Lo Bilong Yumi Yet

AH Angelo*

I INTRODUCTION

The topic of the paper has, in the development of the PILOM meeting programme, evolved from "How to accommodate Customary Rights and Legal Rights inherited from the Colonial Past (with the particular reference to human rights broadly defined)" to "How to accommodate Customary Rights and Emerging International Norms expressed in Multilateral Treaties". The matters of interest - however expressed - are those of the interaction and the interrelationship of customary rights and law, with particular reference to international human rights and multilateral human rights proposals found in the draft Pacific Charter prepared under the aegis of LAWASIA and in the Universal Declaration on the Rights of Indigenous Peoples which is in preparation under the aegis of the UN. The title to this paper seeks to encapsulate these ideas or bring together these threads under the title from a book by one of the leading legal thinkers of this region.[1]

II FEATURES OF CUSTOM VIS-A-VIS WESTERN LAW

Identification of particular features of custom is a useful starting point for this discussion. Significant features, as accepted both by those within customary systems and those who have observed them from outside,[2] is the strong community orientation of those systems and the nature and goals of their dispute resolution mechanisms. The community orientation, one suspects, flows from the physical and social isolation of most customary communities. They have an inward-looking aspect related to the high degree of self-dependence necessitated by the environment, and by the need to maximise the use of what are frequently limited resources - a small group of people must work hard and consistently together to take advantage of the natural resource available. It is also probably true to say that in such a community-oriented system oral communication is the norm. This description is, in general terms, true of the Pacific customary systems, as it is of many other customary communities.

---

* Professor of Law, Victoria University of Wellington. This is an amended version of an address given to the 1991 PILOM on 4 October 1991.

1 The title of Narokobi's book (see note 2) has been adopted as the title for this paper because it seems to address both expressly and implicitly the topic of this paper. That "the law is ours" is a positive assertion of a community's role and interest in the norms that govern it. Also, in its potential aspect, I am reliably informed that it means that the power to control, and responsibility for the norms that govern a community, not only *is* the community's but still *can be* the community's.

2 The seminal Pacific text on this topic is B Narokobi *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific, Suva, 1989). See also more generally R David and J Brierley *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3 ed, Stevens & Sons, London, 1985).

A key feature of the Western definition of law[3] is the focus on the nature of the rules. Another aspect of the notion of law is the focus on the dispute resolution process. While in the Western tradition of law that requires final resolution of disputes by an independent tribunal, dispute resolution in the Pacific customary systems is very much more a reflection of the nature of the rules of the system and their purpose. Dispute resolution, therefore, is typically more concerned[4] with resolving differences within the community context and in a way that serves the community, and less concerned simply with determining the individual rights of the litigants. The smaller and more interdependent the community is, the more likely is this to be the case. Further, in such an environment, flexibility of decision, rather than finality, may provide the best solution.[5] Where death or banishment was the alternative, accommodation of interests had much to commend it. Another general contrast of a similar nature is seen in customary-oriented communities where the dispute resolution process is typically concerned with solution finding and not with guilt finding.

The bias of Western law is in most cases otherwise oriented. It focuses on individuals, it focuses on their rights vis-a-vis each other, and it places a premium on finality. These features of law not unnaturally reflect its different environment of origin. Law, in Western terms, is a phenomenon of larger depersonalised communities and acts in some way as an intermediary between the government and the people. Law, in Western terms, is also a tool of expansion and expansionary political systems. Law is not the typical product of a small, closed and intimate community.

III ACCOMMODATION OF CUSTOM AND WESTERN LAW

The accommodation of customary rights and legal rights has been a matter of difficulty from the beginning of contact between Western European notions of law and the customary systems of the Pacific peoples. The legal invasion has typically followed the political and economic invasion. Because they are so firmly rooted in communities, the customary rules have not died and typically have continued, even when abrogated, to operate as a reality alongside or outside the legal system. For those concerned with customary rights in the Pacific environment of the present and medium-term future, accommodation with law is a necessity.

There are different levels of accommodation but accommodation per se is not difficult. It is submitted that the best method of accommodation and of protection for customary rights is legislation; whether the legislation is general or specific is a matter

---

3 A body of preset and accessible rules, disputes in respect of which are justiciable before an independent tribunal.

4 An interesting example of this is discussed in the context of admissible evidence in R Scaglion "The Role of Custom in Law Reform" in R De Vere, D Colquhoun-Kerr and J Kaburise *Essays on the Constitution of Papua New Guinea* (Tenth Independence Anniversary Advisory Committee, Port Moresby, 1985) 31, 35.

5 Narokobi, above n 2, 156. The emphasis on finality in the Western legal systems is simply exemplified by the maxim *interest rei publicae ut finis litium sit.*

of choice and dependent on the particular goal to be achieved. However, given the political dominance of law as a social ordering mechanism, custom will be best protected if it is clothed in the garment of the legislative process. The alternative is that the administrative needs of government will increasingly take over social regulation by means of the law, and communities governed by customary practices will become more and more isolated and less numerous.

There are many practical ways to achieve a good relationship between law and custom. Participation of customary authorities in the legislation-making process is a prime method. In terms of the substantive rules of custom itself, one of the early British patterns was simply to leave custom untouched and, except in the areas expressly governed by legislation, the operation of custom was to be unaffected by the co-existence of law. Other possibilities more appropriate to modern conditions include:

- giving custom force of law by legislation, either by designating specific subject matters in respect of which the courts are required to apply custom, or by setting aside designated areas which are to be governed by customary rules and subjected to decision and enforcement by customary authorities;

- having legislation that incorporates the substance of the customary rule;

- legislating for administrative decisions to be taken by customary bodies;

- incorporating customary processes into the legal system; or

- incorporating customary remedies into the legal system.

Legislation can also provide for support for customary institutions, for instance by the grant of corporate status and, further, by giving rule making authority to customary authorities on the model of local government legislation.

In all these endeavours, custom is best protected if in the governing legislation customary terms are not defined. At the evidentiary level, this allows custom the task of giving life to the customary concept in the law and also avoids wrong interpretations that flow from false analogies provided by translation.

The above are examples of methods that are practical, and that have been seen to be workable within the Pacific region. Whether the desire is to give a great or a small role to custom there are methods that fit. Further, there are methods that relate better to some subject matters than others and to some political goals than others. The success of any endeavour to establish a good interrelationship between custom and law can therefore depend substantially on the choice of the method used to achieve the goal.

To accommodate and to protect custom is not difficult from the strictly legal point of view. There are, however, difficulties of other kinds. Where the legislative processes are in the control of central political organs there may well, in spite of all the pro-custom rhetoric, be political resistance to the identification and legislative support of customary practices. This is a political reality of which proponents of custom and

customary rights need take early account. The second point is that the legislative process in itself is alienating of, or alien to, communities governed by custom. If, for instance, the legislative process requires the decisions of the group to be written[6] and to be deposited somewhere, or publicised in some way, the procedural steps for promulgation may not be followed because of their seeming irrelevance. The result then is that resolutions of customary authorities which could have the force of law do not, because the paperwork requirements of the legal culture have not been fulfilled. This is a process matter that requires the attention of customary authorities if they wish to do the best for their culture in the present political environment. Thirdly, on the point of difficulties of accommodation, there is the question of time. Most customary communities in the Pacific feel that their customary system is under threat, but for them to appreciate the nature of the threat, and how its worst effects might be countered by the use of the law and the particular processes of the law, involves a considerable investment of time, effort and goodwill on the part both of the legal power holders and the customary power holders. At the end of the process, speed is desirable if the full benefits are to be obtained from the process by both sides. In a customary arena, once the customary authorities have made their decisions they may be implemented. If the process of the use of the law to fulfil customary purposes is accepted by the customary authorities, delay by the legal authorities in implementing those decisions indicates to the customary authorities lack of control of the process and therefore distrust of it. In terms of the legal power holder, the informational background may be substantially lost by the time of implementation and the support of the customary authorities for the end product may well have disappeared. The conclusion on this aspect, then, is that accommodation is possible, that technically it is without difficulty but that there is more to it than simply accommodating law and custom conceptually. The political and cultural backgrounds of the participants in the process need to be taken into account.

---

6 An example is provided by the Tokelau Village Incorporation Regulations 1986, r 19: Procedure for making rules -

(1) Rules made pursuant to regulation 18 of these regulations shall-
  (i) Be made by resolution of the Taupulega: and
  (ii) Be signed by the Faipule: and
  (iii) Indicate the date of the resolution by which they were made: and
  (iv) Be impressed with the seal of the village.

(2) No rule shall come into force until a copy of the rule has been deposited in the Administration Office of the village by which it was made.

(3) A copy of every rule shall be available at all reasonable times -
  (i) For public inspection, without fee: and
  (ii) For purchase, on payment of such amount (if any) as the Taupulega determines,
  at the Administration Office of the village by which the rule was made.

(4) A copy of every rule shall be printed in Tokelauan and in English in the first available issue of *Te Vakai* published after the making of the rule, and copies of the rule shall be sent to the other 2 villages as soon as practicable after the making of the rule.

(5) Failure to comply with subclause (3) or subclause (4) of this regulation shall in no way affect the validity of any rule made under regulation 18 of these regulations.

IV HUMAN RIGHTS IN THE PACIFIC

A Brief History

The focus of this session is, however, much more narrow than a consideration of the accommodation of custom generally. This session is dedicated to a consideration of rights and particularly human rights in the Pacific area. Human rights, like law, is an alien concept born substantially from the Western European political experience and especially as a development of its notion of law.

Human rights in the Pacific is, therefore, part of the Pacific heritage which includes in recent times a substantial element of Western European and international cultural contact. The communities of the Pacific are in general very proud of that element of their cultural heritage. It is also true that people in the Pacific communities are well aware that not all of the cultural heritage that came from outside over the last century has been good. The communities of the Pacific were afflicted by the bad elements[7] of external cultures, just as they were the beneficiaries of the better elements. One thing that is generally perceived is that law and human rights provide a sword which is very powerful in the hand of the person wielding it. Further, that attitudes to human rights are very often dictated by political self-interest.[8] Further, the experience of local communities of the interpretation in domestic courts of human rights in the customary context by expatriate judges has, rightly or wrongly, led to a degree of reserve about human rights.[9]

The history of human rights in the Pacific is substantially a consequence of decisions in Western Europe. The post-World War II flourishing of human rights internationally was a reaction to specific events that affected the whole world but particularly impacted in the Northern hemisphere and in Europe. One consequence was the Universal Declaration of Human Rights of 1948, another was the European Convention for the Protection of Human Rights and Fundamental Freedoms. Historically, the most important for the Pacific today is probably the European Convention which, at the time of independence of many of the Pacific states, found its

---

7 For example, slavery, warfare as a result of great power rivalry, and religious intolerance between missionaries.

8 It is possible to identify many regional examples of opposing international stances being taken on the same human rights issues. The very human rights issue that alienates two communities may bring together one of those communities and a third - all of the states involved subscribing to the same rights and principles. If, as Frames' paper, "Property: some Pacific reflections" (this volume) indicates, there is no quintessential property right, neither is there any quintessential individual right.

9 See, on this topic, the *Saipa'ia Olomalu* case in the Supreme Court and Court of Appeal of Western Samoa, reported from the Court of Appeal (1984) 14 VUWLR 275. See also Narokobi, above n 2; D Chalmers and A Paliwala *An Introduction to the Law in Papua New Guinea* (2 ed, The Law Book Company Ltd, Sydney, 1984); B Ottley and J Zorn "Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict" (1983) 31 AJCL 251.

way directly or indirectly into their constitutions.[10] The British pattern of decolonisation was to provide each nascent state with an entrenched written constitution part of which contained fundamental rights and freedoms essentially based on the European Convention. Most of the states represented at PILOM therefore have, as part of their constitutional foundation, human rights on the European model and these rights in general terms differ very little from the human rights provisions in the constitutions of other independent states in other regions of the world.[11] Since independence the international covenants which have concretised the ideals set out in the Universal Declaration of Human Rights have come into force and, in a slightly different form, follow the broad pattern set out in the European Convention. It is significant that few states of the Pacific are parties to these international agreements.[12]

B Recent Human Rights Initiatives

The latest regional endeavour is the draft Pacific Charter of Human Rights prepared under the aegis of LAWASIA.[13] Within the UN structure there is also a draft Universal

---

10 Many of the States were British colonies and received human rights thinking from the United Kingdom. That thinking relied heavily on the UK experience of human rights under the European Convention.

11 This is a reflection of the colonial history of most of the States. The independence constitutions of most of the former British colonies follow each other in a chronological structural evolution. They are, to some extent, related. For example, the Constitution of Fiji of 1970 was not structurally or conceptually different from the Constitution of Mauritius of 1968.

12 The South Pacific states and jurisdictions which are subject to the International Convenant on Civil and Political Rights are: Australia, Cook Islands (by New Zealand action), Kiribati (by United Kingdom action), New Zealand, Niue (by New Zealand action), Solomon Islands (by United Kingdom action), Tokelau (by New Zealand action) and Tuvalu (by United Kingdom action).The South Pacific states and jurisdictions which have accepted the Optional Protocol to the International Conventant on Civil and Political Rights are: New Zealand and Tokelau (by New Zealand action). The South Pacific states and jurisdictions which are subject to the International Convenant on Economic, Social and Political Rights are: Australia, Cook Islands (by New Zealand action), Kiribati (by United Kingdom action), New Zealand, Niue (by New Zealand action), Solomon Islands, Tokelau (by New Zealand action) and Tuvalu (by United Kingdom action). By virtue of the constitutional and international relations between New Zealand and each of the Cook Islands, Niue and Tokelau, the four jurisdictions have historically typically moved together in treaty matters (although different reservations are sometimes made in respect of each jurisdiction). Since 10 November 1988, however, no treaty signed by New Zealand extends to the Cook Islands and Niue unless it is signed expressly on behalf of the Cook Islands or Niue: see the Declaration setting out the position of the Cook Islands and Niue with respect to New Zealand Treaty actions, dated 10 November 1988. The assistance of Alex Frame is gratefully acknowledged for clarifying the New Zealand treaty-making role vis-a-vis its associated states.

13 The Law Association for Asia and the Pacific. The draft Charter is produced, with the kind permission of LAWASIA, in Appendix 1 to this volume.

Declaration on the Rights of Indigenous Peoples[14] which, it may be anticipated, will be of considerable interest to the communities in the Pacific. That latter document will be given substantial focus in 1993 which has been declared the International Year for the World's Indigenous People.[15]

C Pacific Responses to Human Rights

The strength of customary rights is typically in the fields of land, interpersonal relationships, maintenance of public order, and power structures. The constitutions of the Pacific territories typically make specific provision for the accommodation of customary land rights and traditional power structures. Equally typically on the interpersonal side, the rights provisions give little or no evidence of any impact on constitutional law thinking of the specifics of the human environment in the Pacific region. This may explain why some of the constitutions which are now most accommodating of custom in human rights are those that were autochthonous or that have been reformed in the post-independence era. It may also explain why Pacific states have not become parties to the international covenants; nor, with some notable exceptions, had any profile in the preparation of the draft Pacific Charter or in the extended deliberations on the draft Universal Declaration on the Rights of Indigenous Peoples. There is no doubt of the potential relevance and importance of these endeavours to the Pacific area, but it is quite clear that those endeavours are not regarded as matters of high priority by the Pacific island states. From the internationalist point of view, it may be argued that, since most of the states have entrenched human rights of the international type, there is no need for any further action in the human rights area. Conversely, it could be argued that, if the human rights are already there and accepted, there will be no difficulty in complying with the international instruments. From the local perspective, human rights thinking can raise a number of problems, not least because it is not part of the local landscape and is, like much else of the current political environment, seen as imposed from outside. Is it for instance conceivable that the states in the Pacific would have achieved independence when they did without the inclusion of the standard human rights provisions in their constitutions? These provisions in the constitutions address individuals not communities.

In the post-independence era it is also significant that any treaty obligation is an undertaking not only to the local community but also to the international community. A treaty at this stage in the post-colonial era may simply be seen as a new form of

---

14 Prepared under the aegis of the Working Group on Indigenous Populations set up by the Sub-Commission on Prevention of Discrimination and Protection of Minorities with the endorsement of the Commission on Human Rights, on the authorisation of the Economic and Social Council. The most recent version of the draft Universal Declaration on the Rights of Indigenous Peoples is found in the Report of the Working Group on Indigenous Populations on its ninth session in August 1991 (E/CN4/Sub2/1991/40). This contains the final version of the Preamble and arts 1 to approximately 19; remaining arts are included in draft form. That draft is reproduced in Appendix 2 of this volume.

15 Report of the Working Group on Indigenous Populations, above n 14, 21.

external tie, when states would rather be left alone. Many of the states may feel substantial pressure from external economic dominance or dependence and wish at least to retain control in the rights area.

Additionally, there is no doubt that international human rights carry a substantial cost burden. There is the cost in human and material resources of the internal mechanisms necessary to honour the international human rights obligations - costs which in the present environment cannot be met. There are also related costs of reporting as required by the various treaties. Those material costs, plus the political cost of perceived loss of autonomy, do not augur well for the implementation of international covenants. Some states may consider they could do much better with the money in the provision of education, health, communication services and better protection of the environment from exploitation.[16]

Human rights thinking in the area needs to be the outgrowth of information on the social benefits of the human rights and of a desire to accede to particular treaties. This will take time. At the very least, the international documents are likely to need localising - to become documents in which the Pacific way is visible. In this respect the Pacific is unlikely to be different from the states promoting international human rights. Those human rights are the product of a long historical evolution in the Western European tradition of law and very much reflect that tradition. The call now is for everybody else to follow that way. It is not self-evident that this should be so and it is likely, if customary attitudes to human rights in the Pacific are any guide, that any human rights document that is to be effective in the region will have to go some greater distance towards recognising the cultural imperatives of the region.[17]

D Draft Pacific Charter of Human Rights

The draft Pacific Charter is a remarkable document. It is a compendium of information on international human rights documentation as at May 1989 and not only provides a draft charter developed from that body of international information but also contains data in the explanatory memoranda which serve to put the document in the Pacific context. It is a substantial resource document and represents a huge investment of time and energy by the experts and the interested parties who participated in its

---

16 Pacific States have been involved in various environmental and resource issues over the last decade, eg tuna fishing, driftnet fishing, and a nuclear free Pacific.
On economic issues an example of the "food first" argument is seen in *The Economist* 14 September 1991 page 56:

> When European and North American foreign ministers gathered in Moscow this week for a human rights conference with the grand title of "the human dimension", the corridor talk centered on a dimension of a different kind: how short is the Soviet Union of food and fuel and how urgently does it need help from abroad?

17 See, by way of example, *The Recognition of Aboriginal Customary Laws* Report 31 (Law Reform Commission, Canberra, 1986) para 35.

elaboration. The document finds its origins in LAWASIA promoted papers presented in 1979 and 1982.[18]

Consistent with the view of customary rights presented in the early part of this paper, the memoranda for the draft Pacific Charter recognise:[19]

> The group-based structure of island societies can inhibit the exercise of individual rights if it is abused or used in an oppressive manner, but techniques may nevertheless be developed which will reduce the possibility of conflict. For an example, an approach which recognises the duties of the individual to the group and society as a whole would help to encourage balanced consideration of the vital relationship between the group and its members. ... All societies recognise that individuals owe duties to the community at large, but this point is understood better in Pacific countries than in most other places.

It is further recognised that in the elaboration of international human rights thinking the "world community has tended to ignore the Pacific region with its small nations spread across a vast ocean".[20]

The strength of the implementation of these thoughts in the draft Pacific Charter is, it is submitted, not as great as it may be when proposals have more input from the Pacific community level. The provisions made for accommodating Pacific customary rights, which are typically found by way of exception to the general principles in the draft Charter, could loom large as early positive statements of principle[21] which

---

18 The 1982 paper considered the setting up of an overall Asian Human Rights Commission and for that purpose Asia was divided into four sub-regions, the South and Western Region of which comprised Australia, New Zealand, Papua New Guinea, Fiji and the countries of the Western Pacific. The recorded data on the formulation of the draft shows very little involvement of the peoples of the communities which provide the focus for the draft Pacific Charter. Further, the commentary which accompanies the draft explicitly and/or implicitly criticises the human rights record of at least three states in the region. This could lead to the draft being viewed as politically reactive though the Charter itself does not show any signs of that political viewpoint.

19 Draft Pacific Charter of Human Rights and Explanatory Memoranda, pp 4 and 5.

20 At p 5.

21 Article 29 (2) of the Universal Declaration of Human Rights reads:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

As a first step it is submitted that this principle should be placed at the beginning of any human rights document for the Pacific. This has been done in other States which are strongly communally based. See, eg, the Constitution of Japan:

> *Article 12*: The freedoms and rights guaranteed to the people by this constitution shall be maintained by the constant endeavour of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

emphasise that very sense of community, and the relationship of individuals to that community and in a community which is small and in close contact with its environment.

A relatively new provision on the international scene and one that in the Charter is sourced in the constitutions of the Northern Mariana Islands, Hawai'i, the Federated States of Micronesia and Palau, is the right to a safe environment: "All peoples shall have the right to a clean, healthful and safe environment favourable to their development."[22] Among so many clauses based on European, United Nations and African precedents this article has a clear breath of the Pacific and it was interesting therefore to note that it was sourced from Pacific constitutions. This is an article that should find substantial favour within the Pacific region and one that would be likely to be promoted strongly by the local communities.

There is inevitably a resource implication at the domestic level which flows from accepting international human rights standards. One of the substantial cost elements in that is satisfying the often basic requirement that a Western style legal system should be operative and law professionals be available. The provision and operation of professional legal services creates a cultural as well as a resource barrier. It therefore may be queried whether the provision[23] in the draft Charter for a Pacific Human Rights Commission which "shall consist of seven members chosen from amongst Pacific personalities of the highest reputation ... particular consideration being given to persons having legal experience", is entirely satisfactory. In the Pacific environment, the better approach may be to have suitable persons, whether they have legal experience or not.

E Draft Universal Declaration on the Rights of Indigenous Peoples

Articles 19 to 22A of the draft Pacific Charter, under the heading "Rights of Peoples", deal with peoples' rights of the sort that are found in the draft Universal Declaration on the Rights of Indigenous Peoples. The Charter commentary states that these "group rights are important to Pacific communities, which have long recognised the collective rights of groups and have protected individual rights in the context of the group".[24]

This is a convenient point to consider the contents of the latest draft of the Universal Declaration on the Rights of Indigenous Peoples. The emphasis in the clauses of the

---

Article 13: All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

A number of Pacific Constitutions do at an early point stress that freedoms are subject to the rights and freedoms of others and the public interest, eg Kiribati, art 3, Solomon Islands, art 3, Vanuatu, art 5.

22 Draft Pacific Charter of Human Rights, art 24.

23 Article 31. 1.

24 Above n 13, 48.

draft Declaration is consistently on "indigenous peoples"[25] and collectivities. There is here evident a change of orientation in the drafting of international rights documents and, given the place of indigenous peoples in the Pacific nations, this Declaration is likely to be of great interest to the indigenous and non-indigenous peoples of the region. The draft Declaration does, at one level or another, address all the matters that are of prime concern to indigenous peoples: It speaks of the maintenance of cultural identity and tradition,[26] of self-identity and self-determination. It also states that the Declaration is consistent with general international law thinking. In particular, paragraph 25 states that indigenous peoples have "The right to determine the responsibilities of individuals to their own community consistent with universally recognised human rights and fundamental freedoms." The interaction between the international human rights covenants, protections for individuals and the collective protections for indigenous peoples in the draft Declaration (eg paragraphs 7 to 11) indicates that the point of tension in the protection of customary rights in the context of international human rights documents has yet to be fully explored. It is submitted that the appropriate place for this exploration for members of PILOM is among the communities within the region and in the context of consideration of the draft Universal Declaration on the Rights of Indigenous Peoples.

F Customary Notions and Human Rights Notions

A useful approach to establishing a working relationship between these notions may be indicated by the rights patterns in a number of states worldwide, Pacific and not Pacific. Some states which have inherited international human rights thinking as part of the independence process or which have wished, as part and parcel of their status within the world community, to accede to human rights conventions, have in fact evolved over a 20 to 30 year period from positions of apparent contradiction or intolerance of a generalist interpretation of human rights, to positions of substantial coincidence of interpretation with international expectations. Accepting for the point of the argument that this is a desirable cultural pattern to follow, it does indicate that states committed to international human rights thinking often need time to reach external expectations. Such states have in the not too distant past had judicial and legislative decisions which indicated on rights issues that it was, for instance, perfectly appropriate for women to be treated differently from men in the field of citizenship,[27] voting rights,[28] and jury

---

25 The *Human Rights Fact Sheet* on indigenous peoples, published by the Centre for Human Rights, United Nations Office at Geneva states (page 3) that indigenous peoples are:

> Spread across the world from the Arctic to the Pacific, they number, at a rough estimate, some 300 million. Indigenous or aboriginal peoples are so called because they were living on their lands before settlers came from elsewhere, they are the descendants - according to one definition - of those who inhabited a country or geographic region at the time when peoples of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means.

26 For example, the draft Universal Declaration on the Rights of Indigenous Peoples, paras 5 and 7.

27 See, eg, the situation in Japan. The Constitution of Japan 1946 provides:

service.[29] This sort of thing is best worked out locally and, if not in the context of discussion about a draft Pacific Charter and the implementation mechanisms, at least in the context of the local governmental systems.

A significant element in that local development is the role of the judiciary.[30] It is likely that the evolution will be less traumatic if the judges are members of the specific community. In the case of the expatriate judge, one suspects that the best practical approach (even if not that which is theoretically most satisfying legally) is one of sensitivity to local cultural conservatism.

Some areas of international human rights thinking that can readily conflict with custom and customary rights are those related to communal work,[31] freedom of religion,[32] the due process provisions of article 14 of the International Covenant on Civil and Political Rights, and the equality of sex requirements as elaborated in the Convention on the Elimination of all Forms of Discrimination against Women.[33] These matters, and obviously many more, require specific investigation and consideration in the context of drawing up a Pacific Charter.

On due process, the draft Pacific Charter says in article 7A: "Every individual charged with a criminal offence shall be presumed innocent until proved guilty according to law." This is a fine principle and readily acceptable in Pacific communities. It belies, however, the reality of most customary systems where the emphasis is not on innocence or guilt but on remedying a social disruption. Interestingly enough the draft Charter does not say that punishment shall only be imposed by due process. It may be

---

Article 10: The conditions necessary for being a Japanese national shall be determined by law.

Article 14: All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race creed, sex, social status or family origin.

Until recently law made under art 10 provided differential citizenship rules on gender-based criteria.

28 In Western Samoa the pattern that operated until recently was that only the Matai voted in general elections. In 1991 this pattern changed to universal suffrage as a result of the Electoral Amendment Act 1990.

29 The Constitution of Mauritius states in art 3 that there is to be no discrimination on the basis of sex. The Jury List Act, however, provided in s 2 that jurors must be male. In *Jaulim* v *DPP* 1976 MR 96, s 2 was held to be non-discriminatory. That provision was, however, repealed by the Jury (Amendment) Act 1990.

30 See above n 9 and also see, eg, *Suinkawala* v *R* 1980-1981 SILR 135 (what does "mi losim tingting" mean to a non-local?).

31 International Covenant on Civil and Political Rights, art 8.

32 International Convenant on Civil and Political Rights, art 18.

33 For example, art 5:

State Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; ...

implicit in the draft Charter, but in the Pacific environment and given the summary nature of some punishments in the customary systems this should, if intended, be spelled out.

More critical is the right of every individual to be informed of the right to obtain legal assistance, to communicate with a lawyer, to receive legal assistance without cost in certain circumstances, to examine witnesses against the person[34] and to appeal to a higher tribunal.[35] The report of Dr GP Barton[36] prepared for the Commonwealth Secretariat in 1980 graphically demonstrated the impossibility then of meeting such requirements in many Pacific legal environments. Overall there would still be a substantial shortage of lawyers if legal assistance were to be readily available to every person subject of a criminal charge. Further, the funding needed to provide legal assistance without cost whenever appropriate would be beyond the means of many states. This human rights provision is reflected in most of the Pacific constitutions and substantial efforts are made to honour it, but even with a large number of expatriate lawyers on contract or doing voluntary service the resource needs can still not be met.

There is a shift from the International Covenant on Civil and Political Rights in article 7A of the draft Pacific Charter, in that the draft Charter presumes the adversarial process and the confrontation of witnesses, accused and prosecutor. As the International Covenant recognises,[37] the inquisitorial system is an equally valid one. It is the norm in more countries of the world than is the adversarial. Equally a number of Pacific customary systems operate on the basis of an inquisitorial system and, even in Common Law states, people are more at ease in a system where the judge controls the process because that is the way the village elders, council, or chief, has traditionally dealt with such matters.

The draft Pacific Charter states that punishment is personal and can be imposed only on the offender.[38] Perhaps no Pacific community would object violently to that broad principle at the level of detail. However, it has to be acknowledged that a number of customary systems do, perhaps by the very nature of the communal system, allow individual responsibility for an action to flow over to the individual's family in certain cases. This is quite clearly the case in respect of the responsibility of parents for the action of their children. It is also the case with reprimand - a very effective form of punishment and social control in some of the Pacific communities. A reprimand may be personal and private but it may also be public and reflect resoundingly on one's family and friends. What is the Pacific reaction to this in the human rights context?

---

34 International Covenant on Civil and Political Rights, art 14(3).
35 International Covenant on Civil and Political Rights, art 14(5).
36 *Legal Resource Needs in Small States: Report on some Pacific Jurisdictions* (Commonwealth Secretariat, London 1980).
37 Article 14(3)(e).
38 Article 7A (3).

And what of corporal punishment? The Solomon Islands case of *R* v *Rose*[39] concerned corporal punishment which was meted out during a school assembly. This was held to be degrading and in breach of section 7 of the Constitution of the Solomon Islands. Attitudes in New Zealand have evolved recently to the point of complete intolerance of corporal punishment, not only in the context of education,[40] but also in a restrictive attitude to the rights of parents to discipline their children[41] by corporal punishment. This, it is known, is in direct contrast to the established customary patterns and customary rights of parents in a number of Pacific communities.

V CONCLUSION

The Pacific nations have a commitment to human rights ideals and have an important role to play in the development of those rights in the international community of nations. The people of the Pacific are also concerned with the practical achievement of goals and not simply with the setting of ideals. For this reason a cautious appraisal of current international human rights thinking is only to be expected. One concern about human rights felt in the region is the role of custom and notions of community and the viability of the group.

In the drafting of the Pacific Charter of Human Rights LAWASIA expressly addressed this concern. Indications of that felt concem had earlier been seen in the African Charter of Human Rights. Now there are indications that the international community is responding to them. In the Universal Declaration of Human Rights at the end of a relatively short and clear document the rights of the individual were clearly put in the context of the rights of others. That position has in principle not changed but is found internationally, in much longer and elaborate documents, typically in the same place - at the end.

The draft Pacific Charter moves beyond the African Charter in seeking to address the customary concern. The Pacific Charter is still, however, in the traditional Northern hemisphere mould. The new perspective and new focus that is needed and spoken of in the commentary on the draft Pacific Charter is coincident broadly with customary expectations of the Pacific and is finding a new point of focus in the draft Declaration on the Rights of Indigenous Peoples. As Professor Powles points out in his paper "Duties of Individuals: Some Implications for the Pacific of Including 'Duties' in 'Human Rights' Documents" (this volume) there are Pacific precedents for this new focus and he refers particularly to the constitutions of Papua New Guinea, Vanuatu, Tuvalu. While this shift of focus may be dramatic and new, it is, as the draft Declaration on the Rights of Indigenous Peoples states, only that. All of its principles in the draft Declaration are part of the continued development of human rights thinking and consistent with existing human rights instruments.

---

39 [1987] SPLR 305.

40 Education Act 1989, s 139A.

41 *Erick* v *Police* Unreported, 7 March 1985, High Court, Auckland Registry M 1734/84.

What Pacific nations have now in the context of the present international activity is the opportunity to view human rights from the new and balanced perspective of the Pacific cultures. To be acceptable, viable and vital domestic human rights thinking must take account of customary perspectives. International initiatives which point out the way to bridge the gap between customary cultural expectations and international human rights norms must be encouraged. The way forward, therefore, is to use the new perspective provided by the draft Universal Declaration on Rights of Indigenous Peoples as the base and for Pacific peoples to make a regional contribution to human rights thinking by building on their cultural heritage rather than on the precedents of other regions.

This is the way forward. For it to be fruitful, discussion at the domestic, regional, and at the international level is needed. It is remarkable that the recorded input of the nations of the Pacific to the work of the Working Group on Indigenous Peoples has been very small. Here again there are resource implications and this therefore perhaps provides a role for bodies outside the region - for foreign states, international agencies and government or non-governmental bodies - to provide information and assistance as requested so that Pacific nations can participate as they would wish in the development of human rights at the international level.

The region has recently developed environmental agencies and it has, at this meeting, seen the launching of a series of law reports for the region. These and similar initiatives will all impact on human rights and the quality of life for the people in the region. Participation in human rights at the international level will best assure the future of customary values both internationally and at the domestic level.

The law can belong to the people. It is for the peoples of the Pacific to stake their claim to it in the emerging international norms.