

# Integration of Traditional and Modern Law<sup>1</sup>

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As emerging Pacific nations enter the world order as independent sovereigns, they turn increasingly to the Anglo-American concept of the role of law to maintain social order, resolve disputes, and distribute resources. There is, however, a danger that western law will undermine traditional practices and culture, as occurred in Hawaii. A genuine attempt was made during westernization of the Hawaiian Islands in the mid-19th century to recognize and preserve important cultural prerogatives and customary privileges associated with the native way of life. These attempts failed.

After the division of the King's lands in the 1850s, less than 1 percent of land remained in the hands of commoners. Many did not understand the foreign concept of private ownership, or were never aware of the law giving them the right to own land that they had cultivated. Even those who did exercise their rights, through claims and exercise of resource access, found that the rapid evolution of the islands' social and economic structure left lifestyles associated with the land almost without viability.

The ground rules for the interpretation of claims of native rights were established the first time the newly formulated western-style courts of Hawaii were confronted with the issue. In 1959, when a tenant claimed the traditional right to pasturage on the undeveloped lands of the landlord, the claim of custom was rejected as unreasonable, uncertain, and repugnant to the spirit of the present laws (*Oni v. Meek*, 2 Hawaii 87, 90 (1898)). It was made clear that in the absence of explicit instructions to the contrary, the system of private ownership would be treated as preeminent. Traditional prerogatives simply ceased to exist except to the degree they were explicitly preserved, and rights became applicable only when they did not effectively interfere with western concepts of law and property.

Today, despite recent efforts to give new vitality to native rights and custom, the law of Hawaii is virtually devoid of meaningful retention of native Hawaiian culture, and Hawaii's native people occupy nearly the lowest rung of the socioeconomic ladder. Their rights and privileges have not been

permitted to evolve in relation to contemporary privileges in a way that ensured their continued vitality, nor was the genuine value of these rights ever demonstrated or insisted upon. No comprehensive scheme emerged to satisfy a long-term vision of how the culture was to evolve.

Custom is a valued asset of U.S.-affiliated island communities. Anglo-American law can, but need not, follow the Hawaiian example and be destructive of that asset. Movement toward self-government in Micronesia presents an opportunity to merge the best of traditional practices with the democratic system of law.

## Advantages From Adoption of the Rule of Law

The traditional practices of a community (i.e., custom) are often so engrained in belief and behavior, and so well-known to the populace that they require no legislative decree, no police, no judge, and no law library to exist and to shape social life. This raises the question of why anyone would want to import western law to displace or supplement an existing regime of customary law. Historically there are several reasons why human beings move to law.

For emerging nations, the primary impetus for adoption of western legal systems is to establish sovereignty and achieve legitimacy in the West-dominated world order. The emerging Micronesia nations have adopted wholesale various comprehensive American codes, such as the Federal Rules of Evidence and the Federal Rules of Civil Procedure. The appropriateness of these codes for use in Micronesia may not be as important as their legitimizing function. A nation with American rules of procedure "looks" more like a democracy whose sovereignty deserves respect. The use of codification and adoption of western law to achieve sovereignty is familiar to Pacific legal historians.

Law also serves to promote economic development. The rise of legalism throughout history is correlated with economic growth, industrialization, and the emergence of a class-differentiated society. U.S. legal historians, for example, study the use of legal doctrine and legal systems to promote railroads and other large industries. While critics charge that

<sup>1</sup>This section is summarized from W. Chang, "The Integration of Customary and Traditional Renewable Resource Practices in a Modern Legal Framework," OTA commissioned paper, 1986.

the rule of law can be a tool to increase production while concentrating wealth in a few hands, the instrumental value of law as a promoter is obvious to government leaders, particularly where economic self-sufficiency is seen as a key to political autonomy.

The rule of law provides a stable, predictable environment for economic growth. The adoption of the uniform commercial code in Guam, for example, assures business investors that familiar rules apply to transactions there. Law can actively promote certain business activities by subsidy, tax advantages, and limited grants of privilege. If a Pacific island decides, for example, to promote development of ocean thermal energy conversion (OTEC), it can offer these advantages to OTEC developers.

A corollary to the power to promote is the power to deter through the power of criminal law to punish, or regulatory law to prohibit and of eminent domain to take. Obvious uses of coercive legal rules in the realm of natural resource use include zoning laws, endangered species laws, pollution control laws, and building code laws. All are used by governments to shape development.

### Advantages of Rule of Custom

As the Hawaiian example reveals, however, law has a tremendous power to dislocate and eventually destroy culture. This is particularly true when western systems of law are imported into a community in which citizens are unfamiliar with legal rules and unaware of the need to assert their rights. Given this danger, it is important to recall the reasons for preserving custom. Custom is typically the ordering mechanism used in communal cultures such as those found in the islands of the Pacific. Custom has maintained order, provided for the general welfare, created unity, and preserved a way of life. Custom also is the ordering mode of choice: citizens are proud of their culture and traditions and express genuine sorrow at the passing of custom and dismay at the incursions of westernization. A sudden displacement of custom by law is likely to cause anxiety, cultural dislocation, and disorder.

Customary rules of resource management often have an ecological basis. Fishing taboos help preserve fish populations, use restrictions preserve delicate reef systems, and clan rights allocate scarce water resources. These restraints are accepted and observed while restraints by law are often ignored. As one islander commented on an endangered species law: "How does some man in Washington know how many turtles there are in Yap?"

### Integration of **Custom** and the Rule of Law

Pacific island lawmakers have been careful to state explicitly their intent to preserve custom within the context of the rule of law (e.g., see Constitution of the Federated States of Micronesia). This will require explicit recognition of the value and fragility of custom, coupled with a formalized system for incorporation of custom into a new system of law appropriate for use in societies rich with custom.

Explicit recognition in constitutions, statutes, and case law of the value and primacy of custom can result in the preservation of custom and traditional values. Custom can be recognized and acknowledged whenever a new law is adopted, providing a legislative reminder to courts interpreting statutes. Given the constitutional and legislative mandate for preservation of custom, the role of the courts would be to develop rules of interpretation that follow the mandate. Judges would look first at the system of customary rules and derive underlying values and principles of custom, then use those principles to create legal rules within the system of the rule of law,

For example, there may be a rule on one island that strangers approaching a village at night must carry a lighted torch. The underlying principles represented here is that strangers must respect the peace of the village and make their presence known. The judge may have to decide whether a flashlight can be used in lieu of a torch; whether an unfamiliar light is potentially disruptive of community peace; or whether the light from the flashlight was conformable with the underlying principle of the customary rule. The point here is that the judge, using his knowledge of the village and taking testimony from traditional leaders and community members, strives to find and preserve the essence of custom.

The reason for this process of the distillation of the underlying principles behind customary rules is that, while custom is fluid and adaptable to changing circumstances, certain underlying values remain unchanged. Values such as respect for traditional leaders, consensus-based dispute resolution, and significance of clan membership have survived the impact of colonialism and modernization, and form a significant part of the identity of island peoples.

To the western-trained lawyer, such a judicial system seems to invite imprecision into a system of law that values precision. The western insistence on precision, however, tends to denigrate custom which, by definition, is unrecorded, internalized, and integrated with culture. If precision is valued,

the written statute or case will always defeat custom. If preservation of custom is the goal, judges must reach beyond the demand for precision, and experience the cultural milieu of custom.

The search for analogies between island customs and Anglo-American experience may prove fruitless. As one judge noted in a Marshallese property dispute:

... there is no analogy between the common American idea of an absolute owner and the Marshallese idea of the holder of any one of the levels of rights in the Marshalls.

The concept of property and natural resource ownership is dramatically different in emerging Pacific nations. Ownership is frequently communal, and characterized by layers of use rights rather than fee-simple ownership. Access to reefs, landing areas, surface waters, and fishing grounds may each follow different sets of customary rules,

Judges must recognize that in island communities where access to resources is a part of the liveli-

hood of the people, complex systems of ownership and use have evolved that are very different from western concepts of ownership. In resolving disputes over resource use, access, and ownership, the courts may wish to delay intervention until traditional leaders are consulted and customary methods of dispute resolution are exhausted. In western law, this idea is incorporated in the doctrines of abstention and exhaustion. Encouraging citizens to rush to court with disputes will be destructive of consensus-based systems that have effectively maintained peace and allocated resources in the past.

Appellate courts could defer to findings of custom made by trial judges who are familiar with a community and not lightly overturn a local judge's finding of custom unless it is clearly erroneous. If courts use custom as a guiding principle, they may be able to avoid the destruction of traditional values.