LEGAL SCHOLARSHIP AND PACIFIC ISLANDS' JURISPRUDENCE

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Pacific jurisprudence is still in its infancy. Its development has been hindered by a number of factors including the dominance of the common law and deference to overseas models of law and legal systems. This paper explores some of the exceptions to this pattern, where courts have departed from these familiar forms in favour of a tailored approach. It also highlights some of the pioneers of legal scholarship on Pacific law and legal systems and discusses some of the more recent work by early career researchers and lawyers.

Le processus d'élaboration d'un corpus jurisprudentiel spécifique au Pacifique en est encore à sa phase première. Son développement a été entravé par un certain nombre de facteurs, à commencer par la prédominance de la Common Law mais aussi par un sentiment de déférence envers les modèles de droit et les systèmes juridiques étrangers. L'auteur démontre toutefois que sans faire totalement table rase du passé, de plus en plus les tribunaux de la région du Pacifique se démarquent de ces premières tendances pour favoriser une conception contemporaine de la règle de droit applicable plus conforme à la spécificité de chacun de ces États et territoires du Pacifique.

En marge de ce mouvement jurisprudentiel, l'auteur rend hommage à celles et à ceux qui au fil du temps ont posé les fondements d'un nouveau champ de recherches qui forme maintenant le domaine bien défini d'une science juridique propre aux divers systèmes de droits en vigueur dans le Pacifique. Elle souligne également que les nombreux et récents travaux, émanant de jeunes chercheurs et juristes, portent témoignage de l'intérêt scientifique grandissant porté à ce domaine de recherches ce qui augure aujourd'hui d'un bel avenir.

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I INTRODUCTION

In the lead up to independence, Pacific Island countries[1] appear to have envisaged the development of a national jurisprudence, in the sense of both philosophical debate about legal theory and the evolution of legal principles through decisions of the courts. The vision did not involve discarding the law and legal systems introduced during the colonial era, but envisaged drawing on local custom and culture to develop a system encapsulating the best of both worlds. Perhaps, it was thought, this might gradually give rise to the development of a broader, sub-regional jurisprudence, or even a regional Pacific Islands' jurisprudence. However, these aspirations, reflected in the preambles to many Pacific constitutions,[2] have not translated into reality and, as noted by numerous courts and commentators, Pacific Islands' jurisprudence at both national and pan-Pacific level is still in its infancy.[3] Its development has been hindered by a number of factors including the dominance of introduced common law and deference to overseas models of law and legal systems.[4] This article does not explore these factors in detail as they have been canvassed elsewhere.[5] Rather, it highlights the exceptions to this pattern. It considers the development of Pacific jurisprudence in two contexts: firstly, by looking at the decisions of common law courts[6] in the Pacific, and secondly, by considering some of the academic scholarship relating to small Pacific islands with common law systems and to Papua New Guinea, which has a similar colonial history. The boundaries of jurisprudence are notoriously ill-defined, but this article takes a broad approach, including not only analytical jurisprudence in the narrow sense of analysis

1 In this article, 'Pacific' refers to the member countries of the Pacific Islands Forum other than Australia and New Zealand.

2 The preambles to the independence constitutions of Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tuvalu, and Vanuatu all emphasised the importance of the culture and traditions of each country.

3 See eg *Mouton v SELB Pacific Limited* [1995] VUSC 2.

4 See eg *Sukuramu v New Britain Palm Oil Ltd* [2007] PGNC 21, discussed below at p 147.

5 See eg D Weisbrot "Papua New Guinea's indigenous jurisprudence and the legacy of colonialism" (1988) 10 UHawLRev 1 30–31; Jennifer Corrin "Crossing the Border from Custom to Contract: legal pluralism and Pacific Islands' contract laws" (2021) 1 Oxford University Commonwealth Law Journal 6-7; and *Lash v Law Society of PNG* [1993] PNGLR 53.

6 Customary forums and courts established by statute to deal with customary disputes in accordance with customary laws are not discussed here.

and elucidation of state law, but extending to philosophical discourse on all legal phenomena.[7]

Whilst arising in two contexts, there is a firm link between the contributions to Pacific jurisprudence emanating from the courts and academic scholarship. This is referred to indirectly in the Chief Justice of Papua New Guinea's foreword to *South Pacific Legal Systems*, a book discussed later in this article.[8] Sir Buri Kidu acknowledged the influence of academic writing on judicial decision making, stating that the book had reminded him that courts in other South Pacific nations were struggling with the many of the same problems as the courts of Papua New Guinea. It was clear, his Honour remarked, that the courts had much to offer each other if only they knew more about each other's systems of government and law. The book, the Chief Justice said, "provides the information that we need to learn about each other".[9] On this note, it is worth mentioning that there is evidence of an increase in citation by Pacific courts of decisions from their own jurisdiction and from courts in neighbouring countries within the region.[10] *Beouch v Sasao*,[11] discussed below, is just one example of this. In Melanesia, this development has been invigorated by the exchange of judges to sit in the Courts of Appeal.[12] Whilst not discussed further in this article, both these factors are significant for the development of Pacific jurisprudence.

The first part of the article begins by outlining the scope for the courts to depart from the well-worn path of the common law in favour of an approach tailored to the circumstances of the country in question, or of the Pacific region more broadly. It then proceeds to discuss the extent to which they have shown an appetite to do so, with reference to a selection of relevant cases. The second part of the article focusses

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7 For a discussion of the merits of a broader approach to analytical jurisprudence see William Twining "Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context" (2005) 1:1 International Journal of Law in Context, 5, 10 et seq.

8 Sir Buri Kidu "Foreword" in Michael Ntumy (General Editor) *South Pacific Legal Systems* (University of Hawaii Press, Honolulu, 1993).

9 Above n 8, xiii.

10 Lenore Hamilton *Pacific Islands Legal Information Institute, Impacts in the Region and Beyond*, 2015, 9, noted this increase, citing empirical work published in a PhD thesis by Pierre-Paul Lemyre.

11 [2013] PWSC 1.

12 Also of relevance is the Pacific Judicial Conference, inaugurated in 1972, which provides an opportunity for Chief Justices from Pacific island communities to meet biennially. See further, John M Van Dyke "Providing Support for Independent Judiciaries and Constitutional Governments" Droit Foncier et Gouvernance Judiciaire dans le Pacifique Sud: Essais Comparatistes/Land Law and Judicial Governance in the South Pacific: Comparative Studies, Hors Series, Volume XII, 2011, 279.

on academic research and writing. A comprehensive literature review cannot be undertaken here, but this rather subjective selection of authors and publications highlights the contribution to Pacific jurisprudence made by some of the pioneers of legal scholarship in this area. It also discusses more recent work, which has been undertaken by early career researchers and lawyers.

Given the legal pluralism at play in the South Pacific, it is hardly surprising that most commentary, both in academic research and in the courts, takes the form of analytical jurisprudence, seeking to articulate the relationship between State and customary laws. However, this is not the only scope for the development of a unique jurisprudence. Scholarly works include a broader discourse including research on the philosophy underpinning Pacific legal systems and the content of laws. The courts have also, on occasion, delved into other jurisprudential issues. In particular, as explained below, courts have ample authority to adapt the common law to accommodate local circumstances. Accordingly, the discussion of the courts' decisions is divided into those involving customary law and those where the discussion relates to other aspects of law or legal phenomena.

II THE COURTS

A The Scope for the Development of a Unique Jurisprudence

During the colonial era, many Pacific countries had a shared source of jurisprudence applying in the common law courts due to their place in a hierarchy with a common apex. For example, appeals within the British Western Pacific lay to the High Court of the Western Pacific, in some cases with a final appeal to the Judicial Committee of the Privy Council.[13] Since independence, there remain only a few countries which allow an appeal to the Privy Council,[14] and that avenue is rarely explored. Courts in the Pacific region have been given ample scope by their constituent laws to forge their own path. In former British dependencies the courts are only required to apply introduced statutes, "so far as circumstances admit",[15] and are often empowered to reject introduced common law and statutes if either is "inapplicable to the circumstances of" the country in the receiving jurisdiction.[16]

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13 Western Pacific Order in Council 1877 made under the Pacific Islanders Protection Act 1875, the British Settlements Act 1887, and the Foreign Jurisdiction Act 1890.

14 Eg an appeal to the Privy Council is allowed from courts in the Cook Islands (Constitution of Cook Islands, art 59(2)); Kiribati (Kiribati Independence Order 1979, s 123, sch and Kiribati Appeals to Judicial Committee Order 1979; Niue (Constitution of Niue, art 55(2)); and Tuvalu (Constitution of Tuvalu, Cap 1.02, ss 119(a) 136; Tuvalu (Appeals to Privy Council) Order 1975).

15 Pacific Order in Council 1893 (UK), s 20; Western Pacific (Courts) Order 1961 (UK), s 15. Cf *R v Ngena* [1983] SILR 1, 3.

16 See eg Cook Islands Act 1915 (NZ), s 615.

This allows the courts to depart from introduced common law and equity if those laws do not accord with the realities of everyday life in the Pacific. As was noted in the Samoan case of *Australia and New Zealand Bank Group Ltd v Ale*,[17] some of those concepts and surrounding debates (in that case whether civil disputes must be classified as contract or tort or whether quasi-contract is a legitimate category) "must be rather bemusing for the pragmatic bystander in the South Pacific half a world away from the esoteric discussions taking place in the Courts of England".

In some jurisdictions, including Kiribati,[18] Nauru[19] Palau,[20] Solomon Islands,[21] and Tuvalu,[22] customary laws are stated to be a superior source of law to the common law. In Papua New Guinea a more direct mandate is contained in the Constitution, stemming from an idea developed by Bernard Narokobi, who is featured in the second part of this article.[23] This requires courts to establish rules for the development of the underlying law, the nation's own common law drawn from customary laws and common law and equity.[24] The Underlying Law Act 2000 makes it clear that the imported common law may be used only if there are no 'home-grown' laws on point and that, in the absence of written law, the court must apply customary law to formulate the underlying law.[25]

Notwithstanding, many Pacific courts tend to follow the common law, without investigating whether it is applicable to local circumstances or whether there is any relevant customary law on point. This deference to the common law is typified by the views of Vaudin d'Imecourt CJ, expressed in the Supreme Court of Vanuatu:[26]

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17 [1980-1993] WSLR 468.

18 Laws of Kiribati Act 1989, s 6(3)(b).

19 Customs and Adopted Laws Act 1971, s 4.

20 Constitution of Palau 1979, s 2; Palau National Code Title 1, s 303.

21 Constitution of Solomon Islands 1978, sch 3, para 3(2).

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

23 Papua New Guinea Constitutional and Law Reform Commission "Declaration and Development of the Underlying Law" (Working Paper No 4, Papua New Guinea Constitutional and Law Reform Commission, 1976) draft Bill, clauses 3, 6 (*Law Reform Commission Working Paper*). See further Jennifer Corrin "Getting down to business: developing the underlying law in Papua New Guinea" (2014) Journal of Legal Pluralism and Unofficial Law.

24 Constitution of the Independent State of Papua New Guinea 1975, Sch 2.1.

25 Underlying Law Act ss 6 and 7.

26 *Timakata v Attorney General* (1992) [1989-1994] 2 Van LR 575. See also *Willie v Public Service Commission* (1992) [1989-1994] 2 Van LR 634, 645 and *Banga v Waiwo* [1995] VUSC 2.

> It is clear, that the legal system of this nation is intrinsically linked to the system of those nations of the world as apply the Common Law system and the rule of law. Counted amongst those are virtually all the nations of the Commonwealth of Nations, of which Vanuatu is a proud adherent.

A similar attitude was displayed in a more recent case before a different judge in the same court. In *PP v Leo*[27] the defence argued that, as the alleged criminal actions had been taken by the customary court in accordance with customary laws, they were not justiciable under Vanuatu's written laws. Wiltens J said:[28]

> Of the three bases on which the Court must make a determination, customary considerations are the least significant or compelling. The most compelling basis requires the Court to determine the matter in accordance with law; if no rules of law are in place, then the next basis of determination is substantial justice. If the matter is to be determined on the basis of natural justice, it is only then, if possible, that conformity with custom is to be considered.

As mentioned at the outset, the courts' reasons for favouring the common law have been canvassed elsewhere,[29] but include the fact that judges may have no knowledge or training in customary law. This is an argument that is gradually diminishing as regional judiciaries become increasingly populated by local lawyers.[30] Lack of activism by the courts may also be attributed to the paucity of relevant arguments and authorities advanced by counsel. Even in Papua New Guinea, where the Underlying Law Act obliges the parties to produce evidence and information to assist the court in deciding on whether to apply customary law, common law, or underlying law,[31] counsel rarely provide this. In this respect, the recent decision in *Re Patricia Elaine Cahill*[32] is worthy of mention. In that case, which involved contested applications for admission by foreign lawyers, the National Court refused the application on the basis that the applicants had not met all the requirements for admission and had not validly applied for exemption. Kandakasi DCJ noted that lawyers from outside Papua New Guinea seeking admission might be required to sit examinations in three subjects: the law relating to

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27 [2018] VUSC 75.

28 *PP v Leo* [2018] VUSC 75, [31].

29 See eg Jennifer Corrin "Crossing the Border from Custom to Contract: legal pluralism and Pacific Islands' contract laws" (2021) Oxford University Commonwealth Law Journal 1, 6-7.

30 On the use of foreign judges in the Pacific, see further, Anna Dziedzic "Foreign Judges: Pacific Practice and Global Insights" (2019) 24 (2), Commonwealth Judicial Journal 26.

31 Underlying Law Act s 11.

32 [2020] PGNC 360.

the Constitution of Papua New Guinea; land law in Papua New Guinea; and custom in Papua New Guinea.[33] His Honour considered that the laws taught in such courses formed an important and unique part of the laws in Papua New Guinea. Without education in these areas lawyers would be unable to assist the courts to develop the underlying law with "well-researched, considered and well-articulated submissions".[34]

In contrast to the general reticence to depart from the common law, there are some prominent examples of attempts by Pacific judges to develop a national or sub-regional jurisprudence. As discussed above, there is ample room for them to do so. Whilst a comprehensive survey of these decisions is outside the scope of this article, some interesting illustrations of judicial attempts to expand Pacific jurisprudence emanating from courts of Fiji, Nauru, Palau, Papua New Guinea, Solomon Islands and Vanuatu are discussed below.

B The Development of Pacific Jurisprudence by the Courts

As state courts in many Pacific countries are required to apply relevant customary laws, one would expect a large number of cases to discuss their intersection with the common law. In practice customary law is raised infrequently.[35] Notwithstanding, it is true to say that the opportunity for courts to develop a unique approach arises mainly in the context of cases where customary laws have been at play. Accordingly, the first part of this section explores courts' decisions involving the intersection of state and customary laws. The second part looks at cases where the courts have been looking at other aspects of the law within a state law context.

C Jurisprudence Relating to Customary Law

Banga v Waiwo,[36] a relatively old decision from Vanuatu, has been extensively traversed elsewhere.[37] However, given its prominence in the development of jurisprudence relating to the application of customary laws in common law

33 Lawyers (Examination) Regulation 1992, reg 2.

34 *Re Patricia Elaine Cahill* [2020] PGNC 360 [57].

35 In the context of Papua New Guinea, see Sir Salamo Injia "Presentation by the Chief Justice to the Underlying Law Conference", Alotau, 2012, 19-21 December 2010" Underlying Law Journal 2012 9–33.

36 [1996] VUSC 5.

37 See eg Jean Zorn and Jennifer Corrin "Barava Tru - Judicial Approaches to the Pleading and Proof of Custom in the South Pacific" (2002) 51 International and Comparative Law Quarterly 611, 635-637.

proceedings, it remains an important starting point. At first instance,[38] the current Chief Justice Lunabek, who was then a Senior Magistrate, was called upon to determine the quantum of damages for adultery to be paid to a spouse under Vanuatu's Matrimonial Causes Act.[39] Lunabek SM took the opportunity to review the hierarchy of laws set out in Vanuatu's Constitution. Drawing on the Preamble, which founded Vanuatu society on "traditional Melanesian values", he concluded that British and French law applied only to British and French subjects[40] and not to Ni-Vanuatu, who were only subject to legislation passed by the Parliament of Vanuatu or declared by Vanuatu courts.[41] If no such law existed, then customary laws would apply.[42] In this case, given that the statute did not specify the level of damages, the Senior Magistrate considered the position under customary laws. Given the seriousness of adultery under custom, he awarded punitive damages, stating:[43]

> 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.

The Senior Magistrate went on to discuss the application of customary laws in detail. Acknowledging the challenges of ascertaining the content of customary laws, he considered that the court should not be bound to "observe strict legal procedure or apply technical rules of evidence", but should consider all relevant evidence, including hearsay and opinion, and otherwise inform itself as it saw fit.[44] The Senior Magistrate also dealt with the resolution of conflicts between customary laws, suggesting that, where Ni-Vanuatu parties came from areas with different customs,

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38 *Waiwo v Waiwo* (Unreported, Senior Magistrates Court, Vanuatu, Civ Cas 324/1995, 12 February 1996) 7.

39 Cap 192.

40 The Constitution of Vanuatu 1980, art 95(2), provides, "Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day 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". For further discussion of the application of French law in Vanuatu see Jennifer Corrin "Comment Ca Va?: The Status of French Laws In Vanuatu" 2020, accepted for publication by The American Journal of Comparative Law.

41 During the colonial period Ni-Vanuatu were governed by Joint Regulations, issued by the British and French authorities acting in concert.

42 *Waiwo v Waiwo* [1996] VUMC 1, 3.

43 *Waiwo v Waiwo* [1996] VUMC 1, 3. The SM went on to lay out broader principles for the application of customary laws, seemingly based on the 1963 Customs Recognition Act of Papua New Guinea. That Act was repealed in Papua New Guinea by the Underlying Law Act 2000 (PNG).

44 *Waiwo v Waiwo* [1996] VUMC 1, 10.

the court should formulate a rule from the "common basis or foundation".[45] Where only one of the parties was Ni-Vanuatu, the court should consider both any applicable British or French law and applicable customary laws and "apply the law relevant to the case".[46]

On appeal to the Supreme Court,[47] Chief Justice Vaudin d'Imecourt, a foreign judge, disagreed with the Senior Magistrate's interpretation of the Constitution. He contended that the constitutional drafters must have intended equality before the law, and contended for British and French laws to apply to everyone.[48] The Chief Justice demoted customary law to the bottom of the hierarchy, holding that the courts should use customary law "only in the event that there was no rule of law applicable to a matter before it".[49] However, although the Chief Justice disagreed with the Senior Magistrate's interpretation, he did support the call for a national jurisprudence:[50]

> The Learned Senior Magistrate was right in saying that we have to create our own jurisprudence, without necessarily following to the letter interpretations given in Britain to Acts of Parliament. We come from many different backgrounds and live in quite different circumstances.

More recently, another Melanesian court, this time in Papua New Guinea, considered the relationship of the common law and customary law. In *Sukuramu v New Britain Palm Oil Ltd*,[51] the National Court was prepared to draw on customary law to assist in interpreting the common law. In considering terms to be implied in contracts of employment, Cannings J overturned the common law 'fire at will' rule in favour of a right to be heard prior to dismissal.[52] The basis for this was the development of the underlying law of Papua New Guinea, which, as mentioned above, requires analogies to be drawn from the relevant written law and customary

45 Ibid, 4.

46 Ibid, 7.

47 *Banga v Waiwo* [1996] VUSC 5,

48 *Banga v Waiwo* [1996] VUSC 5, 7.

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

50 Ibid.

51 [2007] PGNC 21.

52 [2007] PGNC 21, [72], [139].

law.[53] His Honour considered that customary law dictated a right to be heard, stating:[54]

> As to the customary law, Papua New Guinean decision-making on major issues is characterised by consultation – talking, discussing, meeting, listening, engaging in dialogue: giving a right to be heard. The same style of decision-making, by analogy, should be used when an employer contemplates sacking an employee.

However, as in *Banga v Waiwo*, the decision was overturned on appeal. The Supreme Court of Papua New Guinea reprimanded the National Court for declaring a new rule of underlying law when this had not been sought by either of the parties.[55] The Supreme Court made it clear that a principle of the underlying law could not be declared without evidence, information and submissions from the parties being presented for the assistance of the court.[56] It was also made clear that s 9 of the Underlying Law Act, which permits the Supreme Court or the National Court to formulate a new underlying law rule if it considers an existing rule to be inappropriate to the circumstances of Papua New Guinea, was not an exception to the provision in the Act that decisions of the Supreme Court are binding on the National Court.[57] In the event that the National Court was faced with a rule declared by the Supreme Court which it considered inappropriate, it should express this view, then apply the law as declared by the Supreme Court or find the necessary facts and refer the question of law to the Supreme Court.[58] To this extent, the decision was a conservative interpretation of the Underlying Law Act. However, the appeal court also contributed in a more positive way to the jurisprudence on the Act by dismissing the submission that the Act only allowed prospective application of a new rule, making it clear that a court could decide a case and give a remedy on a newly declared rule.[59] It also made it clear that, given the detail in the Underlying Law Act, there should no longer be any reference to sch 2 of the Constitution when determining the underlying law.[60]

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53 [2007] PGNC 21, [77]-[78]; s 9.

54 *Sukuramu v New Britain Palm Oil Ltd* [2007] PGNC 21, [121].

55 *New Britain Palm Oil Ltd v Sukuramu* [2008] PGSC 29. See Underlying Law Act 2000 (PNG), s 11(2).

56 [16].

57 [24], considering s 19.

58 [25].

59 [57].

60 [57].

The last three cases in this section are all concerned with jurisprudence relating to customary land, where the relationship between customary and common law has long been a vexed issue. The first case, decided in Melanesia, is *Kasa v Biku.*[61] This was an appeal from a decision of the Registrar, who had held that the appellant must account for monies received from the government in respect of customary land, as he was a trustee for his people in relation to the land. On appeal it was contended that the equitable concept of a trust was not applicable, as it was unknown to customary law and to customary land. The Chief Justice referred directly to customary law jurisprudence. His Lordship stressed that, in providing for the application of customary law as part of the laws of Solomon Islands, the Constitution ranked it above the common law and equity. The courts therefore had to strive to give recognition to principles of customary law where necessary and where they were not inconsistent with the Constitution or Acts of Parliament. Chief Justice Muria stated that it was time for courts "particularly those manned by those of us … knowledgeable in the law and who live under the custom that governs customary land in this country" to tackle the important question of the applicability of the trust concept head on. He stated that:[62]

> The concept of trust is not known in customary law and hence, the use of such expression when describing a relationship between the parties in a customary land dispute must be carefully guarded. Not only is it that the parties have resorted to the trust concept in support of their cases at times but the Courts too, have the tendency, whether consciously or unconsciously, of adopting and applying the concept as applied under received law. Blindly adopting legal and equitable concepts under received law must be avoided where such concepts do not apply or cannot accommodate the fundamental principles of customary law jurisprudence.

His Lordship drew an interesting and useful distinction between using the concept of a trust to refer to the system of the holding and disposition of customary land, which he thought would not always be appropriate and using it for the purpose of the management of the proceeds of the land, which he regarded as "very much an applicable concept, though in a limited way". The principles of trusteeship were not applicable to the system of the holding and disposition of customary land in Solomon Islands, because a representative of the tribe dealing with the land did not hold the legal title to the land on behalf of the tribe, nor could he unilaterally deal with it on their behalf. On the other hand, the principles of trusteeship were relevant to the management of the proceeds of customary land, since it was in the interests of justice

61 [2001] LRC 133.

62 [2001] LRC 133, 137.

that the equitable principles imposing an obligation not to profit from a position of trust and a duty to account should apply to development on customary land in the modern economy of Solomon Islands. It was clearly unjust and inequitable for a tribal representative to deal with the proceeds of tribal land in the absence of any concept of accountability. Given the changing ways in which customary land was being used, the principles of accountability ought to form part of the customary jurisprudence to be applied in determining the relationship and status of a representative who acted on behalf of his landowning tribe in customary land matters, and customary jurisprudence should therefore be modified to include the equitable principles of accountability. The Registrar's decision to regard the appellant as a trustee who was under obligation to account was therefore upheld.[63]

Turning from Melanesia to Micronesia, in *Beouch v Sasao*,[64] the Supreme Court of Palau, sitting in its appellate jurisdiction, was the site of a much more explicit discussion of the relevant jurisprudence. The customary land dispute before the Court hinged on whether the appellant had achieved a particular status in his clan. The Court held that this was a matter of custom, which raised the question of how custom was to be proved. The Court considered the development of Palau's customary law jurisprudence on point and concluded that it stood "on shifting and uncertain grounds". Commenting that the "Constitution demands better", the Court set out to clarify the relevant jurisprudence. The Supreme Court rejected the submission that customary law required a higher standard of proof than other questions of law.[65] It also rejected the view that it should be treated as analogous to business customs in the United States, as business custom was used "as a rule of law regarding the interpretation of contracts, [whereas] Palauan custom exists as a source of law" because "Palauan traditional or customary law stands as 'equally authoritative' to statutes". After reviewing the report of the Constitutional Convention's Committee on General Provisions, the Court concluded that there were four requirements for a custom to be considered traditional law under the Constitution:

(1) the custom is engaged voluntarily;
(2) the custom is practised uniformly;
(3) the custom is followed as law; and

63 On the use of the terms 'trust' and 'trustee' to describe arrangements relating to customary land see also *Harry v Kalena Timber Co Ltd* [2001] 3 LRC 24. See also, Jennifer Corrin "Customary Land and the Language of the Common Law" (2008) 37 (4) Common Law World Review 305.

64 [2013] PWSC 1.

65 Overruling *Udui v Dirrecheteet,* 1 ROP Intrm 114, 115–16 (1984).

(4) the custom has been practised for a sufficient period of time to be deemed binding.

This is the first of the cases discussed in this article where an appellate court took an active stance on the promotion of customary law. Notwithstanding, the Court still insisted on applying a common law lens to its application. The Court held that, in applying the four-element test, the court should first ask whether the traditional law was so firmly established and widely known as to justify taking judicial notice of it. If the court has already recognised a traditional law, in the absence of evidence that the custom has changed, this statement of law would bind lower courts and would be determinative on the issue. If neither of these pathways resolved the question, the court should consider whether it might take judicial notice of facts justifying the treatment of a custom as traditional law under the four-element test. If that did not resolve the matter the court should determine whether the judicially noticeable facts and the record as a whole satisfied the court that the traditional law requirements had been met. Further the Court held that whether a given custom met the traditional law requirements was a mixed question of law and fact, but whether a custom is or is not binding law is a pure determination of law. In both cases, the appeal court was entitled to review the questions de novo. Accordingly, the appeal court would review a lower court's determination as to what the customary law in Palau was de novo. The Court concluded "that this practice is necessary to give the customary rule of law its rightful place in Palauan national jurisprudence". Interestingly, in reaching this conclusion, the Court noted the jurisprudence of Hawaii, which like Palau, but unlike any other American jurisdiction, recognises custom as superior to the common law,[66] thus providing an example of the gradually growing trend of the citing of regional decisions in Pacific courts.

The final case discussed in this section takes us back to Solomon Islands. In *Success v Premier of Guadalcanal Province*[67] the Court of Appeal of Solomon Islands was required to consider the more specific issue of whether the doctrine of privity applied to a contract relating to customary land. The appellant had a timber rights agreement with 'trustees' of landowners on Guadalcanal. After a breach of the agreement, the company was given notice to suspend operations. Attempts to renegotiate failed and the landowners resolved to revoke the agreement. The appellants argued that only the signatories to the original agreement were legally entitled to revoke the agreement, and as the respondents were not signatories, they had no right to terminate it. At first instance, the High Court held that the signatories

66 Citing David J Bederman "The Curious Resurrection of Custom: Beach Access and Judicial Takings" 96 Colum L Rev 1375, 1427 (October 1996): [2013] PWSC 1, fn 5.

67 [2011] SBCA 19.

were signing as trustees, not individuals, and that the agreement had therefore been validly terminated.[68] On appeal it was argued that the doctrine of privity of contract applied to prevent anyone other than a majority of the original grantors revoking the agreement. It was also argued, again based on the doctrine of privity, that the original grantees did not have to act in accordance with the wishes of the majority of beneficiaries (ie the community of landowners). The Court of Appeal of Solomon Islands held that the doctrine of privity did not apply to timber rights agreements, stating:[69]

> The whole concept of group ownership of customary land gives each landowner equal rights over the whole of his clan's or tribe's land. Procedures have been established to ascertain the wishes of the members of the land owning group and to identify trustees from their number to sign the timber rights agreement on their behalf. Numerous cases have established the representative nature of those trustees' duties. The common law concept of privity of contract does not and cannot apply.

This a welcome development in the law, as the doctrine of privity does not sit well in the context of customary land, or in relation to customary transactions more generally.[70] The emphasis in many customary societies is on communal rights and obligations, and customary transactions may often be arrived at through consensus or on the basis of reciprocal obligations, and benefits and burdens may be imposed on all group members, rather than individuals.[71]

Another relevant case, *Australasian Conference Association Ltd v Sela*,[72] is discussed elsewhere in this journal issue and will not be traversed here.

D Jurisprudence Relating to other Areas of Law

In addition to the cases discussed above, which deal with the inter-relationship of customary and common law, there have been a number of instances where Pacific courts have discussed the need to accommodate local circumstances in cases dealing with state law only. There is, of course, some overlap, as in many instances the driving force for taking a national or regional approach to state laws is the demands of local culture.

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68 *Success Company Ltd v Takolu Timber Ltd* [2011] SBHC 65.

69 [9].

70 In some jurisdictions, such as Vanuatu, legislation has narrowed the extent of the doctrine of privity: Law Reform (Contract) Act 2009 (Van), s 4.

71 See further, Jennifer Corrin "Crossing the Border from Custom to Contract: legal pluralism and Pacific Islands' contract laws" (2021) 21:1 Oxford University Commonwealth Law Journal, 73.

72 [2007] FLR 12.

The lack of a developed Pacific jurisprudence in Samoa was considered in *Lauofo Meti Properties v Morris Hedstrom Samoa Ltd*,[73] a case decided in 1990. Whilst the court did not adopt an innovative approach, it did endorse the development of regional jurisprudence. Counsel for the appellants, the fire service and chief fire officer, argued that the duty of care owed in negligence should be considered not on the basis of the common law developed in conformity with philosophies in other jurisdictions, but in the light of the capacity of the fire service in Samoa. Maxwell CJ considered that proposition to be unarguable, but went on to say:[74]

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

Whilst the Chief Justice considered that the limited financial resources of the Government of Samoa might be a factor to be taken into account by a court, that was "a separate issue from the common law, particular in the law of negligence". The law of torts was "part of all developed Western nations to which Western Samoa courts may look for precedent". On the facts of the case, it was held that the appellants owed a duty of care to the respondents.

A few years later, in *Nair v Public Trustee of Fiji*,[75] the High Court of Fiji had to consider whether to depart from the common law of England in favour of the Australian and New Zealand approach to estoppel. The plaintiff in that case sued for specific performance of an agreement for the sale of land. In deciding to adopt the broader approach to estoppel, Lyons J said:

> In my opinion the future of the law in Fiji is that it is to develop its own independent route and relevance, taking into account its uniqueness and perhaps looking to Australia and New Zealand for more of its direction. This certainly is the implication when reading s 100(3) of the Constitution which establishes that the customary law of Fiji shall become part of the overall body of law of this country....

Whilst this comment foreshadows broader developments, the ratio of this case is limited to applying the common law from one part of the developed common law world to another.

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73 [1980–93] WSLR 348.

74 Ibid, 363.

75 (Unreported, Civ Cas 27/1990, 8 March 1996). The decision was upheld on appeal, except on quantum: *Public Trustee of Fiji v Nair* [1997] FJCA 55.

More recently, in *Attorney-General v Secretary of Justice*,[76] the applicants were seeking an order for their release from Nauru's Regional Processing Centre on the basis that they had been unlawfully detained. The Supreme Court of Nauru stressed the danger of applying jurisprudence emanating from international courts relating to human rights instruments to a dispute involving constitutional rights, stating that:[77]

> Whilst learning from those sources may be of assistance, perhaps considerable assistance in some cases, ultimately the function of the courts in Nauru is to apply the Constitution of Nauru according to its terms. For this reason great care must be exercised in applying international jurisprudence based on laws that are set in very different economic and social environments, and especially so if the jurisprudence is based on written laws which are in terms different from the text of the law in Nauru.

Given the difference between the wording of the Constitution of Nauru[78] and the European Convention for the Protection of Human Rights and Fundamental Freedoms Human Rights,[79] von Doussa J declined to follow the international jurisprudence and dismissed the application. Whilst the difference in written texts formed the rationale for the decision in this case, the reference to economic and social factors opens the way for future development of a national jurisprudence.

Another decision that concerns the interpretation of human rights provisions is the Samoan case of *Malifa v Sapolu.*[80] Here, the court's reasons for developing national jurisprudence were located purely in cultural considerations, rather than on distinctions in written laws. The case concerned the constitutionality of the criminal law under which the applicant had been privately prosecuted for criminal libel. The applicants contended that the law contravened the right to freedom of speech and expression. The respondents argued that the law was a reasonable restriction of the right to freedom of speech. In response to the applicants' reliance on Canadian jurisprudence relating to that country's Charter of Rights and Freedoms, the Supreme Court held that comparison was appropriate to the extent that the constitutional provisions in both countries entrenched fundamental rights and freedoms but without making them absolutes. However, as in Nauru, the court emphasised that reliance upon foreign jurisprudence demanded caution, stating that:

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76 [2013] NRSC 10.

77 [2013] NRSC 10.

78 Article 5(1)(h).

79 Article 5(1).

80 [1999] WSSC 47.

> In short, the jurisprudence of other countries, especially Canada, is valuable and instructive but its application to Samoa calls for caution. Differences between constitutional instruments and differences over competing values may produce different results.

In deciding whether the law of criminal libel for Samoa imposed 'reasonable restrictions' on the exercise of the right to freedom of speech and expression, the Court took into account the fact that the value of a person's reputation was particularly high in Samoa:[81]

> where authority and respect for authority is deeply ingrained in the Samoan culture. To so defame a man as to seriously lower him in the estimation of his fellows is to deal a severe blow to his pride and dignity, to undermine his authority and standing to offend his family and even insult his village.

After a detailed analysis, the court held that the offence of criminal libel as it exists in Samoa was a creature of the common law with statutory overlay, and that it infringed the applicants' constitutional right to freedom of speech and expression. That infringement, however, was justified as a reasonable restriction on this right and was therefore permitted by the Constitution. Thus, this case goes a step further than *Attorney-General v Secretary of Justice*, allowing the development of the law in response to the cultural context of Samoa, without resort to distinguishing foreign precedents on the basis of a difference in written laws.

Another example of the development of jurisprudence based on cultural differences, this time relating to societal relationships, is *Komba v Duwaba.*[82] There, the National Court of PNG was required to assess damages for negligence resulting in the death of a school boy in an action brought by the boy's father. The question arose whether the father was entitled to damages for dependency. The court rejected the defendant's claim that the father should receive nothing, stating that whilst the general principle that parents were not dependent on their children "might represent the way things are meant to work in a western, nuclear family", it was not "a true reflection of the way that families operate in Papua New Guinea". Cannings J went on to explain that:[83]

> Extended families are the norm and the wantok system holds sway. Many children continue to live at home after they turn 16 or 18. When they marry they often still live at home. If they get a paid job they are expected to contribute to the maintenance of

81 Above n 80, 49.

82 [2006] PGNC 21.

83 Above n 82, 48.

> the extended family unit. If they are living a predominantly subsistence lifestyle in the village environment they are still expected to contribute to the maintenance of the family. The PNG family unit involves a much more complex, intricate set of interdependent relationships than in western societies, from where the principles that have been applied in the cases referred to above[84] seem to have emerged.

His Honour went on to say that the best approach was "to consider each case on its merits, free of the strictures of a western or common law prism, and ascertain whether, in fact, a parent who is a plaintiff was or was likely to be dependent on a child".[85]

Whilst it can be seen from these decisions that there has on occasion been a willingness to develop local jurisprudence, this is on an ad hoc basis and is not a common occurrence. The discussion in *Lauofo Meti Properties v Morris Hedstrom Samoa Ltd*[86] of the difference in circumstances between the overseas countries where common law has been developed and Pacific nations is rare. Cases such as *Komba v Duwaba,*[87] where local culture was pivotal to the court's decision, are even rarer. It is probably true to say that the type of debate in *Nair v Public Trustee of Fiji*,[88] as to whether English authorities or those of other common law countries should prevail, is more common. Even in those jurisdictions where customary laws rank above the common law, there has been little appetite for exploring this possibility. This reluctance stems not just from the approach of Pacific courts, but also from counsel appearing before them. It is perhaps surprising that, to date, there does not appear to have been any action against a lawyer, by an unsuccessful client, for failing to raise customary law before the court.

III EX CURIA LEGAL SCHOLARSHIP

Generally speaking, there has been a dearth of legal scholarship on Pacific law and legal systems. In 1987, the late Guy Powles commented that:[89]

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84 *None v MVIT* [1990] PNGLR 561; *Tapi v MVIT* [1990] PNGLR 568.

85 Above n 82, 50. Earlier support for this approach was found in *Muna Uokare v The State* [1988-89] PNGLR 655; *Simin Dingi v MVIT* [1994] PNGLR 385; and *Puk Kum v The State*, WS No 44 of 1996, 12.09.03, unreported.

86 [1980–93] WSLR 348.

87 [2006] PGNC 21.

88 (Civ Cas 27/1990, 8 March 1996). The decision was upheld on appeal, except on quantum: *Public Trustee of Fiji v Nair* [1997] FJCA 55.

89 Guy Powles "Pacific Comparative Law at Monash" (1987) 3:3 QIT Law Journal QUT Law Journal, 181, 182-183.

> The region is notorious for the paucity of legal literature available for study, both within and outside each jurisdiction. The reasons are obvious and understandable. Maintaining stocks of legislation (including binding, annotating and reprinting) and publishing judicial reports are expensive enterprises; so also is the transmission of such materials overseas to other jurisdictions — and law schools. Colonial administrations are largely self-serving or do not care. Independent and semi-autonomous governments are encouraged not to spend money unless it is directed towards economic development. Lawyers working in Island jurisdictions, mainly in government, are usually too few and too busy to be able to achieve much improvement in the supply of legal literature — and, in any case, the inevitably parochial nature of legal work acts as a disincentive.

The pioneer of Melanesian jurisprudence was Bernard Narokobi, who not only coined the phrase, but spent most of his life exploring the concept.[90] From 1975 to 1978, he was chair of the Law Reform Commission of Papua New Guinea.[91] Narokobi believed that:[92]

> a truly Papua New Guinean legal system cannot result from the piecemeal repair and overhaul of the existing system. Instead the Commission sees as its eventual goal the overhaul of the entire system and the building up of an entirely new legal order which takes full account of our traditions, our customs and our approach to life.

Following his time as a Commissioner, he published prolifically, including his seminal works *The Melanesian Way*[93] and *Lo Bilong Yumi Yet*.[94] Whilst many of his plans for introducing an autochthonous legal system failed to come to fruition, his contribution to the independence Constitution included not only the basis for what became the National Goals and Directive Principles and the Social Obligations, but

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90 Bernard Narokobi "In Search of a Melanesian Jurisprudence" in Elizabeth Minchin and Peter Sack (eds) *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Law Department, Research School of Social Sciences, Australian National University, Canberra) 215.

91 For a commentary on Narokobi's work with the Law Reform Commission see Alex Golub "Legislating the Melanesian Way: Bernard Narokobi and the Law Reform Commission of Papua New Guinea" (2020) 55:2 The Journal of Pacific History 255.

92 Law Reform Commission of Papua New Guinea, Annual Report 1975, 4.

93 Bernard Narokobi *The Melanesian Way* (rev ed, Institute of Papua New Guinea Studies, Boroko, PNG; Institute of Pacific Studies, University of the South Pacific, Suva, Fiji, 1983).

94 Bernard Narokobi *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service, Goroka, Papua New Guinea, 1989); University of the South Pacific, Suva, Fiji. See further Alex Golub "A Complete Bibliography of Bernard Narokobi" <https://alex.golub.name/2017/03/22/a-complete-bibliography-of-bernard-narokobi/> accessed 30 April 2021.

also the concept of the Underlying Law.[95] The Underlying Law Act 2000, arguably the most radical change to the common law legal system in any Pacific country,[96] was based on Narokobi's work with the Law Reform Commission.[97]

Bernard Narokobi also lectured (and was later an Honorary Professorship in Melanesian Philosophy) at the University of Papua New Guinea. The Law Faculty was one of the foundation Faculties, and the first year of teaching began in 1967, when 17 students were registered for the five year LLB.[98] Research conducted not only by Narokobi, but by many members of the Faculty such as David Weisbrot (who would go on to become President of the Australian Law Reform Commission) and Eric Kwa (currently the Attorney-General of Papua New Guinea), set a high standard for legal research dealing with jurisprudential issues.

From 1970 until about 2006, the Faculty published the well-respected Melanesian Law Journal, which focussed on articles relating to Papua New Guinea and the South Pacific region. Perusal of the contents lists displays contributions to jurisprudence from a long list of prominent South Pacific scholars and offered an outlet for research on jurisprudence relating to Melanesian and the Pacific region.

Other researchers from UPNG, including Michael Ntumy, Jean Zorn, and Stephen Zorn, served on the editorial committee for *South Pacific Legal Systems*, referred to in the introduction to this article. Other contributors from UPNG can be found in the list of chapter authors, including Tony Deklin and John Nonggorr. Whilst descriptive in nature, this book fulfilled its stated aim of providing a major step towards a "comprehensive reference to the legal systems of the nations and territories of the South and Central Pacific". At the time it was a milestone in publication on South Pacific legal systems and an essential reference work for scholars, practitioners, and the courts.

The editorial committee included two other pioneers of South Pacific Law deserving of separate mention: Tony Angelo, whose extensive contribution to Pacific jurisprudence is discussed below and the late Guy Powles, who is quoted

95 The concept is encapsulated in the Constitution of Papua New Guinea 1975, ss 9(f), 20 and sch 2 and expanded on in the Underlying Law Act 2000.

96 See further, Jennifer Corrin "Getting down to business: developing the underlying law in Papua New Guinea" (2014) (2) Journal of Legal Pluralism and Unofficial Law 155.

97 Law Reform Commission of PNG "Declaration and Development of Underlying Law" Report No 7 1997.

98 JBK Kaburise "Access to Legal Education in Papua New Guinea" (1987) 3:3 QIT Law Journal, 163, 165.

from above.[99] Amongst his many other publications, Guy was the driving force behind two books edited in 1977 and 1988 respectively. The first of these, *Pacific Courts and Justice*,[100] was edited in collaboration with the late Ron Crocombe and Mere Pulea, both notable Pacific law scholars in their own right.[101] An updated version, *Pacific Courts and Legal Systems*, was edited with Mere Pulea.[102] These books concentrated on Pacific courts and legal institutions and those who served within them. Contributors were mainly from within the region, engaged in Pacific courts or employed in other law related fields. They provided an insider's view including recommendations for reform based on firsthand knowledge.

The other source of academic writing was the Pacific Law Unit at the University of the South Pacific. Established in 1985 and operating from a one-roomed timber building in Port Vila, the Foundation Professor was the late Don Paterson, who wrote prolifically, including a contribution to *South Pacific Legal Systems*. In the early days he concentrated mainly on filling the void with materials for students, who were usually studying as part of training for para-legal purposes. In the early 1990s USP decided to develop an LLB programme and in 1994, the School admitted its first cohort of undergraduates. Don was one of the foundation professors of the school and remained on staff actively teaching and researching until early in 2021. During that time, he wrote numerous chapters and articles and some important books, generously co-authoring with colleagues such as myself and Sue Farran.[103] *Introduction to South Pacific Law* is now in its fourth edition.[104] There is no doubt that Don's pioneering work, teasing out sources of law and the relationship between them, provided a foundation for much of the scholarship that ensued.

Other members of USP Law School who have played a part in the development of Pacific jurisprudence are too many to mention. However, the extensive

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99 For a tribute to the late Guy Powles, describing some of his work, see Jennifer Corrin, Sue Farran and Don Paterson (eds) (2016) 1 Journal of South Pacific Law (Special Issue).

100 Guy Powles, Ron Crocombe and Mere Kite (eds) *Pacific Courts and Justice* (USP and CMA, Suva, 1977).

101 The trailblazing work of Ron Crocombe includes *Land Tenure in the Pacific* (Oxford University Press, Oxford, 1971); *The South Pacific* (7th ed, 2008, Suva); University of the South Pacific. Mere Pulea's publications include *The Family, Law and Population in the Pacific* (USP, Suva, 1986).

102 Guy Powles and Mere Pulea (eds) *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988).

103 See eg Sue Farran and Don Paterson *South Pacific Property Law* (Routledge-Cavendish, 2004).

104 Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (4th ed, Intersentia, Cambridge UK, 2017).

contribution made by Sue Farran,[105] including work on human rights and on family law, and the work of Miranda Forsyth, particularly her book *A Bird that Flies with Two Wings*,[106] must be noted. Many members of the School have acted as editors of the Journal of South Pacific Law at one time or another. This online journal has exposed South Pacific research to a much broader audience and its articles are regularly cited by South Pacific courts.[107]

Another achievement of the University of the South Pacific's School of Law was the Pacific Islands Legal Information Institute (PacLII), launched in about 2000 with assistance from AustLII. PacLII collects material from twenty Pacific countries: American Samoa, the Cook Islands, Commonwealth of Northern Mariana Islands, Federated States of Micronesia, Fiji, Guam, Kiribati, Marshall Islands, Nauru, Niue, New Caledonia, Palau, Papua New Guinea, Pitcairn, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. It publishes mainly primary materials, but also includes some secondary documents. This free access site, the brainchild of the School's second Dean, the late Robert Hughes, originated as a means of providing students, spread out within twelve member countries of the University, access to primary legal materials. It has grown to be relied upon far more widely and its role in promoting a regional jurisprudence cannot be overestimated. Since its inception, this facility has allowed exponential growth of Pacific research.

Much of the discussion in this section has concentrated on Melanesia, but there is masterful scholarship concerning Micronesia and Polynesia, and also important comparative work that spans the region. Dr Tamasailau Suaalii-Sauni, for example, has written specifically on the indigenous jurisprudence of small island states.[108] Tony Angelo from the Victoria University of Wellington deserves special mention for his comparative scholarship and his leading work on Tokelau, Niue, the Cook Islands and beyond. The quality and range of his publications are formidable, with well over 100 publications, including articles, books and chapters, many of them on the law, legal systems and related matters in small Pacific Island countries. In addition to his own writing, he has also encouraged scholarship and the development of jurisprudence in the Pacific by mentoring and encouraging other scholars, both

105 For a list of Sue Farran's publications, see her staff profile on University of Newcastle Law School's web site <https://www.ncl.ac.uk/law/people/profile/suefarran.html>.

106 ANU Press, 2009.

107 See, eg *Rizwan v Government of the Republic of Vanuatu [*2019] VUCA 10; *Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd* [2021] FJHC 5, fn 12.

108 See eg "Legal Pluralism and Politics in Samoa: The Faamatai, Monotaga and the Samoa Electoral Act 1963" in Petra Butler and Caroline Morris (eds) *Small States in a Legal World* (Springer, Cham, 2017) ch 8.

young and not so young (me included!). His achievements were recognised in a dedicated issue of Victoria University of Wellington Law Review (VUWLR), in which can be found tributes to many of his other contributions, including his important role in law reform in the region, which are too extensive to recite here.[109]

In addition there is the jointly titled Comparative Law Journal of the Pacific (CLJP) and Journal de Droit Comparé du Pacifique (JDCP). The editor-in-chief is Yves-Louis Sage from the University of French Polynesia, a comparative scholar, publishing in both English and French. Founded in 1994 as the *Revue Juridique Polynesienne*,[110] this journal makes a significant contribution, extending the boundaries of Pacific jurisprudence by publishing articles on different aspects of law and the social sciences in the Pacific in both French and English.

More recently, graduates from UPNG and USP Law Schools, and other institutions, particularly in New Zealand, offering courses in Pacific law have been coming into their own. The annual, student run, Pacifika Law and Culture Conference, held since 2010 has increased the understanding of Pacific legal issues and strengthened relationships between Pacific legal scholars and emerging researchers. Since the first cohort of law students commenced at USP's law school in 1994, graduates have gone on to become academics, teaching and researching at USP and internationally.[111] Universities in Papua New Guinea and New Zealand have also produced some remarkable legal scholars. In Papua New Guinea's case this includes Sir Salamo Injia, the former Chief Justice of Papua New Guinea, who has a prolific ex curia catalogue of work.[112]

Early career academics and lawyers have published exciting research, including work drawing on indigenous research methodologies, such as talanoa.[113] Recent publications include chapters in *Legal Systems of the Pacific: Introducing Sixteen Gems*[114] and the articles in this collection. Many of these scholars have developed

109 (2008) 39 VUWLR (Special Issue) 541 et seq.

110 The journal changed its name after volume 16.

111 For example, Dr Joseph Foukona, currently an Assistant Professor in the Faculty of History at the University of Hawa'ii, whose publications can be found at <http://manoa.hawaii.edu/history/people/faculty/foukona/> accessed 25 June 2021.

112 See the 16 works listed in WorldCat Identities <http://worldcat.org/identities/lccn-n99266721/> accessed 2 June 2021.

113 See further on talanoa and indigenous and Pacific research methodologies, Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa *Law Reform in Plural Societies* (Springer, Cham, Switzerland, 2018) chap 2.

114 (Intersentia, Cambridge (UK), 2021).

new ideas, extending the boundaries of South Pacific jurisprudence,[115] foreshadowing a bright future for South Pacific law.

IV CONCLUSION

There is still much to be done in the development of jurisprudence by South Pacific courts. As yet, there is nothing that can be labelled a national jurisprudence in any country of the region. Nor is there evidence of any broader regional jurisprudence, or a sub-regional jurisprudence for Melanesia, Micronesia or Polynesia based on shared cultural values. However, as can be seen from the selection of cases discussed above, there are some clear expressions of a preference for such jurisprudence to be developed by the courts. Not only have some courts promoted customary laws, but also there have been departures from the common law rules in favour of approaches that are more resonant with local circumstances. Also, as mentioned briefly above, there is evidence of an increase in citation by Pacific courts of decisions both from their own jurisdiction and from other neighbouring courts within the region, which bodes well for the development of national and regional jurisprudence.

In the academic area scholarship has come a long way since the late Dr Guy Powles commented on the paucity of legal literature.[116] Whilst the fertile ground for research and writing is still underexplored, there is no doubt that scholars such as Guy and Professor Emeritus Don Paterson have left a lasting legacy. It is also clear that the baton has been taken up by the latest generation of South Pacific scholars, including those that have contributed to this issue.

Afterword

This article mentions only a fraction of the important scholarship that has contributed to South Pacific jurisprudence. The discussion focuses on those whose work has been relevant to my own research; to many of whom I owe a great deal. In this I include not only those who came before me, but also those who came after, for I have learnt such a great deal from my own students. To those who I have not mentioned, please accept my apologies. I may well have benefited from your work and, if not, I hope to read one of your publications soon!

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115 See for example, Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa above n 113.

116 See above n 89.