

'A DISFUNCTIONAL SPOUSE': THE RELEVANCE OF THE PUBLIC OR PRIVATE DICHOTOMY FOR INDIGENOUS CUSTOMARY LAWS IN SOLOMON ISLANDS AND VANUATU

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In Western legal systems a conceptual distinction is made between public and private law. However, the value of this distinction and the boundaries between the two spheres are contested. Paul Verkuil has commented that '[i]f the law is a jealous mistress, the public-private distinction is like a dysfunctional spouse ... It has been around forever, but it continues to fail as an organizing principle.' In the context of the plural legal systems of the small island nations of the South Pacific, the value of the distinction is largely unexplored. In these countries, the force of indigenous customary laws and traditional institutions is reflected in the constitutional and statutory recognition given to them in both public and private spheres. Regardless of state recognition, at the village level, such laws are accepted by members of the community as binding, without any distinction being drawn between public and private laws. This article commences with a brief discussion of the public/private dichotomy and a framework for distinguishing between the two is outlined. This is followed by an introduction to customary laws and traditions and their place in the legal systems of two independent Melanesian countries: Solomon Islands and Vanuatu. The article then discusses the practical implications of the distinction between private and public laws for South Pacific legal systems before moving on to consider how indigenous customary laws should be classified. The article explores whether the public versus private dichotomy is relevant and meaningful in the context of indigenous customary laws operating either as part of the state legal system or at the local community level.

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Les systèmes juridiques occidentaux opèrent une distinction conceptuelle fondamentale entre ce qui relève du domaine du droit privé d'une part et du droit public d'autre part. Si la portée du dogme de cette 'summa divisio' est aujourd'hui de plus en plus fréquemment remise en cause tant par la doctrine que les juges dans les pays de tradition civiliste, l'auteur explique en illustrant sa démonstration par des exemples tirés des régimes juridiques des Salomon et du Vanuatu, que s'agissant des petits États insulaires du Pacifique où le pluralisme juridique est la règle, la valeur de cette distinction reste encore largement méconnue et ce en raison du rôle important que joue la coutume.

I INTRODUCTION

This article commences with a brief discussion of the public/private dichotomy. The extensive literature on the distinction between private and public law is not traversed, but a framework for distinguishing between the two is drawn from Barnett¹ and Wienrib.² This is followed by an introduction to customary laws and traditions and their place in the legal systems of two independent Melanesian countries: Solomon Islands and Vanuatu. The article then discusses the practical implications of the distinction between private and public laws for South Pacific legal systems before moving on to consider how indigenous customary laws should be classified. The article then explores whether the public versus private dichotomy is relevant and meaningful in the context of indigenous customary laws operating either as part of the state legal system or at the local community level. The general debate on the value of the public/private distinction as it relates to common or civil law is not discussed, only the question of whether this categorisation is relevant or useful in the context of customary laws is examined.

II THE PUBLIC v PRIVATE DICHOTOMY

The distinction between public law and private law is a controversial one. The line between the two spheres is often blurred, giving rise to a wealth of literature on where the dividing line is and ought to be drawn.

One of the many explanations of the distinction between public and private sees public law as the law pertaining to state government, and thus as including constitutional law, administrative law and criminal law. Private law, on the other hand, is seen as regulating relations between individuals and is thus manifested as the law of contracts, torts and property. Weinrib states that '[t]he most striking

1 Randy Barnett, 'Four Senses of the Public Law - Private Law Distinction' (1986) 9 Harvard Journal of Law and Public Policy 267.

2 Ernest Weinrib, *The Idea of Private Law* (2nd ed, Oxford University Press, 2012) 1.

feature of private law is that it directly connects two particular parties through the phenomenon of liability'. He goes on to say:

On the institutional side, private law involves an action by plaintiff ... against defendant, a process of adjudication, a culmination of that process in a judgment that retroactively affirms the rights and duties of the parties, and an entitlement to specific relief or to damages for the violation of those rights or the breach of those duties. On the conceptual side, private law embodies a regime of correlative rights and duties that highlights, among other things, the centrality of the causation of harm and of the distinction between misfeasance and nonfeasance.

Barnett draws distinctions between public and private law in the context of four different, although overlapping, aspects of legal regulation:

- (1) Public versus private standards of legal regulation.³ In this context, the distinction stems from whether a public or private harm is being regulated.
- (2) Public versus private complainants.⁴ In this context, the distinction arises from the fact that public law causes of action are usually instituted by governmental authorities, as opposed to private law actions which are brought by private individuals.
- (3) Public versus private subjects of legal regulation.⁵ In this context, the distinction is between, on the one hand, public laws which regulate the internal workings of government or the relationship between government and, on the other, citizens and private laws which define rights and duties between private individuals and groups.
- (4) Public versus private law enforcement.⁶ In this context, the distinction concerns monopolistic formulation of the rules and adjudication of disputes (public law enforcement) as opposed to nonmonopolistic, competitive institutions (private law enforcement).

The distinctions drawn by Barnett cannot necessarily be weighed equally, but together with the features highlighted by Weinrib they do provide useful criteria for categorising law as either public or private. These criteria are drawn upon later in

3 Above n 1, 268.

4 Above n 1, 268-269.

5 Above n 1, 269.

6 Above n 1, 269-270.

this article to assess whether indigenous customary laws can be categorised as either public or private laws.

III RECOGNITION OF CUSTOMARY LAWS AND TRADITIONS

A Customary Laws and Traditional Authority

The South Pacific is a region with a rich cultural heritage.⁷ Societies are arranged on tribal lines, based within a village or group of villages, and more broadly affiliated within an island.⁸ Allegiance to tradition and local community is still strong.⁹ Indigenous customary laws are founded in local culture and play a prominent part in Pacific small island legal systems, although the extent to which they are truly traditional is often contested.¹⁰ These laws do not distinguish between civil and criminal law in the Western sense. They are generally more holistic in nature than the written laws of the state, responding to conflicts or misconduct with solutions which are most suitable for the community as a whole rather than to individual needs. Whilst there are some examples of written pronouncements,¹¹ customary laws are largely unwritten; in fact, they are sometimes referred to as unwritten law.¹² The dangers of codifying customary laws are well known: it changes their entire juridical nature and, in effect, converts them to state law.¹³ A compromise between codifying customary laws and retaining them in unwritten form is the provision of principles or guidelines. In Vanuatu, the best known example of principles of customary laws being reduced to writing is

7 There are about 65 different languages in Solomon Islands and 100 in Vanuatu. Whilst only 0.1 per cent of the world's population lives in the Pacific region, it contains one-third of the world's languages: Pacific Island Populations, Report prepared by the South Pacific Commission for the International Conference on Population and Development, 5-13 September 1994, Cairo.

8 Solomon Islands land area of 30,000 sq km is divided between twenty-six islands and hundreds of small islets.

9 A recent survey found that 62% of the indigenous population considered that that traditional justice should be strengthened: ANUedge and the University of the South Pacific, 2013 SIG RAMSI People's Survey Report (26 June 2013) Regional Assistance Mission to Solomon Islands, 129 <www.ramsi.org/wp-content/uploads/2014/07/FINAL-Peoples-Survey-2013-1-final-111900c1-79e2-4f41-9801-7f29f6cd2a66-0.pdf>.

10 See the revisionist scholarship discussed by Peter Fitzpatrick in 'Traditionalism and Traditional Law' (1984) 28(1 and 2) *Journal of African Law* 20.

11 See, eg Chief Waitotora, *Are-Are Customary Law* 1981.

12 Jean Porter, 'Custom, Ordinance and Natural Right in Gratian's Decretum' in Amanda Perreau-Saussine, James Murphy (ed) *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, 2007) 96.

13 See, eg Obied Hag Ali, 'The Conversion of Customary Law to Written Law' in Alison Dundes Renteln and Alan Dundes (eds) *Folk Law* (University of Wisconsin Press: USA) 351.

the 'Custom Policy of the *Malvatumauri*'.¹⁴ These principles cover both public concerns, such as land management,¹⁵ and private matters, such as marriage and childbirth.¹⁶ In Solomon Islands, there is no statement of country-wide principles, but there are some examples of local guidelines, such as 'The Tradition of Land in Kwara'ae',¹⁷ which sets out principles relating to customary land in one area of Solomon Islands.

In addition to pronouncing laws, chiefs or elders may deal with customary disputes. Indeed, in some cases, it is required that the parties attempt to resolve customary disputes in this manner before accessing the state system of dispute resolution.¹⁸ The chiefs' decisions are not normally viewed as binding on the parties in terms of state law, and they cannot be enforced in state courts unless recorded in accordance with state procedures.¹⁹ In both Solomon Islands and Vanuatu traditional authorities apply their own penalties for misconduct in accordance with customary laws. Banishment is one example of this.²⁰ Another is payback.²¹ Customary penalties have the force of customary law and are binding on members of the community by virtue of their loyalty and commitment to the traditional system.

B State Recognition of Customary Laws

Both Solomon Islands and Vanuatu give specific constitutional recognition to customary laws as a general source of state law.²² Customary laws do not apply if

14 National Council of Chiefs of Vanuatu, reproduced in Lamont Lindstrom and Geoffrey White, (eds), *Culture, Kastom, Tradition* (IPS, USP, Suva, 1994).

15 Article 1.

16 Articless 8 and 23.

17 Ben Burt and Michael Kwaiioloa, 1992 Institute of Pacific Studies: USP.

18 See, eg Local Courts Act Cap 19 s 12.

19 See, eg Local Courts Act Cap 19, s 14.

20 See, eg *Pusi v Leni* (Unreported, High Court, Solomon Islands, Muria CJ, 14 February 1997), accessible via <www.paclii.org> at 1997 SBHC 100. This case is discussed in Jennifer Corrin, 'Breaking the Mould: Constitutional Review in Solomon Islands' (2007) 13 *Revue Juridique Polynesienne* 143, 151. See also Jennifer Corrin Care, 'Customary Law and Human Rights in Solomon Islands' (1999) 43 *Journal of Legal Pluralism and Unofficial Law* 135. *Public Prosecutor v Kota* [1989-94] VanLR 661.

21 See, eg *R v Loumia* [1984] SILR 51.

22 Constitution of Solomon Islands s 75, sch 3, para 3(2); Constitution of Vanuatu arts 95(3) and 47(1). See further, Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law*, 2011, Palgrave Macmillan, 49.

they are contrary to the Constitution or an Act of parliament,²³ although, in Solomon Islands, laws for the application of customary laws are shielded from the anti-discrimination provision in the Constitution.²⁴ Both countries also give specific constitutional and statutory recognition to customary land laws.²⁵ Some recognition is also given to traditional leaders. In Solomon Islands, the Constitution puts a duty on Parliament to 'consider the role of traditional chiefs in the provinces'.²⁶ Unfortunately, the only attempt to give legislative force to this provision was unsuccessful.²⁷ In Vanuatu, the Constitution makes specific provision for the establishment of a *Malvatumauri* Council of Chiefs,²⁸ which is composed of custom chiefs elected by their peers sitting in District Councils of Chiefs. The *Malvatumauri* may be consulted by Parliament on any question, particularly any question relating to tradition and custom and must be consulted in relation to any change to customary land law.²⁹

Customary laws and traditional leaders are also recognised in relation to dispute resolution. Solomon Islands and Vanuatu have both created 'customary' courts with jurisdiction to deal with minor matters in accordance with customary laws.³⁰ The legislation establishing customary courts does not distinguish between public and private law. However, it sets jurisdictional limits in reliance on a distinction between civil and criminal, which, as noted above, is not recognised in customary systems. Since 1985, the local courts in Solomon Islands have been prohibited from dealing with a land dispute until the parties have attempted to have it resolved by the chiefs.³¹ More recently, in Vanuatu, jurisdiction in land disputes has been returned to traditional institutions.³²

23 Constitution of Solomon Islands ss 1, 75, sch 3, para 3(2) Constitution of Vanuatu art 2.

24 Constitution of Solomon Islands s 15(5)(d).

25 Land and Titles Act Cap 113 (SI) ss 239 to 241; Constitution of Vanuatu arts 73 to 75.

26 Constitution of Solomon Islands s 114.

27 See further, Kenneth Brown and Jennifer Corrin Care, 'More on Democratic Fundamentals in Solomon Islands: *Minister for Provincial Government v Guadalcanal Provincial Assembly*' (2001) 32 Victoria University of Wellington Law Review 653, 670.

28 Constitution of Vanuatu, chap 5.

29 Constitution of Vanuatu art 30(2) as amended by Constitution (Sixth) (Amendment) Act 2013 s 11.

30 Local Courts Act Cap 19 (SI); Island Courts Act Cap 167 (Vanuatu).

31 Local Courts Act s 12, as amended by the Local Courts (Amendment) Act 1985.

32 Customary Land Management Act 2013.

IV PRACTICAL IMPLICATIONS OF THE DISTINCTION

The public/private dichotomy is often of more than academic significance. There are many instances when it will have practical consequences. For legal practitioners, it may be of significance in deciding where to commence proceedings. In the sphere of customary laws it may also be relevant in this way with, for example, the state maintaining its stance that serious criminal cases must be tried in state courts due to the public interest involved.³³ It may also be of relevance in less obvious ways. Two instances where the distinction may be of significance in the present context will now be discussed.

A Rule of Law Issues

One key area of practical significance is in relation to the rule of law. Amongst other things, this requires that laws be 'publicly promulgated, equally enforced and independently adjudicated' and 'consistent with international human rights norms and standards.'³⁴ Whilst these principles apply both in the public sector and to civil society, the emphasis is on the former. Thus, the UN web site states that:³⁵

The United Nations works to support a rule of law framework at the national level: a Constitution or its equivalent, as the highest law of the land; clear and consistent legal framework, and implementation thereof; strong institutions of justice, governance, security and human rights that are well structured, financed, trained and equipped; transitional justice processes and mechanisms; and a public and civil society that contributes to strengthening the rule of law and holding public officials and institutions accountable. These are the norms, policies, institutions and processes that form the core of a society in which individuals feel safe and secure, where disputes are settled peacefully and effective redress is available for harm suffered, and where all who violate the law, including the State itself, are held to account.

Consequently, if customary laws are classified as public, the fact that they are unwritten and lack firm boundaries may, when viewed from a Western perspective, be seen as contravening the rule of law. Further issues will arise from the fact that,

33 Constitution of Solomon Islands s 5.

34 *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* S/2004/616 <www.un.org/en/ruleoflaw/> accessed 12 November 2014.

35 United Nations, *United Nations and the Rule of Law* <www.un.org/en/ruleoflaw/> accessed 12 November 2014.

as demonstrated by *Loumia v DPP*,³⁶ discussed below, the norms of customary laws are often diametrically opposed to human rights norms.

B Horizontal v Vertical Application

There is a second, more specific aspect of human rights where the distinction between the public and private spheres has an important practical consequence. The distinction is relevant to a consideration of the enforceability of human rights. There are two directly opposing views on this. The first embraces what has become known as the 'vertical' approach, whereby constitutionally guaranteed rights apply only to protect the individual against violation of those rights by the state or by public bodies or officers acting under state authority.³⁷ The second is known as the 'horizontal' approach, whereby human rights provisions may be enforced against individuals.³⁸ The distinction between the public and private sphere, made in the state system, has been used as an argument against horizontal application of rights.³⁹ This argument does not sit well in plural systems due to the fact that the state may not be the most prevalent source of rights abuses. As will now be discussed, there is no constitutional guidance on the appropriate approach and the case law on point is inconsistent.

1 Solomon Islands

There are no textual indicators in the Solomon Islands Constitution indicating whether human rights should be enforceable horizontally as well as vertically. The latest draft federal constitution does not address this matter either. Section 18, which governs enforcement of protective provisions, says only that any person whose rights have been or are likely to be contravened may apply to the High Court for redress and that the Court has power to make orders 'as it considers appropriate' to secure the enforcement of those rights.

The courts in Solomon Islands have given express consideration to the question of horizontal application. *Loumia v DPP*⁴⁰ is one of the few regional cases where counsel presented argument on the application of rights provisions. In that case, the

36 [1985/6] SILR 158.

37 William P Marshall, 'Diluting Constitutional Rights: Rethinking "Rethinking State Action"' 80(3) *Northwestern University Law Review* 558.

38 Erwin Chemerinsky, 'Rethinking State Action' 80(3) *Northwestern University Law Review* 503; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *Public Law* 423.

39 See further, Colm O'Connell, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' (2003) 4 *Hibernian Law Journal* 77; 79-80.

40 [1985/6] SILR 158, 169.

defendant, from the remote *Kwaio* region, admitted killing members of a rival customary group, but argued that he was only guilty of manslaughter, on the basis of provocation. At the time of the killing, the defendant had just seen one brother killed and the other wounded in the same fight. It was argued that the defendant had been provoked and that he came within s 204 of the Penal Code,⁴¹ which reduced murder to manslaughter if, inter alia, the offender 'acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or do the act which he did'. Evidence was adduced from a local chief that *Kwaio* custom dictated the killing of a person who was responsible for the death of a close relative. As customary laws were constitutionally recognised as part of the law of Solomon Islands, it was argued that s 204 included a 'legal duty' in custom. More pertinently to the current discussion, counsel for the appellant argued that s 4 of the Constitution, which protects the right to life, and most of the other fundamental rights provisions did not apply to relationships between individuals but only between the state and private persons.

The Court of Appeal upheld the defendant's conviction for murder. Whilst agreeing on the outcome, Connolly and Kapi JJA expressed different views on the applicability of the Bill of Rights Chapter. Connolly JA, with whom Wood CJ agreed, conceded that most of the rights guaranteed in Chapter II were principally concerned with the relationship between the citizen and the state. However, His Lordship held that, 'if the *Kwaio* customary duty to kill were part of the law of Solomon Islands [which, for other reasons, he did not think it was] it would be public law and therefore inconsistent with s.4 of the Constitution'. In other words, His Lordship took the stance that all law endorsed by the state is public law and is, therefore, subject to the rights Chapter and to the extent of any inconsistency with such rights it would be invalid.

In a separate judgment, Kapi JA took a different approach. His Lordship considered that the Solomon Islands Constitution created independent rights and freedoms and the extent of their application should be taken from the fundamental rights provisions themselves. His Lordship stated that even though most of those provisions were principally concerned with relations between citizen and the state, there was nothing to confine the protection against deprivation of life to protection against the state only. His Lordship examined the words of s 4 itself and, referring to the words of Lord Wilberforce in *Ministry of Home Affairs v Fisher*,⁴² stated that

41 Cap 26.

42 [1979] All ER 21.

the words, 'No person shall be deprived of his life intentionally' in s 4, 'must be given a wide and generous application'. He pointed out that s 4 (2) (a) allowed a private person to kill another in defence of another person or property, which inferred that s 4 (1) prohibited deprivation of life by a private person.

Kapi JA considered that examination of the other provisions of Chapter II also supported a horizontal application of fundamental rights. He pointed out that s 15(3) of the Constitution, which deals with protection from discrimination, prohibits certain types of treatment as between private persons and private bodies. His Lordship concluded that, 'The essence of fundamental rights provisions in Solomon Islands is that they apply to all persons' and that they are limited only by their terms and the qualifications set out in respect of each provision.

More recently, the Court of Appeal discussed the application of the rights provisions in *Ulufa'alu v Attorney-General*.⁴³ This case arose from the coup which took place in Solomon Islands in 2000, during the course of which the appellant, who was then Prime Minister, was forced to resign. The appellant claimed that a number of his constitutional rights, including the right to personal liberty⁴⁴ and protection of freedom of movement,⁴⁵ had been contravened. On appeal, the Court of Appeal gave detailed consideration to the question of whether these rights were enforceable horizontally, although its comments are obiter, as the case was decided on other grounds. The Court accepted the view of the majority in *Loumia* as applicable, thus, extending the ratio of that case from the right to life to the more extensive menu of rights relied on this case. However, in the *Ulufa'alu Case* the Court noted that 'how far citizens can rely on fundamental rights inter se' 'is a developing area'. Accordingly, the Court was anxious not to be taken as laying down a general inflexible rule that fundamental rights were only applicable vertically. The Court considered that the right relied on and the surrounding context would have to be examined in each case, stating that 'It is necessary to consider the precise rights sought to be relied on and the context in which they are relied on. This Court does not think that it can be said as an absolute principle 'always horizontal' or 'never horizontal'.

2 Vanuatu

In Vanuatu, the only textual guidance is in s 6, which governs enforcement of rights and freedoms. This states only that any person whose rights have been or are

43 [2005] 1 LRC 698.

44 Section 5.

45 Section 14.

likely to be infringed may apply to the Supreme Court for enforcement and that the Court has power to make orders 'as it considers appropriate to enforce the right'.⁴⁶ Although the courts had not expressly discussed the issue, until recently they appeared willing to apply human rights provisions horizontally. For example, in *Nagol Jump v Council of Chiefs of Santo*⁴⁷ the petitioners claimed that their right to freedom of expression, freedom of association, freedom of movement, and equal treatment⁴⁸ had been infringed when the council of chiefs determined that they were not allowed to perform the nagol jump (a custom land diving ceremony) away from its traditional island setting. Although the Court concluded that their rights had not been breached it took no issue with the fact that there was no state party in the case.⁴⁹

However, in *Family Kalotano v Duruaki Council of Chiefs*,⁵⁰ which is the only case in Vanuatu which appears to address the matter directly, the Supreme Court reversed its position on the issue of horizontal application. The Kalotano family alleged that, in dealing with a dispute concerning the title of custom chief, the Council of Chiefs and a number of individual chiefs had breached the family's rights under art 5(1) (d) (the right to protection of the law), (g) (the right to freedom of expression) and (k)(the right to equal treatment), of the Constitution. Lunabek CJ struck out the petition, stating as his 'substantive reason' which 'on its own could dispose of the entire case' that 'the allegations of constitutional rights breach are levelled against individual persons. There is no legal remedy available to the Petitioner by way of constitutional petition such as in the present case'. The decision does not contain any further reference to this point and there is no indication that the parties had the opportunity to submit argument on the point.

V CLASSIFICATION OF CUSTOMARY LAWS AS PUBLIC OR PRIVATE

In debates about the public versus private dichotomy, 'government', 'public authority' and 'public institutions' have generally been taken to refer to state authorities established under the framework provided by the constitution or

46 Section 6(2).

47 [1989-1994] 2 VanLR 545.

48 See art 5(1)(g), (h), (i), and (k) respectively.

49 See also *Public Prosecutor v Kota* [1989-94] VanLR 661.

50 (Unreported, Supreme Court, Vanuatu, Lunabek CJ, 24 May 2002), accessible via <www.paclii.org> at [2002] VUSC 32.

constituent laws, rather than to traditional leaders. Adopting this approach, the outcome when applying Weinrib and Barnett's distinctions to customary laws may differ, depending on the level of recognition accorded to those laws. If customary laws are operating as part of state law, that is the state has admitted a customary law norm or portion of that norm into its own body of norms, its incorporation has arguably made it part of state law. In that case, responses to the criteria are likely to correspond to those given in respect of other state laws, and the laws can be categorised in the same way. For this reason, it is necessary to discuss the position where customary laws are recognised as part of the state system separately from where they are operating in their own environment.

A Customary Laws Operating In State Institutions

Where customary laws are normatively recognised and applied by courts or by other state institutions,⁵¹ they will behave more like state law than where they are operating independently. This is not only because the judiciary and legal practitioners tend to mould customary laws to correspond with the common law concepts with which they are more familiar,⁵² but also because, as noted by Kelsen, substantive and adjective law are inseparable.⁵³ The demands of common law procedure and rules of evidence undoubtedly influence the way in which customary laws are perceived and applied.⁵⁴

For this reason, it is perhaps easier to assess customary laws against Barnett's criteria in this context than where they are operating independently from the state. Where customary laws are being applied in the state system they might be categorised as private law under criteria 1, as standards of regulation are set by community leaders rather than laid down by a public institution. The harm is to customary village group or one of its members, rather than to the public at large. This argument could be countered by reference to the fact that the application of customary laws by the state is often conditional on meeting some standard imposed by the state such as being in accord with principles of humanity.⁵⁵ Under criteria 2,

51 For example, the Trade Disputes Panel.

52 Jean Zorn and Jennifer Corrin Care, 2002, "'Barava Tru": Judicial Approaches to the Pleading and Proof of Custom in the South Pacific', (2002) 51 (3) *International and Comparative Law Quarterly*, 611.

53 Hans Kelsen *General Theory of Law and State* (The Law Book Exchange Ltd, New Jersey, 2009) 129.

54 See further Jennifer Corrin, 'Accommodating Legal Pluralism in Pacific Courts: Problems of Proof' (2010) 15 (1) *International Journal of Evidence and Proof* 1.

55 See, eg Local Courts Act Cap 19 s 18, Warrant Establishing the Luru Local Court LN50/2008, cl 3(a); *Waiwo v Waiwo* (Unreported, Magistrates Court, Vanuatu Lunabek SM, 28 February 1996) available via <www.pacii.org> at [1996] VUMC 1; *Kalsakau v Luru* (Unreported, Magistrates

customary laws might normally come within the bounds of private law as complaints will be made by persons standing outside the public, state sphere. With regard to criteria 3, the subjects of legal regulation may be either private, for example neighbour disputes, or public, for example, use of foreshores by the state for public purposes.⁵⁶ Under criteria 4, customary laws may be seen as more likely to qualify as public, in that a public institution is being used to enforce the rights and duties in question. This criterion is arguably of less weight than Barnett's other criteria. There is obviously a distinction between laws, be they private or public, and the institutions through which they are enforced.⁵⁷ In any event, in some instances, the courts will force the dispute back into the traditional sector. For instance, Local Courts may refer disputes to the chiefs.⁵⁸ They may also record a decision of the chiefs,⁵⁹ which will then be enforceable as a decision of the Local Court.⁶⁰ Whether customary laws should be categorised as public or private in such cases is open to argument.

Reviewing this analysis against Weinrib's institutional perspective on the features of private law, the consequences of normative recognition are particularly evident. Customary laws will normally fall within the private category as they directly connect two particular parties through the phenomenon of liability. From the institutional side, it will normally involve a plaintiff or claimant as such persons are referred to in Solomon Islands,⁶¹ as only those with standing in the state system may usually institute a public action. This action will normally be against a defendant, although this may not always be the case, for example the action may be for a declaratory judgment on a question such as the consequences of particular customary laws. There will be a process of adjudication during which customary laws will be applied by the courts using common law procedures culminating in a judgment, which will retroactively affirm the rights and duties of the parties. That

Court (Land), Vanuatu, Lenalia SM, 13 March 1995) available via <www.paclii.org> at [1995] VUMC 8.

56 (Unreported, *Combined Fera Group v Attorney-General*, High Court, Solomon Islands, Palmer J, 9th November, 1997) available via <www.paclii.org> at [1997] SIHC 55.

57 Ernest Weinrib, 'Private Law and Public Right' (2011) 61 *University of Toronto Law Journal* 191, 195.

58 Local Courts Act Cap 19 s 13.

59 Local Courts Act Cap 19 s 14.

60 Local Courts Act Cap 19 s 14(3).

61 Solomon Islands Courts (Civil Procedure) Rules 2007 R3.1

judgment will entitle the claimant to a common law remedy for the violation of customary law.

When one looks at the conceptual side, as encapsulated by Weinrib, customary laws also seems to fall into the private law category. Customary laws as applied by state courts do embody a regime of correlative rights and duties. Further, as applied by the state, although as discussed below perhaps not in its traditional environment, the causation of harm and the distinction between misfeasance and nonfeasance may be central issues. However, it is arguable that the true nature of customary laws is obscured by the common law procedures within the confines of which they are applied by state courts.

In summary, distinguishing between public and private is a very difficult task. On balance, by reference to Barnett and Weinrib's indicators, it would appear that customary laws as applied in state courts, in most cases, are likely to fall within the realms of private law.

B Customary laws Operating in Traditional Institutions

Where the customary legal system has been institutionally recognised, such as in the case of the nakamals and custom area land tribunals in Vanuatu,⁶² or is operating under its own authority, it would appear at first sight to fall into the private category under the first two of Barnett's criteria. Standards of regulation are set by leaders for the community rather than laid down for the public at large, and complaints will normally be made by a member of the customary community rather than a public representative. However, complaints may also be made by or on behalf of the community as a whole, which may lend it a public flavour. Moreover, the parties are not restricted to those involved in the original dispute and others may be called before the traditional authorities and punished or rewarded, depending on the facts in question.

With regard to criteria 3, the subjects of legal regulation are often private, but the authority of traditional leaders extends to matters categorised by the state as public as well as private. For example, the subject matter of the dispute might relate to a community concern about a person who is not fulfilling his or her customary obligations to the village as a whole. Under criteria 4, as customary laws are being enforced by a private institution, this tends to suggest it is private law. Here the private label belies the essence of customary institutions, which, as discussed below, operate with open doors, opportunity for broad consultation, and unlimited as to parties.

62 Customary Land Tribunals Act 2001 (repealed by Customary Land Tribunal (Repeal) Act 2013 s 1).

Assessing customary laws applied in the traditional sector against the features of private law highlighted by Weinrib's institutional perspective, its status is equally unclear. While customary laws may at times directly connect two particular parties through the phenomenon of liability, this is certainly not its focus. While status may be relevant to customary proceedings in other ways, it would rarely form a barrier to complaint. The complaint may be in general terms and not directed at particular individuals. Although there may be a process of dispute resolution, this may not resemble common law adjudication and it may not culminate in a judgment. Even where the dispute would be viewed as private in the state context, the fact that the community acts collectively puts pressure on the boundaries of categorisation.⁶³ Neither will the process necessarily affirm the rights and duties of the parties or entitle the claimant to a specific remedy for the violation of customary law. The outcome is more likely to be a resolution which best accords with the interests of the community as a whole.⁶⁴ As noted by Weinrib, resolution of private law disputes is concerned with 'not the achievement of a collective goal, but a declaration of principles and standards that could be accepted by all as expressing their nature as free wills'.⁶⁵

From a conceptual perspective, customary laws operating outside the state system appear to be more of a public rather than private nature. Individual concerns give way to the communal and public and private interests become blurred. As stated above, the customary law regime does embody correlative rights and duties. Further, when operating on its own terms, the regime does not highlight the centrality of the causation of harm nor make any distinction between misfeasance and nonfeasance. Rather, it highlights the effect of the harm on the community and the status of the actors in the event.⁶⁶

63 This might be compared with the pressure placed on the distinction by class actions, see further, Jeff Berryman and Robyn Carroll, 'Cy-Pres as a Class Action Remedy – Justly Maligned or Just Misunderstood' in Kit Barker and Darryn Jensen (ed), *Private Law; Key Encounters with Public Law* (Cambridge University Press, 2013), 320.

64 See further, in the context of Fiji, Stephen Ratuva, 'Reinventing the cultural wheel: re-conceptualising restorative justice and peace building in ethnically divided Fiji' in Sinclair Dinnen, Anita Jowitt, Tess Newton (eds), *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, ANU, 2003) 149, 156.

65 Ernest Weinrib 'Law as a Kantian Idea of Reason' (1987) 87 *Columbia Law Review* 472, 497-8.

66 See, eg in the context of Fiji, Stephen Ratuva, 'Reinventing the cultural wheel: re-conceptualising restorative justice and peace building in ethnically divided Fiji' in Sinclair Dinnen, Anita Jowitt, Tess Newton (eds), *A Kind of Mending: Restorative Justice in the Pacific Islands* (Pandanus Books, ANU, 2003) 149.

C Hybrid Cases

Where customary laws are being applied in the so-called customary courts, the position may be even more blurred. In theory, these courts provide an alternative to the common law courts, but, as discussed earlier in this article, they are creatures of statute, and therefore public institutions. This could be said to lend a public element to the proceedings, which might be seen as adding the same flavour to the law being applied. However, this is perhaps overstating the case. As mentioned above, there is a distinction between laws and the institutions through which they are enforced.⁶⁷ Additional uncertainties arise where traditional dispute resolution forums are endorsed, rather than created, by state law, such as chiefs making decisions in customary land cases in Solomon Islands under the power confirmed by the Local Courts Act;⁶⁸ and nakamals and customary institutions exercising jurisdiction in customary land disputes under the Customary Land Management Act in Vanuatu.⁶⁹ In this context, there is not such a clear distinction between the customary rights and duties and the institutions which deal with them. These forums cannot necessarily be said to merely enforce pre-existing rights, but may develop rights and duties, for example, to prevent anticipated disharmony.

Related, and perhaps more obvious, questions arise where the state has endorsed traditional governance institutions, such as the Malvatumauri in Vanuatu.⁷⁰ Whilst this is also a creature of statute, rather than a traditional institution, it is intended to be a gathering of leaders whose authority arises from custom.⁷¹ An uncertainty then arises as to whether this state endorsement converts these institutions into quasi-public bodies, and if so whether this lends force to an argument that the customary laws which they create, particularly those which are for community good rather than relating to individuals, are public laws.

67 Ernest Weinrib, 'Private Law and Public Right' (2011) 61 *University of Toronto Law Journal* 191, 195.

68 Cap 19, ss 12 and 13.

69 Customary Land Management Act 2013 ss 1(1) and 2. Another good example from a neighbouring country is the village fonos in Samoa, which have been endorsed by the Village Fonos Act 1990 (the legislation is controversial and it has been held to restrict the authority of fonos. See further Jennifer Corrin, 'A Green Stick or a Fresh Stick?: Locating Customary Penalties in the Post-Colonial Era' (2006) 6 (1) *Oxford University Commonwealth Law Review* 27, 32 to 33).

70 Constitution of Vanuatu art 29(1). Another good example is the Great Council of Chiefs (*Bose Levu Vakaturaga*), which has been given a formal role by the Constitution of Fiji Islands 1997, s 116. See further, Geoffrey White, and Lamont Lindstrom, *Chiefs Today* (Stanford: Stanford University Press, 1997).

71 A Solomon Islands example lies in the Moli Wards Chiefs Council: Moli Wards Chiefs Council Ordinance 2010.

VI THE UNSUITABILITY OF THE DISTINCTION

As can be seen from the above discussion, focussing on Barnett's criteria and Weinrib's encapsulation of the features of private law leads to a conclusion that customary laws are more likely to be categorised as private law when applied by the state. Traditional leaders and institutions operating outside the state are not 'public' authorities for the purposes of the public versus private dichotomy, although where such persons and institutions have been endorsed by the state, the position is less certain.⁷² When assessing customary laws against Barnett's criteria and Weinrib's description of private law, the non-state standing of their governing bodies weighs in favour of a private law outcome. In other words, the categorisation of traditional authorities as private tends to suggest that customary laws emanating from those bodies are best categorised as private.

From this it is obvious that much hangs on the definition of 'public'. A distinction founded on 'public' conceived as necessitating state involvement is consistent with Barnett and Weinrib's definitions and, is no doubt the most popular conception of the divide from a Western perspective.⁷³ Traditional leaders and institutions stand outside the state, at least when they operate without statutory interference. As a result, applying Barnett and Weinrib's definitive factors, customary laws will generally fall within the private sphere. In countries where traditional leaders are more influential than the state, this may be a misleading outcome, and potentially undesirable in that, as discussed above, it may shield the customary legal system from human rights and rule of law obligations. As stated above, this article does not attempt to describe or assess all the ways of classifying and distinguishing between private and public law. Nevertheless, from the

72 See, eg the Village Fonos in Samoa, which have been endorsed by the Village Fonos Act 1990 (the legislation is controversial and it has been held to restrict the authority of fonos. See further Jennifer Corrin, 'A Green Stick or a Fresh Stick?: Locating Customary Penalties in the Post-Colonial Era' (2006) 6 (1) *Oxford University Commonwealth Law Review* 27-60, 32 to 33). Another example is the Great Council of Chiefs (*Bose Levu Vakaturaga*), which has been given a formal role by the Constitution of Fiji Islands 1997, s 116. See further, Geoffrey White, and Lamont Lindstrom, *Chiefs Today* (Stanford University Press, 1997). In *Alama v Tevasa* [1987] SPLR 385, it was held, obiter, that in the culture of Tuvalu, *matais* were required to make decisions to guide the people and foster their welfare. It was consistent with their traditional role for them to be concerned with politics and express their views to the people. This did not make them an agent of a political candidate for whom they spoke: at 393.

73 See, eg, Ralph Michales and Nils Jansen, 'Private Law Beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Comparative Law* 843; Kit Barker and Darryn Jensen (ed), *Private Law; Key Encounters with Public Law* (Cambridge University Press, 2013) 3-4.

discussion of indigenous customary laws and processes it seems that contrasting matters of general concern to a distinct community with matters of concern to individuals within that community might provide a more reliable yardstick. Within this paradigm, laws within that distinct community might be regarded as either public or private, depending on whether they were concerned with the interests of the community as a whole, such as governance within the community, in which case they should be classed as public laws, or with the interests of individuals within that community such as a boundary dispute between neighbours, which might be viewed as within the private sphere. For the majority of people in Solomon Islands and Vanuatu the social system within which they go about their daily lives is far removed from the realms of central or even, in some cases, provincial government. Particularly in rural areas, the standards of regulation laid down by traditional authorities within the distinct community, will often be the only standards which the people are aware of and try to adhere to. Within its limited sphere, the customary laws are far more relevant than any regulations set down by state government.⁷⁴

Whilst this approach to the distinction might yield a more justifiable approach, a more rigorous analysis reveals that it may still not produce a satisfactory result. Categorisation of customary laws as public or private remains more problematic than distinction between public and private state laws for a number of reasons, including the following:

- It fails to recognise that customary laws do not operate in the same way as state laws, in particular that they embody a more holistic approach. Accordingly, public and private interests are not segregated. An example might be a customary rule relating to adultery, which addresses both the concerns of the parties to the marriage, the concerns of the 'co-respondent' and any spouse of the co-respondent, the concerns of the extended families, the culpability of the 'offenders' for breach of customary laws prohibiting adultery, and the concerns of the community to keep the peace.⁷⁵
- Customary laws are largely unwritten. For this reason it is problematic to categorise them as public laws. As discussed above, this will expose them to

74 See, eg, the comments in the Law Reform Commission of Solomon Islands, *1996 Annual Report*, 1996, para 10.11, where it was said that for Solomon Islanders, 'Whiteman law is not their business'.

75 See further, Jennifer Corrin, 'It Takes Two to Tango, But Three to Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States' (2012) 26 *International Journal of Law, Policy and the Family* 187.

criticism for failing to reach rule of law benchmarks applying to written laws, such as certainty and prior knowledge.

- The lack of firm boundaries between 'custom' and 'customary laws'⁷⁶ raises rule of law concerns if the laws are categorised as public. Customary laws are embedded in the cultural system in which the two cannot be easily separated. As mentioned above, when viewed from a Western perspective, like the absence of written rules, this is a source of uncertainty.
- Customary processes are very different from common law procedures. For example, disputes are very rarely dealt with in private. Ceremonial formalities are often of more importance than written documents. Parties are not restricted to the original complainants or defendants, but may involve a wide range of community members. There are no rigid rules of procedure or evidence. Parties and witnesses may be called by the presiding chief or elder, as well as by a party. There is often an opportunity for members of the community to express their views.⁷⁷
- The norms of custom give a different emphasis to certain types of law. Perhaps the best illustration is customary land tenure. In this sphere the concept of ownership which pervades common law is discordant.⁷⁸ The communal approach to land tenure and management gives it more of a public than private flavour. Similarly, customary dealings which most closely resemble contracts may be status based, rather than rights based.⁷⁹ In fact, it has been said that '[T]raditional transactions are not contracts as understood in the modern common law and no good can come of confusing them.'⁸⁰
- Internally, the binding force of customary laws depends on the community members' loyalty and commitment to the traditional system applying to the

76 Above, n 1.

77 Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands* (World Bank, Washington DC, 2013) 39.

78 See further, Jennifer Corrin, 'Customary Law and the Language of the Common Law' (2008) 37 (2008) *Common Law World Review* 305-333

79 On the movement of societies from 'status to contract, see Sir Henry Maine, *Ancient Law* (Oxford University Press, London, 1931), 139-141.

80 Derek Roebuck, Dhirendra Srivastava and John Nonggorr, *The Context of Contract in Papua New Guinea* (UPNG Press, Waigani, 1984) 44.

group in question. In this sense such laws may be said to be binding in honour rather than in law, so they do not fit into any legal category.

- Where customary laws are personal laws applying to a particular ethnic group, they may be regarded as a subset of private law,⁸¹ and as always lying outside the public domain.
- As already discussed, the distinction between the public and private spheres made in the state system has been used as an argument against horizontal application of rights.⁸²

VII CONCLUSION

The distinction between private and public laws is of more than academic significance. Not only is it an issue for practitioners, for example, where they are seeking the correct forum in which to proceed, but also, categorising customary laws as public law may bring them under scrutiny from a rule of law perspective. On the other hand, if traditional institutions are not formally endorsed by the state in some way, and therefore categorised as private, they may not be subject to constitutionally endorsed human rights provisions if courts refuse to apply these horizontally.

Attempts to categorise customary laws as public or private by using standard taxonomies or distinctions is unsatisfactory as it fails to take account of the very different nature of customary laws and the dispute resolution procedures which accompany them. In particular, applying tests which restrict the public domain to the state may be misleading in situations where traditional authorities are a de facto form of local government.⁸³ Further, the holistic nature of customary laws and the emphasis on community as opposed to individual interests means that the private and public divide becomes hopelessly blurred.

Attempts to categorise customary laws as private or public law may be seen as yet one more example of the common lawyers' insistence on moulding customary laws to fit in with common law concepts.⁸⁴ Approaching the analysis of customary

81 Werner Menski, *Comparative Law in a Global Context* (2nd ed, Cambridge University Press) 243

82 See further, Colm O'Conneide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' (2003) 4 *Hibernian Law Journal* 77; 79-80.

83 For evidence of this see, eg *Pusi v Leni* (Unreported, High Court, Solomon Islands, Muria CJ, 14 February 1997), accessible via <www.paclii.org> at 1997 SBHC 100; *Public Prosecutor v Kota* [1989-94] VanLR 661.

84 This is not to suggest that the public private dichotomy stems from the common law; the idea has been adopted from the more distinct categorisation made under Roman law.

laws on the basis of the universality of concepts such as private and public law only makes sense if the sovereignty of state law is taken as a given. Even if such sovereignty is accepted, which in reality it cannot be in countries such as Vanuatu and Solomon Islands, customary laws do not lend themselves to categorisation as either public or private law as they do not behave in the same way as common law. Insisting on this type of distinction only exacerbates tensions between the two very different legal systems by endorsing an ethnocentric legal culture. In turn, this flies in the face of constitutional mandates by further marginalising customary laws.

