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TRADITIONAL PACIFIC LAND RIGHTS AND INTERNATIONAL LAW: TENSIONS AND EVOLUTION

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It is a genuine pleasure to be here at the 18th Pacific Judicial Conference in Papeete, Tahiti, amongst the leading judges of Pacific nations, all men and women of goodwill, to discuss our common problems and aspirations and to learn from each other's varied experiences and knowledge. Although we come from different nations operating under diverse legal systems, our commonalities are far greater than our differences. The Pacific Judicial Conference provides an exciting opportunity for its members to build on those commonalities and to learn from those differences.

What do we have in common? A few weeks ago, I attended a workshop for judicial officers on Aboriginal and Torres Strait Islander People and the Law in Queensland. One of the talented Indigenous workshop presenters, Grant Sarra, observed that all Australians, whether Indigenous or non-Indigenous, have shared common values. He suggested these were "caring, sharing and respect for the land, people and environment". I think that all of us at this Conference share those common values, although we might add that in caring, sharing and respecting the land, people and environment, we do so under the umbrella of the rule of law and an independent, or as Judge Clifford Wallace said at this Conference in 2003, an "autonomous" legal profession and judiciary.

Participants in this important conference have travelled from as far north as the Commonwealth of the Northern Mariana Islands and Hawaii in the United States of America, from as far south as New Zealand; from as far east as the Pacific rim of the USA, and from as far west as the Republic of Palau. Within those far-flung parameters, are leading Pacific nations like Papua New Guinea, the Federated States of Micronesia, Guam, the Republic of Kiribati, the Solomon Islands, Vanuatu, New Caledonia, the Kingdom of Tonga, the Cook Islands, the Republic of Marshall Islands, Samoa and, of course our wonderful hosts, French Polynesia.

Each country has unique aspects to its culture or cultures, and its own approach to its traditional Indigenous land rights. Many nations have more than one culture, requiring a bi-cultural or even multi-cultural approach. To accurately record all traditional land rights in every Pacific nation would take many lifetimes.

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I also acknowledge the assistance of Queensland's Supreme Court Library staff.

With a degree of wisdom with which I am not always attributed, I have not attempted to do so in this paper.[1] Instead, I will speak briefly of the position of Australian Indigenous land rights. I will then refer to aspects of international law that have the potential to conflict with traditional Pacific land rights. This will be followed by examples of how traditional rights and international law have come into friction. Finally, I will raise potential future issues of tension and friction between Pacific land rights and international law and conclude with a positive outlook on evolution. This is all with a view to provoking discussion on how the international community and Pacific nations can symbiotically benefit from the friction between traditional Pacific land rights and international law expectations.

All Pacific nations have written laws providing that some person or body is the owner of land.[2] A common element in different Pacific nations' traditional land rights is the strong connection felt by Indigenous peoples with their land and its natural features.[3] Pacific nations vary considerably as to if, and how, that connection is acknowledged. Some Pacific nations, including Cook Islands, Fiji, Kiribati, Nauru, Niue, American Samoa, Samoa, Solomon Islands, Tokolau, Tuvalu and Vanuatu have constitutional provisions or legislation providing for land to be held in accordance with Indigenous customs, usages and traditions.[4] Indeed, in Cook Islands and Tuvalu, all land is held under customary land tenure.[5]

A brief summary of the Australian position

You may be interested to hear briefly of the position in Australia as to Indigenous land rights. During the colonial period following the 1788 European contact, international law recognised that one country could legally acquire occupied foreign land, either through conquest or cession. If the land was unoccupied, it could be declared *terra nullius*[6] and subsequently acquired by the colonising nation. Some European colonial nations opportunistically extended the concept of *terra nullius* into what many now regard as a convenient legal myth. They used *terra nullius* to acquire land from people whom they deemed as 'backward', 'barbarous' and 'without a settled law'. The British founded the Australian colonies on this basis of *terra nullius*.

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1 A comprehensive overview of the topic is contained in Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (2nd ed, 2007) chapter 10 "Land Law".

2 Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd ed, 2007) chapter 10 "Land Law", 314-315.

3 S. James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21 *Arizona Journal of International Comparative Law*, 35.

4 Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd ed, 2007) chapter 10 "Land Law", 291.

5 Sue Farran, "Land rights and gender equality in the Pacific region" (2005) 11 *Australian Property Law Journal*, 132.

6 Derived from the Latin phrase 'land belonging to no one'.

Incidentally, you may be interested to know that my state of Queensland, earlier this month celebrated its 150 years. On 6 June 1859, Queen Victoria signed the law allowing the then colony of Queensland to separate from its big sister colony of New South Wales.

This is but a pinprick in the story of Australia's Indigenous peoples whose forebears, for tens of thousands of years before European contact, lived in what is now Australia under complex clan systems with diverse languages and social and environmental rules and lore. They lived off and close to the land which they nurtured, loved and respected with deep spirituality.

The notion that Australia was *terra nullius* prior to British colonisation continued to be part of the law of the Federation of Australia until the High Court of Australia's seminal decision in the case known as *Mabo (No 2)*.[7] The High Court found that the Merriam people from the Torres Strait were entitled by way of common law native title to the possession, occupation, use and enjoyment of sections of the Murray Islands in the Torres Strait. This native title had not been extinguished either by the British annexation of the Murray Islands in 1879 or by any subsequent government actions. The *Mabo* decision was the first time that Australian courts unequivocally recognised that, insofar as Australia was concerned, the doctrine of *terra nullius* was a legal myth and that Australia was already inhabited when colonised by the British.[8]

With hindsight, perhaps the most remarkable thing about the *Mabo* decision is that it took 204 years and some of the cleverest judicial minds in Australia to pronounce what I am sure Indigenous groups well-understood at the time they first experienced European contact. They knew they had a complex, organised, effective society with rules and lore closely entwined in collective clan ownership of the land on which, and from which, the clan lived. They knew they were not 'backward', 'barbarous' or 'without a settled law'.

Four years later, in the *Wik* case,[9] the High Court of Australia again considered the status of native title in Australia. The court recognised that an interest in land that was less than exclusive possession, in that case a pastoral lease, could co-exist with, rather than extinguish, native title.

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7 *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1.

8 *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1, see for example, Brennan J at 58; Deane and Gaudron JJ at 109; and Toohey J at 180 and 182; Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) at 496.

9 *Wik Peoples v Queensland* (1996) 187 CLR 1.

The *Mabo* and *Wik* decisions were major turning points in Australian post-colonial history and are seen by Indigenous and non-Indigenous Australians alike as keystones in the stairway to reconciliation between us. Indigenous rights are now statutorily recognised in all federal and state jurisdictions.[10]

There are two recent High Court cases of relevance. In *Northern Territory v Arnhem Land Trust*[11] the High Court considered the Northern Territories powers under the *Fisheries Act* 1988 (NT) to grant a licence to fish within areas of Aboriginal lands under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). The majority[12] held that the *Fisheries Act* abrogated any common law right to fish but did not authorise persons to fish in any particular place or area.[13] The term "Aboriginal land" in context was not confined in inter-tidal zones to the land surface and should be understood as extending to the fluid (water or atmosphere) above the land surface ordinarily capable of use by an owner of land.[14] The holding of a licence under the *Fisheries Act* did not authorise or permit the holder to fish in areas covered by the *Aboriginal Land Rights (Northern Territory) Act*.

In *Wurridjal v Commonwealth*[15] the majority[16] found that Aboriginal statutory native title rights did not prevent the Commonwealth from creating statutory five year leases over Aboriginal land under the *National Emergency Response and Other Measures Act* 2007 (Cth) to prevent abuse of Indigenous children living on Aboriginal land. The majority concluded that the Act was lawful as it provided a right to compensation on just terms for the Aboriginal land owners.

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10 *Native Title Act* 1993 (Cth); *Native Title Amendment Act* 1998 (Cth); *Native Title Amendment Act* 2007 (Cth); *Native Title Act* 1994 (ACT); *Native Title (New South Wales) Act* 1994 (NSW); *Native Title (Queensland) Act* 1993 (Qld); *Native Title (South Australia) Act* 1994 (SA); *Native Title (Tasmania) Act* 1994 (Tas); *Native Title (State Provisions) Act* 1999 (WA); *Validation (Native Title) Act* (NT). See also *Federal Court of Australia Act* 1976 (Cth); *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth); *Petroleum (Submerged Lands) Act* 1967 (Cth); *Minerals (Submerged Lands) Act* 1981 (Cth).

11 (2008) 236 CLR 24.

12 Gleason CJ, Gummow, Hayne and Crennan JJ, Kirby J agreeing generally; Hayden and Kiefel JJ dissenting.

13 (2008) 236 CLR 24 at 61.

14 (2008) 236 CLR 24 at 66.

15 (2009) 252 ALR 232.

16 French CJ, Gummow, Hayne, Hayden and Crennan JJ; Kirby J dissenting.

International law concepts

United Nations Declaration on the Rights of Indigenous People

Land rights claims of Indigenous people have led to an expanding international law jurisprudence.[17] The United Nations ("UN") declared the decade 1994–2004 as the First World Decade on the Rights of Indigenous Peoples. It is noteworthy that this 2009 Pacific Judicial Conference falls in the midst of the UN's Second World Decade on the Rights of Indigenous Peoples, 2005–2015.

The UN Declaration on the Rights of Indigenous People is a milestone development in international law. This Declaration does not have the force of law in that it is aspirational. But it encourages nations to enact legislation appropriate to its aims. The Declaration was overwhelmingly adopted by the UN General Assembly on 7 September 2007, with 143 votes in favour[18] (relevantly France, Indonesia, the Federated States of Micronesia and Timor-Leste). There were 11 abstentions[19] (relevantly Samoa). Only four countries voted against the declaration: Australia, New Zealand, Canada and the United States of America. On 3 April 2009, Australia belatedly acknowledged the importance of this Declaration by adopting it. The majority of Pacific nations, including Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu and Vanuatu were absent from the UN General Assembly when the Declaration was adopted.[20] It remains unclear

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17 Jeremie Gilbert, 'Historical Indigenous Peoples' Land Claims: A comparative and international approach to the common law doctrine on Indigenous Title' (2007) 56 *International and Comparative Law Quarterly*, 584.

18 Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Austria, Bahamas, Bahrain, Barbados, Belarus, Belgium, Belize, Benin. Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Cambodia, Cameroon, Cape Verde, Central African Republic, Chile, China, Comoros, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Myanmar, Namibia, Nepal, Netherlands, Nicaragua, Niger, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tanzania, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, United Kingdom, Uruguay, Venezuela, Vietnam, Yemen, Zambia and Zimbabwe.

19 Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine.

20 Chad, Cote d'Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Grenada, Guinea-Bissau, Israel, Kyrgyzstan, Mauritania, Morocco, Romania, Rwanda, Saint Kitts and

whether these absent nations regard the Declaration as binding, or even as aspirational.

The Declaration has a significant focus on Indigenous land rights. Its provisions include the following. States should provide mechanisms for the prevention of and redress for any action which has the aim or effect of dispossessing Indigenous people of their lands, territories or resources.[21] Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned, or otherwise occupied and used, lands so as to uphold their responsibility to future generations.[22] Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[23] Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess through traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.[24] States should give legal recognition and protection to these lands with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.[25] Indigenous peoples have the right to redress, by restitution or just, fair and equitable compensation, for any lands, territories and resources which they have traditionally owned, occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.[26] Unless otherwise freely agreed upon by the Indigenous peoples concerned, compensation shall be in the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.[27] Indigenous peoples have a right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States should establish and implement assistance programmes for Indigenous peoples for this purpose without discrimination.[28] States shall take effective measures to ensure that storage or disposal of hazardous materials does not take place on Indigenous lands without the free, prior and informed consent of the Indigenous people concerned.[29]

Nevis, Sao Tome and Principe, Seychelles, Solomon Islands, Somalia, Tajikistan, Togo, Turkmenistan, Uganda and Uzbekistan were also absent.

21 Article 8(2).
22 Article 25.
23 Article 26(1).
24 Article 26(2).
25 Article 26(3).
26 Article 28(1).
27 Article 28(2).
28 Article 29(1).
29 Article 29(2).

Fine words indeed. But unfortunately, the Declaration contains internal tensions. On the one hand, it allows and encourages Indigenous self-determination:

> **Article 3**
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **Article 4**
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> **Article 5**
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

On the other hand, the Declaration specifically denies the right to take any action that may impact on the nation's territorial integrity or sovereignty:

> **Article 46**
> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Whether the Declaration will ultimately improve the lot of Indigenous peoples through successful land rights claims, at least in the short term, remains to be seen.

The United Nations Universal Declaration of Human Rights

Another fundamental tenet of international law with the potential to conflict with traditional Pacific land rights is much older than the Declaration on the Rights of Indigenous People. The UN Universal Declaration of Human Rights was adopted on 10 December 1948, over 60 years ago, in no small part through the mighty diplomatic efforts of the indomitable Eleanor Roosevelt, chair of the Commission of Human Rights. It affirms in 30 articles the inherent dignity of all members of the human family, and their equal and unalienable rights of freedom, justice and peace. In a

shrinking globalised world at the end of the first decade of the 21st century, its 61 year old aspirations continue to shine as a guiding beacon to those who are committed to the sound governance of nations. It declares that all people are entitled to rights and freedoms without distinction of any kind, including gender, property ownership, birth or other status.[30] It highlights that all people are equal before the law and entitled to equal protection without discrimination.[31] Men and women are also entitled to equality, including equal rights as to marriage, during marriage and at its dissolution.[32] It declares that all people have the right to own property alone as well as in association with others,[33] and that no one is to be arbitrarily deprived of their property.[34]

The potential for tension between these declared human rights and both the rights of traditional Indigenous land owners in Pacific Nations, and those who have subsequently acquired property under comparatively newly imposed colonial laws, is manifest.

Other international law matters

Other aspects of international law with the potential to conflict with traditional Pacific land rights include the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; and the Convention and Committee on the Rights of the Child.

In Australia, the High Court has recognised that Australia's ratification of UN conventions gives rise to a legitimate community expectation that the executive will act in conformity with the convention. The ratification alone does not make the convention part of Australian law, however, unless the convention's provisions are specifically incorporated into Australian domestic law by statute.[35] It is noteworthy that, although the Convention and Committee on the Rights of the Child has been ratified by Australia,[36] it did not feature in argument before or in the reasoning of the High Court in *Wurridjal*. Other aspects of international law, including the Universal Declaration of Human Rights, United Nations Declaration on the Rights of Indigenous Peoples, Convention concerning Indigenous and Tribal Peoples in Independent Countries, International Covenant on Civil and

30 Article 2.
31 Article 7.
32 Article 16.
33 Article 17(1).
34 Article 17(2).
35 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; but see the Australian Senate's Legal and Constitutional Affairs Committee's "Commonwealth Power to Make and Implement Treaties" Report, chapter 6.
36 The Federal Government ratified the Convention in December 1990 and it became binding on Australia in January 1991.

Political Rights and International Convention on the Elimination of All Forms of Racial Discrimination, did however feature in the reasoning of some members of the High Court, but not, apparently, in arguments before the court.[37] This may be because Australian lawyers are not accustomed to reasoning in international law concepts or even to a human rights based jurisprudence. After all, Australia remains one of the few nations in the world without a Bill of Rights.[38]

As for the Universal Declaration of Human Rights, the tensions between these covenants and conventions and traditional Pacific land rights are self-evident. An in-depth consideration of these conflicts is beyond the scope of this paper.[39] But, as I have noted, one example of such a conflict arose, but was not addressed, in *Wurridjal* when Aboriginal Australians' rights to control entry onto their traditional land conflicted with the Australian Government's obligations to its children under the Convention and Committee on the Rights of the Child. I will briefly discuss some other examples of such conflicts.

Examples of tensions between traditional Pacific land rights and international law

The most commonly experienced tension between traditional Pacific land rights and international law arises when collective, traditional land rights and individual, human rights collide. International law is broadly based on western legal and political systems, with an emphasis on the individual rights highlighted in the Universal Declaration of Human Rights.[40] Indeed, national and international legal systems, insofar as they are based on a human rights discourse, can sometimes seem incompatible with the collective focus of the culture of many Indigenous groups in Pacific nations.[41] Nevertheless, globalisation, and especially international migration, have kept Indigenous collective rights relevant in contemporary democratic states with multi-national and multi-ethnic components.[42] That is certainly the case in many Pacific nations like Fiji, New Zealand, Australia and others.

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37 *Wurridjal v Commonwealth* (2009) 252 ALR 232 see French CJ at [52], Gummow & Hayne JJ at [147] and Kirby J at [213], [244] & [262].

38 Two Australian States have Bills of Rights: see *Human Rights Act* 2004 (ACT); *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

39 For more information, see Claire Charters, 'Indigenous peoples and international law and policy' (2007) 18 *Public Law Review* 22.

40 S. James Anaya, 'International Human Rights and Indigenous Peoples: The move toward the multicultural state' (2004) 21 *Arizona Journal of International and Comparative Law*, 37 - 38.

41 Megan Davis, 'The UN Declaration on the Rights of Indigenous People' (2007) 6(30) *Indigenous Law Bulletin*, 6.

42 Ryszard Piotrowicz, 'United Nations Declaration on Indigenous People' (2008) 82 *Australian Law Journal* 308.

The most common form of ownership of customary land in Pacific nations is through group or communal ownership where members of a group or community own joint, undivided interests in an area of land where the community is located. See, for example, the *mataqali* or *tokatoka* in Fiji, the *kaainga* in Kiribati and Tokelau, the *mangafoa* in Niue, or the *pui kaainga* in Tuvalu.[43]

I apprehend from my Australian Indigenous friends that their deep connection with the land as its traditional custodians is a concept which is unable to be adequately described in the English language. Perhaps the beautiful and poetic French language can do better! Traditional Pacific land ownership is not ownership as people from the west understand it. It involves a spiritual connection with the land and the concept of stewardship and protection of the land, quite inconsistent with the western and international approach to land as a commodity in a modern market economy. The traditional approach of many Pacific Indigenous people to their land involves a union between the land and the people, entirely contrary to the perception of western land ownership as domination and power over the land.[44]

For this reason, some Pacific nations have revised their constitutions to recognise traditional concepts of land ownership and to accommodate customary property rights. But this is often difficult to successfully achieve in light of international law.[45] A key theme of the Universal Declaration of Human Rights is that all people are created equal, and should have the same rights. It follows that nations should not have laws which discriminate against, or in favour of, one group of people on the basis of race, gender or some such characteristic. The concept of traditional Pacific land rights does not necessarily share or incorporate this individual rights-based view. The resulting tension is probably the biggest challenge facing many Pacific nations post-independence from colonial rule. How can a Pacific nation both preserve its customary laws and practices and at the same time comply with the international human rights expected of it?[46] After all, these international expectations as to the governance of Pacific nations on an individual rights basis are often a pre-requisite to World Bank approval for much-needed international funding and investment.

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43 Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd ed, 2007), ch 10 “Land Law”, 293.

44 John Crosetto, 'The Heart of Fiji's Land Tenure Conflict: The law of traditional and *vakavanua,* the customary "way of the land"' (2005) 14 *Pacific Rim Law and Policy Journal*, 73.

45 John Crosetto, 'The Heart of Fiji's Land Tenure Conflict: The law of traditional and *vakavanua,* the customary "way of the land"' (2005) 14 *Pacific Rim Law and Policy Journal*, 74.

46 Kenneth Brown and Jennifer Corrin Care, 'Conflict in Melanesia: Customary Law and the Rights of Women' (1998) 24 *Commonwealth Law Bulletin*, 1334 – 1335.

Samoan culture, for example, is based on the *matai* system. The word *matai* means something like "chief". It can be a specific honour bestowed on someone in acknowledgement for services provided. The *matai* title can be given to both men and women, but it is much more common for men to receive this honour. Until recently, only *matais* could vote in Samoan parliamentary elections and even now only *matais* are eligible to seek parliamentary office. Changes to the more arbitrary aspect of *matai* rule are gradually being made in Samoa in response to demands that the country respect international human rights and democratic governance.[47]

In many Pacific nations like Fiji, Solomon Islands and Vanuatu, land is managed collectively by forums or councils, invariably comprised of chiefs and leaders, very few of whom are women.[48] Chiefs often have traditional power to approve or refuse the use of land to members of their group, giving the chiefs rights of control rather than rights of ownership.[49] Customary laws often focus on patriarchy and the maintenance of male power and control.[50] This means that gender inequality is a significant issue in many Pacific nations, even though some are signatories to the Convention on the Elimination of All Forms of Discrimination against Women[51] or have constitutional provisions advocating equal treatment.[52] This cannot be dismissed as a "women's issue". It is, as "women's issues" usually are, a serious, broad human rights issue. Women in Pacific nations who do not have access to land use may be denied a livelihood, with the result that they and their children may be denied equal opportunities and the whole family, male-children included, fall into the poverty trap.[53]

A primary method of acquiring rights to ownership of customary land is through inheritance. Pacific nations vary greatly as to their customary laws of inheritance. Some permit only male children to succeed their father's interests (patrilineal). Others permit only daughters to succeed their mother's interests (matrilineal). Sometimes male and female children succeed either mother or father (ambilineal), or both mother and

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47 Afamasaga Toleafoa, 'A changing fa'amatai and implications for governments', University of Technology Sydney, Centre for Local Government <http://www.clg.uts.edu.au/pdfs/Toleafoa.pdf>.

48 Sue Farran, 'Land rights and gender equality in the Pacific region' (2005) 11 *Australian Property Law Journal*, 134-135.

49 Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd ed, 2007), chapter 10 "Land Law", 296.

50 Kenneth Brown and Jennifer Corrin Care, 'Conflict in Melanesia: Customary Law and the Rights of Women' (1998) 24 *Commonwealth Law Bulletin*, 1335.

51 Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, New Zealand, Papau New Guinea, Samoa, Solomon Islands, Timor-Leste, Tuvalu, United States of America and Vanuatu (as at 11 June 2009).

52 See Sue Farran, 'Land rights and gender equality in the Pacific region' (2005) 11 *Australian Property Law Journal* 131.

53 Sue Farran, 'Land rights and gender equality in the Pacific region' (2005) 11 *Australian Property Law Journal*, 139.

father (bilineal). Some customs give preference to female children, others to male children, and some differ in their treatment of legitimate, illegitimate and adopted children.[54] It generally seems to be a common thread that under customary laws women cannot inherit property from men.[55] In Kiribati and Tuvalu, discriminatory customary practices providing for different treatment of male and female heirs are formalised in written laws.[56] Other Pacific nations have followed the western model in regulating succession laws. See, for example, Fiji's *Succession, Probate and Administration Act* 1970.[57]

In the 1994 Vanuatuan case of *Noel v Toto,*[58] a woman applied to establish her right to land and to share with her brother in its benefits. The local custom differentiated between the rights of males and females by depriving married women of certain rights. The Vanuatuan Constitution contained internal tensions that created difficulties in resolving the dispute. It provided that all people should be treated equally.[59] It also provided that custom should form the basis of ownership and use of the land.[60] The court resolved the tension by holding that where custom discriminates against the land rights of women, those customs were subject to the Constitutional recognition of fundamental human rights. Vanuatuan customary law applied in determining ownership of land, but subject to the limitation that any customary rule discriminating against women could not be applied.[61] *Noel v Toto* has been a seminal case for many Pacific nations in interpreting their Constitutions so as to balance customary laws against competing individual human rights.

There is obviously much to commend this approach. It recognises that traditional cultures change and societies evolve, keeping the best of the old and embracing the best of the new. Those of us descended from the English and US common law traditions should never forget that, until the 1800s, men were entitled to beat their wives with a stick, as long as it was no thicker than a thumb (hence the 'rule of thumb').[62] Women upon

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54 Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd ed, 2007), chapter 10 “Land Law”, 296.

55 Kenneth Brown and Jennifer Corrin Care, Conflict in Melanesia: Customary Law and the Rights of Women (1998) 24 *Commonwealth Law Bulletin* 1349.

56 Sue Farran, 'Land rights and gender equality in the Pacific region' (2005) 11 *Australian Property Law Journal*, 134.

57 Kenneth Brown and Jennifer Corrin Care, Conflict in Melanesia: Customary Law and the Rights of Women (1998) 24 *Commonwealth Law Bulletin*, 1350.

58 Unreported, Supreme Court, Vanuatu, CC 18/94, 19 April 1994.

59 Article 5.

60 Article 74.

61 Kenneth Brown and Jennifer Corrin Care, 'Conflict in Melanesia: Customary Law and the Rights of Women' (1998) 24 *Commonwealth Law Bulletin*, 1343.

62 Susan A. Lentz, 'Revisiting the Rule of Thumb' (1999) 10(2) *Women & Criminal Justice*, 17 – 18. But c.f. Henry Ansgar Kelly, '*Rule of Thumb* and the Folklaw of the Husband's Stick' (1994) 44(3) *Journal of Legal Education* 341.

marriage lost the right to own property until the passing of various *Married Women's Property Acts* from 1848 onwards.[63] Until the early 20th century women could not be admitted as lawyers as male judges considered they were not persons.[64] And until the late 20th century, there was no such crime as rape within marriage.[65] Just as English common law traditions have evolved and continue to evolve, so too do the traditions of Pacific nations. Those whose rights and powers are diminished by this evolution sometimes oppose it, allowing self-interest to take precedence over what is best for the social fabric of the nation. There have been similar problems through the millennia of human development in every culture facing change. Change, even positive change, is seldom painless, and no less so when the change is inevitable. Great leaders embrace positive change and help those detrimentally affected by the change to accept and manage it.

Conclusion

The Declaration of the Rights of Indigenous People presents as a promising vehicle to lessen the tension between traditional Pacific land rights and international concepts of individual rights. It contains, however, its own internal tension between the rights of traditional Indigenous people to self-determination and the state's right to territorial integrity and sovereignty. International lawyers and those with a direct interest in Indigenous land rights will be considering how to use the Declaration to benefit Indigenous land owners, and will be closely monitoring any jurisprudence arising from it.

Many Pacific nations are attempting to increase economic development in their countries, whether in the form of primary industries, manufacturing or tourism, to raise the standard of living of their citizens. Such development can conflict with traditional Indigenous land rights.

In 1987, the UN World Commission on Environment and Development ("WCED") released the report, *Our Common Future*. This report is also known as the Brundtland Report in recognition of the then chair of the WCED, former Norwegian Prime Minister, Ms Gro-Harlem Brundtland. The Brundtland Report spear-headed the issue of global sustainable development, defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". It recognised that the forces of economic development

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63 See Jocelynne A. Scutt, *Women and the Law* (1990), 205 – 206; Susan A. Lentz, 'Revisiting the Rule of Thumb' (1999) 10(2) *Women & Criminal Justice*, 18 – 19.

64 Susan Purdon and Aladin Rahemtula, *A Woman's Place* (2005), 9-16.

65 See, for example, amendments to the definition of 'consent' under the *Criminal Code* 1899 (Qld), s 347 in *The Criminal Code, Evidence Act and Other Acts Amendment Act* 1989 (Cth), s 31.

are likely to affect and disrupt traditional lifestyles and that special consideration will be required to preserve traditional land rights.[66]

Most people, especially young people who are the future, are concerned about the effect of climate change on the world's ability to preserve our inherited lifestyle for our grandchildren and great-grandchildren. Many see it as the greatest world threat. The debate as to whether there is climate change and, if so, whether it has been effected by human-induced factors, continues. But all thinking people recognise that any environmental degradation is concerning, not just for the immediate area involved, but for the entire global community. Environmental degradation is occurring in Pacific nations, as it is elsewhere in the world. All too often, the traditional lands of Indigenous people suffer the gravest and most immediate consequences of environmental damage. Pacific nations and, with them, the international community, would be foolish not to involve traditional Indigenous landowners in providing solutions to these environmental challenges. So much was recognised in the 1992 Rio Declaration on Environment and Development, which specifically noted the important role of Indigenous people in environmental management because of their deep understanding of land management.[67] But even here, tensions arise. Traditional land usage invariably involves hunting and fishing rights which can conflict with domestic and international law aimed at protecting endangered flora and fauna.[68]

One aspect of climate change, in particular global warming, is that sea levels are predicted to rise. This has the potential to detrimentally impact on many Pacific nations by the loss of low-lying land gulfed by the rising sea levels. Scientists have reported that Tuvalu faces a real possibility of disappearing completely within this century. International law does not presently address the concept of environmental refugees. This omission should be remedied – and soon. Countries close to those Pacific nations most likely to be gravely affected should be preparing neighbourly, compassionate and appropriate contingency plans in the event of such a catastrophe.

As noted earlier in this paper, cultures, communities, societies and nations change and evolve as they treasure their most valued traditions, whilst also adopting the brightest and best of the new, different and foreign concepts and ideas. This is as true for western liberal democracies as it is for traditional Pacific cultures and nations. The international community has much to learn from traditional Pacific

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66 Graeme Neate, 'Looking after Country: Legal recognition of traditional rights to and responsibilities for the land' (1993) 16 *New South Wales Law Journal*, 165.

67 Claire Charters, 'Indigenous peoples and international law and policy' (2007) 18 *Public Law Review*, 44 – 45.

68 Claire Charters, 'Indigenous peoples and international law and policy' (2007) 18 *Public Law Review*, 46.

Indigenous culture, for example, from the impressive track record of many such cultures in caring for and nurturing their beloved land. Traditional Indigenous Pacific cultures may also learn and grow from respect for internationally recognised individual human rights, which encourage and enable every human being to develop fully and to contribute their real potential to their community.

Like the cycle of life, I will finish where I began, with the statement of the Australian Indigenous workshop presenter, Grant Sarra, as to the shared common values of all Australians. These are not just Australian values they are the values of all Pacific nations, indeed of the whole international community. If the world is to survive into the 22nd century, all nations, whether from a western liberal democratic tradition or from a traditional Pacific Indigenous background, should be united in their "caring, sharing and respect for the land, people and environment" under the rule of law, enforced through an independent legal profession and judiciary.