case law and these are discussed below.

Domestic and social agreements

The presumption is that domestic and social agreements are not intended to have legal force. An example from the case law of a domestic agreement is

²¹ Sale of Goods Act 1975 (Samoa), s 9(2).

²² Sale of Goods Act 1979 (UK), s 8.

²³ *Ellis and Others v Attorney General* [1980–8] 1 Van LR 196.

Dorsamy and Another v Commissioner of Estate and Gift Duty.²⁴ The testator sold his farm and distributed the proceeds amongst his seven sons. After his death, his executors contended that these were not gifts but payments for work done, and therefore not subject to duty. It was held that the contractual relationship had to be proved by sufficient evidence. As there was no such evidence, the claim failed. The presumption can, however, be rebutted.²⁵

Commercial agreements

Commercial agreements are presumed to be intended to create legal relations. The burden of proof on a party who alleges that no legal effect was intended is a heavy one.²⁶ That party must establish the fact of contrary intention by reference to

- the circumstances surrounding the agreement and/or
- the express terms of the agreement.

In *Compass Rose Enterprises Ltd v Taomati Iuta and Anor*,²⁷ the minister for Trade, Industry and Labour told the plaintiff that he would sell him a government-owned company for \$50,000. When he refused to proceed with the sale the plaintiff sued for specific performance. The High Court of Kiribati held the onus was on the defendant to establish that there was no intention to enter into a legally binding agreement. However, it accepted the defendant's evidence that he had been joking when he offered to sell the company and held that a reasonable person would not have interpreted the defendant's conduct as intending to create legal relations.

Consideration

The principle of English law that only those agreements which are supported by consideration or made by deed will be enforced by the courts is applied in the South Pacific region.

Definition

Consideration is the price paid by the promisee for the promisor's promise. Payment does not have to be in the form of money. It may be either a

24 (1976) 22 FLR 70.

25 *Merritt v Merritt* [1970] 1 WLR 1211.

26 *Edwards v Skyways Ltd* [1964] 1 WLR 349.

27 High Court, Kiribati, (unreported) (14 May 1982).

promise or services or, in certain circumstances, avoidance of disbenefit to the promisor.²⁸

Principles of consideration

Consideration must move from the promisee

The promisee (meaning, in this case, the person seeking to enforce the promise) must have provided the consideration, not a third party.²⁹

Consideration must not be past consideration

When the act or promise relied on as constituting consideration is done or given before the promisor's promise, rather than in exchange for it, this is known as past consideration. It will not suffice to support a contract.³⁰

Consideration must be bargained for

The act or forbearance must be done by the promisee with the agreement or assent of the promisee, that is, as part of an agreement or bargain between the parties.

Consideration must be something of value in the eyes of the law

A moral obligation to perform a promise does not constitute consideration for making it.³¹ Similarly, a promise is not binding because it was actuated by a worthy motive.³²

Consideration need not be adequate, but must be sufficient

A promisor cannot complain if what he has agreed to take in return for his promise is not as valuable as the promise. A promise may even be made for nominal consideration. In *Azam v Azam*,³³ a husband agreed to sell his interest in the family home to his wife for \$200. This was held to be binding.

While consideration exchanged need not be of equal value to the promise, and, in some cases, may be of extremely questionable value indeed, it must comprise some element which can be regarded as the 'price' of the transaction.

28 *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512.

29 *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847.

30 *Roscorla v Thomas* (1842) 3 QB 234.

31 *Eastwood v Kenyon* (1840) 113 ER 482.

32 *Thomas v Thomas* (1842) 114 ER 482.

33 (1967) 13 FLR 115.

There are certain acts that the law regards as insufficient to amount to consideration. An example is performance of an act which the plaintiff is under a public duty, imposed by law, to do. This act cannot amount to consideration unless the plaintiff does something over and above that duty.³⁴ Performance of an existing contractual duty to the other party is also normally insufficient.³⁵

Promissory estoppel

Promissory estoppel is one of the most controversial areas of contract law. In the English case of *Central London Property Trust v High Trees House*,³⁶ Lord Denning explained the doctrine of promissory estoppel as follows:

A promise intended to be binding, intended to be acted upon, and in fact acted on, is binding so far as its terms properly apply.

Governing rules

The principle applies in the South Pacific region, subject to restrictions imposed by subsequent English decisions. Lord Denning's wide definition must now be read subject to the following rules.

There must be an existing legal relationship

Promissory estoppel cannot arise in a vacuum. It can only arise where there is an existing relationship between the parties.³⁷ Normally this will be a contract, in which case, consideration will be a 'cardinal necessity' of the formation of the original relationship.³⁸

There must have been a reliance

A person cannot use the doctrine to enforce a promise unless he or she has taken some action on it.

The doctrine cannot be used as a 'sword'

Under English common law, the doctrine cannot be used to found a cause of action, but only as a defence.³⁹ This can be contrasted with the Australian

34 *Glasbrook Bros v Glamorgan County Council* [1925] AC 270.

35 *Stilk v Myrick* (1809) 170 ER 1168. But see *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1990] 1 All ER 512.

36 [1947] KB 130.

37 *Jamnadas Sports Fiji Ltd v Stinson Pearce Ltd* [1994] FJCA 20.

38 *Combe v Combe* [1951] 2 KB 215.

39 *Ibid.*

position, where the doctrine has been used to create new rights.⁴⁰ The courts of Fiji Islands⁴¹ and Kiribati⁴² have chosen to follow the Australian common law. In Tonga estoppel can only operate as a defence as it is regarded as a matter of evidence.⁴³ In Samoa the Supreme Court has acknowledged the developments in Australia, but declined to express an opinion as to whether that approach would be followed in Samoa.⁴⁴ It is not yet clear which approach the other countries of the region will take.

*It must be inequitable for the promisor to go back on the promise*⁴⁵

In Fiji Islands, it has been held that estoppel is closely associated with waiver.⁴⁶ In fact, it may be that the terms can now be used interchangeably.⁴⁷

Promissory estoppel and the rule in Pinnel's Case

Payment of part of a debt will not usually be sufficient consideration for a simple promise to forego the balance. This is known as the rule in *Pinnel's* case. The rule was reaffirmed by House of Lords both in *Foakes v Beer*,⁴⁸ and, more recently, in *Re Selectmove Limited*.⁴⁹ It now appears to be generally accepted that promissory estoppel may be used to mitigate the harshness of the rule in *Pinnel's Case*, provided that all the conditions discussed above are met.

It should be noted that there are other types of estoppel, including proprietary estoppel.⁵⁰

40 *Walton's Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

41 *Nair v Public Trustee of Fiji and Another*, High Court, Fiji Islands, Civ App 27/90 (unreported) (8 March 1996); *Attorney General of Fiji and Another v PACOIL Fiji Ltd* [1996] FJCA 9.

42 *Auspacific Construction Co Pty Ltd v the Attorney-General* [1997] KICA 6.

43 Evidence Act, Cap 15, s 103; *Fie'eik v Ilavalu* [1995] TLR 190; *Salvation Army (Tonga) Trust v Nau* [2001] TOLC 1.

44 *Liuvae v Samoa Credit Union League* [1997] WSSC 13.

45 *Raniga v Sony (South Pacific) Ltd*, Supreme Court, Fiji Islands, Civ App 20/79 (unreported).

46 *Patel v Patel* [1992] FJCA 22.

47 Guest, AG (ed.), *Chitty on Contracts*, 1983, 25th edn, para 206, cited with approval in *Patel v Patel* [1992] FJCA 22.

48 (1884) 9 App Cas 605.

49 [1995] 1 WLR 474.

50 See *Paul v Tuanai* [1994] WSSC 15 and *Meredith and Fuk v Pa'u* [1994] WSSC 7 for examples of the application of this principle in the region. See also Hughes, R and Macfarlane, P, 'The application of custom in South Pacific Contract Law and as a basis for an estoppel', (2004) 20 *Journal of Contract Law* 1.

Privity of contract

Privity of contract is the basic notion that a contract between two parties can have no effect on a third party. Accordingly, a third party cannot claim a benefit under a contract to which he or she is not a party, nor may liability be placed on a third party under a contract. In *Amino Qalovaki v Carpenters*,⁵¹ the plaintiff's claim related to a contract for repairs to his motor vehicle. It was found that the repair contract was made between the defendant garage and the plaintiff's insurance company, and that the plaintiff had no rights against the defendant in respect of that contract. The law has been amended by statute in the United Kingdom to allow third parties to enforce a contract where the parties so intend,⁵² but this act does not apply in the region.

The doctrine of privity is of particular relevance in the South Pacific region where ownership and management are often communal rather than individual.

There are limits to the doctrine, provided by certain exceptions to the rule. The most important of these are as follows.

Agency

The doctrine of privity does not prohibit an agent from making a contract on behalf of a principal. One area in which the agency principle has been developed is in relation to exemption clauses. In *Rabaul Stevedores Ltd v Seeto*,⁵³ the National Court of Papua New Guinea followed Privy Council decisions on this point.⁵⁴ It held that, where stevedores were employed by a carrier, commercial practice required stevedores to enjoy the benefit of exemption clauses in a bill of lading, even though they were not parties to the contract. This approach is likely to be followed in the region.

Statutory limitations

In addition to the common law limitations, regional Parliaments have intervened to confer rights on third parties. Examples are the Bills of Exchange Acts of Fiji Islands,⁵⁵ Tonga⁵⁶ and Samoa.⁵⁷ The Bills of Exchange Act 1882 (UK)⁵⁸

51 Supreme Court, Fiji Islands, Civ App 478/1978 (unreported).

52 The Contracts (Rights of Third Parties) Act 1999 (UK). The act was examined in *Nisshin Shipping Co Ltd v Cleaves and Co Ltd* [2003] EWHC 2602.

53 [1985] LRC (Comm) 383.

54 Eg, *New Zealand Shipping Co Ltd v Satterthwaite and Co Ltd* [1975] AC 154.

55 Cap 227, s 38.

56 Cap 108, s 38.

57 1976, s 38.

58 1882 (UK), s 38. This act would appear to apply in Kiribati, Solomon Islands, Tuvalu and Vanuatu.

and the Bills of Exchange Act 1908 (NZ)⁵⁹ apply in some other regional countries. These acts give the holder of a bill of exchange the right to sue on it, even though he or she was not one of the original parties.⁶⁰ In Tokelau, a third party may take a benefit if sufficiently designated in the contract, provided no contrary intention is displayed.⁶¹

Terms of the contract

Oral statements

Terms need not be written. A contract may consist entirely of oral statements or it may be partly oral and partly in writing. It is only those statements that form terms of the contract that give rise to an action for breach of contract. If the statements do not form part of the contract, then the injured party will have to look for a remedy under the law governing misrepresentation. A representation is a statement made during the course of negotiations which induced the other party to enter into the contract, but which the parties did not intend to become a term of the contract.

The main consideration in deciding whether a statement is a mere representation or a term is the intention of the parties, which is determined objectively. This is known as the intelligent bystander test, from the following words of Denning MR in *Oscar Chess v Williams*:⁶²

The question whether a [term] was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.

It is important to distinguish between a misrepresentation and a term, in order to identify the remedy that will be available to the innocent party. At common law, the only remedy for misrepresentation for an innocent party is rescission (i.e., setting aside) in equity, unless fraud or negligence can be proved, in which case damages can be recovered.

Express terms

Once it has been established that a statement forms a term of the contract, it is necessary to consider what its precise importance and effect is. A term

⁵⁹ Act no 15, s 15. This act would appear to apply in Niue and Cook Islands.

⁶⁰ Other examples can be found in regional Insurance Acts, such as the Motor Vehicle (Third Party) Insurance Act, Cap 83 (SI), ss 10–11, and the Motor Vehicle (Third Party) Insurance Act, Cap 177 (Fiji), ss 12–14, which allow, eg, an insurer to recover sums paid out under a motor vehicle third party policy from the driver in certain circumstances, even though he is not party to the policy.

⁶¹ Contract Rules 2004 (Tokelau), r 23.

⁶² [1957] 1 WLR 370, p 375.

of a contract may be

- a warranty
- a condition or
- an intermediate term.

Conditions

A condition is a vital term, going to the root of a contract, failure to perform which renders performance of the rest of the contract different in substance from that contracted for. To put it another way, if a term is so important that non-performance of it may fairly be considered as a substantial performance to perform the contract at all, it is a condition.⁶³ Breach of a condition normally entitles the innocent party to terminate the contract and/or to sue for damages.

Warranties

A warranty is a term collateral to the main purpose of the contract, breach of which only entitles the innocent party to damages.⁶⁴ Whether a term amounts to a condition or a warranty depends on the intention of the parties, ascertained objectively, at the time when the contract was made.

Intermediate terms

Innominate or intermediate terms form a new category that has been created by the courts to take account of the fact that complex contractual undertakings cannot always be categorised as either a condition or a warranty. According to this method of categorisation, what is important is the gravity of the breach and what its consequences are.⁶⁵

Exemption clauses

Such clauses are clauses of the contract which have the purpose and effect of excluding ('exclusion clause') or limiting ('limitation clause') the liability of the person inserting them. Such clauses are often found in standard form contracts. Because of the injustices which have arisen from this practice, the courts tend to view such clauses with suspicion. Clear proof is demanded that the clause in question is properly a term of the contract and that, on its true construction, it does cover the event that occurred.

⁶³ *Poussard v Spiers* (1876) QBD 410.

⁶⁴ *Bettini v Gye* (1876) 1 QBD 183.

⁶⁵ *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA).

Incorporation of the clause in the contract

The courts have developed certain guidelines to ascertain whether clauses form part of the contract. The guidelines apply to all types of clauses, not only exemption clauses.

SIGNED DOCUMENTS

A party who has signed a document embodying the terms of the contract is generally bound by those terms.⁶⁶ The only exceptions to this occur where the person inserting the term has misrepresented its effect⁶⁷ or where the plea of *non est factum* applies.⁶⁸

UNSIGNED DOCUMENTS

If a document is not signed, but merely delivered, it will only be incorporated into the contract if the other party has reasonable notice of it. Notice may be either actual or constructive. Constructive notice will apply where

- 1 the document is of such a kind that it would be assumed by a reasonable person to be a contractual document rather than, for example, a receipt;⁶⁹
- 2 reasonable steps were taken to give the class of persons to whom the recipient belonged notice of the existence of the term;⁷⁰ or
- 3 the steps were taken before the contract was made or when the contract is made.⁷¹

Interpretation of exemption clauses

Even if it is determined that a clause is a term of the contract, that is not the end of the matter. The court will examine the clause carefully, to ensure that it covers the factual situation. Generally, an exemption clause must be interpreted like any other clause, that is, according to its natural and ordinary meaning, read in the light of the contract as a whole.⁷² Negligence may be

66 *L'Estrange v Graucob* [1934] 2 KB 394.

67 *Curtis v Chemical Cleaning Co* [1951] 1 KB 805 (CA).

68 In very rare circumstances, a person who signs a document may succeed in a plea of *non est factum* on the basis that there was a substantial or radical difference between what he or she signed and what he or she thought he or she was signing. See, eg, *Foster v MacKinnon* (1869) LR 4 CP 704. But cf *Maeniani v Saemala* [1981] SILR 70.

69 *Chappelton v Barry UDC* [1940] 1 KB 532.

70 *Parker v South Eastern Railway Co* (1877) 2 CPD 416.

71 *Olley v Marlborough Court* [1949] 1 KB 532.

72 *'Istros' v FW Dahlstroem and Co* [1931] 1 KB 247.

excluded provided that the words used are clear. In *Burns Philp (South Seas) Co v Marine Pacific*,⁷³ a contract excluded liability for loss or damage to goods carried on deck 'howsoever caused'. The Court of Appeal of Fiji Islands held that these words were clearly wide enough to exclude negligence.

Statutory regulation

There is some statutory control of exemption clauses. The widest controls are contained in the Unfair Contract Terms Act 1977 (UK),⁷⁴ but this does not apply in the region. This act limits, and in some cases takes away entirely, the right to rely on exemption in certain circumstances. Generally, it restricts exclusion of liability by persons acting in the course of business. Greater protection is given to consumers.

The Fiji Islands Sale of Goods Act, Cap 230, also limits the effect of exclusion clauses in sale of goods contracts. Section 55 prevents exclusion of the protections implied by the act in consumer contracts unless it is fair and reasonable. In other contracts, the implied undertaking as to title may not be excluded, and the other undertakings may only be excluded if it is fair and reasonable. The Fair Trading Decree 1992 is also relevant. It repeats some of the provisions of the Sale of Goods Act (Fiji Islands),⁷⁵ but goes further, and prohibits restrictive and unfair trade practices.⁷⁶ The Samoan Sale of Goods Act 1975 implies protections, but does not prevent their exclusion.⁷⁷ The Sale of Goods Act 1893 (UK), as amended in 1973,⁷⁸ applies in Vanuatu to prevent the exclusion of implied terms.

Implied terms

In addition to the terms of a contract upon which the parties expressly agree, terms may be implied into the contract. The circumstances in which this will happen are limited because the courts take the approach that it is not their task to make contracts for the parties concerned, but only to interpret contracts already made.

73 [1979] FJCA 4.

74 Unfair Contract Terms Act 1977 (UK), s 6. See also Unfair Terms in Consumer Contracts Regulations 1999 (UK); *Director-General of Fair Trading v First National Bank plc* [2000] QB 672.

75 Sale of Goods Act, Cap 230 (Fiji). The Fair Trading Decree 1992 (Fiji) repeats some of its sections in Part V.

76 Parts III and IV.

77 Sale of Goods Act 1975 (Samoa), s 54.

78 Supply of Goods (Implied Terms) Act 1973 (UK).

Terms implied by common law

The courts will only imply a term if the parties intended that term to be part of the contract.

TERMS IMPLIED BY CUSTOM OR TRADE USAGE

The custom or usage must be so well known that every party to a contract made in that locality or in relation to that trade must be taken to have intended to have included that custom or usage in the contract.

TERMS IMPLIED TO GIVE BUSINESS EFFICACY

A term which is designed to give business efficacy will only be implied where it is so obvious that it goes without saying. In *Pragji Sidha and Another v Dairaj*,⁷⁹ the appellants covenanted by deed to maintain the respondent, their widowed sister-in-law, until her death or remarriage, whichever should occur first. At the time when the deed was executed, the respondent was living in the family home. She left because she was treated so badly. The deed made no mention of the level or place of maintenance. It was held that the intention of the parties was that the respondent should be maintained in 'a reasonable manner according to her station in life'. Accordingly, that term was read into the contract. However, it was not clear that they had intended her to be bound to remain in the family home, and that she would only be maintained while she was there. This term was not read into the contract.

TERMS IMPLIED INTO CONTRACTS OF A PARTICULAR CLASS

In certain classes of contracts, implied terms have become standardised, and they will be implied in the absence of contrary intention. For example, in *Liverpool City Council v Irwin*,⁸⁰ it was held that a contract between a landlord and a tenant would always have an implied term that the landlord would maintain any common areas. Certain terms are also always implied into contracts between an employer and an employee, for the sale of goods, and for supply of labour and materials.

TERMS IMPLIED FROM A PREVIOUS CONSISTENT COURSE OF DEALING

The courts have been prepared to save an agreement from failing on the grounds of uncertainty if the parties' intention can be ascertained from a previous course of dealing.

⁷⁹ (1962) 8 FLR 91.

⁸⁰ [1977] AC 239.

Terms implied by statute

Terms are also implied by statute. Some of these statutory terms may be excluded by the parties, but others may not. Examples of terms implied by statute can be found in the Sale of Goods Acts of the region. The region has been slow to legislate in this area and, thus, slow to protect the consumer. Fiji Islands and Samoa are the only countries which have their own Sale of Goods Acts (the Sale of Goods Act, Cap 230 (Fiji), and the Sale of Goods Act 1975 (Samoa)). Sections 14–16 of the Fiji Islands Act imply the following terms into a contract for the sale of goods:

Section 14 – an undertaking as to title.

Section 15 – a condition that goods will correspond to description.

Section 16 – a condition that goods will be of merchantable quality and fit for purpose.

Sections 13–16 are the Samoan equivalents. Sections 12–14 of the Sale of Goods Act 1893 (UK), as amended in 1973 by the Supply of Goods (Implied Terms) Act (UK), contain the equivalent United Kingdom provisions, and these apply in Vanuatu. The unamended Sale of Goods Act 1893 applies in several of the other countries of the region. In Tokelau, terms are implied by the Contract Rules 2004 (Tokelau).

Formalities

Where there is no consideration, a contract must be in the form of a deed. Simple contracts are not generally required to be in any particular form. There are some statutory exceptions to this, whereby certain types of contract must either be in writing or be evidenced in writing.

An example of contracts required to be made in writing are bills of exchange. The Bills of Exchange Act (Fiji),⁸¹ the Bills of Exchange Act (Tonga)⁸² and the Bills of Exchange Act (Samoa)⁸³ provide that a bill of exchange and a promissory note must be made in writing. Solomon Islands, Kiribati, Tuvalu and Vanuatu do not have their own act, but the Bills of Exchange Act (UK) applies.⁸⁴ The Bills of Exchange Act 1908 (NZ) applies in Cook Islands and Niue.⁸⁵ Other regional examples can be found in marine insurance legislation and Bills of Sale Acts. The Contract Act⁸⁶ of Tonga formerly required contracts for the sale of goods in excess of 500 pa'anga to be in writing, but that act has since been repealed.⁸⁷

81 Cap 227, ss 3(1) and 17(2).

82 Cap 108 (1973), ss 3(1) and 17(2).

83 No 8 of 1976, ss 3(1) and 17(2).

84 1882, ss 3(1) and 17(2).

85 Act No 15 (NZ), ss 3(1) and 17(2).

86 Cap 26. It did not apply to corporate purchasers: *Teta Ltd v Ullrich Exports Ltd* [1981–8] Tonga LR 127.

87 Contract (Repeal) Act 1990.

Contracts to be evidenced in writing

Section 4 of the English Statute of Frauds 1677⁸⁸ required the following contracts to be made in writing, or be evidenced by a note or memorandum in writing, signed by the person to be charged:

- contracts of guarantee
- contracts for the sale or other disposition of land
- contracts made in consideration of marriage
- contracts not to be performed within one year of their making
- contracts by an executor or administrator to be responsible for the deceased's debts.

This section of the Statute of Frauds was introduced into the law of Cook Islands,⁸⁹ Fiji,⁹⁰ Kiribati,⁹¹ Solomon Islands,⁹² Tonga,⁹³ Tuvalu⁹⁴ and Vanuatu⁹⁵ as part of the law of England that was applied to those countries. In Fiji, it has been replaced by s 59 of the Indemnity, Guarantee and Bailment Act, Cap 232, which is to the same effect. Section 4 of the Statute of Frauds was later modified by the Law Reform (Enforcement of Contracts) Act 1954 (UK) which restricted the application of the section to the first two categories of contracts listed above. This change was introduced in Kiribati, Solomon Islands, Tuvalu and Vanuatu in 1961.⁹⁶ Section 4 was further modified by s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (UK), which requires contracts for the disposition of any interest in land to be made in writing, not merely evidenced in writing. This act would appear to have been in force in Tonga as an act of general application between its introduction in 1989 and 2003 when such acts ceased to apply.⁹⁷ On the other hand, in Nauru,⁹⁸ Niue⁹⁹ and Samoa,¹⁰⁰ s 4 of the Statute of Frauds was disapplied by legislation at an early stage.

88 This Act was substantially re-enacted by the Law of Property Act 1925 (UK), s 40(1).

89 Cook Islands Act 1915 (NZ), s 615.

90 Supreme Court Ordinance 1875, s 35.

91 Pacific Order in Council 1893, s 20.

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 Western Pacific (Courts) Order 1961 (UK), s 15.

97 Civil Law Act 1966, s 3, as amended by the Civil Law (Amendment) Act 2003.

98 Custom and Adopted Laws Act 1971, s 9.

99 Niue Act 1966 (NZ), s 711(2).

100 Samoa Act 1921 (NZ), s 352.

The form required

If the agreement itself is not in writing, it must be evidenced by a sufficient memorandum or note. It does not matter that it was not intended to be a note or memorandum of the contract, as long as it acknowledges the existence of a contract. It is also essential that it contains all the essential terms of the contract. This requirement has been interpreted strictly. In *Ram Narayan v Rishod Shah*,¹⁰¹ the Privy Council held that all the material terms must be precisely recorded. The case involved an agreement for the sale of two parcels of land and some chattels to the defendant Shah for £5,000. The plaintiff signed a written memorandum of the agreement, which specified the price, and the land, but not the chattels. The plaintiff refused to complete. It was held that the memorandum was insufficient for the purposes of s 59 as the contract was an indivisible contract, for an indivisible price, and all the subject matter was not described. However, the court made it clear that a term which is not of major importance and is only of benefit to one party may be waived by that party.¹⁰²

In most countries of the region the memorandum may consist of various letters and papers, but they must be connected and complete. It must be signed by the person whom the plaintiff seeks to make liable or a person expressly authorised to sign. It need not be signed by both parties. Thus, a person who has not signed can enforce it against the party who has.

Part performance

The lack of evidence in writing does not invalidate a contract, it merely means it cannot be enforced in law. Under the equitable doctrine of part performance, even if there is no written memorandum or note, the plaintiff may obtain specific performance in equity of an oral contract if the plaintiff can show sufficient acts of part performance.¹⁰³ In *Ram Nandan v Shiu Dutt*,¹⁰⁴ it was specifically held that the doctrine of part performance applies in Fiji Islands.

The doctrine is strictly limited, and certain requirements must be satisfied before it can apply:

- the acts relied on must lead to the conclusion that a contract exists¹⁰⁵
- the acts must be done by the person seeking to enforce the contract

101 [1979] 1 WLR 1349.

102 See also *Ram Jeet v Chotelal* (1962) 8 FLR 209.

103 *Steadman v Steadman* [1976] AC 536.

104 [1984] FJCA 1.

105 *Rawlinson v Ames* [1925] Ch 96.

- the only impediment to specific performance must be the lack of writing¹⁰⁶
- there must be clear and proper evidence of the contract, whether written or oral.

Factors vitiating contracts

Introduction

Normally, once a contract has been made and its terms ascertained, it will be given effect by a court according to its terms. However, there are a number of limited grounds on which a court will refuse to enforce the terms of a contract because to do so would be either unfair to one or both of the parties or contrary to public policy. These grounds are sometimes referred to as ‘vitiating factors’, and they include incapacity, duress, mistake and illegality.¹⁰⁷

Minors’ contracts

Introduction

In order to make a valid contract, the parties must both be of full capacity. That is, they must be recognised as having ability in law to contract. Disability may arise because a party is a minor, mentally impaired or intoxicated. This chapter looks only at the capacity of minors.

Who is a minor?

A minor is any person under the age of majority. At common law, the age of majority was 21 years. Persons under that age were referred to as ‘infants’. ‘Minor’ is now the preferred term. The age of majority has been modified by statute in some countries of the region, namely, Marshall Islands¹⁰⁸ and Nauru.¹⁰⁹ The Contracts Act¹¹⁰ originally reduced the age of majority to 16 in Tonga, but that act has since been repealed.¹¹¹ In England, the age of majority was reduced from 21 to 18 by the Family Law Reform Act 1969.¹¹² Assuming this to be an act of general application, it will apply in Vanuatu. In Samoa,

106 *Britain v Rossiter* (1882) 11 QBD 123.

107 Misrepresentation is another vitiating factor, but it is outside the scope of this chapter.

108 Domestic Relations Act, 26 MIRC Cap 1, s 107.

109 Interpretation Act 1971.

110 Cap 26.

111 Contracts (Repeal) Act 1990. Note that it still applies to contracts made before 15 February 1991.

112 Family Law Reform Act 1969 (UK), s 1.

the Infants Act 1961 provides that the age of majority is 21.¹¹³ This act gives the court discretion to enforce any contract with a minor. In Tokelau, the relevant age is 16 and the contract may still be enforced if it can be shown to be fair and reasonable.¹¹⁴

In the other countries of the region, although there are, in some instances, statutes reducing the age of majority for other purposes, such as marriage and voting, the age of majority for contractual purposes, remains 21. Thus, the law in this area is more likely to be of practical relevance within the region than in countries where the restriction on contractual capacity applies to a smaller section of the population.

The effect of minority

The common law position required consideration of three separate categories, being:

- contracts binding on minors
- contracts binding on minors unless repudiated
- contracts not binding unless ratified.

This position was originally altered in England by the Infants (Relief) Act 1874. This act removed the third category, as it provided that ratification was ineffective.¹¹⁵ The 1874 Act appears to apply in all countries of the region, other than Samoa, Cook Islands, Niue, Tokelau and Tonga. The act was finally repealed in the United Kingdom by the Minors (Contracts) Act 1987.¹¹⁶

The Cook Islands and Niue are subject to the Minors' Contracts Act 1969 (NZ).¹¹⁷ Nauru is specifically stated to be subject to the common law of England relating to contractual liability of minors.¹¹⁸ As mentioned above, Samoa has its own act which, while based on the Infants Act 1908 (NZ), has its own peculiarities.¹¹⁹ Tokelau also has its own Rules.

To deal with the law throughout the region, it is, therefore, necessary to examine the common law position, the amendments made by both British acts,

113 Section 2.

114 Contract Rules 2004 (Tokelau), r 9.

115 Infants Relief Act 1874 (UK), s 2.

116 The Committee on the Age of Majority had recommended reform at an earlier date (Cmd 3342/1967), but its proposals were not enacted.

117 Cook Islands Act 1915 (NZ), s 630, continued in force by Cook Islands Constitution Act 1964 (NZ), Art 77, and Niue Act 1966, s 692, continued in force by the Constitution of Niue 1974, s 71. Section 692 was repealed by the Legislation (Correction of Errors and Minor Amendments) Act 2004, but the Minors' Contracts Act 1969 is still regarded as part of the law of Niue.

118 Custom and Adopted Laws Act 1971, proviso to the First Schedule, as amended by the Custom and Adopted Laws (Amendment) Act 1976, s 4(e).

119 *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125.

the New Zealand Act of 1969, the Samoan act and the Tokelau Rules. The common law categories will be used as the starting points for this exercise, with the amendments to each of these being discussed under each heading. The New Zealand and Samoan acts and Tokelau Rules are not dealt with in detail here.

CONTRACTS BINDING ON MINORS

There are two types of contracts which were, and remain, binding on minors, in all jurisdictions:

- contracts for necessities
- beneficial contracts of service.

Contracts for necessities Unfortunately, there is no precise definition of necessities. There is some guidance in the Sale of Goods Acts applying in the region. For example, s 4 of the Fiji Islands Act provides:

‘Necessaries’... means goods suitable to the condition in life of such infant or minor or other person and to his actual requirements at the time of the sale and delivery.

Two questions have to be posed to determine whether goods or services constitute necessities:

- is the article or service capable of being a necessary in the eyes of the law?
- is the article or service necessary for this minor?

‘Necessaries’ is not restricted by law to things required to survive, but may include items required for a reasonable existence. Mere luxuries cannot be necessities; luxurious items that have some utility may be.¹²⁰ The second question is a question of fact and depends on the particular circumstances of the minor. For example, it is necessary to ascertain whether the minor is already sufficiently supplied with such goods.¹²¹

Particular care should be taken in this area of law when considering the applicability of cases from outside the region. Items which are regarded by the law as necessities in England may not be regarded as necessities in the South Pacific region, and vice versa. The geographical and cultural situation

¹²⁰ *Chappel v Cooper* (1844) 153 ER 105.

¹²¹ *Nash v Inman* [1908] 2 KB 1.

of the minor are part of the circumstances which will determine what is necessary for him or her.

Even if goods are found to be necessities, it does not mean that the minor will have to pay the contract price. The Sale of Goods Acts¹²² endorse the common law position,¹²³ which is that the liability is only to pay a reasonable price. The position regarding necessary services would appear to be different, and requires payment of the contract price.¹²⁴

Beneficial contracts of service Contracts of service, such as apprenticeships, have been held to be binding on a minor because they provide him or her with the advantage of a livelihood. Again, to deny capacity would be counter-productive, as it would discourage employers from dealing with minors. However, the contract, looked at as a whole, must be substantially for the benefit of the minor. One or two prejudicial terms will not be decisive, and the court will weigh the onerous terms against the advantageous terms.

CONTRACTS BINDING ON MINORS UNLESS REPUDIATED

At common law, contracts that confer an interest in property on the minor which involve continuous or recurring obligations are valid unless repudiated. Examples are contracts for the purchase of shares,¹²⁵ where calls may be made from time to time, and leases,¹²⁶ where rent may be payable on a recurring basis.

The repudiation must take place during the minority, or within a reasonable time afterwards. What is reasonable will be a question of fact, to be considered in the circumstances of each case.¹²⁷ In *Edwards v Carter*,¹²⁸ the House of Lords has held that four years and eight months was too long to be reasonable. The common law position in this category has not been affected by UK legislation.

CONTRACTS NOT BINDING UNLESS RATIFIED

In the case of contracts that are not for necessities and do not confer an interest in property involving continuous or recurring obligations, the common law rule is that they are voidable unless ratified after the minor

122 See, eg, Sale of Goods Act, Cap 230 (Fiji), s 4.

123 *Nash v Inman* [1908] 2 KB 1.

124 See, eg, *Roberts v Gray* [1913] 1 KB 520.

125 *Dunlop and Wicklow Railway v Black* (1852) 8 Ex D 181.

126 *North Western Railway Co v M'Michael* (1850) 5 Exch 114; *Davies v Beynon Harris* (1931) 47 LT 783.

127 *Edwards v Carter* [1893] AC 360.

128 [1893] AC 360.

reaches majority. An example of such a contract would be a trading contract where the minor is the supplier.¹²⁹

In countries where the Infants (Relief) Act 1874 applies, this category no longer exists, as s 2 renders such contracts incapable of being ratified, even if fresh consideration is given. However, in countries where the common law remains intact, ratification will result in the contract being enforceable on both sides.

Liability of a minor in tort

Generally, a minor is liable for action in tort, such as defamation, conversion and negligence, but a minor will not be liable for a tort connected with a contract that is not binding on the minor.¹³⁰ To hold the minor liable in such a case would be to indirectly enforce an otherwise unenforceable contract. If, on the other hand, the tort is unconnected to a contract, the minor will be liable under general tortious principles.¹³¹

Duress, undue influence and unconscionable contracts

Introduction

People may be compelled to enter into unfavourable transactions by a number of factors: the demands of their own circumstances; the lack of an alternative source for the benefits they seek or, more generally, the bargaining strength of the other party. It would, of course, be contrary to all legal principles to allow a party to escape from the consequences of a transactions into which he or she has freely and voluntarily entered. However, there are circumstances in which the pressure is such that the victim cannot be said to have acted freely and voluntarily. In certain cases of improper pressure, the law will afford relief.

The kinds of improper pressure that are recognised fall within the following categories:

- the common law doctrine of duress
- the equitable rules of undue influence
- the limited common law doctrine of unconscionability
- statutory protection.

The common law doctrine of duress

If one party puts pressure on the other to enter into the contract which amounts to duress, the contract will be voidable. The original common law

129 *Mercantile Union Guarantee v Ball* [1937] 2 KB 498.

130 *Jennings v Randall* (1799) 8 Term R 335.

131 *Burnard v Haggis* (1863) 14 CB (NS) 45; *Balsett v Mingay* [1943] KB 281.

doctrine confined the concept to narrow limits. Originally, only physical pressure applied to the person was recognised, and this required actual or threatened violence to the victim. One example can be found in *Barton v Armstrong*,¹³² where the defendant threatened the plaintiff with death if the plaintiff's company did not pay a substantial sum of money to the defendant.

Duress, today, is more likely to take the form of economic duress, and it is now well established that this will suffice.¹³³ However, in *Pao On v Lau Yiu Long*,¹³⁴ the Privy Council refused to uphold a claim of economic duress. They made it clear that, in a contractual situation, commercial pressure is not enough. There must be some factor present 'which could be regarded as coercion of his will, so as to vitiate his consent'.¹³⁵ Where duress is established, the injured party is entitled to set the contract aside. Damages may also be recovered in tort.

The equitable rules of undue influence

If one party induces the consent of the other by undue influence, the contract is voidable in equity. There are two classes of undue influence:¹³⁶

- presumed undue influence
- actual express influence.

PRESUMED UNDUE INFLUENCE

There are two categories of situations when undue influence will be presumed by the courts. First, there are certain relationships which the courts have held are so likely to give rise to undue influence that they will automatically presume undue influence, unless there is evidence to the contrary. The relationships which are automatically presumed to give rise to undue influence are those of parent and child, solicitor and client, doctor and patient, and religious adviser and disciple. It is important to note that the relationship of husband and wife,¹³⁷ and banker and customer,¹³⁸ have been held not to fall within such special relationships.

In addition to these special relationships, the courts have held that wherever there is a relationship of ascendancy and dependency between one person

132 [1976] AC 104.

133 *The Atlantic Baron* [1979] QB 705.

134 [1980] AC 614.

135 See also *Universe Tankships v ITF* [1982] 2 All ER 67; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] 1 All ER 641.

136 *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, paras 8–9; 103–5; 151–8.

137 *Bank of Montreal v Stuart* [1911] AC 120; *Barclay's Bank v O'Brien* [1994] 1 AC 180.

138 *National Westminster Bank v Morgan* [1994] 1 AC 686.

and another, a situation where one person is reliant upon the assistance and advice of another, such as may occur between an elderly family member and younger more literate family member,¹³⁹ and between an overbearing husband and a submissive wife,¹⁴⁰ then it is appropriate to presume undue influence by the ascendant person over the dependent person, in the absence of proof to the contrary.

ACTUAL EXPRESS INFLUENCE

Where there is no such relationship between the parties as to give rise to a presumption of undue influence, the party alleging undue influence must prove that he or she was subjected to influence which excluded his or her free consent.¹⁴¹ As in the case of duress, the contract is voidable, not void. The remedy of rescission can be sought. Award of this remedy is subject to the usual limits imposed by equity, that is,

- affirmation
- lapse of time
- impossibility of restitution
- third party rights.

It is important to note that the courts have held that third parties who make contracts with a person who has been induced to enter into that contract by the undue influence, actual or presumed, of another person will be affected by that undue influence, if they have actual or constructive notice of the undue influence. Thus a contract made with a bank by a husband and wife jointly may be set aside by the wife on the grounds of undue influence by the husband if the wife can show that the bank had actual or constructive notice of the undue influence exerted on her by the husband.¹⁴² Further, the courts have held that one situation when a bank will be held to have constructive notice of undue influence on a wife is when she signs a contract to provide that property owned wholly or partly by her is to be held by the bank as security for a loan which is solely for the benefit of the husband.¹⁴³ The courts have also made it clear that a bank will be fixed with constructive notice not only in the case of a wife and husband, but whenever one party

139 *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127.

140 *Barclay's Bank v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773.

141 *CIBC Mortgages plc v Pitt* [1993] 4 All ER 433.

142 *Barclays Bank v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773.

143 *Ibid.*

to a contract is providing property to a bank as security for a loan to another person. On the other hand, if both parties to a contract to provide property as security to the bank are to benefit from the loan, the bank will not be held to have constructive notice of any undue influence that may have been exerted on one party by the other.¹⁴⁴

Unconscionability

Equity also exercises jurisdiction to set aside a contract which is harsh or unconscionable. The notion of unconscionability is very difficult to define. The traditional way of viewing unconscionability is as a very narrow doctrine. In *Fry v Lane*,¹⁴⁵ the court held that there were three requirements:

- the plaintiff must be poor and ignorant
- the sale must be at an undervalue
- the vendor must not have received independent advice.¹⁴⁶

The remedy in a case of unconscionability is rescission, subject to the same bars that apply in the case of duress and undue influence.

Statutory protection

The Niue Act¹⁴⁷ provides that a court has discretion to refuse to enforce a contract made by a Niuean if the court regards the contract as oppressive, unreasonable or improvident.

The Cook Islands Act¹⁴⁸ gives the High Court the discretion to alter a contract made by a Cook Islands Maori if the court is of the opinion that it is oppressive, unreasonable or improvident. The court may either refuse to enforce it or may enforce it only to such an extent and on such terms as it thinks fit.

The Fair Trading Decree 1992 (Fiji)¹⁴⁹ provides that a person involved in trade or commerce, and, more particularly, the supply of goods or services, shall not engage in unconscionable conduct. Unconscionable conduct is not defined.

144 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200.

145 (1880) 40 Ch D 312.

146 In *Cresswell v Potter* [1978] 1 WLR 225n, Megarry, J, said that 'poor' and 'ignorant' should be replaced by the terms 'a member of the lower income group' and 'less highly educated'.

147 Niue Act 1966 (NZ), s 711.

148 Cook Islands Act 1915, s 645.

149 Fair Trading Decree 1992 (Fiji), s 55.

The Contract Act¹⁵⁰ of Tonga formerly prohibited action against a Tongan subject for the purchase of goods in excess of 500 pa'anga unless the agreement was in writing, stamped and registered. That act has since been repealed.¹⁵¹

The Unfair Terms in Consumer Contracts Regulations 1999 (UK) subject terms of a contract between a seller or supplier of goods or services and a consumer which has not been 'individually negotiated' to a requirement of fairness.¹⁵² However, these regulations and the act under which they are made¹⁵³ do not apply in the region.

Mistake

Introduction

'Mistake', in the context of vitiation of the contract, has a much narrower meaning than normal. The law will only interfere in a limited number of cases.

Common mistake

Common mistake occurs where both parties make the same mistake. English courts have recently made clear that this includes a mistake of law as well as a mistake of fact.¹⁵⁴ For a common mistake of fact or law to vitiate a contract of any kind, it must be fundamental.¹⁵⁵ To amount to a fundamental mistake, it must be such as to render the performance of the contract impossible.¹⁵⁶ One example of common mistake is where the subject matter of the contract has ceased to exist.¹⁵⁷

In *Farid Khan v Ali Mohammed and Others*,¹⁵⁸ a contract based on an error made by all parties as to the financial position of a partnership was

150 Cap 26, s 3(2). It did not apply to corporate purchasers: *Teta Ltd v Ullrich Exports Ltd* [1981–8] Tonga LR 127.

151 Contract (Repeal) Act 1990.

152 The regulations do not apply to 'core terms' defining the main subject matter of the contract, but this term has been interpreted restrictively: *Director-General of Fair Trading v First National Bank plc* [2000] QB 672; *Bairstow Eves London Central Ltd v Smith* [2004] EWHC 263. See also EEC Council Directive 93/13, Official Journal L 095, 21 April 1993, 29–34.

153 Unfair Contract Terms Act 1977 (UK).

154 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 372–5; *Bank of Credit and Commerce International SA v Ali and Others* [2001] 2 WLR 735; *Brennan v Bolt Burdon* [2005] QB 303, 314.

155 *Bell v Lever Brothers Ltd* [1932] AC 161: a mistake as to quality will not normally suffice.

156 *Great Peace Shipping Co Ltd v Tsavlis Salvage Ltd* [2003] QB 679.

157 See, eg, *Couturier v Hastie* [1843–60] All ER 280.

158 (1982) 28 FLR 94.

held to be a fundamental error going to the root of the contract. The contract was therefore void.

Mutual mistake

This refers to the situation where the parties are at cross-purposes. This may be as to the subject matter of the contract or the identity of the other party. If the mistake is so serious that it negates the possibility that the parties actually reached an agreement, then the contract will be void.

A classic example is *Raffles v Wichelhaus*,¹⁵⁹ where the defendant agreed to buy a cargo of cotton from the plaintiff, arriving 'ex Peerless' from Bombay. There were two ships called 'Peerless' and both sailed from Bombay, but the defendant meant the one which sailed in October, and the plaintiff meant the one which sailed in December. It was held that there was no contract.

Unilateral mistake

Where one party is mistaken and the other knows or ought to have known of the mistake, the contract is void for unilateral mistake. Many cases involve mistake as to identity. It has become clear that mistake as to attributes will not render the contract void, whereas mistake as to identity will.

Three factors appear to be required in order to render a mistake as to identity fatal to the contract:

- at the time of the apparent agreement, the identity of the other party must have been material
- there must have been an intention to contract with a different entity
- this intention must have been obvious to the other party.

If parties contract face to face, there is a presumption that they intend to deal with each other and the contract is not, therefore, void for mistake, although it may be voidable for misrepresentation.¹⁶⁰ On the other hand, when the parties contract by correspondence, then the contract is void if one of the parties, to the knowledge of the other party, thought that he or she was contracting with a different person.¹⁶¹

Documents mistakenly signed

In certain circumstances, the courts recognise a particular kind of mistake concerning written contracts, where only one party alleges that the document

159 (1864) 159 ER 375.

160 *Lewis v Avery* [1972] 1 QB 198.

161 *Cundy v Lindsay* (1878) 3 App Cas 459; *Shogun Finance Ltd v Hudson* [2004] 1 AC 919.

signed was of a wholly different nature to that which he or she intended to sign. This is known as *non est factum* (literally, 'this is not a deed'). This plea was discussed in the Solomon Islands case of *Maeaniani v Saemala*.¹⁶² There, the defendant signed a receipt for money paid in respect of the sale of his land. When the time came to transfer the land, he pleaded *non est factum*, on the basis that he did not read the receipt and thought he was going to be a tenant in common of the land, and that the document was for the plaintiff to show to his bank. The High Court held that, as laid down in the English case of *Gallie v Lee*,¹⁶³ a plea of *non est factum* would only be upheld where the element of consent was totally lacking. This would only be the case where the transaction that the document purported to effect was essentially different in substance and kind from that intended.

Mistake in equity

The common law rules concerning operative mistake are very strict. Accordingly, the courts utilised equity to introduce a more flexible approach.¹⁶⁴ In *Solle v Butcher*,¹⁶⁵ it was held that wherever there was a common misapprehension which was 'fundamental' the court had an equitable power to set it aside. In equity the contract was voidable, rather than void. However, the House of Lords has since held that *Solle v Butcher*¹⁶⁶ cannot stand with the House of Lords decision in *Bell v Lever Brothers Ltd*.¹⁶⁷ Accordingly, there is no jurisdiction to grant equitable relief on the grounds of common mistake where that mistake does not render the contract void in law.¹⁶⁸

Illegal contracts

Introduction

A contract which is contrary to law or contrary to public policy is void.

Contracts contrary to law

Illegality may arise where the making of the contract is itself illegal, for example, where such a contract is prohibited by statute,¹⁶⁹ or where the

¹⁶² [1981] SILR 70.

¹⁶³ [1970] 2 WLR 1078.

¹⁶⁴ *Solle v Butcher* [1950] 1 KB 671.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ [1932] AC 161.

¹⁶⁸ *Great Peace Shipping Co Ltd v Tsavliris Salvage Ltd* [2003] QB 679.

¹⁶⁹ *Hunter v Apgar* (1989) 35 FLR. 180; *Gonzalez v Akhtar* [2004] FJSC 2.

contract was performed in a manner which is prohibited by law.¹⁷⁰ The most obvious example of a contract which is contrary to law is an agreement to commit a criminal offence, for example, a conspiracy to murder a third party.¹⁷¹ Another obvious example is an agreement which contravenes a statute. An example of this is *Narendra Nand Sharma v Jagdeo Singh*,¹⁷² where the parties signed a deed whereby the defendant transferred his taxi and taxi permit to the plaintiff. The Traffic (Taxis and Rental Cars) Regulations 1967 forbade the transfer of a permit. It was held that the agreement was illegal and, therefore, void.

As customary law is a source of law in most countries of the region,¹⁷³ it is open to the courts to find a contract which is contrary to customary law to be illegal.

Contracts contrary to public policy

The following types of contract have been held to be contrary to public policy:

- contracts which promote immoral conduct¹⁷⁴
- contracts promoting corruption in public life¹⁷⁵
- contracts tending to pervert the course of justice¹⁷⁶
- contracts prejudicial to public safety¹⁷⁷
- contracts prejudicial to the status of marriage.

In the Solomon Islands case of *Gavin v Gavin*,¹⁷⁸ the last ground was pleaded unsuccessfully.

Contracts in restraint of trade

Restraint clauses are of two types:

- those restricting activities of an employee during and after the period of employment
- those in business sales agreements designed to protect goodwill.

170 *Aerolift International (SI) Ltd v Mahoe Heli-Lift (SI) Ltd* [2003] SBCA 16.

171 An example of an agreement to commit a criminal offence can be found in *Allen v Rescous* (1803) 83 ER 505.

172 (1973) 19 FLR 164. See also *Fakatava and Fakatava v Koloamatangi and Minister of Lands* [1974–80] Tonga LR 16 and *Murray Cockburn and Another v Bilo Limited and Three Others, Court of Appeal, Fiji* (unreported) (24 November 1984) (failure to obtain consent of the Native Land Trust Board to deal with customary land rendered an agreement to sell customary land void).

173 See Chapter 3.

174 *Upfill v Wright* [1911] 1 KB 506.

175 *Parkinson v College of Ambulance* [1925] 2 KB 1.

176 *Kearly v Thompson* (1890) 24 QBD 742.

177 *Regazzoni v Sethia* [1958] AC 301.

178 [1990] SILR 160.

All restraints of trade are presumed to be void unless shown to be reasonable and to be in the public interest. If sufficient consideration has been given in exchange for the restraint, then it will generally be upheld.¹⁷⁹ The doctrine has been used to restrict the use of *solus* agreements,¹⁸⁰ where the public interest takes on greater significance.¹⁸¹

Effects of illegality

The most common effect of illegality, whether through contravention of the law or public policy, is to prevent enforcement of the contract, in whole or in part. The contract will be void *ab initio*, and, therefore, any property which has already passed cannot be recovered. An interesting example of the dilemma faced by the courts is provided by *DB Waite (Overseas) Ltd v Sidney Leslie Wallath*.¹⁸² There, a written agreement to transfer a native lease required the approval of the Native Land Trust Board for validity. The purchaser paid deposit moneys to the vendor before the agreement was submitted by the vendor for the board's approval. The vendor did not request approval or take any further action. When the purchaser claimed the return of this deposit and damages, the vendor claimed the agreement was illegal without approval and asserted that no moneys were recoverable. It was held that damages could not be awarded because this would mean that the agreement had passed some interest in the land, which was not possible without the board's approval. However, without giving clear reasons, the court ordered the vendor to refund the deposit moneys and interest to the purchaser.

In Cook Islands, contracts declared by the courts to be illegal are governed by the Illegal Contracts Act 1987 (Cook Islands).

Discharge of the contract

Termination by frustration

Introduction

Frustration occurs whenever the law recognises that a contractual obligation cannot now be performed because of a change in circumstances. The change in circumstances must create a radical difference between what a party

179 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1984] AC 535.

180 Agreements that restrict a retailer's distribution network, pricing policies or chain of supply.

181 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269.

182 (1972) 18 FLR 141.

agreed to do and what would now take place. The change must not have been brought about by the conduct of the parties.¹⁸³

The following rules and requirements apply:

- there must be something more than the contract becoming more onerous, or inconvenient or expensive;¹⁸⁴
- the event must not be provided for in the contract;¹⁸⁵
- generally, the event must not have been foreseen by the parties. In *Picardie Holdings (NH) Limited v Waagemenn*,¹⁸⁶ the plaintiff was seeking to enforce an agreement for the sale of land to the defendant. The defendant alleged that the plaintiff no longer owned the land, due to statutory changes made to land holding laws, and that, therefore, the contract was frustrated. It was held that the contract was not frustrated as it clearly indicated that the defendant was aware of the changes to the law, which, in any event, did not prevent the sale of the land, but merely meant that the defendant might have to negotiate with customary landowners thereafter.

There is no requirement to show that the party who foresaw the event acted fraudulently in concealing this knowledge from the other party.¹⁸⁷

- the event must not be due to the fault of one of the parties;¹⁸⁸
- a provision purporting to exclude the doctrine of frustration will not be enforced, as it is contrary to public policy;¹⁸⁹
- normally, a lease cannot be frustrated, as it creates not a mere contract, but an estate in land.¹⁹⁰

Perhaps the most obvious example of circumstances amounting to frustration is the destruction of the subject matter of the contract. Another obvious example is where a change in the law between the making of the contract and its execution renders performance illegal.

183 *HP Kasabia Brothers Limited v Reddy Construction Co Ltd* (1977) 23 FLR 235.

184 *Ibid.*

185 But note that the provision must be clear to be applied: *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125.

186 [1980–8] 1 Van LR 5.

187 *Air Transport Ltd v Island Construction Management Ltd* [1999] SBCA 2; see, further, Corrin, J, ‘Case note on *Air Transport Ltd v Island Construction Management Ltd*’ (1999) 6 JSPL, case note 6.

188 *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.

189 *Ertel Bieber and Co v Rio Tinto Co Ltd* [1918] AC 260.

190 *London and Northern Estates Co v Schlesinger* [1916] 1 KB 20. But see *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 All ER 161.

Effects of frustration

At common law, the contract is automatically discharged.¹⁹¹ Each party is automatically released from further performance of the contract, but it is not made void *ab initio*. Unconditional rights accrued before frustration remain enforceable; rights not yet accrued are unenforceable. Neither party is entitled to damages after frustration. The loss arising from the discharge lies where it falls unless there is a total failure of consideration. In *Fibrosa v Fairbairn*,¹⁹² the House of Lords held that, if there is a total failure of consideration, money paid can be recovered by a quasi-contractual claim. However, this does not alleviate injustice where the contract has been partially performed. Also, there may be injustice to a payee who has to return the full price, due to total failure of consideration, as he or she may have incurred costs in preparing to perform.

To remedy this injustice, the Law Reform (Frustrated Contracts) Act 1943 (UK) was passed. This act probably applies in Kiribati, Nauru, Solomon Islands, Tuvalu and Vanuatu, as an act of general application. In Samoa, a similar act, the Frustrated Contracts Act 1975, has been passed. In other countries of the region, the common law will still apply. Both acts allow the court to apportion the loss under a frustrated contract which does not exclude the act.

Termination by agreement

Introduction

What has been created by agreement can be extinguished by agreement. An agreement by the parties to an existing contract to extinguish the rights and obligations it has created is itself a binding contract, provided it is either made by deed or supported by consideration.

Where there are still obligations to be performed on each side, there is no problem with consideration. Consideration is the mutual release by each party of the other from performance of the outstanding obligations. Where the contract is wholly executed on one side, any release of the other party must be by deed or be supported by fresh consideration – accord and satisfaction – accord is the agreement, satisfaction is the price paid for the agreement.

Requirement of writing

Even contracts required to be made or evidenced in writing can be discharged orally. However, any variation or new contract in substitution is required to be in writing or evidenced in writing.¹⁹³

191 *Hirji Mulgi v Cheong Yue Steamship Co Ltd* [1926] AC 497.

192 [1943] AC 32.

193 *Morris v Baron and Co* [1918] AC 1.

Performance

A party who performs a contract according to its terms will be discharged from further performance. A party who only partially performs a contract will not usually be entitled to the contract price. Further, if a party does not perform his or her obligations, not only will the contract not be discharged, but also the defaulting party will be in breach of contract.

In the case of an entire contract, only a party who has performed the contract exactly is entitled to the contract price.¹⁹⁴ A contract is entire if it provides that complete and exact performance of the contract is a condition precedent to payment of the contract price.

In the following cases, exact performance is not required:

- 1 where the contract is a divisible or severable contract, that is, it clearly indicates that some performance less than the whole may suffice to confer rights on the performing party;
- 2 where performance has been substantially completed and what has been left undone is so minor as not to justify the innocent party in terminating the contract. In such cases, the innocent party may still get damages as compensation for the minor matter left undone.¹⁹⁵

Strict compliance with time limits is not generally required.¹⁹⁶

Termination for breach

Introduction

A party who fails to perform a contract according to its terms will be in breach of contract. There are two types of breach: actual and anticipatory. A party who fails to perform at the requisite time is in actual breach, whereas a party who renounces his or her obligations before the time to perform has arrived is in anticipatory breach.

Breach of contract may take one of two forms: repudiation or breach of a term.

The classification of a term of a contract as an essential term, or an intermediate term or a warranty, and the consequences which flow from the breach, are discussed earlier in this chapter.

194 *Cutter v Powell* (1795) 101 ER 573.

195 *Hoenig v Isaacs* [1952] 2 All ER 176.

196 *Harold Wood Brick Co v Ferris* [1935] 2 KB 198 (CA).

Termination for breach of a term

Generally, any breach for failure to perform will entitle the innocent party to claim damages. A right to terminate for breach may also arise either:

- pursuant to the contract, for example, a clause in a lease may provide that if the tenant fails to pay the rent the lessor is entitled to terminate the contract; or
- pursuant to common law. This will occur where there is a breach of an essential term or a serious breach of an intermediate term.¹⁹⁷

Termination for repudiation

Repudiation occurs when a party clearly indicates that he or she no longer intends to be bound by the contract or there is a clear indication that he or she is unable to perform.

Consequences of termination for breach or of repudiation

The innocent party may:

- elect to treat the contract as discharged and sue for damages¹⁹⁸
- elect not to treat the contract as discharged and sue for specific performance.

In the case of anticipatory breach, the innocent party has a third option:

- ignore the breach or threatened breach, and perform the contract.

Remedies

Introduction

The path to take when a party breaches the contract depends on the type of contract and the nature of the breach. It will also depend on the innocent party's conduct. The available remedies are

- damages
- restitution

¹⁹⁷ See, eg, *McGregor Consultant and Management Services Limited v Meli Delana Kama*, Supreme Court, Tonga (unreported) (7 November 1984).

¹⁹⁸ It has been held that, subject to certain limitations, the injured party can continue with performance and claim the contract price as a liquidated sum: *White & Carter (Councils) Ltd v McGregor* [1962] AC 413. There is some tension here with a plaintiff's obligation to mitigate his/her loss.

- specific performance
- injunctions.

Within certain boundaries, the parties are free to plan their own remedies when they draft the contract.

Damages

Introduction

Any breach of contract by one party entitles the other to sue for the common law remedy of damages, except where the obligation is to pay a debt or a specific sum of money which may only be recovered by a specific action for that sum.

The basic purpose of damages for breach is to compensate the innocent party for the loss suffered, not to punish the wrongdoer.¹⁹⁹ The general rule is that

Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed.

*(per Parke B in Robinson v Harman)*²⁰⁰

This does not mean that all loss suffered by an innocent party will necessarily have to be paid for. There are two matters that have to be considered before the amount of damages is finalised:

Remoteness

Damages will only be recoverable if they may reasonably be considered as either:

- arising naturally according to the normal course of things from the breach, or
- within the contemplation of the parties when they made the contract as the probable result of the breach.

¹⁹⁹ *Addis v Gramophone Co Ltd* [1909] AC 488. In so far as *Addis* was authority for the proposition that damages arising out of the manner of dismissal in actions for wrongful dismissal, it has been overruled in Fiji Islands: *Central Manufacturing Company Ltd v Kant* [2003] FJSC 5. See *Alfred McAlpine Construction Ltd v Panatown Ltd* [2000] WLR 946 for a discussion of the difficulties that can arise where the loss is non-financial and the dissenting judgments of Goff and Millett, LJ for suggestions as to how these might be addressed.

²⁰⁰ (1848) 1 Ex D 850, p 855.

This is known as the rule in *Hadley v Baxendale*.²⁰¹

Mitigation

The general rule is that a plaintiff is not entitled to claim for loss that he or she could have avoided by taking reasonable steps.²⁰² The onus of proving that such steps were not taken is on the defendant.

Assessment of damages

There are two primary methods of assessment of damages.

CALCULATION OF 'EXPECTATION LOSS'

This is the most common way of assessing damages and involves working out the value of the lost performance of the contract. This is usually done by measuring the difference between the value of what the innocent party expected to receive and the value of what that party actually received.²⁰³ Often, this will be equivalent to lost profits. In some circumstances, it may be possible to recover the cost of repairs or restoration. This is the usual way of measuring loss caused by defective or incomplete workmanship. In such cases, the only way that the plaintiff can achieve his or her expectation is to have the work put right or completed.²⁰⁴

CALCULATION OF 'RELIANCE LOSS'

This involves reimbursing the innocent party for spent money in reliance on the promise.²⁰⁵

The fact that damages are difficult to assess is no reason for depriving the plaintiff of them. This point is illustrated by *Vaiotei v Cross and The Commodities Board*.²⁰⁶ In that case, the board advertised a prize draw for employees. Only those who were not late or absent during a specified

201 (1854) 9 Ex D 341.

202 *Dunkirk Colliery Co v Lever* (1878) 9 Ch D 20, p 25.

203 This is the measure suggested by the Sale of Goods Acts, which may apply to the measure of damages. Eg, Sale of Goods Act, Cap 230 (Fiji), states that, *prima facie*, the measure of loss is the difference between the contract price and the market or current price (ss 50(3) and 51(3)).

204 *Mertens v Home Freeholds Co* [1921] 2 KB 526. This appears to have been accepted as a proper measure of damages in *Iofi Faafouina Rev v Keil (Bolko)* [1980–93] WSLR 160.

205 See, eg, *Anglia Television Ltd v Reed* [1972] 1 QB 60.

206 [1990] Tonga LR 108; Corrin, J, 'Case note on *Vaiotei v Cross & Commodities Board of Tonga* [1990] TLR 108' (1998) 2 JSPL, case note 1. See also *Chaplin v Hicks* [1911] 2 KB 786.

period qualified to enter it. The board cancelled the prize draw because it considered that none of its employees qualified. The plaintiff brought proceedings to compel the board to hold the prize draw or to pay out damages. It was held that the plaintiff qualified to be included in the draw. Specific performance not being appropriate in the circumstances, it was held that damages had to be calculated on the basis of the plaintiff's chance of winning a prize in the draw.

Types of damage

At one time it was thought that only damages for pecuniary loss could be awarded. Although reluctant to award damages for non-pecuniary loss, the courts have clearly shown that they may be awarded in certain limited cases. Thus, damages may be recovered for:

- substantial physical inconvenience or discomfort,²⁰⁷ or
- injured feelings or disappointment, but only where the contract is one the main object of which is to provide comfort, pleasure or relief from discomfort. An obvious example is a contract for a holiday.²⁰⁸ In *Farley v Skinner*²⁰⁹ it was held that it will suffice if provision of peace of mind or the prevention of distress is an important object of the contract.

In Solomon Islands, damages have been awarded for frustration and disappointment after breach of a contract for sale of a residence (*Beti v Aufiu*).²¹⁰ This decision is unlikely to be followed elsewhere in the region. In Kiribati it has been held, *obiter*, that only nominal damages are available for inconvenience and mental distress.²¹¹

Restitution

This relief will be available if the plaintiff can show that the defendant is obliged by the rules of natural justice and equity to refund money. The defendant will be ordered to restore money or the benefit of work done, goods supplied or services rendered, to the plaintiff, when he or she would

207 *Hobbs v London and SW Railway* (1875) LR 10 QB 111.

208 *Jarvis v Swans Tours Ltd* [1973] QB 233. See also *Peninsular and Oriental Steam Navigation Co v Youell* [1997] TLR 184.

209 [2001] 3 WLR 899.

210 [1991] SBHC 45..

211 *Compass Rose Enterprises Ltd v Taomati Iuta and Anor*, High Court, Kiribati (unreported) (14 May 1982).

otherwise be unjustly enriched. In order to show unjust enrichment, it must be shown that:

- the defendant has been enriched by the receipt of a benefit
- the defendant has been enriched at the expense of the plaintiff, and
- it would be unjust to allow the defendant to retain that benefit.

In *ANZ Banking Corp'n Ltd v Ale*,²¹² it was suggested by Ryan, CJ, *obiter*, that the US approach of not distinguishing between the form and nature of the gain received was more realistic. His lordship said:

the courts in Western Samoa should not be bogged down by academic niceties which have little relevance to real life.

Restitution is a specialised area and will not be examined further here.

Specific performance and injunctions

Specific performance is an order of the court requiring the party in breach to perform primary obligations under the contract. In relation to the sale of goods, the remedy has been put in statutory form in the Sale of Goods Acts which apply in the region. For example, s 52 of the Sale of Goods Act, Cap 230, of the Fiji Islands gives the court discretion to order specific performance in any action for breach of contract to deliver specific or ascertained goods.²¹³

Injunctions are orders granted to prevent a party breaching a negative stipulation in a contract.

Restrictions on the right to specific performance or an injunction

IF DAMAGES ARE AN ADEQUATE REMEDY, SPECIFIC PERFORMANCE AND INJUNCTIONS ARE NOT AVAILABLE

Damages will not be an adequate remedy where the subject matter of the contract is something unique, such as land. In *Ram Shankar v Suva City Council*,²¹⁴ the city council entered into a contract with the Bowling Club to sub-lease some of the land that it leased from the Crown to the club for 80 years. Later, the council decided not to proceed with the sub-lease, and said it would prefer to pay damages, as it wanted to use the land itself.

212 [1980–93] 2 WSLR 468, p 470.

213 I.e., goods identified and agreed upon at the time of contracting or subsequently.

214 (1982) 28 FLR 148.

The Supreme Court held that a contract to sell or lease land was the type of contract in which an order of specific performance was normally granted if a party failed to proceed because damages was not an adequate remedy. This was especially so in this case because the club did not have enough greens to cater for its existing members, and it was likely that membership would increase in the future and still more greens would be required. Damages would not help the situation. Accordingly, an order for specific performance was made directing the city council to prepare and sign a sub-lease of the land, as it had agreed to do.

**SPECIFIC PERFORMANCE WILL NOT NORMALLY BE ORDERED
WHERE THE CONTRACT REQUIRES SUPERVISION**

Generally, a court will not order specific performance of a contract that extends over a period of time or a contract requiring personal services²¹⁵ because of the difficulty of supervising the contract. For this reason, it is not an appropriate remedy for unfair dismissal. Where there is a negative stipulation in a contract of service or for services, the court will not grant an injunction to restrain its breach if this would have the same effect as specific performance and compel a person to work for another.²¹⁶

THE REMEDIES ARE NOT AVAILABLE WHERE THE PLAINTIFF HAS BEHAVED IMPROPERLY

The right to claim specific performance or an injunction may be lost if there is a delay in applying. This was the case in *Vaiotele v Cross and The Commodities Board*,²¹⁷ where 18 months had elapsed since the scheduled date of a prize draw that the plaintiff was alleging should have been held. Another example is *Ram Narayan v Rishad Shah*,²¹⁸ where the plaintiff contracted to purchase the defendant's farm in 1968. In 1970, the defendant told the plaintiff that he did not intend to complete. However, it was not until September 1973 that the plaintiff started court proceedings for an order for specific performance. The Court of Appeal refused to grant specific performance because of the delay.

215 See, eg, *Keil v Polynesian Airlines Ltd* [1980–93] WSLR 395.

216 *Page One Records Ltd v Britton* [1967] 3 All ER 822.

217 [1990] Tonga LR 108.

218 (1975) 21 FLR 139.

Torts law

Introduction

The word ‘tort’ is not a common word in the English language, and many, if not most, English speakers would not know the meaning of the word. The English word tort is derived from the French language, in which tort means wrong, and, in a legal context, tort is used to refer to certain kinds of civil wrongs, and the term ‘tortfeasor’ is used to refer to a person who commits a tort.

A civil wrong is a wrong committed against an individual which gives rise to liability to compensate that individual, as distinct from a criminal wrong which is a wrong which is so serious that the community or the state intervenes to punish the offender. But, not every kind of civil wrong is a tort. Some civil wrongs arise from breach of a contract, and some civil wrongs arise from breach of a trust or other fiduciary relationships. Torts are really the remainder of civil wrongs – those civil wrongs that do not result from a breach of contract or a breach of trust or fiduciary relationship. Unfortunately, torts have no one common, distinguishing, feature which unites them all. This means that it is impossible to define torts in any exact or meaningful way. The most that can be said is that they are civil wrongs, other than a breach of contract, or breach of trust or other fiduciary relationship.

There have always been some connection and overlap between the principles of civil liability for torts, and the principles of criminal liability for criminal offences. Some kinds of conduct give rise to both civil liability and criminal liability. Thus, many kinds of direct and intentional interference with the body or property of another person, false and defamatory statements which harm the reputation of a person and substantial interference with the land of another person are, in most countries of the region, both torts and criminal offences.

Three criteria would seem relevant for determining the liability to pay compensation:

- the nature and extent of the harm suffered by the claimant
- the nature and blameworthiness of the conduct which caused the harm

- the extent of the ability of the person who caused the harm to pay compensation.

Common law liability for torts has evolved without regard to the third element because judges have had regard only to the first and the second elements. In earlier times, the courts seemed to have little regard for the second element, that is, the blameworthiness of the conduct which caused the harm, and, so, many of the torts that were developed early, that is, trespass, nuisance, libel and slander were torts which were not based on blameworthiness. These torts are often described now as torts of 'strict liability'. In the 20th century, however, there has been a strong move towards imposing liability only if there is blameworthiness or, as it is usually referred to, fault. In this context, fault is usually considered to be the intention to cause harm, or recklessness or carelessness. This has manifested itself in a great increase in the scope of the tort of negligence, and also in the development of defences to some of the torts of strict liability.

There has been some legislative intervention to modify the common law of torts, especially with regard to liability for defamatory statements, for unsafe premises and for dangerous animals. Nonetheless, the bulk of the law of torts is made up of principles of common law.

Trespass to the person and to property

One of the earliest forms of conduct to be held to give rise to civil liability in England, and also one of the earliest to be applied in the region, was intentional contact with the body of another person without that person's consent. This is called 'trespass to the person', while intentional contact with movable property is called 'trespass to goods', and intentional contact with immovable property is called 'trespass to land'. So seriously did the courts regard this kind of contact that they imposed liability to pay damages regardless of whether harm had been caused or not.

Courts in the region have held a person liable in trespass to the person for arresting a person¹ or ordering the arrest of a person,² for slapping a female motorist in the face,³ for fighting another person,⁴ for slashing a woman with a cane knife,⁵ for striking another person in the course of an argument⁶ and

1 *Latwer v Macmillen* [1950–9] WSLR; *Rajit v Lateef* (1975) 21 FLR 22; *Kaofisi v Lasa* [1990] Tonga LR 39.

2 *Harding v Liardet* (1877) 1 FLR 15; *Martin v Liardet* (1877) 1 FLR 22; *Harrisen v Holloway* [1980–8] 1 Van LR 147.

3 *Soakai v Taulua* [1981–8] Tonga LR 46.

4 *Cheeb Singh v Meeha Singh* (1957) 7 FLR 69.

5 *Angila Wati v Khatum Nisha* (1979) 25 FLR 12

6 *Ami Chand v Lal Bahadur* (1996) 42 FLR 170.

for kicking and beating an intruder.⁷ Officials of the water supply department of the government of Fiji who entered the property of a consumer and cut off his water supply without legal authority were held liable for trespass to land,⁸ as were villagers in Samoa who returned to land which they had exchanged for other land and built houses on it.⁹ In Samoa, it seems that the banishment of a person from his land by *matai* was regarded as trespass to land by the Supreme Court, despite the absence of any indication that the *matai* had actually entered his land.¹⁰

In England, there has been some discussion as to whether liability for trespass, or, at least, trespass to the person, should only be imposed if the contact is unfriendly or hostile,¹¹ but this is an issue which has not arisen for debate in the region, since all the cases have involved hostile or unfriendly contact. There has also been some discussion as to whether the damages awarded to a person who has suffered an assault should be reduced if that person provoked or initiated the incident that resulted in the assault. The courts both in England¹² and in Fiji Islands¹³ have set their face against any reduction of damages on that account.

Liability for trespass to the person has been extended to include not only actual contact, which is technically termed 'battery', but also the threat of contact, whether made by actions or by actions and words, which is technically termed 'assault',¹⁴ and also detention of a person without his or her consent, whether or not there is actual physical contact, which is technically termed 'false imprisonment'.¹⁵ So, British traders who were arrested and detained in a ship in Apia harbour by the honorary British consul;¹⁶ a Hawaiian businessman who was arrested in Suva by police and held in a police station;¹⁷ a ni-Vanuatu man who was arrested in Port Vila and held by the police in prison;¹⁸ a Tongan dance hall patron who was arrested by

7 *Akou'ola v Fungalei* [1991] Tonga LR 22; *Uhila v Totola* [1992] Tonga LR 9.

8 *Attorney General v Verrier* (1966) 12 FLR 81.

9 *WESTEC v Tuionoula* [1980-93] WSLR 181.

10 *Tuivaiti v Sila* [1980-93] WSLR 17.

11 *Wilson v Pringle* [1987] QB 257; cf Lord Goff in *F v West Berkshire Health Authority* [1989] 2 All ER 545, p 564.

12 *Lane v Holloway* [1968] 1 QB 379.

13 *Ami Chand v Lal Bahadur* (1996) 42 FLR 170.

14 The word 'assault' is often used to mean actual physical contact, but in the context of the law of trespass, the word is used with a different meaning: it means the threat of physical contact.

15 The word 'imprisonment' is rather misleading, in that it suggests that liability only arises if a person has been detained in a prison, but the term imprisonment is used in its old, now obsolete sense of 'seizure' or 'taking'.

16 *Harding v Liardet* (1877) 1 FLR 15; *Martin v Liardet* (1877) 2 FLR 22.

17 *Mendonca v Attorney General* (1976) 22 FLR 105.

18 *Harrisen v Holloway* [1980-8] 1 Van LR 148.

police in Nuku'alofa and held in a police station;¹⁹ a convicted prisoner in Fiji Islands who was granted a remission of sentence and released from prison, but then ordered to be returned to serve the remainder of his sentence which had been remitted²⁰ were all able to recover damages for the unlawful detention (false imprisonment).

Although liability to pay damages will be imposed when a person intentionally makes contact with the body or property of another person without that other person's consent, there are some circumstances when what would normally give rise to liability is regarded by the courts as defensible or justifiable. The defences which arise most often are self-defence, provided it is reasonable;²¹ discipline by parents, teachers or ships' captains, provided it is reasonable;²² and lawful arrests to maintain law and order, that is, arrests made in accordance with a valid warrant for arrest,²³ or arrest without a warrant, upon reasonable suspicion of the commission or threatened commission of a serious offence or a breach of the peace,²⁴ provided the arrested person is told the grounds of the arrest.²⁵ On the other hand, it has been held that an honorary consul in a foreign country has no power to order the arrest and deportation from that country of compatriots, no matter how reprehensible their conduct, and, so, the honorary British consul in Samoa was held liable for the arrest and deportation from that country of two unruly British citizens.²⁶ It has also been held that the fact that the person who was assaulted actually initiated the incident and provoked the assault is not a defence to a claim for damages by the person assaulted, if the assault was excessive and out of proportion to the provoking action, and should not reduce the award of compensatory damages, although it would eliminate any claim for aggravated damages.²⁷

Since the liability for trespass is imposed by the common law, and since the rules of the common law and equity may always be displaced by clear words of the written law, if the written law of a country authorises the intentional contact with the person or property of another person, there can be no liability and the written law provides a complete defence if the contact is

19 *Kaufusi v Lasa* [1990] Tonga LR 39.

20 *Raikali v Attorney-General and Commissioner of Prisons* [1999] 45 FLR 313.

21 *Cheeb Singh v Meeha Singh* (1957) 7 FLR 69; *Uhila v Totola* [1992] Tonga LR 9.

22 *Cleary v Booth* [1893] 1 QB 465; *Mansell v Griffin* [1908] 1 KB 160.

23 *Lalit Lata Singh v Abdul Lateef* (1969) 15 FLR 58; cf *Manorama Rajit v Gurnam Singh* (1975) 21 FLR 22.

24 *Mendonca v Attorney General* (1976) 22 FLR 105; *Hou v Attorney-General* [1990] SILR 88. In the case of an arrest by a private person, the arrest is only lawful if the offence has in fact been committed: *Latwer v MacMillen* [1950-9] WSLR 1.

25 *Kaufusi v Lata* [1990] Tonga LR 39.

26 *Harding v Liardet* (1877) 1 FLR 15; *Martin v Liardet* (1877) 1 FLR 22.

27 *Ami Chand v Lal Bahadur* (1996) 42 FLR 170.

in accordance with its terms. If the contact is not in accordance with the terms of the written law, however, the written law provides no defence, as when government officials entered a private property to cut off the water supply when this was not authorised by legislation.²⁸

Nuisance and the rule in *Rylands v Fletcher*

There are two kinds of indirect interference with property which are regarded as torts and give rise to civil liability to pay damages – one is called ‘nuisance’, from the French word *nuir*, meaning to harm or injure, and the other is called ‘the rule in *Rylands v Fletcher*’, from the name of the decision of the case²⁹ of that name which firmly established this form of civil liability.

These torts have given rise to a considerable number of judicial decisions in England, but neither seems to have assumed the same importance in the region. Indirect interference with land, or with the use and enjoyment of land that is both substantial and unreasonable, in the sense of being more than what a person should be expected to have to tolerate or put up with, has been held to give rise to liability to pay damages. Such a tort is called a ‘nuisance’, or, more accurately, a ‘private nuisance’. Thus, on one occasion,³⁰ it was claimed that the noises coming from a bakery in Apia, Samoa, were so loud as to constitute a nuisance. The High Court, however, held that the noises were not a nuisance since they were no louder or more disturbing than would be expected in a town of the size of Apia. On the other hand, even a town dweller should not have to tolerate very loud noises from building construction.³¹ Where the interference with the enjoyment of land takes the form of excavations on neighbouring land so as to cause the land of the plaintiff to fall away, there is some uncertainty as to whether the claim should be in nuisance or in trespass.³²

Most kinds of nuisance are of a continuing nature and are not isolated incidents of interference, and, at one time, it seems to have been thought that one incident of indirect interference with the use or enjoyment of land could not give rise to liability. However, the House of Lords, in *Rylands v Fletcher*,³³

28 *Attorney General v Verrier* (1966) 12 FLR 81.

29 *Rylands v Fletcher* (1868) LR 3 HL 330.

30 *Haubold v Nillson* [1921–9] WSLR 1.

31 *Matania v National Provincial Bank* [1936] 2 All ER 633; *Andreae v Selfridge and Co* [1938] Ch 1. Likewise, in a rural area, there are some animal smells that are to be expected and tolerated, but very offensive animal smells, such as those produced by many pigs in one sty do not have to be tolerated and are a nuisance: *Wheeler v Saunders Ltd* [1995] 2 All ER 697.

32 *Krishna Deo v Prem Chand Mahabir and Nur Aiyaz Ali* [2000] 1 FLR 190.

33 (1868) LR 3 HL 330.

held that liability must be imposed even where there was only an isolated escape, if the thing which escaped into the property of another person was being kept in the non-natural use of land. The storage of very large quantities of water in a reservoir on rural land for commercial purposes was held to be a non-natural use of that land, and, so, gave rise to liability in *Rylands v Fletcher* when it 'escaped'.³⁴ Much of the original strictness of the liability imposed by the rule in *Rylands v Fletcher* has been removed by the defences to liability which the courts have subsequently recognised: consent to the presence of the thing that escapes;³⁵ escape caused by the act of a third party³⁶ and escape caused by an act of God, that is, an exceptional act of nature.³⁷

The latest discussion by the House of Lords (in 1994)³⁸ of the rule in *Rylands v Fletcher* has brought it closer to the tort of nuisance, in that the House of Lords held that under the rule in *Rylands v Fletcher*, as in nuisance, there is liability only for reasonably foreseeable damage, not for all damage directly resulting from the escape, as had been earlier believed. In Australia, on the other hand, the High Court has held³⁹ that the rule in *Rylands v Fletcher* has been merged into, and replaced by, the tort of negligence, and no longer exists as a separate tort. The countries of the region will have to consider whether the rule in *Rylands v Fletcher* should continue to have a separate existence, or whether it should be regarded as being merged into the tort of negligence or the tort of nuisance.

Cattle trespass and Scienter

From early times, the courts have held that the owners of most farm animals and birds, for example, cattle, horses, sheep, goats, pigs, turkeys, geese and ducks, are liable if they stray outside their owner's property and enter property occupied by another person. This tort is called 'cattle trespass', but the term 'cattle' is used, in this context, in a wide sense and includes all kinds of farm animals and birds. An exception has been made, however, in

34 Likewise, the storage of large quantities of gas and oil for commercial purposes, even in urban areas, has been held to be a non-natural use of land: *Batcheller v Tunbridge Wells Gas Co* (1901) 84 LT 265; *Northwestern Utilities v London Guarantee Insurance Co* [1936] AC 108. On the other hand, the storage of water and electricity in smaller quantities, for domestic use, has been held to be a natural use of land so that there is no liability if they escape; *Rickards v Lothian* [1913] AC 263; *Collingwood v Home and Colonial Stores* [1936] 3 All ER 300.

35 *Peters v Prince of Wales Theatre* [1943] KB 73.

36 *Dunn v Birmingham Canal Co* (1872) LR 7 QB 246; *Rickards v Lothian* [1913] AC 263; *Allardyce Lumber Co Ltd v Laore* [1990] SILR 174, 186.

37 *Nichols v Marsland* (1876) 2 Ex D 1 – exceptional rainfall; *Allardyce Lumber Co Ltd v Laore* [1990] SILR 174, 186.

38 *Cambridge Water Co v Eastern Counties Leather Co* [1994] 2 AC 264.

39 *Burnie Port Authority v General Jones Ltd* (1994) 120 ALR 42.

the case of cats and dogs, because it is so difficult to restrain them, and also because they do not usually cause damage when they stray.⁴⁰ In England, this exception has been removed by the Animals Act 1971, which seems to be a statute of general application which would be in force in Vanuatu.⁴¹

It is not necessary to prove that the actions of the trespassing animals were hostile or unfriendly. Thus, in England, a woman was able to recover for injuries she sustained when she was knocked down by a heifer which had blundered into her when making its way through her garden.⁴² However, as indicated above, liability for trespassing animals is imposed to protect the property of the occupier of the land, and, so, the son of an occupier who was knocked down by a trespassing cow in Solomon Islands was held unable to recover damages.⁴³ There are certain defences to liability for straying farm animals. Consent, whether express or implied, is a defence, and the courts have held that by leaving a door or gate open onto the roadway the householder impliedly consents to the entry of farm animals, at least in a rural area.⁴⁴ Also, if the plaintiff has caused the escape of the animals, for example, by breaking down the fence between the two properties, there is no liability.⁴⁵

Totally separate from liability for trespassing farm animals is the liability that the common law developed for animals which were known to be dangerous to human beings. This is known as cattle trespass 'scienter', meaning 'knowingly'. Under this head of liability, if any animal, including a cat or a dog, is known to be dangerous, that is, it has attacked human beings before or has attempted to do so, the courts have held that it must be kept under proper control, and, if not, the person responsible for it is liable if it harms anybody. Accordingly, a man who knew that his dog had jumped towards people and attempted to bite them was held liable when he kept it in a public yard on a chain that was long enough to allow it to bite a person who was passing through the yard.⁴⁶ On the other hand, if the animal has not demonstrated that it is dangerous to people, or if the owner is not aware of any dangerous character or propensity on the part of the animal, there is no liability. Thus, the High Court of Solomon Islands held that the owner of a cow that attacked and injured a young boy was not liable because, although the animal had been known to butt its head against a fence, it had not been known to attack human beings before.⁴⁷

40 *Buckle v Holmes* [1926] 2 KB 125.

41 See Chapter 2 for further discussion of operation of English statutes of general application.

42 *Wormald v Cole* [1954] 1 QB 614.

43 *Funua v Cattle Development Authority* [1984] SILR 55.

44 *Tillet v Ward* (1882) 10 QBD 17.

45 *MacDonald v Ululoloa Dairy Co* [1950-9] WSLR 31.

46 *Worth v Gilling* (1866) LR 2 CP 1.

47 *Funua v Cattle Development Authority* [1984] SILR 55.

When an animal is of a species that is wild, sometimes referred to by the Latin words *ferae naturae*, meaning 'of a wild nature', it is conclusively presumed by the courts to be dangerous and also to be known by the keeper to be dangerous, so that people who keep wild animals are always liable for them unless they are kept under proper control, regardless of whether or not the particular animal was, in fact, dangerous or known to be dangerous.⁴⁸ However, even though an animal is known, or is presumed to be known, to be dangerous to human beings, there is no liability if it has been placed under proper control.⁴⁹

Some defences to liability for dangerous animals have been recognised by the courts. Consent, either express or implied, is a defence. It is also a defence if the person who was injured caused the attack by coming too close to the animal.⁵⁰ Whether there is a defence if the escape of the animal from control is caused by an act of God or an act of a stranger is, at present, unclear.

Certain modifications to the rules of common law have been made by legislation in the region. In many countries, legislation has been enacted, which imposes civil liability on the owner of a dog for any unprovoked injury caused by the dog, regardless of whether the dog is known by the owner to be dangerous.⁵¹ In Kiribati and Tuvalu, where the more limited provisions of earlier English legislation are still in force, the owner of a dog is liable for any injury done by the dog to farm animals or poultry, regardless of whether the dog is known by the owners to be dangerous, but this does not extend to injuries to human beings.⁵²

In Vanuatu, the Animals Act 1971, which is an English statute of general application, is in force. This act replaces, but largely repeats, the principles of liability for trespassing farm animals and animals known to be dangerous as evolved by the common law, and also repeats the earlier statutory liability for injury to farm animals and poultry imposed upon the owners of dogs by earlier legislation, but abolishes the common law immunity from liability for trespassing cats and dogs.⁵³

Unsafe premises

The common law held that occupiers of land and buildings were liable for injuries caused by the unsafe condition of that property to persons entering

48 Thus, the owner of a circus elephant in England, which was very quiet and tame, was held liable when the elephant was startled by the barking of a small dog, and, turning away from the dog, knocked into a stall, thereby injuring two people who were sitting under the stall: *Behrens v Bertram Mills Circus* [1957] QB 1.

49 *Rands v McNeil* [1955] 1 QB 253.

50 *Sylvester v Chapman* (1935) 79 SJ 773; *Rands v McNeil* [1955] 1 QB 253.

51 Dogs Registration Act 1986 (Cook Islands), s 22; Dogs Act, Cap 168 (Fiji), s 8; Dogs Act 1966 (Niue), s 24; Dogs Act, Cap 150 (Tonga), s 7.

52 Dogs Act 1906 (UK), s 1.

53 Animals Act 1971 (UK).

such property. But the liability was imposed on a graduated scale, according to the circumstances under which the person had entered the property.

Before 1972, the common law distinguished between three classes of persons entering property: 'invitees' (who were defined as persons entering the premises with permission of the occupier and for some purpose of material benefit to the occupier); 'licensees' (who were defined as persons entering the premises with the permission of the occupier, but not for the occupier's material benefit) and 'trespassers' (who were defined as persons entering premises without permission). The common law ruled that the occupier owed invitees a duty to take reasonable care to prevent injury from some defect in the premises which was not known to the invitees.⁵⁴ The occupier owed licensees a duty only to take reasonable care to warn of any hidden defect which was not known to the licensees.⁵⁵ The occupier only owed trespassers a duty not to intentionally or recklessly injure the trespassers.⁵⁶ In 1972, however, the House of Lords held in *British Railways Board v Herrington* that the common law duty owed to a trespasser should be increased to include not only a duty not to intentionally or recklessly injure, but also a duty to treat a trespasser with 'common humanity' and 'in accordance with civilized standards of behaviour'.⁵⁷ This test was applied in 1974 by the Privy Council in *Southern Portland Cement Ltd v Cooper*⁵⁸ in a way which seemed to bring the duty of an occupier towards a trespasser closer to a duty to take reasonable care, and this synthesis was carried forward in 1976 by the English Court of Appeal in *Harris v Birkenhead Corporation*.⁵⁹

Some of these principles of common law have now been replaced by legislation in countries of the region, except Cook Islands, Nauru, Samoa and Tonga. The Occupiers' Liability Act 1957 (UK), as an English statute of general application is in force in Kiribati, Solomon Islands, Tuvalu and Vanuatu, and, as mentioned earlier, applies to persons entering premises with the permission of the occupier, that is, invitees and licensees, but not to trespassers. It substitutes for the differentiated duties, evolved by the common law for invitees and licensees, a common duty to take reasonable care to ensure that the premises are reasonably safe for the purposes for which visitors, whether invitees or licensees, are permitted to enter. The legislation expressly states that, when considering what is 'reasonable care', an occupier must expect that children will be less careful than adults and that persons who normally work on premises, for example, window cleaners, chimney sweeps and painters, will

⁵⁴ *Indermaur v Dames* (1867) LR 1 CP 274.

⁵⁵ *Jacobs v London County Council* [1950] AC 361.

⁵⁶ *Addie and Sons (Collieries) Ltd v Dumbreck* [1929] AC 358.

⁵⁷ [1972] AC 877.

⁵⁸ [1974] AC 623.

⁵⁹ [1976] 1 WLR 279.

be aware of any special risks that arise out of such work. The provisions of this act were followed in Fiji Islands by the Occupiers' Liability Act 1968 of that country, and also in New Zealand by the Occupiers' Liability Act 1962 of that country, which is in force in Niue.⁶⁰ The statutory duty of an occupier of premises to take reasonable care to ensure that those premises are reasonably safe for visitors was discussed at length in *Yavuca Resort Ltd v Elsworth*⁶¹ where an occupier of a resort hotel was held liable for failing to place a warning or protective railing at a window ledge in a night club area of the resort, from which a man who was sitting on the ledge fell backwards and struck the ground some six or seven feet below, suffering serious head injuries – although the damages awarded were reduced by 70% on account of the contributory negligence of the man, who had dozed off after a tiring day.

The Occupiers' Liability Act 1957 of England, and its counterpart legislation in the region, did not affect the position of trespassers, who continued to be protected, to a rather uncertain extent, by the common law, as discussed earlier. In 1984, the British Parliament passed the Occupiers' Liability Act 1984, which supplements the Occupiers' Liability Act 1957 by abolishing the common law rules relating to occupiers' liability to trespassers and providing a duty to take reasonable care of a trespasser who is known, or should be known, to be on premises in respect of dangers which are known or should be known to the occupier. This act is an English statute of general application, but, because it was enacted in 1984, which is after the cut-off date for the application of English statutes of general application in all countries,⁶² It has not been followed in Fiji Islands or in any other country of the region. Accordingly, the liability of occupiers of premises to trespassers is still regulated by the rather imprecise principles of common law enunciated by the English courts in the 1970s, as discussed earlier.

The common law, and the occupiers' liability legislation which modified the common law, imposed liability for unsafe premises only upon the persons in occupation of the premises at the time injury was caused by their condition. Neither the common law nor legislation imposed liability in tort upon the builder or contractor who originally constructed unsafe premises, nor upon the owner who leased unsafe premises, although there might be liability for breach of contract. To remedy this, the British Parliament enacted the Defective Premises Act 1972. This act, which is stated to apply in England and Wales, provides that any person who does work for, or in connection with, the provision of a dwelling house must do that work in a workman-like or professional manner with proper materials so that the premises will

60 Niue Act 1966 (NZ), s 696.

61 [2000] FJCA 65.

62 See, further, Chapter 2.

be fit for habitation as a dwelling. The act authorises the secretary of state to exclude dwellings that are covered by a scheme of guarantee approved by the secretary of state. Since this act was enacted in 1972, after the cut-off date for most countries of the region for English statutes of general application, it could only apply, within the region, Vanuatu. But there must be some doubt as to whether this act can be regarded as a statute of general application and appropriate to the circumstances of those two countries, in view of the fact that it is stated to apply only to England and Wales, and in view of the fact that it provides for the secretary of state to approve schemes of guarantee which will exclude the operation of the act. So far, there is no reported instance of an attempt to rely upon this act in Vanuatu.

Negligence

The term negligence is used in a legal context to refer to carelessness which is recognised by the courts as giving rise to liability to pay damages for the harm that is caused. Not every kind of carelessness is regarded by the common law as giving rise to liability to pay damages. Three essential elements must be established:

- here must be a duty to take care not to cause harm
- here must be a failure to take such care as is reasonable in the circumstances
- the failure to take reasonable care must have caused harm of a kind that is regarded as compensatable.

Duty to take care

The first element is essential to establish liability in negligence, that is, the existence of a duty to take care is critical to the operation of the law of negligence because it is upon this element that all other aspects of negligence depend. Without a duty of care, there is no liability, no matter how careless a person is, and no matter how much harm that person causes.

There are certain categories of person who, it is very well established, owe a duty of care to others. The first such category is that of road users, that is, people driving animals or vehicles along roads. For several centuries, the common law of England had established that a duty must be imposed on road users to take reasonable care in their use of the roads, so as not to cause 'injury' to others on the roads.⁶³ In the region, too, it has long been

⁶³ Eg, *Williams v Richards* (1852) 3 Cars & K 81; 175 ER 471; *Leame v Bray* (1803) 3 East 593; 102 ER 724; *Burkin v Bilezikdji* (1884) 5 TLR 673.

accepted that drivers of vehicles on roads owe a duty to their passengers,⁶⁴ to the drivers of other vehicles⁶⁵ and their passengers,⁶⁶ and to people walking on the road,⁶⁷ to ensure that they are not caused injury or damage. The courts in the region have also accepted what had become well established in England by the 19th century,⁶⁸ namely, that people who have the goods of others in their charge or possession, technically called 'bailees', must take care to ensure that no damage is caused to those goods.⁶⁹ The third situation where it is well established in the region, as in England,⁷⁰ that there is a duty to take care is in the case of employment: employers are under a duty to take care for the physical safety of their employees.⁷¹

It is not often that courts in the region have been called upon to go outside these well-established categories of duty of care. Sometimes, however, this has been necessary, and the courts have had to consider on what basis a duty of care should be held to exist. In several cases decided in the 1980s and early 1990s,⁷² courts of the region followed a statement made by Lord Wilberforce in *Anns v Merton London Borough Council*⁷³ to the effect that, in order to determine whether a duty of care should be imposed, a court should look

- 64 Eg, *Kenila Wati v Mahipal* (1957) 7 FLR 62; *Ram Devi v Bhan Pratap* (1961) 7 FLR 155; *Dhapel v Arjun* (1962) 8 FLR 74; *North West Transport Co v Iferemi Khuibau* (1968) 14 FLR 207; *Ramzan v Jagdish Chand Gosai* (1968) 14 FLR 136; *Lemala Puia'i v Jessop* [1960–9] WSLR 214 *Falakiko v Tukala* [1992] Tonga LR 4; *Teoli v Teoli* [1995] SBHC 55.
- 65 Eg, *Burns Philp (South Seas) Co v Vishnu Deo* (1966) 12 FLR 1; *Caulala Bus Co v Ram Latchan Co* (1969) 15 FLR 23; *South Pacific Sugar Mills v Santlal* (1972) 18 FLR 199; *Fiji Electricity Authority v Balran* (1972) 18 FLR 20; *CML Assurance Co v Attorney General* (1974) 20 FLR 102; *Ganesh v Mohammed Ali* (1978) 24 FLR 147; *Rajesh Ram v Sohan Ram* (1985) 30 FLR 108; *Samoa Public Trustee v Meredith* [1960–9] WSLR 191.
- 66 Eg, *Lemalu Puia'i v Jessop* [1960–9] WSLR 214.
- 67 Eg, *Laitia Kari v Sobar Ali* (1966) 12 FLR 108; *Muineshwar Prasad v Ramzan Khan* (1968) 14 FLR 200.
- 68 Eg, *Coggs v Bernard* (1703) 92 ER 107; 2 Ld Raym 909.
- 69 Eg, *Carruthers v Grey* [1921] WSLR 3; *Burns Philp (South Seas) Co v Ram Rattan* (1965) 11 FLR 132; *Gogay & Sons v Girwar Singh & Sons* (1974) 20 FLR 55.
- 70 Eg, *Smith v Baker and Sons* [1891] AC 325.
- 71 Eg, *Sampat v Colonial Sugar Refining Co* (1963) 9 FLR 144; *Samoan Public Trustee v Pila Patu* [1970–9] WSLR 35; *Feagai v Western Samoa Shipping Corp'n* [1980–93] WSLR 573; *Official Administrator for Unrepresented Estates v Allardyce Timber Co Ltd* [1980–1] SILR 66; *Longa v Solomon Taiyo Ltd* [1980–1] SILR 239; *Sukumia v Solomon Islands Plantations Ltd* [1982] SILR 142; *Liliau v Trading Company (Solomons) Ltd (No 1)* [1983] SILR 10; *Jolly Hardware and Construction Co v Sulubura* [1985/86] SILR 87; *Paerata v Katena Timber Co Ltd*, High Court, Solomon Islands, Civ Cas 24/93 (unreported) (26 November 1993). For further discussion of those of the above cases from Solomon Islands, see Corrin, J, 'Rationality or intuition? – the assessment of the question of damages for personal injuries in Solomon Islands' (1997) 27(1) VUWLR 237.
- 72 *Suruji Lal v Chand and Suva City Council* (1983) 29 FLR 71; *Tonga Flying Fish Co v Kingdom of Tonga* [1987] SPLR 372; *Laufu Meti Properties Ltd v Morris Hedstrom Samoa Ltd* [1980–93] WSLR 348; *Clark v Pikokivaka* [1993] Tonga LR 50.
- 73 [1978] AC 728, 751–2.

first, to see whether there is a sufficient relationship of proximity or neighbourhood between the person causing the injury or damage and the person sustaining that injury or damage to make such injury or damage reasonably foreseeable, and then, if there is such a relationship, the court should look to see whether there is any factor which should negate or reduce the scope of a duty to take care. That statement, which was based upon the celebrated statement of Lord Atkin in the early 1930s in *Donoghue v Stevenson*,⁷⁴ and is frequently referred to as the ‘neighbour’ principle, became subject, during the 1980s and 1990s, to increasing criticism from the House of Lords⁷⁵ and the Privy Council,⁷⁶ on the ground, basically, that it was too simplistic and failed to take account of a number of other factors that should be borne in mind when determining whether a duty of care should be imposed by the courts. In particular, the courts in England stressed that, in order to determine whether a duty of care should be imposed, a court should look to see whether the relationship between the parties was sufficiently direct,⁷⁷ whether, having regard to all the circumstances of the case, it was fair, just and reasonable that a duty of care should be imposed,⁷⁸ and, third, whether such a duty was consistent with public policy.⁷⁹

Since *Anns v Merton London Borough Council*,⁸⁰ the High Court of Fiji Islands in *Wartaj Seafood Products Ltd v Ministry of Home Affairs and Attorney-General*,⁸¹ and the Court of Appeal in *Kumar v Commissioner of Police*⁸² have been required to consider whether a duty of care should be imposed upon the commissioner of police in respect of property placed under the care of the police, and in respect of unarmed police officers accompanying armed soldiers to search for escaped prisoners who were armed, and upon the commissioner of prisons in respect of unarmed police officers accompanying

74 [1932] AC 562.

75 *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Leigh and Sullivan Ltd v Aliakman Shipping Co Ltd* [1986] AC 785; *Curran v Northern Ireland Co-Ownership Housing Association* [1987] AC 718; *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238; *Caparo Industries plc v Dickman* [1990] 2 AC 208; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Marc Rich and Co v Bishop Rock Marine* [1996] 1 AC 211.

76 *Yuen Kuen Yeu v Attorney-General of Hong Kong* [1988] AC 175.

77 *Curran v Northern Ireland Co-Ownership Housing Association* [1987] AC 718; *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238; *Yuen Kuen Yeu v Attorney-General of Hong Kong* [1988] AC 175.

78 *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210; *Leigh and Sullivan Ltd v Aliakman Shipping Co Ltd* [1986] AC 785; *Marc Rich and Co v Bishop Rock Marine* [1996] 1 AC 211.

79 *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238.

80 [1978] AC 728, 751–2.

81 [2000] 1 FLR 200.

82 [2005] FJCA 35. This decision has now been appealed to the Supreme Court: *Kumar v Commissioner of Police*.

armed soldiers to search for such escaped prisoners. In both cases the courts held that no duty of care should be imposed upon the commissioner of police, and in the second case, no duty of care was imposed upon the commissioner of prisons or upon the commissioner of prisons. In *Spooner v Government of Vanuatu*,⁸³ the Court of Appeal of Vanuatu held, following *Davis v Radcliffe*⁸⁴ and *Yuen Kun Yeu v Attorney-General of Hong Kong*,⁸⁵ that there was no duty of care owed by a minister to potential depositors of a bank when deciding whether to grant a licence to that bank to operate in the country.

The liability for a careless statement was considered briefly in 1982 by the Supreme Court of Tonga, in *Soakai v Taulua, Minister of Police and Government of Tonga*,⁸⁶ where Hill, J, held that there would have been liability for an order carelessly given by the police to a motorist that she could not drive her motor car, if she had been able to prove that she had suffered damage as a result of that statement. The judge relied upon the decision of the House of Lords in *Hedley Byrne and Co v Heller and Partners*,⁸⁷ where it had been held that there could be liability for a careless statement if there was a fiduciary or other special relationship between the maker and the receiver of the statement, without, however, defining very clearly when such other special relationship would exist. Since the decision in *Soakai v Taulua, Minister of Police and Government of Tonga* (above), the House of Lords has made it clear, in *Caparo Industries v Dickman*,⁸⁸ which was followed by the English Court of Appeal in *Law Society v KPMG Peat Marwick*,⁸⁹ that a special relationship cannot exist unless the maker of the statement knows who is going to act on the statement and for what purpose. These requirements would not seem to throw any doubt on the correctness of the decision in *Soakai's* case (above), which appears to be within the parameters laid down in *Caparo Industries v Dickman* (above), but they would, no doubt, need to be considered carefully by courts in the region when they are called upon to consider whether a duty of care is owed in respect of an oral or written statement.

Failure to take care

To establish liability in negligence, it is always necessary to show that there has been a failure to take care. If a plaintiff is not able to satisfy the court

83 [2001] VUCA 19.

84 [1990] 1 WLR 821; [1990] 2 All ER 536.

85 [1988] 1 AC 175.

86 [1981–8] Tonga LR 46.

87 [1964] AC 465.

88 [1990] 2 AC 605; see also *James McNaughton Papers Group v Hicks Anderson & Co* [1991] 2 QB 113.

89 [2000] 4 All ER 540.

that the defendant has failed to exercise reasonable care, then the plaintiff cannot succeed, even though there was a duty to take care, and even though the plaintiff has sustained serious harm as a result of the defendant's action.

Thus, the Supreme Court of Fiji, in *Chandar Bali v Yassuf Khan*,⁹⁰ held that the driver of a van which collided with a truck on a bridge in Fiji Islands was unable to succeed in his claim in negligence against the driver of the truck because the latter was able to satisfy the court that the cause of the collision was not his careless driving, but an unforeseeable mechanical failure in his truck which caused the brakes to fail. Again, in *John Banyan v Saukat Ali*,⁹¹ the Court of Appeal of Fiji held that a man who was injured when travelling as a passenger in a car which was involved in a collision with another car could not succeed in his claim in negligence against the driver of the other car because he had not proved that the collision was caused by the careless driving of the driver of the other car.

Where a person is looking after the goods of another person, but they are damaged while in his or her possession, the courts have held, however, that the burden of proof is on the custodian or bailee to prove that he or she took reasonable care for the goods, and/or that the cause of the damage did not occur because of his or her carelessness. Thus, in *Gogay & Sons v Girwar Singh & Sons*,⁹² a road carrier was transporting goods from Suva to Nadi in a truck when fire broke out on the truck and some of the goods were damaged. The Supreme Court held that the road carrier was liable, since, although he had shown that the goods were damaged by a fire which he did not cause, he had not proved either that he had taken reasonable care for the goods, or that the fire had started for some reason for which he was not responsible.

At one time, it was thought that the standard of care required might differ according to the circumstances, so that a higher standard of care was expected where a thing or an activity was obviously very dangerous, but a lower standard was required where a thing or activity was not so obviously dangerous. This differentiation in the standard of care has now been abandoned, and a common standard of reasonable care is required in all situations. In determining what is reasonable, however, all the circumstances of the situation will need to be considered, so that the standard of care that must be observed is a flexible, not a rigid, one.

Damage caused by failure to take reasonable care

Negligence, like most of the torts that were developed at a relatively late stage in the history of the common law, is not actionable *per se*, that is, by itself, without injury or damage. The plaintiff must be able to show that the

90 (1970) 16 FLR 134.

91 (1971) 17 FLR 30.

92 (1974) 20 FLR 55.

careless acts did actually cause physical injury or damage. If a plaintiff did not suffer personal injury or damage as a result of the defendant's action, there is no liability.

Thus, in *Soakai v Taulua, Minister of Police and Government of Tonga*,⁹³ the Supreme Court of Tonga held that, although the police had been careless in telling a woman that she could not drive her motorcar, they were not liable in negligence because the woman had suffered no damage as a result of this careless statement by the police. Again, in *Clark v Pakokivaka*,⁹⁴ the Supreme Court of Tonga held that, although, on the one hand, a yacht owner could claim for the items stolen from his yacht by nearby villagers before it sank, on the other hand, because the police and customs officials did not prevent the villagers taking the articles, he could not claim for the items which sank with the boat and which he was not able to recover because his specially equipped diving helmet had been stolen. This was because, if the helmet had not been stolen, it also would have sunk with the boat, and he would not have been able to recover the sunken items, so that the loss of the sunken items was not caused by the failure to prevent the helmet being stolen – they would have been lost anyhow.

Not only must the harm suffered by the plaintiff have been caused by the failure by the defendant to take reasonable care when under a duty to do so, but the harm must also be of a kind that the courts are prepared to recognise. In England, the courts have laid down some relatively strict guidelines with regard to claims for negligent action which has caused psychiatric illness,⁹⁵ and have also held, after some considerable uncertainty, that pure economic loss is not recoverable.⁹⁶ These are not matters which courts in the region have had to explore as yet.

Defamatory statements and actions

Under the common law, there is liability for oral statements that are defamatory (called 'slander') and also for written statements that are defamatory (called 'libel').⁹⁷ The only difference between libel and slander, nowadays, is that libel is actionable *per se*, that is, without proof of damage, whereas slander is normally actionable only if it causes some special damage, for example, loss of employment. Thus, where an oral statement that a barrister

93 [1981–8] Tonga LR 46.

94 [1993] Tonga LR 50.

95 *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

96 *Murphy v Brentwood District Council* [1991] 1 AC 398.

97 Slander, or malicious gossip, was originally an ecclesiastical offence punishable by the ecclesiastical courts. Libel was originally a criminal offence, punishable by the Court of Star Chamber, and was mainly used to control publications which were seditious or likely to encourage disorder.

had been expelled from a social club in Suva was held by the Supreme Court of Fiji not to be actionable, one of the grounds for the decision was that there was no proof of special damage and the statement was not derogatory of the plaintiff in relation to his profession as a barrister.⁹⁸ Again, an oral statement in Samoa that a *matai* had to be rescued by a woman from an attack by some other women was held to be not actionable because the *matai* could not prove that he had suffered any special damage as a result of the statement.⁹⁹ There are, however, some exceptional situations when it is accepted that slander is actionable without proof of special damage, that is, if the slander is derogatory of a person in relation to his or her occupation or office, or alleges that he or she has some loathsome and contagious disease, or alleges that he or she has committed a criminal offence which is punishable by imprisonment. Also, legislation has provided that a slander is actionable without proof of special damage if it alleges unchastity on the part of a woman or girl.¹⁰⁰ So, a woman shopper in Suva was able to sue for an oral statement made by a shop assistant alleging that she had taken goods from the shop without paying because it alleged that she had committed the crime of theft.¹⁰¹ Also, a journalist in Fiji Islands was able to recover damages in respect of an oral statement made at a meeting accusing him of stirring up racial hatred in his writings in newspapers, because this was derogatory of him in his occupation as a journalist.¹⁰² In Fiji Islands, legislation provides that statements that are broadcast on radio or television are to be regarded as libel,¹⁰³ and in Cook Islands and Samoa, the distinction between libel and slander has now been abolished by legislation and both are actionable without proof of special damage.¹⁰⁴

It is not only oral or written statements that may give rise to liability in defamation. Any form of action that conveys a meaning can give rise to liability, although there may sometimes be difficulty in determining whether it should be regarded as slander or libel in those countries where there is still a requirement of special damage in order to establish liability for slander. The display of placards and the burning of an effigy of a man have been held to be a libel,¹⁰⁵ and so also have films.¹⁰⁶ In some countries of the region,

98 *Berkeley v O'Brien* (1901) 3 FLR 38.

99 *Taupua'i v Tago Toalua* [1980–93] WSLR 1.

100 Slander of Women Act 1891 (UK), s 1, which is in force in Kiribati, Solomon Islands, Tuvalu and Vanuatu; Defamation Act, Cap 34 (Fiji), s 9; Defamation Act, Cap 33 (Tonga), s 16.

101 *Indarwati v WR Carpenter and Co* (1952) 8 FLR 46.

102 *Lomas v Caine* (1980) 26 FLR 108.

103 Defamation Act, Cap 34 (Fiji), s 3.

104 Defamation Act 1993 (Cook Islands), s 4; Defamation Act 1992/93 (Samoa), s 4.

105 *Armagam Pandaram v Pandit Rup Narayan* (1972) 18 FLR 83.

106 *Yousouppoff v Metro-Goldwyn-Meyer Pictures* (1934) 50 TLR 581.

words and pictures broadcast by radio or television have been declared by legislation to be libel.¹⁰⁷

The essence of liability in defamation is that it is the publication or communication of something that is defamatory of a person, that is, something that is likely to lower a person's reputation in the eyes of right-thinking members of the community, or to cause that person to be ridiculed, shunned or avoided. The courts have held that an incorporated body of persons, such as a company or a local authority, may have its reputation lowered and so may sue for defamation,¹⁰⁸ but that it cannot claim for harm to its feelings or self-esteem, as can a natural person, but only for loss or harm to its operations. It is not necessary to prove that, in fact, the words or actions had a defamatory effect. It is sufficient that the words or actions are capable of having that effect on an ordinary fair-minded reader, listener or observer. Thus, the Court of Appeal of Fiji held that to report in a newspaper that the successful applicant for a position had been chosen because he was incorruptible was not capable of lowering the reputation of other applicants, even though evidence was given by several witnesses that they read the statement as implying that the unsuccessful candidates were not incorruptible.¹⁰⁹ Again the High Court of Fiji has held that a letter by an employer to an employee informing him that he has been dismissed because his competency profile was not a close match with the profile required under a re-structuring programme undertaken by the employer, was incapable of being defamatory,¹¹⁰ and so also a newspaper report that the court proceedings instituted by that employee against the employer alleging that the letter was defamatory of him had been struck out.¹¹¹ The courts have insisted that the actual words alleged to have been used by the defendant must be pleaded and proved, and not just a paraphrase or summary,¹¹² but that, in determining whether those words are defamatory they must be considered in their full context. Thus, when considering a statement in an article, the headline of the article, the full text of the article and any accompanying pictures must all be taken into account when determining whether the article is defamatory. It may be that the text of the article neutralises the effect of attention-grabbing headlines or

107 Defamation Act 1952 (UK), s 1, which is in force in Kiribati, Solomon Islands, Tuvalu and Vanuatu; Defamation Act, Cap 34 (Fiji), s 3.

108 *Shailend Shandil and Island Network Corporation Ltd v Air Fiji Ltd* [2005] FJCA 25 – a company recovered damages against a broadcaster for news items that it claimed lowered its reputation as an airline operator.

109 *Tuisawau v Fiji Times and Herald Ltd* (1975) 21 FLR 149.

110 *Ratu Naiqama Tawake Lalabalavu v Native Land Trust Board, Coopers & Lybrand, Permanent Secretary for Fijian Affairs and Attorney-General* [1999] FJHC 5.

111 *Ratu Naiqama Tawake Lalabalavu v Native Land Trust Board and Fiji Times Ltd* [2000] 1 FLR 92.

112 *Mahendra Prasad v University of the South Pacific and Robin South* (1998) 44 FLR 272.

pictures;¹¹³ alternatively, it may be that text is not sufficient to remove the defamatory meaning of headlines or pictures.¹¹⁴

Some examples from the region of statements or actions that have been held to be capable of bearing a defamatory meaning are a statement that a police commander had admitted that a police operation had been a mistake;¹¹⁵ a statement that a female pupil should be expelled because the school was a school for girls not for women, thereby implying that the pupil had been living with a man;¹¹⁶ a statement that a politician had used his position and status as a member of the legislature to secure his appointment as manager of a hotel owned by the government;¹¹⁷ a statement that an organiser of a religious sect had used some of the funds of the sect for his own purposes;¹¹⁸ a statement that a vice chancellor of a university was a poor administrator and had misused funds of the university;¹¹⁹ a statement that an accused person had been 'let down' by counsel;¹²⁰ a statement that a man had misused his position as mayor to give special advantage to the newspaper of which he was editor;¹²¹ a statement that a prime minister was racist and dishonest and unfit for the office of prime minister;¹²² a statement that a prime minister had used public funds to help build his hotel;¹²³ a statement that a businessman was a doubtful character and should be checked out carefully;¹²⁴ a statement that an American Peace corps volunteer had made some terrible mistakes and was not a good team member¹²⁵ and a statement that a businessman slept with his female employees.¹²⁶

Liability for a defamatory statement arises only if the statement has been communicated to some person other than the person defamed because the liability is imposed to protect the reputation of a person in the estimation of other people, not to protect the feelings of a person. Although communication to some other person is often referred to as 'publication', there is no need for the communication to be made to the public or a section of the public. Communication to one other person is sufficient,¹²⁷ even to the spouse of

113 *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65.

114 *Pran Gopal Chand v Vijendra Kumar* (1980) 26 FLR 112.

115 *McCarthy v Samoa Guardian* [1920-9] WSLR 36.

116 *Sanonu v Senate* [1950-9] WSLR 68.

117 *Kingdom of Tonga v Mataele* [1974-80] Tonga LR 34.

118 *Manu v Haidas* [1974-80] Tonga LR 34.

119 *Tauiliili v Malifa* [1980-93] WSLR 440.

120 *Fiji Times and Herald Ltd v Marquardt-Gray* (1968) 14 FLR 213.

121 *Pacific Daily (Fiji) Ltd v Usher* (1971) 17 FLR 122.

122 *Mara v Fiji Times and Herald* (1984) 30 FLR 10.

123 *Alesana v Samoa Observer and Malifa*, Supreme Court, Samoa [1998] WSSC 1.

124 *Orme v Schutz* [1979] Kiribati LR 102.

125 *Doucet v Marshall* [1979] Kiribati LR 115.

126 *Moli v Heston* [2001] VUCA 3.

127 *Eg, Berkeley v O'Brien* (1901) 3 FLR 38.

the person defamed.¹²⁸ On the other hand, if the statement reaches some person whom the maker did not intend, and whom the maker could not reasonably foresee would receive it, there is no liability, as where a letter addressed to a man was, without his authority, read by the man's butler; the court held that there had been no publication.¹²⁹

Consent to a defamatory statement is, as for all torts, a complete defence, so that if the person claiming to be defamed has consented, whether expressly or impliedly, to the communication of the defamatory statement, that person cannot succeed in proceedings for defamation.¹³⁰ Truth or, as it is technically termed, 'justification', whether complete or substantial, is also a complete defence to liability for statements of fact. Hence, no matter how embarrassing or how painful the publication of the statement may be, so long as it is substantially true, there can be no claim for defamation. Thus, a statement that a politician in Samoa, who had opposed the use of foreign capital in his country, was associated with a foreign business company that was trading without any trading licence was held to be not actionable as defamation, even though it was, no doubt, politically embarrassing, because it was true – he was the local agent for a German company which did not have a licence to trade in Samoa.¹³¹ Likewise, a statement that a public servant in Samoa had arranged, on two occasions, for her relatives to be selected for overseas scholarships was held to be justified when it was shown that, on one of these occasions, she had done so.¹³²

If the statement is not so much a statement of fact, but a statement of opinion or comment, then it is a statement which cannot be proved to be substantially or completely 'true', since matters of opinion or comment are, from their very nature, unable to be proved to be true or false. All that one can say of such statement is that it is, or is not, honestly held, or that it is a statement that could honestly be held or not. For this reason, the courts have held that, where such a statement of comment or opinion has been made, it is a defence to show that it is one which an honest person could make about the facts in question – such comment is called 'honest or fair comment'. So, to describe a politician who opposed the introduction of foreign capital into Samoa as 'an enemy of foreign capital' was held to be fair comment, since it was a comment which, although exaggerated, an honest person could make.¹³³ In order to be 'fair comment', however, the statement must indicate, accurately or substantially accurately, the facts to which the comment refers. A person cannot make statements of fact about a person, which are totally

128 *Indarwati v WR Carpenter and Co* (1952) 8 FLR 46.

129 *Huth v Huth* [1915] 3 KB 32.

130 *Chapman v Lord Ellesmere* [1932] 2 KB 431; *Cookson v Harewood* [1932] 2 KB 478.

131 *Gurau v Samoa Bulletin* [1950–9] WSLR 1.

132 *Matatamua v Samoa Times* [1970–9] WSLR 144.

133 *Gurau v Samoa Bulletin* [1950–9] WSLR 1.

or substantially untrue, and then make comments upon those untrue facts and seek to escape liability on the basis of fair comment. Thus, the writer of a letter in a newspaper stated that a senator in Fiji Islands was the appointee of the prime minister, and then made some critical comments about the prime minister for not disciplining the senator for statements made by his appointee. In fact, however, the senator was not an appointee of the prime minister at all, and, so, fair comment was therefore held to be unavailable as a defence.¹³⁴ Again, statements which criticised a journalist in Fiji Islands for stirring up racial hatred in the articles he wrote were held not to be protected as fair comment, because there was no evidence that his articles did stir up racial hatred.¹³⁵

A defamatory statement is protected by the common law from liability if it was made in a situation which was privileged, whether absolutely or provided that certain conditions are satisfied. 'Absolute privilege' is attached by the common law to statements which are made in the course of judicial proceedings, not necessarily in a court, by any party, witness, legal counsel or presiding officer. Thus, in Fiji Islands, a plaintiff was unsuccessful in proceedings for defamation in respect of statements alleging him to be dishonest which were made by the chairman of a committee of inquiry established to investigate the affairs of a town council of which the plaintiff was mayor.¹³⁶ Statements made in preparation for judicial proceedings, for example, statements made to legal counsel preparing a note of what will be presented to the court, are also protected by absolute privilege under the common law. In order to ensure that ministers of government, and other high officers of state, can freely discuss matters of importance to the state, the common law has also cloaked all statements made by high officers of state with absolute immunity.¹³⁷ This absolute privilege has been held, in Fiji Islands, to extend even to gossip by high officers of state, such as a statement by the governor of Fiji to the acting chief justice that a well-known lawyer in the colony had been 'kicked out of the Fiji Club'.¹³⁸

The courts have also held that the common law should protect statements from liability in defamation if they are made pursuant to a legal, social or moral duty, or in protection of some legal, social or moral interest, provided that the person to whom the statement is made has a corresponding or reciprocal legal, moral or social interest or duty to receive the statement, and provided also that the statement is made without malice, that is, without any improper or ulterior purpose. This protection provided by the common

134 *Mara v Fiji Times and Herald* (1984) 30 FLR 10.

135 *Lomas v Caine* (1980) 26 FLR 108.

136 *Chaudhary v Vunibobo*, Supreme Court, Fiji, SC 591/1981 (unreported).

137 *Chatterton v Secretary of State for India* [1895] 2 QB 189.

138 *Berkeley v O'Brien* (1901) 3 FLR 38.

law is called 'qualified privilege', because it is not absolute, but is qualified or conditional, and depends on the absence of malice, that is, intention to injure, or some other improper purpose. In Kiribati, it has been held that information given by a secretary of Trade about the business affairs and reputation of a businessman was information which the government official had a social or moral interest to impart to members of a co-operative society, and which members of the society had a reciprocal interest to receive.¹³⁹ Likewise, also in Kiribati, it was held that statements made about the poor performance of an American Peace corps volunteer by his controlling officer to the Peace corps headquarters in Washington were statements which the controlling officer had a duty to make and the headquarters had a reciprocal interest to receive.¹⁴⁰ In Samoa, following a confirmation by courts in Australia and New Zealand that members of the public in a democracy have both a duty and interest to disseminate and to receive information about government and political matters, it has been held that there is an interest on the part of individual members of the public, and also newspapers, to disseminate information about the activities of holders of political office, such as a minister, including in that case, a prime minister.¹⁴¹ Qualified privilege is destroyed by malice and, so, in the incident in Kiribati relating to the statement made by a secretary of Trade about the businessman, the statement was not protected because the court held that the government official had been motivated by malice.¹⁴² Likewise, also, in Samoa, where a statement in a newspaper editorial alleged corruption on the part of the prime minister, the defence of qualified privilege was rejected by the court because the newspaper editor was found by the court to have been motivated by feelings of personal ill will and enmity against the prime minister.¹⁴³ On the other hand, the statement by the controlling officer of an American Peace corps volunteer about the poor performance of that volunteer was held to be protected by qualified privilege, because the controlling officer was not shown to have been motivated by malice.¹⁴⁴

It has been argued in Samoa, as in some other countries outside the region, such as Australia and New Zealand, that the defence of qualified privilege should be restricted to situations where the person making the statement has exercised reasonable care before making the statement. However, the Supreme Court of Samoa has followed the Court of Appeal of

139 *Orme v Schutz* [1979] Kiribati LR 102.

140 *Doucet v Marshall* [1979] Kiribati LR 115.

141 *Alesana v Samoa Observer and Malifa*, Supreme Court, Samoa, CP 42/97 (unreported) (6 July 1998).

142 *Orme v Schutz* [1979] Kiribati LR 102.

143 *Alesana v Samoa Observer and Malifa*, Supreme Court [1998] WSSC 1.

144 *Doucet v Marshall* [1979] Kiribati LR 115.

New Zealand,¹⁴⁵ rather than the High Court of Australia,¹⁴⁶ in holding that this limitation should not be introduced in Samoa.¹⁴⁷

It has also been argued that there should be a separate defence to libel and slander if it is committed in the discussion of political affairs, in order to ensure the fullest freedom of discussion of matters relating to government and politics in a democratic country. The Supreme Court of Samoa, in a decision which is under appeal,¹⁴⁸ has followed both the Court of Appeal of New Zealand¹⁴⁹ and the High Court of Australia¹⁵⁰ in denying that such a defence should be developed, at least by the courts.

In many countries of the region, the written law has provided some further defences to liability for libel and slander, additional to those evolved by the common law. The statements of members of the Houses of Parliament in England made in the course of parliamentary proceedings have been protected from all civil liability, including liability for defamation, since the enactment of the Bill of Rights 1668, and similar immunity is conferred by the written constitutions¹⁵¹ or the legislation¹⁵² of all the countries in the region except Tokelau. So, members of the legislature are free inside the legislature to say what they like about anyone without liability; but, if they make the same statements outside the legislature, they will be liable.

Unintentional or innocent defamation of a person, that is, where the maker of the statement did not intend to refer to the person and did not know of any circumstances which would cause the statement to be understood to refer to that person, or alternatively, where the maker of the statement used words which were not, on the face of them, defamatory, and did not know of any circumstance which would cause them to be defamatory of that person, is also protected from liability by legislation in most countries of the region. If the maker of the statement is prepared to make an apology and suitable amends by correction or retraction of the statement, there is no liability.¹⁵³

145 *Lange v Atkinson and Australian Consolidated Press NZ*, Court of Appeal, New Zealand CA 52/97 (unreported) (25 May 1998).

146 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

147 *Alesana v Samoa Observer and Malifa*, Supreme Court, Samoa, CP 42/97 (unreported) (6 July 1998).

148 *Ibid.*

149 For the ruling in New Zealand, see fn 145, above.

150 For the ruling in Australia, see fn 146, above.

151 Constitution of Cook Islands, Art 36(3); Constitution of Kiribati, s 76(2); Constitution of Niue, Art 24(3); Constitution of Tonga, cl 73; Constitution of Tuvalu, Art 114(4); Constitution of Vanuatu, Art 25(1).

152 Parliamentary Powers and Privileges Act, Cap 5 (Fiji), s 3; Parliamentary Powers Privileges and Immunities Act 1976 (Nauru), s 3; Legislative Assembly Powers and Privileges Act 1960 (Samoa), s 3.

153 Defamation Act 1952 (UK), s 4, which is in force in Kiribati, Solomon Islands, Tuvalu and Vanuatu; Defamation Act 1993 (Cook Islands), s 6; Defamation Act, Cap 34 (Fiji), s 12; Defamation Act 1992/1993 (Samoa), s 8.

Fair and accurate reports of proceedings of the legislature and of courts of justice are, in most countries of the region, absolutely protected from liability by legislation. In addition, the legislation excludes liability for a number of statements made in newspapers or radio and television broadcasts, subject to a suitable explanation or contradiction having been published, that is, statements made in fair and accurate reports of proceedings of the legislature, or of courts of justice, or of government inquiries, or other public inquiries under any act and of proceedings of international organisations in the country; statements made in fair and accurate copies of, or extracts from, any public register; statements made in notices or advertisements published by, or under the authority of, a court of justice; and statements made in fair and accurate reports of inquiries held in accordance with the rules of sporting, leisure, religious or educational associations, or in fair and accurate reports of public meetings or meetings of companies or associations from which the press and the public have not been excluded.¹⁵⁴

There has been some discussion as to whether the courts should issue an injunction before the trial of proceedings for defamation to stop the publication of confidential or personally sensitive information, but the courts have set their faces firmly against this. Following the approach adopted by courts in England,¹⁵⁵ the High Court of Fiji on several occasions¹⁵⁶ has held that it will not issue an injunction to stop the publication of material that is alleged to be defamatory, unless irreparable harm can be shown, at least where the person making the publication is raising the defence of the truth or justification of the material published.

Passing off

The common law developed a number of torts to protect the economic and financial interests of business people, that is, conspiracy to harm, injurious falsehood, intimidation, passing off, unlawful interference with contract and unlawful interference with business or trade.

Of these various 'economic' torts, as they are sometimes called, only the tort of passing off has made its appearance in the law reports of countries of the region. The tort of passing off occurs where one business person adopts some features, such as name, or logo or markings, which are likely to cause

154 Defamation Act 1952 (UK), s 7, which is in force in Kiribati, Solomon Islands, Tuvalu and Vanuatu; Defamation Act 1993 (Cook Islands), s 15; Defamation Act, Cap 34 (Fiji), s 14; Defamation Act 1992/93 (Samoa), s 18; Defamation Act, Cap 33 (Tonga), s 12.

155 *Fraser v Evans* [1969] 1 QB 349; *Herbage v Pressdram Ltd* [1984] 1 WLR 1160; *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412; *Ferris-Bank (Anguilla) Ltd v Lazar* [1991] Ch 391.

156 *Ratu Ovinia Bokini and Ratu Inoke Kubuabola v Associated Media Ltd et al* (1996) 42 FLR 1; *Burns Philp (Fiji) Ltd v Associated Media Ltd et al* (1998) 44 FLR 145.

confusion with another established business. Where both businesses are in operation, and one has been in operation well before the others, and their businesses are in the same field of activity, for example, the manufacture or sale of ice cream or confectioneries, then it is usually not too difficult to determine whether the features adopted are sufficiently similar to cause confusion. In *Blue Lagoon Cruises Ltd v Evanson*,¹⁵⁷ the Supreme Court of Fiji held, in 1980, that a company which had, since 1965, been operating cruises in the Yasawa Islands of Fiji known as the 'Blue Lagoon' cruises could succeed in an action for passing off against a company subsequently formed in America which started to operate airplane and seaplane services around Fiji Islands and set up a tourist lodge in the Yasawa Islands which it called Blue Lagoon Lodge.

More difficult is the situation where a business has not started to operate in the country at the time it brings the proceedings, although it has well-established business in other countries. In *ITA Sheraton Corporation of America v Sheraton Hotels*¹⁵⁸ and *Club Meditarranee (SA) v Club Meditarranee*,¹⁵⁹ courts in Fiji Islands held that companies which had well-established businesses in the United States and in France and New Caledonia, respectively, could not succeed in an action for passing off against companies operating in Fiji Islands because they had not set up business in Fiji and there was no probability that they would do so. On the other hand, in *Dairy Farm Ltd v Dairy Farm Ice Cream Co*,¹⁶⁰ the Supreme Court held that a company that had been incorporated in Fiji Islands to supply various kinds of food and associated services, although it had not commenced business in the country for some nine years, could obtain an injunction against a company which had recently been incorporated in the country to supply ice cream. In this case, the judge was satisfied that the defendant company had deliberately and dishonestly copied the name, markings and logo used overseas by the parent company of the plaintiff company.

Statutory compensation

In some countries of the world, the legislature has intervened to provide that people who suffer personal injury are entitled to receive compensation at a rate that is prescribed by statute. This entitlement arises regardless of whether the person who is required to pay the compensation has committed a tort under common law, and regardless also of whether the injury has been caused by the carelessness or other fault of that person. In other words, this is similar to the strict or no-fault liability that was imposed by the common

157 (1980) 26 FLR 13.

158 (1974) 20 FLR 26.

159 Court of Appeal, Fiji, CA 44/1978 (unreported).

160 (1981) 26 FLR 28.

law in respect of some of the early torts, for example, trespass, cattle trespass, nuisance, libel and slander, the justification being that, in some circumstances, it is socially desirable that a person should be able to recover some compensation in respect of personal injuries, quickly and without recourse to civil proceedings in the courts.

Within the region, Fiji Islands, Kiribati, Nauru, Solomon Islands and Tuvalu have introduced statutory schemes for the compensation of employees who are injured during the course of their employment, all modelled on the Workmen's Compensation Act 1897 of England.¹⁶¹ The legislation imposes a duty upon employers to pay compensation to their workers who are injured during and in the course of their employment, regardless of any fault on the part of the employers. Exceptions are provided if the injury is intentionally self-inflicted, or is caused by 'serious and wilful misconduct'.¹⁶² Also, a worker's right to compensation is suspended if he or she fails, without reasonable excuse, to submit to medical examination.¹⁶³ If the employer is also liable under the common law, any compensation recovered is deductible from the damages awarded.¹⁶⁴

More ambitious statutory schemes for compensation have been introduced outside the region, particularly in New Zealand and Ontario, Canada. These provide an entitlement for any person who suffers personal injury by accident, whether or not in the course of employment, to receive compensation. Such a scheme obviously requires much more extensive funding and administration than the compensation schemes restricted to workers, and, certainly in New Zealand, has proved to be much more expensive, and much more prone to abuse, than was originally envisaged. For these reasons, an overall accident compensation scheme is unlikely to be introduced in the region.

161 Workmen's Compensation Act, Cap 94 (Fiji); Workmen's Compensation Act, Cap 102 (Kiribati); Workers' Compensation Ordinance, 1956-67 (Nauru); Workmen's Compensation Act, Cap 78 (Solomon Islands); Workmen's Compensation Act, Cap 83 (Tuvalu).

162 Workmen's Compensation Act, Cap 94 (Fiji), s 5; Workmen's Compensation Act, Cap 102 (Kiribati) s 5; Workers' Compensation Ordinance 1956-67 (Nauru), s 6; Workmen's Compensation Act, Cap 78 (Solomon Islands), s 5 Workmen's Compensation Act, Cap 83 (Tuvalu), s 5.

163 *Ibid.*

164 Workmen's Compensation Act, Cap 94 (Fiji), s 25; Workmen's Compensation Act, Cap 102 (Kiribati) s16; Worker's Compensation Ordinance (Nauru), s 19; Workmen's Compensation Act, Cap 78 (Solomon Islands), s 27; Workmen's Compensation Act, Cap 83 (Tuvalu), s 16.

Land law

Introduction

Land law is that body of law, both written and unwritten, which establishes the kinds of interests that people can acquire in land and how such interests can be transferred, modified and terminated.

Before countries of the region fell under the control of European countries,¹ it seems that the customs of communities allowed for land to be owned on a communal or joint basis, as well as by individuals, although communal ownership was more common. In most countries of the region, the right to ownership was based primarily upon discovery and original occupation of land, and then upon succession to the original occupiers of the land. Under the customs of most countries, land could be exchanged or given away by the owners and/or by the chiefs of the communities for special reasons, such as a reward for special services, or as an atonement or compensation for some wrong. On the other hand, sales of land, that is, transfers of land for money or some other object of value, do not seem to have been very common until the arrival of Europeans.

The normal custom patterns of ownership and occupation before European settlement could be, and often were, interrupted and disturbed by various supervening problems. The search for alternative locations for gardens, for water, for hunting and for gathering the produce of the forest often caused communities to move their places of occupation many times. Natural disasters, such as floods, landslides, volcanic eruptions and droughts, could force people to leave their lands and move elsewhere. Disputes from within the community, or invasions from outside the community, could completely displace existing owners and occupiers. Chiefs might strongly assert their powers

1 In this chapter, the word 'European' is used to include not only continental Europe, but also the United Kingdom, and the word 'Europeans' is used to include British people.

over a community and move or dispossess existing owners and occupiers. In these various ways, the normal patterns of custom ownership and occupation could be disrupted and overturned.

When settlers from European countries began arriving in countries of the region in the 19th century with the intention of acquiring land and making a living, they brought with them a different concept of land ownership, that is, individual ownership of land which could be held indefinitely, but could be transferred freely to others, either during lifetime or upon death. This kind of ownership was usually called 'perpetual ownership' or 'freehold ownership'. The indigenous peoples of most countries in the region, though initially unfamiliar with this concept, were usually willing to make grants of perpetual ownership of their land to Europeans in exchange for money or items of monetary value. Whether the islanders always realised the full implications of these grants, or always received a fair exchange for them, may in many instances be doubted. In Tonga, the ruler, Taufa'ahau, who later became King George Tupou I, prohibited all sales of land to Europeans from 1850 onwards, and the Constitution of 1875 prohibited all sales of land to any person. But, in the other countries, alienations of customary land to Europeans continued to be made before the countries came under European control.

As the countries of the region became colonies, protectorates or protected states of Britain, France and Germany, or, in the case of New Hebrides, a joint sphere of influence of both Britain and France, the controlling governments had to decide what approach to adopt towards the sale of land to European settlers. In the British colony of Fiji² and in the New Zealand dependencies of Cook Islands,³ Niue,⁴ Tokelau⁵ and Western Samoa,⁶ previous grants of ownership to foreigners which had been made were allowed to remain in place unless clearly fraudulent, but no further grants of ownership of land to foreigners were permitted, except when in Fiji, the prohibition was relaxed for a brief period between 1905 and 1908. In the British protectorates

2 Native Lands Transfer Prohibition Ordinance 1875, s 1.

3 Cook Islands Act 1915 (NZ), ss 467–9.

4 *Ibid.* Niue was, until 1966, a part of Cook Islands. After it became a separate country, the prohibition against alienation of land to foreigners was continued by Niue Act 1966 (NZ), ss 432–4.

5 Tokelau Amendment Act 1967 (NZ), s 25.

6 Samoa Act 1921 (NZ), s 280.

of British Solomon Islands⁷ and Gilbert and Ellice Islands⁸ and also in the Australian dependency of Nauru,⁹ sales of perpetual ownership of land to foreigners were, for some time, allowed, subject to government approval, but were later prohibited. In British Solomon Islands, all existing freehold ownership of land by foreigners was abolished in 1977 and converted into fixed term estates.¹⁰ In the Anglo-French condominium of New Hebrides, however, grants of perpetual ownership to foreigners were permitted throughout the period of dependency, subject to approval by the Joint Court.¹¹ In Tonga, while it remained a protected state of Britain, 1900–70, Britain did not disturb the prohibition on sales of land to foreigners which had originally been imposed by King Tupou I in 1850, and which was extended to all persons by the Constitution of 1875.¹²

The controlling governments of all countries except Tonga insisted that all land which was not held in customary ownership or which had been legally transferred to foreigners belonged to the controlling government, and they also enacted legislation to enable them to acquire, whether by agreement or compulsorily, any land that was required for the purposes of government, for example, roads, wharves, schools, etc. In Tonga, all land was decreed in 1852 to be owned by the king; this was confirmed by the Constitution of 1875, and was not interfered with by the British Government during the period that the country was a protected state of Britain until 1970.

The result was that, when the countries of the region apart from Tonga attained independence or self-governance, the majority of the land was still held in customary ownership by the indigenous people, but, with the exception of Solomon Islands, there were some areas of land which were held in perpetual ownership by foreigners, usually about 10% of the available land, but in New Hebrides about 30%, and there were areas which were owned by the state, usually rather less than 10% of the available land. This situation has remained after independence, except in Vanuatu where, at the time of independence, the constitution vested all land in the custom owners, subject to the right of the republic to acquire land for public purposes.

7 Land Regulation 1914, s 3.

8 Native Lands Ordinance 1922, s 1.

9 Lands Act 1976, s 3(1).

10 Land and Titles (Amendment) Act 1977, s 98A(2).

11 Protocol Respecting the New Hebrides between the governments of Britain and France (6 August 1914), Art 12.

12 Constitution of Tonga, cl 104.

Customary land tenure

Introduction

In Cook Islands,¹³ Fiji Islands,¹⁴ Kiribati,¹⁵ Nauru,¹⁶ Niue,¹⁷ Samoa,¹⁸ Solomon Islands,¹⁹ Tokelau,²⁰ Tuvalu²¹ and Vanuatu,²² the constitution or

- 13 Cook Islands Act 1915 (NZ), s 422: 'Every title to and interest in customary land shall be determined according to the ancient custom and usage of the natives of the Cook Islands.'
- 14 Native Lands Act Cap 133, s 3: 'Native lands shall be held by native Fijians according to native custom as evidenced by usage and tradition.'
- 15 Magistrates' Court Act, Cap 52, s 58(1) provides that magistrates' courts 'shall hear and adjudicate in accordance with the provisions of the Lands Code [which purports to codify customary law] applicable or, where the Code is not applicable, the local customary law, all cases concerning land, land boundaries and transfer of title to native land registered in the registers of native lands and any disputes concerning the possession and utilisation of native land'.
- 16 Custom and Adopted Laws Act 1971, s 3(1): 'The institutions, customs and usages of the Nauruans, to the extent that they existed immediately before the commencement of this Act, shall, save in so far 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; [cont]
 - (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'.
- 17 Cook Islands Act 1915 (NZ), s 422 – see, above, fn 13. Until 1966, Niue was a part of Cook Islands, but, after it was separated from Cook Islands in 1966, s 23 Niue Amendment Act 1968 (No 2) (NZ) provided: 'Every title to, and estate or interest in, Niuean land shall be determined according to Niuean customs and any Act of the Niuean Assembly or other enactment affecting Niuean custom'.
- 18 Constitution of Samoa, Art 101(2): 'Customary land means land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoa custom and usage'.
- 19 Land and Titles Act, Cap 133, s 239(1): 'The manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable thereto, and all questions relating thereto shall be determined accordingly'.
- 20 Tokelau Amendment Act 1967 (NZ), s 20: 'Subject to the provisions of this Part of this Act, all land in Tokelau shall be held by the Crown subject to customary title', and s 18 of the act states that 'customary title' means 'title to land in accordance with the custom and usages of the Tokelauan inhabitants of Tokelau'.
- 21 Native Lands Ordinance, Cap 22, s 12, provides that the Lands Court 'shall hear and adjudicate in accordance with the provisions of the Lands Code [which purports to codify customary law] or, where the Code is not applicable, the local customary law, all cases concerning land, land boundaries and transfer of titles to native land registered in the register of native lands and any dispute concerning the possession and utilisation of native land'.
- 22 Constitution of Vanuatu, Art 73: 'All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants'. Constitution of Vanuatu, Art 74: 'the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu'.

legislation provides for land to be held in accordance with the customs, usages and traditions of the indigenous inhabitants. Such land used to be called 'native land', but is now more commonly referred to as 'customary land', and the owners of such land are usually called 'custom owners'.

The constant references in the written law to 'custom', 'usage' and 'tradition' may suggest, to the casual reader, a permanence and certainty about the principles of the tenure of customary land, and their application, which does not correspond with reality. There are several reasons for the uncertainties about the principles and operation of customary land tenure in countries of the region in earlier times, especially before the imposition of colonial, protectorate or trusteeship administration by European countries. In the first place, conditions of life were very unsettled and disturbed, so that communities were constantly on the move, making it difficult for settled patterns of ownership and occupation to develop.²³ Boundaries of land were normally indicated by natural features, such as trees, rocks, rivers and hills, or by man-made features, such as carved rocks, burial places, dwelling houses, *tabu* (sacred) places, which could be changed by nature or by people over a period of time.²⁴ Further, when European administrators subsequently attempted to make records in the countries of the region, misunderstandings

- 23 Eg, in Fiji Islands, France records: 'The normal conditions in which Fijians held land, by their own accounts, in pre-contact times, were those of incessant intertribal skirmishing involving continuous migration and resettlement. Out of over 600 *tukutuku raraba* [ie, tribal narratives] recorded in Viti Levu and adjacent islands, only 21 tell of a tribe which claims to occupy the site on which it was founded. The rest bear out the opinion of Brewster, who, after spending the greater part of his long career among the tribes of central *Viti Levu*, recording the oral tradition of the major tribes, wrote:

They harried and chased each other, frequently burning villages, which were speedily replaced by others ... The impression on my mind after some study of their legends and folklore stories is that life in the hills in the olden times was like a huge game of hide and seek.

These unstable conditions were not confined to the hill tribes. A general state of ferment persists throughout the group as far back as oral traditions extend. Even the chiefly Yavusa [large tribal unit] of the present day make no claim to immemorial occupation of the land they occupy. Each has its own migration story, evidenced by names and recognisable village sites on which were fought the wars which brought them power' (France, P, *The Charter of the Land*, 1969, Melbourne: OUP, p 13). One of the early Native Lands Commissioners, Basil Thomson, went so far as to declare: 'The Fijians had no territorial roots. It is not too much to say that no tribe now occupies the land held by its fathers two centuries ago' (*Ibid*, France, p 138).

- 24 Eg, in Kiribati, Pole Atanraoi comments: 'Another disadvantage of the land registers was that the boundaries were never determined properly. Boundaries were marked by cutting a mark (*kaka*) on trees, or the letter X (*reken*) or by coral boulders which could be easily removed, burnt and destroyed'. Atanraoi, P, 'Customary land and development in an Atoll Nation – the case of Kiribati', in *Customary Land Tenure and Sustainable Development: Complementarity or Conflict?* 1995, Noumea: SPC, p 63.

and errors about rights to customary land were not infrequently made, especially in Cook Islands,²⁵ Fiji Islands²⁶ and Gilbert and Ellice Islands.²⁷ On some occasions, alterations were made to the early records of land holdings which were, whether deliberately or unintentionally, incorrect.²⁸ In some countries, the bodies authorised to determine boundaries and ownership of

- 25 The noted commentator on Pacific land tenure, Professor Ron Crocombe, makes the following remarks about the work of the Land Court of Cook Islands, which was established shortly after Cook Islands were annexed to New Zealand in 1901: 'Owing to its misunderstanding of the significance of lineage application in determining ownership and succession to land rights, the Land Court awards title in common to all children of a previous owner, thus creating excessive fragmentation of ownership. Moreover, as equal rights are awarded to persons who are not primary members of the lineages concerned, and as the social status of the leaders of the various segments is not recognised by the court in relation to land rights, this rapidly increasing and heterogeneous group of "owners" of each section lack effective leadership' (Crocombe, RW, 'The Cook Islands', in Crocombe, RW (ed.), *Land Tenure in the Pacific*, 1987, Suva: USP, pp 60–1).
- 26 In Fiji Islands, the main error made by the colonial land administrators was to believe that all land in Fiji was held by land-owning units called mataqali, when, in fact, much land was owned under custom by families and individuals. As a result of this error, 'the social unit of the Fijian people which successive Lands Commissioners had discovered to be the most remote from the exercise of land rights was gradually transferred, through a number of causes unconnected with Fijian custom, into the legally registered owner' (*Ibid*, France, p 173).
- 27 Pole Atanraoi vividly describes the early errors made by colonial land administrators in the Gilbert and Ellice Islands Protectorate in the following words: 'After the introduction of colonial law and order, it became impossible to gain land by force. Then land grabbing by guile in gaining the support of those in authority and by outwitting coparceners (persons who share joint right to the same land) became the order of the day. However, what was gained by guile could be lost to superior guile or by a change in authority and there was little security of tenure. The early administrators sought to improve matters by registering titles. In the first decade of this century, Land Registers were prepared on most of Gilbert and Ellice Islands. However, the control of transfers was not effective for many reasons. First, the visits of administrative officers were infrequent and brief. Second, the native magistrates, though just in certain cases, found it impossible to resist nepotistic pressure on land matters. Third, the administrative officers were not familiar with local custom regarding land tenure and were apt to introduce English conceptions which were strange and unacceptable to the islanders. Finally, a new concept regarding land tenure emerged: the prospect of winning land by litigation, thus confusing the situation further (Cartland, 1954: 1)'. (*Op cit*, Atanraoi, fn 24, pp 59–60.)
- 28 Eg, in Gilbert and Ellice Islands, now Kiribati and Tuvalu, Pole Atanraoi observed: 'Nobody took the records seriously. Native magistrates entertained appeals against them as a matter of habit. District Officers often took a hand themselves. Names in the register were erased, replaced and erased again within the space of a year. For 16 years, this went almost unchecked. Native magistrates and their families became large land owners with such excellent opportunities. Any and every claim was given a hearing, with one limitation, that if some unjustly ousted owner became too importunate for redress, he was imprisoned for contempt of the native court! The effect was to encourage people to become land claimants. They could see that, be a claim ever so flimsy, it might succeed. Nothing was too far fetched for a biased court or a deluded district officer. In any case,

customary land have not operated effectively.²⁹ The result is that in almost every country of the region, except Tonga where customary land does not exist, there are still serious controversies and disputes, both about rights to ownership and about boundaries of customary lands.

Ownership of customary land

The most common form of ownership of customary land throughout the region is group or communal ownership, whereby members of a group or community own joint undivided interests in the area of land where the community is located. The group or community which forms the land-owning unit is normally based on blood relationship, that is, they are all related by blood, having descended from a common ancestor or ancestors. The size of the land-owning unit varies: in Cook Islands, Solomon Islands and Vanuatu, it is frequently a line, clan or tribe which could be quite large in number; in other countries, it is frequently a group of families or extended families, called a *mataqali* or *tokatoka* in Fiji, a *kaainga* in Kiribati, a *mangafaoa* in Niue, *kaiga* in Tokelau or *pui kaainga* in Tuvalu.

While communal ownership is the most common form of ownership of customary land in the region, it is not necessarily every member of that community who will, according to custom, have rights to ownership of that land. In some places both male and female legitimate descendants of the original owners have equal rights, but in some places, especially in Melanesia, it is only the male legitimate descendants, or the female legitimate descendants, who are regarded as having ownership rights. Illegitimate and adopted children do not have rights to land unless they have been accepted by the land-owning parent, and also, often, by the community as a whole.

there was all to gain and nothing to lose by trying. So, the habit of land claiming was fostered, and among a folk naturally greedy for land, it assumed hideous proportions (Lundsgaarde, 1968: 296). These types of problems with the register are still common' (*Op cit*, Atanraoi, fn 24, p 60).

- 29 In Niue, there was no effective Land Court in operation for 70 years, as Professor Crocombe notes: 'the periodic requests by Niueans for an effective land tribunal were delayed until 1941, when Judge McCarthy arrived to undertake comprehensive lands determination and registration. The Pacific War, however, led to his withdrawal shortly thereafter. Applications made in 1923 were dealt with in 1942, but those lodged in 1942 (and earlier) were still pending 20 years later. Niueans stated in the 1950s that the law provided no effective way for them to settle their own land problems, and that the government had promised to set up the legally constituted court "as soon as possible" for 50 years. Even in 1968, only 1.6% of Niuean land had been registered, though a great deal of preparatory work had been done in anticipation of legislation'. (Crocombe, R, 'Traditional and colonial tenure in Niue', in Kalaini, S (ed.), *Land Tenure in Niue*, 1977, Suva: USP, p 21). In Vanuatu, in early 1997, the acting chief justice announced that the Supreme Court would not hear any more appeals in land cases because of a lack of judges.

Although joint communal ownership is the most common form of ownership of customary land in the region, it is by no means the only form of ownership of such land. Ownership of customary land by nuclear families or by individuals was permissible under the customs of many areas. The early Native Lands Commissioners of Fiji remarked upon the ownership of land both by families and by individuals in various parts of Fiji before *mataqali* or extended families were accepted as the official land-owning unit throughout the country.³⁰ In Kiribati³¹ and Nauru,³² individual ownership of customary land was, and is, not uncommon, as also in parts of Samoa³³ and Solomon Islands.³⁴

The extent of family or individual ownership of customary land seems to be increasing in countries of the region. In 1977, Scheffler observed that, in Solomon Islands,

there is a pronounced tendency for persons to attempt to establish relatively exclusive title, sometimes individual title, to once corporate properties or segments of them; family estates are now frequently declared

- 30 Basil Thomson, a Native Lands Commissioner in the early 1890s, recorded that, in the Rewa Valley, 'in every instance the tenure is strictly individual, with descent through male heirs'. (Thomson, B, *General Report on Rewa Province*, NLC, cited in *op cit*, France, fn 23, p 134.) His successor, David Wilkinson, found that 'the Commission received more support when it recorded blocks as "family holdings", and that such holdings were common in the west of Viti Levu'. (Wilkinson, D, *Final reports on Ba/Yasawa*, para 103, cited in *op cit*, France, fn 23, p 142.)
- 31 'The notion of the group owing the land is not as strong as in the past. Nowadays, an individual may be registered as owner. However, it is not wholly true to conclude from this that the allodial title vests in the individual. In reality, residual rights still remain with a larger group, in that, if A is registered as owner of the land X, and he decides to sell it, he has to get the consent of his children who are 18 years old and above and consult with the extended family' (*Op cit*, Atanraoi, fn 24, pp 64–5).
- 32 'Ownership of land is vested in family groups and the individuals within such group. For instance, brothers and sisters usually share equally. There may also be a situation where a brother and a sister have a quarter share each in a piece of land and the other half is vested in an uncle or in their cousins in equal shares, as the case may be' (Keke, L, 'Land tenure and administration in Nauru', in Powles, G and Pulea, M (ed.), *Pacific Courts and Legal Systems*, 1988, Suva: USP, p 145).
- 33 'Individual land tenure is now widely established in Western Samoa, and, with it, economic individualism. The process has taken well over a century, however, and has not been easy ... Nevertheless, changes have now set so far in the direction of individualism that ... individual or national progress is now eating at the roots of Samoa's "communitistic system"' (O'Meara, T, 'From corporate to individual land tenure in Western Samoa', in *Land, Custom and Practice in the South Pacific*, 1995, Cambridge: CUP, pp 109–10).
- 34 The Report of the Special Commission on Customary Land Tenure in the British Solomon Islands Protectorate in 1957 recorded that, although the line or tribe was the usual land-owning unit, there was 'a progressive breakdown to individual tenure in almost all coastal areas' (chapter XIII, para 21, p 304).

to be exclusive property, especially in cases where single individuals are the sole remaining title holders.³⁵

In 1995, O'Meara reported that, in Samoa,

individuals have replaced corporate *aiga* as the primary land owning units, nuclear family households have replaced multihousehold extended families as the primary socio-economic units, and economic individualism has largely replaced the 'communitistic system' of Old Samoa.³⁶

In Tokelau, the elders of Nukuonu reported that

the unity of the descent groups is disappearing and they are breaking up into smaller units ... Some *tamatane* [male elders] and even some *fatu-paepae* [senior women] have left the large extended families, making requests of the *matai*, or elected elders to give them exclusive rights to pieces of land.³⁷

In some places custom may allow chiefs to have ownership rights over land occupied by their followers. A very good example of that appears from the case of *Tokyo Corporation v Mago Island Estate Ltd*³⁸ where the *Tui Cakau* claimed to own the island now known as Mago Island and sold it to a European free of all its native inhabitants who were required by him to relocate to another island. On the other hand, it is necessary to be aware that chiefs and leaders may sometimes appear to have rights of individual ownership of land, which custom does not provide. In Samoa, most customary land is attached to a chiefly title, and the holder of a chiefly title has *pule* (meaning 'power') under custom to determine what is done with the land attached to his or her title. But custom also expects that the *matai* will act with the concurrence of the members of his or her *aiga* or extended family, and will act for their benefit, so that the *matai* is virtually in the position of a trustee for the members of the *aiga*. CC Marsack, a former president of the Land and Titles Court, explained, in 1961:

The *pule* is a vastly different thing from beneficial ownership ... A *matai* holding land under this *pule* is holding it virtually in the capacity of

35 Scheffler, H, 'The Solomon Islands seeking a new land custom', in *op cit*, Crocombe, fn 25, pp 287–8.

36 *Op cit*, O'Meara, fn 33, p 122.

37 The Elders of Nukunonu, 'Customary principles in Nukunonu', in Crocombe, R (ed.), *Land Tenure in the Atolls*, 1987, Suva: IPS, USP, pp 110, 112.

38 (1992) 38 FLR 28.

trustee for the family. He has almost unlimited powers of administration of the land subject to his pule, but he must exercise that power not for his personal benefit, but for the benefit of the family.³⁹

In Fiji Islands, Solomon Islands and Vanuatu, chiefs often have power under custom to approve or veto the use of customary land by members of their tribe. Such chiefs, especially hereditary chiefs, may appear to have, and, indeed, may claim to have, rights of ownership of land under their control, which custom does not provide. The rights of chiefs in relation to customary land are more accurately described, in such cases, as rights of control, rather than as rights of ownership.

Acquisition and transfer of ownership of customary land

Discovery or original occupation of land was initially the main basis of rights in custom to ownership of land in all countries of the region. The justification for this was that the persons who cleared and worked the land should receive some return for their initiative and their labour. As the Special Commission on Customary Land Tenure in the British Solomon Islands Protectorate explained, in 1957, 'the individual or group who first cleared the virgin forest established a hereditary interest in the land, in return for the labour expended'.⁴⁰ Moreover, there was no one else, at the time, who could raise a better claim to the land, unless there was some chief or leader who could successfully assert that the land was under his control.

Nowadays, the main method of acquiring rights to ownership of customary land is by inheritance, that is, succession to the original owners. In all countries of the region, customs have accepted that descendants of the original owners of the land could inherit the interests of the original owners, but there is great variation amongst the customs of the region as to precisely which descendants are entitled to succeed. Some customs permit only male children to succeed to their father's interests (patrilineal); some customs permit only female children to succeed to their mother's interests (matrilineal); some customs permit children to succeed to either mother or father (ambilineal), or to both mother and father (bilineal). In addition, some customs give priority to the oldest children, whereas other customs give priority to the youngest children; some give preference to male children, whereas other customs give preference to female children; some customs give preference to legitimate over illegitimate children, whereas others treat legitimate and illegitimate

39 Marsack, CC, Notes on the practice of the court and the principles adopted in the hearing of cases, 1961, Samoa: Land and Titles Court, p 22.

40 Report of the Special Commission on Customary Land Tenure in the British Solomon Islands Protectorate, 1957, chapter VIII, para 1.

children alike; some customs give preference to natural children over adopted children, whereas others treat natural and adopted children alike; some customs give priority to adopted children from within the family, whereas others treat children adopted from outside the family and children adopted from within the family alike.

The differences that may exist in different customs with regard to succession, and the difficulties that often occur in determining what is the correct custom for succession, are well illustrated by *Maerua v Kahanatarau*.⁴¹ In that case, a local court in Solomon Islands had held, in 1975, that the custom rules of descent in part of Makira Island provided for patrilineal succession, and this had been accepted by the Customary Land Appeal Court and the High Court as the correct rule of succession. Later, in 1982, a local court and a Customary Land Appeal Court held that the earlier decisions were mistaken and that the proper custom rules for that part of Makira Island provided for matrilineal descent; this was accepted by the High Court. The Customary Land Appeal Court explained:

The fact is that the custom of Makira Island – and this part of Makira Island – is to follow the woman. It is a matrilineal system. The patrilineal system is from Ulawa and Amalauta. It has small place in Arosi II – but not in Bauro. We are bound to find that the land belongs to Kahanatarau. Whilst we have every sympathy for the appellant, any other decision would be a recognition of a custom which does not exist.⁴²

It is very important to notice that in principle custom does not normally require that the successors to the original occupiers of land must themselves be in occupation or possession of the land. Thus, in *Uma v Registrar of Titles*,⁴³ the High Court of Solomon Islands held that the descendants of a tribe which had occupied a small island in the 1870s were the owners of the island, even though the tribe had left the island in the 1880s and lived elsewhere in Solomon Islands for nearly a century. There is, thus, in most customs of the region, nothing corresponding to the English common law concept of acquisition of title by lengthy occupation, that is, adverse possession, nor to the statutory concept, recognised in many countries, of limitation of proceedings, that is, limiting the period of time within which proceedings to assert rights may be brought.

Having said that custom does not require continuing occupation of land to which one is entitled by birth, the reality is that if persons leave the

41 [1983] SILR 95.

42 *Ibid*, pp 98–9.

43 [1984] SILR 265.

land to which they are entitled, they may have very great difficulty re-asserting those rights at a later stage if the lands become occupied by others. Thus owners of inland land who leave that land and go and live on the coast, may find that they have lost access to their land which has become occupied by others who are not willing to give it up without a fight. For this reason, landowners who go and live in towns usually endeavour to return to their land during holiday periods to keep their land rights alive. Not surprisingly, serious complications can arise about entitlements to customary land and serious difficulties in establishing proof of original occupation because, obviously, that will have occurred many years ago, and any evidence is almost certain to be unreliable and open to dispute.⁴⁴

It is also important to be aware that, although customs may provide for succession to follow a certain pattern and for certain persons to succeed the original occupiers of land, the actual practice may be different and may not conform with the custom rules as expressed or laid down by elders. Thus, Professor Ron Crocombe, while describing the ownership of certain blocks of land in Niue, observed:

Analysis of the data shows considerable divergence between ‘custom’ as spoken by the people and ‘custom’ as practised by them. This is common in any society and makes it essential to study actual behaviour ... Although the ‘proper’ way to acquire land was from one’s parents, in only two cases was this so. Of the others, an unrelated person was given a block in return for caring for the former owner in her old age, one inherited though registered adoption, two through unregistered adoptions and one allegedly illegitimate person from the nephew of his assumed father.

Niueans are quoted as saying that the ‘proper’ system of inheritance is from father to son. Though this is the more common practice than any other in the cases for which data was collected, in no case was inheritance consistently from father to son, even over the few generations remembered, and such inheritance accounted for only 10 of the 24 recorded transfers.⁴⁵

Although succession to the original discoverers and occupiers of land is the most usual basis for ownership of customary land in the countries of the region, it is not the only method recognised by custom for acquiring ownership

44 See, eg, the following decisions, discussed in Chapter 3: *Detsiyogo v Degoregore*, *Nauru Law Reports*, 1969–82, Part B, 139; *Marie and Kaltabang v Kilman* (1988) 1 Van LR 343.

45 Crocombe, R, ‘Traditional and colonial tenure in Niue’, in Crocombe, RW (ed.), *Land Tenure in Niue*, 1977, Suva: USP, pp 14–15.

of customary land, and the customs of many communities have recognised that customary land can be acquired by voluntary or involuntary transfer, that is, alienation. In the 19th century, some anthropologists, such as Lewis Morgan and Lorimer Fison, claimed that customary lands were inalienable by their customary owners. These views had some influence upon some colonial administrators at the time, but subsequent research has shown them to be erroneous, and that, in most communities, custom permitted some forms of alienation of land.

In the first place, it is clear that the customs of most places recognised that the seizure or confiscation of land of people conquered in war could change the ownership of land. Many wars were fought for the express purpose of seizing the land of others, and, even when the seizure of land was not the purpose of a war, it was the usual consequence of victory: the victims would seize the lands of the vanquished, and either appropriate the lands for their own use, or sell or exchange them to offset the costs of war. Forceful confiscations of land were recognised as conferring rights of ownership under custom, and these rights of ownership were accepted by the subsequent colonial administrators because to do otherwise would have caused great uncertainty and confusion. As France explains, with regard to Fiji:

Since the pre-contact wars had been constant and widespread, to have encouraged the belief that conquered tribes were unlawfully dispossessed of their lands would have plunged the whole group into confusion as there were few tribes which had not recently come into possession of the lands on which they were settled.⁴⁶

More peaceful methods of acquiring land were also recognised by the customs of many communities. Grants of land were frequently made as a mark of gratitude for services rendered. Help in times of war or natural disaster, nursing care in times of sickness or old age, provision of a proper burial, even provision of sexual favours and of hired assassins could be rewarded by the grant of some land. From time to time, grants of land were also made at the time of a marriage either as a dowry or a bride price.

Grants of land could also be made under custom, in many countries of the region, as a form of apology and atonement for a wrong that had been committed, in order to avert revenge being taken by the community of the victim. If the apology was not accepted, land could also be granted as a form of compensation and punishment.

⁴⁶ *Op cit*, France, fn 23, p 121. See also *Wena Kaigo v Siwi Kurundo* [1976] PNGLR 34, where the validity of seizure of land by warfare was recognised by a court in Papua New Guinea.

With regard to Fiji Islands, France records that the Land Claims Commission was informed of the following kinds of voluntary alienation of land amongst Fijians before European contact:

The alienation of land was ... as the Commission quickly discovered, a very common practice among Fijians before the white men arrived. Evidence was frequently given of changes of ownership which had been a constant feature of the land practices in pre-session times. The various ways in which land could pass from chiefs to their commoners in return for services were instanced; the practices of transferring land rights as dowry, and, in response to claims of the *vasu*, all appeared in evidence of land sales. Tales of large scale alienations between social units as a result of friendly intercourse or help in time of war were related ... In many cases, the land had changed hands so many times before its final alienation that it was impossible to determine what rights were claimed by past occupiers at the time of the sale. The Commission took note of these practices and acted in accordance with the belief that they were traditionally respectable.⁴⁷

The grant of land to people who had been obliged to leave their own land was also something which the customs of Fiji permitted, provided appropriate respect was shown to the original landowners, as discussed in *Native Land Trust Board v Nagata*.⁴⁸

In Solomon Islands, certain voluntary alienations of customary land were accepted under custom. For example, the Malaita Customary Land Appeal Court is recorded as stating, in *Buga v Ganifiri*,⁴⁹ that, in Malaita, several forms of voluntary alienation were recognised by custom:

ownership of land in Malaita may only be based upon traditional customary facts, of which there are five: (i) original discovery; (ii) gift of land by male line to female line; (iii) compensation following murder or other atrocity; (iv) reward for bravery or other notable service; (v) custom purchase from true land owners.⁵⁰

In Kiribati, the following methods of alienation of land under custom are described by Pole Atanraoi:

Land could also be acquired as a means of compensation. For instance, if a member from one *kaainga* killed a man from another, the relatives

47 *Op cit*, France, fn 23, p 120.

48 (1993) 39 FLR 148.

49 [1982] SILR 119.

50 *Ibid*, p 120.

of the deceased would claim land as compensation. Such land was known as the *aba n nenebo* ... Another way in which land could be acquired was for sexual favours. For instance, A (boy) marries B (girl). A's uncle fancies B, so A's uncle can sleep with B, who, as a consequence, will be given land by the uncle. Such land was known as the *aba n tinaba* ... Another traditional way in which land could be acquired in this period was through nursing. For instance, old people could give land to those who looked after them. Such land was known as the *aba ni kuakua* ... Land could also be given as an acknowledgment of an adopted child – the *aba n toba*. The best land was given to the adopted child, or, where the land was limited, the best *babai* pits would be given. The gift of the *babai* pits was known as the *rua n tibu* ... Another method of acquiring land was *kaiwenei*, the exchange of land between land owners on different islands.⁵¹

While grants of customary land, as rewards for special services, as atonement or compensation for wrongs and as dowries or bride price, were permitted by the customs of many countries in the region, there were some forms of customary alienation and acquisition which were of more restricted application. Thus, in many areas in Fiji Islands, the rights of the *vasu*, that is, the son of the mother's brother, to acquire land from the mother's family were recognised by custom, but this custom does not appear in other countries of the region.⁵² In Nauru, custom has allowed land owners to dispose of their lands by will, which comes into effect upon death, but alienations by will were recognised in few other customs in the region.⁵³

Exchanges of land, it seems, were freely permitted by the customs of many communities. The extracts from the writings of France and Atanraoi cited above refer to exchanges of land occurring in Fiji Islands and Kiribati. In Vanuatu too, exchanges of land were permitted by custom. In *Toto v Pasu*,⁵⁴ the Supreme Court of Vanuatu noted that the claimant 'contends that his ancestor owned the land ... and has submitted to the court an

51 *Op cit*, Atanraoi, fn 24, pp 56–7.

52 'It was generally accepted that persons who stood in this relationship [ie, *vasu*] to a tribe had the right to take at will any of the tribe's possessions ... The process of transferring land rights ... response to claims of the *vasu* all appeared in evidence of land sales', *op cit*, France, fn 23, pp 50, 120.

53 Devises of land by will were upheld by the Supreme Court of Nauru as being in accordance with Nauruan custom, provided the devisee was a Nauruan, in *Duburiya v Agoko*, *Nauru Law Reports*, 1969–82, Part B, 74, and *Hedman v Roland*, *Nauru Law Reports*, 1969–82, Part B, 112. On the other hand, a devise of land by will to a non-Nauruan is not acceptable under the custom of Nauru: *Aramua v Nauru Lands Committee*, *Nauru Law Reports*, 1969–82, Part B, 17.

54 (1987) 1 Van LR 300.

exchange document, Exhibit 1(a), which shows that his ancestor, Chief Mete, exchanged a piece of land in block two on the Survey plan for the subject piece of land'.⁵⁵

Sales of customary land for money or items of monetary value also occurred in many places, even before the Europeans arrived. In Fiji Islands, sales of land, especially by chiefs, were evidently quite common:

The alienation of land was, however, as the Commission quickly discovered, a very common practice among Fijians before the white men arrived ... Throughout the group, the ruling chiefs had sold lands without consulting, or in many cases even informing, the occupants.⁵⁶

In Samoa, O'Meara records that

common opinion ... was that a matai could legitimately alienate part of his title land with the concurrence of leading family members and village lands could be alienated with the concurrence (and for the benefit) of all resident families ... Given the ubiquitous testaments to the 'tyrannical' powers of chiefs in Old Samoa, many chiefs presumably strayed from this ideal of consultation.⁵⁷

In some parts of Solomon Islands, purchase of land was recognised by custom. It will be recalled that the Customary Land Appeal Court of Malaita, whose judgment was reported in *Buga v Ganifiri*⁵⁸ (see above), stated that one of the five ways in which custom permitted the acquisition of rights to customary land on the island of Malaita was 'custom purchase from true land owners'.⁵⁹ In Vanuatu, the Supreme Court, in *Lale v Silas*,⁶⁰ heard evidence by a witness deposing that

the land was in the family for generations and that his family sold it to Chief Benbi and many people paid for the purchase of the said piece of land. ... when the money was paid, the whole village had a feast and all put money in a basket and gave it to the old Chief, Willie, for the purchase of the land.⁶¹

55 (1987) 1 Van LR 300, p 301.

56 *Op cit*, France, fn 23, pp 120–1; see also *Tokyo Corporation v Mago Island Estate Ltd* (1992) 38 FLR 28.

57 *Op cit*, O'Meara, fn 33, p 114.

58 [1982] SILR 119.

59 *Ibid*, p 120.

60 (1985) 1 Van LR 221, p 223.

61 *Ibid*, p 223.

In one country, Samoa, rights to ownership of customary land were, with some specific exceptions, traditionally always linked to *matai* titles. In other words, the ownership of land was attached to, or appurtenant to, a title and could only be acquired by the holder of the title to which the land was attached. Thus, a former president of the Land and Titles Court, CC Marsack, emphasised:

The first point to be established is that, with certain named exceptions, all Samoan customary land is held as appurtenant to a particular title or titles. There is, in general, no Samoan customary land of which the *pule* [that is, power of control] cannot be ascertained.⁶²

As a result, when a *matai* dies or relinquishes his title, in Samoan custom, the *pule* over the family land descends not to the heirs or children of the *matai*, but to the next holder of the title. Although it is still the accepted official position in Samoa that land must be attached to a title, in recent years, the number of *matai* titles has proliferated to such an extent that it was estimated that, in 1988, 75% of all males aged 23 and over residing in Savaii were *matai*, and, since then, the number of registered *matai* has increased by about 15%, with no comparable change in population.⁶³ This development, together with a continuing desire on the part of individuals to increase their standard of living, has meant that, in practice, there is a movement towards recognising that the heirs or children of the *matai* can acquire rights to his land. O'Meara describes and explains the phenomenon as follows:

Both ownership and *pule* are now usually inherited by the children of the former owners, without regard to the particular *matai* titles any of them might hold, and, increasingly within the last 10 years, even without regard to whether they hold *matai* status at all. Thus, individuals have replaced corporate *aiga* as the primary land owning unit, nuclear family households have replaced multihousehold extended families as the primary socio-economic units and economic individualism has largely replaced the 'communistic system' of Old Samoa.⁶⁴

Secondary interests in customary land

Although absolute ownership of land is the greatest interest in land recognised by the customs of countries of the region, it is not the only interest in land

⁶² *Op cit*, Marsack, fn 38, p 22.

⁶³ *Op cit*, O'Meara, fn 33, p 155, fn 2.

⁶⁴ *Op cit*, O'Meara, fn 33, p 122.

that is recognised by customs. The customs of many communities allow that persons other than the custom owners may have a right to enter customary land and use it for certain purposes.

Marriage to a member of a land-owning family will, in most areas, provide a customary right to occupy some of the ground of the family of the spouse: the right to reside on it and use it for gardens. People owning neighbouring land may be allowed in custom to pass across the land, and to take nuts or fruit from trees on the land, to take water and salt from it and to cut trees and leaves for custom houses. These rights are sometimes technically described as 'usufructuary rights', and correspond to easements and *profits à prendre* in English common law. Thus, in Viti Levu, Fiji, Professor Ravuvu describes how all the members of a *vanua*, that is, a grouping of *mataqali*, or land-owning units, have a right to use the forests and the fishing grounds owned by a *mataqali*:

The *Vanua* of Waimaro consists of the *yavusa* of Waimaro itself and its five *mataqali* groups, together with two other supporting *yavusa* and their *mataqali* subdivisions ...

Rights to use the *veikau* (forest) although now legally vested in the *mataqali* of the area, are still available to members of the *Vanua* of Waimaro who continue to support its activities. As long as a member of this community is extracting resources for his personal use or for the benefit of the *Vanua* as a whole, he is generally allowed access to the *veikau* without formal approval from the legal rightholders ...

Like the *veikau*, the *qoliqoli* (fishing ground) is, to some degree, still culturally vested in the *Vanua*, as opposed to the *mataqali*. It includes all rivers, creeks, lakes and other stretches of water which the *Vanua* and its component *yavusa* and *mataqali* claim as their traditional fishing grounds. Such waters are still generally open for exploitation by the members of the local community or related kinsmen.⁶⁵

Where the usufructuary rights are for traditional purposes and are kept within traditional limits, they provide a very helpful means of improving life in a subsistence economy. But when the usufructuary rights acquire a commercial value, and are extended well beyond their traditional extent and scope, as has happened particularly with regard to usufructuary rights to take timber from land owned by other persons, then serious inequities and dissatisfactions can occur. For example, in Solomon Islands, the Forest Resources and Timber Utilisation Act⁶⁶ allows for agreements to be made between logging companies and the persons having rights over timber for

⁶⁵ Ravuvu, A, *Development or Dependence*, 1988, Suva: IPS, USP, pp 7, 13.

⁶⁶ Cap 40.

the culling and renewal of the timber. Where the persons having the rights to the timber are not the owners of the land on which the timber stands, serious problems can arise; such problems have given rise to much litigation.⁶⁷ The unsatisfactory situation that can occur, and has occurred in many places, is illustrated by the following extract from the judgment of the High Court of Solomon Islands in *Tovua v Meki*:⁶⁸

Mr Tegavota, on behalf of the applicants [that is, land owners], has argued, with some force, that ... timber rights and land ownership are not always the same ... These secondary rights, when they were granted or acquired, gave rights to such things as harvesting and gathering food and cutting wood to make custom houses. To suggest that these secondary rights may now allow people who do not own the land to enter into agreements with logging companies to extract the most valuable commodity on the land, take the royalties for themselves and leave the land owners with a wasteland, is really taking the matter too far. I could not be more in agreement with him, but, unfortunately, that is not the way the law is written.⁶⁹

As one observer, J Corrin, has commented:

it is beyond doubt that the Act is still in need of amendment or preferably replacement by a totally new scheme of legislation ... The significance of primary and secondary rights need [*sic*] to be accounted for ... Failure to properly accommodate concepts of customary law in the legislation has led to ridiculous results.⁷⁰

Alienability of customary land

Although it is clear that the customs of many communities in the region allowed for land to be alienated and the rights of ownership to be transferred by the owners and/or the chiefs, in many countries of the region, the colonial administrators did not favour alienation of customary land to Europeans, for fear that it would remove the basis of subsistence for the indigenous population. Accordingly, in Cook Islands,⁷¹ Fiji Islands,⁷²

67 See, eg, *Tovua v Meki* [1988–9] SILR 74; *Allardyce Timber Co Ltd v Attorney General* [1958–89] SILR 78.

68 [1988–9] SILR 74.

69 [1988–9] SILR 74, p 76.

70 Corrin, J, 'Abrogation of the rights of customary land owners by the Forest Resources and Timber Utilisation Act' (1992) 8 *QUTLJ* 131, p 139.

71 Cook Islands Act 1915 (NZ), ss 467–9.

72 Native Lands Transfer Prohibition Ordinance 1875, s 1.

Niue,⁷³ Samoa⁷⁴ and Tokelau,⁷⁵ from a very early stage of their period of dependency, legislation was passed which prohibited the alienation of customary land to non-indigenous people, except to the Crown, although sales of customary land prior to that date were generally recognised unless clearly fraudulent. In the British Protectorates of British Solomon Islands⁷⁶ and Gilbert and Ellice Islands⁷⁷ and in the Australian dependency of Nauru,⁷⁸ alienations to foreigners were permitted for a longer time, but a prohibition against sales to non-indigenous people was imposed at a later stage. In Tonga, King George Tupou I prohibited the sale of lands to foreigners in 1850, and in the Constitution of 1875 this prohibition was confirmed, and extended to sales of land to any person.⁷⁹ These prohibitions against the alienation of customary land to foreigners have been maintained to the present day in Cook Islands,⁸⁰ Fiji Islands,⁸¹ Kiribati,⁸² Nauru,⁸³ Niue,⁸⁴ Samoa,⁸⁵ Solomon Islands,⁸⁶ Tonga⁸⁷ and Tuvalu.⁸⁸ In New Hebrides,⁸⁹ alienations of customary land were permitted by the condominium governments, subject to the approval of the Joint Court until, at the time of independence, the alienation of customary land to a non-indigenous person was completely prohibited by the constitution.⁹⁰

The extent to which customary land is alienable to indigenous persons varies greatly within countries of the region. In Solomon Islands⁹¹ and Vanuatu,⁹² no restriction on the alienation of customary land to an indigenous person is imposed by the written law. In Cook Islands,⁹³ Kiribati⁹⁴ and

73 Cook Islands Act 1915 (NZ), ss 467–9. Until 1966, Cook Islands included Niue.

74 Samoa Act 1921 (NZ), s 280.

75 Tokelau Amendment Act 1967 (NZ), s 25.

76 Land Regulation 1914, s 3.

77 Native Lands Ordinance 1922.

78 Lands Act 1976, s 3(1).

79 Constitution of Tonga, cl 104.

80 Cook Islands Act 1915 (NZ), ss 467–9.

81 Native Land Trust Act, Cap 134, s 5(1).

82 Native Lands Act, Cap 61, s 5.

83 Lands Act 1976, s 3(1).

84 Niue Act 1966 (NZ), ss 432–4.

85 Constitution of Samoa, Art 102.

86 Land and Titles Act, Cap 133, s 221.

87 Constitution of Tonga, cl 104.

88 Native Lands Ordinance, Cap 22, s 5.

89 Protocol respecting New Hebrides between the governments of Britain and France (4 August 1914), Art 12.

90 Constitution of Vanuatu 1980, Arts 73–5.

91 Land and Titles Act, Cap 133.

92 Land Reform Act, Cap 123.

93 Native freehold land may be alienated with the approval of the High Court: Land (Facilitation of Dealings) Act 1970, ss 51–3.

94 Magistrates' Courts Act, Cap 52, s 64(1)(a).

Tuvalu,⁹⁵ alienation is permitted subject to the approval of the appropriate court, and, in Nauru,⁹⁶ alienation is permitted subject to approval by the head of state. On the other hand, in Samoa,⁹⁷ alienation of customary land to anyone is prohibited by the constitution, and, in Fiji Islands,⁹⁸ Niue⁹⁹ and Tokelau,¹⁰⁰ alienation of customary land is permitted only to the Crown. In Tonga¹⁰¹ too, the sale of land to any person is completely prohibited by the constitution.

Determination of disputes as to rights to customary land

The customary method of determining disputes as to rights to customary land was usually a decision by the chief(s) of the area in which the land was situated. This method has the advantage that the chief(s) would normally be very knowledgeable about the entitlements to the land. It has the disadvantage however, that the chief(s) might have an interest in the disputed lands, and be biased, or appear to be biased. There is the further disadvantage that the chief(s) might make a decision without listening fully to one or more of the disputants, and, as a result, make a decision which is incorrect or is considered to be unfair.

In most countries of the region, a more formal and 'court-like' procedure has been adopted for determining disputes about rights to customary land. In some countries, the ordinary courts are authorised to determine such disputes, that is: in Cook Islands¹⁰² and Niue,¹⁰³ the High Court, with appeal to the Court of Appeal; and, in Vanuatu island courts with appeal to the Supreme Court until 2001.¹⁰⁴ In other countries specially constituted land courts have been established, but usually working in conjunction with the ordinary courts. In Kiribati specially constituted magistrates' courts (where three out of the five members are drawn from a panel of lands magistrates), with appeal to a specially constituted High Court (a judge sitting with four lands magistrates), and in both courts the decision is given by a majority.¹⁰⁵ In Solomon Islands also, there is a combination of ordinary courts and special

95 Native Lands Ordinance, Cap 22, s 19(1)(a).

96 Lands Act 1976, s 3(3).

97 Constitution of Samoa, Art 102.

98 Native Land Trust Board Act, Cap 134, s 5(1).

99 Land Act 1969, s 17(3).

100 Tokelau Amendment Act 1967 (NZ), s 25.

101 Constitution of Tonga, cl 104.

102 Constitution of Cook Islands, Arts 47–60.

103 Constitution of Niue, Pt III.

104 Land Reform Act, Cap 123, s 5; Island Courts Act, Cap 167 (Vanuatu), ss 1 and 22.

105 Magistrates Courts Act, Cap 52, Pts VI and VIII.

land courts: local courts, with appeal to Customary Land Appeal Courts, and further appeal to the High Court, but only on a question of written law, and not customary law.¹⁰⁶ In Tuvalu, there is a Lands Court at first instance, with appeal to a Land Courts Appeal Panel, and then to the Senior Magistrate's Court, and to the High Court, but only on questions of law;¹⁰⁷ persons knowledgeable in land matters may be asked to sit as assessors in the Senior Magistrate's Court and the High Court, but the decisions are to be given by the senior magistrate or judge, respectively. In Fiji Islands and Vanuatu since 2001, on the other hand, disputes about ownership of customary land are to be dealt with solely by tribunals and the courts are not involved at all: in Fiji Islands disputes are heard by the Native Land Commission, with appeal to the Appeals Tribunal, the members of which are appointed by the minister of Fijian Affairs,¹⁰⁸ and in Vanuatu disputes about the ownership of customary land are, since 2001, determined by a village land tribunal, with appeal to a custom area land tribunal, and final appeal to an island land tribunal, all the members of which are appointed from the custom area in which the land is situated by the appropriate chiefs.¹⁰⁹ Legislation introduced in Solomon Islands in 1985 requires that all disputes about customary land must first be submitted to the custom chiefs for adjudication, and only if their decision is not acceptable can the matter be referred to the courts for decision;¹¹⁰ the same practice is observed in Vanuatu, although not required by legislation.

There is still much discussion as to the best method of determining disputes about customary land. Some argue that there should be a return to traditional methods, that is, determination by custom chiefs. But traditional methods were not always successful, and many disputes continued which were concluded, if at all, only by warfare and violence. Also, decisions of customary chiefs may often be open to objection on the ground of breaches of natural justice, that is, failure to provide a disputant with an adequate opportunity to present a case, a real likelihood of bias, and decisions given without reasonable supporting evidence. To counter this, it can be argued that natural justice is an introduced legal concept, not an element of custom or customary law in most countries, and, therefore, should not regulate interests in customary land. In addition, there is the question of cost and availability of human resources to consider. For example, in Solomon Islands and Vanuatu, local courts and island courts, respectively, have not operated on some islands because of financial difficulties, and in Vanuatu

106 Land and Titles Court Act, Cap 133, ss 231, 231A, 231B and 232.

107 Native Lands Ordinance, Cap 22, Pt IV.

108 Native Lands Act, Cap 133, ss 6–7.

109 Customary Land Tribunal Act 2001.

110 Local Courts Amendment Act 1985, s 8.

the Supreme Court announced in 1997 that it could no longer deal with new appeals in land cases because of lack of judicial personnel.

Registration of customary land

Another matter relating to customary land, about which there has been much discussion, is whether customary land and the rights to customary land should be registered. In Cook Islands, Fiji Islands, Kiribati, Nauru and Tuvalu, during colonial times, there was a systematic registration of all customary land. However, the boundaries of the land that was registered were not surveyed, and were frequently identified by natural features, which over time became increasingly subject to change as a result of human and natural forces. Also, in the case of Gilbert and Ellice Islands, the first attempt by Campbell in the 1890s was so erroneous that the registration process had to start all over again in the 1920s, but even then the possibility for error and fraud still remained.

Conclusiveness of the registration

In Fiji Islands the legislation does not expressly state whether the register of native lands is conclusive, but it does allow for it to be changed, upon an order from the chairman of the native land commission, if it is found that an error was made in the preparation of the register, or that the name of a Fijian has been omitted from their proper land-owning unit or has been recorded in a land-owning unit which is not the proper one.¹¹¹ In Kiribati and Tuvalu, however, the legislation expressly states that the titles to customary land which have been registered by the Native Land Commission or by courts in accordance with the legislation are 'indefeasible', except in respect of titles which existed at the time that the native land commission conducted its enquiries, but which was not registered by the commission,¹¹² and, in Kiribati, titles on two islands – Tarawa and Tabiteuea. The indefeasibility of the registration has been upheld by the Court of Appeal of Kiribati on several occasions,¹¹³ but the courts have indicated that registration could be challenged if it were proved to have been procured by fraud, although such a case has not been proved yet.¹¹⁴ It can be argued, further, that much customary land is not worth the time and expense to register because it is not used commercially. There is also the argument of principle against registration, which is derived from the fundamental facts that the tenure of customary land is very flexible and also that it often allows for control by chiefs over the use of land. Registration, it is

111 Native Lands Act, Cap 133, s 10(2).

112 Native Lands Act Cap 61 (Kiribati), s 4; Magistrates Court Act, Cap 52 (Kiribati), s 59; Native Lands Ordinance, Cap 22 (Tuvalu), ss 4, 14.

113 *Kibae v Ueantabo* [1997] KICA 19; *Nakau v Kabwebwenibeia* [2004] KICA 15.

114 *Teitikai v Bwebwetaratai* [2003] KHC 167; *Nakau v Kabwebwenibeia* (above).

argued, will interfere both with the flexibility and the chiefly authority that are important features of customary land tenure. For these various reasons, systematic registration of customary land has not been undertaken in Samoa, Solomon Islands or Vanuatu. Instead, registration is required only when the customary land is leased and, in Samoa, licensed.¹¹⁵ Optional registration of customary land has, however, been provided for in Solomon Islands by the Customary Land Records Act 1994, which came into force in 1995; a project for the systematic registration of all land in Niue, which was commenced in 1992, looks likely to be discontinued, and replaced, if at all, by a system of voluntary registration.¹¹⁶

Management of customary land

Under the customs of most communities, the custom land owners can unanimously agree as to the way in which customary land is to be used and managed, at least if they have the approval of the chief. Where the custom owners and chief are all resident together in one location, and are not many in number, it is not difficult to arrange for meetings to be held, and for unanimous decisions about the use of customary land to be reached. However, when the custom owners are scattered and are numerous it becomes much more difficult to arrange meetings and to achieve unanimity amongst the custom owners. Further, when there are many custom owners of land, some custom owners, and indeed also some people who are not custom owners, can claim that they have rights to the custom land which they do not possess, and people wishing to deal with the custom owners may be confronted with an ever-changing group of people claiming to be owners who have ever-changing demands.

If a commercial transaction is satisfactorily entered into for the development of customary land and income is to be received from customary lands which is to be shared amongst the custom owners, it is important that there should be some efficient, honest and economical means of ensuring first that the proper monies are received, at the due times, and, second, that they are accurately and efficiently distributed to the persons entitled to receive them.

Various strategies have been used to attempt to overcome the practical problems involved in the management of customary lands. One strategy

115 Samoa Land Registration Order 1920 (NZ), s 4; Land and Titles Act, Cap 43 (Solomon Islands), s 106 (leases over two years); Land Leases Act, Cap 163 (Vanuatu), ss 22 and 35 (leases over three years).

116 Review of Niue Land Titling Project, March 1998, Wellington, New Zealand: Ministry of Foreign Affairs. For further discussion, see Richmond-Rex, F, 'Seeking security and sustainability in a situation of high mobility: the Niue experience', in *Customary Land Tenure and Sustainable Development: Complementarity or Conflict?* 1995, Noumea: SPC, pp 75–93.

which has been adopted is to authorise a court to summon meetings of owners, either upon the application of the government or an interested person, and to allow for decisions to be made by a majority of the owners, subject, however, to confirmation by the court. This has been adopted in Cook Islands by Pt II of the Land (Facilitation of Dealings) Act 1970.

Another strategy is to provide for one person to represent the custom owners, and to make decisions on their behalf and receive and distribute to them any returns from the land. Such a person is virtually in the position of trustee for the owners of the land. The customs of some countries do allow for this, that is, *matai* in Samoa, and *leveki mangafoa* in Niue. The difficulty with this kind of arrangement is ensuring that the selected person does make sound decisions, does recover any revenues efficiently and distributes them honestly. The existence of a court or tribunal which can oversee the operations of the owners' nominee or trustee, as in Samoa and Niue, is, therefore, very desirable.

An extension from the concept of an individual trustee is a committee or board of trustees to act on behalf of the custom owners. This strategy has been adopted in Vanuatu, where committees of trustees have been established to manage the customary lands of the three main villages around the capital, Port Vila: the Ifira, Mele and Pango villages. Such a committee may employ accountants and administrators to assist them in their duties, as does the committee of trustees of Mele village. Even with a committee of trustees, however, there is still the danger that their decisions may be unsound and/or may serve only the personal interests of the committee members or the personal interests of those families to whom they are related. As with a single trustee, the existence of a court or tribunal to supervise the work of trust committees is obviously desirable.

An alternative is for the custom owners to be incorporated by legislation into a corporate body, and for the powers of that corporation to be exercised by a small management committee. The committee may be authorised by the legislation to act by a majority, and it will then be easier for it to operate. Incorporation of owners has been provided for in Cook Islands by Pt I Land (Facilitation of Dealings) Act 1970, and has also been adopted in the neighbouring countries of New Zealand¹¹⁷ and Papua New Guinea.¹¹⁸ The dangers of this arrangement are that the management committee may take actions which are inept and unwise and/or are too much in the personal interests of the members of the committee or of certain of the custom owners. These dangers can be countered by requiring that members of the management committee be either approved by, or appointed by, a court or tribunal,

117 Maori Affairs Amendment Act 1967.

118 Land Groups Act, Cap 147.

and that their decisions must be approved or ratified by a court or tribunal, as is provided for in the legislation of Cook Islands.

Another strategy, which at one time was very popular in British dependencies, is the establishment of a statutory body with power to manage customary lands. These bodies were usually called 'land trust boards', and they were established in Fiji Islands, Solomon Islands and Vanuatu. In the last two countries, they did not prove successful, and were short lived. The Solomon Islands Trust Board was established in 1959¹¹⁹ to manage what were thought to be vacant lands, but all the lands were claimed by Solomon Islanders, and it was disbanded in 1964.¹²⁰ The Land Trust Board of New Hebrides was established in 1974¹²¹ and given powers to administer lands of the Australian Government in New Hebrides. It was seen by many New Hebrideans before independence as inconsistent with indigenous land aspirations, and it did not survive independence, when all land was vested in the custom owners.¹²² The Vila Urban Land Corporation and the Luganville Land Corporation, which were established in Vanuatu shortly after independence,¹²³ were abolished by the government in 1988 on grounds of mismanagement and excessive expense.¹²⁴ In Fiji Islands, however, the Native Land Trust Board,¹²⁵ established in 1940 to manage the lands of Fijians, still continues to operate, but against a chorus of expressions of dissatisfaction by custom owners, which manifest themselves, from time to time, in road blocks and forcible closures of schools, health centres and other government facilities.¹²⁶ The expressed grounds of dissatisfaction seem to be mainly the

119 Land and Titles Ordinance 1959, s 9.

120 Land and Titles (Amendment) Ordinance 1964, s 4.

121 Land Trust Board Regulation No 14 of 1973.

122 Constitution of Vanuatu, Arts 73–5. See, further, Stober, W, 'The Land Trust Board', in Larmour (ed.), *Land Tenure in Vanuatu*, 1984, Suva: IPS, USP, pp 34–46; Van Trease, H, *The Politics of Land in Vanuatu*, 1987, Suva: IPS, USP, pp 116–26.

123 Land Reform (Port Vila Urban Land Corporation) Order No 30 of 1981; Land Reform (Luganville Urban Land Corporation) Order No 118 of 1981.

124 Land Reform (Revocation) Order No 16 of 1988; Land Reform (Revocation) Order No 17 of 1988. See *Vanuatu Weekly Hebdomadaire*, No 187 (21 May 1988), pp 1–4; No 188 (28 May 1988), pp 1–2.

125 Native Land Trust Act Cap 134. See further Kamikamica, J and Davey, T, 'Trust on trial – the development of the customary land trust concept in Fiji', in Ghai (ed.), *Law, Politics and Government in the Pacific Island States*, 1988, Suva: IPS, USP, pp 285–304; Volavola, M, 'The Native Land Trust Board of Fiji', in *Customary Land Tenure and Sustainable Development, Complementarity or Conflict?* 1995, Noumea: SPC, pp 47–54.

126 See, eg, (1998) *Fiji Times*, 8 September; (1999) *Fiji Times*, 6 March; 17 March. Illustrative of the problems that occur is the saga of *Korotolutolu* Primary School, near *Seaqaqa* in *Vanua Levu*. Early in September 1998, the school was closed by angry land owners, when they discovered that the lease of the land on which the school stood had expired in 1996, and they had not been informed of this by the Native Land Trust Board, nor

leasing of excessive areas of land to lessees, thus allowing the custom owners inadequate areas for their own occupation and use; delays and inefficiencies in distribution of rentals received from lessees and failures to inform custom owners of the expiry of leases. In addition, there are some fundamental issues that require consideration, that is, the relatively low rentals negotiated by the board (usually 6% of unimproved capital value); the high administration charges, that is, 25%, which the board is authorised by statute to deduct from the rentals¹²⁷ and the payments of 5%, 10% and 15% of the balance of the rentals, which the board is required by regulations to pay to the chiefs of the *taukei*, *yavusa*, and *mataqali*, respectively,¹²⁸ so that the owners ultimately receive only 52% of the gross rentals, that is, 70% of 75%.

The most radical strategy for coping with the problem of managing customary land is for government to take over the management of such land. This has been provided for by legislation in some countries. In Cook Islands, legislation authorises the government to manage customary land if a majority of the owners agree.¹²⁹ In Kiribati¹³⁰ and Vanuatu,¹³¹ the government is authorised by legislation to manage customary land if it is neglected and not adequately maintained. In Vanuatu, the government is also authorised to hold and manage land if the ownership of it is in dispute.¹³²

Non-customary interests in land

While custom provides the basis for legal interests in most of the land in countries of the region, there are some areas which are not held in accordance with the custom of the local inhabitants, but are held in accordance

had they received any rent from the board since that time. The spokesman for the group was reported as saying that 'the land owners wanted an explanation from the school and the Native Land Trust Board as to why they had not been told that the lease had expired two years ago ... [and] the school would remain closed until they received an assurance from the school and NLTB that they would be paid what they were owed' (1998) *Fiji Times*, 6 September. On 3 October 1998, a meeting was held to settle the matter, which was attended by representatives of the NLTB, the education department, the school management committee and the land owners. On 6 March 1999, however, the press reported that the school had been closed again by the land owners, who claimed that the terms of the settlement reached at the meeting in October 1998 had been broken: (1999) *Fiji Times*, 6 March. When interviewed, the representative of NLTB was reported as saying: 'We are trying to update our records on the land lease issues.' (1999) *Sunday Post*, 7 March.

127 Native Land Trust Act, Cap 134, s 14.

128 Native Land Trust (Leases and Licences) Regulations 1984, reg 11.

129 Cook Islands Amendment Act 1946, Pt IV.

130 Neglected Lands Act, Cap 62.

131 Land Reform Act, Cap 123, Pt V.

132 *Ibid*, Pt V.

with principles enunciated in the written law or common law and equity. These interests will now be considered in descending order of the extent and importance of the interests in land that are created.

Ultimate ownership of land

In all countries of the region, the written law provides that some person or body is the ultimate owner of land. Ultimate ownership of land, which is sometimes called 'allodial title' or 'radical title', signifies that the person or body does not hold the land from any other person or body, and has the right to make grants of interests in that land to other persons, and also the right to own any land that is vacant or not claimed by any other person.

Under the common law, the Crown is the ultimate owner of all land in the United Kingdom, and this concept was also applied to colonies, such as Fiji Islands (subject to the Treaty of Cession 1874) and the Gilbert and Ellice Islands. In Fiji Islands and Kiribati, this right has now been vested in the state.¹³³ In Cook Islands, Niue and Tokelau, the land is stated to be vested in the Queen, but subject to all rights lawfully held by any person, including those held under custom.¹³⁴ In Nauru, confiscated lands, reserve lands, unclaimed lands, wastelands, land in respect of which there has been a failure of heirs, and lands under the control of the government are all vested in the state.¹³⁵ The remainder is owned by the customary owners. In Samoa, customary land and freehold land is stated to be held from the state of Samoa, while public land is vested in Samoa.¹³⁶ In Tonga, all land is stated by the constitution to be owned by the king.¹³⁷ On the other hand, in Vanuatu, 'all land in the Republic belongs to the indigenous custom owners and their descendants'.¹³⁸

In Solomon Islands, there is no express statement as to who is the owner of all the land in the country because it is believed that every part of the country is owned by Solomon Islanders. However, ss 58 and 158 of the Land and Titles Act¹³⁹ provide that, if any land is discovered to be vacant, it is to be vested in the Commissioner of Lands who is to hold it on behalf of the government of the country; if there is no successor to a registered interest

133 Head of State and Executive Authority of Fiji Decree 1988, s 29(5); Kiribati Independence Order 1979 (UK), s 9.

134 Cook Islands Act 1915 (NZ), s 354; Niue Amendment Act (No 2) 1968 (NZ), s 4; Tokelau Amendment Act 1976 (NZ), s 20.

135 Laws Repeal and Adopting Ordinance 1922–64, s 5.

136 Constitution of Samoa, Art 101.

137 Constitution of Tonga, cl 104.

138 Constitution of Vanuatu, Art 73.

139 Cap 133.

in land, that land also is to be vested in the Commissioner of Lands on behalf of the government.

Freehold estates in fee simple

Under the English common law, a freehold estate in fee simple provided the most extensive interests in land that a private person could acquire. Although it was not ownership in the strict sense because, as discussed above, ownership was regarded as vesting only in the Crown, a 'freehold' estate was one which, as its name indicates, was held free of any feudal or other obligations, such as the payment of rent, and being an 'estate in fee simple' meant that it was inheritable by the heir or the successor to the holder. It could, thus, stay in a family forever, or be devised by the holder by will to some other person. By the end of the 13th century, it was also recognised in England that freehold estates in fee simple could be transferred by the holders during their lifetimes. Freehold estates in fee simple, thus, provided the holders of the estates with full powers to use the lands and to dispose of them as they pleased.

During colonial times, in Cook Islands, Fiji Islands, Nauru, Niue and Samoa, the colonial governments were given power by the written law to make grants of freehold estates in fee simple.¹⁴⁰ This power was not conferred in British Solomon Islands Protectorate because the country was a protectorate and not a colony, and so the ownership of the land was not vested in the Crown. This was also the case in the Protectorate of Gilbert and Ellice Islands until the islands became a colony in 1916.¹⁴¹ In the Anglo-French condominium of the New Hebrides also, the colonial governments did not have power to make grants of land themselves. Nevertheless, in these countries, the European administrations recognised that the custom land owners could make grants to foreigners of perpetual ownership amounting to freehold and that there could be transfers of such ownership, until they were prohibited in Solomon Islands in 1914¹⁴² and in Gilbert and Ellice Islands in 1922.¹⁴³

In more recent times, especially approaching or after independence, there has been a movement in many countries of the region against freehold estates in fee simple, on the ground that they provide too great an interest in the land of the country, especially when such interests are acquired by people who

140 Cook Islands Act 1915 (NZ), s 355; Niue Act 1966 (NZ), s 324; Real Property Ordinance 1876 (Fiji), s 9; Samoa Act 1921 (NZ), s 269.

141 Gilbert and Ellice Islands Order 1915, cl IV.

142 Land Regulation 1914, s 3.

143 Native Lands Ordinance 1922, s 1.

are not indigenous citizens of the country concerned. In Niue,¹⁴⁴ the power to make grants of freehold was removed in 1968, and in Solomon Islands¹⁴⁵ and Vanuatu¹⁴⁶ freehold estates were abolished in 1977 and 1980, respectively. No power to grant freehold was contained in the legislation which provided for the annexation of Tokelau to New Zealand in 1948.¹⁴⁷ In Nauru, freehold estates can now be held only by citizens.¹⁴⁸ In Samoa, freehold estates can be held by non-citizens, but transfers of freehold estates to persons who are not resident citizens require the approval of the head of state as advised by the Minister of Lands.¹⁴⁹

One of the essential features of a freehold estate is that holders may use the land as they please, free of all conditions. The holder of a freehold estate, therefore, has a right, which does not usually occur with customary land, to exclude family members and others. Thus, in *Ao v Leata*,¹⁵⁰ the holder of freehold land in Samoa was held able to exclude members of his family from that land. Another important aspect of a freehold estate, and again a feature which is very different from most customary land, is that, under the common law, a freehold estate can be relinquished by the owner, to be acquired by other persons by adverse possession, after a given period of time. Under the common law, 20 years of adverse possession is sufficient to divest a person of freehold estate, provided that there is continuous possession which is adverse, that is, possession which occurs without the permission of the true owner. The elements of adverse possession were discussed in *Bird v Registrar of Titles*,¹⁵¹ where it was held that visiting land to collect coconuts and clear bush two or three times a week, without actual residence on the land was not sufficient to constitute adverse possession. Again, the planting of some patches of land with young coconut trees was held to be insufficient proof of adverse possession, in *WESTEC v Faisaovale*.¹⁵² In many countries, there is also legislation in force which provides a time limit, usually of 12 years, within which proceedings to recover possession of land must be brought.¹⁵³

144 Niue Amendment Act (No 2) 1968.

145 Land and Titles (Amendment) Act 1977, s 98A(2). For further discussion, see Kabui, F, 'Crown ownership of foreshores and seabed in Solomon Islands' (1997) 21 *JPacS* 123.

146 Constitution of Vanuatu, Arts 73–5.

147 Tokelau Act 1948 (NZ).

148 Lands Act 1976, s 7.

149 Alienation of Freehold Act 1972, s 6.

150 [1970–9] WSLR 202.

151 [1980–1] SILR 47.

152 [1970–9] WSLR 136.

153 Limitation Act 1939 (UK), s 4, which is in force in Kiribati, Solomon Islands and Tuvalu; Limitation Act 1950 (NZ), s 7, which is in force in Cook Islands and Niue; Limitation Act 1975 (Samoa), s 9.

Perpetual estates

Perpetual estates are kinds of interests in land which were introduced in Solomon Islands in 1959 by the Land and Titles Act.¹⁵⁴ These estates provide interests and rights in land which are nearly as extensive as those provided by freehold estates. They provide the holder of such estate with 'the right to occupy, use and enjoy in perpetuity the land and its produce', and the right to 'dispose of it, either in whole or in part, and either during his life or, at his death, by a valid will, in any manner he thinks fit'.¹⁵⁵ So, a perpetual estate provides the right to use the land as the holder pleases, and it is freely inheritable and transferable, like an estate in fee simple.

A perpetual estate is not, however, free from obligations, as is a freehold estate, because the legislation imposes certain obligations upon the holder: the proper maintenance of all boundary marks and existing roads, the payment of rent, and the performance of such other obligations as may be specified in the grant or the transfer of the estate.¹⁵⁶ Moreover, a perpetual estate cannot be held by a person who is not a Solomon Islander or a person approved by Parliament. As of 31 December 1977, all perpetual estates registered in the name of a person who was not a Solomon Islander or a Solomon Islands institution were automatically converted into fixed term estates, the term being 75 years.¹⁵⁷

Every grant and transfer of a perpetual estate must be registered¹⁵⁸ and, upon registration, the estate becomes subject to the overriding interests described in s 104 of the act. The most important of these overriding interests are rights of way and of water, existing easements and *profits à prendre*, the interests of tenants in possession under a lease for not more than two years and the rights of any person in actual occupation or in receipt of rents and profits, except where inquiry was made of such person and the rights were not disclosed.

Hereditary estates

The Constitution of Tonga provides that the king 'may grant to the nobles and titular chiefs or *matabules* one or more estates to become their hereditary estates'.¹⁵⁹ Many such hereditary estates, called *tofias*, were granted in 1875, and some in subsequent years, and later they were all set out in Sched I

¹⁵⁴ Cap 133.

¹⁵⁵ Land and Titles Act, Cap 133, s 102.

¹⁵⁶ Land and Titles Act, Cap 133, ss 122 and 123.

¹⁵⁷ Land and Titles (Amendment) Act 1977, s 6.

¹⁵⁸ Land and Titles Act, Cap 133, s 124.

¹⁵⁹ Constitution of Tonga, cl 104.

of the Land Act, which was enacted in 1927; in total, they account for about two-thirds of the land area of the kingdom. These hereditary estates are inheritable in accordance with the rules of succession set out in cl 111 of the constitution, which are based upon legitimate male primogeniture. Accordingly, the Supreme Court, in *Moeaki v Fakafanua*,¹⁶⁰ dismissed a claim to inherit an estate because the person through whom the claim was traced was illegitimate.

Unlike freehold estates in fee simple and perpetual estates, hereditary estates cannot be transferred by the holder, either during his or her lifetime or, at death, by will. Hereditary estates are, in fact, similar to the 'freehold estates in fee tail' which were recognised by the common law, but have now been abolished in England, in that they are inheritable through a prescribed line of succession and are not transferable. In one other respect, hereditary estates of Tonga are more restricted than freehold estates in fee simple, and also perpetual estates: they are subject to allocation of commoners' allotments. Every male Tongan subject over 16 years old is entitled to apply to the Minister of Lands for two allotments of land to be made to him – one in the town and one in the country.¹⁶¹ The act states that these allotments should be allocated out of the estates of the noble on whose estates the applicant is normally resident, if possible, but, if none is available, then out of the estates of any willing noble or, if there are no willing nobles, out of Crown lands.¹⁶² The Minister of Lands is required to consult with the estate holder before making an allocation out of his estates, but he does not require the consent of the estate holder before allocating an allotment on his estate.¹⁶³ The only recourse which an estate holder has to change the allocation of an allotment is to seek a review of the minister's decision by the Land Court under s 34 of the Land Act.¹⁶⁴ The estate holder cannot make the allocation of an allotment, or change an allocation that the minister has made. So, when a noble permitted a man to move from an allotment on his estate, which had been allocated to the man by the minister, onto another allotment on his estate which had been allocated by the minister to another person, the Land Court held that the man must leave the second allotment.¹⁶⁵

Such parts of a hereditary estate as have not been allocated for allotments can be leased by the noble, with the approval of cabinet, for a period of up to 99 years; and, with the approval of the Privy Council, for a longer period.¹⁶⁶

160 (1927) II Tongan LR 26.

161 Constitution of Tonga, cl 113; Land Act, Cap 132, ss 6 and 43.

162 Land Act, Cap 132, s 50.

163 *Ibid*, s 34.

164 Cap 132.

165 *Tu'ino v Tulua* (1937) II Tongan LR 36.

166 Constitution of Tonga, cl 114; Land Act, Cap 132, s 33.

Hereditary estates can also, with the approval of the Minister of Lands, be mortgaged.¹⁶⁷

Hereditary allotments

The constitution and legislation of Tonga provide, as described earlier, for hereditary allotments of land, called *api*, to be made by the Minister of Lands to male Tongan subjects by birth who are aged 16 years or over. One of these allotments, called a 'town allotment', which is located in a town and is 1618 square metres in area, is to provide a town residence for the grantee; while the other, called a tax allotment, which is located in the country and is 3.3 hectares in area, is to provide for his gardens.¹⁶⁸

Like freehold estates and perpetual estates, these allotments are hereditary, but, like hereditary estates, they are not transferable and are not devisable and can be inherited only in accordance with certain prescribed principles of succession that are set out in s 82 of the Land Act.¹⁶⁹ These principles are based on male primogeniture, but are subject to a life interest in favour of the widow of a holder until her remarriage, adultery or fornication. The right of succession is not automatic, but is conditional upon an application being made to the minister by the heir or the widow within 12 months of the death of the holder. If no claim is made to the Minister of Lands within the prescribed time, the land is to revert back to the hereditary estate or the Crown estate from which it had been allocated.¹⁷⁰ While the Privy Council, in *Pohabau v Niu'ila*,¹⁷¹ has accepted that a claim may be made orally on behalf of a widow or heir, nevertheless, if there is a failure to submit a claim within the time specified, any grant of an allotment will be invalidated. So, a grant made on 5 August 1983 upon an application by an heir in respect of an allotment, the holder of which had died on 23 October 1981, was held, in *Taufa v Vilingia Tuputo'a and Minister of Lands*,¹⁷² to be invalid. This has been held also to apply when allotments are surrendered: *Vakameitalo v Vakameitalo*.¹⁷³ The effect of this may be that the rights of succession of an heir who is a child and unaware of the need to make application within 12 months can be shut out inadvertently or deliberately by the failure of somebody to make application on his behalf, but the Privy Council has held, in

167 Land Act, Cap 132, s 101.

168 *Ibid*, ss 6 and 43.

169 Cap 132.

170 Land Act, Cap 13, s 89.

171 [1962–73] Tonga LR 42.

172 [1981–8] Tonga LR 85.

173 [1989] Tonga LR 98.

Sione Malamala v Sione Halafihī Malamala,¹⁷⁴ that 'whilst this may be considered an undesirable practice, it is not an illegal one'.

Allotments are to be made by written grants issued by the Minister of Lands.¹⁷⁵ Prior to the enactment of the Land Act in 1927, grants of allotments could be made orally by the Minister of Lands.¹⁷⁶ Lengthy occupation and cultivation of land is evidence of an oral grant,¹⁷⁷ but it has been held that that is not conclusive.¹⁷⁸ Again, the fact that a claimant's name has been entered on a map in the office of the Ministry of Lands, and that an entry has been made in the register of allotments held by the ministry, although strong evidence of a grant, is not conclusive.¹⁷⁹ So, also, the fact that there is no entry in the register, while it is evidence which suggests that there was no grant, is not conclusive.¹⁸⁰

Decisions by the Minister of Lands as to the granting or refusal of allotments may be reviewed by the Land Court, which is authorised by s 149(b) of the Land Act¹⁸¹ 'to hear and determine all disputes, claims and questions of title affecting ... any tofia, tax or town allotment or any interest therein'. From decisions of the Land Court, appeals lie to the Privy Council.¹⁸² This jurisdiction has been held to include not only a power to cancel a grant made by a Minister of Lands, but also a power to direct the minister to make a grant.¹⁸³

On several occasions, the Privy Council has stated that a decision by the minister to grant an allotment can be cancelled if it is shown to have been made on wrong principles, 'which means that the Minister acted contrary to statute, or in breach of the rules of natural justice or in breach of a clear promise by the Minister and the tofia holder'.¹⁸⁴ A grant of an allotment may also be cancelled by the courts if it was based upon a material mistake of fact, such as when a grant of land was made to a man which included a portion which, unknown to the minister, the grantee had promised to

174 (1958) II Tongan LR 169.

175 Land Act, Cap 132, s 43.

176 *Tu'uhetoka v Malungahu* (1945) II Tongan LR 53; *Tekiteki v Minister of Lands* [1962-73] Tonga LR 34; *Latu v Moala* [1981-8] Tonga LR 134.

177 *Latu v Moala* [1981-8] Tonga LR 134.

178 *Ongosia v Tu'inukuafe* [1981-8] Tonga LR 113.

179 *Ibid.*

180 *Moala v Tu'afata* (1956) II Tongan LR 153; *Manakotau v Vabai* (1959) II Tongan LR 121; *Ongasia v Tuinokuafe* [1981-8] Tonga LR 113; *Latu v Moala* [1981-8] Tonga LR 134.

181 Cap 132.

182 Land Act, Cap 132, s 162.

183 *Afu v Lebas* (1958) II Tongan LR 167; *Kaufusi v Taunaholo* [1981-8] Tonga LR 70; *Tavelangi v Tavelangi* [1981-8] Tonga LR 123.

184 *Sione Malamala v Sione Halafihī Malamala* (1958) II Tongan LR 169; *Havea v Tu'i'atitu* [1974-80] Tonga LR 64; see also *Afu v Lebas* (1958) II Tongan LR 167; *Vea and Totofili v Finau* [1981-8] Tonga LR 131; *Vai v Uli'afia* [1989] Tonga LR 56; *Mahe v Deputy Minister of Lands* [1974-80] Tonga LR 20.

surrender to another person, on the faith of which promise that person had built a substantial house on that portion.¹⁸⁵

Rent is payable by the holder of an allotment to the holder of the estate upon which the allotment is allocated at a rate fixed by the act, and a holder of an allotment who is more than two years in arrears with rent, or who fails to satisfy a judgment for payment of rent within three months, is liable to be ejected from the allotment.¹⁸⁶ If the holder of a country allotment has not maintained it in the average state of cultivation of allotments in that district, or has been convicted on more than two occasions in the preceding three years of failing to plant 200 coconuts on the country allotment within 12 months of the allocation and keep them reasonably free from weeds, he may be ejected.¹⁸⁷ Further, if the holder of an allotment has abandoned it for more than two years, it may be declared forfeited by the Land Court.¹⁸⁸

Although the right of male Tongans to receive hereditary allotments is confirmed by cl 113 of the constitution and by ss 6 and 43 of the Land Act, in fact, for several decades, there has been insufficient land available for allocation as allotments, and it is estimated that by the year 2000 there will be about 24,000 male Tongans who are still waiting to receive the allotment to which they are entitled under the law.¹⁸⁹

Occupation rights

In 1946, legislation was passed by the New Zealand Parliament which authorised the Native Land Court¹⁹⁰ of Cook Islands (including Niue) to make orders granting a right to occupy customary land 'for such period and upon such terms and conditions as the court thinks fit'.¹⁹¹ Such orders may be made only if a majority of the owners of the customary land agree, and only if the grantee is an indigenous Cook Islander.¹⁹²

The usual practice of the court is to make a grant of a quarter of an acre for a house site, or half to one acre for citrus production, and to impose certain conditions, for example, that a house must be built or that the land must be cultivated within five years, and that the occupation right will continue

185 *Fosita v Tu'ineau* [1981–8] Tonga LR 105; see also *Ministry of Lands v Kulitapu* [1974–80] Tonga LR 101; *Vai v Uli'afia* [1989] Tonga LR 56; *Moa v Faka'osita* [1990] Tonga LR 195; affirmed [1991] Tonga LR 32.

186 Land Act, Cap 132, s 68.

187 *Ibid*, s 68.

188 Land Act, Cap 132, s 44.

189 Maude and Sevele, 'Tonga: equality overtaking privilege', in Crocombe (ed.), *Land Tenure in the Pacific*, 1987, Suva: IPS, p 14.

190 Now, the Lands Division of the High Court.

191 Cook Islands Amendment Act 1946 (NZ), s 50(1).

192 *Ibid*, s 50(1).

for an initial period of 20 years, and, after that, for so long as the grantee or the direct descendants of the grantee are in occupation of the land.¹⁹³ The court order granting an occupation right normally also provides that the occupation right may be cancelled by the court if the land has not been developed in accordance with the terms of the order.¹⁹⁴

An occupation right is, like a hereditary allotment, usually stated by the court to be inheritable by the direct descendants of the holder, but it is not transferable by the holder *inter vivos*, that is, during lifetime. An occupation right may be used as a security for a loan, but it was reported that the commercial banks are reluctant to accept such a right as a security.¹⁹⁵

Leasehold estates

Leasehold estates are estates in land recognised by the common law as occurring when the owner of a freehold estate in fee simple grants another person the exclusive possession of all or part of the land, for a fixed or definable period of time, subject to the grantee or lessee paying a stipulated rent and performing such other obligations as are set out in or to be implied in the instrument granting the lease. The person granting the lease is called the 'lessor', and the person to whom it is granted is called the 'lessee'. Under the common law, a lease may also be granted by the holder of a leasehold estate, in which case, the lease is called a 'sublease' and the original lease is called a 'headlease'.

Under the common law, a grant of a lease could be made either orally or in writing or by written deed, but this gave rise to much confusion and uncertainty, and also fraudulent practices, by both lessors and lessees. The legislature intervened in England and required that leases for over three years must be by deed, but leases for under that period may be made orally or in writing.¹⁹⁶ In some countries of the region, the legislation requires that leases over a certain period, that is, one year in Cook Islands, Fiji Islands, Niue, Samoa and Tokelau,¹⁹⁷ two years in Solomon Islands,¹⁹⁸ three years in Vanuatu¹⁹⁹ and all leases for whatever term in Tonga,²⁰⁰ must be in

193 David, R, 'Cook Islands, occupation rights', in Acquaye and Crocombe (eds), *Land Tenure and Rural Productivity*, 1984, Suva: IPS, p 166.

194 *Ibid*, p 166.

195 *Ibid*, p 170.

196 Law of Property Act 1925 (UK), ss 52 and 54.

197 Property Law Act 1952 (NZ), s 10, which is in force in Cook Islands, Niue, Samoa and Tokelau; Land Transfer Act, Cap 131 (Fiji), s 54.

198 Land and Titles Act, Cap 133, s 135.

199 Land Leases Act, Cap 163, s 35.

200 Land Act, Cap 132, ss 33 and 56.

a prescribed form. A leasehold estate can be inherited and it can also be transferred or assigned unless this is restricted by the terms of the lease. In these respects, the leasehold is similar to a freehold estate in fee simple.

One important distinction between a leasehold estate and a freehold estate is that the former only provides exclusive possession for a limited period of time. If the period of the lease is not indicated with certainty, there can be no valid lease, as in *Congregational Christian Church v Tauga*,²⁰¹ where certain land and premises were stated to be leased 'for so long as the lessor shall use the said premises for the purposes of its Church thereon and its congregation'; this uncertainty as to the period of the lease was held to render the lease void. The other important distinction between a freehold and a leasehold estate is that the right to exclusive possession under a lease is subject to the conditions or terms which are expressed or implied in the lease agreement. Invariably, there is a condition that the lessee must pay a certain sum as rent, but usually there are also other terms and conditions that are expressed or implied.

A breach by the lessee of the important terms of a lease will normally entitle the lessor to cancel or forfeit the lease. In most countries of the region, there are legislative provisions, often called 'relief against forfeiture' provisions, which control the way in which the lessor can exercise a power to forfeit a lease so as to ensure that the lessee has proper notice of the alleged breach, and proper opportunity to make good the breach.²⁰² Thus, in *WESTEC v Leung Wai*,²⁰³ the High Court of Samoa refused to issue an injunction to order a lessee not to go onto leased lands after the lessor claimed that the lessee was in breach of the terms of the lease because the notice by the lessor to the lessee describing the alleged breaches of the terms of the lease by the lessee was not sufficiently specific to meet the standard required by the legislation in force in Samoa.²⁰⁴

A lease agreement often makes provision for the renewal of a lease. Sometimes, this may provide the lessee with a right to have the lease renewed, provided the lessee complies with any conditions in the lease instrument or in the written law. If any pre-conditions are fulfilled, then the lessee has a right to receive a renewal of the lease, but, if the terms are not complied with, then there is no right to receive a renewal of the lease. Thus, in *ET Oldehaver & Co Ltd v Attorney General*,²⁰⁵ it was held that a lessee

201 [1980-93] WSLR 22.

202 Property Law Act 1952 (NZ), s 118, in force in Cook Islands, Niue and Samoa; Property Law Act, Cap 130 (Fiji), s 105; Land and Titles Act, Cap 133 (Solomon Islands), s 146; Land Leases Act, Cap 163 (Vanuatu), s 45.

203 [1960-9] WSLR 6.

204 Property Law Act 1952 (NZ), s 118(1), which is in force in Samoa.

205 [1970-9] WSLR 159.

company had lost its right to a renewal of a lease when it submitted its request for a renewal about 18 months after the expiry of the lease, instead of within three months before the expiry of the lease, as stipulated in the lease. Again, in *Nuku v Church of Jesus Christ of Latter Day Saints*,²⁰⁶ a grant of a renewal of a lease of a hereditary estate which had been made by the Minister of Lands of Tonga was held to be unlawful because there had been no written request by the lessee for a renewal as required by s 36 of the Land Act.²⁰⁷

Sometimes, the terms of a lease instrument or of the written law may provide that the lease may be renewed if the lessor is willing to do so. This does not give the lessee a right to have the lease renewed, but only holds out a hope or possibility that it will be renewed and, if the lessor chooses not to renew the lease, the lessee is powerless. Thus, in *Tukino and Haukinima v Minister of Lands*,²⁰⁸ the Privy Council of Tonga held that a lease, which was granted by the Crown to trustees of a settlement of Niuean people in Nuku'alofa and which contained a clause that 'if the lessor is willing to grant a further lease ... then the lessees should have the first offer', did not confer any right on the lessees to insist on a renewal of the lease, and since the Crown was not willing to grant a renewal of the lease, the lessees were directed by the Privy Council to leave the leased premises peacefully. In Tonga, it has been held, in *Quensell v Minister of Lands*,²⁰⁹ that, once cabinet has decided to grant a renewal, it cannot subsequently change its mind, even though it has given no indication of its decision to the lessee or any other person. Since a leasehold estate is an interest in land which is of limited duration, the grant or transfer of such an estate in land is of not such great concern to governments in the region as the grant or transfer of a freehold estate or a perpetual estate. Accordingly, there is no country in which the grant or transfer of leaseholds has been prohibited. In some countries, however, for example, Nauru, Tonga and Vanuatu, all leases require the consent of the government;²¹⁰ in Kiribati,²¹¹ Samoa,²¹² Solomon Islands²¹³ and Tuvalu,²¹⁴ some leases require the approval of government.

206 [1980-1] Tonga LR 78.

207 Cap 132.

208 [1974-80] Tonga LR 74; see also *Kalinavalu v Government of Tonga* [1974-80] Tonga LR 5.

209 [1962-73] Tonga LR 49.

210 Lands Act 1976 (Nauru), s 3; Land Act, Cap 132 (Tonga), s 83; Land Reform Act, Cap 123 (Vanuatu), ss 6 and 7.

211 Leases which are not native leases: Native Lands Act, Cap 61, s 9.

212 Leases of customary land: Alienation of Customary Land Act 1965, s 4; leases for over 20 years: Alienation of Freehold Land Act 1972, s 6.

213 Leases to non-Solomon Islanders: Land and Titles Act, Cap 133, s 143(2).

214 Leases which are not native leases: Native Lands Ordinance, Cap 22, s 30.

In Fiji Islands, some special legislative provisions were enacted in 1967 by the Agricultural Landlord and Tenant Act,²¹⁵ often referred to as ALTA, to protect leases of agricultural land. 'Agricultural land' is defined, for the purpose of the act, as 'land ... used or proposed to be used predominantly for the growing of crops ... poultry keeping or breeding, or the breeding or keeping of livestock',²¹⁶ although its main application, in practice, has been with regard to land used for the growing of sugarcane. This act, as amended in 1977, provides that every lease of agricultural land after December 1967 and before September 1977 shall be deemed to be a lease for a period of 10 years from 1966, and shall also be deemed to contain a right of two further renewals for not less than 10 years, provided that the lessee is complying with the express and implied terms of the lease.²¹⁷ Every lease of agricultural land after September 1977 is stated to be a lease for 30 years.²¹⁸ Further, the act provides that, if a person was in occupation of, and cultivating, agricultural land for a period of three years before or after 29 December 1967, and the landlord had taken no steps to remove that person, a lease was to be presumed to exist unless the landlord could prove affirmatively that there was no lease.²¹⁹ This act was designed to provide some security for the tenants of agricultural land, especially land used for sugar growing, and, so, to provide stability in the sugar industry, which is supplied by many small-scale leaseholders. The period of protection provided by this legislation is now coming to an end, and, once again, uncertainty and insecurity are facing many lessees of agricultural land in Fiji Islands.

Fixed term estates

Fixed term estates are interests in land which were introduced in Solomon Islands in 1959 by the Land and Titles Act.²²⁰ A fixed term estate provides the holder with 'the right to occupy, use and enjoy, for a period of time fixed and certain at the time of the grant thereof, the land and its produce'.²²¹ A fixed term estate is, thus, very similar in effect to a leasehold estate, except that a fixed term estate held by a non-Solomon Islander can continue for no longer than 75 years,²²² and all such estates are made subject to certain conditions imposed by the act. A fixed term estate is similar to a leasehold

215 Cap 270.

216 Agricultural Landlord and Tenant Act, Cap 270, s 1.

217 *Ibid*, ss 6(a) and 13.

218 *Ibid*, s 6(b).

219 Agricultural Landlord and Tenant Act, Cap 270, s 4.

220 Cap 133.

221 Land and Titles Act, Cap 133, s 103(1).

222 *Ibid*, s 98.

estate also in that the owner may 'dispose of it either in whole or in part, and either during his life or, at his death, by a valid will, in any manner he thinks fit'.²²³ As with a leasehold estate, a fixed term estate is subject to the payment of rent and is subject to any other obligations incident to it, but it is, in addition, subject to such other restrictions as are imposed by the act.²²⁴ The act imposes obligations to properly maintain all boundary marks and existing roads and also to allow to owners or occupiers of neighbouring land reasonable access to reach a roadway, river, creek or foreshore.²²⁵ Failure by the holder of a fixed term estate to pay the rent or to perform any other obligation is a ground for forfeiture of the estate by the Commissioner of Lands, subject, however, to compliance with the requirements of the act as to forfeiture.²²⁶ Every transfer or grant of a fixed term estate must be registered,²²⁷ and, when registered, a fixed term estate becomes subject to the same overriding interests²²⁸ as are imposed on perpetual estates (see earlier).

Licences or permits

The common law recognised that the holder of a freehold estate or a leasehold estate could give permission or a licence to a person to enter and stay on part or all of the land, and, during the period of the permission, the permittee or licensee could not be removed. The permission to occupy the land may provide for the land to be shared with others, that is, joint occupation, or it may grant the licensee sole or exclusive occupation. Again, the permission may be for a very limited purpose, for example, walking across the land, grazing cattle, making a survey of boundaries, or for very extensive activities, for example, to operate a business or to build residence on the land. When the licence allows for exclusive occupation and for extensive activities, it may appear very similar, to outward appearances and in practical effect, to a leasehold estate.

The difference between a lease and a licence is that a lease confers an estate or an interest in land which continues until the termination of the lease, and which can be transferred and inherited, whereas a licence provides no estate or interest in land and is personal to the licensee. The fact that the parties use the terms 'licence', 'licensor' and 'licensee' is an indication that the arrangement is a licence and not a lease, but it is not conclusive, and the court will look at all the circumstances to see whether the arrangement that

223 *Ibid*, s 103(2).

224 *Ibid*, s 103(2).

225 *Ibid*, ss 105 and 123.

226 *Ibid*, ss 126–9.

227 *Ibid*, s 124.

228 *Ibid*, s 104.

has been made indicates that an estate in land is being granted or only a permission to enter and use land. In *Street v Mountford*,²²⁹ the House of Lords stated that if an arrangement is designed to give a person exclusive possession of land or premises, it is normally to be regarded as a lease, not a licence, no matter how the parties have described themselves or their transaction. Thus, in that case, an agreement by a house owner to allow a woman to have exclusive possession of two rooms on payment of a certain sum of money per week, subject to termination on 14 days' notice, was held to be a lease and not a licence, notwithstanding the fact that the agreement was called a 'licence agreement' and was stated to grant a 'licence' to occupy the rooms.

A licence to enter land continues until the time which is stated in the licence, and, if no time is stated, the licence can be terminated at any time by the licensor giving notice to the licensee. Thus, in *Ao v Loata*,²³⁰ the Supreme Court of Samoa held that members of an extended family who were permitted by the owner of freehold land to live on his land, but who had been told to leave the land by the land owner must do so: 'the licence has been terminated by the plaintiff. An injunction will therefore issue to restrain the defendant from trespassing upon the land.'²³¹ Notice to terminate a licence must, under the common law, be reasonable: it must be sufficient to enable the licensee to depart and remove his or her family and belongings from the land. Thus, in *Pulu v Bloomfield*,²³² where a woman who had been permitted by the holder of an allotment to build a house on his allotment was ordered by him to leave, the Supreme Court of Tonga said:

Nola is going to have to move her house off this land. But, on the other hand, as she has been there since 1962, she is obviously entitled to a reasonable time to make arrangements to move her house.²³³

Not only does the common law require that notice to terminate a licence to occupy land must be reasonable, but the courts in England have held that the rules of equity require that, if a person has been permitted on the land by the land owner and encouraged to spend money in building a house in the land in the expectation that some estate or interest in the land will be granted, the land owner may be required to grant that interest.²³⁴ On the basis of these decisions, the Privy Council of Tonga held, in *OG Sanft and*

229 [1985] AC 809.

230 [1970-9] WSLR 202.

231 *Ibid*, pp 204-5.

232 [1974-80] Tonga LR 105.

233 *Ibid*, p 106.

234 *Dillwyn v Llewelyn* (1862) 4 De FF & J 517; 45 ER 1285; *Ramsden v Dyson* (1866) LR 1 HL 129; *Plimmer v Wellington City Corporation* (1884) 9 App Cas 699.

Sons v Tonga Tourist and Development Co,²³⁵ that a lessee of land in Tonga which had allowed people who were forming a company to construct a hotel on the land in the expectation that they would be granted a sub-lease of the land, must, in fact, grant a sub-lease to the company when it was formed. The rules of equity may also provide that, even though no expectation has been held out by a land owner that a person will be granted an interest in the land, nevertheless, if a land owner has allowed a person to construct a building on the land, that land owner may be stopped or barred from ejecting the person from the land during that person's lifetime. On several occasions, in Tonga, the Supreme Court has held that holders of allotments who had allowed family members or friends to build houses on part of their allotments could not later, after the houses had been built, eject the licensees because the parties had quarrelled.²³⁶

Since licences do not usually confer any substantial legal interests in land, they are not normally subject to control by government. In Samoa and Vanuatu, however, licences of customary land require the approval of the Minister of Lands;²³⁷ and, in Tonga, licences, called 'permits', for aliens to occupy land can only be granted by the Minister of Lands.²³⁸

Easements and profits à prendre

Easements and *profits à prendre* are special interests of a limited nature which the common law recognises that a person may have in the land of another person. These are similar to the secondary rights which custom often recognises that persons other than the custom owners may have in custom land (see earlier). Easements are of two kinds: positive and negative easements. Positive easements allow a person to do something on another person's land, for example, to walk over the land, to lay drains in the land. Negative easements allow a person to stop the owner of the land from doing something on that land, for example, erecting a fence or structure over a certain height, constructing a building in a certain place or near a certain boundary.

Some easements are imposed by the common law. These are sometimes called 'natural easements' because they arise from the nature of the land. The two most important natural easements are an easement over land on a lower level to receive all water naturally flowing from a higher land and an

235 [1981–8] Tonga LR 26.

236 *Fakataua v Koloamatangi* (1974) II Tongan LR 15; *Veikune v Toa* [1981–8] Tonga LR 138; *Vai v Uliafu* [1989] Tonga LR 56; *Motuliki v Namoa* [1990] Tonga LR 61.

237 Alienation of Customary Land Act 1965 (Samoa), s 4; Land Reform Act, Cap 123 (Vanuatu), ss 6 and 7.

238 Land Act, Cap 132, s 14.

easement over each piece of land to support adjoining land. Some easements are imposed by the written law. Thus, s 105 of the Land and Titles Act,²³⁹ Solomon Islands provides that all interests in land (including customary land) shall be held subject to an implied right of way in favour of a neighbouring owner or occupier of land, who has no other reasonable means of access to a road, river, creek or foreshore. Other easements can be provided by grant, that is, the owner of one land grants to the owner of another land an easement over his or her land. Probably the most common form of easement by grant is a grant by the owner of land to allow another person to pass across that land, that is, an easement of right of way.

The written law of most countries of the region expressly recognises that easements may be created over most kinds of land holdings: over freehold and leasehold land in Cook Islands, Fiji Islands, Niue and Samoa;²⁴⁰ over customary land and leasehold land in Nauru;²⁴¹ over perpetual estates, fixed term estates and registered leases in Solomon Islands²⁴² and over registered leases in Vanuatu.²⁴³ There is no express reference to the granting of easements in the legislation of Kiribati or Tuvalu in respect of non-customary land, probably because the amount of non-customary land is so small in those countries. Nor is there any express provision in the Land Act of Tonga as to the granting of easements over hereditary estates or allotments.

Under the common law, easements can only be attached to land, not to people, or '*in gross*' as it is technically termed. So, it is always necessary to show that there is some land to which the easement is attached. The land in whose favour the easement operates is technically called the 'dominant tenement', and the land which is subject to the easement is technically termed the 'servient tenement'. A person claiming an interest in an easement under common law must always be able to show both a servient tenement and a dominant tenement. In some countries of the region, however, that is, Cook Islands, Fiji, Niue and Samoa, this common law rule has been expressly abrogated by legislation.²⁴⁴

A *profit à prendre* is an interest in land recognised by the common law which is a special kind of positive easement in that it allows a person to go on to the land of another person and to remove something of benefit from that land, for example, fruit, coconuts, coral, sand. On the other hand, the

239 Cap 133.

240 Property Law Act 1952 (NZ), s 122, which is in force in Cook Islands, Niue and Samoa; Property Law Act, Cap 130 (Fiji Islands), s 106.

241 Lands Act 1976, s 11.

242 Land and Titles Act, Cap 133, s 165.

243 Land Leases Act, Cap 163, s 67.

244 Property Law Act 1952 (NZ), s 122, which is in force in Cook Islands, Niue and Samoa; Property Law Act, Cap 130 (Fiji), s 106.

removal of something that does not belong to the owner of the land, such as water in a river or a lake, is not regarded as a *profit à prendre*. Unlike easements, *profits à prendre* do not have to attach to land, but can be granted to people, or, as it is technically said, they can exist *in gross*.

It is only in a few countries of the region that the legislation provides for *profits à prendre*. In Fiji Islands, the legislation recognises that profits à prendre may be created over freehold or leasehold land.²⁴⁵ In Solomon Islands, s 167 of the Land and Titles Act²⁴⁶ provides that *profits* may be created over perpetual and fixed term estates, and also registered leaseholds, and in Vanuatu *profits* may be created over registered leaseholds.²⁴⁷ In the other countries of the region, the common law would have to be relied upon to provide a legal basis for the granting of *profits à prendre*.

Mortgages

A mortgage is the grant of land or of a charge over land as a security for the repayment of a loan. It is called a mortgage because the land comes into, or under the control of, the 'dead hand' (from the French: '*mort gage*') of the lender, called the 'mortgagee', until the borrower, called the 'mortgagor', can repay the loan.

Under the common law, a mortgage took the form of a transfer or conveyance of a freehold or leasehold estate to the lender, subject to a covenant or an agreement by the mortgagee that the land will be returned to the mortgagor when the loan is repaid. In Cook Islands, Niue and Samoa, where there is no local legislation regulating mortgages, and where the Property Law Act 1952 (NZ) is in force, a mortgage of freehold and leasehold land may be made either by a conveyance by way of mortgage (which is not usually adopted) or by an instrument of mortgage.²⁴⁸ In Fiji Islands,²⁴⁹ legislation provides that mortgages may be made of freehold and leasehold land by way of an instrument of mortgage which, when registered under the Land Transfer Act,²⁵⁰ takes effect as a security or a charge, but not as a transfer of the estate. There is legislation to a similar effect in respect of the mortgage of perpetual estates, fixed term estates and registered leasehold estates in Solomon Islands,²⁵¹ and in respect of registered leasehold estates in Vanuatu.²⁵² In Kiribati, Nauru and Tuvalu, there is no

245 Land Transfer Act, Cap 131, ss 49 and 50.

246 Cap 133.

247 Land Leases Act, Cap 163, s 68.

248 Property Law Act 1952 (NZ), s 76.

249 Land Transfer Act, Cap 131, s 63.

250 Cap 131.

251 Land and Titles Act, Cap 133, s 152(3).

252 Land Leases Act, Cap 163, s 50(3).

locally enacted legislation to provide for mortgages, but the Law of Property Act 1925 (UK), as a statute of general application, because it was in force in England prior to 1961, would appear to be in force in these countries to regulate mortgages of freehold and leasehold estates. It provides that a mortgage of a freehold estate must take the form either of a lease of a freehold estate or a sub-lease of a leasehold estate, or of a deed of charge expressed by way of legal mortgage of a freehold or leasehold estate.²⁵³ In Tonga, mortgages may, with the approval of the Minister of Lands, be granted over hereditary estates, over tax and town allotments, and over registered leaseholds.²⁵⁴ In Tonga, a mortgage takes the form of the granting of a lease for a specified period to cover the repayment of the loan,²⁵⁵ as under the Law of Property Act 1925 (UK) (see earlier).

In most countries of the region, mortgages of land are not regarded as being of sufficient interest or concern to governments as to require governmental approval, but in Tonga all mortgages require the approval of the Minister of Lands.²⁵⁶ In practice, governmental approval is also required for mortgages in Solomon Islands because this is usually a requirement included in the terms of the grant of mortgage.

Registration of estates and interests in non-customary land

The principles of common law and equity regulate the legal interests which people have in land and how they may be acquired and how they may be transferred, but they do not provide for them to be recorded in any way. It is the responsibility of each person to keep the documents relating to his or her interest in land. Moreover, since the basic principle of common law is that a person can only transfer those interests in land which he or she legally possesses, sometimes expressed in the Latin maxim *nemo dat quod non habet* (meaning, literally, 'no person gives what he or she does not have'), then it is very important to be able to trace all the previous documents relating to that land, to ensure that there is no legal flaw in the title which would persist through to the present time.

The result is that, under the common law, before a person wishing to acquire an interest in land can be sure that such interest can be validly acquired, that person must search for, and check, all the documents relating to the title to land in which he or she is interested. These documents might be in the hands of many different people, and very difficult to obtain. Moreover, even after making such a search, and proceeding with a transaction to acquire

253 Law of Property Act 1925 (UK), ss 85, 86.

254 Land Act, Cap 132, ss 99–101.

255 *Ibid*, s 96.

256 *Ibid*, ss 99–101.

that interest, a person can never be sure that some person may not emerge at some stage with a document that may cast doubt on the validity of the interest that he or she thought had been validly acquired.

For this reason, in those countries of the region where there are significant areas of non-customary land or leases of customary land, that is, Fiji Islands,²⁵⁷ Niue,²⁵⁸ Samoa,²⁵⁹ Solomon Islands,²⁶⁰ Tonga²⁶¹ and Vanuatu,²⁶² legislation has been enacted requiring that all documents involving legal interests in such land must be registered in a central land registry operated by a governmental department. The effect of registration, and conversely of non-registration, is, however, not the same in all six countries.²⁶³ The legislation of Fiji Islands, Solomon Islands and Vanuatu expressly states that, except in the case of fraud, and in Solomon Islands and Vanuatu, except in the case of a person who has received land as a gift, a registered interest in land shall be affected only by those interests that are registered prior in time, and shall not be affected by any unregistered interest. The registered interest of a person who has acquired it for value is, thus, made very strong and is able to be challenged in only very limited circumstances. This is sometimes described by saying that registration renders the interest 'indefeasible', although that is not strictly true because it can be challenged or defeated, but only in very limited circumstances.

The effect of registration is also expressly stated by the legislation in Niue, but to a much different effect. Section 5(1) of the Land Act 1969 states that 'no instrument ... shall, until it has been registered or entered, be effectual to create or extinguish or transfer or charge any interest in land'; but, sub-s (2) states that the 'Land Register shall in no way constitute conclusive evidence of ownership of title'. Thus, registration of instruments relating to land in Niue is necessary before they can legally affect land, but registration does not validate them or give them any greater legal validity than they already have, and the interests in land which they purport to create are not rendered virtually indefeasible or unchallengeable as in Fiji Islands, Solomon Islands and Vanuatu.

In Samoa, s 8 of the Samoa Land Registration Order 1920 (NZ) expressly states that 'no instrument of title shall, in any manner, affect the legal title to land in Samoa unless such interest is registered in the Land Register in

257 Land Transfer Act, Cap 131.

258 Lands Act 1969.

259 Samoa Land Registration Order 1920 (NZ).

260 Land and Titles Act, Cap 133.

261 Land Act, Cap 132.

262 Land Leases Act, Cap 163.

263 Land Transfer Act, Cap 131 (Fiji), Pt V; Land and Titles Act, Cap 133 (Solomon Islands), Pt VIII; Land Leases Act, Cap 163 (Vanuatu), Pt IV.

accordance with the Act'. This section is of a similar effect to sub-s (1) of s 5 of the Land Act 1969 of Niue, in that it provides that registration is necessary before an instrument can affect title to land in Samoa. Although there is no sub-section corresponding to sub-s (2) of s 5 of the Niue act, it is clear that the effect of the Samoa act is to provide that only registered instruments can affect title, but not that registered instruments are given any greater validity than they would otherwise have.

In Tonga, the sections of the Land Act²⁶⁴ which require that grants of allotments, and also leases, mortgages and permits of hereditary estates and allotments must be registered,²⁶⁵ do not expressly state what the effect of registration is, and so the courts have been obliged to infer what effect should be inferred from the act. They have held that registration is not necessary to prove a title to an allotment alleged to have been granted before the enactment of the Land Act in 1926, because, prior to that act, registration of allotments was not required.²⁶⁶ The same interpretation has also been adopted with regard to non-registration of a grant of an allotment alleged to have been made after the act came into force.²⁶⁷ The courts in Tonga have also held that registration of an interest, although evidence of such interest, is not conclusive or indefeasible. If it can be shown that an error has been made in the registration process, for example, misrecording of the number of the allotment,²⁶⁸ the entry in the register may be ordered to be amended by the Land Court. Also, it has been stated on one occasion²⁶⁹ that the register could be ordered to be amended by the Land Court if fraud were proved to have occurred in the registry. The courts have also held that, even though no mistake or fraud is shown to have occurred in the registration process, decisions by the Minister of Lands to grant or refuse allotments may be reviewed by the Land Court, and set aside, if they are shown to have been made up on a wrong principle, that is, contrary to the act, or to principles of natural justice, or to a clear promise made by the minister, or upon a material mistake of fact.²⁷⁰ Thus, in Tonga, the courts have held that registration is not necessary to establish a claim to an allotment, and, further, that registration of any instrument may be cancelled if it is shown to have been made under a mistake or procured by fraud, and that registration of a ministerial decision to grant or refuse an allotment does not render it conclusive or indefeasible, but it may be cancelled if it was contrary to law or made under a mistake of fact.

264 Cap 133.

265 Land Act, Cap 133, ss 104, 107, 115, 137.

266 *Tu'iafitu v Moala* (1957) II Tongan LR 153; *Manakata v Vahai* (1959) II Tongan LR 121.

267 *Ongosia v Tu'inukuafefe* [1981-8] Tonga LR 134.

268 *Hema v Hema* (1959) II Tongan LR 126.

269 *Ma'asi v Akau'ola* (1956) II Tongan LR 107.

270 See, above, Hereditary allotments, p 319.

Land use planning

In Cook Islands,²⁷¹ Fiji Islands,²⁷² Kiribati,²⁷³ Samoa,²⁷⁴ Solomon Islands²⁷⁵ and Vanuatu,²⁷⁶ legislation has been enacted which enables planning authorities to control the use of land in a systematic way. This is to be achieved by, first, the promulgation, after public notice and opportunity for objection, of a plan or scheme which designates what physical structures can be built on land within the area of the plan, and also what uses of land can be undertaken there. In Cook Islands, the initiative for preparing a plan is required to be undertaken by central government.²⁷⁷ In Kiribati, a general plan is to be prepared first by an agency of central government, the Central Land Planning Board, and then local plans by local planning boards which are the local government councils.²⁷⁸ In Samoa the plan is prepared by an appointed agency of central government, the Planning and Urban Management Agency, which comprises an appointed board and officials of the Ministry of Natural Resources and Environment.²⁷⁹ In Solomon Islands, however, this is the responsibility of provincial and municipal local planning boards, nominated by the provincial executive and Honiara council, respectively.²⁸⁰ In Fiji Islands²⁸¹ and Vanuatu,²⁸² the primary responsibility for preparing a land use scheme is imposed upon elected local authorities, subject, in the case of Fiji Islands, to the approval of central government.

Once the planning scheme is in force, it designates what kinds of development and uses are permitted in specified zones of the planning area. Normally, they tend to follow the dominant use patterns in the area which exist at the time of the formulation of the scheme, and prohibit or regulate intrusions into these areas of uses which are significantly different, so as to preserve a basic similarity or compatibility of uses in each zone. The legislation provides that the commencement of any development which is not permitted by the legislation or by the plan requires prior permission from the planning authority.²⁸³ In some countries, additional activities relating to

271 Land Use Act 1969 (Cook Islands).

272 Town and Country Planning Act, Cap 139.

273 Land Planning Act, Cap 48.

274 Planning and Urban Management Act, 2004.

275 Town and Country Planning Act, Cap 154.

276 Physical Planning Act, Cap 193.

277 Land Use Act 1969, s 3.

278 Land Planning Act, Cap 48, s 9.

279 Planning and Urban Management Act, 2004, s 13.

280 Town and Country Planning (Amendment) Act 1982, s 3.

281 Town and Country Planning Act, Cap 139, ss 18–25.

282 Physical Planning Act, Cap 193, ss 2, 3.

283 Land Use Act 1969 (Cook Islands), s 6; General Provisions for Town Planning Schemes and Areas 1980 (Fiji Islands), provision 8; Land Planning Act, Cap 48 (Kiribati), s 2; Planning and Urban Management Act, 2004 (Samoa), s 34; Town and Country Planning Act, Cap 154 (Solomon Islands), s 14; Physical Planning Act, Cap 193 (Vanuatu), s 1.

land require planning permission. In Fiji Islands, the subdivision of any land, the formation or widening of streets or means of vehicular access to streets, the making of earthworks and the destruction of large trees also require planning permission.²⁸⁴ In Solomon Islands, engineering, mining or other operations in or over or under land require permission, and the Minister of Lands may make regulations declaring that any type of intensive or large-scale agricultural use of land requires permission.²⁸⁵ In Vanuatu, as in Fiji Islands, the subdivision of land requires planning permission.²⁸⁶ All the various works on land that require planning permission are usually described as 'development'. In addition, in Fiji Islands, Samoa, Solomon Islands and Vanuatu, any material or significant change of use, even without development, does, with certain specified exceptions, require permission from the planning authorities.²⁸⁷

In most countries of the region, the legislation provides that developments and uses which were in existence at the time the planning scheme came into force are deemed to have permission subject to conditions, or, as in Cook Islands, do not require permission, provided they are not increased.²⁸⁸ Other developments and uses which are not permitted by the plan require the permission of the planning authority. This permission may be refused, granted, or granted subject to conditions. A series of judicial decisions in England has made it clear that conditions imposed by planning authorities upon the grant of planning permission must be for planning purposes only and not for some other purpose, that they must be based only upon considerations relevant to planning, and not upon some other irrelevant considerations, that they must not be patently unreasonable, and that they must be expressed in terms which are intelligible.²⁸⁹ These decisions have been followed in Fiji Islands.²⁹⁰

284 General Provisions for Town Planning Schemes and Areas 1980, provision 8.

285 Town and Country Planning Act, Cap 154, s 14.

286 Physical Planning Act, Cap 193, s 1.

287 General Provisions for Town Planning Schemes and Areas 1980 (Fiji Islands), provision 8; Planning and Urban Management Act 2004 (Samoa), s 2; Town and Country Planning Act, Cap 154 (Solomon Islands), s 114; Physical Planning Act, Cap 193 (Vanuatu), s 1.

288 Land Use Act 1969 (Cook Islands), ss 6, 7; Town Planning (Interim Development) Regulations 1960 (Fiji Islands), reg 5; Land Planning Act, Cap 48 (Kiribati), s 29; Planning and Urban Management Act, 2004 (Samoa), s 62; Town and Country Planning Act, Cap 154 (Solomon Islands), s 35; Physical Planning Act, Cap 193 (Vanuatu), s 7(8).

289 *Pyx Granite Co v Ministry of Housing and Local Government* [1959] 1 QB 544; *Chertsey Urban District Council v Mixnam's Properties Ltd* [1965] AC 735; *Fawcett Properties v Buckingham County Council* [1969] AC 636; *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; *Kent County Council v Kingsway Investments Ltd* [1971] AC 72; *Hall and Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240.

290 *Lautoka City Council v Time Investments* (1981) 27 FLR 111.

If a person is dissatisfied with a decision of a planning authority, there is a right of appeal in Fiji Islands, Kiribati, Samoa, Solomon Islands and Vanuatu. In Fiji Islands, an appeal lies first to the director of Town and Country Planning, and then to the Minister of Lands;²⁹¹ in Kiribati, a person can appeal to the Central Land Planning Board, and then to the High Court;²⁹² in Samoa, an appeal lies to a Planning Tribunal, comprising a judge of the Supreme Court and two other persons nominated by cabinet;²⁹³ in Solomon Islands²⁹⁴ and Vanuatu,²⁹⁵ an appeal lies to the Minister of Lands.

If a person develops or uses land without obtaining permission from the planning authority, or in breach of the conditions attached to permission given by the planning authority, action can be taken by the planning authority. In Fiji Islands,²⁹⁶ Kiribati,²⁹⁷ Samoa,²⁹⁸ Solomon Islands²⁹⁹ and Vanuatu,³⁰⁰ the planning authority can serve an enforcement notice or order upon the person specifying the respects in which the person is in breach of the scheme and requiring action to be taken to remedy the breach, and, if the person fails to comply with that notice, not only can he or she be prosecuted and fined by the courts, but also the planning authority can itself remove the development or stop the use which is in breach of the section. In Cook Islands,³⁰¹ a person who fails to comply with a zoning order may be prosecuted and fined.

291 General Provisions for Town Planning Schemes and Areas 1980, provision 8; Town and Country Planning Act, Cap 139, s 5.

292 Land Planning Act, Cap 48, ss 21–4.

293 Planning and Urban Management Act, 2004, ss 54, 67.

294 Town and Country Planning Act, Cap 154, s 19.

295 Physical Planning Act, Cap 193, s 9.

296 Town and Country Planning Act, Cap 139, s 27.

297 Land Planning Act, Cap 48, s 28.

298 Planning and Urban Management Act, 2004, s 80.

299 Town and Country Planning Act, Cap 154, s 24.

300 Physical Planning Act, Cap 193, Sched 2.

301 Land Use Act 1969, s 8.

State courts

Introduction

A mechanism for dispute resolution is an important part of any society. In pre-colonial times, methods of dispute resolution ranged from warfare to resolution by traditional leaders. During the colonial period, introduced laws were accompanied by introduced court systems. Although some modernisation and regional innovation has taken place, the introduced systems remain largely intact. It is these state courts that are examined in this chapter. It should be made clear that parties may choose not to resolve their disputes through the courts but to use some form of alternative dispute resolution, such as negotiation, conciliation,¹ arbitration² or mediation.³ The use of such procedures has been very slowly increasing in the South Pacific, but has been hampered in some countries by the dearth of qualified mediators and arbitrators and the reluctance of some lawyers to settle disputes.

Another way in which disputes may be resolved is through customary processes. Such processes commonly exist, outside the formal hierarchy, at village level, for example, the village courts in Vanuatu.⁴ They do not necessarily have any legal recognition; rather, they are based on respect for customary authority. While these bodies may be regarded as the most important forums from the point of view of those to whom they apply, they are not covered in this chapter, which looks only at the formal state courts. Customary processes are more fully described in Chapter 3.

1 In land disputes, settlement is encouraged by the Customary Land Tribunals Act 2001 (Vanuatu), ss 28(2) and 31.

2 Many regional countries have specific legislation regulating arbitration. See, eg, Arbitration Act, Cap 38 (Fiji); Arbitration Act 1990 (Kiribati); Arbitration Act 1980 (Marshall Islands); Arbitration Act 1976 (Samoa); Arbitration Act 1991 (Tuvalu).

3 Mediation is encouraged in Vanuatu: Civil Procedure Rules 2002 (Vanuatu), Part 10. Mediation is encouraged in land disputes in Papua New Guinea: Land Disputes Settlement Act, Cap 45, ss 9–20.

4 The Customary Land Tribunals Act 2001 (Van) gives statutory authority to village level determination of disputes concerning customary land.

The hierarchy of the courts in countries of the USP region generally follows a standard model which has three levels, consisting of inferior courts, a superior court and an appeal court. In each country, the superior court has a supervisory jurisdiction over the inferior courts.⁵ This supervisory jurisdiction is discussed under 'Judicial review' in Chapter 5. Superior courts also possess jurisdiction to deal with applications made under the constitution or involving interpretation of the constitution.⁶ Due to lack of resources, the appeal court is not constituted in each country on a permanent basis, but sits between one and four times each year to deal with accumulated appeals.⁷ In some countries Court of Appeal judges include judges appointed from overseas. For example, in Solomon Islands they include judges from Australia, Papua New Guinea and England; in Vanuatu they include judges from Australia and New Zealand. Courts of Appeal deal with two sorts of appeals: 'first appeals' from decisions of the superior courts sitting in their original jurisdiction and 'further appeals' from decisions made by the superior courts acting in their appellate jurisdiction. Four countries, the Cook Islands,⁸ Niue, Kiribati and Tuvalu, allow another level of appeal, to the Privy Council in England. Fiji Islands allows a further appeal to a second internal appeal court. In addition to the standard courts, many countries have established separate courts to deal with customary land and administer customary law. Appeal from these courts often leads back into the standard structure. These courts have been covered in this chapter if they form part of the formal hierarchy and if their jurisdiction is not restricted to land.

The Cook Islands

Hierarchy and constitution of the courts

Privy Council
Court of Appeal
High Court (presided over by a judge)
High Court (presided over by justices of the peace)

- 5 See, eg, Constitution of Fiji Islands 1997, s 120(6); Constitution of Kiribati, s 89; Constitution of Solomon Islands, s 84.
- 6 See, eg, Constitution of Cook Islands, Art 123; Constitution of Fiji Islands 1997, ss 41, 120(2); Constitution of Kiribati, ss 17, 88; Constitution of Niue, Arts 54(1) and 55; Judicature Act 1961 (Samoa), s 31; Constitution of Solomon Islands, ss 18(2), 83; Constitution of Tuvalu, s 130; Constitution of Vanuatu, Art 53. In some countries, jurisdiction to interpret the constitution is exclusive, eg, Constitution of Fiji Islands 1997, s 120(4).
- 7 See Pulea, M, 'A Regional Court of Appeal for the Pacific' (1980) 9(2) *Pacific Perspective* 1, for a discussion of the historical perspective, and Mataitoga, I, 'South Pacific Court of Appeal' (1982) 11(1) *Pacific Perspective* 70, for a discussion of some of the problems which favour the present system in preference to a regional appeal court.
- 8 For a survey of the relationship between the Privy Council and the Cook Islands, see Frame, A, 'The Cook Islands and the Privy Council' (1984) 14 *VUWLR* 311.

In the Cook Islands, the standard three-tier regional model is varied, in that the first two tiers exist within one court. The High Court may be constituted as an inferior court or a superior court, depending on who presides. Appeal lies to the Court of Appeal. The Cook Islands is one of the four regional countries which still allows a further appeal, in matters prescribed by statute, to the English Privy Council.

The Court of Appeal is established under Art 56 of the constitution. It is constituted by three judges of the Court of Appeal.⁹ The chief justice and puisne judges of the High Court are judges of the Court of Appeal.¹⁰ Other judges are appointed by the Queen's Representative acting on the advice of the Executive Council.¹¹ Decisions of the Court of Appeal are final, except where appeal to the Privy Council is allowed by statute.¹²

The High Court is established under Art 47 of the constitution. It is divided into a civil division, a criminal division and a land division.¹³ It consists of the chief justice and any other judge who has been appointed by the Queen's Representative acting on the advice of the Executive Council.¹⁴ There is provision for the judge to sit with a jury when hearing certain criminal cases.¹⁵

Article 62 of the constitution provides for the appointment of justices of the peace to be appointed by the Queen's Representative, acting on the advice of the Executive Council. The Judicature Act 1980–81 provides for justices to sit in the High Court, either alone¹⁶ or as a bench of three.¹⁷

Jurisdiction

Privy Council

CIVIL JURISDICTION

Appeals lie from the Court of Appeal to the Privy Council:

- where the case involves a substantive question of law as to the interpretation or effect of the Constitution of Cook Islands
- where final judgment has been given, involving at least \$5,000, or

⁹ Constitution of Cook Islands 1964, Art 57.

¹⁰ *Ibid*, Art 56(2)(b).

¹¹ Constitution of Cook Islands 1964, Art 56.

¹² Constitution of Cook Islands 1964, Art 59. For problems surrounding the wording of this section see Frame, A, 'The Cook Islands and the Privy Council' (1984) 14 *VUWLR* 311. The Privy Council (Judicial Committee) Act 1984 extends the Order in Council of 10 January 1910 (SR 1973/181 NZ) to the Cook Islands.

¹³ Constitution of Cook Islands 1964, Art 47(3).

¹⁴ Constitution of Cook Islands 1964, Art 52.

¹⁵ See Judicature Act 1980–81, ss 13–17, and also chapter 12.

¹⁶ Judicature Act 1980–81, s 19.

¹⁷ *Ibid*, s 20.

- where the appeal involves a question of great general or public importance or which otherwise ought to be submitted to the Privy Council.¹⁸

Appeals from decisions as to the right of a person to hold a chiefly office or as to ownership of customary land, Ariki land¹⁹ or land owned in fee simple by a Cook Islander were not allowed between 1992 and 2000, when the restrictive provision were repealed.²⁰

CRIMINAL JURISDICTION

The Privy Council (Judicial Committee) Act 1984 makes no reference to a specific criminal jurisdiction of the Privy Council in relation to the Cook Islands. However, the general jurisdiction contained in s 2(c), noted above, is sufficiently wide to include criminal matters. Similarly, the saving section of the Act (s 6) continues the right of Her Majesty in Council to admit an appeal from any decision of the Court of Appeal 'upon such conditions as Her Majesty in Council thinks fit to impose'.

Court of Appeal

CIVIL JURISDICTION

The Court of Appeal has jurisdiction to hear appeals from the High Court as of right:²¹

- where the High Court certifies that a substantive question of law is involved
- where the dispute involves \$400 or more, or
- where a question arises as to the interpretation of the constitution.

Appeals also lie with the leave of the High Court²² or special leave of the Court of Appeal,²³ in certain cases.

The Court of Appeal may also determine a question of law by way of case stated, either on application by a party or the High Court's own motion.²⁴

18 Privy Council (Judicial Committee) Act 1984, s 3(2).

19 The terms 'customary land' and 'Ariki land' bear the meaning given in the Cook Islands Act 1915. 'Ariki land' means chiefly land.

20 Privy Council (Judicial Committee) Amendment (Repeal) Act 2000, s 2.

21 Constitution of Cook Islands 1964, Art 60(2)(a)–(d).

22 *Ibid*, Art 60(2)(e).

23 *Ibid*, Art 60(3), as amended by Constitution Amendment (No 16) Act 1993–94.

24 Judicature Act 1980–81, s 52.

CRIMINAL JURISDICTION

The Court of Appeal has jurisdiction to hear appeals from judgments of the High Court'.²⁵ Appeals lie as of right where the appellant has been sentenced to

- life imprisonment or death, or
- a term of imprisonment exceeding six months or a fine of \$200 or more, unless the sentence is fixed by law.²⁶

In other cases special leave of the Court of Appeal is required to appeal. There is also jurisdiction to conduct appeals by way of case stated in criminal cases.²⁷

High Court (constituted by a High Court judge)

CIVIL AND CRIMINAL JURISDICTION

The High Court has unlimited original jurisdiction in relation to both civil and criminal matters.²⁸ This is normally exercised by a single judge. Appeal lies to the High Court, in relation to civil and criminal matters, from all decisions of justices of the peace, whether sitting alone or together.²⁹

LAND JURISDICTION

The land division has all the jurisdiction which used to be exercised by the land court,³⁰ except for jurisdiction to deal with disputes concerning land in the islands of Mangaia, Mitiaro and Pukapuka unless requested to so by the traditional leaders from those islands.³¹

High Court (constituted by justices of the peace)

CIVIL JURISDICTION

A single justice presiding in the High Court has jurisdiction to deal with actions for the recovery of any debt or damages or recovery of chattels,

²⁵ Constitution of Cook Islands, Art 60.

²⁶ See Constitution of Cook Islands, Art 60(2)(b).

²⁷ Judicature Act 1980–81, s 52.

²⁸ Constitution of Cook Islands, Art 47(2).

²⁹ Judicature Act 1980–81, s 76.

³⁰ Constitution of Cook Islands, Art 48(2).

³¹ Constitution of Cook Islands, Art 48(3).

where not more than \$1,500 is involved.³² Three justices sitting together may deal with actions for the recovery of any debt or damages or recovery of chattels involving between \$1,500 and \$3,000.³³ Both a single justice and a full bench may have additional jurisdiction conferred by statute.³⁴

CRIMINAL JURISDICTION

A justice sitting alone has jurisdiction:

- where the offence is punishable by a fine only
- where the offence is listed in Pt I of Sched 2 of the Judicature Act 1980–81
- where the offence is one other than those already specified, for the purpose of receiving a plea from an accused person, and
- where it has been specified in another piece of legislation that the offence in question is one which may be determined by a justice sitting alone.³⁵

The maximum penalty on conviction that may be given by a justice sitting alone is imprisonment for up to two years and/or a fine of no more than \$200.³⁶

When constituted by three justices, the High Court has jurisdiction to deal with criminal cases:³⁷

- where the offence is specified in Pt II of the second schedule to the Judicature Act 1980–81, and
- where the legislation creating the offence specifies that it may be heard by the High Court when constituted by three justices.

The court may impose a maximum term of imprisonment of three years and/or a fine of up to \$300.³⁸

Fiji Islands

Hierarchy and constitution of the courts

Supreme Court
Court of Appeal

³² *Ibid*, s 19(b).

³³ *Ibid*, s 20(b).

³⁴ *Ibid*, ss 19(b)(iii), 20(e).

³⁵ Judicature Act 1980–81, s 19(a).

³⁶ *Ibid*, s 21.

³⁷ *Ibid*, s 20(a).

³⁸ *Ibid*, s 21(2).

High Court Magistrates' courts

Fiji Islands is the only country of the region to have two levels of appellate court within its own jurisdiction. Prior to the entry into force of the 1997 Constitution, there was also provision for inferior courts to operate at a village level.³⁹ In fact, these courts had not operated since 1967.⁴⁰

Section 117 of the constitution of the Republic of Fiji Islands 1997 vests the judicial power of the state in the High Court, the Court of Appeal and the Supreme Court and other courts created by law. The Supreme Court consists of the chief justice who is the president of the court, judges appointed to the Supreme Court and the Justices of Appeal.⁴¹ It must sit with at least three judges.⁴² The Court of Appeal consists of the president of the Court of Appeal, Justices of Appeal, and the puisne judges of the High Court.⁴³ The High Court consists of the chief justice and not less than 10 puisne judges.⁴⁴ The family division of the High Court is constituted by one or more judges.⁴⁵

The chief justice is appointed by the president of Fiji Islands on the advice of the prime minister, following consultation with the leader of the opposition.⁴⁶ Other judges and Justices of Appeal are appointed by the president of Fiji Islands on the recommendation of the Judicial Service Commission, following consultation with the minister and the sector standing committee of the House of Representatives responsible for the administration of justice.⁴⁷ The exception is judges of the family division of the High Court who are appointed by the chief justice.⁴⁸

Magistrates' courts are established by the Magistrates' Courts Act.⁴⁹ Magistrates are divided into three classes: resident magistrate, second class magistrate, and third class magistrate.⁵⁰ Magistrates are appointed by the Judicial Service Commission.⁵¹ The family division of the magistrates court is constituted by a resident magistrate appointed by the chief magistrate.⁵²

39 Constitution of Fiji 1990, Art 122(1); Fijian Affairs Act 1945; and Fijian Affairs (Courts) Regulations 1948 (revoked 1967).

40 See Nadakuitavuki, V, 'Fijian magistrates – an historical perspective', in Powles, G and Pulea, M (eds), *Pacific Courts and Legal Systems*, 1988, Suva: USP, pp 78–84.

41 Constitution of Fiji 1990, s 128.

42 Supreme Court Decree 1991, s 5(1).

43 Constitution of Fiji Islands 1997, s 127.

44 *Ibid*, s 126(1).

45 Family Law Act 2003 (Fiji), s 18(1).

46 *Ibid*, s 132(1).

47 Constitution of Fiji Islands 1997, s 132(2).

48 Family Law Act 2003 (Fiji), ss 15(2), 16(1).

49 Cap 14.

50 Magistrates' Courts Act, Cap 14, s 3(2).

51 Constitution of Fiji 1990, s 133(a).

52 Family Law Act 2003 (Fiji), s 20(2).

Jurisdiction

Supreme Court

CIVIL JURISDICTION

The Supreme Court is the final appellate court of the state.⁵³ It has exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal, with leave of the Court of Appeal or special leave of the Supreme Court.⁵⁴ Appeals lie as of right

- from final decisions involving any constitutional question, and
- from final decisions in proceedings involving F\$20,000 or more.⁵⁵

The president of Fiji Islands may, on the advice of cabinet, refer questions as to the effect of the constitution to the Supreme Court for an opinion.⁵⁶

CRIMINAL JURISDICTION

The Supreme Court is the final appellate body criminal matters.⁵⁷ The court may grant leave to appeal to the Court of Appeal against its own decision in any criminal case.

Court of Appeal

CIVIL JURISDICTION

The Court of Appeal has jurisdiction to hear and determine appeals from judgments of the High Court.⁵⁸ Appeals from final judgments lie as of right⁵⁹

- from decisions of the High Court sitting in first instance⁶⁰
- from any original decision of the family division of the High Court⁶¹

53 *Ibid*, s 117(2).

54 Constitution of Fiji Islands 1997, s 122.

55 Supreme Court Decree 1991, s 8(1).

56 Constitution of Fiji 1990, s 123.

57 See Supreme Court Decree 1991, s 8(2).

58 Constitution of Fiji Islands 1997, s 121.

59 Court of Appeal Act, Cap 12, s 12(1).

60 The Court of Appeal (Amendment) Act 13 of 1998 replaced s 3(3) of the principal act, which dealt with appeals from the defunct High Court of the Western Pacific with a new subsection conferring jurisdiction on the Court of Appeal to hear appeals from final judgments of the High Court exercising original jurisdiction. In civil cases, this jurisdiction was already conferred by s 12(1)(a), which does not require the decision to be final, although s 12(2)(f) provides that leave is usually required to appeal from interlocutory orders or judgments.

61 Family Law Act 2003 (Fiji), s 19(2).

- on questions of law only, from decisions of the High Court sitting on appeal⁶²
- from final decisions in matters arising under the constitution or involving its interpretation
- from final decisions involving interpretation of the Judicature Act 1988, and
- from interlocutory orders where
 - the liberty of the subject or the custody of minors is concerned
 - an injunction or the appointment of a receiver is granted or refused
 - a decision determines the claim of a creditor or the liability of any contributory or the liability of any director or officer under the Companies Act
 - a judgment or order in an admiralty action determines liability.

Other applications require leave.⁶³

CRIMINAL JURISDICTION

Any person convicted by the High Court may appeal to the Court of Appeal against conviction as of right on a question of law or with leave of the Court of Appeal in other cases.⁶⁴ Appeal also lies against sentence (other than a sentence fixed by law) with leave of the Court of Appeal. The Court of Appeal also hears appeals with leave from a Supreme Court's decision on appeal from a magistrates' court on a question of law, provided that there is no appeal where the High Court has confirmed an acquittal by a magistrates' court.⁶⁵

High Court

CONSTITUTIONAL JURISDICTION

The High Court has original jurisdiction in any matter arising under the constitution or involving its interpretation.⁶⁶ More specifically, it has original jurisdiction to hear applications concerning the breach of any of the

62 The Court of Appeal (Amendment) Act 13 of 1998 inserted a new sub-s (4) in s 3 of the principal act. The new s 3(4) confers jurisdiction on the Court of Appeal to hear appeals from final judgments of the High Court exercising appellate jurisdiction. In civil cases, this jurisdiction was already conferred by s 12(1)(c), which does not require the decision to be final, although s 12(2)(f) provides that leave is usually required to appeal from interlocutory orders or judgments.

63 This implication arises from Constitution of Fiji Islands 1997, s 121, and Judicature Decree 1988, s 12(1).

64 Court of Appeal Act, Cap 12, s 21; Family Law Act 2003 (Fiji), s 19(3).

65 Court of Appeal Act, Cap 12, s 22(1).

66 Constitution of Fiji Islands 1997, s 120(2).

rights and freedoms granted by chapter 4 of the constitution.⁶⁷ Further, if a question of breach of any of the rights under chapter 4 arises in a lower court, the judge may at his own discretion, or if the party requests the judge must, refer the question to the High Court.⁶⁸ The High Court is the court of Disputed Returns and has original jurisdiction to determine whether a person has been validly elected as a member of the House of Representatives⁶⁹ and applications for a declaration whether the place of a member of the House of Representatives or the Senate has become vacant.⁷⁰

CIVIL JURISDICTION

The High Court has unlimited original jurisdiction to hear and determine civil proceedings.⁷¹ It also has jurisdiction to determine appeals from all judgments of subordinate courts.⁷² Appeals from all decisions (including interlocutory proceedings) of a resident magistrate may be taken to the High Court.⁷³ Magistrates may refer any question of law to the High Court.⁷⁴

CRIMINAL JURISDICTION

The High Court has unlimited jurisdiction in criminal matters.⁷⁵ It also has jurisdiction to hear appeals from magistrates' courts.⁷⁶

Either party to a criminal matter may appeal to the High Court. Appeals lie against judgment, sentence or an order of a magistrates' court in relation to matters of fact, as well as law.⁷⁷ Determinations of a magistrates' court may also be referred to the High Court by way of case stated.⁷⁸

FAMILY JURISDICTION

The family division of the High Court has jurisdiction to deal with matrimonial causes and all other matters instituted under the Family Law Act 2003.⁷⁹ It has exclusive jurisdiction to hear applications for orders of

67 Fiji Islands Constitution (Amendment) Act 1997, s 41.

68 *Ibid*, s 41(5).

69 *Ibid*, s 73(1)(a).

70 *Ibid*, s 73(1)(b).

71 Constitution of Fiji Islands 1997, s 120(1).

72 *Ibid*, s 120(3).

73 Magistrates' Courts Act, Cap 14.

74 *Ibid*, Cap 14.

75 See Constitution of Fiji 1990, Pt VII.

76 Criminal Procedure Code, Cap 21, Pts X and XI.

77 Criminal Procedure Code, Cap 21, s 308.

78 See Criminal Procedure Code, Cap 21, ss 329–40.

79 Family Law Act 2003, s 17(1).

nullity of marriage and orders involving Fiji Islands' obligations under the Convention on the Civil Aspects of International Child Abduction.⁸⁰ The family division of the High Court also hears appeals from the family division of the magistrates' court.⁸¹

Magistrates' courts

CIVIL JURISDICTION

The territorial jurisdiction of magistrates' courts is limited to the division in which they are situated.⁸² Resident magistrates have jurisdiction to hear

- claims in contract or tort where the amount involved does not exceed F\$15,000
- proceedings between landlord and tenant where the annual rental does not exceed F\$2,000⁸³
- all suits involving trespass or recovery of land (other than landlord and tenant disputes)
- habeas corpus applications, and
- applications for appointment of guardians or custody.

The magistrates' court is specifically empowered to grant injunctions and similar relief in any action instituted.⁸⁴

Second and third class magistrates have jurisdiction to try civil proceedings arising out of motor accidents where the amount claimed does not exceed F\$1,000 and F\$200, respectively.⁸⁵

A resident magistrate has jurisdiction to hear appeals from decisions of second and third class magistrates.

CRIMINAL JURISDICTION

The territorial jurisdiction of magistrates' courts, identified above in relation to civil matters, also applies in relation to the hearing of criminal matters. Criminal jurisdiction is conferred on magistrates' courts by the Magistrates' Courts Act,⁸⁶ the Criminal Procedure Code⁸⁷ and miscellaneous

80 Family Law Act 2003, ss 17(2), 200; Convention on the Civil Aspects of International Child Abduction, signed at The Hague on 25 October 1980.

81 Family Law Act 2003 (Fiji), s 19.

82 Magistrates' Courts Act, Cap 14, s 4(1).

83 Magistrates' Courts Act, Cap 14, s 16(1), as amended by Magistrates' Courts (Civil Jurisdiction) Decree 1988, ss 2(1), 3.

84 Magistrates' Courts (Civil Jurisdiction) Decree 1988, s 2(1)(f).

85 *Ibid*, s 2(2).

86 Cap 14.

87 Cap 21, ss 4–9 and First Schedule.

other laws. The Penal Code offences which may be dealt with by a magistrate are listed in the First Schedule to the Criminal Procedure Code,⁸⁸ which also identifies the class of magistrate which may hear each type of offence. The magistrates' courts are subject to the following limits on the sentences they may impose:

- Resident magistrate: imprisonment for up to five years; a fine of no more than \$1,000; corporal punishment not exceeding 12 strokes⁸⁹
- Second class magistrate: imprisonment for up to one year; a fine of no more than \$200; corporal punishment not exceeding 12 strokes⁹⁰
- Third class magistrate: imprisonment for up to six months; a fine of no more than \$100⁹¹

FAMILY JURISDICTION

The family division of the magistrates' court has jurisdiction to deal with matrimonial causes and all other matters instituted under the Family Law Act 2003.⁹²

Kiribati

Hierarchy and constitution of the courts

Privy Council
Court of Appeal
High Court
Magistrates' courts

The court structure in Kiribati follows the standard model of inferior court, superior court and appeal court. Additionally, the country has retained an appeal to the Privy Council in England on a limited range of matters. Prior to 1977, there were also island courts, which dealt with minor local matters.⁹³ These were abolished by the Magistrates' Courts Act.⁹⁴ There was also a Native Lands Court and a Native Land Appeal Panel, but these have also been abolished.⁹⁵

88 *Ibid.*

89 Criminal Procedure Code, Cap 21, s 7.

90 Criminal Procedure Code, Cap 21, s 8.

91 *Ibid.*, s 9.

92 Family Law Act 2003, s 17, s 21(1).

93 Island Courts Act, No 10 of 1965.

94 Cap 52.

95 Native Lands Ordinance, Cap 22, Pt IV. See, now, Native Lands Ordinance, Cap 61, as amended.

The Judicial Committee of the Privy Council, sitting in England, forms part of the judicial hierarchy in Kiribati, because limited appeals from the High Court still exist. For the purpose of hearing such appeals, the Privy Council has all the jurisdiction and powers of the High Court of Kiribati.⁹⁶ Its decisions are enforceable as if they were decisions of the High Court.⁹⁷

Section 90 of the constitution establishes the Court of Appeal. It is constituted by the chief justice and other judges of the High Court and other persons appointed by the Berentitenti,⁹⁸ acting in accordance with the advice of the chief justice sitting with the Public Service Commission.⁹⁹ The president of the Court of Appeal is appointed by the Berentitenti, acting in accordance with the advice of the cabinet after consultation with the Public Service Commission.¹⁰⁰ It must sit with not less than three judges.¹⁰¹

Section 88 of the constitution establishes the High Court. It is constituted by the chief justice and other judges.¹⁰² Appointment of the chief justice is by the Berentitenti acting in accordance with the advice of cabinet after consultation with the Public Service Commission.¹⁰³ Additional judges may be appointed by the Berentitenti, acting in accordance with the advice of the chief justice and the Public Service Commission, but no such appointment has yet been made.¹⁰⁴

Magistrates' courts are established by the Magistrates' Courts Act,¹⁰⁵ on a district basis as ordered by the chief justice.¹⁰⁶ They are composed of three magistrates sitting together, one of whom is the presiding magistrate,¹⁰⁷ except in land cases, where five magistrates must preside. A clerk of the court is attached to each magistrates' court.¹⁰⁸

Jurisdiction

Privy Council

The Privy Council has jurisdiction to hear appeals from any decision of the High Court which involves the interpretation of the constitution where

96 Constitution of Kiribati, s 123(3). See also Appeals to Judicial Committee Order 1979 (UK) (SI 1979 No 720).

97 *Ibid*, s 123(2).

98 The president; see Constitution of Kiribati, s 30(1).

99 Constitution of Kiribati, s 91.

100 *Ibid*, s 91(3).

101 Court of Appeal Act, Cap 16B, s 5(1).

102 Constitution of Kiribati, s 80(1).

103 *Ibid*, s 81(1).

104 *Ibid*, s 81(2).

105 Cap 52.

106 Magistrates' Courts Act, Cap 52, s 3(2).

107 *Ibid*, s 7.

108 *Ibid*, s 12.

application to the High Court was made on the basis of contravention of the rights of any Banaban¹⁰⁹ or of the Rabi Council¹¹⁰ under chapter III or IX of the constitution.¹¹¹

Court of Appeal

CIVIL JURISDICTION

The Court of Appeal has jurisdiction to hear appeals as of right from any decision of the High Court exercising original jurisdiction.¹¹² The Court of Appeal also has jurisdiction to hear appeals from the High Court on a question of law¹¹³ or with leave.¹¹⁴

- where an order was made by consent or is as to costs only
- where the order or judgment is interlocutory, except in a case
- where the liberty of the subject or custody of infants is concerned
- where an injunction or appointment of a receiver is granted or refused, or
- where a decree nisi in a matrimonial cause or a judgment or order in an admiralty action is involved.

No appeal lies from

- a decision allowing an extension of time in which to appeal
- an order giving unconditional leave to defend an action
- a decision of the High Court which is provided by statute to be final, or
- from an order absolute for the dissolution or nullity of marriage, where the opportunity to appeal against the decree nisi has not been taken.¹¹⁵

The Court of Appeal has jurisdiction to hear appeals from the High Court exercising appellate jurisdiction in land matters.¹¹⁶

CRIMINAL JURISDICTION

Any person convicted by the Supreme Court may appeal to the Court of Appeal against conviction as of right on a question of law or with leave of

109 A person from Banaban Island.

110 Council of Rabi Island in Fiji.

111 Constitution of Kiribati, s 123(1).

112 Court of Appeal Act, Cap 16B, s 10(1)(a).

113 *Ibid*, s 10(1)(b).

114 *Ibid*, s 10(2).

115 *Ibid*.

116 Magistrates' Court (Amendment) Act 1990, ss 2, 3.

the Court of Appeal in other cases.¹¹⁷ Appeal also lies against sentence (other than a sentence fixed by law) with leave of the Court of Appeal. The Court of Appeal also hears appeals with leave on a question of law from the High Court's decision on appeal from a magistrates' court.¹¹⁸

High Court

CONSTITUTIONAL JURISDICTION

The High Court has original jurisdiction to determine any question as to the interpretation of the constitution,¹¹⁹ and may determine applications in respect of any alleged breach of the constitution.¹²⁰ More specifically, it has original jurisdiction to hear applications concerning the breach of any of the rights and freedoms granted by the constitution.¹²¹ It also has exclusive jurisdiction to determine questions as to membership of parliament.¹²²

CIVIL JURISDICTION

The High Court would appear to have unlimited original jurisdiction.¹²³ Appeals lie to the High Court as of right from decisions of a magistrates' court:

- in exercise of its jurisdiction in divorce
- in any claim in which the amount involved exceeds \$20,¹²⁴ and
- in land cases.¹²⁵

The High Court is also empowered to determine disputes as to the validity of election of any member of the *Maneaba ni Maungatabu* and as to vacation of seats.¹²⁶

CRIMINAL JURISDICTION

The High Court has unlimited original jurisdiction in criminal cases.¹²⁷ It also hears appeals by way of petition from magistrates' courts.¹²⁸ In addition,

117 Court of Appeal Act, Cap 16B, s 19.

118 *Ibid*, s 21.

119 Constitution of Kiribati, Cap 1, s 88(6).

120 *Ibid*, Cap 1, s 88.

121 *Ibid*, Cap 1, s 17.

122 Constitution of Kiribati, ss 60(1) and (4).

123 This is not stated in the Constitution, nor is there a specific statute conferring such jurisdiction.

124 Magistrates' Courts Act, Cap 52, s 66(1).

125 *Ibid*, s 75(1).

126 Constitution of Kiribati, s 60.

127 Criminal Procedure Code, Cap 17, s 4.

128 Criminal Procedure Code, Cap 17, Part IX.

cases may be referred to the High Court by way of case stated and the High Court may 'confirm, reverse or vary' the magistrates' court's decision.¹²⁹

Magistrates' courts

CIVIL JURISDICTION

A magistrates' court has jurisdiction within the limits of the district within which it is situated and over any territorial waters adjacent to the district in which it is situated, as well as over inland waters.¹³⁰ It may determine

- petitions for divorce under the Native Divorce Ordinance
- claims in contract and tort where the amount involved does not exceed \$3,000, and
- applications to grant injunctions to preserve the *status quo*.

A magistrates' court has jurisdiction to deal with all land matters, but only if it is specially constituted as a land magistrates' court under s 7(4).¹³¹ The chief justice may authorise an increase in jurisdiction in civil cases.¹³²

CRIMINAL JURISDICTION

Within the territorial limits outlined above, magistrates' courts have jurisdiction to deal with any offence carrying a maximum punishment of a fine of \$500 or five years imprisonment'.¹³³ They also have jurisdiction to deal with specified offences contained in the Penal Code.

The following sentences may be passed by magistrates' courts:

- imprisonment for a term not exceeding five years
- a fine not exceeding \$500
- both the above sentences, or
- any lawfully authorised sentence or order.¹³⁴

129 Criminal Procedure Code, Cap 17, s 280.

130 Magistrates' Courts Act, Cap 52, s 4.

131 See above. This jurisdiction has been narrowly interpreted to exclude personal actions in contract or tort, even where land is involved: *SMEC v Temwakamwaka Landowners* [1998] KICA 4.

132 Magistrates' Courts Act, Cap 52, s 28.

133 *Ibid*, s 28 and Schedule 2.

134 *Ibid*, s 24(1).

Marshall Islands

*Hierarchy and constitution of the courts*¹³⁵

Supreme Court
High Court
Traditional rights courts
District courts
Community courts

The hierarchy of the courts in Marshall Islands consists of a three-tier structure of inferior, superior and appeal court. Additionally community courts have been established to deal with minor local cases and a traditional rights court to deal with traditional matters.

The Supreme Court is established by the constitution. It consists of a chief justice and two associates justices.¹³⁶ Appointment is by cabinet acting on the recommendation of the Judicial Service Commission and with the approval of the Nitijela.¹³⁷ Associate justices are usually appointed from other jurisdictions, including the United States, the Republic of Palau, the Commonwealth of the Northern Mariana Islands and Canada.

The High Court is established by the constitution as a court of record. It consists of a chief justice and an associate justice.¹³⁸ Appointment is by cabinet acting on the recommendation of the Judicial Service Commission and with the approval of the Nitijela.¹³⁹

The traditional rights court is established by the constitution as a court of record. It consists of three or more judges selected to include a fair representation of all classes of land rights.¹⁴⁰ Appointment of judges is by the Judicial Service Commission.¹⁴¹

The district court is a statutory court of record. It consists of a presiding judge and two associate judges.¹⁴² Appointment of judges is by the Judicial Service Commission.¹⁴³

Community courts are established by statute as courts of record for each local government area. Each community court consists of a presiding judge

135 See Zorn, J, 'The Republic of Marshall Islands' in Ntumu, M (ed.), *South Pacific Island Legal Systems*, 1993, Honolulu: University Hawaii Press, p 100, 111–13.

136 Constitution of Marshall Islands, Art. VI, s 1(1).

137 *Ibid*, s 1(4).

138 *Ibid*, s 1(1).

139 *Ibid*, s 1(4).

140 *Ibid*, s 1(1).

141 *Ibid*, s 5(3)(c).

142 27 MIRC Part IV.

143 Constitution of Marshall Islands, Art. VI, s 5(3)(c).

and such number of associate judges, if any, as may be appointed.¹⁴⁴ Appointment of judges is by the Judicial Service Commission.¹⁴⁵

Jurisdiction

Supreme Court

CIVIL AND CRIMINAL JURISDICTION

An appeal lies to the Supreme Court as of right from a final decision of the High Court in the exercise of its original jurisdiction. It also lies as of right from a final decision of the High Court exercising appellate jurisdiction if the case involves a substantial question of law as to the interpretation or effect of the constitution.¹⁴⁶ In other cases, an appeal lies from any final decision with leave of the Supreme Court.¹⁴⁷

High Court

CIVIL AND CRIMINAL JURISDICTION

The High Court has unlimited original jurisdiction.¹⁴⁸ It has jurisdiction to determine appeals from all subordinate courts.¹⁴⁹

Traditional rights courts

The traditional rights court has jurisdiction to resolve disputes relating to titles to land rights or other legal interests depending wholly or partly on customary law and traditional practices.¹⁵⁰

District courts

CIVIL JURISDICTION

The district court has original jurisdiction concurrently with the High Court: in all civil cases where the amount claimed or the value of the property involved does not exceed \$10,000, except matters vested by the

144 Judiciary Act 1983, s 233(1).

145 Judiciary Act 1983, s 233(2).

146 Constitution of Marshall Islands, Art. VI, s 2(1)(a) and (b).

147 *Ibid*, s 2(1)(c).

148 Constitution of Marshall Islands, Art. VI, s 3.

149 *Ibid*.

150 Constitution of Marshall Islands, Art. VI, s 4(3).

constitution in the High Court, admiralty and maritime matters, and cases of adjudication of title to land or interest in land (other than the right to immediate possession); provided, however the district court has jurisdiction to award alimony and support for children in divorce cases and for the children of unmarried parents, regardless of the \$10,000 limitation, and to include in any such award land or an interest in land owned by any party to the case; provided, however, that this jurisdiction does not include jurisdiction to adjudicate the validity of a claim to ownership of the land or interest therein. The district court has jurisdiction to hear appeals from any decision of a community court.¹⁵¹

CRIMINAL JURISDICTION

The district court also has original jurisdiction in all criminal cases involving a penalty of a fine up to \$4,000 or imprisonment up to three years, or both.¹⁵² As stated above, the district court has jurisdiction to hear appeals from any decision of a community court.¹⁵³

Community courts

CIVIL AND CRIMINAL JURISDICTION

A community court has original jurisdiction in civil cases involving claims not exceeding \$200, and claims involving land other than a claim to immediate possession. A community court also has original jurisdiction in cases involving a penalty of a fine up to \$400 or imprisonment up to six months, or both.¹⁵⁴

Nauru

Hierarchy and constitution of the courts

High Court of Australia
Supreme Court
District court

The court hierarchy in Nauru follows the standard model of inferior court, superior court and appeal court. However, the appeal court is not a domestic court, but the High Court of Australia. Additionally, there is a separate

151 27 MIRC Part IV.

152 27 MIRC Part V.

153 27 MIRC Part IV.

154 27 MIRC Part V.

court to deal with family matters, rather than customary claims as in many other regional jurisdictions.¹⁵⁵ The family court is not discussed here.

There is no provision in the constitution for an appeal court.¹⁵⁶ Article 57(2) provides that Parliament may provide that an appeal lies from the Supreme Court to a court of another country. In 1974, the Appeals Act 1972 was amended to introduce such an appeal.¹⁵⁷ The High Court of Australia must sit with a full court of at least two justices of the High Court to hear an appeal.¹⁵⁸

Provision for the Supreme Court to be established as a court of record is made in Art 48 of the constitution. It consists of the chief justice and other judges appointed by the president¹⁵⁹ of Nauru from persons who have been qualified to practice as a barrister or solicitor in Nauru for at least five years.¹⁶⁰

The constitution also provides for the establishment of subordinate courts. Pursuant to this provision, the district court has been established by the Courts Act 1972. It consists of a resident magistrate and no fewer than three lay magistrates appointed by the president after consultation with the chief justice.¹⁶¹ Candidates for appointment as resident magistrate must be qualified for appointment as a Supreme Court judge.¹⁶² Lay magistrates are required to be qualified for appointment as a pleader.¹⁶³

Jurisdiction

High Court of Australia

CIVIL JURISDICTION

The High Court of Australia has jurisdiction to hear appeals from the Supreme Court against any final first instance judgment.¹⁶⁴ It may also hear appeals, with leave of the trial judge or the High Court, against an interlocutory order or judgment.¹⁶⁵ With leave of the High Court, it may hear

155 Family Court Act 1973.

156 Article 57(1) provides that Parliament may provide for an appeal from a single judge of the Supreme Court to a court constituted by two or more judges.

157 Appeals (Amendment) Act 1974.

158 Appeals Act 1972, s 47.

159 Article 49(2).

160 Article 49(3).

161 In 1993, no lay magistrates had been appointed: Deklin, T, 'Nauru', in Ntummy, M (ed.), *South Pacific Islands Legal Systems*, 1993, Hawaii: Hawaii UP.

162 Courts Act 1972, s 10.

163 *Ibid*, s 10. See Aroi, K, 'The role and training of pleaders in Nauru', in Powles, G and Pulea, M (eds), *Pacific Courts and Legal Systems*, 1988, Suva: USP, pp 153–6.

164 Appeals Act 1972, s 44(a).

165 *Ibid*, s 44(b).

an appeal from the Supreme Court exercising jurisdiction in appeals from the district court.¹⁶⁶

No appeal is permitted in the following cases:

- where the appeal involves the interpretation or effect of the constitution
- from a determination by the Supreme Court of a question concerning membership of Parliament
- from a consent order
- from a judgment given on appeal from the Nauru Lands Committee
- from an order allowing an extension of time in which to appeal
- from an order giving unconditional leave to defend
- from a decision which is provided by statute to be final, nor
- from an order absolute for the dissolution or nullity of marriage where an opportunity to appeal from the *decree nisi* was not taken.¹⁶⁷

CRIMINAL JURISDICTION

Appeals from decisions of the Supreme Court in criminal cases may be made to the High Court of Australia.¹⁶⁸ Appeals against convictions at trial before the Supreme Court are allowed in all cases. Appeals against sentence are also permitted unless the sentence is fixed by law.¹⁶⁹

Appeals from decisions made on appeal from the district court to the Supreme Court in criminal matters require the leave of the High Court.¹⁷⁰

Supreme Court

CONSTITUTIONAL JURISDICTION

The Supreme Court has exclusive original jurisdiction to determine any question as to the interpretation or effect of the constitution.¹⁷¹ Such questions may also be referred to the Supreme Court for an opinion by cabinet.¹⁷² More specifically, it has original jurisdiction to hear applications concerning the breach of any of the rights and freedoms granted by the constitution.¹⁷³ It also has exclusive jurisdiction to determine questions as to membership of parliament.¹⁷⁴

166 *Ibid*, s 44(c).

167 Appeals Act 1972, s 45.

168 Appeals Act 1972, Pt V, inserted by the Appeals (Amendment) Act 1974.

169 Appeals Act 1972, s 37(1)(a) and (b).

170 Appeals Act 1972, s 37(2).

171 Constitution of Nauru 1968, s 54(1).

172 *Ibid*, s 55

173 *Ibid*, s 14.

174 *Ibid*, s 36.

CIVIL JURISDICTION

The Supreme Court has unlimited original jurisdiction.¹⁷⁵ It hears appeals from final decisions of the district court.¹⁷⁶

CRIMINAL JURISDICTION

Section 17 of the Courts Act 1972 makes no specific reference to a criminal jurisdiction of the Supreme Court. However, the general jurisdiction that is laid down is one that is sufficiently wide to include an original criminal jurisdiction in line with the superior courts of other jurisdictions within the USP region. The Supreme Court also exercises an appellate jurisdiction with regard to decisions of the district court regarding criminal matters. This jurisdiction is specified in s 3 of the Appeals Act 1972. Any person convicted on trial before the district court may appeal to the Supreme Court with regard to either conviction or sentence or both. Appeals may be based on questions of fact or of law.

District court

CIVIL JURISDICTION

This court hears and determines all civil cases involving not more than A\$3,000.¹⁷⁷

CRIMINAL JURISDICTION

The district court has jurisdiction to hear cases under the Criminal Code Act¹⁷⁸ other than offences punishable by death, imprisonment exceeding three years or a fine exceeding A\$3,000.¹⁷⁹

Niue

Hierarchy and constitution of the courts

Privy Council
Court of Appeal
High Court

Until 1992, Niue did not have its own Court of Appeal. Instead, appeals were heard by the Court of Appeal of New Zealand. There was also a

¹⁷⁵ Courts Act 1972, s 17.

¹⁷⁶ Appeals Act 1972, s 27.

¹⁷⁷ Courts Act 1972, s 21.

¹⁷⁸ 1899 (Qld).

¹⁷⁹ Criminal Procedure Act 1972, s 7.

separate court to deal with land matters prior to 1992, from which appeals lay to a separate land appellate court. The Constitution Amendment (No 1) Act 1992, which came into force on 1 July 1992 changed this. At first sight, the court structure in Niue still does not conform to the standard model. There are only two levels of court established locally, that is the superior court and the appeal court. However, the superior court may sit as an inferior court or as a superior court, depending on its constitution. Niue is one of the four regional countries which still allows a further appeal, in matters prescribed by statute, to the English Privy Council.

The Court of Appeal is established under Art 52 of the constitution. It is constituted by three judges of the Court of Appeal.¹⁸⁰ The chief justice and puisne judges of the High Court are judges of the Court of Appeal.¹⁸¹ Other judges are appointed by the governor-general acting on the advice of cabinet tendered by the premier.¹⁸² The Court of Appeal is constituted by three judges, who may sit in Niue or overseas.¹⁸³ Decisions of the Court of Appeal are final, except where the Queen grants a petition to appeal to the Privy Council.¹⁸⁴

The High Court in Niue is established as a court of record under Art 37 of the constitution. It is divided into a civil division, a criminal division and a land division.¹⁸⁵ It consists of one or more judges appointed by the governor-general acting on the advice of cabinet tendered by the chief justice, or, in the case of appointment of the chief justice, tendered by the chief justice and the minister of Justice.¹⁸⁶ Jurisdiction may be exercised by a single judge.¹⁸⁷ Commissioners of the High Court may be appointed by cabinet to exercise such functions of a judge other than any jurisdiction vested exclusively in the chief justice, as are conferred on him or her by statute.¹⁸⁸ It may also appoint justices of the peace and any two justices acting together may fulfil the role of a commissioner of the High Court.

Jurisdiction

Privy Council

CIVIL AND CRIMINAL JURISDICTION

Appeals lie from the Court of Appeal to the Privy Council by leave of the Court of Appeal or by special leave of Her Majesty in Council.

180 Constitution of Niue 1974, Art 53.

181 *Ibid*, Art 52(2)(a).

182 *Ibid*, Art 52(2)(b).

183 *Ibid*, Art 53.

184 *Ibid*, Art 55(2).

185 *Ibid*, Art 37.

186 *Ibid*, Art 42.

187 *Ibid*, Art 37(5).

188 *Ibid*, Arts 46 and 48.

Court of Appeal

CIVIL JURISDICTION

The Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court as of right

- if the High Court certifies that a substantial question of law as to the interpretation or effect of the constitution is involved
- if the matter in dispute is worth not less than the minimum amount prescribed by statute, or
- in any case where an appeal is provided for by statute.¹⁸⁹

The Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court with leave of the High Court¹⁹⁰ or special leave of the Court of Appeal.¹⁹¹

CRIMINAL JURISDICTION

The Court of Appeal hears appeals against conviction by the High Court acting in its criminal jurisdiction, as of right if the appellant has been sentenced to death or life imprisonment.¹⁹² Legislation may provide for appeals in other cases and appeals against sentence, where the sentence is not fixed by law.¹⁹³

High Court

CIVIL AND CRIMINAL JURISDICTION

The High Court has unlimited first instance jurisdiction in civil matters.¹⁹⁴ Since there are no subordinate courts set up in Niue, under Art 66 of the constitution, a commissioner or two justices of the peace have jurisdiction to deal with actions for the recovery of debt or damages or recovery of chattels not exceeding \$1,500.¹⁹⁵

A judge of the High Court has jurisdiction to hear appeals from decisions of the commissioner or two justices sitting together.¹⁹⁶

189 *Ibid*, Art 55A(2).

190 Constitution of Niue, Art 55A(2).

191 *Ibid*, Art 55A(3).

192 Constitution of Niue, Art 55A(2)(b).

193 *Ibid*, Art 55A(2)(b).

194 *Ibid*, Art 37(2).

195 Rules of the High Court 1916, Amendment Regulations 1991, reg 3.

196 Rules of the High Court 1916, Amendment No 2, reg 1.

Further, the High Court has unlimited original jurisdiction in criminal matters.¹⁹⁷ As in civil cases, the High Court may be constituted by a commissioner of the High Court who has the same jurisdiction as a High Court judge.¹⁹⁸

LAND JURISDICTION

The land division has all the jurisdiction which used to be exercised by the land court,¹⁹⁹ and any other jurisdiction conferred by statute.²⁰⁰

Samoa

Hierarchy and constitution of the courts

Court of Appeal
Supreme Court
District courts Land and Titles Court
Village *fonos*

The hierarchy of the courts in Samoa follows the standard model of inferior court, superior court and appeal court. Village *fonos* (councils) have also been incorporated into the formal structure, to deal with village affairs. Appeals do not lead back into the standard structure, but to the Land and Titles Court.

Article 75 of the constitution establishes a Court of Appeal, as a superior court of record.²⁰¹ The judges of the Court of Appeal are the chief justice and other judges of the Supreme Court and such other persons as are appointed by the head of state, acting on the advice of the Judicial Service Commission.²⁰²

Article 65 of the Constitution of Samoa 1960 provides for the establishment of a Supreme Court, as a superior court of record. It consists of the chief justice and an unspecified number of puisne judges.²⁰³ The head of state appoints the chief justice on the advice of the prime minister.²⁰⁴ Other judges are appointed by the head of state acting on the advice of the Judicial Service Commission.²⁰⁵ The powers of the court may be exercised by a single judge.²⁰⁶

197 Constitution of Niue, Art 37(2).

198 *Ibid*, Art 48.

199 Constitution of Niue, Art 38(2).

200 *Ibid*.

201 Judicature Act 1961, s 41 contains a parallel provision.

202 Constitution of Samoa 1962, Art 75; Judicature Act 1961, s 41(2).

203 Judicature Act 1961, s 41(2).

204 *Ibid*, s 22.

205 *Ibid*.

206 Judicature Act, s 32.

The Land and Titles Court is governed by the Land and Titles Act 1981.²⁰⁷ It is constituted by at least four members,²⁰⁸ including the president or deputy president, at least two Samoan judges and one assessor.²⁰⁹ It usually comprises six members: the deputy president, three judges and two assessors.²¹⁰ The appeal division of the Land and Titles Court is constituted by the president and two Samoan judges appointed by the president.²¹¹ The president is the chief justice, a person qualified for appointment as a judge of the Supreme Court or as a Samoan judge.²¹² Deputy presidents, Samoan judges and assessors are appointed by the head of state on the advice of the Judicial Services Commission.²¹³ To be appointed as a Samoan judge or an assessor candidates must be *matai*.²¹⁴

Legal practitioners have no right of audience before the Land and Titles Court.²¹⁵

District courts are established pursuant to s 74 of the constitution. They are governed by the District Courts Act 1969.²¹⁶ Appointment of district court judges is by the head of state acting on the advice of the Judicial Service Commission.²¹⁷ A district court may also be constituted by a *fa'amasino fesoasoani*²¹⁸ appointed by the head of state acting on the advice of the Judicial Service Commission.²¹⁹

The village *fono* is formally recognised by the Village Fono Act 1990. It consists of the assembly of the *alii ma faipule* or *matais* (chiefly heads of families or *aiga*) from the particular village.²²⁰ It must exercise its powers in accordance with custom and usage.²²¹

207 Constitution of Samoa, Art 103; and Land and Titles Court Act 1981.

208 Land and Titles Act 1981, s 34(2). This court is the direct descendant of the Land and Titles Commission established in 1903 by the German administration as a means of disposing peacefully of disputes between Samoans over *matai* titles and customary land. See further Corrin, J, 'A green stick or a fresh stick: locating customary penalties in the post-Colonial era', (2006) 6(1) *Oxford University Commonwealth Law Journal*, pp 27–60.

209 Land and Titles Act 1981, s 35(1).

210 Taulapapa, A and Enari, A, 'The land and chiefly Titles Court of Western Samoa', in Powles, G and Pulea, M (eds), *Pacific Courts and Legal Systems*, 1988, Suva: Institute of Pacific Studies, p 107.

211 Land and Titles Act 1981, s 77.

212 *Ibid*, s 26A.

213 *Ibid*, ss 27(1), 29, 31(1).

214 Land and Titles Act 1981, s 28. There is an exception to the 65 age cap for judges see s 29(2).

215 Land and Titles Act 1981, s 92.

216 District Courts Amendment Act 1992/3 renamed the magistrates' courts as district courts. It came into force on 1 February 1999: Commencement Order 1999/2 (Samoa).

217 Magistrates' Courts Act 1969, s 5(2).

218 *Fa'amasino fesoasoani* means assistant magistrate.

219 Magistrates' Courts Act 1969, s 6.

220 Village Fono Act 1990, s 2.

221 *Ibid*, s 3(2).

Jurisdiction

Court of Appeal

CIVIL JURISDICTION

The general jurisdiction of the Court of Appeal is to hear and determine appeals (including proceedings removed by order of the Supreme Court to the Court of Appeal) as provided by Act.²²² Section 51 of the Judicature Act 1961 provides that appeals lie from the Supreme Court to the Court of Appeal

- as of right from a decision involving WST\$400 or more, or
- with leave of the Court of Appeal or the Supreme Court in matters of general or public importance, or where the magnitude of interests affected or some other reason dictates that the decision ought to be submitted to the Court of Appeal for a decision.

The Court of Appeal also has jurisdiction to hear appeals from decisions of the Supreme Court in cases involving a substantial question of law as to the interpretation or effect of the constitution.²²³ An appeal lies as of right from any decision of the Supreme Court in proceedings under Art 4 of the constitution,²²⁴ that is, against any decision regarding remedies for the enforcement of any fundamental right established by the constitution.

CRIMINAL JURISDICTION

Any person convicted by the Supreme Court may appeal to the Court of Appeal against conviction as of right on a question of law or with leave of the Court of Appeal in other cases.²²⁵ Appeal also lies against sentence (other than a sentence fixed by law) with leave of the Court of Appeal. The Court of Appeal also hears appeals with leave from a Supreme Court's decision on appeal from a district court.²²⁶

Supreme Court

CONSTITUTIONAL JURISDICTION

The Supreme Court has jurisdiction to determine any question as to the interpretation or effect of the constitution.²²⁷ Such questions may also be

222 Constitution of Samoa 1962, Art 79.

223 Constitution of Samoa 1962, Art 80; Judicature Act 1961, s 41.

224 Constitution of Samoa 1962, Art 81; Judicature Act 1961, s 41.

225 Judicature Act 1961, s 53.

226 *Ibid*, s 63.

227 Constitution of Samoa 1960, Art 73(1) and (2).

referred to the Supreme Court for an opinion by the head of state on the advice of the prime minister.²²⁸ More specifically, it has original jurisdiction to hear applications concerning the breach of any of the rights and freedoms granted by the constitution.²²⁹ It also has exclusive jurisdiction to determine questions as to membership of parliament.²³⁰

CIVIL JURISDICTION

The Supreme Court has unlimited original jurisdiction²³¹ throughout Samoa.²³² It also has specific jurisdiction conferred upon it by statute.²³³

The Supreme Court has jurisdiction to hear appeals from a district court²³⁴

- as of right from a decision involving WST\$400 or more or where the title to land is in question, or
- with leave of the district court.

CRIMINAL JURISDICTION

The Supreme Court has unlimited original jurisdiction in criminal matters.²³⁵ The Supreme Court has jurisdiction to hear appeals from any criminal conviction or order (other than costs of dismissal of the information) by the district court.²³⁶

The Land and Titles Court

The Land and Titles Court has exclusive jurisdiction in all matters relating to Samoan names and titles and in all claims and disputes between Samoans relating to customary land.²³⁷ In addition to the powers expressly granted by the act the court has all the powers of a court of record.²³⁸ The appellate

228 Constitution of Samoa 1960, Art 73(3).

229 *Ibid*, Art 4.

230 Constitution of Samoa 1960, Art 47.

231 *Ibid*, s 31.

232 *Ibid*, s 32.

233 See, eg, Administration Act 1975, s 5 (probate jurisdiction); Citizenship Act 1972, s 18(2) (enquiry into deprivation of citizenship).

234 Magistrates' Courts Act 1969, s 70.

235 Criminal Procedure Act 1972, Pt VII.

236 Criminal Procedure Act 1972, s 138.

237 Land and Titles Act 1981, s 78.

238 Land and Titles Act 1981, s 25(2).

division of the Land and Titles Court hears appeals from original decisions of the Land and Titles Court with the leave of the president where²³⁹

- new evidence has been found since the hearing of the petition of which the applicant had no knowledge, or which could not reasonably have been adduced at the hearing of the petition
- the successful party was guilty of misconduct in relation to the hearing of the petition, which affected the result of the case
- a witness was guilty of misconduct in relation to the hearing of the petition, which affected the result of the case
- a member or officer of the court had made a mistake or misconducted himself in relation to the hearing of the petition, which affected the result of the case
- the court did not have jurisdiction to make the final decision or order
- the decision or order was wrong in law or not in accordance with custom and usage
- the decision or order was manifestly against the weight of the evidence.

The Land and Titles court also hears appeals as of right from the village fono.²⁴⁰

District courts

CIVIL JURISDICTION

A district court has jurisdiction to hear and determine²⁴¹

- any action founded on tort or contract:
 - where the debt demand or damage, or the value of the chattels claimed, is not more than WST\$10,000
 - where the debt or demand claimed consists of a balance not exceeding WST\$10,000 after a set-off of any amount claimed by the defendant from the plaintiff in the particulars of his claim or demand
- claims for money recoverable by statute
- claims relating to tax matters
- actions for the recovery of any penalty, expenses, contribution or other like demand which is recoverable by statute, if

²³⁹ *Ibid.*

²⁴⁰ Village Fono Act 1990 (Samoa), s 11.

²⁴¹ *Ibid.*, s 23.

- it is not expressly provided by legislation that recovery shall only be possible in some other court, and
- the amount claimed in the action does not exceed WST\$10,000
- actions for the recovery of freehold land where the value of the land or interest does not exceed WST\$100,000 or the annual rental does not exceed WST\$10,000,²⁴² and
- claims in equity where the sum involved does not exceed WST\$10,000.²⁴³

A district court has ancillary power to make any necessary orders in proceedings properly before it.²⁴⁴ Customary land is excluded from district courts' jurisdiction.²⁴⁵

A court presided over by a *fa'amasino fesoasoani* has jurisdiction²⁴⁶

- to hear and determine any action founded in contract or tort where the amount involved does not exceed WST\$1,000²⁴⁷
- to hear and determine any action for the recovery of any penalty (other than a criminal fine), expense, contribution or similar demand, which is recoverable under legislation, if:
 - jurisdiction is expressly conferred by the legislation, or
 - the amount claimed in the action does not exceed WST\$1,000.

The jurisdiction of a *fa'amasino fesoasoani* may be extended by the chief justice, through the Supreme Court registrar, to allow him or her to deal with

- disputes involving up to WST\$2,000
- judgment summonses in cases where the original judgment was for up to \$2,000.²⁴⁸

CRIMINAL JURISDICTION

The general criminal jurisdiction of magistrates' courts extends to dealing with offences that are punishable by a fine, penalty, forfeiture or period of imprisonment, with the exception of those offences that are punishable by a term of imprisonment exceeding five years.²⁴⁹

242 District Courts Act 1969, s 25.

243 *Ibid*, s 28. The specific equitable jurisdiction is set out in the section.

244 District Courts Act 1969, s 21.

245 *Ibid*, s 26.

246 *Ibid*, s 33.

247 District Courts Amendment Act 1992/1993, s 7, substituted WST\$1,000 for WST\$40.

248 District Courts Act 1969, s 23.

249 District Courts Act 1969, s 36, as amended by the Courts Amendment Act 1972.

The jurisdiction of a *fa'amsino fesoasoani* is more limited than that of a district court judge. He or she may deal with

- offences with a maximum penalty of one year's imprisonment or a fine of WST\$1,000 or both,²⁵⁰ and
- theft, where the value of the stolen property does not exceed WST\$1,000.²⁵¹

A *fa'amsino fesoasoani* may not impose a sentence of imprisonment in lieu of, or in addition to, a fine.²⁵²

Village fonos

CIVIL JURISDICTION

The jurisdiction of the village *fono* is limited to persons ordinarily resident in the village and does not extend to persons, other than *matai*, residing there on government, freehold or leasehold land who are not liable in custom to render *tautua* to a *matai* of that village.²⁵³ The village *fono* has power to deal with the affairs of the village in accordance with custom and usage.

CRIMINAL JURISDICTION

Although criminal jurisdiction is not specifically conferred on the village *fono* by statute, its customary jurisdiction is preserved.²⁵⁴ In fact, there is no clear distinction between civil and criminal matters in the customary system. The village *fono* has the power to impose punishments in accordance with the custom and usage of the village, which is deemed to encompass the power to impose punishments of²⁵⁵

- fines in money, mats, animals, food or a combination of any of these things, or
- work on village land.

250 District Courts Act 1969, s 39.

251 It is possible for the jurisdiction of the *fa'amsino fesoasoani* to be extended by the chief justice under s 18 of the District Courts Act 1969.

252 District Courts Act 1969, s 38.

253 Village Fono Act 1990, s 9.

254 *Ibid*, s 3(3).

255 Village Fono Act 1990, s 6. It should also be noted that, where a village fono has imposed a punishment on a person who is subsequently convicted by a court with regard to the same matter, 'the court shall take into account in mitigation of sentence the punishment imposed by that Village Fono' (Village Fono Act 1990, s 8).

The territorial and other limitations on the jurisdiction of the *fono* that apply in civil cases apply equally to criminal matters.

Solomon Islands

*Hierarchy and constitution of the courts*²⁵⁶

Court of Appeal
High Court
Magistrates' courts Customary land appeal courts
Local courts

The hierarchy of the courts in Solomon Islands follows the standard model of inferior court, superior court and appeal court. Additionally, separate courts have been set up to deal with customary land and minor local disputes. A separate appeal court has also been established to deal with customary land appeals. A further appeal on a point of law from the customary land appeal court leads back into the standard structure.

The Court of Appeal is established under s 85 of the constitution. It is constituted from time to time, as the need arises, by a president and justices of appeal, together with the chief justice and the puisne judges of the High Court.²⁵⁷ The president of the court and the justices of appeal are appointed by the governor-general acting on the advice of the Judicial and Legal Service Commission.²⁵⁸ Appointees must be qualified for appointment to the High Court.²⁵⁹

The High Court is established under s 77 of the constitution. It consists of the chief justice and puisne judges.²⁶⁰ They are appointed by the governor-general acting on the advice of the Judicial and Legal Service Commission.²⁶¹ Commissioners of the court may be appointed to attend to urgent business.²⁶²

Magistrates' courts are established as courts of record by the Magistrates' Courts Act.²⁶³ They are divided into principal magistrates' courts,

256 See Corrin, J, 'Courts in Solomon Islands' (1999) *LAWASIA Journal* 98; Corrin, J, 'Solomon Islands', in Saunders, C and Hassall, G (eds), *Asia Pacific Constitutional Yearbook* 1993, Melbourne: Centre for Comparative Constitutional Studies, pp 244-71, at pp 252-3.

257 Constitution of Solomon Islands 1978, s 85(2).

258 *Ibid*, s 86.

259 *Ibid*, s 86(3).

260 *Ibid*, s 77(2). See *Qalo v Qalobe* [2004] SBCA 5, held that parties may not fund a sitting of the court.

261 Constitution of Solomon Islands 1978, s 78.

262 *Ibid*, s 79.

263 Cap 20.

magistrates' courts of the first class and magistrates' courts of the second class.²⁶⁴ The courts sit in districts, as directed by the chief justice.²⁶⁵ Magistrates' courts are constituted by a principal magistrate or magistrate of the relevant class sitting alone. All magistrates are appointed by the Judicial and Legal Service Commission.²⁶⁶ A clerk of the court is appointed to each magistrates' court by the chief justice or a judge.²⁶⁷

The customary land appeal courts are established by chief justice's warrant under the Land and Titles Act.²⁶⁸ Each customary land appeal court is constituted by a president, vice president and at least three other members, one of whom must be a magistrate. All members are appointed by the chief justice.²⁶⁹

The local courts are established by chief justice's warrant under the Local Courts Act.²⁷⁰ Each court is constituted in accordance with the law or custom of the area in which it has jurisdiction.²⁷¹ The court may sit to hear a case provided that at least three justices are present.²⁷² Each court must also have a clerk appointed to it by the chief justice.²⁷³

Jurisdiction²⁷⁴

Court of Appeal

CIVIL JURISDICTION

The Court of Appeal has jurisdiction to hear appeals as of right from²⁷⁵

- any decision of the High Court sitting at first instance, including decisions of judges sitting in chambers
- any decision of the High Court under the provisions of the Islanders' Divorce Act,²⁷⁶ and

264 Magistrates' Courts Act, Cap 20, s 3(1).

265 *Ibid*, ss 3(2), 50.

266 Constitution of Solomon Islands 1978, s 118.

267 Magistrates' Courts Act, Cap 20, s 12.

268 Cap 133, s 255(1).

269 Cap 133, s 255(2).

270 Cap 19.

271 Local Courts Act, Cap 19, s 3. The chief justice may prescribe the constitution of a local court (s 3) and has done so in each warrant establishing a local court.

272 See warrants establishing the local courts, eg, Warrant establishing the Honiara Local Court, LN 48/86 and LN 54/89.

273 Local Courts Act, Cap 19, s 5.

274 See *op cit*, Corrin, 1999, fn 256.

275 Court of Appeal Act, Cap 6, s 11.

276 Cap 170.

- on a question of law only, from any decision of the High Court exercising appellate jurisdiction provided that further appeal to the Court of Appeal is not prohibited by statute.

The Court of Appeal has jurisdiction to hear appeals from the High Court with leave²⁷⁷

- where an order was made by consent or is as to costs only
- where the order or judgment is interlocutory, except in a case
 - where the liberty of the subject or custody of infants is concerned
 - where an injunction or appointment of a receiver is granted or refused
 - where the decision determines the claim of any creditor or liability of a contributor or other officer under the Companies Act and
 - where a decree nisi in a matrimonial cause or a judgment or order in an admiralty action is involved.

No appeal lies from

- a decision allowing an extension of time in which to appeal
- an order giving unconditional leave to defend an action
- a decision of the High Court which is provided by statute to be final, for example, on appeal from the Customary Land Appeal Court²⁷⁸ nor
- from an order absolute for the dissolution or nullity of marriage, where the opportunity to appeal against the decree nisi has not been taken.

CRIMINAL JURISDICTION

A person tried by the High Court may appeal to the Court of Appeal as of right against conviction on a question of law or with leave in other cases.²⁷⁹ Appeal also lies with leave against sentence unless it is one that is fixed by law.²⁸⁰ The Court of Appeal also hears appeals from a decision of the High Court on appeal from a magistrate on question of laws, but not on the ground of severity of sentence.²⁸¹ There is no appeal to the Court of Appeal where the High Court has confirmed an acquittal by the magistrates' court.²⁸²

277 Court of Appeal Act, Cap 6, s 11.

278 Land and Titles Act, Cap 133, s 256(4).

279 Court of Appeal Act 1978, s 20.

280 *Ibid*, s 20(c).

281 Court of Appeal Act 1978, s 22(1).

282 *Ibid*.

High Court

CONSTITUTIONAL JURISDICTION

The High Court has original jurisdiction to determine any question as to the interpretation or application of this constitution.²⁸³ More specifically, it has jurisdiction to determine applications for breach of the rights contained in chapter 2 of the constitution.²⁸⁴ It also has jurisdiction to determine questions as to membership of parliament.²⁸⁵

CIVIL JURISDICTION

The High Court has unlimited original jurisdiction but has no power to give advisory opinions.²⁸⁶ Appeals lie to the High Court as of right from all judgments, orders and decisions of any magistrates' court, except where it is made by consent, is *ex parte* or relates to costs only.²⁸⁷ In those cases, special leave of the magistrates' court, or of the High Court is required.²⁸⁸ The High Court also hears appeals from customary land appeal courts on questions of law, other than customary law, or where failure to comply with a procedural requirement is alleged.²⁸⁹ The decision of the High Court is final.

CRIMINAL JURISDICTION

The High Court has unlimited original jurisdiction in relation to the determination of criminal matters within Solomon Islands.²⁹⁰ This unlimited jurisdiction is reiterated in s 4 of the Criminal Procedure Code²⁹¹ and s 6 of the Code states that the High Court may pass 'any sentence authorised by law'. In addition, the High Court has an appellate jurisdiction which is defined in Pt IX of the Criminal Procedure Code.²⁹² Appeals lie as of right.²⁹³ There is also an appeal by way of case stated.²⁹⁴

283 Constitution of Solomon Islands 1978, ss 83, 84(2).

284 *Ibid*, s 18(2).

285 *Ibid*, s 52.

286 *Attorney-General and the Chairman of the Public Service Commission v Wheeler* [1990] SILR 137.

287 Magistrates' Courts Act, Cap 19, s 41.

288 *Ibid*, s 41.

289 Land and Titles Act, Cap 133, s 256(3).

290 Constitution of Solomon Islands 1978, s 77(1).

291 Cap 7.

292 *Ibid*.

293 Criminal Procedure Code, Cap 7, s 282(1).

294 *Ibid*, s 297(1).

Magistrates' courts

CIVIL JURISDICTION

The Magistrates' Courts Act²⁹⁵ confers jurisdiction on principal magistrates' courts throughout Solomon Islands. Other magistrates' courts are limited to the district in which they were established and to the territorial waters adjacent to that district.²⁹⁶ Magistrates' courts have civil jurisdiction:

- in claims in contract or tort where the amount involved does not exceed SBD2000 or, in the case of a principal magistrate, SBD6000
- in suits between landlord and tenant for possession of any land where the annual value or rent does not exceed the sum of SBD500 or, in the case of a principal magistrate, SBD2000
- to make guardianship and custody orders
- to grant injunctions, orders for the detention or preservation of any property; orders to restrain torts or breaches of contracts; or similar relief
- to determine claims for relief by way of interpleader in respect of land or other property attached in execution of a decree made by any magistrate provided that the value of the land or other property concerned does not exceed SBD500 or, in the case of a principal magistrate, SBD2000
- to enforce its orders by attachment and sale or delivery, and
- to make a committal order of up to six weeks against a person with the means to pay who fails to comply with a court order for payment of an order or judgment.

The jurisdiction of second class magistrates is limited to cases involving a maximum of SBD200.²⁹⁷

Magistrates' courts do not have jurisdiction to deal with

- suits where the title to any right, duty or office is in question
- suits where the validity of any will or testamentary writing or of any bequest or limitation under any will or settlement is in question
- suits wherein the legitimacy of any person is in question
- suits wherein the validity or dissolution of any marriage is in question
- actions for malicious prosecution, defamation, seduction or breach of promise of marriage²⁹⁸

²⁹⁵ Cap 20.

²⁹⁶ *Ibid*, s 4.

²⁹⁷ Magistrates' Courts Act, Cap 20, s 19(4).

²⁹⁸ *Ibid*, s 19(3).

- actions where the title to land or ownership of land is disputed, except where the parties consent.²⁹⁹

The chief justice may order an increase in the civil jurisdiction of named magistrates.³⁰⁰

CRIMINAL JURISDICTION

The territorial jurisdiction of the magistrates' courts outlined above applies in relation to criminal matters, as well as civil. The criminal jurisdiction of magistrates' courts varies according to the class of magistrate. All classes of magistrate have jurisdiction to try criminal matters summarily.³⁰¹

A principal magistrates' court has jurisdiction in relation to the following:

- all criminal offences that carry a maximum punishment of 14 years' imprisonment, or a fine or both
- any other offence which has been expressly made subject to the principal magistrate's jurisdiction by law, and
- any offence that has been expressly provided to be triable summarily.

The jurisdiction of the principal magistrate is limited in relation to the maximum punishments that may be imposed: a term of imprisonment of five years or a fine of \$1,000 or both.³⁰² First and second class magistrates' courts have a lesser jurisdiction. Magistrates in these classes may summarily try any offence which carries a maximum punishment of imprisonment for one year, or a fine of \$200 dollars or both. In addition, they have jurisdiction to try any other offence where such jurisdiction is expressly granted by law or it has been provided that the offence may be tried summarily.³⁰³ The magistrates' courts also have jurisdiction to hear appeals from decisions of the local courts operating within their specified area.³⁰⁴

Customary land appeal courts

Customary land appeal courts hear appeals from local courts as of right.³⁰⁵

299 *Ibid*, s 19(6).

300 *Ibid*, s 26.

301 *Ibid*, s 27.

302 Magistrates' Courts Act, Cap 20, s 27(1).

303 *Ibid*, s 27(2).

304 Local Courts Act Cap 19, s 22.

305 Land and Titles Act, Cap 133, s 256(1).

Local courts

CIVIL JURISDICTION

The local court has jurisdiction conferred by the Local Courts Act,³⁰⁶ to the extent set forth in its warrant, over causes and matters in which all parties are islanders³⁰⁷ resident or within the area of the jurisdiction of the court.³⁰⁸ Civil jurisdiction extends to all civil suits and matters in which the defendant is ordinarily resident within the jurisdiction of the court or in which the cause of action arises, up to the monetary limit set out in the warrant. In cases involving immovable property, the property must be situated within the jurisdiction of the local court.³⁰⁹ The court has jurisdiction to enforce its decisions by attachment and sale or delivery or committal for up to six weeks.³¹⁰

The local court has exclusive jurisdiction to deal with all proceedings of a civil nature affecting or arising in connection with customary land other than

- matters expressly excluded by the Land and Titles Act, and
- questions as to whether land is customary or alienated.³¹¹

As a prerequisite to the exercise of jurisdiction the local court must be satisfied that

- the dispute has first been referred to the chiefs
- all traditional means of resolving the dispute have been exhausted, and
- no decision wholly acceptable to both parties has been made by the chiefs.³¹²

A local court also has jurisdiction to deal with any matter of a civil nature referred to it by the High Court or a customary land appeal court under the Land and Titles Act. Its decisions on such matters are subject to appeal to the Customary Land Appeal Court, and from there to the High Court on a point of law only.³¹³

306 Cap 19.

307 The term 'Islander' is not defined in the act, but see the definition of 'Islander' in the Interpretation and General Provisions Act, Cap 85, s 17(1).

308 Local Courts Act, Cap 19, s 6.

309 *Ibid*, s 8(1).

310 *Ibid*, s 8(2).

311 Land and Titles Act, Cap 133, s 254.

312 Local Courts Act, Cap 19, s 12(1).

313 Land and Titles Act, Cap 133, ss 254(3), 256.

CRIMINAL JURISDICTION

The criminal jurisdiction of the local courts is limited to the territorial jurisdiction of the court, in the same way as the civil jurisdiction previously referred to. The specific criminal jurisdiction of the local courts is defined as follows:

The criminal jurisdiction of a local court shall extend to the hearing, trial and determination of all criminal charges and matters in which any person subject to the jurisdiction of the court is accused of having wholly or in part within the jurisdiction of the court, committed or been accessory to the committing of an offence under the provisions specified in the Schedule to this Order or under the provisions of any bye-law made by any local government council.³¹⁴

In addition, the local courts are limited in terms of the punishments that they can administer. Section 12 of the Local Courts Act³¹⁵ stipulates that a local court ‘may inflict any punishment authorised by law or custom of Islanders, provided that such punishment is not repugnant to natural justice and humanity and the fine or other punishment shall in no case be excessive but shall always be proportioned to the nature and circumstances of the offence’. It is noteworthy that the statutory provisions relating to punishments do not specifically state that the punishments apply to criminal matters. However, para 3 of the Local Courts (Criminal Jurisdiction) Order 1978 states that in the exercise of the criminal jurisdiction outlined in para 2 of the order, a local court ‘may pass sentences ordering imprisonment for a term not exceeding six months or imposing a fine not exceeding two hundred dollars’.

Tokelau

Hierarchy and constitution of the courts

Court of Appeal of New Zealand
High Court of New Zealand
Village courts

³¹⁴ Local Courts (Criminal Jurisdiction) Order 1978, para 2. The Schedule to the Order lists certain offences under the following pieces of legislation: Penal Code, Cap 26; Local Government Act, Cap 117; Roads Act, Cap 129; Public Hospitals and Dispensaries Act, Cap 51, repealed by the Health Services Act, Cap 100; Aerodromes Rules, Cap 97, subsidiary legislation p 3895, repealed by the Civil Aviation Act Cap 47; Firearms and Ammunition Act, Cap 80; Public Health Act 1970, No 2 of 1970, repealed by the Environmental Health Act, Cap 99 and Fisheries Act, Cap 38.

³¹⁵ Cap 19.

Tokelau does not follow the standard model hierarchy. There is only one level of courts within the country. While provision is made for major civil and criminal cases and appeals to be dealt with by New Zealand courts sitting as courts of Tokelau, no cases have yet been taken there. In fact, most disputes are dealt with outside the formal court hierarchy in the *Taupulega* (Council of Elders).

The Court of Appeal of New Zealand has no separate status in Tokelau.³¹⁶ The Tokelau Amendment Act gives the High Court of New Zealand the status of a separate court of justice in and for Tokelau.³¹⁷

Village courts are established on each of the three main islands, namely, Atafu, Fakaofo and Nukunonu. They are presided over by a commissioner or, in his absence, the *faipule* or 'chair' of the village council.

Jurisdiction

Court of Appeal of New Zealand

CIVIL AND CRIMINAL JURISDICTION

The Court of Appeal of New Zealand has jurisdiction to hear appeals from the High Court of New Zealand exercising its jurisdiction in relation to Tokelau.³¹⁸ The decision of the Court of Appeal is final.³¹⁹

High Court of New Zealand

CIVIL AND CRIMINAL JURISDICTION

The High Court has original jurisdiction to deal with matters outside the jurisdiction of the commissioner.³²⁰ It also has jurisdiction to hear appeals from civil judgments of a commissioner.³²¹ In addition, it has jurisdiction to hear appeals from decisions of a commissioner relating to criminal matters. However, there is no appeal as of right in relation to minor criminal matters (offences punishable by imprisonment of up to three months or by a fine of up to \$150). Appeals in relation to such offences may be made under regulations passed pursuant to the Tokelau Act 1948.³²²

316 Tokelau Amendment Act 1986, s 4(1).

317 *Ibid*, s 3(1).

318 *Ibid*, s 4(1).

319 *Ibid*, s 4(2).

320 Tokelau Amendment Act 1986, s 3(1).

321 *Ibid*, s 10.

322 *Ibid*, s 10.

Village courts

CIVIL JURISDICTION

A commissioner's territorial jurisdiction extends to

- the island for which that commissioner is appointed, and
- the territorial sea of Tokelau that surrounds that island.³²³

Within those territorial boundaries, commissioners have civil jurisdiction

- in actions for the recovery of debt or damages not exceeding \$1,000, and
- in actions for the recovery of chattels not exceeding \$1,000 in value.³²⁴

Parties to a dispute may extend the jurisdiction of a commissioner by memorandum of agreement.³²⁵

CRIMINAL JURISDICTION

The criminal jurisdiction of a commissioner is also a limited one. By virtue of s 7 of the Tokelau Amendment Act 1986, a commissioner has jurisdiction in criminal proceedings in the following circumstances:

- where the offence is punishable only by a fine, or
- where the offence is punishable by a period of imprisonment that does not exceed one year.

In addition, there are limitations on the powers of punishment available to commissioners. A commissioner may do one or more of the following when dealing with a criminal case:

- impose a term of imprisonment for no more than three months
- impose a fine of no more than \$150
- order that the convicted person undertake community work
- order that the convicted person be placed under the supervision of the police
- publicly reprimand the convicted person
- order payment of compensation of no more than \$1,000 for 'the loss of or damage to any property of the victim of the offence', and/or
- order restitution of the victim's property.

³²³ *Ibid*, s 7(3).

³²⁴ *Ibid*, s 7.

³²⁵ *Ibid*, s 8.

Tonga

Hierarchy and constitution of the courts

Privy Council (of Tonga)
Court of Appeal
Supreme Court Land court
Magistrates' courts

The court structure in Tonga follows the standard model of inferior court, superior court and Court of Appeal. There is a Privy Council of Tonga, but this is a body appointed by the king to assist him, rather than a court.³²⁶ However, the Privy Council has jurisdiction to hear appeals from the land court in relation to hereditary estates and titles.³²⁷ Its decision in such matters is final.³²⁸ The land court is a separate court dealing with land disputes. The Privy Council of Tonga is not covered in detail in this chapter.

The Court of Appeal is established under cl 84 of the constitution and is governed by the Court of Appeal Act.³²⁹ It consists of the chief justice and such other judges as are appointed by the king with the consent of the Privy Council.³³⁰ The chief justice is the president of the Court of Appeal.³³¹ The court must sit with at least three members,³³² except in some limited cases, where appeals may be determined by two judges.³³³ The registrar of the Court of Appeal is the registrar of the Supreme Court.³³⁴

The Supreme Court is established under cl 86 of the constitution and governed by the Supreme Court Act.³³⁵ It consists of a chief justice and judges appointed by the king with the consent of the Privy Council.³³⁶ In both civil and criminal cases, the court is normally constituted by a single judge. However, a party to a civil case has the right to elect for trial by jury if an issue of fact is involved³³⁷ and in criminal cases, such election may be made by an accused charged with an offence punishable by imprisonment

326 Constitution of Tonga, Cap 2, cl 50(1).

327 *Ibid*, cl 50(2).

328 *Ibid*.

329 Cap 9.

330 Constitution of Tonga, Cap 2, cl 85.

331 Court of Appeal Act, Cap 9, s 4.

332 *Ibid*, s 6.

333 Court of Appeal (Constitution of Court) Rules 2003.

334 *Ibid*, s 8.

335 Cap 10.

336 Constitution of Tonga, Cap 2, cl 86.

337 *Ibid*, cl 99.

of more than two years or a fine of 500 pa'anga,³³⁸ or both. In practice, the right to trial by jury is rarely exercised in criminal cases.³³⁹

The land court was established by the Land Act,³⁴⁰ pursuant to cl 84 of the constitution. It is constituted by a presiding judge and an assessor, who advises about custom and usage.³⁴¹ The judge and a panel of assessors are appointed by the king and the Privy Council.³⁴²

Magistrates' courts are constituted under cl 84 of the constitution and governed by the Magistrates' Courts Act.³⁴³ They may be constituted by the chief police magistrate or a district magistrate appointed by the prime minister with the consent of cabinet.³⁴⁴ Magistrates' courts are authorised to operate in five districts under the Magistrates' Courts Act.³⁴⁵

Jurisdiction

Court of Appeal

CIVIL JURISDICTION

The Court of Appeal has all the powers of the Supreme Court.³⁴⁶ The Court of Appeal has exclusive jurisdiction to determine appeals from the Supreme Court.³⁴⁷

Appeal lies as of right from all decisions except

- where the amount involved does not exceed \$1,000
- from an order made by consent
- from an order as to costs, and
- interlocutory decisions

in which situations, leave of a Supreme Court judge or of the Court of Appeal is required.³⁴⁸

338 This right is guaranteed by the Constitution of Tonga, Cap 2, cls 11 and 99. See *Pedras v Rex* [2000] TOCA 4.

339 Personal communication with Senior Crown Counsel and John Appleby, Legal Practitioner, Tonga.

340 Cap 132, s 144.

341 Land Act 1988, s 146.

342 *Ibid*, s 147(1).

343 Cap 11.

344 Magistrates' Courts Act, Cap 11, s 2(1).

345 *Ibid*, s 3(1).

346 Court of Appeal Act, Cap 9, s 11.

347 Constitution of Tonga, Cap 2, cll 91 and 92.

348 Court of Appeal Act, Cap 9, s 10(1).

The Court of Appeal also has jurisdiction to hear appeals from the land court except in matters relating to the determination of hereditary estates and titles, where appeals lie to the Privy Council.³⁴⁹

Both the Supreme Court and the land court may refer a point of law to the Court of Appeal by way of case stated.³⁵⁰ Judges of the Court of Appeal are also empowered to give opinions on important or difficult matters when requested so to do by the king, the cabinet or the Legislative Assembly.³⁵¹

CRIMINAL JURISDICTION

The exclusive jurisdiction of the Court of Appeal to hear and determine appeals from the Supreme Court referred to previously applies in relation to criminal matters as well. Part III of the Court of Appeal Act³⁵² deals specifically with criminal appeals. Any person who has been convicted on trial in the Supreme Court may appeal to the court in the following circumstances:

- against conviction on any ground of appeal involving only a question of law
- with leave of the court on any ground of appeal, and/or
- with leave of the court against sentence unless the penalty is one that is fixed in law.

The Court of Appeal Act³⁵³ makes no reference to the jurisdiction of the court to hear 'further' appeals. However, the Magistrates' Courts (Amendment) Act of 1990 provides that any party to an appeal from the magistrates' courts to the Supreme Court may make a further appeal to the Court of Appeal on a point of law with leave of either the Supreme Court or the Court of Appeal.

Supreme Court

CONSTITUTIONAL JURISDICTION

The Supreme Court has jurisdiction in all cases arising under the constitution except those concerning titles to land.³⁵⁴

349 Constitution of Tonga, Cap 2, cl 90.

350 Court of Appeal Act, Cap 9, s 3.

351 Constitution of Tonga, Cap 2, cl 93.

352 Cap 9.

353 *Ibid.*

354 Constitution of Tonga, Cap 2, cl 90.

CIVIL JURISDICTION

The Supreme Court has jurisdiction in all cases under the laws of Tonga.³⁵⁵ It also has exclusive jurisdiction in

- cases where the amount claimed exceeds \$500
- in divorce, probate and admiralty matters, and
- in any other matters not specifically allotted to any other tribunal.³⁵⁶

The Supreme Court has jurisdiction to hear appeals as of right from the civil judgment or order of a magistrate.³⁵⁷

CRIMINAL JURISDICTION

The original jurisdiction of the Supreme Court in relation to criminal matters is set out in ss 4 and 14(1) of the Supreme Court Act.³⁵⁸ Section 14(1) states that the court is empowered to try all indictable offences, and s 4 states that the court has criminal jurisdiction in relation to all offences that carry a maximum penalty of a fine that is more than \$500 or a period of imprisonment exceeding two years. In addition, the court has all the powers of the magistrates' courts.³⁵⁹ The court has appellate jurisdiction in relation to decisions of the magistrates' courts by virtue of s 74 of the Magistrates' Courts Act.³⁶⁰

Land court

The land court has jurisdiction to determine disputes relating to a question of title or any other interest in land.³⁶¹ It may also define land boundaries.³⁶²

Magistrates' courts

CIVIL JURISDICTION

A magistrates' court constituted by the chief police magistrate has jurisdiction throughout Tonga.³⁶³ Other magistrates may exercise jurisdiction

355 *Ibid.*

356 Supreme Court Act, Cap 10, s 4.

357 Magistrates' Courts Act, Cap 11, s 69(1).

358 Cap 10.

359 Supreme Court Act, Cap 10, s 5.

360 Cap 11.

361 Land Act 1988, s 149(1)(b). The land court does not have jurisdiction to hear disputes affecting any land resumed by the Crown under Part IX of the Land Act 1988.

362 Land Act 1988, s 149(1)(a).

363 Magistrates' Courts Act, Cap 11, s 2(3).

within the district to which they are assigned.³⁶⁴ Every magistrate has the following general powers and jurisdiction in civil cases:

- to make orders for maintenance
- to issue subpoenas for witnesses
- to enforce payments
- to take affidavits and administer oaths
- to exercise powers set down by law, and
- to make temporary orders where prompt action is needed.³⁶⁵

It also has specific jurisdiction in civil actions where the plaintiff or defendant resides in its district, provided the amount claimed does not exceed \$1,000 or, in the case of the chief police magistrate, \$2,000.³⁶⁶ A magistrates' court may also deal with claims for ownership or possession of goods up to the value of \$1,000.³⁶⁷

CRIMINAL JURISDICTION

Part II of the Magistrates' Courts Act³⁶⁸ details the summary jurisdiction of magistrates' courts in relation to criminal matters. Section 11(1)³⁶⁹ states that all magistrates have jurisdiction with regard to hearing and determining criminal matters in which the prescribed punishment does not exceed a fine of \$1,000 or a period of three years' imprisonment. In addition, the chief police magistrate has jurisdiction to hear cases in which the fine provided by law is no more than \$1,500.³⁷⁰

Tuvalu³⁷¹

Hierarchy and constitution of the courts

Privy Council
Court of Appeal

364 *Ibid*, s 3(2).

365 *Ibid*, s 8.

366 Magistrates' Courts Act, Cap 11, s 59(1) and (2), as amended by the Magistrates' Courts (Amendment) Act 1990.

367 Magistrates' Courts Act, Cap 11, s 60(1), as amended by the Magistrates' Courts (Amendment) Act 1992.

368 Cap 11.

369 As amended by the Magistrates' Courts (Amendment) Act 1990.

370 Magistrates' Courts Act, Cap 11, s 11(2), as amended by the Magistrates' Courts (Amendment) Act 1990.

371 See Lafaele Kaitu, 'Functions and standards of adjudicators in Tuvalu', and Atkinson, B, 'Regional co-operation in the courts: a Tuvalu view', in Powles, G and Pulea, M (eds), *Pacific Courts and Legal Systems*, 1988, Suva: USP, pp 53–6 and 241–4.

High Court
Magistrates' courts Lands courts appeals panel
Island courts Lands court

The court hierarchy in Tuvalu is laid down in s 119 of the constitution. This states that it consists of the English Privy Council, the Court of Appeal, the High Court and such other courts, and tribunals as are provided for by statute. The Magistrates' Courts Ordinance³⁷² and the Island Courts Ordinance³⁷³ make provision for inferior courts. The Native Lands Ordinance provides for lands courts and a lands court appeals panel.³⁷⁴ Thus, in addition to the standard model courts, there are additional courts to deal with land matters and local disputes. Unlike other regional countries, these are separate bodies.

By virtue of s 119, the Privy Council is part of the judicial system in Tuvalu.³⁷⁵ Section 134 of the constitution establishes the Court of Appeal. It is governed by the Superior Courts Ordinance.³⁷⁶ It consists of the judges of the High Court and not less than three judges of appeal. Judges of appeal are appointed by the governor-general acting in accordance with the advice of the cabinet.³⁷⁷ It is constituted by at least three judges.³⁷⁸

Section 120 of the constitution establishes the High Court as a superior court of record. It is constituted by the chief justice, who is appointed by the head of state acting in accordance with the advice of the cabinet.³⁷⁹ The current appointee is based in Fiji Islands and visits approximately once every three years. Additional judges may be appointed by the head of state, acting in accordance with the advice of the cabinet after consultation with the chief justice, but no such appointment has yet been made.³⁸⁰ When sitting to hear appeals on customary land matters, the chief justice is empowered to appoint two or more assessors to assist him.³⁸¹

The Magistrates' Courts Ordinance establishes magistrates' courts. This court is theoretically divided into two levels, namely, the senior magistrates' court and the magistrates' court. When sitting to hear appeals on customary land matters, the senior magistrate is empowered to appoint two or

372 Cap 2.

373 Cap 3.

374 Cap 22.

375 See also Tuvalu (Privy Council) Order 1975 (UK) (SI 1975 No 1507). There are plans to abolish appeals to the Privy Council. The Constitutional Review Committee, which recently toured the country, asked for views on this.

376 Cap 1C.

377 Superior Courts Act, Cap 1C, s 8(2).

378 *Ibid*, s 7(2).

379 Constitution of Tuvalu, s 122.

380 *Ibid*, s 123.

381 Native Lands Ordinance, Cap 22, s 27.

more assessors to assist him.³⁸² However, the senior magistrates' court is not operating at the moment. There is only one magistrates' court operating, which is referred to as the resident magistrates' court.

Island courts are established, by the Island Courts Ordinance,³⁸³ on each island that the governor-general designates.³⁸⁴ They are subordinate to magistrates' courts and are presided over by three island magistrates, being the president, the vice president and an ordinary member.³⁸⁵ Appointments are by the governor-general acting in accordance with the advice of the Public Service Commission and subject to the approval of the chief justice.³⁸⁶ A clerk of court is appointed by the senior magistrate to each island court.³⁸⁷

The lands court is constituted by at least six members, including the president.³⁸⁸ Members are appointed by the local government council with the approval of the land's officer.³⁸⁹ The lands courts appeals panel is constituted by the president, a vice president and at least three other members, all of whom are appointed by the minister.³⁹⁰

Jurisdiction

The Privy Council

CIVIL JURISDICTION

The Privy Council has jurisdiction to hear appeals from the decisions of the Court of Appeal, with leave from the Court of Appeal, in the following matters:

- cases referred to in s 136(1)(a) of the constitution, namely
 - a final decision on a question as to interpretation or application of the constitution
 - a final decision in proceedings for the enforcement of the fundamental rights provisions in Pt II of the constitution

382 Native Lands Ordinance, Cap 22, s 26.

383 Cap 3.

384 Island Courts Ordinance, Cap 3, s 3(1). There are currently eight island courts.

385 *Ibid*, s 9(1).

386 *Ibid*, s 9(2).

387 *Ibid*, s 12(1).

388 Native Lands Ordinance, Cap 22, s 6.

389 *Ibid*.

390 Native Lands Ordinance, Cap 22, s 9.

- a final or interlocutory decision in any case which the Court of Appeal considers to involve a question of great general or public importance or which ought to be submitted to the Privy Council
- any civil case involving \$2,000 or more or
- proceedings for dissolution or nullity of marriage.³⁹¹

CRIMINAL JURISDICTION

Section 136 of the constitution makes no reference to a specific criminal jurisdiction of the Privy Council. However, the general jurisdiction within this section (particularly s 136(1)(a)(iii)) is sufficiently wide to encompass appeals relating to criminal matters. Part IV of the Superior Courts Act³⁹² also deals with the jurisdiction of the Privy Council in Tuvalu; again, there is no specific reference to criminal matters.

To date, it appears that an appeal has never been taken to the Privy Council.

The Court of Appeal

CIVIL JURISDICTION

The Court of Appeal has jurisdiction to hear appeals as of right from the High Court exercising any type of jurisdiction, except

- where an order was made by consent or is as to costs only or
- where an order or judgment is interlocutory, except in a case prescribed by rules of court

in which case, leave is required.

No appeal is allowed from

- a decision allowing an extension of time in which to appeal
- an order giving unconditional leave to defend an action nor
- a decision of the High Court which is provided by statute to be final.³⁹³

CRIMINAL JURISDICTION

Section 135 of the constitution outlines the general jurisdiction of the Court of Appeal; the court may hear appeals from any decision of the High Court

³⁹¹ Superior Courts Act, Cap 1C, s 13(1)(b).

³⁹² Cap 1C.

³⁹³ Court of Appeal Act, Cap 16B, s 10(2).

whether such a decision was made by that court acting in its original jurisdiction or as an appellate court.³⁹⁴ Appeals lie as of right from decisions of the High Court to the Court of Appeal.³⁹⁵

To date, it appears that an appeal has never been heard by the Court of Appeal.

The High Court

CONSTITUTIONAL JURISDICTION

The High Court has original jurisdiction to determine any question as to the interpretation or application of this constitution.³⁹⁶ More specifically it has jurisdiction to determine applications for breach of the bill of rights contained in the constitution.³⁹⁷ It also has jurisdiction to determine questions as to membership of parliament.³⁹⁸

CIVIL JURISDICTION

The High Court has unlimited original jurisdiction in civil cases.³⁹⁹ This includes matrimonial, admiralty, probate and maritime matters.⁴⁰⁰ The High Court has jurisdiction to hear appeals as of right from all decisions of the senior magistrates' court,⁴⁰¹ other than orders made *ex parte*, by consent, or as to costs only. In those instances, special leave of the first instance or appellate court is required.⁴⁰² The High Court's jurisdiction to hear appeals from the senior magistrates' court exercising appellate jurisdiction includes decisions on appeal from the lands courts appeals panel.⁴⁰³ In practice, these appeals go directly to the High Court as the senior magistrates' court is not sitting. The High Court may also decide a question of law referred to it by way of case stated from the senior magistrates' court.⁴⁰⁴ The High Court also has a supervisory jurisdiction over inferior courts.⁴⁰⁵

394 See below.

395 Superior Courts Act, Cap 1C, s 9(1)(a).

396 Constitution of Tuvalu 1986, s 131(1). See also s 130(1).

397 Constitution of Tuvalu 1986, s 38(1) and s 130(1)(a).

398 Constitution of Tuvalu 1986, s 100 and s 130(1)(b).

399 *Ibid*, s 3(2)(a).

400 *Ibid*, s 3(2)(b) and (c).

401 Magistrates' Courts Ordinance, Cap 2, s 39.

402 *Ibid*, s 39(2).

403 Native Lands Ordinance, Cap 22, s 26(2).

404 Magistrates' Courts Ordinance, Cap 2, s 41.

405 Superior Courts Act, Cap 1C, s 3(2)(d).

CRIMINAL JURISDICTION

The High Court's original jurisdiction in relation to criminal matters is unlimited.⁴⁰⁶ The High Court is also governed, in relation to criminal matters, by the Criminal Procedure Code.⁴⁰⁷ Section 6 states that the High Court may pass 'any sentence authorised by law'. In addition, the High Court exercises an appellate jurisdiction with regard to decisions of the Senior Magistrate's court.⁴⁰⁸ This jurisdiction is identified in general terms in the Superior Courts Act⁴⁰⁹ and, in more particular terms, in Pt IX of the Criminal Procedure Code.⁴¹⁰ Appeals lie as of right and may be made in relation to questions of fact and/or law, including the matter of sentence, which is deemed to be a question of law. In addition, there is provision for appeals to be made by way of case stated.

Magistrates' courts

A magistrates' court has original jurisdiction to hear civil cases involving actions for up to \$500. The senior magistrate's court has jurisdiction to hear civil cases involving actions for up to \$10,000.⁴¹¹ The senior magistrate may also make adoption orders.

The senior magistrates' court has jurisdiction to hear appeals from any other magistrates' court as of right in all matters⁴¹² other than orders made *ex parte*, by consent, or as to costs only. In those instances, special leave of the first instance or appellate court is required.⁴¹³ The senior magistrate's court also has jurisdiction to hear appeals for the lands courts appeals panel.⁴¹⁴ The senior magistrate's court may decide a question of law referred to it by way of case stated by a magistrate.⁴¹⁵ In practice, these matters go directly to the High Court as the senior magistrates' court is not sitting.

Magistrates' courts may hear appeals from island courts exercising divorce jurisdiction or jurisdiction in any civil matter where the amount involved exceeds \$10.⁴¹⁶ A magistrates' court also has power to review any island court case, either on the petition of a party or of its own motion.⁴¹⁷

406 *Ibid*, s 3(2)(a).

407 Cap 7.

408 Appeals from the ordinary magistrates' courts are made to the senior magistrate's court, although they may come before the High Court in the form of 'further' appeals.

409 Cap 1C, s 3(2)(e).

410 Cap 7.

411 LN 2/88 made under Magistrates' Courts Ordinance, Cap 2, s 22(3).

412 Magistrates' Courts Ordinance, Cap 2, s 39.

413 *Ibid*, s 39(2).

414 Native Lands Ordinance, Cap 22, s 26(1).

415 Magistrates' Courts Ordinance, Cap 2, s 41.

416 Island Courts Act, Cap 3, s 28.

417 *Ibid*, s 37.

CRIMINAL JURISDICTION

The criminal jurisdiction of the senior magistrate's court differs from that of the other magistrates' courts. This is largely with regard to the types of offences that each court may try and the sentences that each court may pass. All magistrates' courts have summary jurisdiction only.

The senior magistrate's court may hear cases in the following circumstances:

- where the offence is one for which the maximum punishment does not exceed 14 years' imprisonment, a fine or 'both such imprisonment and such fine',⁴¹⁸ or
- where jurisdiction has been expressly conferred upon the court or there has been express provision that the offence in question is one that may be tried summarily.

The maximum punishment that may be imposed by the senior magistrate's court is a term of imprisonment for five years, a fine of \$1,000 or 'both such imprisonment and such fine'.⁴¹⁹ In addition, the senior magistrate has jurisdiction to hear appeals from decisions of other magistrates' courts.⁴²⁰

Other magistrates' courts have a more limited jurisdiction. They may only hear cases in the following circumstances:

- where the offence is one for which the maximum punishment does not exceed imprisonment for more than one year, a fine of \$200 or both, or
- where jurisdiction has been expressly conferred on the court or there has been express provision that the offence in question may be tried summarily.⁴²¹

The magistrates' courts exercise an appellate jurisdiction with regard to decisions of the island courts of the district within which the magistrates' court is situated.⁴²²

Island courts

CIVIL JURISDICTION

Island courts have jurisdiction within the boundaries of the island on which they were established and over inland and adjacent waters.⁴²³ Within that

418 Magistrates' Courts Ordinance, Cap 2, s 25(1)(a) and (b).

419 *Ibid*, s 25(1)(b).

420 See above.

421 Magistrates' Courts Ordinance, Cap 2, s 25(2)(a) and (b).

422 *Ibid*, Pt VI.

423 Island Courts Ordinance, Cap 3, s 4.

area, they have summary jurisdiction to deal with the following civil matters:

- petitions for divorce or associated proceedings under the Native Divorce Ordinance Cap 21, provided both parties are domiciled in Tuvalu
- claims in contract and tort where the amount involved does not exceed \$60
- applications for maintenance under the Maintenance (Miscellaneous Provisions) Ordinance Cap 4, and
- applications under the Custody of Children Ordinance Cap 20.⁴²⁴

Island courts do not have jurisdiction over customary land disputes, which are dealt with by the lands courts, which also have jurisdiction over customary wills and adoptions and customary fishing rights.⁴²⁵

CRIMINAL JURISDICTION

The criminal causes that come within the criminal jurisdiction of the island courts are set out in Sched 2 of the Island Courts Act.⁴²⁶ Numerous specific offences are listed. Most of these offences are contained in the Criminal Penal Code,⁴²⁷ although there are also offences that arise under other enactments.⁴²⁸ In addition, the court may hear cases in relation to offences the maximum punishment for which is a fine of \$100 and/or a period of imprisonment of six months.⁴²⁹

Lands court

The lands court has jurisdiction over all owners of customary land⁴³⁰ and may decide all customary land disputes.⁴³¹ It may decide deal with native wills,⁴³² adoption and related conveyances of land,⁴³³ customary fishing rights⁴³⁴ and disputes concerning customary leases.⁴³⁵ The lands court also

424 Island Courts Ordinance, Cap 3, Sched 1.

425 Native Lands Ordinance, Cap 22, ss 12, 14, 15, 16 and 17.

426 Cap 3.

427 Cap 8.

428 Eg, Local Government Ordinance, Cap 19; Marriage Ordinance, Cap 29; Dogs Ordinance, Cap 46.

429 Island Courts Ordinance, Cap 3, Sched 2. See also s 6 of the Ordinance.

430 Native Lands Ordinance, Cap 22, s 11.

431 *Ibid*, s 12.

432 *Ibid*, s 15.

433 *Ibid*, s 16.

434 *Ibid*, s 17.

435 *Ibid*, s 18.

has power to deal with the paternity of children born to single mothers.⁴³⁶ All appeals from the lands court lie in the first instance to the lands courts appeals panel.⁴³⁷

Vanuatu

Hierarchy and constitution of the courts⁴³⁸

Court of Appeal
Supreme Court
Magistrates' courts
Island courts

The hierarchy of the courts in Vanuatu follows the standard model of inferior court, superior court and appeal court. Additionally, separate courts have been set up to administer customary law and to deal with customary land and minor local disputes. Appeal from these courts leads back into the standard structure. Tribunals have also been established to deal with customary land.⁴³⁹

The Court of Appeal was established under Art 50 of the constitution. It is constituted from time to time, as the need arises, by two or more judges of the Supreme Court.⁴⁴⁰

The Supreme Court was established under Art 49 of the constitution and by s 28 of the Courts Act 1980. It consists of the chief justice and three puisne judges.⁴⁴¹ Except for the chief justice, members of the judiciary are appointed by the president of Vanuatu on the advice of the Judicial Services Commission.⁴⁴² The chief justice is appointed by the president on the advice of the prime minister and the leader of the opposition.⁴⁴³ The constitution of the court is one judge sitting alone.⁴⁴⁴ The judge may dispense with the assessors in any civil case where he thinks their presence unsuitable,⁴⁴⁵ and this power is often utilised where the case does not involve custom.

Magistrates' courts are established under, and governed by, the Courts Act 1980. They are presided over by a lay magistrate or senior magistrate appointed by the Judicial Services Commission.⁴⁴⁶ When hearing appeals

436 Native Lands Ordinance, Cap 22, s 20.

437 Native Lands Ordinance, Cap 22, s 10.

438 See, further, Corrin, J, 'Courts of law in Vanuatu' (1987) *LAWASIA Journal* 119.

439 Customary Land Tribunals Act 2001.

440 Constitution of Vanuatu, Art 48; Courts Act 1980, s 32.

441 Constitution of Vanuatu, Art 47(2).

442 *Ibid*, Art 47(2).

443 *Ibid*, Art 49(3).

444 Courts Act, Cap 122, s 14(1), as amended by Courts Regulation (Amendment) Act 1989, s 1.

445 Courts Act, Cap 122, s 29(2).

446 *Ibid*, s 20.

from an island court, they must sit with two or more assessors knowledgeable in custom.⁴⁴⁷

The island courts were established by the Island Courts Act 1983, pursuant to the constitution.⁴⁴⁸ Each island court is constituted by at least three justices knowledgeable in customary law, at least one of whom must be a custom chief residing within the jurisdiction of the island court. Each island court must also have a supervising magistrate with powers and duties prescribed by the chief justice.⁴⁴⁹ The island courts are not functioning regularly, due to lack of resources.

Jurisdiction⁴⁵⁰

Court of Appeal

CIVIL JURISDICTION

The Court of Appeal has jurisdiction to hear appeals from the Supreme Court exercising original jurisdiction in civil cases.⁴⁵¹ It has all the power, authority and jurisdiction of the Supreme Court and may substitute its own judgment or opinion, but may not interfere with the exercise of discretion unless it was manifestly wrong.⁴⁵² A judgment of the Court of Appeal has full force and effect and may be executed as if it were an original judgment of the Supreme Court.⁴⁵³

CRIMINAL JURISDICTION

The Court of Appeal has a broad-ranging jurisdiction which is laid down in s 26 of the Courts Act.⁴⁵⁴ The aspects of the criminal jurisdiction mirror those of the civil jurisdiction outlined above. Such a wide jurisdiction encompasses an appellate function in relation to decisions of the Supreme Court acting as a court of first instance, and in relation to 'further appeals' from the Supreme Court acting in its appellate capacity.⁴⁵⁵

447 Island Courts Act, Cap 167, s 22(2).

448 Art 50.

449 Island Courts Act, Cap 167, s 2.

450 See, further, *op cit*, Corrin, fn 438.

451 Constitution of Vanuatu, Art 50. The Courts Act, Cap 122, does not define the appellate jurisdiction. No appeal from the Supreme Court exercising appellate jurisdiction has been provided, although the constitution, by Art 50, states that such jurisdiction may be conferred.

452 Courts Act, Cap 122, s 26.

453 *Ibid*, s 26(4).

454 Cap 122.

455 See below.

In addition, s 200(2) of the Criminal Procedure Code⁴⁵⁶ states that any person who has been convicted at trial in the Supreme Court may appeal to the Court of Appeal.

Supreme Court

CONSTITUTIONAL JURISDICTION

The Supreme Court has jurisdiction to determine applications regarding infringement of the constitution.⁴⁵⁷ It also has exclusive jurisdiction to determine question as to the interpretation of the constitution involving a fundamental point of law.⁴⁵⁸ More specifically it has jurisdiction to determine applications for breach of the bill of rights contained in the constitution.⁴⁵⁹ It also has jurisdiction to determine questions as to membership of parliament⁴⁶⁰ and to hear complaints from citizens about emergency regulations made by the council of ministers.⁴⁶¹ The president may refer to the Supreme Court any regulation which he considers to be contrary to the constitution.⁴⁶²

CIVIL JURISDICTION

The Supreme Court has jurisdiction throughout Vanuatu.⁴⁶³ It has unlimited jurisdiction to hear and determine civil proceedings.⁴⁶⁴

The Supreme Court has jurisdiction to hear appeals from a magistrates' court exercising civil jurisdiction. It may also hear an appeal by way of case stated.⁴⁶⁵

The Supreme Court has jurisdiction to hear appeals from island courts as to ownership of land.⁴⁶⁶ Its decision in such cases is final.⁴⁶⁷

CRIMINAL JURISDICTION

In relation to criminal matters, it is also the case that the jurisdiction of the Supreme Court extends throughout Vanuatu.⁴⁶⁸ The original jurisdiction of

456 Cap 136.

457 Constitution of Vanuatu 1980, Art 53.

458 Constitution of Vanuatu 1980, Art 53(3).

459 Constitution of Vanuatu 1980, Art 6.

460 Constitution of Vanuatu 1980, Art 54.

461 Constitution of Vanuatu 1980, Art 72.

462 Constitution of Vanuatu 1980, Art 39(3).

463 Courts Act, Cap 122, s 15.

464 Constitution of Vanuatu, Art 47.

465 Courts Act Cap 122, s 26(1).

466 Island Courts Act 1983, s 22(1). The Supreme Court will not entertain first instance applications regarding custom ownership of land: *Pulorovo v Dinb*, Supreme Court, Vanuatu, Civ Cas 99/95 (unreported) (4 December 1995).

467 Island Courts Act 1983, s 22(4).

468 Courts Act, Cap 122, s 15.

the Supreme Court is 'unlimited' in relation to criminal matters.⁴⁶⁹ Section 16 of the Courts Act (Cap 122) refers to the general appellate jurisdiction of the Supreme Court in relation to decisions of magistrates' courts. This jurisdiction is also referred to in s 200 of the Criminal Procedure Code.⁴⁷⁰ Section 200(1) states that any person convicted on trial in the magistrates' courts may appeal to the Supreme Court.

Magistrates' courts

CIVIL JURISDICTION

Magistrates' courts have jurisdiction to hear cases where the amount claimed or the subject matter in dispute does not exceed vt1,000,000.⁴⁷¹ They also have jurisdiction to hear disputes between landlord and tenant where the amount claimed does not exceed vt2,000,000; claims for maintenance not exceeding vt1,200,000 and uncontested petitions for divorce or nullity of marriage. Magistrates' courts are specifically excluded from exercising jurisdiction in wardship, guardianship, interdiction, appointment of *conseil judiciaire*, adoption, civil status, succession, wills, bankruptcy, insolvency or liquidation.⁴⁷² Magistrates' courts have jurisdiction to hear appeals from civil decisions of island courts, except decisions as to ownership of land, where appeal is to the Supreme Court.⁴⁷³

CRIMINAL JURISDICTION

Magistrates' courts constituted by a senior magistrate have jurisdiction in criminal proceedings where the maximum penalty does not exceed 2 years' imprisonment.⁴⁷⁴ Other magistrates may only deal with offences where the penalty does not exceed three months. This jurisdiction may be extended in the circumstances set out in s 4(2) and (3) of the Courts Act.⁴⁷⁵ Magistrates' courts have jurisdiction to hear appeals from island courts.⁴⁷⁶

TERRITORIAL JURISDICTION

In addition to the limitations outlined above, magistrates' courts have limited territorial jurisdiction. This is outlined in s 2 of the Courts Act⁴⁷⁷ and

469 Constitution of Vanuatu, Art 49(1).

470 Cap 136.

471 Magistrates' Court (Civil Jurisdiction) Act, Cap 130, s 1, as amended by Magistrates' Court (Civil Jurisdiction) (Amendment) Act 1994.

472 Magistrates' Court (Civil Jurisdiction) Act, Cap 130, s 2.

473 Island Courts Act, Cap 167, s 22(1).

474 See Courts Act, Cap 122, s 4(1)(a).

475 Cap 122.

476 See below for information regarding the jurisdiction of the island courts.

477 Cap 122.

refers to the 'district' within which the court is located as the limit of the court's jurisdiction. The territorial jurisdiction extends to both inland waters and territorial waters adjacent to the district.⁴⁷⁸ However, 'every magistrate may exercise jurisdiction throughout the Republic of Vanuatu' by virtue of s 6 of the Courts Act.⁴⁷⁹

Island courts

CIVIL JURISDICTION

The jurisdiction of island courts is limited to cases where all the parties are resident or within their territorial boundaries.⁴⁸⁰ They are also limited to dealing with matters in which the defendant is ordinarily resident within their territorial jurisdiction or in which the cause of action is within their boundaries.⁴⁸¹ In land cases, the land must be within their territorial boundaries.⁴⁸² Provided that territorial jurisdiction exists, island courts may determine claims in contract or tort where the amount claimed or the subject matter does not exceed vt50,000; claims for compensation under provincial bylaws not exceeding vt50,000 and claims for maintenance not limited in amount.⁴⁸³ Jurisdiction over customary land has been transferred to the customary land tribunals.⁴⁸⁴ Island courts are specifically empowered to administer the customary law prevailing within their territorial jurisdiction so far as it is not in conflict with any written law and is not contrary to justice, morality and good order.

CRIMINAL JURISDICTION

Like magistrates courts, the jurisdiction of island courts is limited both by the level of penalty and the place where the crime was committed. The jurisdiction extends to offences where the maximum penalty does not exceed 6 months' imprisonment or a fine of 24,000 vatu and committed 'wholly or in part within the territorial jurisdiction of the court'.⁴⁸⁵

TERRITORIAL JURISDICTION

In addition to the limitations outlined above, island courts are limited to acting within their territorial jurisdiction in both civil and criminal cases. This is outlined in the warrant by which they are established.⁴⁸⁶

478 See Courts Act, Cap 122, s 2(2).

479 Cap 122.

480 Island Courts Act, Cap 167, s 6.

481 *Ibid*, s 8.

482 *Ibid*.

483 *Ibid*, and as conferred by warrant under s 1 (see, eg, Warrant Establishing the Efate Island Court (30 April 1984)).

484 Customary Land Tribunals Act 2001 (Van).

485 Island Courts Act, Cap 167, ss 7 and 11.

486 *Ibid*, ss 1, 6 and 7.

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