

Anthropology of Law in the Pacific

Literature Review & Annotated Bibliography

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Anthropology of Law in the Pacific Literature Review

This literature review and accompanying annotated bibliography are contributions to a project on the anthropology of law in the Pacific: **'Pacific Rules: international law, custom, postcolonial realities'**; this stage of the project was funded by the University Research Fund of Victoria University of Wellington. They were designed to support articles to be written by the project investigators: principal investigator Associate Professor Petra Butler of the School of Law on dispute resolution; associate investigator Professor Richard Boast of the School of Law on land tenure; and associate Investigator Professor Brigitte Bönisch-Brednich of the Cultural Anthropology Programme of the School of Social and Cultural Studies on custom, law, and ritual.

The project was predicated on a perceived lacuna in legal-anthropological research on the Pacific; while this study has assembled a good deal of literature from across the Pacific, 197 items in fact, it is certainly true that there is a comparative lack of material on some topics and on the regions of Micronesia and Polynesia, geographical categories which, along with Melanesia, are adopted from common usage rather than any valid characterisation of the areas concerned and their people. The subject of possible fields for future research will reappear in the final section of this review. The entries in the bibliography are of material published in English set out in order of author and date of publication. References specific to this review appear at its conclusion; other references appear in the annotated bibliographies.

The material involves both law, in some form or other, and anthropology or anthropological perspectives. The area of research, anthropology of law or legal anthropology, is one frequently regarded, in the modern sense of the latter term, as having its origin in the Pacific with **Malinowski's 1926** *Crime and Custom in Savage Society*. While there is some earlier material included mainly for historical reasons, the great bulk of the material is published after that date. While the two component categories appear clearly defined at first glance, examination of the material reveals a good deal of porosity of borders and shape-shifting in both those categories and in legal anthropology itself. The parameters of this sub-discipline or interdisciplinary field are both customarily and disciplinarily contestable and contested. In the end, some of the decisions about inclusion in the bibliography have been subjective and sometimes even spill over the limits initially adopted.

Law, for instance, seems at first to include, for this purpose, the categories of law in its conventional sense, customary law, custom, and *kastom*. Because of its relationship here with anthropology, however, it is not the entire discipline or field of law that is under review but a particular aspect of it, as will become clear in considering the anthropological element. Similarly, it is not the whole of custom or even customary law that is under review; custom embraces a much broader territory than that of law and generally does not distinguish the areas involved in the usual concept of law from the custom of religion, reciprocity, ritual, and social organisation in general. On the other hand, while *kastom* and related concepts have validity in the Melanesian countries speaking Tok Pisin, Pijin, and Bislama, elsewhere there are particular and much more unitary concepts such as the *fa'aSamoa*, *Te Rii ni Banaba*, and the *vakavanua* of Fiji. Customary law is itself a much-debated subject, as is clear from a number of the annotations.

The anthropological element of this survey falls largely within a space demarcated by ethnography, the ethnologically informed, and what was once described as ethnohistory. It also includes, however, some historical material that has become the subject of anthropological interrogation and a certain amount of judicious, and judicial, participant observation of an informal but perceptive nature. So the emphasis is not on the content of the law but on the conduct of the law, often as observed in fieldwork; in the final analysis, I have fallen back on the rather questionable notion of the culture of the law in making a final decision about inclusion.

Brief history of the anthropology of law

This very brief sketch of the history of the anthropology of law is intended to outline very broadly some of the shifts in thinking about the subject that will emerge in this review. The origins of the subject as a sub-discipline or interdisciplinary field have been traced back as far as the early-nineteenth-century writings of German historical jurist Friedrich Carl von Savigny but are more usually found among the great evolutionist and comparativist works of the second half of that century. While Swiss jurist and ethnologist Johann Jakob Bachofen is acknowledged for his 1861 *Das Mutterrecht* and Scottish lawyer and ethnologist John Ferguson McLennan for his 1865 *Primitive Marriage*, it is British jurist and historian **Henry Maine's 1861 *Ancient Law*** and US ethnologist and lawyer Lewis **Henry Morgan's 1877 *Ancient Society*** that are more generally recognised as precursors (Conley & O'Barr 1993, 42-44; Goodale & Merz 2007, 68-69; Riles 1994, 599-601). While based on unreliable data and a good deal of comparativist conjecture, those works did locate the study of law **within a broad cultural framework and concepts such as Maine's progression from social status to contractual arrangements and Morgan's** through savagery, barbarism, and civilisation remained influential into the twentieth century.

Those influences and their evolutionist underpinnings became increasingly threatened, however, by the emergence of ethnographic methods and appearance of the results of such initiatives as the Cambridge Torres Strait Expedition and the development of the Boasian school of anthropology in the USA. One outcome of the ensuing shift of particular relevance to the Pacific was the 1926 publication of Bronislaw **Malinowski's** *Crime and Custom in a Savage Society*, widely celebrated as the starting point of legal anthropology in the modern sense of the latter term. With its foundations in sustained ethnographic fieldwork and a functionalist approach to questions of social control, it replaced the search for traces of western-style institutions with the idea that legal processes, and complex ones at that, are present in all cultures and do not depend upon the existence of a state. Indeed, it has prompted the **authors of one historical survey to observe: 'The breadth of the** generalization may offend some, but we believe that most legal anthropology through about 1980 can be fairly characterized as the pursuit of **Malinowski's agenda'** (Conley & O'Barr 1993, 46-47).

The publication in 1941 of anthropologist E Adamson Hoebel's and lawyer Karl Llewellyn's *The Cheyenne Way*, described by Jean G Zorn as **'the first serious study, since Malinowski's Trobriand ethnographies,** of the legal processes of a non-state people' (1990b), introduced to **functionalism the legal realist method of examination of 'trouble cases'** in the context of cultures and societies as a whole. Beginning in the 1950s, contention developed between anthropologists Max Gluckman and Paul Bohannan, and among many other legal anthropologists, over the categories to be employed in discussion of legal systems, Gluckman taking the etic view that those from western jurisprudence are appropriate and Bohannan the emic one that only Indigenous categories **are valid. In the same period, Leopold Pospisil (1958a), working in today's** Indonesian province of Papua, was among those beginning to establish

the notion of legal pluralism, a product of the declining years of a colonialism with which many legal anthropologists were linked, together with the concept of customary law.

The 1960s and 1970s saw challenges to positivist approaches and a shift of focus from the elaboration of rules and examination of cases to the study of the processes by which disputes are resolved, accompanied by an increasing concentration on legal pluralism and the relationship between custom and the state. At the same time, interest in individual agency emerged from previous assumptions of conformity with social and cultural norms. Beginning in the 1980s, anthropology in general underwent what has been called a crisis of representation and ethnographic practices and their writing up were subjected to comprehensive critique and review; this crisis of identity is not particularly evident in the output of Pacific legal anthropology. Against this background emerged an increasing interest in such issues as international law, human rights, and, particularly, the rights of women, and the protection of cultural heritage and traditional knowledge.

Reviewing changes over the previous decades and into the 1990s, Sally **Falk Moore describes legal anthropology as increasingly 'saturated with political messages' and sees as its 'newest concern' at the beginning of the twenty-first century as 'a very much wider vision of the political milieu in which law is imbricated'** (2001, 109-110). In the same article, **she identifies 'three scholarly explanations of law' over the previous 50 years: 'as culture, as domination, as problem-solving ... frequently mixed together'** (2001, 97). Zorn has taken a different approach to the development of legal anthropology since the 1920s, setting out four distinct shifts: from the 1920s to the 1940s, anthropologists adopted and lawyers rejected customary law; from the 1940s to the 1970s, anthropologists and lawyers combined to create customary law, while

from 1960 to 1975 lawyers pursued competing responses to the concept; and from 1975 onwards, both anthropologists and lawyers espoused legal pluralism with the former focusing on 'nonstate sources of law' and lawyers on 'the attempts of state law to maintain hegemony' (1990b, 275-294, 292).

Literature

This literature review is arranged under geographical headings and within them in order of date of publication and author. The order is Pacific; Melanesia; Papua New Guinea in general and under headings of Port Moresby, Highlands, Sepik, Islands, and Madang; Papua; Timor Leste; Solomon Islands; Vanuatu; Fiji; Kiribati and Banaba; Polynesia; Tonga; **Samoa; Tokelau; Rotuma; Rarotonga in the Cook Islands; Hawai'i; and the French Collectivities.**

Pacific

While often referring to the Pacific in general, these writings from the late 1980s almost to the present are almost entirely confined to the consideration of the countries of the South Pacific. Almost all are concerned with broad questions of the relationships among, variously, custom and *kastom*, customary law, introduced and colonial law, common law, statutory law, constitutional law, and, to a lesser degree, international and human rights law and, hence, with the nature of legal pluralism. Major themes are lack of progress in developing underlying law, the nature and formation of the common law, resistance of courts and educational systems to the recognition of custom and customary law, customary law as a product of colonisation, the influence of repugnancy, the persistence of legal formalism, and the pleading and proving of custom and customary law as law or fact. Of particular interest are Aleck **1991's** argument that custom should be recognised as the legitimate basis of common law; Findlay 1997 on the modification of legal

formalism by custom; Zorn & Corrin Care 2002a and Corrin 2011 on legal pluralism and customary law as law or fact; Corrin Care 2002b on constitutional weaknesses in promoting customary law and the distinction between custom and customary law; Corrin Care 2006 on the resilience of customary law and the argument that it is more than just a colonial creation; and Forsyth 2013 on the need for a pluralistic approach to protecting traditional knowledge.

Melanesia

While much of this material features comparative studies across Papua New Guinea, Solomon Islands, and Vanuatu, there is also a concern with the possibility of development of a Melanesian jurisprudence, particularly in Narokobi 1989a and 1989b and Forsyth 2015. There is much discussion of the nature and components of customary law and, in Zorn & Corrin Care 2002b, a return in a specifically Melanesian context to their 2002a consideration of the pleading and proving of custom with their advocacy of the treatment of custom as both fact and law. Later material moves on to issues of state and customary law in relation to human, and **particularly women's, rights, conflict across the region**, implications of the changing nature of custom, and new practices emerging in lower-level courts.

Papua New Guinea

The preponderance of material on Papua New Guinea reflects the preoccupations of anthropology in general while following those of legal anthropology in particular. Throughout there is a concentration on legal pluralism, the nature of customary law, problems in the development of underlying law, and the practices of courts, particularly those at the local level, and resistance by a positivist judiciary to the acceptance of customary law. Across much of the material there is continuing discussion of the relationship between law and anthropology. The

contexts of colonialism and decolonisation underlie much of the earliest material, here and in the studies of particular regions of the country, and a case orientation on disputes, disputation, and the resolution of disputes remain the principal focus of analysis through into the 1990s. Scaglione 1983 provides a particularly useful survey of the nature and status of customary law in districts across the whole country at the time of writing and Aleck 1992 a literature review of all material on the village-court system. Goddard 1992 is a short country-wide survey of village courts that is followed up in a more sustained and detailed way in items in the section on Port Moresby.

The later period sees much more intensive and sustained examination of the practices of the courts and the inter-relationships and interactions of culture, custom, customary law, and state law, particularly in the substantial bodies of work by Jean G Zorn and Melissa Demian, and an increasing consideration of the effects of globalisation, particularly on land issues. Filer 2006 is a reconceptualisation, somewhat in the spirit of Paul Bohannan's **emic approach and drawing on Tok Pisin terms, of the** ideologies of both law and custom and particularly of the ideology of land ownership in Papua New Guinea. Wesch 2007 provides a rare example of self-reflexivity in this field with its **multi-layered account of the author's** experience of a witch hunt. Legal perspectives on witchcraft and sorcery and customary defences appear in Forsyth 2015 and Stewart 2015. Demian 2015b distinguishes between *kastom* as placed and custom as placeless, and employs a cartographic metaphor and a mix of *kastom*, custom, and law to explore the concept of legal pluralism.

Papua New Guinea: Port Moresby

This is principally the record of Michael Goddard's sustained and intensive fieldwork studies of three village courts in the suburbs and on the outskirts of Port Moresby preceded by Zorn 1990a which draws on

the procedures of similar courts to support a general argument and supplemented by personal experience of a mediator in a similar community in Ivoro 2010. Challenging the binarism of legal pluralism and even the concept of custom in Goddard 1996, the author goes on to explore the fluidity and dynamism of the courts in Goddard 1998, their location between Indigenous procedures and district courts in Goddard 2000, and the access to justice they offer to women in Goddard 2005, and he draws together and supplements that material in Goddard 2009. He goes on to examine the role of such a court in restorative justice in Goddard 2010b and in land tenure and disputes in Goddard 2011.

Papua New Guinea: Highlands

Passing from a concern with stateless social order and control in Glasse 1959 to a concentration on disputes and cases in Mount Hagen and their settlement in the context of Australian colonisation in the 1970s works of the Stratherns and others, the focus of anthropological attention in the Highlands turns to processes in both customary forum and court and the **role of the legal system in the 'breakdown in law and order' in the 1980s** and 1990s. Gordon & Meggitt 1985 and the critique of it in Zorn 1990b provide a stimulating picture of the respective roles of lawyers and anthropologists within legal anthropology and the history of their relationships, drawing on Pacific-related examples to make the respective cases. Marilyn Strathern 1985 challenges then-accepted concepts of dispute settlement, emphasising the political nature of consequent wealth exchanges. Later, in Marilyn Strathern 2004, the author proposes alternatives to universalism and relativism in addressing questions of human rights.

Papua New Guinea: Sepik

Social control and disputes are successive concerns of the two 1970s pieces. Luluaki 1990 is particularly interesting for going beyond the usual

discussions of conflicts between customary and introduced law to consider conflicts between and among different systems of customary law. Scaglione 1990 is the product of a 10-year study of legal pluralism in a village court and emphasises the importance of long-term studies to detect incremental change and local agency. Lipset 2004 investigates the playful and rhetorical use of a mock-legal framework to suggest outcomes of legal pluralism beyond that of simple conflict resolution.

Papua New Guinea: Islands

Beyond the Malinowski classic and the characteristic themes and concentration on cases of disputes of the 1970s, Counts & Counts 1994 applies that focus to cases taken and won by women. Deklin 1995 draws attention to the role of the failure fully to develop a customary law system and its confinement to situations of open conflict in the Bougainville crisis; Saovana-Spriggs 2010 brings a personal perspective to successful restorative-justice processes in that crisis; and Larcom 2015 points to the revival of customary law and chiefly authority in the absence of state institutions during that crisis as an indicator of continuing, underlying primacy of customary law.

Papua New Guinea: Madang

Leach 2011 is a trenchant critique of the impact of the introduction of extractive industry on the customary land-tenure system, exposing its foundation in western property law as a weakness allowing the replacement of customary values by those of individualistic property ownership.

Papua

Beyond their historical importance and place in the development of legal **anthropology, Pospisil's pioneering pluralism and Koch's studies of**

conflict and reconciliation remain somewhat stranded in their time in the absence of continuing work in what is now a province of Indonesia.

Timor Leste

Fitzpatrick 2008 is an assessment of the successes and limitations of the mediation model introduced by the UN in 2000 to deal with conflicts over customary land.

Solomon Islands

Hogbin 1944 and Keesing & Corris 1980 together present a vivid picture of colonial law in action, if from somewhat different points of view. Issues of legal pluralism and its implementation underlie all the more recent pieces. Brown 1986 and 1997 examine case-based clashes between customary and outside law in relation to killing and the welfare principle; Brown 2005 suggests that success in creating a local jurisprudence will depend on the advocacy of customary law as a primary source by judges and lawyers and their balancing of its application with that of imported law where appropriate. Sharon Tiffany 1983, Goddard 2010a, Evans et al 2011, and Allen et al 2013 all deal, in a variety of ways, with courts and their handling of custom and customary law: Tiffany 1983 emphasises their difficulties in dealing with land disputes; Goddard 2010a (a valuable literature review) and Evans et al 2010 examine their hybridity at the lower level; and Allen et al 2013 locates them within the wider framework of community and *kastom* and offers a critique of their effectiveness in relation to customary systems. Akin 1999 and Arkwright 2010 address the changing nature of compensation claims in the face of a globalised economy, monetarisation, governmental insecurity, and questioning of the role of the state.

Jennifer Corrin's substantial body of work takes a more theoretical

approach to conflicts within legal pluralism: Corrin Care 2001 locates

customary law as subordinate to Solomons constitutional and legislative provisions but superior to UK-derived common law, requiring a balancing act on the part of the courts; Corrin Care & Zorn 2001 examines the difficulties of legislative provision for the incorporation of customary law when custom itself is so variable, contrasts Papua New Guinea and Solomons approaches to the question and, incidentally, discusses the distinction between custom and customary law; Corrin 2008b deals with common-law influences on customary concepts of land tenure in a comparative study of Samoan and Solomon Islands provisions; and Corrin 2009 delivers a persuasive argument for a less binary approach to legal pluralism and a more complex and blended one to the relationship between customary and state law.

Monson 2010 studies the changes to land tenure resulting from urbanisation and economic changes, and their negative effects on women landowners, and advocates a strengthening of state legal frameworks to counter the ways in which the intersection of customary and legislative systems has enabled domination by a largely male minority. Guo 2011 investigates the ways in which the legal apparatus is incorporated in **people's lives and, particularly,** in land disputes; tracing the transformation of law from rules to discourse, the author proposes the **term 'legalscape' to capture the entanglement of law and culture.** Forrest and Corrin 2013 is a rare example of commercial interests in conflict with cultural claims and discusses the problematic nature of legal pluralism in the protection of cultural heritage.

Vanuatu

Again the operation of legal pluralism and the role of courts, especially local ones, in adopting and adapting it are central concerns and **considerably intertwined.** **William Rodman's work, pre-Independence** and across the period of its achievement, looks at the introduction of local

legal figures called assessors and the associated reassignment and renegotiation of a variety of roles: Rodman 1977 and 1982 outline the processes involved in securing status for such middlemen in systems other than the legal one; Rodman 1985 examines the wholesale legal changes consequent upon Independence, including a complex legal system developed entirely on local initiative, leading the author to question why so little work has been done on such innovations in innovative Melanesian societies and suggesting the cause may be the lack of long-term fieldwork, particularly on the part of centralist scholars; Rodman & Rodman 1978 investigates the reasons for resort to courts rather than family discussion in domestic disputes and concludes that the court, in a time of changing social norms, provides a public forum for the refinement of relationships and the reconciliation of disputes

Weisbrot 1989 surveys the complex legal pluralism resulting from dual colonisation; assesses the results of reversion to customary law in land tenure, and concludes that custom and land have become synonymous and that the internal tensions of the newly independent country will eventually result in a progressive western legalism invoking culture as a symbol of national unity and legitimacy. Larcom 1990 explores the **production of cultural identity in local courts in which 'kastom' is being transformed into anthropological 'culture'**. Jolly 1992 is a comparative study of superficially similar concepts of custom in Vanuatu and Fiji, the actual differences between the two resulting in differences in the codification of land tenure in the two countries. Brown 1997 examines case-based clashes between customary and outside law in relation to the application of the welfare principle; Brown 2005 suggests that success in creating a local jurisprudence will depend on the advocacy of customary law as a primary source by judges and lawyers and their balancing of its application with that of imported law where appropriate.

Miranda Forsyth's three studies address reasons for the lack of progress in the two-way process of integration of customary and official law. Forsyth 2004 critiques existing explanations for the lack of progress, identifies the absence of empirical research as a root cause, and sets out a proposal for on-the-ground research. Forsyth 2006 focuses on sorcery to examine such issues and concludes that the solution, rather than a simple two-way transfer of norms, is the introduction of minor legislative but major mind-set changes in the state system. Forsyth 2009 is based on the fieldwork project proposed in Forsyth 2004 and argues that reform depends on taking into account all legal orders that deal with conflict and recognition, not least in the interests of the strength of the state system, and that recognition of the fundamental importance of *kastom* to the process, and proposes a new approach to legal pluralism based thereon.

Benedicta 2008 seeks to destabilise and expand previous discussions of the relationship between customary and state law and to propose an alternative to both positivism and legal pluralism; noting an elision of **'custom' and 'kastom', the differences between which are outlined, the** author argues that custom creates frustrations in island courts because of the difficulty of applying *kastom*. Sheehy & Maogoto 2008 reviews the law in action during the 2001 constitutional crisis, the debate over legal pluralism, and continuing social changes and tensions to conclude that **the dominance of state law over customary holds 'certain attractions'**. In response to the question whether a return to customary law would promote the interests of women or disempower them, Bothmann 2010, while accepting the possibility of deconstructing custom without **undermining it, identifies five levels of the 'masculinist rhetoric of nostalgia' that threaten the autonomy of women.**

On the question of land tenure, Regenvanu 2008 identifies recognition of customary rights as fundamental to much-needed land reform, while Farran 2010 surveys changes in the narrativisation employed in recorded cases of land disputes in local-level courts to ask whether such changes signal survival or demise for customary land rights. Rio 2010, exploring the development of sorcery law, identifies problems involved in the encompassment of customary law by state law and suggests that both custom and sorcery are transformed thereby so that policing and sorcery become alternative vehicles for discipline and violence. Serrano & Stefanova 2011 considers the possibilities for international or regional law offering support for both cultural-heritage preservation and sustainable economic development in such a country as Vanuatu; the authors express optimism that it can be achieved in the face of land problems, lack of transparency, misinformation, and legal pluralism.

In the most recent studies of the operations of village and island courts, Evans et al 2010 examines the nature of the hybridity of village courts and its strengths and limitations; and Goddard & Otto 2013 concludes from a survey of island courts in five areas that their success will depend on better resourcing and support, more sensitivity to *kastom*, and overcoming the dichotomy between the win-lose nature of court outcomes and the flexibility of customary approaches.

Fiji

After a comparative flurry of legal-anthropological work in Fiji in the 1970s it only resumed in the early twenty-first century. In the 1970s, major interests were dispute resolution and forms of ritual apology, acceptance, and reconciliation. In the case of the former, Arno 1974 is **interesting for the author's rejection of a focus on 'trouble cases' and a turn to 'instances of conflict'**. Rituals of apology in the forms of *bulubulu*, *i soro*, and *matanigasau*, their performance, and their role in conflict

management appear in Toro 1973, Arno 1974, Hickson 1975, Arno 1976, **and Hickson's contribution to Koch et al 1977**, and reappear in Cretton 2005 and a section of Merry 2006. The last presents a variety of attitudes to and perspectives on *bulubulu* in the context of rape and sensitively conveys the position of women activists as accepting the tradition but rejecting its replacement of legal processes and suggests that local communities may have visions of social justice founded not in rights but in sharing, reconciliation, and responsibility.

Merry & Brenneis 2003 presents a wide variety of disciplines and a variety of **approaches to the history and anthropology of Fiji and Hawai'i**; of interest here are the chapters by Collier on transformations in chiefly rule and Kaplan on the influence of colonial legal entities. Crosetto 2005 distinguishes between colonial tradition and Indigenous custom to address the entanglement of law and custom in land-law reform. Similarly, Abramson 2009 addresses the interconnections of jural and ritual spheres in the codification of land tenure. Howard 2011 appears **here only because of Rotuma's** colonial relationship with Fiji and is covered in the relevant section.

Kiribati & Banaba

Lundsgaarde 1968a and 1974 trace transformations in traditional law under the influence of British colonisation some time before and on the eve of Independence, concluding in the former that land disputation is the result of such transformations and, in the latter curiously identifying a Gilbertese inability to distinguish between law, morality, custom, and ideology. Lundsgaarde 1968b advances four hypotheses as to the sources of personal and property disputes and litigation. Thomas 2001 investigates traditional, colonial, and post-Independence systems of marine tenure and suggests a process of reform. Against the background of Banaban exile to Rabi Island in Fiji, Sigrah & King 2004 outlines the

traditional system of law governing land ownership, genealogy, and social roles and argues for its preservation and implementation within the system of introduced law.

Polynesia

Hogbin 1934 takes a Malinowskian approach to questions of the foundations of social order in Polynesia, locating the legal system within a complex of social organisation, belief, and ceremony and the foundation of social order not in prohibitions but in cultural forms.

Tonga

Marcus 1977a and 1977b examine the litigation of succession disputes by members of the Tongan nobility, the effects of three levels of kin relationship on the conduct of such litigation, and the consequences for the organisation of chiefly groups. Powles 1979 considers the relationships between the operations of introduced institutions governing the maintenance of order, dispute settlement, and land-holding and the traditional authority of the nobility and the ways in which the institutions have adapted to that authority. Van der Grijp 1993 investigates a land-**inheritance case on the island of Vava'u to illuminate the socio-economic** consequences of the manner in which modes of production and modes of thinking are combined.

Samoa

Krämer 1995 gives a late-nineteenth-century account of the role of the family council and *fono*, the village council of chiefs, in the maintenance of order and initiates a long line of accounts and analyses of the *ifoga* or ceremony of apology, acceptance, and reconciliation that resumes in Mead 1969, Shore 1982, **Filoiali'i & Knowles 1983, and MacPherson & MacPherson 2005**. Mead 1969 also refers to the judicial place of the *fono*, as do Powles 1973 and Tiffany 1980, which locates it between the family

and the court; Corrin 2008a considers its role in relation to that of the court in conflicts between customary law and human rights. The processes and procedure of the Land and Titles Court in succession and land issues are examined in Marsack 1961, Powles 1973, Sharon Tiffany 1974, Corrin 2008a and 2008c, and Sapolu et al 2012, and Walter Tiffany 1975 discusses succession issues in the American Samoa High Court. Corrin 2008b deals with common-law influences on customary concepts of land tenure in a comparative study of Samoan and Solomon Islands provisions. Shore 1976 relates incest prohibition and punishment in the context of Samoan ideology and social organisation and Shankman 2001 traces the colonial history of attitudes to interethnic unions and their regulation.

Powles 1979 analyses the relationships between the operations of introduced institutions governing the maintenance of order, dispute settlement, and land-holding and traditional chiefly authority and the ways in which the institutions have adapted to that authority. More philosophical approaches to Samoan law are presented in Mead 1961, which considers the possible contribution of anthropology to the study of **natural law**, Efi 2009 and the response in Lealofi 2009, and Va'a 2009.

Tokelau

Angelo 1987 contains some discussion of the relationship between customary and official criminal law, finding them in parallel rather than in conflict in so far as each recognises a crime but defines it differently. **Angelo, Kirifi, & Toy 1989 records elders' perceptions of earlier law**-like rules and institutions and the interface between custom and law.

Rotuma

Howard 2011 reviews historical land-tenure systems in the context of a rebellion against colonially imposed law, finding that most land disputes had been resolved satisfactorily by customary methods.

Rarotonga, Cook Islands

All of this material relates to pre-colonial and colonial land tenure and the basis and operations of the Land Court. Gilson 1955 critiques the ethnological understanding of pre-European land tenure upon which New Zealand colonial administrator based his land laws. Crocombe 1964 attempts a comprehensive reconstruction of the pre-European land system based on a number of sources, including the records of the New Zealand-derived Native Land and Titles Court. Baltaxe 1975 and Campbell 2002, both critical of **the rigidity of Crocombe's account and findings**, retrace the same ground, as does Pascht 2011 which is more accepting of Crocombe but, contrary to Crocombe, finds customary land rights continue to play an important role alongside the provisions introduced from the New Zealand system in an interplay of flexibility and restriction.

Hawai'i

Both Matsuda 1989 and Merry 2000 trace the process by which introduced US law supplanted customary law and address the consequent negative effects on Hawaiian culture, Merry drawing on district-court **records in Hilo on the island of Hawai'i**. **Merry & Brenneis 2003 presents a wide variety of disciplines and a variety of approaches to the history and anthropology of Fiji and Hawai'i; of interest here are the chapters by Silva on the effects of the prohibition of hula performance, Merry on law and identity in colonial Hawai'i, and Osorio on the deployment of two distinct legal strategies in the quest for Hawaiian self-government.** Weiner 2006 concludes that customary law is an artefact of colonial and state

administration and adds some observations on the relationship between anthropological and legal perspectives on culture.

French Collectivities

Deckker & Faberon 2001 is a multi-authored, multi-disciplinary investigation of the place of Indigenous custom in the development of law in the now-renamed French Overseas Territories of New Caledonia, French Polynesia, and Wallis and Futuna.

Prospects for future investigations

In considering the prospects for future investigations in the anthropology of law in the Pacific it is worth considering the environment in which it will take place before focusing more closely on particular areas. While there is now a reasonable picture of what has already been published, it is possible that there are other projects being carried out in the countries of the region as well as other centres. Indeed, a survey of exactly that may be a valuable contribution to the development of the field. Certainly, in preparing for future phases of this project, it would be highly desirable at the earliest possible stages of their formulation to engage with any people who may be considering similar work in the countries of the Pacific rather than adding on a component of consultation at a later stage. Similarly, it could be beneficial for the project to consider the place of and possibilities for the anthropology of law in the complex of disciplines and fields that may be investigating law in the region: other legal studies, history, sociology, Pacific studies, human geography, and others.

Looking over the material covered in this review, the overall pattern is quite clear: Melanesia is, for the most part, well-researched; Micronesia appears to be virtually untouched for reasons that would require further

research to determine; and, while there is some material from liminal Fiji and Samoa, it is far from comprehensive and much of Polynesia is yet to be studied. So Melanesia is currently well-placed, with very substantial bodies of work in a variety of topics by Jennifer Corrin at the University of Queensland, Melissa Demian and Miranda Forsyth at State, Society and Governance in Melanesia at the Australian National University, Michael Goddard as an associate at Macquarie University, and Jean Zorn continuing work as professor emerita at the law school at Florida International University.

What are missing here are any significant studies in the anthropology of commercial law and, in particular, the interface between culture and contract in a courtroom setting. One reason for that may be the considerable emphasis in the anthropological literature on social order and, within that, criminality. Another may be the very nature of **'traditional' economic relationships and in the preoccupations of** anthropologists themselves. In short, the massive and complex systems of reciprocity that still exist to varying degrees in the Pacific do so in a parallel but very different register from systems of contract and it may well be that anthropologists have, to date, been consistently attracted to the former. That does not explain the absence of attention by legal scholars, though that may be the result of a seeming lack of legal-anthropological interest in the higher courts where specifically contractual disputes would be conducted. On the other hand, there also appears to be a paucity of reports of such cases; a colleague was able to trace only three reported cases involving custom and contract in the entire Pacific.¹ Despite that, dispute resolution in matters commercial across the region must be a growing field of study and strongly invites serious attention and further investigation.

¹ I am grateful to Sophia Edwards, PhD candidate in the Cultural Anthropology Programme at Victoria University of Wellington, for this information and notes of the cases.

What the Melanesian work does offer is an example that could be adapted to work in other regions. While institutions such as land and titles courts in Tonga and Samoa have received some consideration, there is an almost complete absence in Polynesia of the ethnography of courts and other customary judicial bodies such as village *fono* in Samoa. That such fieldwork is possible and can be successful is confirmed by projects such as **Alessandro Duranti's sociolinguistic study of the *fono*** at Falefa (1981). In matters of land and land tenure, while there is a certain amount of historical/ethnological material on pre-European and colonial systems, there is very little, apart from the related question of title succession, in the way of contemporary observation of the practices and processes of land courts, the role of custom in those proceedings, and the development of customary law in disputes and decisions over land. One avenue for future work would be a comparative study of land courts across Polynesia or, more ambitiously, across the whole region. Certainly, in relation to Polynesia, the history of colonisation would suggest that there is also room for the legal-anthropological study of the influence of **New Zealand's Native Land Court and its successors and the Waitangi Tribunal** on the conduct of customary and other land-court processes.

As already suggested, customary bodies in Polynesia such as the Samoan *fono*, councils of village chiefs and elders in Fiji, and the island commissions in Tokelau offer fertile ground for the study of ritual as, for that matter, do the various levels of state courts throughout the region. While more public procedures such as the *ifoga* and *i soro* have, for obvious reasons, attracted the attention of legal anthropologists, it would seem that the perhaps somewhat more hermetic nature of the processes of the *fono* and like institutions as judicial bodies has inhibited investigation of their obvious rituals. Conversely, it may be the seeming familiarity of the variety of state courts has blunted interest in their

ritualistic aspects. In either case, the Melanesian studies of customary fora and state bodies such as village and island courts offer an example, if not a model, for such investigation in the future.

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4 January 2016

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<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1787&context=facpub>, accessed 26 November 2015.

Anthropology of Law in the Pacific Annotated Bibliography

Abramson, Allen. 2009. The Life of the Land: Suturing the Jural and the Ritual in Fiji, Western Pacific. In *Law and Anthropology: Current Legal Issues 2008*, edited by Michael Freeman and David Napier, 269-291. Oxford: Oxford University Press.

Setting the tone of this chapter with a cameo of the role of *yaqona* (kava) in the inter-relationship between ritual and officialdom in social control **in Fiji, Abramson explores this 'partially unobserved, partly mediated dualism'** (270) by mapping the codification of Native land tenure in early colonial times, detailing its rich, underlying, uncodified constitution of ritualised land and house relations, and identifying the structures that **'sutured' these contradictory domains. He concludes that the interconnections of the jural and ritual spheres were fashioned from below by an Indigenous framework and warns that the suturing would be in danger of rupturing, with possibly explosive consequences for existing harmonious relations, should either Indigenous or outside interests succeed in superimposing property relations beyond 'this historic accommodation'** (290).

Akin, David. 1999. Compensation and the Melanesian State: Why the Kwaio Keep Claiming. *The Contemporary Pacific* 11 (1): 35-67.

Akin argues that, as Melanesian countries enter the new millennium, local communities are challenging their status with regard to the state and increasingly framing their relationships with it in the context of Indigenous cultural models and a presumption of social equivalence and a broadening of compensation claims. This article traces the history of ideas about compensation held by Kwaio Malaitans in the Solomon Islands and, in particular, explores the series of claims made by them since Independence resulting from crimes committed by a 1927 punitive expedition in response to the assassination of a district officer and his party (see Keesing and Corris 1980). Akin employs ethnographic, historical, and political analysis to investigate the role of *kastom* in the Kwaio pursuit of this particular compensation claim on the Solomon Islands Government. He then draws on this background to explore claims over more recent incidents, including the 1989 and 1996 demonstrations and looting, and the place of *kastom* in Kwaio anti-government ideology.

Aleck, Jonathan. 1991. Beyond Recognition: Contemporary Jurisprudence in the Pacific Islands and the Common Law Tradition.

QUT Law Review 7: 137-143,
<https://lr.law.qut.edu.au/article/view/347>, accessed 8 May 2015.

Aleck's purpose here is to promote understanding of the seemingly intractable issues involved in the relationship between law and custom in the Pacific. He notes that, while most of the countries in some form legally recognise custom or customary practices, this is circumscribed by certain qualifications: it must not be contrary to or inconsistent with the **law, must conform to the latter's rules and principles, and must not be** repugnant to justice, equity, good conscience, and the principles of humanity. In addition, he observes that, while it was intended that initial constitutional recognition of custom would be interim to its integration into the overall system, such commitment has waned since Independence. He attributes this to wrong-headed anthropological assumptions which tend to bolster politicised arguments with organic or ethnological ones based on the idea that custom and law are inherently incompatible. On the contrary, except where applying to minorities, Aleck **argues that rather than recognition, what is required is that custom, 'the fundamental jural values of the community', be the legitimate basis of the common law and that the common law tradition is best regarded as 'a system of customary law' (143).**

Aleck, Jonathan. 1992. The Village Court System of Papua New Guinea. *Research in Melanesia* 16: 101-128.

This article is a literature review of most of the material available in 1992 on the Papua New Guinean village-court system established in 1974 and coming into active operation in early 1975. It includes a variety of approaches including the anthropological. Aleck notes that the literature **contains 'a myriad of diverse perspectives ... which supplement earlier prognostications with a wide range of detailed descriptions of actual court performance and problems of administration' (101). The material is** grouped under five classificatory headings: general historical materials, historical materials specifically related to Papua New Guinea, policy-oriented literature and the evolution of the village courts, salient issues and recurrent problems, and general comments. In conclusion he **observes that the material surveyed unequivocally confirms 'that the village court system in Papua New Guinea is working' (123).**

Aleck, Jonathan. 1993. Mismeasuring the Law: Some Misconceptions Concerning the Nature of Law and Custom in Papua New Guinea Today. *TaimLine: A Journal of Contemporary Melanesian Studies* 1(1): 93-109.

Picking up some of the themes from his 1992 article, Aleck sets out a range of views, legal and anthropological, on the relationship between

the two disciplines, and sets out to establish something more productive **than the existing 'tribal warfare' between them (Zorn 1990b, 271), and** reconsider the dichotomous relationships between traditional and modern, law and custom, state and stateless, and lawyer and social anthropologist. Setting out the elements of those bifurcations, he surveys the political and organic formulations of the relationship; the origins and nature of organic misconceptions of the law, including conventional **representations of both Melanesian custom and 'Western' law; and law and custom as possibly anthropomorphic constructs.** Noting the beneficial effects of some recent reconsiderations by both legal ethnographers and academic lawyers in response to postmodern critique, as well as those by Papua New Guineans themselves, he questions the **'mismeasuring' and 'misconception' that continue to represent the common law as a 'monolithic, rule-bound, Anglo-centric formalism'** (106). He provides examples of the ways in which the assumptions underlying that representation have been challenged, including theoretical and practical developments in the common law tradition. Returning to the variety of anthropological and legal views of the **relationships, Aleck concludes that 'the dynamic nature of law and custom' and a constructive integration of the two can only be achieved in the light of 'the complementary insights of jurisprudential and ethnographic understanding' (107).**

Aleck, Jonathan and Jackson Rannells (eds). 1995. *Custom at the Crossroads*. Port Moresby: University of Papua New Guinea.

This volume comprises an editorial introduction and individual papers presented by lawyers, judges, and legal academics at the 1992 Papua **New Guinea Annual Law Conference on the development of 'a genuinely autochthonous Papua New Guinean jurisprudence' (4). The 15 papers are** grouped under four conference themes covering the role of customary law in the legal system, custom and the courts, traditional rights and customary law, and some comparative considerations. While the contributions concentrate more heavily on the content than the conduct of the law, some draw to a degree on ethnological sources and observation of legal processes and applications. One paper appears here in a separate entry as Deklin 1995.

Allardice, Marion. 1984. Custom and Law in Malaita, *New Zealand Law Journal*, August 1984: 283-84,
<http://library.victoria.ac.nz/databases/nzlawjournal/Pubs/1984/1984-08Aug-257.pdf> accessed 8 May 2015.

In a slightly playful short piece, including a reference to 'dusky' girls in the context of brideprice, Allardice reports that, in 1981, 'Are 'Are chiefs in Malaita in the Solomon Islands published a book, *Are Are Customary*

Law, containing 112 specific offences against their custom. Briefly reviewing the place of customary law in the legal system, related aspects of land law, inheritance, proof of title, brideprice, marriage, and divorce, the conduct and authority over children, and settlement by **compensation, she concludes that the chiefs' book will need to be constantly updated and 'that custom continues to play its lively role in the Solomon Islands. So, stranger, beware!'** (284).

Allen, Matthew, Sinclair Dinnen, Daniel Evans, and Rebecca Monson. 2013. *Justice Delivered Locally: Systems, Challenges, and Innovations in Solomon Islands*, World Bank J4P Research Report, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/09/27/000356161_20130927130401/Rendered/PDF/812990WP0DL0Se0Box0379833B00PUBLIC0.pdf, accessed 7 May 2015.

This 92-page report by four Australian academics with a variety of qualifications in anthropology, geography, law, and sociology, all specialists in justice and dispute resolution, draws on a range of sources, **including a number of anthropologists, as well as the authors' own** extensive fieldwork. Their key findings comprehensively supported, is that four main types of disputation were found: social-order problems; development and land-related disputes; problems arising from NGO, donor, and government projects; and marital disputes and domestic violence. They also find that, though the *kastom* system is fragile in many places, where it exists and functions it is the most commonly used form of dispute settlement though ineffective in dealing with substance abuse **and land disputes; that its fragility is largely due to chiefs and leaders'** involvement in power struggles; that no institutional systems were capable of dealing with logging disputation; that citizens simultaneously express a preference for non-state systems and a desire for better responses from the state; that local-level policing and court services have been undermined by cost-cutting centralisation; and that contemporary governance innovations derive in part from the enduring legacy of colonial experience and institutions.

Angelo, A H. 1987. The Indigenous People of Tokelau and the Legal System. *Law and Anthropology: Internationales Jahrbuch für Rechtsanthropologie*, Vol. 2, 347-358. Vienna: VWGÖ-Verlag.

Mostly a history and description of the political and legal systems in Tokelau, the article does briefly discuss the relationship between customary and official criminal law. Angelo describes the two as not so much in conflict as in parallel where the two systems know the same crime but define it differently. There is some comment on the settlement of land disputes and the lack of legislative recognition of local methods of dispute resolution.

Angelo, Tony. 2010. Rule of Law – Role of Law in the South Pacific. *Governance and Self-reliance in Pacific Island Societies: Comparative Studies, Revue Juridique Polynésienne* (Hors série) 10: 63-89.

In this article, Angelo engages in some discussion of custom and its characteristics in the Pacific, noting, in particular, that it differs from law in form, structure, and purpose and supports that argument with a table setting out physical conditions, social conditions, social regulation, and the law. He suggests that the law in Pacific Island countries could be strengthened by engaging in its vernacularising (as in the creation of the law of England) and engaging with custom while at the same time **'extending English language education and inculcating an understanding of the nature of the law and its processes'** (88).

Angelo, A H, Hosea Kirifi, and Andie Fong Toy. 1989. Law and Tokelau. *Pacific Studies* 12(3): 29-52, <https://ojs.lib.byu.edu/spc/index.php/PacificStudies/article/view/9563/9212>, accessed 1 June 2015.

The authors seek to place on record elders' pre-1984 perceptions of 'lawlike' rules and institutions and to summarise the reality of social ordering at that time. Their concern is with 'the interface between custom and law at a key period' (30). They identify three main forms of custom in the villages of the three atolls: written rules, unwritten rules, and the response of elders to situations not covered by either. Summarising material presented at the first law meeting held in Tokelau under the auspices of the Tokelau Law Project, they present an overview of the 'limited but increasing' role of law and suggest that custom largely remains outside its purview and provides 'a viable system of social order' at that time (46-47). The article includes a useful history of colonial, dependency, and New Zealand law in Tokelau and the interplay of custom and external law in that history.

Arkwright, Norman. 2010. Restorative Justice in the Solomon Islands. In *A Kind of Mending: Restorative Justice in the Pacific Islands*, edited by Sinclair Dinnen, Anita Jowitt, and Tess Newton Cain, 177-194. Canberra: Pandanus Books, <http://www.jstor.org/stable/pdf/j.ctt24hbc4.21?&acceptTC=true&jpdConfirm=true>, accessed 15 June 2015.

The author, who has been a Catholic parish priest in various parts of the Solomon Islands, sets out the practices he has observed relating to brideprice and compensation in the 1960s, recounts major events from the disturbances and violence that emerged in the late 1990s and early 21st century between Guadalcanal people and Malaitans, and discusses

the escalation of compensation claims that emerged after the riots and attacks. Whereas previously compensation, like brideprice, was paid out in dolphin teeth, shell money, pigs, and betel nut, Arkwright argues that the scale of damage that occurred, the introduction of cash and monetary compensation, and the willingness of the government to meet compensation claims have led to a skyrocketing of the amounts of money sought in compensation. In the face of the inadequacy of traditional forms of reconciliation to deal with this escalation, he proposes a biblical and church-related approach. See also Akin 1999.

Arno, Andrew. 1974. Conflict Management in a Fijian Village. Unpublished Harvard University Anthropology PhD Thesis.

In his early 1970s field research on Moce Island in the Lau group of Fiji, Arno undertakes an ethnography of communication about conflict and investigates the ways in which a small and comparatively isolated **community deals with intragroup conflict, initially using the 'case method' based on collecting as many 'trouble cases' as possible (4).** Finding that approach unsatisfactory in light of experience, he turns to **'instances of conflict' as his units of analysis on the grounds that 'instances of conflict are far more numerous than instances of resort to available processes of dispute settlement' (6).** **Setting out the general ethnographic background of the island, he goes on to outline the reciprocal categories of its relationship system, the role of village 'talk' in conflict management, and the place and performance of the *i soro* ritual of reconciliation within the whole process of conflict management.** In his conclusion, Arno provides an explanation of the ways in which those various elements combine to provide a form of adjudication of disputes. See also Arno 1976, Hickson 1975, Koch et al 1977, Merry 2006, and Toro 1973.

Arno, Andrew. 1976. Ritual of Reconciliation and Village Conflict Management in Fiji. *Oceania* 47(1): 49-65, <http://www.jstor.org/stable/pdf/40330266.pdf?acceptTC=true&jpdConfirm=true>, accessed 22 June 2015.

In this paper, Arno asks how the performance of *i soro* or *i bulubulu* operates as a conflict-management system while appearing to be no more than a formal outcome in disputes. *I soro*, he explains, is a ritual of reconciliation used throughout Fiji in which a wrongdoer makes a ritualised surrender to an injured party by presenting the ritual object *tabua* (whale tooth) and *yagona* (kava); while formally a confession of guilt, a humbling, and request for forgiveness, it is also a powerful demand for the restoration of normal relations. By means of detailed studies of the context and practice of *i soro* in two villages, one in the Tongan-related Southern Lau islands and the other in the mountains of

Vanua Levu, he examines how the ritual can effect resolution without providing for fact-finding or the visible application of norms. He concludes that the *i soro* is not so much concerned with damage as with the **parties' future relations and that, though conceived of as a self-contained act, it 'is part of a larger system that can be brought into play by any instance of conflict within the community' as a response to and** escape from the pressure of social disapproval (65). See also Arno 1974, Hickson 1975, Koch et al 1977, Merry 2006, and Toro 1973.

Baltaxe, James Bernard. 1975. *The Transformation of the Rangatira: A Case of the European Reinterpretation of Rarotongan Social Organization*. Unpublished University of Illinois PhD Thesis in Anthropology.

While his principal concern in this ethnohistorical thesis is to advance the understanding of the processes whereby changes come about in social organisation, Baltaxe does provide a good deal of valuable material bearing on pre-European Rarotongan society and land tenure as well as the establishment and operations of the Rarotonga and Other Cook Islands Land Court from 1902 to the late 1960s, with particular attention to the earlier period of the New Zealand colonial administration of Walter Edward Gudgeon. It is also significant as the first examination, analysis, and critique of Crocombe 1964, in which Baltaxe finds the outline of pre-European social organisation excessively unilineal and hierarchical and of which he says: **'In summary, then, Crocombe presents a model of the ideal structure of a Rarotongan tribe as a segmentary lineage system in spite of the many exceptions and fundamental qualifications he is thus forced to make throughout the book' (153). See also Campbell 2002, Gilson 1955, and Pascht 2011.**

Bothmann, Susan. 2010. Rites, Whites and Might: A Critique of the Effect of the Revival of Customary Law upon the Autonomy of Indigenous Women. In *Passage of Change: Law, Society and Governance in the Pacific*, edited by Anita Jowitt and Dr Tess Newton Cain, 143-164. Canberra: Pandanus Books, <http://www.jstor.org/stable/pdf/j.ctt24h3jd.16?&acceptTC=true&jpdConfirm=true>, accessed 15 June 2015.

Recognising the development of political projects to renew customary ideas and practices in a number of areas including Melanesia, Bothmann asks whether the return to a customary legal system will promote political autonomy for Indigenous women or simply become a vehicle for their disempowerment and oppression by Indigenous men. Referencing recent feminist legal scholarship and postmodern approaches, she critiques the body of knowledge of custom gathered by white and male anthropologists and other outsiders and suggests that it is possible to

deconstruct the notion of custom without threatening its usefulness or denying its importance as a marker of identity. Considering some models of custom, especially those of Vanuatu, and noting the absence of **women's voices, she identifies five levels of 'the masculinist rhetoric of nostalgia' used to foster men's power (155). They are the use of anthropological inputs annihilating women's business; employment of outsiders' patriarchal misinterpretations of actual relations between men and women; denial of any vehicle for the recognition of women's traditions; modification of custom by men's reinventions in pursuit of greater control over women; and a power paradigm so patriarchal that men become the sole arbiters of custom. She warns that the reinvigoration of custom may induce 'schizophrenia' in women as their loyalty to a customary ideology confronts 'masculinist interpretations that erase their gender perspective' 158). There is some discussion of *Waiwo v Waiwo and Banga* as an example of the difficulty of reconciling imported and traditional concepts.**

Brown, Bernard. 1971. Outlook for Law in New Guinea. *Oceania* 41(4): 244-254, <http://www.jstor.org/stable/pdf/40332159.pdf>, accessed 5 June 2015.

In the context of a broader discussion of existing legal provision in Papua and New Guinea in the 1960s, and possible developments in the 1970s, Brown records some observations of the conduct of law at that time in **support of his contention that the main concern should perhaps be 'the integration of custom with appropriate rules of Western origin' (246). On the basis of those observations he proposes three steps for the 'legal engineer': to leave native conciliation procedures' alone where they seem to be working; to make available judicial bodies and procedures more compatible with custom than the *wet kot* (white court) where conciliation or mediation do not work; and in towns and other centres to establish courts equipped to deal with the faster pace of life while sorting out 'the frightening complexities of custom conflicts' (249).**

Brown, Kenneth. 1986. Criminal Law and Custom in Solomon Islands. *Queensland Institute of Technology Law Journal* 2: 133-139.

This article examines the problems and conflicts resulting from the imposition of an outside, centralised, and uniform criminal legal system onto a culture such as that of the Solomon Islands and the ways in which courts have responded. Brown discusses **that country's constitutional provisions for the application of custom and analyses *Loumia v DPP* in the Solomon Islands Court of Appeal in 1985 in considerable detail. He concludes that, while it is possible to understand judges' reluctance to accept a customary duty to kill as extenuation, it is clear that the**

appellant in that case lived totally according to custom and that the Constitution appears to require some recognition of that.

Brown, Kenneth. 1997. Customary Rules and the Welfare Principal: Post-Independence Custody Cases in Solomon Islands and Vanuatu. *Journal of Pacific Studies* 21: 83-101, <http://www.usp.ac.fj/fileadmin/files/Institutes/jps/Brown.PDF>, accessed 1 June 2015.

In this article, Brown investigates the place of customary law in the hierarchy of legal sources and the resolution of conflicts between customary and outside law in cases relating to the custody of children in the situation where the effect of payment of brideprice is that, in the case of marriage break-up, the children 'belong' to the father's line. He examines four post-Independence Solomon Island decisions involving the welfare principle: *Sukutaona v Hounihou*, *In Re B, K v T and Ku*, and *Sasango v Beliga*; and two Vanuatu decisions: *M v P* and *G v L*. Brown concludes that it is clear that, in the case of a clash between customary rules and the welfare principle, the latter has prevailed and that, in the majority of cases, there is failure to address, confront, and analyse the relationships among different sources of law in a legally pluralistic system.

Brown, Kenneth. 1999. Customary Law in the Pacific: An Endangered Species? *Journal of South Pacific Law* Vol. 3, http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Brown1.htm, accessed 4 May 2015.

Brown observes that the subordination of customary law under colonialism resulted in powerful claims at Independence for its **integration into the body of law and an aspiration to 'promote genuine legal pluralism rather than a stratified dualism with one source dominant and the other subservient' with customary law a primary source** (no page numbers). Here he examines the extent to which this has been achieved and asks if regional jurisdictions can develop a distinctive Indigenous common law and jurisprudence, if customary law can be adapted to a technological and globalised world, if it is flexible enough to meet modern norms of human rights and particularly gender equity, and whether its survival depends on its isolation if it cannot adjust to interdependent internationalism. He concludes that isolation should be rejected as superficial and that fresh approaches are what are required; that there is no impediment to synthesising customary and imported common law; that customary law is actually evolving a more **contemporary ethos, essential if it is not to be 'a reactionary conservative code of practice'**; and that, over all, the prognosis is mixed, with

acceptance and survival depending on 'well-funded, meticulous and qualified research'.

Brown, Kenneth. 2005. *Reconciling Customary Law and Received Law in Melanesia: The Post-Independence Experience in Solomon Islands and Vanuatu*. Darwin: Charles Darwin University Press.

Though much of this PhD-based monograph by a former magistrate and public solicitor in the Solomon Islands is devoted to definitions, history, and individual cases, the author does draw widely on anthropological materials in his discussions and one section, 'Custom, customary law and received law' (77-100) will be of particular interest to legal anthropologists. There he blends consideration of legislation and judgments with ethnographic and personal observation to conclude that the successful creation of local jurisprudence in the two countries will depend on judges and lawyers promoting the inclusion of customary law as a primary source while also being aware of circumstances where the application of imported law may also be appropriate.

Campbell, Matthew. 2002. History in Prehistory: The Oral Traditions of the Rarotongan Land Court Records. *Journal of Pacific History* 37(2): 221-238,
<http://www.tandfonline.com/doi/pdf/10.1080/0022334022000006619>, accessed 5 June 2015.

Campbell draws on the records of the Land Court, which he describes as an invaluable ethnohistoric source on pre-encounter land tenure and social and political relations, to contextualise the archaeological record of Rarotonga by following the fortunes of the Tinomana and Makea families. **Critical of the 'excessively rigid and hierarchical model of society'** proposed in Crocombe 1964 (224), he is concerned to provide an alternative view of fundamentally fluid and flexible social relations existing before European contact. Against that background, he traces the gradual growth of *ariki* (highest-chiefly) power during the missionary and colonial periods, during which their hegemony became assured and political unity cemented. He adds that, while European intervention was a defining episode, it was only a moment in a long history. See also Baltaxe 1975, Gilson 1955, and Pascht 2011.

Chowning, Ann. 1974. Disputing in Two West New Britain Societies: Similarities and Differences. In *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, edited by A L Epstein, 152-197. Canberra: ANU Press.

Ethnographic studies of communities respectively on the north and south coasts of West New Britain, the Sengseng, and Kove respectively, offer, in

the context of wider kin and social relations, comparison and contrast of their forms and conduct of dispute settlement. Chowning concludes that **her research demonstrates 'that two societies that** resemble each other so closely can still vary so widely in such important areas indicates again the eternal difficulties of generalising from one Melanesian society even **to its closest neighbours' (197).**

Corrin Care, Jennifer. 2001. Customary Law in Conflict: The Status of Customary Law in Post-Colonial Solomon Islands. *University of Queensland Law Journal* 21(2): 167-177, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/qland21&id=173&print=section§ion=22&ext=.pdf>, accessed 2 June 2015.

Examining uncertainties about the status and application of customary law in the Solomon Islands, Corrin Care takes into account the Constitution, recent legislation on proof of customary law, and judicial attempts to deal with conflict between customary and introduced law. In relation to constitutional law she outlines the issues in *R v Loumia and Others* and *Remisio Pusi v James Leni and Others* and in other areas makes reference to a variety of significant decisions. She observes that, while customary law has constitutional recognition as a general source of law, in the case of conflict it is mostly subordinate to constitutional provisions and to acts of the Solomons parliament but superior to acts of the UK parliament that continued in force and to common law and equity. She concludes that the existing legal pluralism is experiencing problems unforeseen at Independence, leaving the courts to perform a balancing act among the various sources of law.

Corrin Care, Jennifer. 2002a. Cultures in Conflict: The Role of the Common Law in the South Pacific. *Journal of South Pacific Law* 6(2), <http://www.paclii.org/journals/fJSPL/vol06/2.shtml>, accessed 15 June 2015.

Noting that though South Pacific law remains based on English, the two have diverged as a result of constitutional cut-off dates with consequent culture-conflict, Corrin Care sets out to examine such conflict through consideration of cases in twelve countries: Cook Islands, Fiji, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, and Vanuatu. In doing so, she considers the sources of common law, its conditions of application and relationship with other sources, and judicial consideration thereof, citing a variety of mostly Melanesian cases. She concludes that failure to adapt common law to the complexities of regional societies is a threat to the operation and growth of local cultures and inhibits both the limiting of common law and the freethinking needed to establish a **regional jurisprudence. She suggests that this will continue until 'the**

common law is abandoned or, at least, restricted to cases where it is **inarguably applicable to local circumstances'** (no page numbers). In addition, she suggests expanding traditional dispute resolution and introducing undergraduate and postgraduate study of customary law in regional legal education.

Corrin Care, Jennifer. 2002b. Wisdom and Worthy Customs: Customary Law in the South Pacific. *Reform* 80: 31-36, 72, <http://www.austlii.edu.au/au/journals/ALRCRefJI/2002/7.html>, accessed 10 June 2015.

Corrin Care observes that because constitutional recognition of customary law did not include specification of its precise relationship with introduced laws, this absence afforded opportunities for courts to avoid it. In dealing with the nature of customary law, she distinguishes between custom as normal group behaviour and customary law as the rules governing that behaviour. She notes that such definitions of the latter as do exist are often unsatisfactory, that it is unclear how widespread it needs to be to warrant recognition, and raises questions about its applicability in disputes between members of different customary groups or Indigenous and non-Indigenous people, and asks whether it is regarded as law at all. She goes on to deal with the proving and recording of customary law and whether it should be superior to common law, the establishment of customary courts, relevance to local circumstances, and traditional recognition. She draws on *R v Loumia and Others* to consider distortions of the objective test of conduct, intention, and reasonability.

Corrin Care, Jennifer. 2006. A Green Stick or a Fresh Stick: Locating Customary Penalties in the Post-Colonial Era. *Oxford University Commonwealth Law Journal* 6(1): 27-60, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/oxuclwj6&id=27&print=section§ion=4&ext=.pdf>, accessed 10 June 2015.

Dealing with the legacy of transplanted laws, Corrin Care emphasises the resilience of customary law and, on that basis, disputes the claim of some scholars that it is no more than a colonial creation. In this article she takes the example of punishment by banishment to illustrate the **difficulty 'of locating customary penalty in the plural systems existing in the post-colonial era' (29). In doing so, she backgrounds legal provision** in the South Pacific, considers the divide between the theory and practice of introduced and customary law, and outlines the ways in which they have been dealt with by the courts. Her focus is on the ways in which courts have balanced custom in the form of banishment, particularly in Samoa, with introduced and constitutional law, with detailed reference to

Ta'amale v Attorney-General and *Leituala v Mauga*. Corrin Care concludes that the cases confirm the cultural specificity of penalties and the need for sensitivity in their application and appeals for appreciation of the strength of the diversity of local systems as a counter-balance to the uniformity imposed by globalisation.

Corrin, Jennifer. 2008a. Land, Law and the Faa-Samoa. *Lawasia Journal* 46: 46-69, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/lawasiaj9&id=52&print=section§ion=7&ext=.pdf>, accessed 5 June 2015.

Identifying serious tensions between commerce and tradition in land tenure and use in early twenty-first-century Samoa, Corrin investigates related problems of tenure and dispute resolution in the context of legal pluralism and contemporary demands. In doing so, she examines the existing system of land tenure and use and, in particular, the alienation of customary land. Moving on to the resolution of customary land disputes, she surveys both statutory and informal fora, the Land and Titles Court and the village *fono* (councils of chiefs), their practices, procedure, and forms of evidence, and the role of the Land Investigation Commission in determining the status of land and questions of individual ownership. In the context of the relationship between culture and customary law, she highlights breakdowns of tradition, debates over definitions of custom and its relationship with common law, and the role of *fono* and court in dealing with conflicts between customary law and **human rights**. While acknowledging that the court's status as a court of record has preserved it from some of the pitfalls experienced by other customary courts, she warns that there will be increasing resort to formal courts in response to disputes involving governments, foreign individuals, and companies.

Corrin, Jennifer. 2008b. Customary Land and the Language of the Common Law. *Common Law World Review* 37(4): 305-333, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/comlwr37&id=313&print=section§ion=25&ext=.pdf>, accessed 5 June 2015.

Against a background of the region and development of its legal systems, the significance of land, legal pluralism, and the terminology of customary land tenure, Corrin discusses mainly Samoan and Solomon Islands provisions of land tenure, both formal and customary, and the manner of representation of customary concepts in common-law terms. This discussion covers forms of ownership and **types of 'landowners'**, timber rights, chiefs and titles in Samoa and the Solomons, primary and secondary interests, trusts, and agency. She argues that, despite

constitutional protections for customary land and law, the common law has effected significant changes in customary concepts, with the tension between the two likely to increase in response to the challenges of changing lifestyles.

Corrin, Jennifer. 2008c. Resolving Land Disputes in Samoa. In *Making Land Work*, Vol 2, 199-220. Canberra: Australian Agency for International Development, <http://dfat.gov.au/about-us/publications/Pages/making-land-work.aspx>, accessed 18 June 2015.

This is a useful summary account of the legal and land-tenure systems in Samoa and institutions and issues relating to the resolution of land disputes. It includes descriptions of the roles and practices of village councils, the Land and Titles Court, the Land and Titles Appeal Division, the Supreme Court, and the Land Investigation Commission as well as discussion of settlement by *matai* (chiefs) within the family and negotiation, mediation, and arbitration procedures. Corrin outlines some recent innovations involving resources and leadership, cultural underpinnings, court systems, and avenues for the development of customary land, and proposes establishing and maintaining specialist institutions and recognising customary ones, recognising challenges to tradition, and providing alternatives for dispute resolution.

Corrin, Jennifer. 2009. Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific. *Journal of Legal Pluralism and Unofficial Law* 59: 29-48, <http://www.heinonline.org/HOL/Print?collection=fijournals&handle=hein.journals/jlpul59&id=47&print=section§ion=8&ext=.pdf>, accessed 15 June 2015.

Corrin dismisses such binary oppositions as traditional and modern, customary and traditional or state law, and informal and formal justice and argues for a more complex interplay between them and a new **category of 'blending'**. Addressing the tensions and uncertainties resulting from legal pluralism in action, she uses examples drawn from the Solomon Islands to illustrate the blurring that has occurred between customary and state law. In the context of incorporating customary law in statutes, she analyses in some detail *Majoria v Jino* and the Solomon Islands National Provident Fund Act as a statutory amendment introduced to take account of customary laws with the subsequent case of *Tanavulu and Tanavulu v Tanavulu and SINPF*. In conclusion, Corrin laments the **'one dimensional, hierarchical approach to legal pluralism'**, the lack of progress since Independence in the promotion of customary law and a South Pacific jurisprudence, as well as the absence of an appropriate philosophical basis for such initiatives (45).

Corrin, Jennifer. 2011. Accommodating Legal Pluralism in Pacific Courts: Problems of Proof of Customary Law. *International Journal of Evidence and Proof* 15(1): 1-25, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/intjev15&id=3&print=section§ion=4&ext=.pdf>, accessed 2 June 2015.

Here Corrin is dealing, mainly in relation to the common-law courts of Australia but also to some South Pacific courts, with issues relating to the proof of customary law and the question of whether it should be treated as law or fact. She surveys related Australian and Pacific legislation and civil and criminal proceedings in a number of Australian cases and also in *Allardyce Lumber Company v Laore*, *Tafisi v Attorney-General* (both Solomons) and *Waiwo v Waiwo and Banga* (Vanuatu). She proposes that Australia could take a lead from countries such as Kiribati, Tuvalu, and Papua New Guinea in allowing for customary law to be treated as a matter of law.

Corrin Care, Jennifer and Jean G Zorn. 2001. Legislating Pluralism: **Statutory 'Developments' in Melanesian Customary Law.** *Journal of Legal Pluralism and Unofficial Law* 33(1): 49-101, <http://www.tandfonline.com/doi/pdf/10.1080/07329113.2001.10756552>, accessed 2 June 2015.

This comparison of two pieces of legislation, Papua New Guinea's Underlying Law Act and the Solomon Islands' Customs Recognition Act, proceeds from the question of how to incorporate customary law in the legal system when custom varies even from village to village and also seeks to discover why two parliaments have taken such different approaches to similar problems of pluralism. It includes a very useful discussion of differentiations between custom and customary law (52-53 footnote 5). Following a survey of law before, during, and after the colonial period, the authors minutely examine the respective acts, their goals, construction, and differences, and finds that, while both statutes were intended to enhance the role of customary law, the Solomon Islands parliament chose to base itself on an earlier Papua New Guinea act already discarded by that country in favour of one providing stronger support for customary law. The principal difference between the two acts is that the Underlying Law Act provides for custom as law while the Customs Recognition Act restricts custom to proof as fact. The authors suggest that the reasons for the disparity lie in the existence in Papua New Guinea of a Law Reform Commission, the support of influential figures in that country, and the actual experience of the weaknesses of the earlier legislation providing the impetus for stronger provisions.

Counts, D and D. 1974. The Kaliai Lupunga: Disputing in the Public Forum. In *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, edited by A L Epstein, 113-151. Canberra: ANU Press.

The coastal Kaliai of Northwest New Britain employ some forms of *lupunga*, literally **'gatherings', for the public settlement of disputes and grievances** between parties of different kin groups. The Counts identify three possible outcomes of such a *lupunga*: agreement reached, dispute escalated, and dispute unsettled, the latter particularly in the case of disputes of rights in persons. Having tabulated and discussed the varieties of rights violations, methods and types of settlements, they draw on two case studies, one concerning a death and the other coconut inheritance, to reach their conclusions. They are that a *lupunga* may or may not involve confrontation between adversaries, that confrontation results in rival claims of violation of rights rather than assertion and denial of violation, and that, in the case of conflict between custom and administration law, the latter is paramount.

Counts, Dorothy Ayers and David R Counts. 1994. When Women Win: Male-Female Disputing in Kaliai, West New Britain. *Law and Anthropology, International Yearbook for Legal Anthropology* 7: 331-352.

Basing themselves on 11 case studies, summarised in an appendix, of disputes taken and won by women from the Kaliai area of West New Britain in Papua New Guinea, the authors examine strategies to determine which ones were effective, whether women successfully use strategies different from those of men, and whether disputes between women differ from those between a woman and a man. They identify the importance of strong kin and community support, display of determination, and appearance of willingness to escalate the dispute by reference to the court or by violent behaviour, even to themselves and to property, as key strategies. Men, on the other hand, rarely resort to the court in disputes with men and never with women, urge women to use traditional methods, and less frequently destroy property or themselves. For women, suicide or the threat of it is the ultimate cry for justice and an extreme vehicle for control of life or fate.

Cretton, Viviane. 2005. Traditional Fijian Apology as a Political Strategy. *Oceania* 75(4): 403-417, <http://www.jstor.org/stable/pdf/40331997.pdf?acceptTC=true&jpdConfirm=truehttp://www.jstor.org/stable/pdf/40331997.pdf?acceptTC=true&jpdConfirm=true>, accessed 5 June 2015.

At the time of release of the parliamentary hostages after the Fiji coup d'état of 2000, **stories circulated that the leader of the coup had**

performed a *matanigasau* (ceremony seeking forgiveness) with *tabua* (whale tooth) and *yaqona* (kava) and the deposed prime minister had signified forgiveness by acceptance; the story was denied by the hostages present, saying they were just having a kava session among themselves on which the coup leader dropped in. Cretton uses this dispute about the meaning of reconciliation to tease out the notion of tradition as an object of negotiation between both the original parties and between them and herself as anthropologist. In the light of such performances of apology as evasions of punishment by the courts, and noting the parallels between this discursive denial of the law and the institutionalisation of tradition over custom during colonisation, she concludes that the 2000 coup exacerbated opposition between customary and constitutional rights and heightened the colonial dichotomy between tradition and democracy.

Crocombe, R G. 1964. *Land Tenure in the Cook Islands*. Melbourne: Oxford University Press.

In this ethnohistorical study of land tenure in the Cook Islands, Crocombe bases his reconstruction of the pre-European system of Rarotonga on the physical features of the island, the mass of data recorded by Rarotongans, evidence of external observers, previous researches including those in the Land Court records, fieldwork, and his knowledge of other, related land-tenure systems. In assessing the impact of European culture on the Cook Islands more generally, he relies heavily on missionary sources and to a lesser extent on the observations of seafarers, traders and travellers. For his final section on the Land Court, he draws on court records and his fourteen-month field survey to outline and discuss the establishment and processes of the court, court practice and custom, tenure reform and productivity, developments since World War II, and some future possibilities. The rigidity of his model of pre-European society has been subject to quite sharp criticism, particularly in Baltaxe 1975 and Pascht 2011.

Crocombe, Ron. 1988. Land Courts. In *Pacific Courts and Legal Systems*, edited by Guy Powles and Mere Pulea, 112-126. Suva: University of the South Pacific.

This is a broad survey of land tenure systems and methods of resolution of disputes over customary land across the South Pacific in the 1980s, including the role of the courts, the relationship between traditional and introduced mechanisms, and the timing of phasing out of the former.

Crosetto, John. 2005. Heart of Fiji's Land Tenure Conflict: The Law of Tradition and Vakavanua, The Customary Way of the Land. *Pacific Rim Law and Policy Journal* 14(1): 71-102,
<http://heinonline.org/HOL/PrintRequest?collection=journals&nocove>

[r=&handle=hein.journals%2Fpacrim/vol14/issue1/79.html](http://www.hein.journals.org/pacrim/vol14/issue1/79.html)
[=1&fromid=79&toid=110&formatC=PDFsearchable&submitx=Print%2FDownload&submit1=Print%2FDownload](http://www.hein.journals.org/pacrim/vol14/issue1/79.html), accessed 5 June 2015.

Focusing on recent land-tenure law reform in Fiji as a means of easing racial tension and political unrest, Crosetto distinguishes between tradition as defined by the colonial administration and custom as the conduct of everyday life and observes that, despite constitutional paramountcy of Fijian interests, the practice of customary tenure by farmers diverges from the law as defined by tradition. He proposes that reform of the land laws, including leasing arrangements, to recognise the transition from a subsistence to a market economy would in fact better preserve the Fijian cultural identity that constitutional paramountcy was intended to protect.

Deckker, Paul de and Jean-Yves Faberon (eds). 2001. *Custom and the Law*. Canberra: Asia Pacific Press.

In this English translation, a variety of Francophone scholars, including several anthropologists as well as legal practitioners and academics, mostly based in French Polynesia and New Caledonia, **investigate 'the place of indigenous custom in the development of law in the South Pacific' (ix) and, in particular, those laws concerning land rights, mining rights, and legal guarantees.** In fact, their investigations are largely confined to the then French Overseas Territories and cover two broad fields: the position of Indigenous custom in the rules of those territories and Indigenous custom and jurisprudence therein. An introductory discussion of custom and the law is followed, in the first part, by a chapter on adaptation to local sociological particularities and individual chapters on customary rules in New Caledonia, French Polynesia, and Wallis and Futuna. In the second part, individual chapters include two on aspects of the magistrature in New Caledonia, a land- and marine-oriented discussion of customary law and custom in French Polynesian jurisprudence, and a survey of customary legal processes in Wallis and **Futuna. An appendix contains transcriptions of two short 'debates' that appear to have taken place at a conference at which the chapters were presented as papers.**

Deklin, Tony. 1995. The Future of Papua New Guinea Customary Law: Rot Wei? In *Custom at the Crossroads*, edited by Jonathan Aleck and Jackson Rannells, 34-42. Port Moresby: University of Papua New Guinea.

Deklin, an Indigenous Papua New Guinea practitioner, laments the lack of progress in the development of the underlying law 17 years after Independence despite the constitutional directive for its introduction.

This he ascribes to weaknesses in the training of lawyers and their own unwillingness to embrace customary law. He identifies three ideological positions: primacy of adopted law over-riding customary law in case of conflict; primacy of customary law even in the case of conflict; and equal primacy in respective areas of strength and primacy in the case of conflict depending on the merits of the particular case. He argues strongly for the second position and points to the Bougainville crisis as a result of failure to organise a customary law system and its confinement to situations of **actual conflict. Characterising the existing state of underlying law as 'a bastardisation, a concoction' (39), he suggests three steps towards the primacy of customary law: separating customary law from the underlying law; giving it relative primacy; and giving primacy to statutory law only in the case of irreconcilable conflict.**

Demian, Melissa. 2003. Custom in the Courtroom, Law in the Village: Legal Transformations in Papua New Guinea. *Journal of the Royal Anthropological Institute* 9(1): 97-115, <http://www.jstor.org/stable/pdf/3134756.pdf?acceptTC=true&jpdConfirm=true>, accessed 7 May 2015.

Demian proposes that customary law in Papua New Guinea is ripe for reassessment, not least, as she sees it, as an ideal mechanism for meeting some of the obligations imposed on the country by international law. Rather than focusing on the usual opposition of exogenous and Indigenous, she proposes examining their influence on each other since Independence. Noting anthropological agreement on customary law as a product of colonial encounter combining, like *kastom* itself, Indigenous and introduced, she examines village and national urban courts in questioning the accuracy of that position. On the basis of her analysis of two village-court cases, involving an apparent theft and sorcery respectively, and *Luke Kere and Another v Bessi Timon and Family*, involving brideprice, in the National Court of Justice, Demian suggests **that while village courts take custom for granted and must 'discover' law, high courts take law for granted and must 'discover' custom. She concludes that, far from being hybridised as customary law, custom and law are strategically distinguished to enable them to draw upon each other as required.**

Demian, Melissa. 2008. Fictions of Intention in the 'Cultural Defense'. *American Anthropologist* 110(4): 432-442, <http://onlinelibrary.wiley.com/doi/10.1111/j.1548-1433.2008.00076.x/pdf>, accessed 21 May 2015.

Setting out to discover 'what sort of evidence culture is that it can be marshalled as a legal argument' (432), Demian surveys views on the cultural defence from a wide range of scholars. Examining the concept in

operation in a British case in which the defence fails, *R v Sebastian Pinto and Others*, and a US one in which it succeeds, *People v Kimura*, she suggests that the cultural defence provides anthropologists with an example of culture as an ethnographic object being employed as a tool for revealing the intentions of a defendant. Turning to Papua New Guinea, her analysis of a land case, *Madaha Resena, Raho Gaigo and Igo Oala v The Independent State of Papua New Guinea*, leads her to observe that **the cultural defence seldom succeeds in that country 'because it may be "repugnant" but also because it cannot reveal the intentions of defendants' (438). She ascribes this failure to the operation of custom there as a description of actions, not intentions, undertaken in the past, the legal fiction residing in 'its projection of categorically historical action into the present of the court, rather than the projection of categorically internal motivations into the public of the court' (439). Comparing legal and anthropological treatments of culture, she concludes that law regards it instrumentally while anthropology uses it descriptively and analytically; in each case it serves as a means of making disciplinary intentions explicit.**

Demian, Melissa. 2011. 'Hybrid Custom' and Legal Description in Papua New Guinea. In *Recasting Anthropological Knowledge: Inspiration and Social Science*, edited by Jeanette Edwards and Maja Petrović-Šteger, 49-69. Cambridge: Cambridge University Press.

Reviewing frequent observations of the failure to develop the underlying law to give customary law precedence over common law, Demian asks if what is needed may be to replace the anthropological concept of custom as locally produced relations with a concept of universal custom analogous to the law as an alternative to hybridity. Taking account of the problem of a possible excess of universality in Papua New Guinea, she **discusses compensation and sorcery as offering examples 'of the pitfalls of requiring universality as a condition of recognising custom as the analogy to law' (64). On the basis that working out the proper relationship between customary and common law is fundamental to developing the underlying law, she identifies two obstacles: the incommensurability of the two and the popular framing of custom as implicit and specific against the law as explicit and general. Demian concludes that, while universality has its own hazards, for custom to supplant common law as the source of the underlying law it must be seen to have the same properties and, most particularly, universal applicability.**

Demian, Melissa. 2014. On the Repugnance of Customary Law. *Comparative Studies in Society and History* 56(2): 508-536, <http://search.proquest.com/docview/1513963472/fulltextPDF/42FC465EE66E4C96PQ/10?accountid=14782>, accessed 21 May 2015.

This interrogation of repugnancy in its strict and extended senses, customary law, and custom engages with Elizabeth Povinelli on the **framing of repugnance as a refusal of recognition and traces the 'life history' of the concept** through seven Papua New Guinea cases: *State v Aubafo Feama, Nama Auri, and Kafidiri Kududebe Hagima* on cannibalism; *State v Maraka Jackson* on sorcery-related murder; *Re Kaka Ruk* and *Application by Non* on adultery, compensation, and bondage; *Senan Ess Olwen v Lucy Tiso* on marriage break-up; *Robson Ubuk v Rachel Darius* on child custody; and *In re Miriam Willingal* on status of compensation. Invoking a variety of writings on disgust as physical, moral, and aesthetic, she suggests that it is those aspects of repugnance that enables the separation and relegation of certain customary actions from the underlying law. To that end she identifies three contributing themes: the pre-independence desire of Europeans to distinguish themselves from Papua New Guineans; fear of and fascination with contamination; and the almost unique retention of the colonial-era repugnancy clause. Demian then notes two important aspects of the appearance of repugnance: a middle-class space-making for modernity and the endeavour of PNG judges to differentiate themselves from Europeans. She concludes that the consequence is that repugnancy can be invoked when a customary-law practice is too shameful.

Demian, Melissa. 2015a. Introduction: Internationalizing Custom and Localizing Law. *Political and Legal Anthropology Review* 38(1): 3-8, <http://onlinelibrary.wiley.com/doi/10.1111/plar.12083/pdf>, accessed 3 May 2015.

This is the introduction to a collection of papers presented at a **symposium organised by the author and described by her as 'an endeavour to re-evaluate and update what may at first blush appear to be a thoroughly old-fashioned or folkloristic set of ideas for anthropologists: the concept of custom' (3)**. Acknowledging the legal-anthropological transition from a quest for law-like practices in unlawful societies to a post-decolonisation concern with the mutually constitutive relationship between local customary law and official forms of law, she nonetheless draws attention to a continuing disconnect between custom in the formal legal system and in everyday life. In parallel, she remarks on the turn from customary law as a colonial imaginary to its integration into **official institutions, thereby providing 'yet one more space in which to contest the legitimacy of claims by measuring them against equally contested domains of authenticity and autochthony' (4)**. The balance of the introduction is an outline of the papers included in the collection in which Demian observes a common theme of interplay between difference and distinction between legal and quasi-legal regimes. See also Demian 2015b.

Demian, Melissa. 2015b. Dislocating Custom. *Political and Legal Anthropology Review* 38(1): 91-107, <http://onlinelibrary.wiley.com/doi/10.1111/plar.12088/pdf>, accessed 26 May 2015.

Characterising her approach as ‘an experiment with cartographic metaphors of scale and location’ (91), Demian initially sets aside the idea of Papua New Guinea’s law as haunted by colonialism to discuss the relationship between custom and *kastom*, noting that the nature of that relationship causes trouble for anthropologists, jurists, and ordinary Papua New Guineans. Anthropologists, she argues, have struggled with treating *kastom* as a Melanesian version of culture; jurists have sought to **establish which of custom’s manifestations are simultaneously unique** and universal enough to be integrated into the underlying law; and ordinary people, especially speakers of Tok Pisin and English, fail to distinguish between the two. She herself distinguishes between *kastom* as belonging to a place and custom as placeless, illustrating the distinction by moments from law-**students’ discussions of the concepts,** and claims that the category of custom is increasingly moving away from that of *kastom*, so that the levels of *kastom* on the one hand and custom and law on the other have become incommensurate, the former operating on a small scale and the latter on a larger scale of experience, with consequences for the concepts of legal pluralism and customary law. **Employing a cartographic metaphor and the notion of a ‘mix’ of *kastom*,** custom, and law to examine those levels and the concept of legal pluralism, Demian finds in the mix a variously stimulating, efficacious, threatening, and pleasurable interplay in which, from different perspectives, any one of the elements can play background with the effect of foregrounding another.

Dinnen, Sinclair, Doug Porter and Caroline Sage. 2010. *Conflict in Melanesia: Themes and Lessons*. World Bank World Development Report 2011 Background Paper, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/05/30/000333037_20110530041921/Rendered/PDF/620250WP0ConfIOBOX0361475B00PUBLIC0.pdf , accessed 11 May 2015.

This ethnographically and historically informed case study of four recent experiences of conflict in Melanesia examines Bougainville and the Highlands in Papua New Guinea, the Solomon Islands, and Vanuatu and identifies some common themes despite diversity, geography, and different experiences of globalisation. Part I provides a background survey of conflict before and during colonisation as well as local, national, and transnational aspects of contemporary conflicts and their management. The analytical Part II discusses those events under three

headings: recognition of conflict as an inherent part of social change with positive and negative aspects; the impact of local perceptions on regulation of and responses to conflict; and the need for regulatory institutions above and below the level of the state. The authors conclude that such conflicts must be understood as responses to contemporary transformations of global order, economies, and the nature of statehood and identity, both collective and individual.

Eaton, Peter. 1983. Customary Land Dispute Settlement: Should Lawyers Be Kept Out? *Melanesian Law Journal* 11: 47-50.

Eaton analyses the nature and causes of land disputes in Papua New Guinea in order to ascertain the principles to be applied to land-dispute settlement. Having described the general features of customary land tenure prevailing at the time over 97 per cent of the country, he goes on to emphasise that the system is not uniform, varying particularly in the balance between collective and individual rights, but in all cases forming the basis of social and economic organisation. He identifies land disputes between individuals within the group over inheritance or use-rights or arguments between different groups over territorial rights and boundaries as short-term factors; and population increase, expansion of the monetary economy, greater mobility, and pleasure in fighting as longer-term ones. He also notes that disputes seeming to be over land may involve a number of other factors such as status, power, generational differences, and claims to leadership. The balance of the article deals with the 1973 Commission of Inquiry into Land Matters, the Land Dispute Settlement Act, and the relationship of land courts to the judiciary, in the latter with commentary on two cases between 'clans': *The State v District Land Court, Kimbe, ex parte Caspar Nuli* and *The State v Richard James Giddings*. On the question of legal representation he weighs dangers and benefits, only noting that it is already a *fait accompli* and advising 'that many disputes stand a better chance of being solved if they can be kept out of the courts' (57).

Efi, Tui Atua Tupua Tamasese Ta'isi Tupuola Tufuga. 2009. Samoan Jurisprudence and the Samoan Land and Titles Court: The Perspective of a Litigant. In *Su'e Su'e Manogi - In Search of Fragrance: Tui Atua Tupua Tamasese Ta'isi and the Samoan Indigenous Reference*, edited by T M Suaalii-Sauni et al, 153-172. Apia: National University of Samoa.

Tui Atua, current head of state of Samoa and holder of one of its four paramount titles, claims to know little about jurisprudence and less about philosophy, disclaims any qualification as a judge, jurist, or lawyer, and proceeds to bring both assertions into doubt in his discussion of ways in which customary law might inform a jurisprudence relating to the Land

and Titles Court. In his discussion of *tulafono* (law) he draws on four Samoan concepts: *tua'oi* (boundary), *tofa sa'ili* (wisdom or the search for it), *faasinomaga* (personal designation), and *pae ma auli* (mediation); and three reference points: the theological for its theory of creation; the historical for an understanding of *tua'oi* and rights; and the practical for solutions to the land-court problems of resistance to traditional judicial **review, delays, and 'lack of judicial rigour** reflected in its decision-making, i.e. in its interpretation of Samoan custom in the past and the **application of Samoan custom in the present' (167). He illustrates the nature of these problems in four anonymised cases and proposes some ways forward. See also Lealofi 2009.**

Epstein, A L. 1970. Procedure in the Study of Customary Law. *Melanesian Law Journal* 1(1): 51-57.

Addressing the best approaches to the study and teaching of customary law in Papua New Guinea, Epstein emphasises the importance of studying it in the context of disputes and their settlement. Having supported this argument with examples from his African field work, he turns to its possible application to a Papua New Guinea lacking African-type courts but with the benefit of its own vernacular vehicles for settlement of disputes, whatever reservations lawyers may have about them. In **summary, he advocates an emphasis on 'the elucidation of concepts and their underlying assumptions' rather than 'the more usual form of recording or codification of customary law' (56).**

Epstein, A L. 1971. Dispute Settlement among the Tolai. *Oceania* 41(3): 157-170,
<http://www.jstor.org/stable/pdf/40329935.pdf?acceptTC=true>,
accessed 8 June 2015.

Returning to a focus on disputes and their resolution, Epstein draws on earlier ethnologists to examine traditional settlement procedures in the form of a *varkurai* or village forum and observes that their continued satisfactory operation at the time of his field work in Matupit village on an island off Rabaul is demonstrated by the rarity of references to a formal court. In the absence of broader Tolai terminological categories and leaving aside land disputes in this case, he surveys disputes and their resolution involving matrimonial issues, theft, debt, resulting quarrels between close kin, and a miscellaneous category of breaches of customary law or rules. Outlining and analysing a matrimonial dispute to demonstrate the application of the traditional process, he concludes that its principal aim is the achievement of a full airing of grievance and reconciliation of the parties to the dispute. See also 1974b.

Epstein, A L (ed). 1974a. *Contention and Dispute: Aspects of Law and Social Control in Melanesia*. Canberra: ANU Press.

This book assembles nine chapters based on papers presented to the 1973 Waigani Seminar at the University of Papua New Guinea on *Law and Development in Melanesia*, with a comprehensive introduction by the editor including analysis across the material presented. The research on which the papers were based covers a variety of processes of dispute **settlement in the D'Entrecasteaux Islands, New Britain, Western Highlands, and East Sepik**. See Chowning 1974, Counts & Counts 1974, Epstein 1974b, Reay 1974, Sack 1974, Strathern A 1974, Strathern M 1974, Tuzin 1974, and Young 1974.

Epstein, A L. 1974b. Moots on Matupit. In *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, edited by A L Epstein, 93-112. Canberra: ANU Press.

Based on fieldwork among the Tolai of the village of Matupit on an island off Rabaul in Papua New Guinea in the 1960s, this is an evaluation of the workings of the system of *varkurai*, the village forum, as a continuing alternative to the official Court of Native Affairs conducted by a *kiap* or local administrative officer. On the evidence of two detailed case studies of *varkurai* proceedings, one of a land dispute, the other of a domestic dispute, Epstein concludes that, while hearings in that forum are not **always successful, it 'constitutes the one form of "due process" which the Matupi acknowledge as their own' (95)**. Furthermore, he suggests that such success is dependent not on modifications of customary law but on the presence of a skilled mediator and the preparedness of parties to make concessions in the interests of reconciliation.

Evans, Daniel. 2010. Historical Tensions at the Gold Ridge Mine, Solomon Islands. *Pacific Economic Bulletin* 25(3): 121-134, http://peb.anu.edu.au/pdf/PEB25_3_Evans.pdf, accessed 11 May 2015.

This study uses documentary and interview materials to investigate the history of tensions in the late 1990s around the Gold Ridge mine site, its 2000 takeover by local Guadalcanal people, and the expulsion of Malaitan workers and residents. Exploring the underlying reasons for the takeover, Evans advances two rationales: the securing of weapons and other materials to support the conflict as well as ideological opposition to resource extraction, rather than greed. Casting doubt on prospects for reconciliation, he suggests that concerns about resource extraction continue on Guadalcanal because of failure to address land-ownership issues and development outside Honiara, the capital, and to introduce forgiveness legislation, as well as government delay in the holding of a

reconciliation ceremony at the site of the mine resulting in the prospect of payback against the mine because of selective incarceration of relatives of local people.

Evans, Daniel, Michael Goddard, and Don Paterson. 2011. The Hybrid Courts of Melanesia: A Comparative Analysis of Village Courts of Papua New Guinea, Island Courts of Vanuatu and Local Courts of Solomon Islands. *World Bank Justice and Development Working Paper Series 13*, <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/HybridCourts.pdf>, accessed 7 May 2015.

This is a comparative survey of three systems of justice in Melanesian countries with state legal systems originally introduced by colonial **governments but which, the authors argue, have developed 'hybrid'** forms to address disputes among small-scale social groups less or more formally in accordance with customary forms. They describe the courts as lowest in the judicial hierarchy, filling the void between official courts and local populations, and identify three common traits: lay authority and customary application; limited jurisdictions; and no formal rules of evidence. Following detailed descriptions of the operations of the respective courts, the authors identify variety of limitations and strengths in the areas of application of custom, gender bias and favouritism, acting in excess of jurisdiction, enforcement, training, co-option and rejection, and duplication of official courts. Commenting on issues of oversight, resourcing and support, flexible and simple legislation, and local **ownership, they conclude that the hybrid courts 'provide a blueprint for accessible, quick, representative, and community-owned justice in Melanesia' (35).**

Farran, Susan. 1997. Custom and Constitutionally Protected Fundamental Rights in the South Pacific Region: The Approach of the Courts to Potential Conflicts. *Journal of Pacific Studies* 21: 103-122, <http://www.usp.ac.fj/fileadmin/files/Institutes/jps/Farran.PDF>, accessed 1 June 2015.

Noting the attempts by some South Pacific countries to give custom the force of law in the face of binaries such as tradition and development, moral and civil, custom and law, Farran sets out to examine the potential conflict between customary and constitutional rights and court attempts to resolve it through specific cases. Exploring the sources of such conflict, she identifies three possibilities: double institutionalisation of custom as extra-legal and legal; strengthening, elevating, and changing custom as a result of codification by an external agency such as a constitution; recognition in principle undermined by denial in practice as a result of lack of sanction by an external state force. Locating the courts

at the heart of potential conflict, she proceeds to an examination of specific cases. In the context of land issues she describes and analyses decision-making in *John Noel v Obed Toto* involving land ownership and usage in Vanuatu, *Chu Ling (John v Bank of Western Samoa (No. 1))* on Indigenous security, and *Fugui and Another v Solmac Construction Company Ltd and Others* on compensation for wrongful deprivation of property in the Solomons. In regard to public order and private ordering, she deals with the Solomons case of *R v Loumia and Others* involving a customary duty to kill and with *Italia Taamale and Taamale Toelau v the Attorney General of Western Samoa* on a Land and Titles Court ordered **banishment. Farran concludes 'that customary rights that survive as enforceable rights will be modified in the process'** (120).

Farran, Sue. 2010. Law, Land, Development and Narrative: A Case-Study from the South Pacific. *International Journal of Law in Context* 6(1): 1-21, <http://search.proquest.com/docview/209809584/fulltextPDF/6A708E778C894377PQ/1?accountid=14782>, accessed 5 June 2015.

Farran's focus here is on Vanuatu and her thesis is that narratives of land, and particularly those in support of land claims, are significant elements in shaping and understanding the identity of Indigenous people and relationships to land. First outlining the historical, legal, and land-tenure background of the country as well as the role of chiefs in informal resolution, she then examines the narratives of recorded law cases dealing with land disputes adjudicated by local, island, and customary courts. She explores evidence as narrative, including origins and magic and sorcery; narrative as evidence in cases of boundaries and genealogies, witness credibility, *kastom*, and customary law; and narrative as record in converting oral histories, setting precedents, **translating, and 'legalising' language and concepts. Farran asks whether** changes in narrative signal survival or demise for customary land rights and what those consequences might mean. The reported cases on which she draws are *Billy v Ameara*, *Malas v Thretham Construction Ltd*, *Alanson v Malignman*, *Sanhabat v Salemunu*, *Rory v Rory*, *Hiatong v Tavulai Community*, *Houlon v Edward*, *Manassah v Koko*, *Awap v Lapenmal*, *Tomoyan v Shem*, *Kaising v Kaites*, *Selangji v Donna*, *Awop v Lepenmal*, and *Mata v Mata*.

Farran, Sue. 2011. Introduction. *Pacific Studies* 34(2/3): 92-102, <https://ojs.lib.byu.edu/spc/index.php/PacificStudies/article/view/30813/29272>, accessed 25 August 2015.

This short essay introduces a collection of articles based on contributions **to a panel on 'Land, Laws and People in the Pacific'** at a European Society for Oceanists conference on **'Exchanging Knowledge in Oceania'**. It is

intended as a contribution to information on land matters and interdisciplinary perspectives on customary forms of land tenure and dispute resolution. It includes extended commentaries on Howard 2011, Pascht 2011, Guo 2011, Goddard 2011, and Leach 2011.

Filer, Colin. 2006. Custom, Law and Ideology in Papua New Guinea. *Asia Pacific Journal of Anthropology* 7(1): 65-84, <http://www.tandfonline.com/doi/pdf/10.1080/14442210600554499>, accessed 6 May 2015.

Filer's complex and sophisticated 'contribution to debates about the relationship between legal and anthropological approaches to the concept of custom or customary law as the property of native or indigenous peoples' (66), has two main elements: a consideration of the non-nationalist ideological flavour of concepts of law and custom at certain moments in the history of Papua New Guinea; and the need to take account of an ideology of land ownership in order to achieve an ethnographic understanding of the relationship between custom and law. He suggests that that relationship changed at the time of Independence, with the political replacement of 'custom' and 'law' by Tok Pisin 'kastom' and 'lo', and also by their displacement, as a result of the growth of extractive industry, by a secondary opposition of land/resource law and customary land/resource ownership. Furthermore, he argues that the relationship 'has to be understood through an exploration of the metaphorical use of the Tok Pisin word *rot* ('road'), which seems to stand for something between a "cult" and "ideology", as well as the political transformation resulting from 'large-scale resource development' (65).

Filoiali'i, La'auli A and Lyle Knowles. 1983. The Ifoga: The Samoan Practice of Seeking Forgiveness for Criminal Behaviour. *Oceania* 53(4): 384-388, http://www.jstor.org/stable/40330698?seq=1#page_scan_tab_contents, accessed 18 May 2015.

This description of the performance of *ifoga* in Samoa and the United States defines the action as **'the traditional practice of seeking forgiveness and rendering a formal apology resulting from a hostile event involving physical injury and/or the verbal degrading of a family reputation' (384). The parties involved in an *ifoga*** may be individuals, families, villages, or even islands and it is performed by the offending family or village. The authors outline Samoan social structure and the role of the *fono* or village council therein and detail the conduct of *ifoga* between an individual/family and a village council, between families, between two villages, between two islands, and between families in urban USA. They trace the typical events as follows: the group seeking forgiveness, led by its *matai* (chief) sits outside the house of the offended

group with their heads and bodies covered by fine mats; they remain, sometimes having to return the following day, until called inside to be heard; discussion and formal apology ensues, followed by a process of forgiveness; upon reconciliation, the offending group will usually present gifts of food. See also Krämer 1995, MacPherson & MacPherson 2005, and Mead 1969.

Findlay, Mark, 1997. Crime, Community Penalty and Integration with Legal Formalism in the South Pacific. *Journal of Pacific Studies* 21: 145-160, <http://www.usp.ac.fj/fileadmin/files/Institutes/jps/findlay.PDF>, accessed 1 June 2015.

Characterised by its author as an exploration of ‘the adaptation of legal formalism in contexts of resilient and resonant custom’ (145), this article examines claims by institutional legality to predominance over culture, even when it has been modified by custom and particularly in the context of penalty, which he regards as a bridge between different systems of sanction. In response to the limitations of existing modes of reconciliation of custom to introduced law, he attributes the colonising **effect of legal formalism to distinctions between ‘law’ and ‘custom’, identification of ‘customary law’, designation of what is to be integrated,** rejected, or denied by legal formalism, and he identifies ideological, functional, and structural elements in the latter. Observing the existence **of a number of ‘paradoxes’ between customary and introduced,** Findlay discusses those of liability in the Solomons *Loumia v DPP*, justification and excuse in the Fijian *Sosiveta and Others v R*, and extenuation and mitigation also in Fiji in *R v Waisea Naburogo and Others* and *R v Voduvuli*. Moving to the reconstruction of penalty by custom within legality, he surveys banishment in *Italia Taamale and Taamale Toelau v Attorney General of Western Samoa* and reconciliation in Fijian *R v Lati*, and relates the continuing interaction between custom and formalism to the resilience of customary penalties.

Fitzpatrick, Daniel. 2008. Mediating Land Conflict in East Timor. In *Making Land Work*, Vol 2, 175-198. Canberra: Australian Agency for International Development, <http://dfat.gov.au/about-us/publications/Pages/making-land-work.aspx>, accessed 18 June 2015.

Assessing the effectiveness of the mediation model introduced to East Timor by the UN in 2000 to deal with conflicts over customary land, later **consolidated in that country’s Land and Property Directorate,** Fitzpatrick judges it as having been successful in a number of potentially violent disputes, particularly in comparison with the record of its court system. Outlining the setting and the nature of the mediation process, he reviews

its successes and limitations in four cases in the city of Maliana and explores the possibilities for its transfer, with appropriate adaptations, to other Pacific contexts.

Forrest, Craig and Jennifer Corrin. 2013. Legal Pluralism in the **Pacific: Solomon Island's [sic] World War II Heritage**. *International Journal of Cultural Property* 20(1): 1-21, <http://journals.cambridge.org/action/displayIssue?decade=2010&jid=JCP&volumeld=20&issueld=01&iid=8901626>, accessed 7 December 2015.

This is an extended examination of an application for judicial review of a decision by the Solomon Islands Minister of Culture and Tourism to revoke a licence issued under the Protection of Wrecks and War Relics Act 1980. The case, *Alpine Concrete Constructions Pty Ltd v Attorney General*, required the High Court to examine the law on the recovery and export of World War II relics, raising issues about the rights of various stakeholders and the question of the status of the relics as cultural heritage and illustrating the difficulties consequent upon unclear boundaries between different legal systems within a legally pluralistic framework. The authors discuss that framework in the Solomons, summarise the dispute, outline the provisions of the act and the **court's** decision, and set out the existing rules governing land ownership with reference to *Kofana v Aute'e*, *Allardyce v Laore*, and *Combined Fera Group v The Attorney General*. Continuing to the question of the ownership of relics and the nature of cultural heritage values, the authors conclude, given the uncertainties involved and the relationship between **customary law and legislation, that 'providing a rigorous protective regime for cultural heritage is problematic Especially so when foreign norms are introduced'** (16).

Forsyth, Miranda. 2004. Beyond Case Law: *Kastom* and Courts in Vanuatu. *Victoria University of Wellington Law Review* 35: 427-446, http://www.upf.pf/IMG/pdf/09_Forsyth.pdf, accessed 15 May 2015.

This article addresses the general failure to develop a Melanesian jurisprudence, considers the limitations of the reasons given for lack of progress in the integration of customary law and the official legal system in Vanuatu, drawing on *Waiwo v Waiwo and Banga* and *Public Prosecutor v Gideon*, and argues that such integration needs to be a two-way process. As well as critiquing the limitations of previous research efforts, Forsyth identifies six categories of reasons given for the lack of integration, the **mixing of 'oil and water': the Constitution, lack of homogeneity of kastom**, common-law-tradition training, lack of clarity in application of *kastom* rules, fundamental differences in the natures of common law and *kastom*, and different views of the respective players. Acknowledging

some validity in them, she identifies two limitations: a failure to go outside case law and legislation because of the paucity of empirical research and the lack of investigation of the changes needed in each system to facilitate integration. She concludes with a plea for **investigation ‘on the ground’ and a proposal for an empirical research project.**

Forsyth, Miranda. 2006. Sorcery and the Criminal Law in Vanuatu. *Lawasia* 1: 1-27, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/lawasiaj7&id=7&print=section§ion=5&ext=.pdf>, accessed 20 May 2015.

Forsyth here examines the problems involved in incorporating customary norms into Melanesian criminal law with a focus on sorcery in Vanuatu. She explores the background to contemporary beliefs and practices and how behaviour generated by them is dealt with in the customary legal system and in the state systems of courts and legislation, with particular reference to *Malsoklai v Public Prosecutor*, the *Sorcery Act 1971*, and the *Penal Code*. In relation to Vanuatu and the wider Melanesian context of acceptance of mitigation, she reviews *Public Prosecutor v Tupun* and *Public Prosecutor v Kuvu Noel and Others* in Vanuatu, *R v Sisiolo* in the Solomons, *State v Wakilau* in Fiji, and *Secretary for Law v Ulao Amantasi* in PNG. She concludes that the issue of the relationship between customary and state legal systems cannot be resolved by the simple transfer of norms from one to the other but that it is possible for the state system to accommodate such social realities as belief in sorcery with minor legislative but major mind-set changes.

Forsyth, Miranda. 2009. *A Bird That Flies With Two Wings: Kastom and State Justice Systems in Vanuatu*. Canberra: ANU Press, <http://press.anu.edu.au?p=49351>, accessed 6 May 2015.

Following on from the approach proposed in Forsyth 2004, this book is based on five years of fieldwork in both *kastom* and state justice systems, following a year spent as a volunteer prosecutor in the Public **Prosecutor’s Office in Vanuatu, and investigates the problems and possibilities of plural legal orders in that country. Forsyth’s approach is** based on the idea that such a survey must be based on all legal orders dealing with conflict because the majority of disputes are dealt with in *kastom*; strengthening the state system without taking account of *kastom* would undermine the latter and weaken conflict management in general, and legitimation of the state system would be enhanced by a supportive relationship between the two systems, an outcome she sees as achievable given some changes within and adaptations between them. Beginning with a general orientation to contemporary Vanuatu, Forsyth goes on to

establish her theoretical framework, survey the history of ethnography in Vanuatu, explore the current workings of both *kastom* and state systems, discuss problems in the relationship between the two, develop a typology of possible relationships, and uses that to propose a new method of doing legal pluralism.

Forsyth, Miranda. 2013. Do You Want it Gift Wrapped?: Protecting Traditional Knowledge in the Pacific Island Countries. In *Indigenous Peoples' Innovation: Intellectual Properties Pathways to Development*, edited by Peter Drahos and Susy Frankel, 189-214. Canberra: ANU Press, <http://press.anu.edu.au/wp-content/uploads/2012/08/ch09.pdf>, accessed 21 May 2015.

Drawing on the traditional knowledge in 'songs, stories, oral traditions, visual and performing arts, ritual and cultural practices, and architectural forms' rather than biological knowledge (190), Forsyth argues for a pluralistic approach to its protection rather than the existing ill-founded, shallow, and commercially oriented approach common in the Pacific. Identifying a number of problems likely to result from a continuation of that state-based approach, she proposes a deeper investigation of an already sophisticated customary system to address the challenges traditional knowledge faces from globalisation.

Forsyth, Miranda. 2015. A Pluralist Response to the Regulation of Sorcery and Witchcraft in Melanesia. In *Talking it Through: Responses to Sorcery and Witchcraft Beliefs and Practices in Melanesia*, edited by Miranda Forsyth and Richard Eves, 213-239, <http://press.anu.edu.au/wp-content/uploads/2015/05/12.-A-Pluralist-Response-to-the-Regulation-of-Sorcery-and-Witchcraft-in-Melanesia.pdf>, accessed 21 May 2015.

Responding to a variety of questions about sorcery and witchcraft in the criminal justice systems of Melanesia and, particularly, Papua New Guinea, in the light of historical and contemporary considerations, Forsyth proposes to move beyond the role of the state to view them through two broader paradigms: a pluralist one and a responsive regulatory one involving a number of non-government bodies as well as government departments. She reviews the role of the criminal justice system, the operation of the *Sorcery Act 1971*, the criminalisation and punishment of sorcery and witchcraft practices and responses to them, accusations thereof, and sorcery or witchcraft beliefs as a defence. Stepping back from those issues to consider the possibility of a new and unique Melanesian jurisprudence, she raises further questions about the incorporation of custom and human rights, the role of regulatory systems in relation to effective local mechanisms, and the appropriateness of western legal rationalism to Melanesian contexts.

Gilson, R P. 1955. The Background of New Zealand's Early Land Policy in Rarotonga. *Journal of the Polynesian Society* 64(3): 267-280, <http://www.jstor.org/stable/pdf/20703499.pdf?acceptTC=true>, accessed 26 May 2015.

An ethnologically based historical account of the social organisation of Rarotonga in the Cook Islands and an outline of the early years of **New Zealand's land policy in its new colony around the turn of the twentieth century**. Gilson mounts a sharp and closely argued critique of the **'artificial' ethnological account of Rarotongian custom conceived by** Walter Edward Gudgeon, the first New Zealand administrator in the Cook Islands, and the land-tenure provisions and land-court decisions he based on it. See also Baltaxe 1975, Campbell 2002, Crocombe 1964, and Pascht 2011.

Glasse, Robert M. 1959. Revenge and Redress among the Huli: A Preliminary Account. *Mankind* 5(7): 273-289.

Glasse proposes to demonstrate 'how social control is achieved in a New Guinea society that has no system of centralized authority' by examining the operations of 'two institutional complexes', 'revenge' and 'redress', among the Huli of the Southern Highlands (273). His thesis is that, while they form temporary alliances to exact vengeance, those alliances are unstable because of hostilities produced by the system of redress. He supports his argument with a geographic backgrounder, a comparison of **three 'social personalities' at different levels of wealth**, and a discussion of the way in which social order emerges from the functional inter-relation of the two complexes. In concluding, he observes that this form of social control is self-regulating or self-adjusting, needing no centralised, systematic system of political authority.

Goddard, Michael. 1992. Of Handcuffs and Foodbaskets: Theory and **Practice in Papua New Guinea's Village Courts**. *Research in Melanesia* 16: 79-94.

Goddard revisits long-standing discussions about the judicial efficacy and **grassroots efficiency of Papua New Guinea's village-court** system and observes that the original idealism has largely given way to practical considerations. First setting out an expansive historical background to the courts he goes on to a lengthy discussion of the relationship between law and custom in their operation and adds some recent observations. He suggests that the courts are not fulfilling their original function because of their perceived status at the bottom of the judicial hierarchy, because villagers perceive them as other than customary, and because of the impossibility of integrating law and custom within a framework of theoretical, if selective, support for custom but a practical inability to

codify it. He concludes that it is likely that the law and custom problem will persist and that the effect of the continuing operation of the village courts will be increasingly to extend introduced law into the villages.

Goddard, Michael. 1996. The Snake Bone Case: Law, Custom and Justice in a Papua New Guinea Village Court. *Oceania* 67(1): 50-63, <http://www.jstor.org/stable/pdf/40331519.pdf?acceptTC=true&jpdConfirm=true>, accessed 21 May 2015.

In relation to village courts, Goddard critiques academic and journalistic perpetuation of the idea of a binary relationship, whether antagonistic or articulatory, between law and custom, an idea he sees as rooted in colonial administrative attitudes and later sustained by the anti-colonial defence of custom. He identifies two schools of thought on the subject of the courts: one, variously described as legal centralism or structural pluralism, sees a steady drift towards legalism in their operations; the other, described as interactive pluralism, points to the creative and flexible use of the courts by local people. In closely examining a case of attempted sorcery in a Port Moresby village court, he not only extends his criticism of the binary approach but also calls into question the validity of the very notion of custom in the context of contemporary Papua New Guinea justice. While generally endorsing the interactive model of the village-court system, he casts doubt on the suggestion that their flexibility either pursues the aims of customary law or will further its practice.

Goddard, Michael. 1998. Off the Record: Village Court Praxis and the Politics of Settlement Life in Port Moresby, Papua New Guinea. *Canberra Anthropology* 21(1): 41-62, <http://www.tandfonline.com/doi/pdf/10.1080/03149099809508373>, accessed 19 June 2015.

Returning to the subject matter of the previous article, Goddard turns to one of the three urban courts in which he has conducted long-term fieldwork to examine its records and try to discover the reasons for the absence of references to sorcery within them in a district known for such practices. Taking account of the demography and reputation of the area and, in particular, its squatter settlements, he observes that, while the village court is viewed favourably by local people, awareness of its links to other institutions makes them vulnerable to public exposure, hence **the avoidance of mention of sorcery in the records, not 'a methodically planned subversion ... but a tacit, historically conditioned awareness of the possibility of disruptive intrusion by agents of urban authority' (57). He concludes by making the 'old-fashioned anthropological point' that the court system is a dynamic institution with a complex articulation of introduced law and 'fluid, changing "customs"', informed by much more**

than those two elements, and embedded in the social life of communities (57-58).

Goddard, Michael. 2000. Three Urban Village Courts in Papua New Guinea: Some Comparative Observations. In *Reflections on Violence in Melanesia*, edited by Sinclair Dinnen and Allison Ley, 241 - 253. Canberra: Hawkins Press and Asia Pacific Press.

Reviewing the complex of influences on the nature and operations of the village courts in dispute settlement since Independence in Papua New Guinea, Goddard suggests that they have neither replaced nor absorbed autochthonous procedures or the fora in which they take place, coming to occupy a place between them and the local and district courts. Comparing the history and operations of the three village courts in which he has conducted long-term fieldwork, he acknowledges their differences but concludes that they are neither customary nor neo-customary and, given their placement within the legal system, not strictly mediators between customary mechanisms and legal courts. He concludes that, while they have a strong future, official demands on them mean they will become embedded at the foot of the state legal system.

Goddard, Michael. 2005. Research and Rhetoric on Women in Papua **New Guinea's Village Courts**. *Oceania* 75(3): 247-267, <http://www.jstor.org/stable/pdf/40332083.pdf?acceptTC=true&jpdConfirm=true>, accessed 5 June 2015.

Interrogating recent and popular claims that women are discriminated **against in the name of 'custom' in male**-dominated village courts by way of review of the literature and his own research in three village courts in Port Moresby, Goddard argues not only that the rhetoric is unsupported by evidence but that it ignores the access to justice they offer to **grassroots women and denies their agency by 'portraying them as passive victims, rather than 'confident and reasonably successful disputants'** (262). Finding the condemnatory literature hard to classify in terms of legal centralism, legal pluralism, or conservative legalism, he suggests that it is driven by an *a priori* position unsupported by evidence and is in danger of vilifying a community resource women find increasingly useful.

Goddard, Michael. 2009. *Substantial Justice: An Anthropology of Village Courts in Papua New Guinea*. New York: Berghahn Books.

This expansion and extension of Goddard's earlier approaches to village courts includes some material from Goddard 1992, 1996, and 2005. The fieldwork for this book was conducted from 1994 onwards at three urban village courts in Port Moresby, the capital of Papua New Guinea, two of

them in suburban settlements and the other in a village on the edge of the town. Following a history of colonial law in the country, he examines the introduction and administration of village courts and the continuing influence of colonialism; the on-the-ground problems encountered by court officers **in the context of the courts' problematic positioning with** regard to state law and custom; the distinctive characteristics of the three fieldwork courts; the politics of being a village-court official; each of the three individual courts in action using transcripts of cases; and the tension between dominant group dynamics of dispute settlement and the formal requirement to treat disputing parties as individuals with rights.

Goddard, Michael. 2010a. *Justice Delivered Locally: Solomon Islands*, World Bank J4P Literature Review. Washington: World Bank.

This literature review of material on the delivery of justice and dispute resolution at the community level in the Solomon Islands examines historical mechanisms and their effectiveness, contemporary mechanisms for dealing with civil, criminal, and customary-land issues, and the historical roles of church and NGO services. The review is divided into three sections, each with a useful concluding summary: first-contact to the Pacific war covering early documentation, anthropological research, local-level reforms, and the effects of Christianity; post-war period to Independence covering local political movements, chiefs and *kastom*, local governance and *kastom*, and the influence of Christianity; and Independence to the present covering pre-RAMSI literature on local courts and custom, local courts and land issues, Christianity, *kastom*, and **conflict, women's groups and NGOs, the post-colonial Westminster system, post-RAMSI literature, the rule of law and negotiation of *kastom*, non-state agency, and local courts and land.** Characteristically rejecting a dichotomous attitude to custom and state law, Goddard concludes that a **'hybrid court system at the local level, supported by existing (and clearly workable) church resources and the newly emergent local women's organizations,** presents itself as a potentially valuable alternative to previous attempts to maintain legal and customary forums as alternative justice-**delivery resources' (29).**

Goddard, Michael. 2010b. The Age of Steam: Constructed Identity and Recalcitrant Youth in a Papua New Guinea Village. In *A Kind of Mending: Restorative Justice in the Pacific Islands*, edited by Sinclair Dinnen, Anita Jowitt, and Tess Newton Cain, 45-72. Canberra: Pandanus Books, <http://www.jstor.org/stable/pdf/j.ctt24hbc4.9?acceptTC=true&jpdConfirm=true>, accessed 15 June 2015.

Warning of the need for caution in approaching matters of tradition and cultural meaning because of their equivocal natures, and all the more so

in the case of the 'invention' of tradition, Goddard turns to one of the peri-urban villages in which he has done long-term field work to **'contextualise a judicial process which might be glossed as restorative in issues of communal identity, the interpretation of tradition and the negotiation of modern sociality'** (45). **In particular, he argues that restorative justice must be seen in its social context where it is subject to cultural contestation and refashioning, illustrating the argument by analysis of attempts by the village court to control illicit-alcohol offences within a period characterised by contradictions between the village's self-perception as tradition-oriented and its proximity to the city of Port Moresby.**

Goddard, Michael. 2011. Bramell's Rules: Custom and Law in Contemporary Land Disputes among the Motu-Koita of Papua New Guinea. *Pacific Studies* 34(2/3): 323-349, <https://ojs.lib.byu.edu/spc/index.php/PacificStudies/article/view/30823/29282>, accessed 15 June 2015.

Goddard observes that the introduction of official 'land-tenure' systems based on colonial understandings of 'Native Land Custom' has resulted in the appearance of two sets of 'custom' in the settlement of land disputes by peri-urban villagers: informal procedures not involving the land court and the official traditional land custom it has adopted. Returning to the general area of his fieldwork and one of its villages, he discusses in this paper 'the effects on postcolonial intragroup land disputes and conceptions of descent principles when Motu-Koita have recourse through the courts to a colonial-era representation of their customary attitudes to land rights' (323). Using the example of one particular ownership dispute between two village lineages, he demonstrates the ways in which paradoxes arise from the rigidity of the application of official 'custom' in court proceedings.

Goddard, Michael and Leisande Otto. 2013. *Hybrid Justice in Vanuatu: The Island Courts*, World Bank Justice and Development Working Paper Series 22, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/08/12/000333037_20130812150614/Rendered/PDF/801920NWPOJOD00Box0379802B00PUBLIC0.pdf, accessed 11 May 2015.

In this working paper, the authors survey the island courts of Vanuatu in Efate, Santo, Malekula, Epi, and Tanna, with a quantitative and qualitative study of pluralism, *kastom*, and chieftancy; community strategies for addressing disputes; the history, jurisdiction, procedures, caseloads, and operations of the courts, supported by a tabular appendix of the cases heard in each court. They conclude that the courts are not performing as well as they might but have an important role to play given better

resources, support, and sensitivity to *kastom*. They suggest that the current dichotomy between win/lose court outcomes and the flexibility of village-based approaches will need to be overcome for the courts to **become more amenable and 'not seen as a cut-down version of magistrate's courts' (37).**

Goodale, Mark Ryan. 1998. Leopold Pospisil: A Critical Reappraisal. *Journal of Legal Pluralism and Unofficial Law* 30(40): 123-149, <http://www.tandfonline.com/doi/pdf/10.1080/07329113.1998.10756500>, accessed 6 May 2015.

Identifying a current reduction of attention to the output of major legal anthropologist Leopold Pospisil to his work on the theory of legal levels, Goodale sets out to explore this reduction in the light of recent socio-legal studies. **Noting that aspects of Pospisil's work 'miss the mark' and that his style of presentation is 'troubling', he emphasises that his analysis of an article two major books, including 1958a, is not intended as a tribute or a case for a renaissance but an attempt 'to draw out some of the true complexity in the work of a major figure in socio-legal studies in the second half of this century' (125). Despite his own criticisms, particularly of structuralism and empiricism or 'scientism', and support for other critics, Goodale concludes that there are six facets of the work that remain current: insistence on wider relevance; legal levels; the relativity of law; the importance of empirical research; legal language as social code; and analysis of socially constituted legal meanings. Pospisil's response is in Pospisil 2001.**

Gordon, Robert J and Mervyn J Meggitt. 1985. *Law and Order in the New Guinea Highlands*. Hanover: University Press of New England.

A comprehensive and closely argued ethnographic analysis of the then-much-publicised 1980s 'breakdown of law and order' in Enga Province in the Highlands of Papua New Guinea together with a strong critique of 'lawyerly' approaches to the question. **The authors seek to address three inter-related paradoxes that appear in representations of the conflicts: that Enga dislike war because of its deleterious effects but war occurs; that only a few administration officials maintain law and order in colonial days while, post-independence, a much greater number cannot; and that Enga agree that the cause of the resurgence of violence is a 'soft' government when it has actually increased the size of the police force and the severity of penalties. Successive chapters examine official and Enga perspectives of law and order; the decline of *kiap* (field officer) justice; the rise of specialist magistrates and 'legal formalists' (15); increasing Enga participation in elective political processes; a reinterpretation of conventional academic wisdom on rural violence; the 'customary law' approach to dealing with law and order and its lack of**

viable solutions; and the growth and decline of village courts. The authors argue that the latter then-neglected and disparaged option has the greatest potential for dealing with law and order. See Zorn 1990b.

Grijp, Paul van der. 1993. After the Vanilla Harvest: Stains in the Tongan Land Tenure System. *Journal of the Polynesian Society* 102(3): 233-254, <http://www.jstor.org/stable/pdf/20706516.pdf?acceptTC=true&jpdConfirm=true>, accessed 25 May 2015.

Lamenting the normative character of most existing work on land law and land use in Tonga, van der Grijp presents a detailed case study of land **inheritance within a kin group on the island of Vava'u. He chooses this** study as indicative of the Tonga-wide transition from slash-and-burn to intensive agriculture, from self-sufficiency and gift exchange to monetised commercial production, and from an individual place in society to wage labour. The study comprises a description of the village in question, discussion of property and land-tenure legislation, a specific example of genealogical inheritance with a demonstration of the recent phenomenon of land shortage, and consideration of the impact of the introduction of money. Van der Grijp concludes that the socio-economic **situation 'is incomprehensible and inexplicable unless explicit attention is paid to the way in which modes of production and modes of thinking are combined' (248).**

Guo, Pei-yi. 2011. Law as Discourse: Land Disputes and the Changing Imagination of Relations Among the Langalanga, Solomon Islands. *Pacific Studies* 34(2/3): 223-249, <https://ojs.lib.byu.edu/spc/index.php/PacificStudies/article/view/30819/29278>, accessed 5 June 2015.

This paper investigates the ways in which the people of the Langalanga Lagoon on Malaita in the Solomon Islands incorporate legal ideas, language, and framework in their land disputes and everyday lives. Guo analyses changes in the ways in which the imagining of social relations has been changed by the post-Independence legalisation of land, even in the ways in which genealogy is recited and represented, and the movement towards stronger preference for unilineal rules of inheritance. Drawing on fieldwork at Seagrass Island, he traces the transformation of law from a set of rules to a genre of discourse in the course of land **disputes and proposes the study of 'legalscape' as a 'potential way to understand the entanglement of law and culture in contemporary Oceania' (245).**

Hatakana, Sachiko. 1973. Conflict of Laws in a New Guinea Highlands Society. *Man* (New Series) 8: 59-73,

<http://www.jstor.org/stable/pdf/2800610.pdf?acceptTC=true&jpdConfirm=true>, accessed 22 June 2015.

Examining the conflict between introduced and customary law among the Sinasina of Chimbu in the Highlands of Papua New Guinea in the 1960s, Hatakana characterises the community as lacking the concepts and terminology of law as usually understood but recognising the functional concept in a set of binding obligations involving rights and duties. Acknowledging customary law, informal court hearings, and compensation negotiations as avenues of dispute settlement, he sets out the changing roles therein of customary arbitrators, introduced village officials, informal courts, and local courts, the work they perform in a changing society, and their patterns of variation by area within the district. Observing limitations in the effectiveness of the imposed judicial system and according considerable importance and potential to the unofficial courts, he sees the establishment of local courts and magistrates as assisting the transition to a more stable society and the adoption of a unified legal system.

Hickson, Letitia. 1975. *The / Soro: Ritual Apology and the Avoidance of Punishment in Fijian Dispute Settlement*. Unpublished Harvard University Anthropology PhD Thesis.

Hickson's investigation of the role and operation of the reconciliation ritual of *i soro* was conducted in one village on Viti Levu and another on Vanua Levu in Fiji. Describing the village environment and the structure of its interpersonal relationships, she goes on to examine the kinds of sanctions to which *i soro* is a frequent alternative, the way in which its confessional nature enables an offender to escape punishment, and Fijian and theoretical material on individual confession. Taking as her hypothesis that such customs are embodied in a hierarchical authority structure, she concludes that her examination of *i soro* **indicates a 'very close relationship between dispute settlement and the dominant social and psychological patterns in a society' (202). Within the text and in an appendix**, Hickson provides detailed descriptions of 18 cases of resort to *i soro*. See also Arno 1974 and 1976, Koch et al 1977, Merry 2006, and Toro 1973.

Hogbin, H I (ed). 1934. *Law and Order in Polynesia: A Study of Primitive Legal Institutions*. London: Christophers.

Cataloguing successive contributions to the centuries-old question of the foundations of social order, **and settling on Malinowski's concept of** reciprocal social relationships, Hogbin identifies the influences to be studied in determining those foundations: education, mutual dependence and reciprocity, sanctions for conformity to custom, and the force of

tradition. Locating the legal system and punishment within the whole complex of social organisation, belief, and ceremony in Ontong Java and **in Tonga, Hawai'i, and Samoa, he concludes that, rather than depending** on a single foundation, the body of binding social obligations within those societies is much wider than the prohibitions of criminal law and includes reciprocity, educational influence, respect for authority, social approval and disapproval, and religious beliefs and performances.

Hogbin, H I. 1944. Native Councils and Native Courts in Solomon Islands. *Oceania* 14 (4): 257-83, http://www.jstor.org/stable/40328032?seq=1#page_scan_tab_contents, accessed 15 June 2015.

Returning to the site of his 1930s fieldwork in North Malaita in the Solomon Islands, Hogbin surveys recent administrative changes and reactions to them against a background of law and order in pre-colonial times, from 1910 to 1940, and at the time of his return, including observations of the operations of government-introduced councils, **courts, and headmen. Identifying indifference on the part of 'heathens'** and resentment on the part of Christians at the attempt at recognition of customary leaders but general acceptance of the Native Court, except by missionaries, he recommends improvement in the abilities and resourcing of headmen and removal of mission influence on courts and schools as fundamental to the success of the reforms.

Howard, Alan. 2011. Land Issues on Rotuma. *Pacific Studies* 34(2/3): 157-174, <https://ojs.lib.byu.edu/spc/index.php/PacificStudies/article/view/30816/29275>, accessed 15 June 2015.

Looking back on his fieldwork in Rotuma at the time of rebellion against **the Fijian colonial government's replacement of a bilineal land-** transmission system by the Fijian model of male-line inheritance, Howard reviews historical land-tenure systems in relation to the kinship model, sets out the seven concepts basic to land rights, and identifies the origins of the new provisions in a long-standing concern about boundary disputes. Reporting to the government on land issues on the basis of his research at the time, he highlights the effectiveness of the bilineal system in redistributing land when necessary, particularly in the face of increasing mobility and finds that most land disputes were in fact satisfactorily settled in customary ways. He observes that, while the new legislation remains on the books to the time of writing, it was never enforced, land remains unsurveyed, and custom continues to obtain. In terms of recent change to the value of land, Howard identifies the causes as changes in the nature of housing, tourism prospects, and dramatic **changes to the island's isolation resulting in an increasing tension**

between adherence to the bilinear system and the heightened investment of current landowners.

Ivoro, John. 2010. Conflict Resolution in a Multi-Cultural Urban Setting in Papua New Guinea. In *A Kind of Mending: Restorative Justice in the Pacific Islands*, edited by Sinclair Dinnen, Anita Jowitt, and Tess Newton Cain, 109- 113. Canberra: Pandanus Books, <http://www.jstor.org/stable/pdf/j.ctt24hbc4.14?&acceptTC=true&jpdConfirm=true>, accessed 15 June 2015.

Ivoro, a Papua New Guinean trainer in a conflict-resolution programme, recounts the introduction of resolution techniques to deal with uncertainty and insecurity resulting from crime and violence in the multi-ethnic Saraga Settlement in Port Moresby, the conduct and consequences of mediation sessions, and relationships with local firms, police, and churches. He concludes with a short case study of the mediation of a dispute over a brideprice arrangement.

Jolly, Margaret. 1992. Custom and the Way of the Land: Past and Present in Vanuatu and Fiji. *Oceania* 62(4): 330- 354, <http://www.jstor.org/stable/pdf/40332509.pdf?acceptTC=true>, accessed 5 June 2015.

Comparing Vanuatu's *kastom* (custom or tradition) with Fiji's superficially similar *vakavanua* (way of the land), Jolly argues that they are, in fact, marked by different articulations of past and present, the first predicated on rupture and revival and the second on continuity of past and present. Identifying the different attitudes to tradition underlying the divergence in the terms, she explores in considerable detail the ways in which those differences contributed to colonial land policies, the extent to which customary land tenure was acknowledged and codified in Vanuatu and Fiji, and the impact of the two colonial histories, in particular of the respective courts, on present meanings of *kastom* and *vakavanua*. In some final thoughts, she considers linguistic aspects of the divergence and possible effects of the two different processes of decolonisation.

Keesing, Roger and Peter Corris. 1980. *Lightning Meets the West Wind: The Malaita Massacre*. Oxford: Melbourne University Press.

Keesing and Corris's ethnohistorical account of the 1927 'Malaita massacre' is bookended by three introductory chapters on the culture and society of the Kwaio of Malaita in the Solomon Islands up to the 1920s and a 'Colonial Justice' chapter. The latter, based on interviews with descendants and one survivor, archives, and journalistic sources, recounts the events of the pre-trial investigation and trial, described by

the authors as 'in some ways charades' (185), and the continuing post-trial detentions from both Kwaio and administration points of view.

Koch, Klaus Friedrich. 1967. Conflict and Its Management among the Jalé People of West New Guinea. 2 vols. Unpublished University of California at Berkeley PhD Thesis.

In this thesis, Koch sets out the fieldwork results and consequent provisional conclusions upon which Koch 1974 is based and from which it is extended. His description and analysis of Indigenous conflict management in a horticultural society not yet affected by foreign-government control seeks to remedy the absence in anthropological literature 'of studies dealing with processes of dispute settlement in societies without formal legal institutions like courts and offices whose incumbants [sic] have a delegated juridical authority' (1: 20). The first part is an ethnography of Jalé society, economy, and the primary institutions of marriage and initiation. The second part identifies four action patterns in conflict, oral dispute, fighting, warfare, and avoidance, and discusses them in relation to kinship and territorial levels. From these observations, he hypothesises that the 'absence of third-party institutions and the correlated presence of procedures of forceful self-help tend to be found in societies in which (1) cross-cutting group affiliations are non-existent, (2) territorial factions form independent political units and (3) these are represented by fraternal power groups' (1: 311). Going on to examine theoretical aspects of those propositions and their predictive value for 'Eskimo' societies, Koch goes on to conclude that 'a male individual's identification with his adult role as a member of a solidary group having joint liability appears to be enhanced by the structural arrangements which produce a strict separation of the sexes in the economic, political and ritual systems of the society' (1: 318).

Koch, Klaus-Friedrich. 1974. *War and Peace in Jalémó: The Management of Conflict in Highland New Guinea*. Cambridge, MA: Harvard University Press.

The focus of this West Papuan ethnography is on 'the political prerequisites for the transformation of a dyadic conflict into a triadic relationship between the opponents and a third party who can resolve their dispute' (26). The model underlying Koch's approach involves six processes of conflict management: adjudication, arbitration, mediation, negotiation, coercion, and avoidance. Against this background, he identifies five Jalé conceptions of antagonistic interaction: altercation, scuffle, sorcery, avoidance, and warfare. There follow 14 detailed case studies divided among conflicts between relatives, between neighbours, and between strangers and involving disputes over such issues as

resources, adultery, marriage, abduction, gardening and crops, inheritance, and, especially, pigs. Koch concludes that the absence of political integration and judicial authorities in Jalé society results in the institutionalisation of coercive self-help as a means of conflict management.

Koch, Klaus-Friedrich, Soraya Altorki, Andrew Arno, and Letitia Hickson. 1977. Ritual Reconciliation and the Obviation of Grievances: A Comparative Study in the Ethnography of Law. *Ethnology* 16(3): 269-283, <http://www.jstor.org/stable/pdf/3773312.pdf?acceptTC=true>, accessed 15 June 2015.

Identifying a lack of analysis and understanding of the obviation of grievances by initial avoidance followed by ritual reconciliation as a method of conflict resolution, the authors set about remedying the situation to some extent by examining the organisational and ideological contexts with which such rituals occur among the Jalé of what is now West Papua, women city dwellers of Jeddah in Saudi Arabia, and Fijians. There follow extensive descriptions of the nature and conduct of each of the rituals, including the Fijian *i soro*, the effects of which they summarise as a reconstitution of an agnatic lineage in the case of the Jalé, avoidance of rupture of vital interpersonal networks in the case of the women of Jeddah, and preservation of a communal order rigidly defined by ascribed status differences in the case of the Fijians. In general, they suggest, maintenance of close kin relationships is too important to be put at risk by resort to litigation when customary rules are broken. See also Arno 1974 and 1976, Hickson 1975, Merry 2006, and Toro 1973.

Krämer, Augustin. 1995 [1901]. *The Samoa Islands: An Outline of a Monograph with Particular Consideration of German Samoa*, Vol. 2, Material Culture, translated by Theodore Verhaaren. Auckland: Polynesian Press.

Within his massive ethnography of Samoa in the late nineteenth century, Krämer devotes a few pages (2: 103-108) to the administration of justice, **which he found by no means wanting but existing 'only at the low level expected only at the low level of isolated primitive peoples' (103).** He finds that such processes mainly involve settlement between the two parties concerned with involvement of third parties only in the case of such serious offences as adultery, murder, and theft in taro plantations. He traces the root of the system to that need to protect plantations and produce and itemises forms of punishment by priests, taboos, ordeal, personal arbitrary actions, family council, and, in extremis, the *fono* or community assembly. The bulk of the material deals with theft, its

prevention, detection, and punishment, the *ifoga* or formal performance of apology and forgiveness, some extreme punishments, and the availability of places of refuge.

Larcom, Jean. 1990. Custom by Decree: Legitimation Crisis in Vanuatu. In *Cultural Identity and Ethnicity in the Pacific*, edited by Jocelyn Linnekin and Lin Poyer, 175-190. Honolulu: University of **Hawai'i Press.**

In the context of what she sees as something similar to a Habermasian **'legitimation crisis' in 1980s Vanuatu, Larcom identifies the corresponding difficulties in 'the production of meaning' in relating to** the meaning of *kastom* (175). In the course of the chapter, she explores the production of cultural identity in local-level courts and, on the basis of her fieldwork among the 550 Mewun of South West Bay on the island of Malakula, argues that their pre-Independence idea of *kastom* is being transformed into anthropological **'culture', a transition observable in** those courts. In doing so, she examines models of the person as displayed in 1973-1974 local-court cases and in emerging Vanuatu nationalism and addresses the problem of negotiating identity within a changing legal system.

Larcom, Shaun. 2015. Empirical Study of the Sanction of Wrongs in the New Guinea Islands. In *Legal Dissonance: The Interaction of Criminal Law and Customary Law in Papua New Guinea*, 75-111. New York: Berghahn.

Commencing this chapter with an outline of his research method, which is based on questionnaires and interviews, and a description of the New Guinea island provinces of East and West New Britain and the Autonomous Region of Bougainville, Larcom traces the history of law enforcement in the regions since before colonisation. Focusing on current controls and sanctions and taking into account the substantial continuing role of customary law, he surveys the relationship between it and state law in the town centres and their surrounds and in the remote villages. Identifying a number of problems with the existing arrangements, mainly involving police corruption and brutality, he outlines the particular situation in Bougainville where customary law and chiefly authority have been most significant since the absences of the state and police at the **time of the Bougainville Crisis. Larcom concludes that 'below the surface the state legal order plays a secondary role to customary law' (94).** Tables of descriptive statistics from the survey are appended.

Lawrence, Peter. 1969. The State Versus Stateless Societies in Papua and New Guinea. In *Fashion of Law in New Guinea: Being an Account*

of the Past, Present and Developing System of Law in Papua New Guinea, edited by B J Brown, 15- 37. Sydney: Butterworths.

Characterising the problem of decolonisation as a failure to recognise that two diametrically opposed systems are involved, Lawrence sets out **to demonstrate that this opposition is at the heart of Australia's problem** of the decolonisation of New Guinea. Suggesting that New Guineans exploit rather than assimilate Australian law, he proceeds to describe and analyse in some detail the systems of social control in the Australian **'state' and in 'stateless' Papua and New Guinea. Thus identifying the** opposing fundamental principles of social control underlying the two systems, he discusses the force of socialisation, public opinion, and reciprocity in the New Guinea system and thereby draws the distinction between the two: a difference in aims in settling disputes, with western law aiming to protect individual and equal rights and the New Guinean the resolution of quarrel and restoration of social order, the one abstract and impartial, the other concerned with relationships. Lawrence offers no easy solution **but concludes that 'we may be able to do little more than establish our basic legal principles, and leave the people to develop them in ways they see best and we are now quite unable to foreshadow'** (37).

Lawrence, Peter. 1970. Law and Anthropology: The Need for Collaboration. *Melanesian Law Journal* 1(1): 40-50.

Proposing far-greater collaboration or partnership between Law and Anthropology in order to deal with the problems of decolonisation, **Lawrence argues that 'both the lawyer and social anthropologist have a direct interest and much to contribute' to an outcome dependent on** partnership or partial amalgamation (41). In support, he examines and critiques the approaches of both lawyer and anthropologist and ascribes to the lawyer the clarification of initial practical problems and to the anthropologist location of problems in their total setting and provision of skills for exploring them. His concluding recommendations are for scholars trained in both disciplines and the introduction of lectureships in **'Ethnojurisprudence'**.

Leach, James. 2011. 'Twenty Toea Has No Power Now': Property, Customary Tenure, and Pressure on Land Near the Ramu Nickel Project Area, Madang, Papua New Guinea. *Pacific Studies* 34(2/3): 295- 322,
<https://ojs.lib.byu.edu/spc/index.php/PacificStudies/article/view/30822/29281>, accessed 25 August 2015.

Suspecting that the acknowledgment of customary land tenure in Papua New Guinea may, under pressure from large-scale extractive industry, have resulted in no more than a narrow right of disposal for minimal

gain, Leach examines the reality of the impact of a nickel-mine project on landowners in Madang on the north coast of Papua New Guinea. He investigates the failure, in the face of subtle pressures resulting from the introduction of the project, of customary tenure to protect the long-standing relationship to the land of constitutive interdependence rather than property rights, particularly in the context of produce-market **development and its 'nexus between kinship, land and gender'**. Exploring the local people's related **'nexus of person, place, vitality and cultural expression'** as a counter to individualistic property ownership (310), he concludes that **customary tenure's foundation in western property law** has resulted in replacement of that nexus by an autonomous power to alienate, exploit, and appropriate.

Lealofi, E. 2009. Samoan Jurisprudence: A Commentary. In ***Su'e Su'e Manogi - In Search of Fragrance: Tui Atua Tupua Tamasese Ta'isi and the Samoan Indigenous Reference***, edited by T M Suaalii-Sauni et al, 340-346. Apia: National University of Samoa.

In this response to and commentary on Efi 2009, Lealofi first sets out his initial reservations about **Tui Atua's project for a Pacific jurisprudence on the grounds that it is an attempt 'to express a fluid oral tradition in terms of a well organized and established system'** and because of his doubts about the existence of uniformity in Pacific legal systems (341). Rethinking that reaction in response to the written chapter, however, he **praises the author's acuity and grasp of Samoan society and proposes some possibilities for the future on the basis of Tui Atua's argument**. They are that certain basic norms may be set up, certain laws may be established, a legal system based on Samoan values may be put in place, peaceful traditional arbitration may be set up, and training of local judges may be advanced.

Lipset, David. 2004. The Trial: A Parody of the Law Amid the Mockery of Men in Postcolonial Papua New Guinea. *Journal of the Royal Anthropological Institute* New Series 10: 63-89.

Noting a preoccupation with conflict resolution in legal-pluralism studies, Lipset employs a Sepik episode in which a mock-trial developed out of a horseplay session among a group of village men to demonstrate that law may be used rhetorically as well as politically, especially in colonial and post-colonial settings, in expressing ambivalence and identity. In other words, he sets out **to 'consider a relationship between forms of indigenous satire, irony and parody and the law as dialogical'** (64).

Against a background of theories of play, the history of legal pluralism in Papua New Guinea, and law and order in the Sepik village, he lays out an extensive description, including transcripts, of events as they unfolded in **the impromptu 'people's court'**. Drawing on Northrop Frye's typology of

European fiction, he develops and tabulates ‘an heuristic device to help in clarifying representations of the law in colonial and post-colonial political settings’ (80), and concludes that it would be to the benefit of legal pluralism to become less literal.

Luluaki, John Yavavu Yakienjo. 1990. Customary Family Law in Yangoru: Implications of Legal Pluralism in a Papua New Guinea Society. Unpublished University of Cambridge PhD Thesis.

In this study of the Yangoru people of the East Sepik in Papua New Guinea, Luluaki undertakes a survey of the implications of legal pluralism for customary law and also of the legal regulation of customary family law and its sources, including the Constitution and legislation, courts and their jurisdictions, and the legal validity and proof of customary marriage. Luluaki explores the formation of marriage, brideprice, marriage breakdown and consequences, and parenthood along with custody, adoption and fosterage, and step-parenting. In considering the implications of legal plurality for the field of the family, he goes beyond conflicts between customary and introduced law to consider conflicts that arise when different customary-law systems come into contact with each other.

Lundsgaarde, Henry P. 1968a. Some Transformations in Gilbertese Law: 1892- 1966. *Journal of Pacific History* 3: 117-130, <http://www.jstor.org/stable/pdf/25167940.pdf?acceptTC=true&jpdConfirm=true>, accessed 26 May 2015.

A decade before Kiribati Independence, Lundsgaarde draws attention to the dramatic procedural and substantive transformations of traditional Gilbertese law consequent on British colonisation and suggests that the present syncretic product will suffice for the immediate future, that statutory codification and a constitution will be ineffective given the subsistence-level economy, and that attempts at political education on **the part of the withdrawing British ‘will only reinforce existing religious, racial, and political factionalism’ (118). He concludes that land questions** in particular are the product of successive transformations of pre-colonial law rather than the imposition of introduced law.

Lundsgaarde, Henry P. 1968b. The Strategy and Etiology of Gilbertese Property Disputes. *American Anthropologist* 70(1): 86-93, <http://onlinelibrary.wiley.com/doi/10.1525/aa.1968.70.1.02a00100/pdf>, accessed 5 June 2015.

Observing a Gilbertese preoccupation with litigation over property and personal disputes, Lundsgaarde finds its source in three variables: geography, demography, and land use. Basing himself on an intensive

quantitative analysis of cases on 12 of the 16 islands of the future Kiribati, he advances four hypotheses concerning the etiology of court disputes: that land disputes stem from scarcity and multiple ownership; that criminal cases stem from inequalities in the political and economic systems; that the frequency of disputes is the result of overcrowding and joint exploitation rights; and that the intensity of cases for each island relates to its economic, political, and geographical features. He concludes that those hypotheses suggest the causes of litigation are largely the product of independent conditions beyond the control of the residents.

Lundsgaarde, Henry P. 1974. Transactions in Gilbertese Law and Justice. *Journal of the Polynesian Society* 83(2): 192-222, <http://www.jstor.org/stable/pdf/20704991.pdf?acceptTC=true>, accessed 26 May 2015.

Published on the eve of Kiribati Independence, this article embarks on an ethnographic description and analysis of the structure and operation of British-derived courts based on Lundsgaarde's earlier fieldwork in 1963-1964. In particular, he concentrates on the combination of western-court setting and Gilbertese concepts of fairness and justice in describing 18 cases before the Native Lands Court and Native Island Court on Nanouti and Tamana Islands involving assault and battery, land boundary location and trespass, ownership of a sewing machine, a bequest, theft, adultery, and incest. He suggests that the paradox of cultural complexity and simplicity in principle and outcome in those cases results from Gilbertese failure to distinguish between law, morality, custom, and general ideology. He concludes that the colonial legal system is of recent origin and may eventually 'establish for the Gilbertese distinctive contrasts parallel to our own Roman-derived tripartite: the law of persons, the law of obligations, and the law of property.

MacPherson, Cluny and La'avasa MacPherson. 2005. The *Ifoga*: The Exchange Value of Social Honour in Samoa. *Journal of the Polynesian Society* 114(2): 109-134, <http://www.jstor.org/stable/pdf/20707272.pdf?acceptTC=true>, accessed 25 May 2015.

The authors define the *ifoga* as 'a public act of self-humiliation—accompanied by the gift of *'ie toga* or fine mats, speeches of contrition and food—made as a form of apology by one group for the conduct of **one of its members to another offended group**' (109). They summarise a number of historical accounts of its performance, describe its place and performance in contemporary Samoa, and summarise four recent examples involving a shooting, trespass, elopement, and the beating of a student. Locating at the heart of the *ifoga* a calculation by both sides of the value of the social honour foregone by the offended party, they

identify four indicators of the seriousness of an offence: the composition of the party, the number and quality of *'ie toga*, the length of time before acceptance, the tone of the speeches of apology, and that of the speeches of the aggrieved, their number, and length. Moving on to the effects of a changing social environment on the *ifoga*, the MacPhersons discuss its economic significance, probable future, and relationship to police and court actions. They conclude that new forms of social honour and the availability of other forms of dispute resolution, particularly **resort to the courts, threaten its viability. See also Filoiali'i & Knowles 1983, Krämer 1995, and Mead 1969.**

McLachlan, C A. 1988. State Recognition of Customary Law in the South Pacific. Unpublished University of London PhD Thesis.

In this comprehensive comparative study of state recognition of Indigenous customary law in 14 Commonwealth South Pacific jurisdictions, McLachlan draws on material from Australia, Cook Islands, Fiji, Kiribati, Nauru, Niue, New Zealand, Papua New Guinea, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, and then-Western Samoa. He **approaches his work on the basis of four 'propositions': the persistent** fact of pluralism; a legacy of colonial misconceptions; the implications of a reassertion of autochthonous values; and justice and group identity. In successive chapters he explores legal pluralism and legal theory, the colonial experience and the idea of customary law, custom as a source of underlying law, human rights and cultural relativism, custom as process in disputes, and custom as title in land issues. In conclusion, McLachlan **contrasts on the one hand custom's changing ideological role with the** realities of recognition and on the other recognition by incorporation into state law with recognition by adjustments to state law in acknowledgment of the separate sphere of custom. He ends with a plea for a co-operative pluralism.

Malinowski, Bronislaw. 1926. *Crime and Custom in Savage Society*. London: Kegan Paul, Trench, Trubner.

Malinowski, often referred to as the founder of legal anthropology in the modern, ethnographic sense, here displaces the great comparativist schemes of the nineteenth-century evolutionists, epitomised by Sir Henry Maine and Lewis Henry Morgan, with the application of sustained fieldwork; replaces **their pursuit of legal institutions in 'primitive'** societies with his functionalist investigation of the mechanisms of social control; and, where they found slavish obedience to static custom, reveals a context of complex cultural relationships. Rejecting both compulsion and communism as the wellsprings of Melanesian social order, he locates its source in reciprocity and its networks of obligations and rightful claims and defines the civil law of the Trobriand Islanders in

this manner: ‘a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society’ (58).

Marcus, George E. 1977a. Succession Disputes and the Position of the Nobility in Modern Tonga. *Oceania* 47(3): 220-241, <http://www.jstor.org/stable/pdf/40330294.pdf?acceptTC=true>, accessed 5 June 2015.

In this first of two parts of his article on the Tongan nobility, Marcus sets out to give a detailed account of succession disputes and what they indicate about the position of the nobility in modern Tonga. First surveying the history of changes in Tongan society since unification under a constitutional monarchy and of the manner of succession to hereditary titles and estates, he goes on to discuss succession disputes in **general and the Vakalā case in particular and at some length as the last** such dispute to be fully litigated.

Marcus, George E. 1977b. Succession Disputes and the Position of the Nobility in Modern Tonga (Continued). *Oceania* 47(4): 284-299, <http://www.jstor.org/stable/pdf/40332193.pdf?acceptTC=true&jpdConfirm=true>, accessed 15 June 2015.

Resuming his examination of the modern nobility, Marcus identifies three main categories of important issues: the relationship of the monarch to law and legal process; relationships within noble kin groups; and the **nobility’s overall status. In the case of the first, he observes an increasing and successful reliance by monarch’s on informal methods of achieving** dynastic aims. In the second, he considers the effects of three different levels of kin relationship on the conduct of litigation and ascribes the appearance of such disputes to internal reorganisation of chiefly groups. In the third, he concludes, on the basis of the succession disputes he has **surveyed, that the nobility ‘has been ringed on all sides and thoroughly infiltrated by the socially levelling and individualizing’ that have been** generated by monarchic reforms.

Marsack, C C. 1961. *Notes on the Practice of the Court and the Principles Adopted in the Hearing of Cases Affecting (1) Samoan Matai Titles; and (2) Land Held According to Customs and Usages of Western Samoa*. Apia: Land and Titles Court.

This account of the principles underlying the processes and decision of the Land and Titles Court is informed by a great deal of intensive experience and observation by a former president of the court who was also an observer and collector of wider Samoan epistemology and

practices. Topics covered, combining both community and court practices, include succession to and splitting of titles, holding of titles by women, desirable qualifications, removal and relinquishment of titles as well as their creation, the forms of titles, provisions applying to **title-holders' houses (including the prescribed heights of foundations), and** title-related aspects of land tenure.

Matsuda, Mari J. 1989. Native Custom and Official Law in Hawaii. *Law and Anthropology: Internationales Jahrbuch für Rechtsanthropologie*, Vol. 4, 135-146. Vienna: VWGÖ-Verlag.

Addressing the extent to which a once-thriving body of custom in Hawai'i has been supplanted by state law, Matsuda traces the history of the codification of introduced law and observes that custom is not only uncodified but has no recognised repository or designated institution and exists in only a few scattered places. Where it is recognised to a limited degree, in land tenure and use, it has no tie to ethnicity and is available **to all. Observing that the relationship between custom and law 'is one of conflict, accommodation, hegemony, and counter-hegemony over time'** (142), she suggests that the dominance of state law reflects the loss of **culture, language, and identity for Native Hawaiians. Concluding that 'the demise of folk law hastens the demise of culture', she nonetheless expresses some hope that 'if law can destroy culture it can also preserve it' and points to the scholars and activists who might achieve that (143).** In the course of her survey of land issues, Matsuda discusses *Kalipi v Hawaiian Trust*, *Estate of Cunha, re Ashford*, *County of Hawaii v Sotomura*, and *Robinson v Ariyoshi*.

Mead, Margaret. 1961. Some Anthropological Considerations Concerning Natural Law. *Natural Law Forum* Paper 59: 51-64, http://scholarship.law.nd.edu/nd_naturallaw_forum/59, accessed 21 May 2015.

In this article, Mead takes up the question of the contribution anthropology can make to the study of natural law and, in particular, the universality of the recognitions peculiar to natural law, case studies of first contact with western law, and how a distillation of the essence of that law can aid the process of diffusion of historical systems of law. Surveying constancies relating to murder, incest, and property rights, she **defines natural law 'as those rules of behaviour which** had developed from a species-**specific capacity to ethicalize'** (54). **Summarising case studies** from her fieldwork in New Guinea, Indonesia, and American Samoa, she concludes that there are as many possible developments when custom and law meet each other as there are such contacts. Finally, she wonders whether the basis of law can be seen as a set of universal science-like principles or as an accumulation of comparative legal

systems, 'each seen as part of a particular culture and one link in a long historical chain of legal inventions' (64).

Mead, Margaret. 1969 [1930]. *Social Organization of Manu'a*. Honolulu: Bishop Museum Press.

Mead includes some slight commentary on law, justice, and penalties in **her ethnographic study of Manu'a in American Samoa on pages 17, 43, 169-170**. These section include discussion of the village *fono*, chiefly forum, as judiciary as well as legislature, a detailed description of the conduct of the *ifoga* (including a misconceptions about a supposed difference between eastern and western Samoa), a listing of village crimes and offences, and a description of the manner of trials and punishments. **See also Filoiali'i & Knowles 1983, Krämer 1995, and MacPherson & MacPherson 2005.**

Merry, Sally Engle. 2000. *Colonizing Hawai'i: The Cultural Power of Law*. Princeton: Princeton University Press.

In this ethnography of the colonising project in Hawai'i, Merry calls on archival sources and 10 years of fieldwork, mainly in Hilo on the island of Hawai'i, to background and explore 60 years of district court minute books from the 1850s to the first decade of the twentieth century. In Part One she examines how Hawai'i came to adopt Anglo-American law and how that changed Hawaiian law and follows the process of transformation in religious and secular law. In Part Two she outlines the social organisation and plantation hierarchy of the town of Hilo, drawing on the court records to study judges and caseloads, protest and law in the sugar plantations, and sexuality, marriage, and the management of the body. In drawing her conclusions, Merry proposes a rethink of the relationships between culture and history, law and social change, and law and resistance. An appendix includes the minutes of 30 cases involving a variety of offences.

Merry, Sally Engle. 2006. *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago Press.

Material on the Fijian practice of *bulubulu*, a form of *i soro*, the ritual of reconciliation, frequently employed in cases of rape, is included in Chapter One (4-5) and Chapter Four (113-133). Prompted by a considerable degree of mutual misunderstanding between the committee and the Fijian delegation at the 2002 hearings of the Committee on the Elimination of Discrimination against Women (CEDAW) in New York, Merry sets out to understand how the discussion could have gone so wrong, surveying the existing anthropological literature and interviewing anti-

rape activists, magistrates, police, and religious leaders. Observing the importance of social context to the function of *bulubulu* and identifying as the real issue not its use in general but its use to drop charges and mitigate sentences in rape cases, she examines *bulubulu* in village and city over time and in relation to the law and to cultural nationalism. Returning to the CEDAW hearings, Merry notes the fundamental tension between equality and universal rights and the maintenance of cultural **diversity and urges understanding of ‘the possibility that there are embedded in local communities alternative visions of social justice that are not founded on conceptions of rights but on ideas such as sharing, reconciliation, or mutual responsibility’ (133). See also Arno 1974 and 1976, Hickson 1975, Koch et al 1977, and Toro 1973.**

Merry, Sally Engle and Donald Brenneis. 2003. *Law and Empire in the Pacific: Fiji and Hawai’i*. Santa Fe: School of American Research Press.

This collection of papers, largely from a 2001 advanced seminar of **scholars working of Fiji and Hawai’i, is intended by its editors ‘to be a contribution to Pacific anthropology, as well as a Pacific location for an analysis of the intersections between law and culture over time’ and also an endeavour ‘to address basic questions in anthropology about methods of comparison, the importance of colonial knowledge production, and the nature and consequences of anthropological knowledge production’ (9).** Its chapters, heavily historical in character, include a comprehensive editorial introduction; Jane F Collier on commonalities in the two **countries experience of the law in transforming chief’s rule over people to rule over land; John D Kelly on Arthur Gordon’s legal strategies in the colonisation of Fiji; Noenoe K Silva on the ways in which prohibition of hula performance and Hawaiian-language literacy combined to produce new forms for maintaining legally and socially consequential stories; Merry on law and identity in colonial Hawai’i; Martha Kaplan on the ways in which legally defined entities in Fiji’s colonial history have shaped contemporary events; Annelise Riles’s response to the question of the appeal or use of law as object in Fiji at that particular anthropological moment; Jonathan Kamakawiwo’ole Osorio’s discussion of the deployment of two distinct legal strategies in Hawaiians’ quest for self-government; Hirokazu Miyazaki’s focus on 100 years of anti-confiscation petitions by a Fijian village to suggest that ‘indeterminacy is not always a given condition and that indeterminacy, as well as determinacy, may be a product of carefully orchestrated strategies’ (240); and Brij V Lal’s reflections on Fiji in transition.**

Monson, Rebecca. 2010. Women, State Law and Land in Peri-Urban Settlements on Guadalcanal, Solomon Islands. *World Bank J4P Briefing Note*, <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/20>

10/05/07/000020953_20100507115121/Rendered/PDF/544240Briefing1Guadalcanal1SolIslds.pdf, accessed 11 May 2015.

Following an overview of the existing intersection of state and customary land laws in peri-urban settlements around Honiara in the Solomon Islands, Monson investigates the effects of urbanisation, the growth of those settlements on customary land, and the distribution of royalties from logging licences and water sources on landowners. She concludes that the intersection of legal systems has allowed a small number of people, mainly men, to solidify their control over customary land by **converting a customary 'right to speak' into effective ownership to the detriment**, especially of women landowners who may lack formal education or customary authority to speak in public forums. To overcome this, she recommends a focus on state legal frameworks and proposes further, properly funded research into those frameworks and dissemination of the findings, notices to all landowners of pending royalty payments, separate consultations with men and women, and the introduction of programmes in legal literacy.

Narokobi, Bernard. 1989a. Law and Custom in Melanesia. *Pacific Perspectives* 14(1): 17-26.

Signalling some of the issues he would take up and expand in Narokobi 1989b, the author canvasses the idea of a Melanesian jurisprudence and surveys colonial and contemporary legal principles and practice. He identifies and discusses 10 characteristics of Melanesian social order upon which a Melanesian jurisprudence would need to be based: community of people, living in a defined locality, having social relations among themselves, recognising themselves as a social unit, common origin, acknowledged leadership, shared common values, common language, recognition as different, and diplomatic links. He goes on to list 12 basic characteristics throughout Melanesia relevant to the context of Melanesian law, defines the task before Melanesia as linking Melanesian perspectives with universal law, and describes the challenge in that as infusing appropriate degrees of Melanesian thought and practice in those systems already introduced, while being sensitive to pressures coming from the Far East.

Narokobi, Bernard. 1989b. *Lo Blong Yumi Yet: Law and Custom in Melanesia*. Suva: Institute of Pacific Studies, University of the South Pacific; Goroka: Melanesian Institute for Pastoral and Socio-Economic Service.

Lawyer, jurist, politician, and diplomat, Narokobi draws on anthropological materials as well as a good deal of his own informal but perceptive participant observation to discuss the state of law in

Melanesia, more particularly in Papua New Guinea and with an ethnographic emphasis upon the Arapesh. Considering the jurisprudence of 'classical' Melanesia (2), he observes that custom remains effective in criminal law and in village conflicts over land, brideprice, and exchange. More particularly, and in the Arapesh context, he discusses a wide variety of concepts and categories including the human person, power, balance and harmony, sympathy, sharing, affinity and honour, tradition, trusteeship, consent, and restraint, control, and discipline. He goes on to survey the principles of western, and particularly Anglo-Australian, legal principles and to compare them with the current Melanesian practice. In this he covers, among other topics, the state and sovereignty, separation of powers, the relationship between law and justice, the primacy of written law, the dichotomy between criminal and civil law, and human rights.

Ottley, Bruce L and Jean G Zorn. 1983. Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict. *American Journal of Comparative Law* 31(2): 251 - 300,
<http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/amcomp31&id=261&print=section§ion=17&ext=.pdf>,
accessed 1 June 2015.

Noting the failure since Independence in Papua New Guinea to integrate custom into the legal system despite the claims of leaders at that time, **the authors identify the major reason for that failure in 'the belief, endemic to state institutions, including the courts, that a customary legal system, created to serve the interests of small, homogeneous, stateless societies, constitutes a threat to the state and to the system of codes and common law cases, created by the agencies of government in order to reinforce the authority and legitimacy of the state' (254). Pursuing this** conception through the criminal law, they survey its origins in customary law and process and in the colonial period, they intensify their examination in the context of colonial-period Supreme Court reactions to defences of provocation and a variety of defences to charges of murder of a sorcerer. With regard to provocation they cite *R v Hamo Tine*, *R v Yande Piaua*, *R v Rumints-Gorok*, *R v Manga Kitai*, *R v Moses Robert*, and *Secretary for Law v Witrasep Binengim*. In the sorcerer cases they cite *R v Manga-Kitai*, *R v Womeni-Nanagawo*, *R v Ferapo Meata*, and *R v K J*. Continuing on to consider the period since Independence, the authors observe that custom has still not achieved a major place in the legal system and that, rather than giving a greater role to custom, the court seems intent on lessening its impact, supporting this observation by reference to *The State v Aubado Feama and Others*, *R v Noboi-Bosai*, *Secretary for Law v Ulaa Amantasi*, *Acting Public Prosecutor v Tumu Waria of Yagos*, *Acting Public Prosecutor v Unama Aumane*, *State v Luku Wapulae*, *Secretary for Law v Witrasep Binengim*, and *Sangumu Wauta v*

The State. Reviewing developments over that period, they summarise the **position of the courts as applying criminal laws ‘without reference either to the intent of the legislature or to the conditions of the populace’** (297). They conclude that customary law is seen by governments as a direct **attack on the legitimacy of the state while ‘common law and the continuing effects of colonialism seem to have denied to the courts the creativity required’ to synthesise the two systems** (300).

Pascht, Arno. 2011. Land Rights in Rarotonga (Cook Islands): Traditions and Transformations, *Pacific Studies* 34(2/3): 175-194, <https://ojs.lib.byu.edu/spc/index.php/PacificStudies/issue/view/2411>, accessed 15 June 2015.

Tracing the influence of European ideas about land rights and ownership in Rarotonga in the Cook Islands through the colonial-era, New Zealand-derived, Native Land and Titles Court and in the period since, Pascht surveys pre-European land tenure (mainly relying, uncritically, on Crocombe 1964) and the history of the existing land-tenure system. He closely examines the later stages of and background to a land dispute, the Te Puna case, that had lasted over a hundred years. He concludes that both ancestral bestowal and length of occupation are influential in determining ownership. He then goes on to explore contemporary **allocation of ‘Native freehold land’ (as opposed to ‘customary land’)**, once again providing history and background, looking particularly at those influences. He concludes that ideas about land rights at the time of writing comprise intermingled pre-European, European-derived, and locally and more recently developed elements. Finally, and contrary to **Crocombe’s findings in this area, he concludes that precolonial ideas** about land rights continue to play an important role alongside notions from the New Zealand legal system in an interplay of flexibility and restriction in land transactions. See also Baltaxe 1975, Campbell 2002, Gilson 1955, and Pascht 2011.

Pospisil, Leopold. 1958a. *Kapauku Papuans and Their Law*. New Haven: Yale University Press.

A major contribution to the anthropology of law, Pospisil’s study of the Kapauku Papuans of then-Netherlands New Guinea, today two provinces of Indonesia, is notable for its pioneering pluralistic framework in which consideration of law ‘is properly related to the legally relevant aspects of religion, politics, economy, and customs in general both of the society as a whole and of its subgroups’ (3). **Pospisil’s approach is based on the proposition that ‘law is manifested by decisions of legal authority rather than by abstract rules or by the behavior of the litigants. However, for analytical purposes, it is important to investigate all three categories’** (249). The first three parts of the book, then, deal with the individual in

the Kapauku world, the society and its subgroups, and rules and disputes. The fourth deals with the form and attributes, rather than a single characteristic, of Kapauku law. Those attributes are authority, intention of universal application, obligation, and sanction, including corporal, economic, psychological, supernatural, and self-redress sanctions and he adds cases without sanctions. Pospisil continues that part with analysis of legal levels and dynamics and the phenomenon of **justice and concludes 'that law and custom are relative concepts which are relative to the level of investigation' (289).**

Pospisil, Leopold. 1958b. Social Change and Primitive Law: Consequences of a Papuan Legal Case. *American Anthropologist*, New Series 60(5): 832-837, <http://onlinelibrary.wiley.com/doi/10.1525/aa.1958.60.5.02a00040/pdf>, accessed 5 June 2015.

A rather whimsical account of 'one of those exceptional volitional inventions by means of which a member of an unpacified primitive Papuan society radically changed the social structure of his village and political confederacy' (832), a case involving a pulchritude-loving headman, incestuous marriage, elopement, and a change to exogamy and incest rules. Pospisil identifies a number of theoretical implications **relating to 'primitives': the importance of an individual** in structural transformation; the unexceptional nature of volitional invention; politics as a determinant of social structure; the possibility of the abolition of exogamy having the same effects as those more usually sought in its implementation.

Pospisil, Leopold. 1969. Structural Change and Primitive Law: Consequences of a Papuan Legal Case. In *Law in Culture and Society*, edited by Laura Nader, 208-229. Chicago: Aldine.

Responding to what he sees as the banishment of the role of the individual from anthropology under the influence of sociology and to an attempted refutation of Pospisil 1958b, the author returns to the subject of that article to record the passage of events among the Kapauku Papuans since the time of its writing in order to add to the literature on volitional innovations. Drawing on his own restudies in 1959 and 1962, he retraces the nature and history of the change to incest rules, and recounts the sociological consequences and social acceptance thereof. Arguing that his fieldwork over nine years reinforces the importance of the role of the individual in legal and structural change, he reaffirms his original conclusion that volitional invention may not be as exceptional as assumed.

Pospisil, Leopold. 1981. Modern and Traditional Administration of Justice in New Guinea. *Journal of Legal Pluralism and Unofficial Law* 19: 93-116, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/jlpul19&id=109&print=section§ion=9&ext=.pdf>, accessed 3 June 2015.

Returning again to his studies of the Kapauku in 1975 and 1979, here Pospisil draws on his long-term fieldwork to set out a record of the **resulting 'dynamic picture of a Stone Age society, its rather abrupt transition to civilization, and the concomitant changes in its legal structure' (93). The areas he surveys are changes in political and legal authority, including the decline of the headman, social control, and recent Indonesian influence; transition in the principles of jurisdiction and the introduction of a new territorial unit, the village; changes in the laws of procedure, including Dutch and Indonesian influences; changes in legal sanctions from payment of damages to physical punishment; a surprising transition from contract to status in economic and socio-political life; and a shift from double to single standards of morality and legality. He concludes with a catalogue of changes resulting from the imposition of Dutch and Indonesian colonial and state legal systems.**

Pospisil, Leopold. 2001. Corrections of a Reappraisal of Leopold Pospisil. *Journal of Pluralism and Unofficial Law* 46: 115-120, <http://www.tandfonline.com/doi/pdf/10.1080/07329113.2001.10756554>, accessed 17 May 2015.

This response to and rebuttal of Goodale 1998 on a number of grounds **is notable for Pospisil's defence of the necessity of knowing the language and culture of those studied in the face of criticism by 'those who failed to learn the native tongue' and of eschewing study of one's own culture** in the absence of such linguistic ability in order to avoid ethnocentrism (118). **Pouring scorn on the '-isms' of Marxists, 'interpretists, postmodernists, evolutionists, and all the other disciples and followers' of 'academic ancestors', he stresses the need for independent thinking and emphasises 'that true science is not democratic' (118).**

Powles, Guy. 1973. The Status of Customary Law in Samoa. Unpublished Victoria University of Wellington LLM Thesis.

Powles's thesis covers traditional institutions, including *matai* and 'aiga, chiefs and families, principles of land tenure, *matai* authority, and *fono*, village councils; sources of non-customary law, including early administrations, New Zealand legislation, subordinate legislature, English law, directions to apply custom and usages, and the Constitution and pre-independence law; the Constitution, its elements, and the place of

imported concepts; the jurisdiction, status, and procedures of the Land and Titles Court; custom, law, and customary law; and overall assessments of Constitution and legislation and the perspective of the courts. In conclusion, he observes a transition from arrogance to ignorance at the heart of mutual misunderstandings, suggests attention to both openness and the language of the law to improve the situation, and proposes a number of steps towards the protection of customary law and, thereby, of the law of Western Samoa in general.

Powles, Charles Guy. 1979. *The Persistence of Chiefly Power and its Implications for Law and Political Organization in Western Polynesia*. Unpublished Australian National University PhD Thesis.

In this thesis, Powles studies the manner of the transformation of chiefly power in then-Western Samoa and Tonga from origins to its function as a constituent element of the political and legal frameworks of the respective post-Independence states, including the interaction of Indigenous and introduced politics and law. Beginning with a reconstruction of the two societies before western engagement and a historical account of the impact of western ideas and the response of the chiefly systems, he examines the constitutional and legislative ways in which chiefly power has been recognised since 1840 in each of the countries and its consequent nature and power. He goes on to consider challenges to the *matai* system and the monarchy and nobility from introduced institutions, including those for the maintenance of order, dispute settlement, and the regulation of land-holding, and the adaptation of such institutions to chiefly authority.

Powles, Guy. 1997. Common Law at Bay?: The Scope and Status of Customary Law Regimes in the Pacific. *Journal of Pacific Studies* 21: 61-82, <http://www.usp.ac.fj/fileadmin/files/Institutes/jps/Powles.PDF>, accessed 1 June 2015.

Powles characterises his article as an attempt to demonstrate the diversity and extent of the recognition and use of customary law in the context of the introduction of common law. He identifies lack of guidance in its application, the operation of repugnancy, and uncertainty as to proving as factors in the current status of customary law. Using examples from countries and societies across the Pacific, he surveys contemporary perceptions of its place; its dimensions, including spheres of operation, form, time, place, and diversity of types and extent of use; its recognition, limits, and proof; the forms, operations, and supervision and review of courts and other institutions; the approach to traditional punishments; and progress, or the lack of it, in developing a new jurisprudence. Powles supports the latter with a tabular record of the

types and uses of recognised custom in 24 countries and territories covering population, date of independence, relationship with power, and type of custom. Summarising that material, he offers two perspectives on customary law in relation to introduced common law: one that its spheres and support appear not to have been diminished; the other that, while **there might be a 'stand-off' there is not a 'stalemate'**. He concludes that, **in the 1990s, the 'Western juggernaut has been stopped in its tracks, but its engine has not stalled' (78).**

Reay, Marie. 1974. Changing Conventions of Dispute Settlement in the Minj Area. In *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, edited by A L Epstein, 198-239. Canberra: ANU Press.

The 10 cases examined here by Reay are the result of fieldwork among the Minj in the Western Highlands of Papua New Guinea and involve **disputes in the sense of 'a quarrel that has come to public notice and is conducted at least in part in the public arena' (199)**. Noting the existence of a concept of *kab'g'* among the Minj **'embracing but more flexible than our notion of justice' (198)**, she questions the existing anthropological emphasis on dispute settlement as restoration of harmony rather than such a sense of justice. On the evidence of the cases, however, she argues that conventions have been altered by administration and *kiap* law in such a way as to remove previous safeguards against unjust decisions and increasingly to subordinate group welfare to personal advantage. Furthermore, she suggests that those changes demonstrate that the **pressures of 'modernisation' to separate the legal universe from the political** demonstrate that the expansion of the former may result in reduction of the moral universe.

Regenvanu, Ralph. 2008. Issues with Land Reform in Vanuatu. *Journal of South Pacific Law* 12(1): 63-67, <http://www.paclii.org/journals/fJSPL/vol12no1/pdf/regenvanu.pdf>, accessed 15 May 2015.

Setting out to determine the reasons that land reform is needed in Vanuatu and some pressing legal issues associated with it, Regenvanu recognises as the main problem with the existing regime the **government's failure** to discharge its constitutional duties to customary and Indigenous owners, communities, and the nation. Setting out that constitutional context and legal developments since Independence, he identifies key issues to be addressed in land reform as government fulfilment of its mandate to operate in the best interest of landowners and the country, perhaps through establishment of a land court; advancement of and legislation for the constitutional provision that land use should be determined by customary landowners in accordance with

customary rules; and legislation to determine the manner in which leases come to an end.

Rio, Knut. 2010. Handling Sorcery in a State System of Law: Magic, Violence and Kastom in Vanuatu. *Oceania* 80(2): 182-197, <http://search.proquest.com/docview/613405674/fulltextPDF/C3D7760B07E1489APQ/6?accountid=14782>, accessed 15 May 2015.

In order to explore sorcery in Vanuatu in its **modern 'democratised' form**, Rio focuses on a particular, recent attempt to control it within a system of law influenced by at least some constitutional recognition of traditional culture and customary authority. To do so, he finds it necessary to eschew **stereotypes of the irrational and see sorcery as occupying 'a social sphere with its own type of social ontology that posits an alternative kind of social space'** (184). **Reviewing various aspects of the history and development of sorcery law in Melanesia in general and Vanuatu in particular, he takes the position that 'it is problematic for state law to encompass customary law in such a way as to assume that sorcery can be treated as a unitary phenomenon codified in the abstract decontextualized principles of law' and suggests that 'perhaps custom and sorcery are being transformed through this process, creating forms of inter-legality and punishment regimes'** (186). **Illustrating his thesis that a side effect of the opposition of law and *kastom* 'is that policing and sorcery can become alternative modes of discipline and violence'** (187) with an extended discussion of a sorcery case in North Malekula, he concludes that the likely outcome of contemporary, state-law methods of dealing with sorcery is a new system of terror resulting from inequality, individualism, and anger.

Rodman, William L. 1977. Big Men and Middlemen: The Politics of Law in Longana. *American Ethnologist* 4(3): 525-537, <http://onlinelibrary.wiley.com/doi/10.1525/ae.1977.4.3.02a00080/pdf>, accessed 3 June 2015.

In this article based on fieldwork between 1969 and 1971 in the village of Longana on the island of Aoba or Ambae in the north of the New Hebrides, now Vanuatu, Rodman investigates the potential for conflict, **and its resolution, between traditional leaders, 'big men', and government appointed 'assessors'**. **Surveying the history of the village and transitions in its political leadership and the process of appointment of its assessors, he outlines the political context of resulting legal change, relationships within the new system of social control and dispute settlement, and the integration of assessors into customary rankings by entrepreneurial big men seeking scarce political resources.** Rodman concludes that assessors, by becoming men of rank, are able to assume

the customary decision-making role of Indigenous leaders, thereby becoming effective middlemen.

Rodman, William L. 1982. Gaps, Bridges and Levels of Law: Middlemen as Mediators in a Vanuatu Society. In *Middlemen and Brokers in Oceania*, edited by William L Rodman and Dorothy Ayers Counts, ASAO Monograph No 9, 69-95. Ann Arbor: University of Michigan Press.

Returning to the subject of the government-appointed assessors in Longana on the island of Aoba or Ambae in what is now Vanuatu, Rodman revisits their role as middlemen and the operation there of the three levels of law within a single hierarchy: informal mediation by traditional leaders at the level of the hamlet, unofficial assessor hearing at the level of the district, and native court at the national level. Illustrating the inter-relationships among the courts with a study of a case that proceeded through all three levels, he then discusses the varieties of cases dealt with at each of the levels and the role of the middlemen therein. He concludes that the Longana assessors succeeded as middlemen by both building bridges and maintaining communication gaps between the local people and the colonial administration, the gaps complementing the bridges that they built.

Rodman, William L. 1985. 'A Law unto Themselves': Legal Innovation in Ambae, Vanuatu. *American Ethnologist* 12(4): 603-624, <http://onlinelibrary.wiley.com/doi/10.1525/ae.1985.12.4.02a00010/pdf>, accessed 2 June 2015.

Returning to the same island in northern Vanuatu, variously Aoba or Ambae, between 1978 and 1982, Rodman here investigates what he **describes as 'an instance of wholesale legal reform and innovation in the last days of colonial rule in the New Hebrides', as Vanuatu was called** at the time (604). There he finds a new, complex, multi-layered, and codified legal system developed, installed, and accepted entirely on the initiative of the local people. Discussing the need for and conditions of the changes, he analyses the detail of the changes and suggests that they **demonstrate the possibility of 'spontaneous legal decentralization' (604)**. Locating his particular findings within a broader cross-cultural context, Rodman questions why so little anthropological attention has been paid to legal innovation in such otherwise innovative Melanesian societies and concludes that an explanation may be the reluctance of centralist legal scholars to conduct the long-term fieldwork required for observation of such innovation.

Rodman, William and Margaret Rodman. 1978. Courts and Courtship in a New Hebridean Society. *Oceania* 49(1): 35-45,

<http://www.jstor.org/stable/pdf/40330392.pdf?acceptTC=true&jpdConfirm=true>, accessed 5 June 2015.

Drawing on fieldwork in Longana on the island of Aoba or Ambae in pre-Independence New Hebrides, now Vanuatu, the Rodmans take up the question of why parents and offspring in conflict as to the choice of a mate resort readily, contrary to the findings of Koch et al 1977, to the unofficial court rather than resolving the disagreement within the household. Setting out the previous processes of arranged marriage, they go on to discuss how and why young people precipitate dispute by open displays of inappropriate sexual conduct and why parents choose the unofficial court in which to respond. They conclude that, at a time when arranged marriage is gradually giving way to freedom of choice, the court provides the public procedure by means of which roles and relationships can be redefined and courtship disputes reconciled when the parties are prepared to consider renegotiation of the distribution of authority.

Rousseau, Benedicta. 2008. "This is a Court of Law, not a Court of Morality": *Kastom* and Custom in Vanuatu State Courts. *Journal of South Pacific Law* 12(2): 15-27, <http://www.paclii.org/journals/fJSPL/vol12no2/pdf/rousseau.pdf>, accessed 15 May 2015.

In reference to 'the exercises in division which take place in the state courts' (15), Rousseau aims to destabilise and expand the terms of reference of previous discussions of the relationships between customary and state law in Vanuatu. In particular, she sees an elision having taken place between English 'custom' and Bislama '*kastom*', obscuring 'an important problematic in assessing ways to find a better 'fit' between ni-Vanuatu expectations of justice and their experience of state courts' (15). First discussing the nature of *kastom* and the incorporation of custom into the state legal system, she outlines the distinction between the two terms using both fieldwork observations and recorded judgments: *Public Prosecutor v Gideon*, *Public Prosecutor v Wayane*, *Public Prosecutor v Tariodo*, and *Waiwo v Waiwo and Banga*. Finally, she considers ways in which 'custom' creates frustrations in the island courts because of the difficulty of actually applying *kastom*. Arguing that her approach offers an alternative to both positivism and legal pluralism, she concludes that the elision referred to 'perpetuates a separation between ni-Vanuatu and their court system that may not allow recognition of how courts can be used and experienced' (27).

Sack, Peter G. 1974. The Range of Traditional Tolai Remedies. In *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, edited by A L Epstein, 67-92. Canberra: ANU Press.

In examining a range of existing ethnographies and finding in each a different exception, Sack questions the then-prevailing understanding that the Tolai of East New Britain had no option other than physical retaliation in redress of a wrong. Closely examining their cases and examples, he derives a rich variety of alternatives and argues that the root of the misconception had been a determination to discover a western-style structure, with courts, lawyers, police, prisons, and objective justice in Tolai society. He concludes that the crux of the **problem 'is not that traditional Tolai law is different from Western law but that it cannot be reduced to any neat two-dimensional system' (91).**

Saovana-Spriggs, Ruth. 2010. Bougainville **Women's Role in Conflict Resolution** in the Bougainville Peace Process. In *A Kind of Mending: Restorative Justice in the Pacific Islands*, edited by Sinclair Dinnen, Anita Jowitt, and Tess Newton Cain, 195-213. Canberra: Pandanus Books, <http://www.jstor.org/stable/pdf/j.ctt24hbc4.22?&acceptTC=true&jpdConfirm=true>, accessed 15 June 2015.

In this chapter, Saovana-Spriggs, herself Bougainvillean and a participant in the peace process, discusses perception and belief in the process of restorative justice and difficulties encountered by traditional procedures in accommodating changes in contemporary Bougainville. Using specific examples from her own involvement, she examines the background to the 2000 situation, difficulties and conflicts in the traditional system, and **women's role and efforts in conflict resolution and restorative justice**, and offers detailed suggestions as to why the peace process worked in Bougainville.

Sapolu, Patu Falefatu et al. 2012. Law and Custom. In ***Samoa's Journey 1962-2012: Aspects of History***, edited by Leasiolagi Malama Meleisea, Penelope Schoeffel Meleisea, and Ellie Meleisea, 18-43. Wellington: Victoria University Press.

Tracing the development of laws and practices in the 50 years since Independence, the authors, including the present chief justice, argue that Samoa has been successful in combining the ideal of democracy with a unique cultural heritage in building its legal system. They survey that relationship, its constitutional basis, law and justice services after Independence, judicial independence, Samoanisation of the judiciary, mobile and youth courts, Land and Titles Court issues, law and custom in elections, custom and human rights, including the changing status of women, and population growth and the diaspora.

Scaglione, Richard. 1979. Formal and Informal Operations of a Village Court in Maprik. *Melanesian Law Journal* 7(1): 116-129.

Responding to criticisms of the village courts in Papua New Guinea in the 1970s, Scaglione undertakes a study of such a court in the Maprik district in East Sepik to assess its operations within the framework of conflict management. First backgrounding the village, he goes on to discuss the local government council, police, welfare officers, magistrates, and *kiaps* (administration district officers), and analyses the court records as to location, judgments, the substance of disputes, and caseload. In relation to the operation of the court, he concludes that it is functioning quite successfully, if not in the way in which it was intended, constituting more a primary-jurisdiction court of introduced law than a forum for settlement of traditional matters under customary law.

Scaglione, Richard (ed). 1983. *Customary Law in Papua New Guinea: A Melanesian View*. Port Moresby: University of PNG Press.

This volume is the product of a research project into the principles of customary law carried out by University of Papua New Guinea students in their home areas under the guidance of US anthropologist Richard Scaglione. Initially proposed as a survey of village-court records, their scantiness and unreliability resulted in a very productive resort to field work in those courts and questioning of individual magistrates. A particular strength of the project is that each researcher was both free and assisted to design a format appropriate to the particular home area so as not to force customary law into unnatural categories, particularly those of western jurisprudence. The outcome was this collection of summaries of the customary laws from 24 districts of Papua New Guinea in the mainland, islands, Highlands, and Papua.

Scaglione, Richard. 1990. Legal Adaptation in a Papua New Guinea Village Court. *Ethnology* 29(1): 17-33, <http://www.jstor.org/stable/pdf/3773479.pdf?acceptTC=true&jpdConfirm=true>, accessed 15 May 2015.

Returning to the Maprik village court in the East Sepik to examine the operations of legal pluralism by means of a ten-year retrospective analysis, Scaglione first outlines the history of the village courts since their inauguration in 1975. Using the results of fieldwork and records collected in 1979 and 1988, he examines locations of hearings, relationships among litigants, judgments, the substance of disputes, and gender of complainants. Identifying significant changes in the operation of the court over 15 years, he points particularly to innovations in dispute settlement, greater involvement of women, and an effective synthesis of traditional and introduced law. Finally, in response to the paucity of material on legal innovation in Melanesia, Scaglione emphasises the

importance of long-term studies such as his if processes of incremental change are to be observed, along with the agency of local people.

Serrano, Katherina and Milena Stefanova. 2011. Between International Law, Kastom and Sustainable Development: Cultural Heritage in Vanuatu. In *Island Futures: Conservation and Development Across the Asia-Pacific Region*, edited by Godfrey Baldecchino and Daniel Niles, 19-36. Osaka: Springer Japan.

In this chapter, the authors focus on the possibilities for international or regional law in offering support for both cultural-heritage preservation and sustainable economic development within the poorly resourced pluralistic legal systems of the Pacific. First defining the concept of **cultural heritage and its application in the case of the Chief Roi Mata's** Domain World Heritage site in Northwest Efate, Vanuatu, they go on to survey possible utilisation of the available international framework to support that project. Identifying its particular challenges, they observe that difficulties arise in heritage protection and sustainable-development management from land issues, low institutional transparency, misinformation, and legal pluralism but that existing international and **regional agreements are capable of filling Vanuatu's legislative gaps**. They conclude with the hope that Pacific governments may realise that in time.

Shankman, Paul. 2001. Interethnic Unions and the Regulation of Sex in Colonial Samoa, 1830-1945. *Journal of the Polynesian Society* 110(2): 119-148, <http://www.jstor.org/stable/pdf/20706988.pdf?acceptTC=true>, accessed 26 May 2015.

Making the case that a full discussion of the subject would require a much more substantial piece of work than a journal article, Shankman embarks on a broad study, based on ethnographic and historical texts, of interethnic relationships in Samoa from early encounters and mission arrivals, through the German and New Zealand colonial periods, to the end of World War Two with its influx of US troops. He argues that the nineteenth century was characterised by acceptance and approval, the early twentieth by increasingly systematic regulation, intensifying under New Zealand rule, and the war period by fraternisation and promiscuity, with some consequent harm to Samoan culture.

Sheehy, Benedict and Jackson Nyamuya Maogoto. 2008. Constituting Vanuatu: Societal, Legal and Local Perspectives. *Asia Pacific Law Review* 16(2): 133-155, <http://heinonline.org/HOL/Index?index=journals/asiaplwr&collection=journals>, accessed 15 May 2015.

Considering the nature and status of law and governance in Vanuatu in **the early 2000s, the authors ask: 'how is a society like Vanuatu constituted and is law, as the social ordering of Western liberal democracy, sufficient to create a functioning liberal democratic society?' (137).** They survey societal and legal perspectives, and particularly the European system and its developments, law, constitution, and Independence, and the nature, functions, organisation, and privileges of the National Council of Chiefs. Going on to examine the law in action in the 2001 constitutional crisis, the debate over western and Indigenous law and governance, and ongoing societal issues, they conclude that legal dominance holds certain attractions over a return to pre-western systems **and that 'Vanuatu's multiculturalism and pluralistic legal traditions will require some form of system that allows accommodation of its various traditions' (154).**

Shore, Bradd. 1976. Incest Prohibitions and the Logic of Power in Samoa. *Journal of the Polynesian Society* 85(2): 275-298, <http://www.jstor.org/stable/pdf/20705167.pdf?acceptTC=true>, accessed 25 May 2015.

This account of Samoan incest prohibitions within a comprehensive cultural system comprises an ethnographic survey followed by an analytical study, based on that material, relating prohibitions to those aspects of Samoan ideology and social organisation concerning brother-sister relationships. The first part covers attitudes to incest, the extent of the prohibition, the definition of the offence, and sanctions. In the second part, Shore outlines the characteristics of the relationship between brother and sister, ***feaga'iga*, as a manifestation of the 'powerful and pervasive ideological dichotomy underlying many of the major Samoan social institutions' (284).** In particular, he analyses the relationship in terms of formal power, deriving from position, and instrumental power, deriving from authority, as expressed in the covenant between the two siblings. Returning to the question of incest, he introduces the concepts of respect, aggression, and sexuality, the symbolic nature of blood, and its place in the quest for control, and concludes that incest prohibition and exogamy rule share a common idiom of power relations, differentiated by the two forms of power.

Shore, Bradd. 1982. ***Sala'ilua: A Samoan Mystery***. New York: Columbia University Press.

Shore's brilliant 'interpretive ethnography of Samoa cast as a mystery story' (xiv), based on involvement in Western Samoa over ten years, including seven as an anthropologist, traces a history of conflict between two senior *matai*, chiefs, in the village of Sala'ilua and reports on the

murder of one of them. With that event as his starting point, he systematically extends outwards in an examination of the structures within which the event took place, including the village, its chiefly system and political order, titles, and methods of social control and the meanings inherent in the manner in which people and institutions responded to what had occurred. While the entire book provides a deeply perceptive background to the processes of Samoan law, pages 107 to 120 and 150 to 167 deal specifically with formal legal aspects, the latter including material from interviews about attitudes to social control and pages 284 to 291 set out the judicial consequences of the events.

Sigrah, Ken Raobeia and Stacey King. 2004. **Essentially Being Banaban in Today's World: The Role of Banaban Law 'Te Rii ni Banaba'** (*Backbone of Banaba*) in a Changing World. *Changing Islands - Changing Worlds*, Islands of the World VIII International Conference, 1-7 November 2004, <http://www.banaban.info/ISISA2004Paper-Ken.pdf>, accessed 18 October 2015.

This study focuses on the Banaban traditional system of law known as *Te Rii ni Banaba* which governs settlement of disputes over land ownership, genealogy, and roles within society. Identifying the problems facing Banabans as a result of the fragmentation resulting from colonial rule, World War II, and exile to Rabi Island in Fiji after devastation of their original island in phosphate mining, the authors argue that the preservation of the traditional law and its implementation within introduced law are vital to social, political, and economic development. Outlining the history of Banaba and its people and strongly criticising the contributions of colonial administrators to their understanding, they set out their own history of the introduction of the village system and individual land holding, the foundation of the Island Court, the fragmentation of cultural law under the influence of Europeans, war, and resettlement on Rabi, and the effects of living under two other nations, Fiji and Kiribati. The authors conclude with recommendations for the cultural strengthening of the legal framework of the island government.

Stewart, Christine. 2008. Men Behaving Badly: Sodomy Cases in the Colonial Courts of Papua New Guinea. *Journal of Pacific History* 43(1): 77-93, <http://www.tandfonline.com/doi/pdf/10.1080/00223340802054693>, accessed 21 May 2015.

Stewart brings an anthropologist's eye to a number of cases of male-to-male sex tried shortly before Independence, examining in some detail how the incidents were treated by the colonial courts in order to determine the appropriateness of the law and its application. The cases in question are *R v Mama Kamzo*, *R v Clemence Mandoma Kausigor*, *R v*

Siune Wel, and *R v C E C Leech and Peter Yaku*. Stewart finds striking in the cases the lack of acknowledgment of custom, despite pre-Independence rhetoric, and an attitude to sodomy so rigid that it could not countenance any reform of the law against it. In her ensuing discussion, Stewart considers the extent to which the court was required to take account of custom and its demonstrated abhorrence of sodomy, **particularly in the case of a white man, Leech, and concludes: 'In 1972, it appeared that sodomy was indeed an offence designed for the enforcement of officially received opinions on sexual morality. The question remains, however: whose opinions and received by whom?' (93).**

Stewart, Christine. 2015. The Courts, the Churches, the Witches and their Killers. In *Talking it Through: Responses to Sorcery and Witchcraft Beliefs and Practices in Melanesia*, edited by Miranda Forsyth and Richard Eves, 183-195, <http://press.anu.edu.au/wp-content/uploads/2015/05/10.-The-Courts-the-Churches-the-Witches-and-their-Killers.pdf>, accessed 21 May 2015.

Setting out a brief background history of legal approaches to witch-killing in Europe from the fourth to the eighteenth century, she then takes up the colonial and contemporary approaches to witch-killing and sorcery in Papua New Guinea through legislation and passing references to a number of reported cases. In the context of custom and witch-killing post-Independence, Stewart outlines a pattern of defences in which it has been argued that the killers were acting in defence of the community and she identifies as a philosophical problem beyond the scope of the common-law system the question of whether protecting the individual or protecting the community is more important. Noting an increasing reluctance on the part of the judiciary to accept mitigation arguments based on a blend of custom and Christianity, she concludes that there are still unresolved underlying questions about who the criminals really are.

Strathern, Andrew. 1972. The Supreme Court: A Matter of Power and Prestige. *Melanesian Law Journal* 1(3): 23-28.

In considering the role of the Supreme Court in Papua New Guinea, Strathern identifies a tension between law and social factors stemming from a lack of congruence between the Indigenous normative order and the imposed rule of law. Illustrating his point with a case history of a multi-faceted dispute between two communities and sets of individuals in the Mount Hagen area of the Western Highlands, he observes a gap between the views of the local people and the court as a result of the **Mount Hageners' emphasis on inter-group relations** and that of the court on guilt and responsibility. In conclusion, he suggests that awareness of the need to bridge that gap could add prestige and influence to the **court's existing** legal power.

Strathern, Andrew. 1974. When Dispute Procedures Fail. In *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, edited by A L Epstein, 240-270. Canberra: ANU Press.

In his fieldwork in Mount Hagen in the Western Highlands of Papua New Guinea, Strathern investigates what he describes as a crisis in dispute settlement that had developed there since the mid-1960s and the reasons that confrontations, and consequent fearfulness, have increased. Examining two local cases involving traffic accidents, he identifies the causes as the contemporary economic background, including increased roading, cash cropping, land shortages, and population growth. He concludes that previously effective settlement procedures, particularly between large-scale groups created by innovations such as electoral boundaries, fail when the level of hostility is such that it can only be expressed in physical violence or mutual ostracism. Consequently, he suggests that earlier systems of dispute settlement by compensation payment have come to require legal underpinning and more formal processes of mediation.

Strathern, Andrew. 1975. Compensation Payments in the Highlands. In *Lo Bilong Ol Manmeri*, edited by Jean Zorn and Peter Bayne, 184-192. Boroko: University of Papua New Guinea.

Drawing on a case history of a dispute between two tribes in the Mount Hagen area of the Western Highlands of Papua New Guinea, Strathern **seeks to answer the question of 'when compensation is feasible and effective as a means of restoring inter-group relations and when it is not'** (184). Identifying a range of requirements and difficulties in negotiating compensation, he concludes that a settlement imposed by force from outside will never have the effectiveness of one negotiated by the groups themselves, with outside assistance if necessary in the case of deadlock. Moving on to a consideration of compensation against a background of ceremonial exchange, he notes the benefits of involvement in the latter in the resolution of more disputatious relationships and emphasises the importance of land in dispute-settlement in the Highlands.

Strathern, Andrew. 1994. Crime and Compensation: Two Disputed **Themes in Papua New Guinea's Recent History**. *Political and Legal Anthropology Review* 17(1): 55-66, <http://onlinelibrary.wiley.com/doi/10.1525/pol.1994.17.1.55/pdf>, accessed 3 May 2015.

This article comprises a series of case studies of crime and compensation in the context of the disjunction of law and custom, the conflation of law and government, gangs and guns, electoral violence, and the clan versus

the state, including the attribution of clan-like identity to a section of the government. Observing a resurgence of custom against law and the **transformation of colonially derived problem of 'law and order' into competition for resources**, he warns that an **'intertwining of contemporary politics with revived and reshaped tribal categories produces a continuing set of dynamic probabilities of chronic conflict'** (64).

Strathern, Marilyn. 1971. Legality or Legitimacy: Hageners' Perception of the Judicial System. *Melanesian Law Journal* 1(2):5-27.

In this brief but comprehensive ethnography of dispute-settlement procedures in Mount Hagen in the Western Highlands of Papua New Guinea, **Strathern is concerned with 'the extent to which the imposition of "law and order" has been accepted by one Highlands community' (5).** Setting out the processes at different levels of formality, she discusses the roles of traditional settlement, official courts, out-of-court settlements, *kiaps* (local administration officers), and councillors and *komitis*, **she identifies a gap between the Hageners' model of the present legal system and that of the administration. Itemising in some detail the repercussions of the former's point of view and the local usage of the term 'lo', from law, with its cluster of meanings, she concludes that, while Hageners have only a partial constitutional understanding of the total judiciary, they do understand the need to maintain 'law and order'; the 'crux', as Strathern sees it, 'is what weight is going to be put on the legality or illegality of Hageners' own attempts to respond positively to the new law?' (26).**

Strathern, Marilyn. 1972. *Official and Unofficial Courts: Legal Assumptions and Expectations in a Highlands Community*, New Guinea Research Bulletin 47. Canberra: Australian National University.

This ethnography is the result of intensive fieldwork in the Mount Hagen region of Papua New Guinea in the Western Highlands. Hagen was particularly suitable for the project as Strathern was already familiar with the region, because it was regarded as a law and order problem area, and because of continuing local resort for the settlement of disputes to **'quasi-traditional processes' (1), including courts, unofficial but locally regarded as part of the official judicial system.** Her often minutely recorded observations are organised into chapters on traditional dispute settlement, the official judicial structure, out-of-court channels, perceptions of the judicial system, and the workings of that system.

Strathern, Marilyn. 1974. Managing Information: The Problems of a Dispute Settler (Mount Hagen). In *Contention and Dispute: Aspects of*

Law and Social Control in Melanesia, edited by A L Epstein, 271-316. Canberra: ANU Press.

Strathern commences with an observation that the people of Mount Hagen in the Western Highlands of Papua New Guinea greatly value bringing grievances between those in frequent direct contact into the **open for 'talking out' in *kot***, regarded locally as part of the official hierarchy but by the administration as **'out-of-court arenas' (273)**. She sets out to examine *kot* **'from the inside', setting out comprehensive** descriptions of four cases involving domestic violence, a pig attack and garden damage, divorce, and slander and examining the roles of *komiti*, local council members, as dispute-settlers and the tactics employed by them.

Strathern, Marilyn. 1975. Sanctions and the Problem of Corruption in Village Courts. In *Lo Bilong Ol Manmeri*, edited by Jean Zorn and Peter Bayne, 48-58. Boroko: University of Papua New Guinea.

Contrasting on the one hand Australian administration concerns that provision of enforcement procedures to village courts may lead to corruption by putting power into the hands of local big men with, on the other, the lack of concern about corruption on the part of the local people in Mount Hagen in the Western Highlands of Papua New Guinea, Strathern here examines the question of power and its transfer in the context of unofficial and village courts. Examining the exercise of power and the deployment of sanctions in each of those systems, she argues for the accommodation of the traditional dispute-settlement procedures of the unofficial courts within the village court system and, in particular, the retention of compensation in satisfaction of grievances without imposed limits on the amount of such settlements.

Strathern, Marilyn. 1985. Discovering 'Social Control'. *Journal of Law and Society* 12(2): 111-134, http://www.jstor.org/stable/1409963?seq=1#page_scan_tab_contents, accessed 20 May 2015.

Challenging both anthropological and western legal emphasis on social order and control and their association with processes of disputing, Strathern suggests that the case of Papua New Guinea throws a different light on dispute settlement. Reviewing current academic views on the imposition of law, she turns to discussion of Papua New Guinea dispute settlement, referencing Chowning 1974, Epstein 1974a, Koch 1974, and **Lawrence 1970, and argues that, contrary to received opinion, 'the more disputes are "settled" then the more they will erupt' (123)**. In surveying associated wealth exchanges, she advances three points: that they, like fighting, enable conversion of emotional states into political acts; that

political groups are related not through dependency but through **'negotiated reciprocity and strenuously sustained independence'** (126); and that **'group appropriation of emotional states makes them, as it were, lethal instruments of self-aggrandisement'** (126). Strathern concludes that wealth exchanges cannot just be seen as alternatives to violent solutions but that such mediations, effecting the mutability of values, are specifically political interactions.

Strathern, Marilyn. 2004. Losing (Out On) Intellectual Property, In *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, edited by Alain Pottage and Martha Mundy, 201-233. Cambridge: Cambridge University Press.

Prefacing her discussion with an outline and analysis of a case in Mount Hagen in the Western Highlands of Papua New Guinea in which a young woman was offered as part of the compensation for a death, Strathern **sets out to 'extricate kinship and the question of obligations from the antithesis between Tradition and Modernity'** (209). Surveying concepts of body ownership, whole persons as things and their ownership, and part persons, body parts, as agents, she critiques the de-contextualisation of cases such as she has set out, suggesting that there are alternatives to supra-local universalism and total relativism in addressing human rights. In conclusion, she proposes a role for anthropology in re-contextualisation as both an activist and a scholarly intervention.

Techera, Erika J. 2009. Legal Foundations for the Recognition of Customary Law in the Post-Colonial South Pacific, In *Law and Anthropology: Current Legal Issues 2008*, edited by Michael Freeman and David Napier, 218-246. Oxford: Oxford University Press.

Tracing responses to introduced law through the stages of legal realism, sociological studies, Critical Legal Studies, and legal anthropology and legal pluralism, Techera notes the continued existence of customary law in the South Pacific, often in tension with the dominant legal system, and **proposes 'to examine the theoretical bases that may be used to support the formal recognition of customary law and to illustrate why it should be acknowledged as an important source of law'** (220). In doing so, she examines the relationships between law and custom, arguments for and against formal recognition of customary law, legal pluralism and the recognition of customary law, international human-rights law and Indigenous peoples, environmental justice, ways in which customary law may be recognised, and customary law and environmental management. Recognising that customary law has been eroded by colonisation and globalisation, she nonetheless argues that legal pluralism provides theoretical justification for its formal recognition and reinvigoration and a springboard for the process of law reform.

Thomas, Frank R. 2001. Remodelling Marine Tenure on the Atolls: A Case Study from Western Kiribati, Micronesia. *Human Ecology* 29(4): 399-423, <http://www.jstor.org/stable/pdf/4603409?acceptTC=true>, accessed 25 August 2015.

Identifying the less-visible demarcation of sea tenures compared with those on land as a source of colonial and global impacts on Pacific seascapes and a conflict between advocacy and developmental anthropological approaches, Thomas examines an eroding but still existing system of Customary Marine Tenure in the Tungaru Archipelago of Kiribati. Setting out the types of traditional resource areas, the impacts of social change upon their exploitation, and the conflict between short-term gains and conservation, for solution of consequent problems he looks to cooperative ventures and the application of Traditional Ecological Knowledge as an instrument for resource management. In the light of inadequate government enforcement capability, he proposes that **'a polycentric system to common-pool resources monitoring could be created, whereby local users would retain authority to formulate at least some of the regulations by virtue of their local knowledge and the redundancy and rapidity of a trial-by-error learning process'** (417).

Tiffany, Sharon W. 1974. The Land and Titles Court and the Regulation of Customary Title Successions and Removals in Western Samoa. *Journal of the Polynesian Society* 83(1): 35-57, <http://www.jstor.org/stable/pdf/20704970.pdf?acceptTC=true>, accessed 25 May 2015.

Tiffany commences her study of title conflicts and the influence of the Western Samoan Land and Titles Court on customary procedures with a short but very helpful outline of the nature and role of the **'aiga**, family, **the largest of the 'kin groups based on non-unilineal principles of descent reckoning'** (35), and of the **history, composition, and procedures** of the court. In dealing with the process of title succession she returns to the **'aiga** in its form of the **'aiga potopoto**, the assemblage of family members that determines its affairs and its criteria in evaluating the candidates for a *matai*, a title: consanguinity, service, and personal **qualities. Turning to the court's parallel criteria, she** observes that, while it recognises those customary principles, it has not established any fixed hierarchy of them, acknowledging consanguinity as important but also recognising other criteria. Drawing on a number of cases to investigate the splitting of titles and removal from office, she identifies three contexts in which the court adjudicates: those in which the family cannot reach consensus, those with questions over family participation, and those subject to challenge by those affected. Tiffany concludes that the

court is an increasingly important institution for dispute resolution as a neutral alternative to traditional procedures.

Tiffany, Sharon W. 1980. Politics of Land Disputes in Western Samoa. *Oceania* 50(3): 176-208, <http://www.jstor.org/stable/pdf/40330473.pdf?acceptTC=true>, accessed 8 June 2015.

Using case studies from the Western Samoan Land and Titles Court, **Tiffany examines 'land controversies as part of a continuous political process of defining and negotiating interpersonal and intergroup relations' (176) within three distinct legal systems, those of 'aiga, families, fono, village councils, and the court.** Setting out the history of land and judicial institutions through aboriginal tenure, involvement by Britain, Germany, and the US, the 1889 Berlin Act, a succession of German and New Zealand acts and institutions, as well as Independence and constitutional provisions, she goes on to describe the nature and role of the other two systems of *'aiga* and *fono*, their involvement in land tenure, and court processes in land disputes. Illustrating the structural patterns of land-dispute generation, development from village to court, and the kinds of conflicts that reach the courts in eight cases heard before 1969, she concludes that petitioning the court has become part of negotiating strategy in disputes while, despite an increase in litigation, many continue to be managed by *'aiga* and *fono*.

Tiffany, Sharon W. 1983. Customary Land Disputes, Courts, and African Models in the Solomon Islands. *Oceania* 53(3): 277-290, <http://www.jstor.org/stable/pdf/40330681.pdf?&acceptTC=true&jpdConfirm=true>, accessed 8 June 2015.

Outlining the relationship between the 65 Solomons local courts and the High Court through a variety of cases involving appeals from the former to the latter, Tiffany observes that Solomon Islanders resort to court action for their **own ends 'based on their understanding of white men's custom and expectation' (279) and that the western presumption of a unified corpus of principles requires Indigenous court members to draw on their own knowledge of both introduced and customary law and litigants to persuade them of the validity of their own versions of custom.** Challenging the western assumption that courts can definitively resolve land disputes and the validity of imposing models derived from African anthropological research on Melanesian societies, she concludes that land claims are not easily settled by courts and that the evidence suggests that rehearing of local-court decisions has been incorporated into customary dispute processes.

Tiffany, Walter W. 1975. High Court Adjudication of Chiefly Title Succession Disputes in American Samoa. *Journal of the Polynesian Society* 84(1): 67-92, <http://www.jstor.org/stable/pdf/20705045.pdf?acceptTC=true&jpdConfirm=true>, accessed 10 June 2015.

Discussing the influence of the introduced court system on the traditional procedures and criteria of title succession in American Samoa, Tiffany outlines the evolution of the High Court in that territory, the emergence of its decision criteria, and current selection criteria including character **and value, hereditary right, and the wishes of the majority of 'clans'**. In a case study of a title-succession contest between 1964 and 1970 in Fitiuta village in the district of **Manu'a, he describes the pre-trial negotiations, the public trial, and the court's decision and award of the *matai* (chiefly) title. Comparing this case with an earlier one in which the court's** decision was pre-empted by the village *fono* (chiefly council), he observes that even the most conservative villages have, by the late 1960s, resorted to the High Court in title disputes. Following a discussion of title splitting and removals of *matai*, **he concludes that, despite the administration's** stated intentions to preserve Samoan custom, judicial institutions have in fact influenced traditional processes and criteria in title succession.

Toro, M. 1973. Disputes in a Fijian Village Setting. Unpublished University of the South Pacific MA Thesis.

This brief account of dispute situations and procedures for their resolution was mainly carried out in Mouta village on Vanua Levu in Fiji. **Toro's areas of interest include procedures for dispute situations** involving women, the social context of those procedures, and available choices for dispute settlement. Having set out a general ethnography of Mouta supplemented by observations in two neighbouring villages, Toro turns specifically to conflict situations, itemising a variety of expressions and surveying methods of social control including internal and external sanctions and procedures involving chiefs and families. Summarising two examples of internal sanctions in cases of produce theft and adultery and more fully describing three cases of external sanctions in cases of elopement, a love affair, and adultery, he turns to *bulubulu*, a variety or example of *i soro*, a major means of conflict resolution involving apology and presentation of cultural goods by the offending party and acceptance and forgiveness by that offended against. See also Arno 1974 and 1976, Hickson 1975, Koch et al 1977, and Merry 2006.

Tuzin, Donald. 1974. Social Control and the Tambaran in the Sepik. In *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, edited by A L Epstein, 317- 344. Canberra: ANU Press.

Tuzin's report of his fieldwork among the Ilahita Arapesh of the East Sepik in Papua New Guinea examines a form of public disturbance which, **he claims, the elders of the community uncharacteristically 'manage with remarkable skill and success'** (320). **The cause of the disturbances is death, nearly always ascribed to sorcery, which in more than half of recorded cases is attributed to Nggwal, 'the paramount figure in the men's secret *tambaran* cult'** (320). **Describing and analysing six such cases in detail, he concludes that the religiously oriented processes of social control employed in dealing with these cases results, through the agency of Nggwal, in authority being exercised not by youthful troublemakers but by 'prudent old men who recognise that their personal and group self-interest coincides completely with the welfare of the village'** (344).

Va'a, Unasa I F. 2009. Samoan Custom and Human Rights: An Indigenous View. *Victoria University of Wellington Law Review* 40(1): 237-247,
<http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/vol-40-1>, accessed 15 May 2015.

Focusing on human rights from the perspective of Samoan life and custom, **Va'a argues that, despite different origins, the western in metaphysics, the Samoan in humanity and in the state of being an heir, the overall understanding of human rights is the same.** Summarising the Samoan concepts of *tagata*, human personhood, the rights of a *suli*, heir, *feagaiga*, relationships, particularly those between a brother and sister, **and core values and beliefs, he concludes that Samoans 'were aware of universal human rights and women's rights, long before they were popular in the West'** (245). **Surveying the current state of human rights in Samoa, he declares that traditional Samoan and modern western human rights are compatible, despite some challenges in the spheres of economic and political rights.**

Vaai, Asiata. 1997. The Idea of Law: A Pacific Perspective. *Journal of Pacific Studies* 21: 225-245,
<http://www.usp.ac.fj/fileadmin/files/Institutes/jps/Vaai.PDF>,
accessed 1 June 2015.

In a broad historical survey of concepts and approaches underlying the theory of law in general and the anthropology of law and its application to Africa and the Pacific, Samoan MP and barrister Vaai pays particular attention, in the Pacific context, to the work of Malinowski, Hogbin, and Pospisil, shifts in response to nationalism and decolonisation in the 1960s, increasing interest in customary law, and the emergence of legal pluralism. Reviewing the development of constitutions in Papua New Guinea, Fiji, Solomon Islands, Tuvalu, Vanuatu, and (Western) Samoa, he

concludes that the imposed law and new constitutions resulting from colonisation have **'effectively and permanently marginalised customary laws'** (242).

Weiner, James F. 2006. Eliciting Customary Law. *Asia Pacific Journal of Anthropology* 7(1): 15- 25, <http://www.tandfonline.com/toc/rtap20/7/1>, accessed 8 June 2015.

Referring mostly to an Australian context in this article, Weiner, in **critiquing Noel Pearson's concept of a 'Recognition Space' between Australian law and Aboriginal law, tests it in a number of different societies and periods, including Hawai'i and Papua New Guinea, and concludes that customary law is 'an artefact of colonial and state regimes of administration of the indigenous' (15). He appends some observations on the relationship between existing anthropological and legal perspectives on culture.**

Weiner, James F. 2011. Foreword. *Pacific Studies* 34(2/3): 87-91, <https://ojs.lib.byu.edu/spc/index.php/PacificStudies/issue/view/2411>, accessed 8 June 2015.

In his foreword to this historical and anthropological special issue on land and law in Australia and the Pacific, Weiner introduces and surveys the contributions and refers particularly to Farran 2011, Goddard 2011, Guo 2011, Howard 2011, and Pascht 2011.

Weiner, James F and Katie Glaskin. 2006. Introduction: The (Re-)Invention of Indigenous Laws and Customs. *Asia Pacific Journal of Anthropology* 7(1): 1- 13, <http://www.tandfonline.com/doi/pdf/10.1080/14442210600551826>, accessed 8 June 2015.

This introduction to a collection of articles from a workshop on Indigeneity and Indigenous laws and customs sketches the history of structural-functionalism in the anthropology of law and opens up the **issue of 'invention of tradition'. Diverging from discussions of the creation of customary law, the authors suggest that there is now sufficient 'ethnographic and case material to indicate how the progress of 'tradition' and 'customary law' is being re-analysed and re-assessed both by anthropologists and by the courts in a number of countries. The article includes reference to and commentary on Filer 2006 and Weiner 2006.**

Weisbrot, David. 1989. Law and Native Custom in Vanuatu. *Law and Anthropology: Internationales Jahrbuch für Rechtsanthropologie*, Vol. 4, 103- 134. Vienna: VWGÖ-Verlag.

Characterising Vanuatu as a **'manifestation of quadruple personalities'** combining French civil law, British common law, joint law, and customary law (103), Weisbrot outlines that country's colonial background, including early contacts, the Condominium, and moves towards Independence, and the Independence Constitution. Examining pluralism in practice, he assesses the work of the formal courts, the application of French jurisprudence, the island courts, and the National Council of Chiefs. He assesses the results and implications of reversion to customary law in **land tenure, arguing that 'custom' and 'land' have come to be** synonymous and concludes that it is not, as elsewhere, inertia that has impeded progress in integrating legal systems but the conflicting demands of *kastom* and Christianity, social democracy and tradition, Melanesian socialism and international capitalism, and unity and **diversity. He predicts that the outcome will be 'a form of progressive western legalism, with custom, culture and traditional values invoked in the general sense as powerful symbols of national unity and legitimacy'** (123).

Wesch, Michael. 2007. A Witch Hunt in New Guinea: Anthropology on Trial. *Anthropology and Humanism* 32(1): 4-17, <http://onlinelibrary.wiley.com/doi/10.1525/ahu.2007.32.1.4/pdf>, accessed 21 May 2015.

In this complex and thoughtful examination of some of the ethical dilemmas of fieldwork, Wesch employs a layered telling and retelling of the story of a witch hunt he experienced in an anonymous community in **Papua New Guinea to 'trace the roots of these ethical dilemmas to the ways holism, cultural relativism, and participant-observation have been reshaped to serve new theoretical interests but have not yet been reformulated into a consistent ethical stance for fieldwork practice' (4). In his first telling of the witch-hunt story he recounts it in the form he would deliver to students as a 'Being there' story. In the retelling, he provides details of the government resettlement campaign that gave rise to the witch hunts and his own deeply troubling participation in the events as well as his eventual sense of powerlessness and fragmentation, a state he offers, by way of solace for the lack of a happy ending, as a productive position to be in.**

Westermarck, George D. 1986. Court is an Arrow: Legal Pluralism in Papua New Guinea. *Ethnology* 25(2): 131-149, <http://www.jstor.org/discover/10.2307/3773665?uid=3738776&uid=2129&uid=2&uid=70&uid=4&sid=21106720840883>, accessed 11 May 2015.

Responding to what he sees as a failure to give sufficient weight to Indigenous factors, Westermarck proposes that an interactional approach

will be most profitable in understanding the complex relationship between state and Indigenous law. Reviewing other theoretical contributions to developing the interactional approach, he sets out to demonstrate its effectiveness in a study of village courts in the Agarabi area of the Eastern Highlands of Papua New Guinea. In doing so, he takes account of precolonial Agarabi society, social change, court officials, supervision, and procedures of the courts, and their uses, the latter supported by statistical tables of cases and decisions. By this process of drawing on a combination of cultural and historical elements, he concludes that the courts have generated their own rules and procedures, have received general acceptance as a result of a blend of positive factors, and have proved themselves successful. Westermarck adds that **the benefit of the interactional approach 'is that it acts a sensitizing concept which calls attention to neglected aspects of social life' (147).**

Westermarck, George D. 1987. The Agarabi Moot: Customary Law and Legal Development in Papua New Guinea, edited by Richard Scaglion. *Journal of Anthropology* 6(1): 77-94.

Returning to the Agarabi people of the Eastern Highlands of Papua New Guinea, Westermarck focuses upon the operation of the village moot, one **of a number of fora for the settlement of disputes, and one 'where disputes are aired through a relatively unconstrained negotiation between the parties and their supporters' (77).** Surveying pre-colonial Agarabi society and subsequent social and economic change, he outlines the goals and procedures of the village moot, its linkages with the village court, and the uses to which the moot it is put. He concludes that the separate but complementary identities of the village moot and the village court have become conceptually conjoined to provide mediation and adjudication in ways culturally appropriate to the particular circumstances of a dispute.

Westermarck, George D. 1991a. Controlling Custom: Ideology and Pluralism in the Papua New Guinea Village Courts. *Legal Studies Forum* 15(2): 89-102, <http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/lstf15&id=99&print=section§ion=19&ext=.pdf>, accessed 10 June 2015.

Looking again at dispute resolution in Papua New Guinea's village courts, Westermarck acknowledges the usefulness of models of social control and of social resistance but adopts two ideological perspectives, national and local, for the purpose of analysis. He discusses them in relation to five primary dimensions: custom, government, procedure, allowances, and crime. As a result, he observes, the national ideology privileges custom in the conduct of the courts while local ideology focuses on custom but

places it on an equal footing with state law, the two perspectives developing in dialogue with each other.

Westermarck, George D. 1991b. Village Courts in Papua New Guinea: A Comparative Perspective. *Law and Anthropology: Internationales Jahrbuch für Rechtsanthropologie*, Vol. 6, 67-79. Vienna: VWGÖ-Verlag.

Within a review of theoretical orientations in the field of legal pluralism, Westermarck emphasises Benda-**Beckman's suggestion 'that the jurisdictions of neo-traditional forums should be compared with indigenous socio-political structures to understand the effectiveness of their operations' (67). Drawing on his own research in the Agarabi area of the Eastern Highlands of Papua New Guinea and that of others in two other districts, he backgrounds the establishment and development of the village courts in general and presents case studies of their procedures in Agarabi, Chuave in the Eastern Highlands, and Abelam in the Sepik River area on the north coast. He finds in the results of case studies ample support for Benda-Beckman's approach, with each set of courts operating in accordance with a variety of pre-existing customary, geographical, and leadership considerations. Most important for Westermarck in this regard is 'the fact that the courts' jurisdictions are limited enough so that there are continuous lines of communication and personnel between the village moots and the full courts' (76).**

Westermarck, George D. 1997. Clan Claims: Land, Law and Violence in the Papua New Guinea Eastern Highlands. *Oceania* 67(3): 218-233, <http://www.jstor.org/stable/pdf/40331558.pdf?&acceptTC=true&jpdConfirm=true>, accessed 8 June 2015.

Returning to his field site in the Agarabi area of the Eastern Highlands of Papua New Guinea, Westermarck investigates recent confrontations over land resulting from new economic opportunities, an accompanying elaboration **of clan histories in pursuit of claims, and, in particular, 'the interconnection of threats and acts of violence, legal institutions, and the cultural elaborations associated with clan stories' (218). Tracing patterns of identity and conflict through pre-colonial, colonial, and Independence periods and surveying legal discourse and practice around land, law, and economy, he presents four case studies in which land claims have been pursued with strategies of both law and violence: one relating to town land and others to distant land, shared land, and old land. Detecting both cultural continuity and transformation in the cases outlined, and acknowledging that the narrative elaboration is not recent but reflects the local normative order of earlier periods, Westermarck predicts that land disputes will continue to feature a mixture of physical confrontation and formalised claims.**

Wormsley, William. 1987. Courts, Custom, and Tribal Warfare in Enga: Customary Law and Legal Development in Papua New Guinea, edited by Richard Scaglione. *Journal of Anthropology* 6(2): 55-107.

Wormsley sets out 'to review the role of custom in the courts where inter-tribal violence has characterized the general context of conflict' (55), basing his study on fieldwork with the Enga of the Northern Highlands of Papua New Guinea and focusing particularly on the impact of legal decisions in developing the customary elements of the underlying law. Describing the Enga people and the nature and forms of tribal warfare among them, he surveys government responses, including pacification, intervention, and legislation, and illustrates their effect with three cases involving murder, accidental death, and deaths resulting from negligence. Going on to consider conflicts between custom and law outside the context of warfare, he presents some speculations on custom as law and **concludes that the courts' minimisation of the influence of custom, which he describes as 'idiosyncratic and situational' (101), may be best for the equal protection of Papua New Guineans.**

Young, Michael W. 1974. Private Sanctions and Public Ideology: Some Aspects of Self-Help in Kalauna, Goodenough Island. In *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, edited by A L Epstein, 40-66. Canberra: ANU Press.

This ethnography of the settlement of disputes in the village of Kalauna **on Goodenough Island in the D'Entrecasteaux Islands of Papua New Guinea** focuses on the sanction of food-giving-to-shame or coercive food-giving, and its most institutionalised form of *abutu*, in disputes over food, pigs, or women, and identifies the legal principles underlying the process. From two case studies, one simply conducted within the village meeting, the other involving something of a judicial procedure, Young concludes that these procedures provide a forum for self-help and that one consequence is that the ideology of such a system of social control must be flexible enough to allow for disputes only to appear to be settled.

Zorn, Jean G. 1990a. Customary Law in the Papua New Guinea Village Courts. *The Contemporary Pacific* 2(2): 279-311.

Responding to criticisms of the effectiveness and formalism of Papua New **Guinea's village courts in their earlier stages, Zorn observes in them a** continuing combination of customary and court procedures, challenges the assumption that custom is not appropriate to the large heterogeneous societies that have emerged, and argues that custom and court environment will each be transformed by interaction. In support of

her argument, she outlines the structure and functions of the village **courts and their supposed 'westernisation', a criticism based on** adherence to two separate models of dispute settlement, court and compromise, and an assumption that the village courts have strayed from the latter to the former. Seeing both models operating in existing studies, she examines the operation of customary law and formalism in the courts of two villages located near the capital, Port Moresby, and concludes that **they 'contain many elements of the court model,** but these are manipulated by the magistrates and blended with elements of the compromise model in such a way as to permit the village courts to **achieve the results of the compromise model' (305).**

Zorn, Jean G. 1990b. Lawyers, Anthropologists, and the Study of Law: Encounters in the New Guinea Highlands. *Law and Social Inquiry* 15(2): 271-304,
<http://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/lsociq15&id=279&print=section§ion=20&ext=.pdf>,
accessed 8 June 2015.

Responding to Gordon and Meggitt 1985 and, in particular, their 'attacks' on lawyers and legal scholarship, Zorn outlines the history of the evolution of legal anthropology in five episodes she characterises as follows: anthropologists - toward customary law from 1920 to the 1940s; lawyers - the rejection of customary law from 1920 to the 1940s; lawyers and anthropologists - the creation of customary law from the 1940s to the 1970s; lawyers - competing responses to customary law from 1960 to 1975; and anthropologists and lawyers - legal pluralism and its antitheses from 1975 to the time of writing. Returning to Gordon and Meggitt, she responds in some detail to their arguments about the perceptions and practices of the Enga, the subjects of their study, and finds their account of the reasons for the resurgence of tribal warfare **'ultimately unsatisfying' (295). She acknowledges that they provide a** corrective to studies based on the imposition of state law but suggests that their analysis would benefit from the inclusion of lawyerly perspectives. Distinguishing the approaches of anthropologists as beginning inside a culture in ethnographic study from those of lawyers beginning outside a culture from the vantage point of state law, Zorn compares the strengths and weaknesses of the two approaches and **concludes that they 'must operate collectively to understand the special** needs and goals that the Enga reveal through their re-creation of tribal fighting, to respond to those needs, and to help the Enga achieve those **goals' (303).**

Zorn, Jean G. 1991. Making Law in Papua New Guinea: The Influence of Customary Law on Common Law. *Pacific Studies* (14(4): 1-34,

<https://ojs.lib.byu.edu/spc/index.php/PacificStudies/issue/view/2402>, accessed 8 June 2015.

Zorn recounts ‘the story of a court case in Papua New Guinea’ (1), png *Ready Mixed v The State*, to examine the positions of and inter-relationships among the company, the government, and the villagers concerned with their attempted ejection, as well as the ways in which customary law is entering and altering introduced common law and the findings of the National Court. Observing that, while the court set out its opinion in such a way as to suggest that it merely found and applied pre-existing rules, it, in fact, made some radical changes to land law, she discusses in some detail the manner in which that came about.

Remarking that the Papua New Guinea courts are ‘resolutely positivist’ while the Constitution is not, she argues that, while the court’s opinion in this case ‘demonstrates the dominance in Papua New Guinea of positivist ideology, it also demonstrates the inability of that paradigm to encompass everything that judges, even positivist judges, routinely do’ (20). She concludes that the common law will eventually become an amalgam of elements of both the law of England and the customary law of Papua New Guinea, being and becoming, in that process, itself.

Zorn, Jean G. 1992a. *Graun Bilong Mipela: Local Land Courts and the Changing Customary Law of Papua New Guinea*. *Pacific Studies* 15(2): 1-38, <https://ojs.lib.byu.edu/spc/index.php/PacificStudies/issue/view/804>, accessed 8 June 2015.

Taking into account increasing pressure on land ownership and use in Papua New Guinea as a result of the introduction of a market economy and consequent pressures to shift custom towards individual ownership, Zorn suggests that the inherent flexibility of customary law will allow it adapt to respond to conflicts between both disputing claimants to land and different views on land tenure, and to influence legal values and processes. Setting out the parameters of customary land law, she identifies three factors in the post-Independence decision to create land courts: interest in replacing introduced law with customary law, a perception that tribal fighting was increasing, and recognition that existing governmental mechanisms were incapable of resolving land disputes. Zorn then traces the history of the development of land law, and the role of the National Court therein, through *Kaigo v Kurondo*, *State v Giddings*, *Application of Nango Pinzi*, *Application of Ambra Nii*, and *State v District Land Court, ex parte Caspar Nuli*. In the context of custom, common law, and economic development, she argues that customary law offers an escape from commodification and the rule of the market through its economic origins in egalitarianism, smaller scale, and **reciprocity. She concludes that: ‘By permitting contradictory rules to exist**

simultaneously, by eschewing finality, by focusing on interests in and needs for land rather than on ownership and other rights, customary law **permits land cases to be reopened whenever the need arises' (33).**

Zorn, Jean G. 1992b. Common Law Jurisprudence and Customary Law. In *Legal Issues in a Developing Society*, edited by R W James and I Fraser, 103-127. Port Moresby: Faculty of Law, University of Papua New Guinea.

On the growing reflection of its society in the underlying law of Papua New Guinea, Zorn observes that in this very departure from introduced English law it actually resembles its adaptable progenitor. While the Constitution provides for the underlying law to combine customary law and common law, she detects significant obstacles to the integration of customary law in the positivism of the judiciary and the reluctance of parliament to legislate for it. Discussing the possibilities for finding existing rules of customary and common law, with reference to *png Ready Mixed v The State*, and the formulation of new rules of the underlying law, she goes on to compare positivism and legal realism as influences on the underlying law, briefly traces the histories of the two philosophical approaches, and itemises problems she sees as inherent in the positivist mode of judicial decision-making and possible benefits of **legal realism. She concludes that, 'if the judges are legal realists, if they recognize both the inevitability of legal change and the special role that the judiciary can play in directing that change, then they will create an underlying law that keeps pace with the needs and circumstances of Papua New Guinea's dynamic social order, an underlying law truly suited to Papua New Guinea' (127).**

Zorn, Jean G. 1996. Custom and/or Law in Papua New Guinea. *Political and Legal Anthropology Review* 19(2), <http://onlinelibrary.wiley.com/doi/10.1525/pol.1996.19.2.15/pdf>, accessed 3 May 2015.

Zorn returns to the subject of the interplay between courts, with their state power, and custom, with its sanctity of tradition, this time in a case involving the application of law and custom to a dispute about the existence or otherwise of a customary marriage, *Application of Thesis Maip and In the Matter of the Constitution S. 42(5)*. Outlining the facts of the case, she pauses to background the historical development of the Papua New Guinea legal system before returning to the conflicting opinions and decisions of a village-court magistrate and a Supreme-Court judge. She concludes that, in the face of the social conservatism of the magistrate, the judge, going out of his way to acknowledge and apply custom, in fact changed custom, turning it into customary law. Zorn adds that the case makes clear that existing custom would not be recognised

by a Papua New Guinean of a century ago and that the roles of women, their norms of conduct, and the institution of marriage are changing, however slowly.

Zorn, Jean G. 2010a. Custom Then and Now: The Changing Melanesian Family. In *Passage of Change: Law, Society and Governance in the Pacific*, edited by Anita Jowitt and Dr Tess Newton Cain, 95-123. Canberra: Pandanus Books, <http://www.jstor.org/stable/pdf/j.ctt24h3jd.14?&acceptTC=true&jpdConfirm=true>, accessed 15 June 2015.

Zorn opens this chapter with a series of questions she describes as **'important for courts, clients and counsel' (96): What is custom? 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? With reference to the last, she outlines custom then, customs changing, and custom now analyses three cases from three Melanesian countries. Of *Application of Thesia Maip* from Papua New Guinea, she observes a court refusing to use new practice in a case involving customary marriage because it is insufficiently widely used; of *To'ofilu v Oimaae* from the Solomon Islands, a court accepting new practices in a matter of brideprice but as if they were common law; and of *Molu v Molu No 2* of Vanuatu, a court applying new and old in a customary manner to a question of custody of children. Zorn concludes that the important issue from these varying combinations of custom and common law 'is the relationship that the people should have to their law, and that the law should have to the people', the vital thing for a society being that 'law and customs must be close to one another' (112).**

Zorn, Jean G. 2010b. Issues in Contemporary Customary Law: Women and the Law. In *Passage of Change: Law, Society and Governance in the Pacific*, edited by Anita Jowitt and Dr Tess Newton Cain, 125-142. Canberra: Pandanus Books, <http://www.jstor.org/stable/pdf/j.ctt24h3jd.15?&acceptTC=true&jpdConfirm=true>, accessed 15 June 2015.

Zorn's thesis in this chapter is that critics of the discriminatory practices of Indigenous cultures have been wrong in assuming that state courts will provide a corrective; where such discrimination exists, she suggests, state agencies have done little or nothing. Focusing particularly on three forms of indirect discrimination, she provides examples from three **Melanesian countries of the effects of 'gender-neutral' legislation, the influence of social and cultural attitudes on interpretation and procedures, and failure to correct discrimination.** The first case, *Public Prosecutor v Kota*, appears to address the issue of women and the powers

of chiefs in Vanuatu; the second, *Talusui v Tone-ewane*, women and the vote in the Solomon Islands; and the third, *The State v Joseph Kule*, women and compensation in Papua New Guinea. While the cases appear to be about customary treatment of women, she argues, they were in fact about powers of chiefs in a dual political system, religion, and the welfare of children and that the blindness of the courts to indirect discrimination supported the direct discrimination of customary law. Zorn concludes by asking how respect for the integrity of Indigenous cultures and for the integrity and dignity of all people can both be accomplished.

Zorn, Jean G and Jennifer Corrin Care. 2002a. *Proving Customary Law in the Common Law Courts of the South Pacific*. London: British Institute of International and Comparative Law.

The central issues addressed by the authors are the inherent difficulties **for courts more accustomed to common and statutory law in 'finding'** custom, and the consequent problem that many judges and lawyers take the view that customary law must be pleaded and proved as if it is not law but fact. Following a survey of constitutional and legislative provisions on the pleading and proof of custom in general and in Fiji, the Marshall Islands, Vanuatu, the Solomon Islands, Papua New Guinea, Tuvalu, Kiribati, Niue, and Tonga, the main body of this small book deals with a variety of judicial approaches to finding custom as fact in general and as law in Nauru, Fiji, and the Solomon Islands. In the case of finding as fact, they consider such sources as anthropologists; books treatises and other documents; elders, chiefs, and assessors; and the demeanour of witnesses. While acknowledging some recent shifts in anthropologists' orientations, they suggest that the best use of their testimony is in confirmation of the evidence of others such as elders and the more credible parties.

Zorn, Jean G and Jennifer Corrin Care. 2002b. 'Barava Tru': Judicial Approaches to the Pleading and Proof of Custom in the South Pacific. *International and Comparative Law Quarterly* 51(3): 611-639, <http://www.jstor.org/stable/pdf/3663070.pdf>, accessed 5 June 2015.

Covering some of the same territory as Zorn and Corrin Care 2002a, drawing **heavily on Martin Chanock's work on relationships among** custom, customary law, and common law in Africa, and contrasting the positivism of colonisers with the realism of social anthropologists and the colonised, the authors set out to examine the ways in which custom changes in response to court demands that it be pleaded and proved. Summarising key aspects of Pacific legal systems, constitutions, and statutes, they extensively cover judicial approaches to proving custom, including finding custom as fact, from a variety of sources, referencing *Malas Family v Songariki Family* and *Regenvanu Family v Ross & Abel* in

Vanuatu, and identifying as a serious problem the ability of methods used consistently so to do. In discussing finding custom as law, they consider legislation, precedent, with a focus on *Maerua v Kahanatarou* in the Solomon Islands, *res judicata*, and judicial notice referencing *Waiwo v Waiwo and Banga*, and distinguishing between the effectiveness of the use of prior cases in common law and its uncertainty in the case of custom. They propose an alternative, in-between approach based on treating custom as both fact and law, one they suggest would still change **custom into customary law but would forge 'a customary law that may be truer to custom than are any of the other methods mentioned above'** (635).

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4 January 2016