

## 5. CUSTOM THEN AND NOW: THE CHANGING MELANESIAN FAMILY\*

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### KEY TERMS AND PHRASES

#### **Agnates**

Relatives by marriage (cognates are relatives by birth). So, an agnatic relationship is a relationship with an in-law or other relative by marriage.

#### **Kula**

This is a Papuan word for the circle trade in precious shells that Hula, Trobriand, Motu and other Papuan people engaged in.

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## INTRODUCTION

*All times are changing times, but ours is one of massive, rapid moral and mental transformation. Archetypes turn into millstones, large simplicities get complicated, chaos becomes elegant, and what everybody knows is true turns out to be what some people used to think.*<sup>1</sup>

One of the difficulties faced by state courts when they try to recognise and apply custom in their decisions is the ever-changing nature of custom.<sup>2</sup> Customs change faster than the law changes, and the rate at which customs are changing probably has accelerated, even since the colonial period, due to the technological, economic and political changes that the Pacific island nations are undergoing.

This chapter looks at a number of questions that are important for courts, clients and counsel. What is custom?<sup>3</sup> What has caused custom to change, and what kinds of changes have occurred since the pre-colonial era? If custom is constantly changing, how do courts assure themselves that what they are applying is custom? In looking at that last question, the chapter will analyse some recent cases that deal with changing customs.<sup>4</sup> The three cases illustrate different reactions to changes in custom. In *Thesia Maip's* case, a Papua New Guinea court refuses to recognise and apply the new practice, determining that it has not yet become widely used enough to qualify as a custom. In *To'ofilu v Oimae*, a Solomon Islands court accepts changed practices, but treats them as if they were rules of the common law rather than customary rules. Finally, in *Molu v Molu*, the Vanuatu court applies new and old customs in a very customary style. We must ask ourselves what prompted these very distinct responses and which is best?

## CUSTOM THEN

In pre-colonial times, each of the indigenous societies of the Pacific had its own customs.<sup>5</sup> While there were similarities in the customs of all societies of the Pacific islands, based primarily on broad similarities in their economics and technology,<sup>6</sup> there were also differences from one society to another — some the result of differences in the means of production (fishing versus gardening, for example), some more likely the result of history (chiefly societies versus 'big man' cultures, perhaps). It was through these distinctive customs that each such society defined itself as unique. With only a few exceptions, each of the small village societies of the pre-colonial Pacific was an independent, mono-cultural entity.

Customs are the norms (the rules) of the group. As such, they perform a function within the group similar to the function that law performs within a nation. Without complicated state mechanisms — without legislatures or courts or police forces — the pre-colonial societies of the Pacific nevertheless had functioning legal systems. They had complex sets of (unwritten) rules governing all aspects of social, political and economic behaviour.<sup>7</sup> They had effective methods for ensuring that the rules would be followed, and they also had workable procedures for settling disputes. The same customary legal systems continue to function today in most Pacific villages.<sup>8</sup>

## CUSTOMS CHANGING

Colonialism and its aftermath produced many changes in the cultures of the Pacific. Of greatest importance to our study, perhaps, was the introduction into the Pacific of the colonisers' laws and legal systems, which were superimposed upon existing customs and customary dispute settlement methods.

At independence the new Pacific nations might have done away with the legal systems that the colonisers had imported and returned to an indigenous legal system made up entirely of custom. They did not. Instead they kept the structure of the imposed legal system: its courts and legislature. They also kept much of the content of the imposed legal system: the constitutions, statutes and common law imported from or based upon foreign models. But they tried to find a meaningful place for custom within this formal framework.

The constitutions or statutes of most Pacific nations provided that, in addition to statutes and common law, the formal courts<sup>9</sup> should recognise and apply the customs of the indigenous peoples of the nation.<sup>10</sup> But the courts have been reluctant to use custom. One reason may be that the colonisers' disdain for custom has carried over to inform the beliefs and values of judges in the post-colonial period. Another may be that judges who are trained in the common law find it difficult to work with norms that are uncodified and unwritten. Expatriate judges, in particular, unfamiliar with indigenous cultures, may worry that they could be led to choose norms that do not really exist or to apply them incorrectly.<sup>11</sup>

One of the major reasons for the state courts' hesitation to recognise and apply custom may be the tendency of custom to change without warning. The customs of a group are no more than the accumulated beliefs, values and habits of the members of the group. Over time beliefs, values and habitual ways of acting change and, because custom is not written down, the changes go unrecorded. As Ursula LeGuin said, gradually, over time, hardly without our noticing, "what everybody knows is true turns out to be what some people used to think."<sup>12</sup>

During the colonial period courts, for the most part, avoided the problems caused by changes to custom by recognising and applying only those customs that had "existed from time immemorial".<sup>13</sup> At independence, however, the definition of custom was redrawn in a number of jurisdictions to require of courts that they apply such customs as exist at the time of the court action.<sup>14</sup> This has raised problems for courts in ascertaining just what the applicable custom is and in figuring out what to do, once a court has adopted a custom, if that custom later changes.

### **What makes customs change?**

Every society is changing all the time. The societies of the Pacific were always changing, even before the colonial intervention.<sup>15</sup> Drought, excess rain, tribal wars or the lure of the unknown caused whole societies to move to new villages, even to new islands far across the sea. Pigs and sweet potato changed people's diets, their gardening and hunting patterns, and even their feasts and ceremonial exchanges.

Styles of dress and ornament, tattooing and body painting changed over time. Different verses and steps to ritual dances went in and out of fashion, or altered over time as generations forgot old verses or invented new ones. Without written records many changes went unrecorded and unremembered.

Although the societies of the Pacific have always been changing, colonialism brought change of a kind probably never before experienced in the Pacific. Some of the changes were intentional on the part of the colonisers. Others were the unplanned result of changes to the political system, to technology, and to the economy. Whichever the cause, the rate of change was more rapid than ever before, and the political, economic, technological, religious and social leaps probably greater than anyone in the Pacific had ever experienced.<sup>16</sup>

### **The ways in which customs have changed**

The economic, social and political changes that began in the colonial era, and that have continued to occur, changed custom in many important respects. Customary norms have changed to embrace these economic, social and political changes. For example, the settlements to many disputes now include the payment of money, something that did not exist in pre-colonial times. Customary processes have also changed, adopting some of the formalities that characterise the formal courts of the introduced legal system.

The most far-reaching change is probably the one most overlooked. The villages of the Pacific went from being separate, sovereign entities to being lesser parts of larger political entities. Similarly, in the colonial period, custom ceased to be the sole legal system operating in Pacific villages. At best, in territories where the colonial power recognised the legitimacy of custom, it became the lesser of two different legal systems. At worst, even if villagers still utilised custom, in many Pacific colonies, it had no official sanction as a legal system.<sup>17</sup>

The existence of a competing, and more powerful, legal system had a number of effects on custom. Villagers dissatisfied with the results of a customary meeting now knew they could go to one of the formal courts where a different outcome might be obtainable. Once villagers knew that there were courts where one party could win everything, instead of having to agree to a compromise, some were even tempted to try the formal courts without first exhausting customary remedies. Moreover, villagers who disagreed with customary rules of behaviour now knew they could ignore those norms if the introduced legal system had different rules.

### **CUSTOM NOW**

Recent cases illustrate both the nature of the changes that have occurred in the cultures of indigenous peoples and the difficulties that these changes pose for the courts. The cases also show that judges in the Pacific are actively engaging with the problems raised by changing customs, attempting to sort out current custom from bygone tradition, to fashion legal rules that will assist the courts in recognising and

applying custom and to treat custom as a viable part of the state legal system. Precisely how they are doing it is the topic of this chapter.

The chapter will focus on cases having to do with marriage and divorce. I have chosen cases from this area of law not because marital customs are any more changed than other customs or because courts handle changing custom in this area either particularly well or particularly badly, but only because the examination of three cases that happen all to be within the same area of the law affords a clearer picture of the ways in which courts react to changes in custom. For the same reason the three cases chosen were all from Melanesia. The continuity of culture from one of these cases to the other makes the nature of cultural change, and the ways in which courts react to it, stand out all the more clearly.

This part of the chapter will begin with a brief overview of marriage law for those who wish to be reminded of the key doctrinal principles. At the same time, the chapter will discuss the kinds of changes that have occurred in customs relating to marriage, divorce and the custody of children. The chapter will then analyse three cases about customary marriage, divorce and custody practices.

## MARRIAGE THEN AND NOW

One of the reasons that is often given for the continuing recognition of customary marriages is that people most resist changing those customs — such as marriage and divorce — that are the most personal.<sup>18</sup> Moreover, almost every one gets married so, if marriages performed according to custom were unlawful, a great many people would be in violation of the law. Rather than have that happen the drafters of the marriage and divorce statutes in many Pacific jurisdictions thought it would be better to recognise the validity of customary marriage.<sup>19</sup>

Contrary to prediction, practices related to marriage and divorce have changed considerably over the years, making it more and more difficult for the courts to decide what custom is or was. The changes have been both large and small. One of the larger is the intrusion of Christianity into the marriage ceremony. These days, many couples who believe that they are entering into a customary marriage have a church ceremony, in addition to all the customary feasts, exchanges and rituals. However, if the member of the clergy who performed the church ceremony saw to it that the couple complied with the statutory formalities, and he or she probably did, then they are now married under the statute, regardless of whether they may also be married under custom.<sup>20</sup>

### **What makes a customary marriage**

The first of the cases in this chapter is concerned with whether there can be a customary marriage between people from different parts of the country, places with different customs.<sup>21</sup> One of the many changes that have occurred in the relations between men and women in the Pacific is the growth of relationships between people from different cultures. Some of these relations are between Pacific islanders and

people from other countries, both within and outside the Pacific islands. In more diverse countries, such as Papua New Guinea, relationships develop between people from different parts of the country with different matrimonial customs. If the parties live together without going through the statutory form of marriage ceremony, the courts may question whether they are married at all, even under custom. *Application of Thesia Maip* is such a case.<sup>22</sup>

Thesia Maip came from a village in the Western Highlands of Papua New Guinea, Jude Sioni came from Bougainville, another Papua New Guinea province but far from the Highlands, and different in many ways. This is how the judge of the National Court describes the relationship between Thesia and Jude:<sup>23</sup>

... they met at Mendi [which is in the Southern Highlands] and started living together. He suggested that if she behaved well they would get married in a church. However there was no formal marriage in a church or under the *Marriage Act* nor was there any public ceremony involving brideprice in the village. They lived together at Mendi and it appears that at no time did Jude Sioni ever visit Thesia's village namely Balk village in the Western Highlands. I am sure that he would have spent some money on her and he states in his evidence he did give her some money at different times. However, this would be expected when two people are living together. And also perhaps relatives did visit and cost him some money. After living together at Mendi for two years, he was apparently arrested and taken to Bougainville for some problems and was locked up for some months. He escaped some time in 1990 and came to the Western Highlands to Balk village to look for Thesia. It would appear that this was his first visit to the village. At that time she had taken up with another man so he then took her to the village court.<sup>24</sup>

Jude's complaint to the Village Court was that Thesia "was his wife and had left him and gone off with another man." Hearing this plea, the Balk Village Court ordered Thesia to pay K700 compensation "which was later reduced to K300 by the Local Court Magistrate" who reviewed the case.<sup>25</sup> Since Thesia was unable to pay that amount, she was imprisoned for 30 weeks. Mr Justice Woods of the National Court on a tour of Highlands prisons discovered Thesia in prison and ordered her release.<sup>26</sup>

But J. Woods could not have ordered Thesia released from prison unless the law gave him a reason to do so. He found that reason in the rules about marriage and adultery.<sup>27</sup> According to the common law that Papua New Guinea imported from England, 'adultery' consists of sexual relations between two persons only if one or both of them is married to someone else.<sup>28</sup> Sexual relations between unmarried persons do not constitute adultery.<sup>29</sup>

The Village Court found that Thesia and Jude were married under customary law, which made her an adulteress. The National Court held that they weren't. The differences between the two courts illustrate two opposite responses towards defining, finding and applying custom when social mores and behaviour are

changing. The Village Court took the position that custom changes with the times, and that courts should change along with it:

The Chairman of the village court has confirmed that according to the traditional custom if two people marry and they both are from the Highlands then they pay brideprice in the village and that is witnessed by the village people. He then stated that in modern times due to the interaction that takes place between the different provinces people from coastal [province]s are marrying people from the Highlands and are not following the traditional procedures. However, even though they are not following the traditional procedures people today are recognizing it as a marriage.

The Village Court was willing to adopt and apply new customs provided that they met two criteria. First, the Village Court required that the new activity be fairly widespread. Thesia and Jude were not the only couple from different provinces to have formed a relationship: “people from coastals” generally, the Village Court chairman said, “are marrying people from the Highlands”. Secondly, the Village Court required that there be general acceptance of the new activity among other members of the community: “people” generally, the chairman added, “are recognising it as a marriage.”

In understanding that customs change as circumstances change the Village Court chairman was accurate, both as a social scientist<sup>30</sup> and in his application of Papua New Guinea law.<sup>31</sup> But was he correct in stating that marriage practices had changed to the point where the Village Courts ought to recognise liaisons like that of Jude and Thesia’s as a new kind of customary marriage? In social terms he probably was. Anthropologists would say that a new way of thinking and behaving becomes a custom when it is fairly regularly practised by more than just a few people in a community and when a large segment of the community, including those who might not themselves engage in the activity, view it as normative.<sup>32</sup>

The National Court judge, however, held that the chairman was incorrect in stating that relationships such as the one between Jude and Thesia met the *legal* definition of custom:

Whilst one must accept that custom must develop in Papua New Guinea to meet the many changes within the country one must be very careful in accepting that such developments in custom are clearly recognised by everyone and that they do not leave the way open for far reaching consequences.

The judge gave several reasons for deciding that a relationship such as that between Thesia and Jude could not be a customary marriage. These reasons may become guidelines for Village and Local Court magistrates, lawyers, and legal scholars in their attempts to determine which new activities are customs that the state courts will adopt and which are not. It is therefore important that we explore the judge’s reasoning.

First, he said that in order for a belief or activity to become a custom, it must be “clearly recognised by everyone”. Secondly, he said that the courts must consider what “far-reaching consequences” their adoption of a new custom might have.<sup>33</sup>

What did the judge mean when he said that the custom must be “clearly recognised by everyone”?<sup>34</sup> There are, he said, “three clearly recognisable ways of getting married” in Papua New Guinea:

Firstly by the traditional custom as has always been. Secondly through the church under the Marriage Act and thirdly by a civil marriage registrar under the Marriage Act.

Since there are already three ways to get married, a fourth is hardly needed. If there is to be a fourth way, it must be as widely recognised as the three that already exist.

That is a very high standard to meet. But the judge had a reason for setting the bar so high. He did not want the courts adopting customs that “might have far-reaching consequences” without first thinking through those consequences. Marriage, he pointed out, creates many rights and obligations. The courts ought not to uphold the rights — or, in this case, enforce the obligations — unless they are quite sure that the parties intended to take on those rights and obligations. The only way to be sure of that is to require that people go through a well-recognised form of marriage:

In view of the fact that imprisonment can result from the breakdown of marriages at the village court, great care must be taken to ensure that such marriages are firstly properly recognised and comply with either custom or the formal law... Because of the legal implications and responsibilities that arise in a marriage and if imprisonment can be used as a sanction if there is a breakdown, the law cannot recognise anything but a properly arranged or certified marriage whether properly done according to the custom of the place or under the formal law, the Marriage Act.

The judge believed that the law should not easily assume a marriage has occurred because marriage has important consequences for a couple, for their families, for society as a whole. He pointed out that the laws about adultery are not the only ones that operate only if a couple is married. Other important rights that arise only within the context of marriage include the right to receive maintenance, the right to inherit a share of a spouse’s property and the right to petition for custody of one’s children.<sup>35</sup>

Applying these principles and policies to the relationship between Thesia and Jude, the judge held that they were not married. Their relationship did not meet Judge Woods’ test of a custom that the courts should apply; it is not “clearly recognisable by everyone” as a marriage. Indeed, the judge says, relationships like that of Thesia and Jude are “clearly recognisable” by most people as casual liaisons:

In the modern world two people living away from their homes living together is quite a common occurrence. Often it is just for the convenience of the time. However, sometimes it is a serious trial to see if the two people are seriously interested in getting married.

Moreover, he noted, Thesia and Jude themselves had not thought they were married. Jude had said “when they were living together in Mendi that if she behaved herself he was considering getting married in a church”. Their arrangement seems to have been, like the others the judge has described, “no more than a casual arrangement... which suited them both at the time”.<sup>36</sup>

Even if one agrees with the outcome of the case, one can quarrel with the tests that Judge Woods devised for ascertaining whether a new practice has become a custom. The test is very hard to meet. That may be appropriate when marriage is at issue, but the bar may be set too high for most other purposes. Can we think of any custom that is recognised by *everyone*? In every society, there are likely to be a few people at least who are unaware of recent changes.

Moreover, the test is vague and will therefore present definitional problems as later courts try to apply it. Just what, for example, is meant by ‘recognised’? Does this mean that everyone must now be willing to *act* in accordance with the custom, that they must *agree* with it, or merely that they know of its existence? If the former, then the courts are even less likely to adopt and apply new customs, because, in most societies, there are people who dissent to even the most widely shared customs. Murder, for example, is fairly widely condemned, but there is no society in which murder never occurs. Are we to conclude that respect for life is not customary? And what, precisely, is meant by the adverb ‘clearly’?

However, even if we disagree with Judge Woods about the details of his test for recognising changes to custom, I think most of us would agree with him about two things. First, I think we would agree that, whatever our attitude towards Thesia’s behaviour, we do not condone putting women, or anyone for that matter, into prison for acts that are not criminal.<sup>37</sup> Secondly, I think we would agree that the courts need a test that lays out rules to recognise new customs and adopt them as customary law. Without such a test, generally accepted by all the courts, each magistrate or judge will have to make up his or her own tests. There will be no uniformity. More likely, in the absence of helpful standards or guidelines, most courts will refuse to adopt and apply any new customs.

### **Brideprice**

The second case looks at the ways in which the exchange of marital gifts has been altered by the addition of cash as part of the brideprice.<sup>38</sup> The intrusion of money into the process has altered the custom in many ways, giving rise perhaps to those “unforeseen consequences” that Judge Woods worried about. The major difference is summed up in the adoption of that unfortunate English term ‘brideprice’ to describe a custom that originally involved an exchange of gifts, not a sale and purchase.<sup>39</sup> ‘Price’ suggests that something — or someone — is being bought and sold, and that is the way it has come to be viewed, both by local people, who now talk of ‘buying’ a bride,<sup>40</sup> and by feminist anthropologists, who argue that the custom of ‘buying’ wives demeans and dehumanises the women involved.<sup>41</sup> When the husband’s family views the bride as a purchase, not as a person, they expect her to

redeem the brideprice by working for the family and by bearing children, who are also seen as property that the husband's clan has purchased. This is probably an oversimplified view. Nor does it exist universally.<sup>42</sup> But it does highlight the kinds of new social relations and problems that develop when brideprice is transformed by the infusion of money into the transaction.

Traditionally, brideprice marked the beginning of a relationship not just of the bride with her new in-laws, but also of the two families. The marriage was a key to the many relations — social, political and economic — that would now exist between the bride's clan or extended family and the groom's clan or extended family. Aspects of the complex inter-family relationships that begin with the exchange of brideprice still exist, but the relationships between agnatic families have undergone many changes.<sup>43</sup> Not all of those changes have occurred because money has become a significant part of bridewealth, but, as the case of *John To'ofilu v Oimae*<sup>44</sup> illustrates, money is a potent symbol of the ways in which traditional exchange relationships have been transformed into market economy transactions.

In the *To'ofilu* case, for example, representatives of two families negotiated a brideprice that included six *tafuliae*,<sup>45</sup> \$1,000 (SI) in cash, three pigs and four bags of rice. It turned out, however, that, before the marriage, the bride had been made pregnant by another man. She and her new husband lived together as man and wife for only a month and a half before he sent her away. His father sued her father in the Local Court for return of the brideprice.<sup>46</sup>

The Local Court held for the groom's father (the plaintiff). The bride's father (the defendant) admitted that he had known, even before the brideprice negotiations began, that his daughter was pregnant.<sup>47</sup> The Local Court decided the case according to the customary law of the region, which expects both parties to divulge all the important facts during the negotiation for the brideprice.<sup>48</sup> Moreover, "according to Malaita custom only virgins are paid with high price". Therefore, the Local Court "found Oimae... not honest in telling John To'ofilu the truth... [so] according to Malaita custom [Oimae] must refund full brideprice and expenses".<sup>49</sup>

The Magistrate's Court, to which the case was appealed, disagreed with the Local Court not only about how much brideprice should be returned, but also about what the customary rules were that determine the quantum to be paid back. The Magistrate's Court discussed two rules of customary law that seem not to have been mentioned in the Local Court. First, the Magistrates' Court mentioned that the amount of the brideprice might have been high because of the groom's intense desire for this woman, and not because she was presumed to be a virgin. The magistrate, however, decided that this was not a reason in customary law for determining how much brideprice should be returned.<sup>50</sup> The magistrate was swayed, however, by the defendant's argument that less brideprice is to be returned "where the groom rejects the bride."<sup>51</sup> Taking these customary norms into account, the magistrate decided that the bride's family need return only half the brideprice. This decision respected Malaitan custom in a number of ways. Not only did the magistrate make an effort to discover exactly what customary rules govern brideprice, but he also handled the

rules in a customary way. In customary dispute settlement, it is common for two or three or even more rules to be mentioned, all potentially applicable to the same case. Here, for example, the parties brought up at least four rules:

- That both sides must tell the whole truth during brideprice negotiations;
- That a virgin deserves a high brideprice;
- That the returned brideprice will be halved if the husband sends his wife away; and
- That the party who shows ‘first sight love’ has to pay a higher brideprice.

The magistrate refused to accept the last of those rules, but he recognised the other three. He handled the situation very much like an elder or clan leader would handle a customary dispute settlement mediation.<sup>52</sup> He used the rules as markers, as principles, as reminders to all the parties of what their rights and obligations were, not as the guidelines by which he would decide the case. He looked for a way, within the general bounds set by the rules, to get the parties to stop arguing, to give something to each, perhaps, in the hope that he would thereby restore harmony and good relations. Thus, he said that the bride’s family acted wrongly, so that some brideprice should be returned. But he made them return only half of it. A very customary solution. Unfortunately for the magistrate’s hopes for settlement, however, times — and customs — have changed. A great deal of money was involved, and a court system that allowed for appeals was in place. The plaintiffs promptly did.

The High Court judge, Palmer J., overruled the magistrate, reinstating the Local Court’s decision requiring the bride’s family to return the entire brideprice. Palmer J. did apply a rule of customary law — he agreed with the Local Court that the bride’s father ought to have disclosed her pregnancy during the brideprice discussions — but he applied that rule in a very common law way. First, he made it clear that there could be only one rule operating in this case. Common law adjudication requires that the court find just one rule for every issue, because the judge is supposed to decide the case by applying that rule to the facts, not by exhorting the parties to remember the rules generally and to re-establish good relations in light of the rules.

The High Court determined that of the various customary norms that the parties had suggested the courts should use only the rule that dishonesty about a “material fact” during brideprice negotiations will require the return of all the brideprice.<sup>53</sup> The court chose this norm over the others for a number of reasons. The other rules had not been discussed in the Local Court, and it is a principle of common law adjudication that any issue not raised at trial may not be raised on appeal. Given the adversarial nature of common law adjudication, this is a useful procedural standard because it ensures that all the evidence needed to prove each issue will have been presented in a timely manner. It is not, however, the procedure that customary forums would naturally adopt. There the goal is not to be sure that the truth of all contentions has been tested but to permit everyone to say all they feel like saying so the parties (and their friends, family and supporters) are free to raise whatever seems important, whenever.<sup>54</sup>

A second (and related) reason for the High Court's refusal of the other customary rules was that counsel had not presented sufficient evidence proving the existence of these rules:

The... issue [concerning the groom's love at first sight] had never been raised in the Local Court as a matter relevant to the question of calculating the quantum of compensation. It was only raised for the first time it seems in the Magistrates' Court but with no evidentiary backing in custom. The learned Magistrate accordingly had no basis in custom to allow that submission to be taken into account in calculating the quantum of compensation.... The Magistrates' Court... was [also] wrong in [taking into account that the groom had sent his wife away].... It had no evidentiary basis in customary law to find that because there had been a rejection of the would-be wife by the husband, that the quantum of the brideprice to be refunded should be halved.<sup>55</sup>

One might ask why evidence was needed to prove the existence of either of these two rules when evidence seems not to have been required to support the Local Court's adoption of the rule that the parties must disclose all material facts during brideprice negotiations.<sup>56</sup> First, the High Court may have been presuming that evidence about the existence of that rule was presented in the Local Court. Secondly, the High Court suggested that it trusted Local Court magistrates not to need evidence, since they are chosen because of their knowledge of custom. Thirdly, the High Court may have been holding that magistrates do not need to produce evidence in support of every custom they intend to apply, but only when they disagree with the Local Court.

The High Court treated the rejected rules differently. In regards to the rule that only half the brideprice should be returned if the husband has rejected his wife, the Court implied that, had the defendant raised it in the proper court and supported it with evidence, then perhaps the case would have been decided on that ground. The High Court had a very different reaction to the rule that the amount of brideprice would be higher if the prospective groom had fallen in love with the bride at first sight. The Court stated that the rule most definitely did not exist. If neither party presented any evidence about the existence of the rule, how could the High Court know this? And if the High Court did know which customary rules exist and which do not, then why did it require evidence of their existence? Why did it criticise the magistrate for adopting customary rules without evidence when it was willing to reject customary rules without evidence?

The answer may be that Judge Palmer, who is a Solomon Islander himself, may have known from his own experience that there was no 'first sight' rule in customary law. Indeed, Judge Palmer may have known from experience about all the rules, but did not want the case decided on that basis. Looking beyond this case to others that will arise in future, he may have wanted to instruct magistrates and other judges about how to deal with custom. To that end he was at pains to announce, and to illustrate, a general rule of procedure, pointing out, first, that the Local Courts are best able to decide what the rules of customary law are, and, secondly, that a Local Court's

holdings about custom may be challenged in the Magistrates' Court only if evidence is presented to confirm that the Local Court erred.<sup>57</sup>

The *To'ofilu* case illustrates some of the ways in which the presence of money has changed custom. The High Court looked upon the pre-marital discussions between To'ofilu and Oimae as if they were common law contract negotiations. I do not think the Court was mistaking the nature of their meetings. I am sure that, today, in many parts of the Pacific, brideprice has become subject to negotiated agreement, similar to the negotiations that take place over any other monetary transaction. Moreover, because the brideprice transaction involves money — a scarce, valued and, today, highly necessary commodity<sup>58</sup> — people are probably more prone to go to court when the transaction falls apart than to look for an unofficial way of settling their dispute.<sup>59</sup> And, once the dispute is in the courts, it is more likely to be decided by adjudication, leading to a 'winner-take-all' outcome, than by a negotiation or mediation that encourages compromise and consensus. Of course, that might be one of the reasons people go to court. Because money is involved, a winner-take-all solution may be precisely what they want. They don't want a compromise, such as the one proposed in the Magistrates' Court, that gives them only half.<sup>60</sup>

Brideprice has evolved from a mutual exchange of gifts and promises into a one-way transaction centering on the payment of cash. Brideprice has become a contract between two parties, with terms negotiated essentially at arms' length, instead of the start of a lifelong relationship which begins in mutual feasting and celebration. The focus on money has transformed the role of women, significantly lowering their status. Instead of being the key to the relationship between two families, women now are viewed as servants whose work and childbearing capacities have been purchased. Finally, the large amount of money involved in the brideprice transaction has led to disagreements that have sometimes escalated into violence. In his thoughtful decision, Palmer J. demonstrated his awareness of these changes and responded to them by making the High Court a forum in which disputes over brideprice could be safely and surely litigated.

### **The custody of children**

In our third case the custody of children of divorced parents is at issue and we will see in it the ways in which norms from the imported common law system now mingle with customary norms.<sup>61</sup> If a marriage ends in separation or divorce someone must decide who will have custody of the children of the marriage. When the parents (or other family members) cannot agree, the disputants may turn to the courts to resolve the matter for them. For a long time the courts of the Pacific have been concerned about what to do when there is a conflict between the rules of customary law in regard to custody and the rules of the introduced statutory or common law.<sup>62</sup>

The general principle found in treaties, statutes and the common law is that custody should be decided according to the 'best interests of the child'.<sup>63</sup> What this has meant in practice in the common law courts, at least in the last seventy years, is the assumption that small children belong with their mothers.<sup>64</sup> Different cultures make

different assessments about what is in a child's interest. Until sometime in the 1920s, the common law rule in England was that the best interest of the child would be served by giving custody to their father because he was the breadwinner, the property owner, and the person whose name they bore.<sup>65</sup> Only in more recent years, under the influence of twentieth century inventions like family therapy, has the common law decided that young children need a mother's care and that it is in their best interests, therefore, to be with her.<sup>66</sup>

Custom usually provides that children in matrilineal societies live with their mother's people and children in patrilineal societies live with their father's.<sup>67</sup> While that may conflict with the common law notion that small children should always be with their mothers it does not, necessarily, conflict with the 'best interest' standard. The customary law of most Pacific societies presumed that children did not live in tiny nuclear households cared for only by their mother or father, but in villages, surrounded and cared for by grandparents, aunts, uncles, cousins, older siblings — by everyone in the extended family. Thus, customary law did not make a choice between father and mother at all, but between the father's clan and the mother's clan. Customary law held that it was in the best interest of children to remain with their own clan. They were, in a phrase commonly used in societies in which kinship ties are important, 'born for that clan'.<sup>68</sup> Their land, all their inheritance rights, their adult place in the world, sprang from that clan. The members of that clan would love them best and care for them most responsibly.

The contemporary Pacific has changed in many respects that have a bearing on the interests of children. For example, though many children still live with the extended family in relatively traditional village settings, many others have migrated with their parents to urban areas, where they live in nuclear family units, or, at most, in households in which, in addition to their mother, father, and siblings, there are, at most, one or two other adult, or near-adult, relatives. One might ask how the courts should deal with custody issues in these circumstances. Should customary law be applied to everyone, even when it might not be in the best interest of an urban child? Should the common law be applied to everyone, ignoring the interests of village children in patrilineal societies? Should the choice of law depend upon the type of family unit — that is, urban or rural, nuclear or extended — or ought courts attempt to ascertain what the parties, including the children, might want?

Acting Chief Justice (as he then was) Vincent Lunabek of the Vanuatu Supreme Court was confronted with such a case recently, and resolved it by fashioning an order that combined the common law and customary law in ways designed to further the interests of the children involved. In *Molu v Molu No.2*,<sup>69</sup> the Acting Chief Justice applied the 'best interest of the child' standard, but did so in ways derived from the wisdom of customary law.

Patricia Molu was from Pentecost, her husband Cidie Molu from Santo. They married in 1992 in Port Vila,<sup>70</sup> were separated in 1996, and divorced in Port Vila in 1998.<sup>71</sup> They had three children — Yannick, who was born in 1988, ten years old at the time of the divorce; Annie-Rose, born in 1992, six years old at the time of the

divorce; and Ian, born in 1994, four at the time of the divorce. Cidie and Patricia did not have a happy marriage. He had spent most of it getting drunk and beating her, allegations that he denied during the divorce hearing when he wasn't blaming it all on Patricia. The Court found his testimony utterly lacking in credibility.<sup>72</sup>

Of the three children only Annie-Rose, the middle child and only girl, was living with her mother at the time of the divorce. Yannick, the eldest child, had been sent to Pentecost to live with Patricia's family when he was four years old, partly because his parents both thought "the general environment... would be better on the island" than in Port Vila.<sup>73</sup> When Patricia and Cidie separated, Cidie's brothers came to Port Vila and, against Patricia's wishes, took Ian, who was then two years old, back to Santo with them. At the time of the custody hearing he was still living with Cidie's family in Santo. Patricia had not seen him in two years.

The divorce was acrimonious and the custody dispute no less so. Each parent sued for sole custody of all three children. The Acting Chief Justice stated that, in making his custody decision, he was bound by the statutory standard.<sup>74</sup> Therefore, the best interests of the children had to be his primary consideration.<sup>75</sup> That requirement, he noted, is contained in the Convention on the Rights of the Child, which was ratified by the Vanuatu Parliament, making it a statute binding upon the courts:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*<sup>76</sup>

Using that guideline, the Court decided that Annie-Rose should be in her mother's custody, because, "It is a matter of common sense and human experience that she will be better with her mother than her father.... I am of the view that it will be in her best interest that her custody be awarded to her mother and she will be under the care and control of the Petitioner/mother".<sup>77</sup> The Court's determination about the custody of Annie-Rose was in line with the common law and statutory rules regarding custody. Like countless common law judges before him, the Acting Chief Justice decided that a child of tender years belongs with her mother.<sup>78</sup>

However, the Court did not follow the 'tender years' doctrine in determining the custody of the two Molu boys, even though Yannick, at ten, was probably still a child of tender years, and Ian, only four, was well within the 'tender years' range. The Court applied the statutory 'best interest' standard to them, but did so in a way that departed from common law practice. His holdings in regards to the two boys were infused with the sensibility of customary law. The Court decided that, at least for the time being, both boys should stay where they were—Yannick with his mother's family on the island of Pentecost, and Ian with his father's family in Santo.

The Court's reasoning in regard to Ian was a mixture of common sense, common law precedent and, most importantly, customary law. Using common sense, the Court pointed out that the boy has been with his father's family for quite a while and there had been no reports that he was unhappy or that the family was not caring for him properly.<sup>79</sup> Using common law precedent, the Court quoted a 75-year-old English

case, whose holding seemed to be that, given enough time, the child would forget his mother.<sup>80</sup> The customary aspects of the Court's reasoning were not stated so obviously, but were nonetheless present. The father's "intention appeared to be that Ian will be raised by his family rather than the child's mother or father" the Court said, adding, "such an arrangement is not uncommon in Vanuatu".<sup>81</sup> Santo is a patrilineal community. The boys, the Court agreed, belong to their father's clan. Elsewhere, the Court phrased it as "the children are for them".<sup>82</sup> Moreover, the Court seemed, like Cidie's eldest brother, to give 'brideprice' its contemporary connotation. By 'paying' brideprice (earned by their hard work) to Patricia and her family, Cidie's clan has 'paid' for her children. The Court decided that it was in the best interests of this little boy that he be raised in the clan of his fathers. In so doing, the Court brought the common law and customary law together.

The decision partook of the customary legal process in another way as well. To the extent possible, the Court gave something to every party, compromised, looked for a resolution that would restore peace and harmony, even if custom and the common law had both to be bent a little in order to do so. It is a patrilineal world, but, nevertheless, Yannick will stay with his mother's family, at least through primary school. Ian, though of tender years, will stay with his father's family. Annie-Rose will stay with her mother. Even Cidie gets something. Though he does not have physical custody of Ian, the Court gives him legal custody. And everyone, in good customary consensus-building style, is supposed to put their anger behind them and get together to work out regular visits for both parents with all three children.

## CONCLUSIONS AND AFTER THOUGHTS

The three cases that have been discussed in this chapter illustrate the ways in which custom is changing (at least in the area of family law) and the different approaches that courts are developing to deal with the changes. All three cases are very much about the impact of the market economy on marriage and the family. In *Thesia Maip's* case we see that the development of towns and industries has led to the beginnings of a working class, of people who move away from home, and who leave the subsistence economy (perhaps forever, perhaps only for a time) to find work and a new style of living. When they meet and form attachments to people from other regions, they are breaking out of the customary framework in which marriages are arranged by parents and other family members and attested to by a series of ceremonial events that take place in the village. But they are still people in-between, they have not broken entirely from village ways. They still expect the marriage to be customary.

Judge Woods is trying also, it seems, to fashion rules that will suit a world in which custom and common law are both undergoing changes. He recognises that norms that were effective within a village setting can have different (and for *Thesia Maip*, exceedingly unhappy) consequences when moved from that setting into the very different life of the towns. He tells the Village Court magistrates that they cannot impose yesterday's values on today's circumstances. He is not calling for an end to

custom, but for the recognition that custom has changed. Nor is he refusing to recognise and apply new customs. He is, instead, creating standards that will enable courts to determine when a new custom exists, so that it can be recognised and applied.

The *To'ofilu* case illustrates some of the changes that occur when the brideprice ritual, which used to be performed in a society that got its motive force from kinship ties, mutual help and reciprocity, begins to be performed in a society characterised by the existence of a market economy. Brideprice is no longer infused with the notion that life is a series of mutual exchanges and that the gifts given by the groom's family are symbolic of the future relations between the two families. Instead, the focus is now on the money and other valuable commodities that are being handed over in payment for a bride and her children.

The court decides to treat brideprice in the same way that the parties do. If the transaction is, indeed, payment for services to be rendered, then the parties must have negotiated a contract about that payment, if not explicitly, then implicitly. The court applies the common law of contracts to the brideprice transaction, assessing whether the contract negotiations were carried out in good faith and with full disclosure of material facts so that there could be the requisite meeting of the minds. Finding that the negotiation did not meet this standard, the court, in effect, holds that the contract was not duly entered into. The money and other valuables given in payment must therefore be returned.

In the third case, a couple living in town, but with ties still to their home villages, cannot agree on which of them should have custody of their children. One child lives in town; the other two are living with the extended family in what is probably a relatively traditional lifestyle. She wants the common law principle applied, so that the children will be with her. He and his brothers prefer custom, at least in regards to their youngest son.

The Court adopts a mixture of approaches, borrowing freely and flexibly, in a very customary way, from statute, common law and custom. Utilising the common law doctrine of 'tender years', the judge decides that the girl should stay in town with her mother. Using custom, he decides that the youngest son should remain in the village with his paternal kin. Using common sense, which may be what underpins both the common law and custom, he decides that the eldest son should remain in another village with his maternal kin.

The customs of Pacific islanders will continue to change and the pace of those changes will continue to be rapid. Nothing in these three cases suggests any attempt on the part of the courts to stifle change. On the contrary the courts have shown, so far, much creativity in keeping up with the changes at the same time that they are trying to make sure that no one is unduly harmed by the application of old rules in new settings. Nevertheless, the decisions raise a number of critical questions. Although the three decisions differ in the balance that they strike between custom and the common law, nevertheless all three courts do seem to presume that the common law is here to stay and that the role of judges is to fit customs, whether old

or new, into a common law scheme. It is not too late, but it is time, for judges and lawyers in the Pacific islands to think about the relationship that ought to exist between custom and the common law. And, in contemplating that relationship, we need to think not only about the substantive rules but also, as the judges did in these cases, about the differences in the styles and goals of decision-making between the two legal systems.

The great issue that is raised by all of these cases, though, is the relationship that the people should have to their law, and that the law should have to the people. In no society with a formal governmental structure and legal system is law a direct match for the customs of the people. But, for a society to survive, law and customs must be close to one another. In order to feel that their law is just people need to feel that it is familiar, that it relates to their moral sense and to their values. To the extent that the courts privilege common law principles and processes over customary law, the law diverges from the felt experience of the people. Moreover, to the extent that courts cling to outmoded customs or otherwise refuse to recognise and adopt new customs, the law just as surely diverges from the culture. However, if the law goes too far too fast, if it adopts and enforces practices that are not accepted as customary by most people, then it will just as surely be seen as out of step with contemporary norms and values. The question that these cases raise, that these judges have tried to answer, and that we must continue to consider, is how the law can maintain that delicate, but necessary balance.

ENDNOTES

- 1 LeGuin, U.K. 2000 *Tales from Earthsea*. New York: Harcourt Inc, at p xiii.
- 2 For complete and detailed discussions of the role assigned to custom in the legal systems of the Pacific island nations see Ntumy, M. (ed.) 1993. *South Pacific Islands Legal Systems*. University of Hawaii Press: Honolulu (which devotes a chapter to the legal system of each Pacific island country or territory); Zorn, J.G. 1994. *Custom and Customary Law*. Course Book for University Extension Course SEC16, Pacific Law Unit, School of Social and Economic Development, University of the South Pacific, Suva, Fiji, especially Book 2, pp 1–53 and Corrin Care, J., Newton, T. and Paterson, D. 1999. *Introduction to South Pacific Law*. London: Cavendish.
- 3 Some writers on Pacific and other traditional legal systems distinguish between ‘custom’ and ‘customary law’. Unfortunately for consistency, however, they do so in different ways and for different reasons. There are at least four main differentiations made: (a) Some use ‘custom’ to mean rules or norms of the indigenous peoples, while ‘customary law’ is saved for those customary rules that have been recognised and applied by the state courts, thereby becoming part of the formal law. This distinction is useful because readers can easily tell which the writer is referring to. Also, it points out that the adoption of custom by state courts changes the customs into something different. They cease to be the flexible and ever-changing, mostly unwritten, mostly unconsidered, norms of a culture and become rules that courts treat as precedent. See, for example, Woodman, G.R. 1969. Some Realism about Customary Law – the West African Experience. *Wisconsin Law Review* 1969:128–152. (b) Some legal scholars don’t like to make that distinction between ‘custom’ and ‘customary law’ because it is the distinction that the colonial rulers made, and they meant by it that the ‘customs’ of indigenous people were not ‘law’ in any sense and, indeed, were inferior to the ‘laws’ that the colonisers brought with them or imposed on their subjects. For discussions of colonial approaches to custom, see Zorn, J.G. 1992. Common Law Jurisprudence and Customary Law. In James, R.W. and Fraser, I. (eds.) *Legal Issues in a Developing Society*. Port Moresby: University of Papua New Guinea and Ottley, B.L. 1995. Looking Back to the Future: The Colonial Origins of Current Attitudes toward Customary Law. In Aleck, J. and Rannells, J. *Custom at the Crossroads*. Port Moresby: University of Papua New Guinea. In opposition to that colonial view, many scholars purposely use the phrase ‘customary law’ to refer to the unwritten norms, usages, rules and values of the indigenous peoples of the Pacific. Another example of this political use of the terms ‘custom’ and ‘customary law’ occurs in the laws of Papua New Guinea. The older PNG *Customs Recognition Act* 1963 (now Cap 19), which requires courts to treat the unwritten norms of the peoples of PNG as facts, not as laws, refers to those norms as ‘custom’. The more recently enacted PNG *Underlying Law Act* 2000, which provides that these norms and usages are to be the primary and major source of Papua New Guinea’s own common law, refers to them as ‘customary law’. (c) Colonial (and even some post-colonial) legislation and court-made laws used the term ‘custom’ to refer only to those norms and usages of the indigenous peoples of the Pacific that had existed since long before colonial times, since ‘time immemorial’. Thus spoke the PNG *Customs Recognition Act*, enacted during the colonial period. At Independence, the *Constitution*, s 20, redefined ‘custom’ to mean the “customs and usages of the indigenous inhabitants of

the country ... regardless of whether ... the custom or usage has existed from time immemorial". After Independence, the *Customs Recognition Act 1963* was revised to adopt the new definition of custom. (d) Finally, many lawyers, judges, legislators and scholars use the two terms — ‘custom’ and ‘customary law’ — interchangeably, without paying much attention to shades of meaning.

- 4 The cases discussed in this chapter are *Application of Thesis Maip; In the Matter of the Constitution, s 42(5)* [1991] PNGLR 80; *To'ofilu v Oimae*, Unreported, High Court of Solomon Islands, Civil Appeal Case No. 5 of 1996, 19th June, 1997. and *Molu v Molu No. 2*, Unreported, Supreme Court of the Republic of Vanuatu, Civil Case No. 30 of 1996, Matrimonial Case No. 130 of 1996, 15th May, 1998 ([http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu\\_cases/Volume\\_G-N/Molu\\_v\\_Molu2.html](http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_G-N/Molu_v_Molu2.html). Accessed 19/8/02).
- 5 Many anthropology texts try to describe the pre-colonial cultures of the Pacific. For useful reviews, and a bibliography, of these ethnographies, see Foerstel, L. and Gilliam, A. (eds.) 1992. *Confronting the Margaret Mead Legacy: Scholarship, Empire and the South Pacific*. Philadelphia: Temple University Press. Although, by definition, no anthropologist was in a position to observe Pacific cultures prior to the colonial period, most of the early ethnographies pretend to write as if colonisation had not occurred. Excellent critiques of this ethnographic method can be found in Marcus, G.E. and Fischer, M.M.J. 1986. *Anthropology as Cultural Critique*. Chicago: University of Chicago Press and Kuper, A. 1998. *The Invention of Primitive Society*. London: Routledge.
- 6 Pre-colonial Pacific islands societies were, for the most part, small, autonomous communities. Membership and status in the community depended primarily on kinship and marriage. Technology was simple (the primary occupations related to food-getting, through swithin or ‘slash and burn’ gardening, fishing and hunting), producing a subsistence economy, in which each household was expected to produce enough for its own members’ survival, leaving insufficient surplus to support a leisure class or to allow for much division of labour in to specialised categories. Even in Polynesia, with its chiefly and royal castes, there was little status differentiation. Members of the community interacted on the basis of relative equality. Most communities partook of a rich and textured social, religious and spiritual life.
- 7 Customary norms were seldom reduced to writing. They were certainly not written down in pre-colonial times. Nor do most non-governmental groups today write down many of their most important norms. The faculty of a law school, for example, has many norms — who gets which office, when to gather for morning coffee, whether to attend one another’s social events — none of which are written.
- 8 All non-governmental groups have effective means of teaching and enforcing norms. Although there are in every group a few dissidents (just as there are those who refuse to obey some or all of the laws of state societies), most members obey most of the norms most of the time — either because they believe in the values of the group because they need to remain in good repute with other members or the group, or because they fear the adverse consequences of misbehaviour. See, further, Moore, S.F. 1983. *Law as Process: An Anthropological Approach*. London: Routledge at pp 54–81; Rheinstein, M. (ed.) 1967. *Max Weber on Law in Economy and Society*. New York: Simon & Schuster at pp 20–33.

- 9 I use the phrase ‘formal court’ or ‘state court’ to distinguish the official courts of the state legal system from the informal customary dispute-settlement meetings described in the text accompanying n 8 above.
- 10 For descriptions of the relevant constitutional and statutory provisions, see above n 2.
- 11 See the cases discussed in Zorn, J.G. and Corrin Care, J. 2002. Proving Customary Law in the Common Law Courts of the South Pacific. *Occasional Paper No. 2*. London: British Institute of International and Comparative Law.
- 12 See above, n 1.
- 13 This phrase is taken from the colonial version of the Papua New Guinea *Customs Recognition Ordinance* 1963, though the phrase was used elsewhere in the Pacific as well. The refusal of the colonial courts to apply anything other than long-established customs did avoid the problems associated with change, but that was not the major reason for the rule. Colonial courts were, for the most part, intended to wean Pacific islanders from custom, and to head them towards acceptance of the imposed legal system in place of custom. The courts continued to apply customs only because they believed it unfair to impose western law on people not yet sufficiently acquainted with it, but the general view during the colonial period was that custom would gradually wither away, at which point courts would no longer need to apply it. See, further, the cases cited in Ottley, B.L. and Zorn, J.G. 1983. Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict. *American Journal of Comparative Law* Vol 31: 251–300.
- 14 See, for example, the *Constitution* (Papua New Guinea), s 20, the Papua New Guinea *Customs Recognition Act* [Cap. 19], as it was revised after Independence, and the Papua New Guinea *Underlying Law Act* 2000.
- 15 Bellwood, P. 1979. *Man’s Conquest of the Pacific: The Prehistory of Southeast Asia and Oceania*. New York: Oxford University Press.
- 16 Howe, K. R. 1984. *Where the Waves Fall: A New South Seas History from First Settlement to Colonial Rule*. Sydney: Allen & Unwin.
- 17 There are too few articles or books about law in the colonial period. Until the definitive text is written, see the articles collected in Starr, J. and Collier, J.F. (eds.) 1989. *History and Power in the Study of Law: New Directions in Legal Anthropology*. London: Cornell University Press.
- 18 The countries and territories that recognise both statutory and customary marriages are Papua New Guinea, Vanuatu, Solomon Islands, the Federated States of Micronesia, Palau, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands. Zorn, J. G. 1994. Above, n 2, at pp 88–89.
- 19 Zorn, J. G., 1994. Above, n 2, at pp 95–98. For informative discussions of the relationship between customary and statutory marriage laws, see McCrae, H. 1981. *Cases and Materials on Family Law – Part I: Marriage*. University of Papua New Guinea: Port Moresby at pp 2–7 and McCrae, H. 1982. Reform of Family Law in Papua New Guinea. In Weisbrot, D., Paliwala, A. and Sawyer, A. (eds.) *Law and Social Change in Papua New Guinea*. Sydney: Butterworths.
- 20 *Islanders’ Marriage Act* [Cap. 171] (Solomon Islands) ss 4–9; *Control of Marriage Act* [Cap. 45] (Vanuatu).

- 21 *Application of Thesia Maip; In the Matter of the Constitution s 42(5)* [1991] PNGLR 80.
- 22 Readers who wish to read the decision in conjunction with reading this chapter, will find the Papua New Guinea Law Reports at the University of the South Pacific law library and at many other libraries. See, also, Zorn, J.G. 1996. Custom and/or Law in Papua New Guinea. *Political and Legal Anthropology Review* 19:15–27.
- 23 In this chapter, I will quote frequently from the National Court decision, using a mimeo version. Since the decision is quite short (3 or 4 pages), I will not use page references to the PNG Law Reports. Unless otherwise referenced quotes in this section come from the National Court decision.
- 24 The rules about village court jurisdiction, personnel and procedures are contained in the *Village Courts Act 1973* (PNG).
- 25 *The Village Courts Act 1973* (PNG) provides that all decisions of village courts may be reviewed by the Chief Magistrate of the District Court in the district where the village court operates. K700 is approximately USD200 though, for a village woman without a regular cash income, it is a staggeringly huge amount.
- 26 *Thesia Maip's* case was one of a number that suggested the village courts in the Highlands were discriminating against women and treating them unduly harshly. In 1990, the year that Thesia Maip was imprisoned, more than fifty complaints were made to the national court in the Eastern Highlands about women being imprisoned by village courts for marital matters. Thesia Maip was one of three Highlands women whom Judge Woods freed from prison in a single month. Different village courts had ordered each of them imprisoned all on the same grounds. All three women were charged with adultery, ordered to pay fines, and imprisoned when they could not pay. In large part because of Judge Woods' efforts, which brought these and similar cases to the attention of the press and the higher courts, Village Courts were convinced to abandon this practice. For a more detailed discussion, see Zorn, J.G. 1994–5. Women, Custom and State Law in Papua New Guinea. *Third World Legal Studies* 1994–95: 169–205.
- 27 Judge Woods found different reasons to release the women in the other cases that he heard that month. One woman was released on the ground that charging her with adultery when her husband had, to all intents and purposes, deserted her several years before, violated her right to equality under s 50 of the *Constitution* (PNG). See *Application of Wagi Non; In the Matter of the Constitution s 42(5)*, Unreported, National Court of PNG, 1991. Judge Woods released another woman on the grounds that it was a violation of natural justice to order her to pay compensation, when the village court knew she was a village wife with no access to cash. See *In the Matter of Kaka Ruk; In the Matter of the Constitution s 42(5)* [1991] PNGLR 105. See, further, Jessep elsewhere in this volume.
- 28 There is no definition in the statutes. The standard treatise defines adultery as 'voluntary or consensual sexual intercourse between a married person and a person (whether married or unmarried) of the opposite sex not being the other's spouse.' Cretney, S.M. & Masson, J.M. 1976. *Cretney's Principles of Family Law* (2<sup>nd</sup> ed.). Sweet & Maxwell: London. At p 102.
- 29 It seems that the customary law of the Balk villagers, as interpreted by the Balk Village Court, was the same. Judge Woods does not quote the customary rule, but he does say

that Jude told the Village Court magistrate that he and Thesia were married and Thesia told the court they were not, implying that the Village Court's decision about adultery under customary law turned on whether Thesia and Jude were married.

- 30 Customs are not written down in the way that laws are written down, so customs can, and do, change more easily than laws can. Customs are nothing more than beliefs, values and habitual activities. Beliefs, values and habitual activities change constantly, to meet new circumstances or just because everything in human behaviour changes over time. Rheinstein, M. (ed) 1967. Above, n 8, at pp 11–20.
- 31 *Constitution* (PNG), s 20, defines custom as ‘customs and usages’.
- 32 Nanda, S. and Warmas, R.L. 1997. *Cultural Anthropology* (6<sup>th</sup> ed.) Columbus: Wadsworth at p 43.
- 33 The judge also raises a jurisdictional issue: “My initial confusion is how can a man from Bougainville come to a village court in the Western Highlands and seek what is in effect an order for restitution of conjugal rights when there has been no contact at all between him and that village apart from his living with a woman from that village elsewhere in Papua New Guinea”.
- 34 Note the subtle, but important difference between the Village Court's standard (“people today are recognising it as a marriage”) and the National Court's standard (“clearly recognisable by everyone”). The Village Court, unlike the National Court, does not require that everyone recognise the custom, nor that the recognition be *clearly* recognisable.
- 35 See for example *John Noel v Obed Toto*, Unreported, Supreme Court of the Republic of Vanuatu, Civil Case No. 18 of 1994, 19<sup>th</sup> April, 1995 regarding inheritance ([http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu\\_cases/Volume\\_g\\_N/Noel\\_v\\_Toto.html](http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_g_N/Noel_v_Toto.html) Accessed 19/9/02); *Pandosy Jean Charles v Pascaline Thuba*, Unreported, Supreme Court of the Republic of Vanuatu, Matrimonial Case No. 16 of 1996, 10<sup>th</sup> December, 1997 regarding custody of children ([http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu\\_cases/Volume\\_O\\_Q/Pandosy\\_v\\_Thuha.html](http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_O_Q/Pandosy_v_Thuha.html)).
- 36 The judge also suggests that there may be some hypocrisy on Jude's part: “The thwarted man here had ample opportunity to consider a proper marriage, either by a public ceremony in the village concerned or in the church or registry office under the Marriage Act. He elected not to take any of these procedures”. Jude wanted, the judge is suggesting, none of the responsibilities that a real marriage would entail, but all of the rights of marriage.
- 37 “Jails are for criminals,” Judge Woods says, near the conclusion of his decision, “not as a means of revenge on the breakdown of a living together arrangement which discriminates against the female partner”.
- 38 *To'ofilu v Oimae*. Unreported, High Court of Solomon Islands, Civil Appeal Case No. 5 of 1996, 19 June 1997. I am grateful to Jennifer Corrin Care for sharing with me her detailed case note on this decision. See Corrin Care, J. 1999. *To'ofilu v Oimae* Case Note in *Journal of South Pacific Law*, case note 4 of Volume 3 ([http://www.vanuatu.usp.ac.fj/journal\\_splaw/Case\\_Notes/Corrin\\_Care3.html](http://www.vanuatu.usp.ac.fj/journal_splaw/Case_Notes/Corrin_Care3.html) Accessed 19/9/02).

- 39 In pre-colonial Melanesia, and in other parts of the Pacific as well, marriages were arranged between the parents of the prospective bride and groom. The marriage was confirmed when the groom's extended family gave a feast for the bride's family and presented them with gifts. The gifts usually included pigs, polished shells, fine mats, carved bowls, boars' teeth, and yam, taro or other foodstuffs. The groom's father tried to get members of his family — his uncles, brothers and sisters — to contribute as much as possible towards the brideprice, as the amount signified the value and status of the family, as well as their respect for the bride and her family. *Pidgin* has been heavily influenced by colonialism, so the Papua New Guinea *pidgin* term for brideprice now is *baim meri* ('buy a woman'). In most of the indigenous languages of Melanesia, however, the concept of a price or purchase is absent. According to Simon Fuo'o, a law student from Kwara'ae region of Solomon Islands, there is no word in Solomon Islands *pidgin* for brideprice. In his own (local) language it is *daurai'ia*, for which there is no accurate English translation. He said, after some thought, that today most people would think of the word as having something to do with an exchange to compensate for the fact that the bride's family were going to lose her services.
- 40 Many comments posted on a thread about brideprice in April–May 2001 on the Solomon Islands Department of Commerce message board substantiated this, though a number of the e-mail notes also pointed out that the custom did not, at least traditionally, have anything to do with a sale or purchase. See [www.commerce.gov.sb](http://www.commerce.gov.sb)
- 41 Rubin, G. 1975. *The Traffic in Women: Notes on the Political Economy of Sex*. In Reiter, R.R. (ed.) *Toward an Anthropology of Women*. New York: Monthly Review Press.
- 42 However, these attitudes do exist, as a number of the comments on the Solomon Islands message board demonstrated. See [www.commerce.gov.sb](http://www.commerce.gov.sb)
- 43 The relationships between inter-married clans and families have been changed by a number of causes. One of the causes can be found in the changed political situation which has limited tribal warfare thereby lessening the need for members of different clans to depend on one other to provide help in times of war. Economic change has also reduced the inter-relationships between in-laws. For example, as traditional inter-island trading, as exemplified by the *kula* ring, disappears, so does the need to create agnates in order to have dependable trading partners. See, further, Malinowski, B. 1984. (original edition 1922) *Argonauts of the Western Pacific*. Waveland Press: New York. The development of a market economy, in which buying and selling carries no traces of reciprocity or other relationship between the purchaser and seller has also lessened the need for people to extend their family ties.
- 44 *To'ofilu v Oimae*, above, n 38.
- 45 These are shells so special that they are referred to in English as 'shell money'. They differ from cash, however, in that they are supposed to be exchanged only at ceremonial occasions. They cannot be used to buy goods or services the way cash is used. They are valuables in and of themselves, not, like money a means to enable actors in the marketplace to buy and sell.
- 46 In addition to the return of the full value of the shell money, rice, pigs and cash, the To'ofilu family also asked to be compensated for the money they had spent traveling to the brideprice ceremony. The Local Court ordered the defendants to pay for these expenses,

the Magistrates' Court denied them these expenses, and the High Court reinstated the Local Court's order.

47 See above, n 28 at p 2.

48 "...in the circumstances, the Defendant owed a duty in custom to disclose this material fact to the Plaintiff during the course of discussions and negotiations for the amount of brideprice to be fixed... [but] the Defendant did not disclose this fact;... the Plaintiff thereby was deprived of the opportunity to either re-negotiate the amount of the brideprice fixed or to decline to pay the amount asked for... in the circumstances, the Plaintiff must be compensated in custom for this breach of customary duty or obligation, the quantum being the refund of the brideprice in its entirety." See above, n 44 at p 2.

49 See above, n 38 at p 3.

50 "...brideprice should not be taken as a yardstick to measure the man's love for his wife. In this case clearly it was the man Ronny who showed first sight love for Fiona. Whether the woman Fiona was pregnant before the marriage or not is a matter for negotiation so as to determine the amount of the brideprice to be paid to the girl's family."

See above, n 44 at p 5.

51 See above, n 38 at p 4.

52 One of the purposes of a legal system is to resolve disputes between members of the group so that the dispute does not result in violence and so that the interdependent activities of group members can continue. In state societies the courts assume this function also, applying the rules of tort, contract or property law to disputes between citizens, and resolving the disputes according to these rules. The aim of these court proceedings is to reach a definitive conclusion, based upon the applicable rules, both so that the parties to the dispute will feel that a resolution in accord with their beliefs and values has been attained and so that participants in the market economy generally can act in the confidence that, so long as they are acting in accordance with the rules, their expectations will be rewarded. In the non-state societies of the pre-colonial Pacific, there were customary means of resolving disputes. One method consisted of meetings, attended by everyone with a concern for the parties to the dispute, often by everyone in the village, in which the grounds of the disagreement would be discussed, commented upon, and discussed again, until all those at the meeting had reached a consensus about how to resolve the dispute. Often a chief or elder presided at these meetings but the outcome was not his to dictate. He acted as a mediator not as a judge because without the threat or reality of police at his command, he had no means to enforce his orders. He had to depend upon the willingness of both parties to the dispute to enforce the outcome upon themselves. The aim of these customary meetings, therefore, was to restore peace and harmony between the disputants and within the group as a whole, so that the members of the small community could go back to living and working together.

53 See above, n 38 at p 2. The use of the phrase "material fact" is itself an indication that the High Court is treating custom as if it were common law. That phrase is part of common law jurisprudence, not part of customary dispute settlement. Another common law motif occurs in the way in which the High Court judge views the brideprice negotiation. He describes it as a judge would describe any negotiation over a contract, not necessarily as one would the more free-flowing, open-ended negotiations that occur in customary environments.

- 54 The High Court also noted that the Local Court, being closer to the parties and their village, and made up of magistrates who are chosen for their knowledge of custom, is better equipped to decide what the customary rule governing each case is than are magistrates, who live farther away and whose training has been, for the most part, in the common law.
- 55 See above, n 38 at p 6.
- 56 The *Customs Recognition Act 2000* (No. 7 of 2000) (Solomon Islands) provides, at s 3, that the courts must have evidence of the existence of any customary law that a court intends to use, and that, for this purpose, customary law is to be treated as a fact. The Act did not exist at the time *To'ofilu v Oimae* was decided, and the Solomon Islands courts did not seem to believe that evidence of custom was always required.
- 57 This is a carefully, and purposefully, limited decision. The High Court has said here only that evidence must be presented to overturn a Local Court's decision about custom. The High Court has not said that evidence must be presented every time a party wishes custom to be adopted by a state court.
- 58 This is particularly the case in today's world where people need (or want) many things that they cannot grow or make for themselves. Cash is needed today for every thing from store-bought clothes and canned goods, airplane flights, television sets, trucks and other tools to a primary school education. In the early 1970s, when I observed brideprice ceremonies in the Papua New Guinea Highlands, cash was included amongst the gifts, but cash was not as necessary a part of people's lives at that time as it has become since. It tended more to show the prestige of the donor — 'I'm one of those few with access to the western world and its paper money' — than to be of real use to those who received it.
- 59 Of course, people having arguments over brideprice did not have the ability to go to a formal court in pre-colonial times, because no state courts existed. Even during the colonial period, few disagreements of this sort would have been heard in state courts, because those courts tended to be forums primarily for criminal cases and for disputes between expatriates. Ottley, B. L. 1995. Above, n 3, at pp 97–107.
- 60 Another reason people probably prefer the courts to customary mediation, especially where a large amount of money is involved, is because of the perceived finality of a court solution. Even in a civil suit brought in a local court, courts have the power of the state behind them, enforcing every judgment. And the magistrates and judges speak so definitively. However, despite their desire for an absolutist verdict (or, perhaps, because of it), people are led by the hierarchal nature of the court system into continuing appeals, making resolution of the dispute ever more elusive. The High Court decision in *To'ofilu v Oimae* was handed down more than four years after the matter first came before the Local Court.
- 61 *Molu v Molu No. 2*. Unreported, Supreme Court of the Republic of Vanuatu, Civil Case No. 30 of 1996, Matrimonial Case No. 130 of 1996, 15 May 1998.
- 62 The leading case, holding that custom may be applied in determining custody so long as custom does not conflict with the common law 'best interests of the child' standard, is from Solomon Islands. See *Sukutaona v Houanibou* [1982] SILR 12.
- 63 The United Nations Convention on the Rights of the Child (CRC), art. 3(1), adopted by the General Assembly of the United Nations, 20th November, 1989, provides that "in all

actions concerning children... the best interests of the child shall be a primary consideration.” The Convention is self-executing. It is binding on every country that has ratified it and all the Pacific island nations, including Solomon Islands, have ratified it. (The only nations not to ratify it are the United States and Somalia.) An example of a Pacific Islands statute mandating that custody decisions be based solely upon the best interests of the child is the *Custody of Children Act* [Cap 20] (Tuvalu), s 3(3): “...the court shall regard the welfare of the child as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father is superior to that of the mother or the claim of the mother is superior to that of the father”. In other Pacific jurisdictions — for example, in Solomon Islands — the ‘best interests of the child’ standard has been established by the courts, rather than directly by statute. See, for example, *Sukutaona v Houanibou* [1982] SILR 12. In some jurisdictions, the statutory standard also takes the interests of other family members into account. In Marshall Islands, for example, the statute requires the courts to take into account the interests of everyone involved. See *Domestic Relations Law* [26 Revised Statutes, Cap 1] (Marshall Islands). Section 4 of the *Matrimonial Causes Act* [Cap 282] (PNG) stipulates that the courts should take into account equally the welfare of the child, the conduct of the parents, and the wishes of each parent. Section 3 of the *Custody of Children Act* [Cap. 20] (Tuvalu) also permits the court to take the conduct and wishes of the parents into account, but specifies (as quoted above) that they be secondary to the child’s welfare.

- 64 See, for example, the discussion of this point in *Sukutaona v Houanibou* [1982] SILR 12.
- 65 Yes, the major common law countries (England, Australia, the United States) were patrilineal and patriarchal, and this was reflected in the common law. See Cott, N.F. 2001. *Public Vows: A History of Marriage and the Nation*. Harvard University Press: Cambridge; Hartog, H. 2000. *Man and Wife in America: A History* Harvard University Press: Cambridge and Yalom, M. 2001. *History of the Wife*. Harper Collins: New York.
- 66 I do have to point out that, despite the certainty of judges, there is no certainty in the psychological, sociological or medical literature as to whether children of ‘tender years’ are invariably best served by being in their mother’s custody, even when their mother is in all respects fit to care for them. The consensus amongst professionals seems to be: ‘It depends on the mother, the father, and the children’. See Baris, M.A. and Garrity, C.B. 1988. *Children of Divorce*. Psytec: New York.
- 67 An excellent discussion of customary and statutory custody rules can be found in McCrae, H. 1981. *Cases and Materials on Family Law – Part III: Custody, Maintenance, DeFacto Relationships and Ex-Nuptial Children*. University of Papua New Guinea: Port Moresby at pp 2–7.
- 68 A phrase used in many kin-based societies to signify the inter-dependence of clan members. For descriptions of the important role played in a child’s life by the extended family in kin-based societies, see Glasse, R.M. and Meggitt, M.J. 1969. *Pigs, Pearlsbells and Women. Marriage in the New Guinea Highlands*. New York: Prentice Hall; Hutter, M. 1959. *The Family Experience: A Reader in Cultural Diversity*. London: Allyn & Bacon; Mead, M. 1959. *Coming of Age in Samoa*. New York: Mentor; and Pulea, M. 1986. *The Family, Law and Population in the Pacific Islands*. Suva: University of the South Pacific.

- 69 *Molu v Molu No. 2*, Above, n 61.
- 70 It was a statutory marriage, performed in a church, although Cidie and his family also gave brideprice to Patricia’s family. To his mind, therefore, they also had a customary marriage. The Court points out, however, that, under the *Marriage Act* [Cap 60] (Vanuatu), if one is married with all the proper formalities in a church, the law recognises it as a statutory marriage, and only a statutory marriage, regardless of what additional customary ceremonies may have been performed. Therefore, the Court must apply the statutory standards, not the customary rules, to all aspects of the marriage, including divorce, child custody and property division. See above, n 61 at p 12. But what if, in addition to observing the statutory formalities, the couple had gone through all the aspects of a customary marriage, rather than just giving brideprice? The Court does not say whether it would, then, be willing to apply customary law, rather than the statute, in determining custody or the division of property. It does say, “There is no evidence that the marriage between the Petitioner and the Respondent was a custom marriage performed in a place and according to the form laid down by local custom of the parties”. See above, n 61 at p 12. This suggests that the Court *might* apply customary law, at least within the bounds permitted by the statute in such a circumstance.
- 71 See *Molu v Molu No. 1*, Unreported, Supreme Court of the Republic of Vanuatu, Civil Case No. 130 of 1996, Matrimonial Case No. 2 of 1996, 21st April, 1998. ([http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu\\_cases/Volume\\_G-N/Molu\\_v\\_Molu1.html](http://www.vanuatu.usp.ac.fj/paclawmat/Vanuatu_cases/Volume_G-N/Molu_v_Molu1.html) Accessed 19/9/02).
- 72 See above, n 71 at pp 4–8.
- 73 See above, n 61 at p 5: “I accept the general environment which both the Petitioner and Respondent thought would be better on the island. But I reject the evidence that Yannick wanted to go to Pentecost to escape the behaviour of his father since he was just a little boy (4 years) when he was sent there, even if the Respondent admitted he slapped him on one occasion”.
- 74 The Vanuatu *Constitution* provides, at Art 72, that ‘the rules of custom’ are part of Vanuatu law, and, again, at Art 93(3), that ‘customary law shall have effect as part of the law of the Republic’. The *Constitution* does not, however, stipulate amongst statutes, custom and the common law, as to which takes precedence. The Acting Chief Justice ruled, in this case, that he had to follow the dictates of the *Matrimonial Causes Act* [Cap 192] (Vanuatu) in relation to matters arising out of marriages performed under the *Marriage Act* [Cap 60] (Vanuatu).
- 75 *Matrimonial Causes Act* [Cap 192] (Vanuatu), s 15. The *Matrimonial Causes Act* [Cap 192] (Vanuatu) itself does not expressly mention the ‘best interests’ standard. It provides only that “the Court may... make such provision as appears just with respect to custody...”
- 76 Convention on the Rights of the Child, Art 3(1), adopted by the General Assembly of the U.N., 20th November, 1989; ratified by Vanuatu Parliament, *Ratification Act 1992* (Vanuatu). The emphasis in the quotation was added by the Acting Chief Justice. See above, n 61 at p 6.
- 77 See above, n 61 at p 7.
- 78 See text at n 66 above.

- 79 It should be noted that, though the Court gave formal custody to Cidie, the father, the Court intended that the boy live not with the father in Port Vila, but with the paternal family in Santo — an important distinction, since Cidie Molu had spent most of Ian’s life drunk and beating up Ian’s mother.
- 80 The Court quotes from the decision of *Re Thain* [1926] All E.R.384: “one knows from experience how mercifully transient are the effect of parting and other sorrows [for young children]; and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends”. The quotation, it seems to me, could just as well mean that, if Ian were returned to his mother, he would soon stop missing the people in Santo. Today, as opposed to 1925, most childcare and child psychology professionals would agree that children have very long memories, that they do not soon get over parting and other sorrows, and that the novelty of fresh surroundings do not diminish their longing for former days, especially if those former days included their parents. Baris, M. A. & Garrity, C. B. 1988. Above, n 66. However, those studies were done, for the most part, in the United States, Australia and the United Kingdom. It is altogether possible that children in other cultures, especially those cultures in which most children live in extended families, rather than in nuclear families react differently.
- 81 See above, n 61 at p 5. However, the Court notes, it is unusual for such an arrangement to occur over the objections of one of the parents.
- 82 This is a phrase found, in one version or another, in all clan-based societies, to mean that the children belong to the clan. The clan is for them, and they are for the clan. See above, n 68.