

The challenges of legal pluralism in the Cook Islands and beyond: An insight from *Hunt and Tupou & Ors v Miguel*, Cook Islands Court of Appeal, 19 February 2016

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The Cook Islands Court of Appeal handed down an important decision in early 2016 dealing with the issue of whether the state or a customary authority had the right to decide entitlement to a major customary title in the Cook Islands.² As such, the case raises an issue that continues to be highly contested in many Pacific island nations: the limits of adjudicatory responsibility of customary authorities within the nation's constitutional framework. That such issues continue to arise in the Cook Islands, even fifty years after internal self-governance, is a testimony to the complexity of the task of determining the role of custom, customary leaders and institutions within an introduced legal and governance framework. This extended case-note article discusses the judgment and its main findings, and then draws out some of the case's broader implications for questions for plural legal orders. Principally amongst these are the issues of conceiving of customary law as a comprised of separable rules and processes, and also questions of the limit and type of court oversight of decision-making by customary authorities. This latter issue is very relevant given the prevalence of initiatives to create custom-based registers (for example of traditional knowledge in the Cook Islands and Fiji and of by-laws in Samoa)³ and also to codify custom through by-laws and local constitutions.⁴

Background and overview of the court's decision

The central question of the case concerned the entitlement to succeed to and administer the Makea Nui Ariki title (a major customary title) from the island of Rarotonga in the Cook Islands. This title

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² *Hunt and Tupou & Ors v Miguel*, 2/14, 3/14, 7/14, 8/14, Cook Islands Court of Appeal, 19 February 2016

³ Robinson, D. F., and Forsyth, M. (2016) People, Plants, Place, and Rules: The Nagoya Protocol in Pacific Island Countries. *Geographical Research*, doi: [10.1111/1745-5871.12178](https://doi.org/10.1111/1745-5871.12178). In Samoa the Village Fono Amendment Bill 2016 creates a register of village faiga fa'avae ("rules"): <http://www.palemene.ws/new/wp-content/uploads/Bills/2016/01.May/Village-Fono-Amendment-Bill-2016-Eng.pdf>

⁴ See Miranda Forsyth, The Writing of Community By-Laws and Constitutions in Melanesia: Who? Why? Where? How?, SSGM In Brief 2014/53 available at http://bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/IB-2014-53-Forsyth-ONLINE_0.pdf; The Sénat Coutumier, 'Charte du Peuple Kanak: Socle Commun des Valeurs Kanak et Principes Fondamentaux de la Civilisation Kanak' (Senat Coutumier de la Nouvelle-Calédonie, 2014) <http://www.senatcoutumier.nc/phocadownload/userupload/nos_publications/charte_socle_commun_2014.pdf>; Meleisea and Schoeffel note that the Samoan Village Fono Act 1990 is "Village Fono (Council) Act of 1990, limits the powers of the village councils to making by-laws on related to economic development and public health matters. It is currently under amendments which will require, among other provisions, that villages formalise their by-laws in writing." Malama Meleisea and Penelope Schoeffel, 'Land, Custom and History in Samoa' *Journal of Samoan Studies* (2015) 5(2), p.29. The proposed Bill is available at: <http://www.palemene.ws/new/wp-content/uploads/Bills/2016/01.May/Village-Fono-Amendment-Bill-2016-Eng.pdf>. It does not appear to refer to an obligation to write down the by laws or to register them, just the opportunity to do so.

carries with it customary and also property value as it entitles the holder to the revenue from certain leases over land. For over a hundred years the Cook Island courts have claimed that they have the right and the duty to determine questions of succession to customary titles in accordance with section 409(f) of the Cook Islands Act 1915. This provides:

In addition to the jurisdiction elsewhere conferred upon [the Land Court, now the Land Division of the High Court] by this Act, that Court shall have jurisdiction – to hear and determine any question as to the right of any person to hold office as an Ariki or other Native Chief of any island.

However, the courts have also been clear that they themselves have no authority to actually confer the title, and are required to act only when a dispute or question arises in connection with an appointment or proposed appointment. In such a case they are required to “ascertain the right of a person to hold office.”⁵ As discussed below, the courts have formulated a rule called the primogeniture rule to guide them in making determinations under this Act.

The Makea Nui Ariki title has remained vacant since 1994 when the last holder of the title died. During the 1990s a number of claimants made applications to the Court for confirmation of their right to hold the title; but all were dismissed as they did not come within the application of the rule of primogeniture or its recognised exceptions, and the court concluded there had not been a valid election of them by the Kopu Ariki, the customary body the courts have consistently recognised as having the authority to select the Ariki.⁶ The Kopu Ariki is comprised of the descendants of identified previous Ariki, although its actual composition was also contested in the case.⁷

In 2013 four applicants applied to the High Court for orders concerning the right to the title,⁸ and the decision made by Justice Isaacs in that case gave rise to the appeal that is the subject of this paper. Two of the four applicants (the first applicants/ appellants) were not themselves seeking the Ariki title but a declaration that their family was part of the Kopu Ariki. These applicants were joined in the case by the fourth appellants /applicants who called themselves the Aronga Mana of Te Au O Tonga. They were comprised of the Makea Karika, Makea Vakatini along with their respective Rangatira (lesser chiefs) and the Ui Mataiapo. The Aronga Mana refers to a group of traditional leaders with certain customary powers/titles, although its exact meaning is disputed as discussed below. The Mataiapo are independent sub-chiefs,⁹ another category of traditional title holders in the Cook Islands. The fourth appellants sought orders that according to custom they should be the interim caretakers or trustees for the Makea Nui Ariki title since the Ngati Makea (Makea tribe) were in disarray and could not agree on a candidate.

⁵ *In re MacQuarie* [1995] CKLC 8; Application 502.94, 138.95 (18 September 1995), p.12.

⁶ *In re MacQuarie* [1995] CKLC 8; Application 502.94, 138.95 (18 September 1995); *In re Ariki* [1999] CKLC 5; Application 299.98 (26 November 1999)

⁷ In the appeal the Court found it was comprised of the members of the family of Ariki Tinirau (who died in 1826) or Ariki Pori (who died in 1839).

⁸ One of the applicants had applied in both the 1995 and the 1999 case.

⁹ Originally they were the captains or leaders who sailed with the Ariki in his migration in separate canoes. See *In re MacQuarie* [1995] CKLC 8

At first instance His Honour found that the court was bound by the doctrine of precedent to apply the custom of primogeniture in determining the question of who has the right to hold the office and rejected all the applicants. His Honour's decision was appealed and at the appeal an additional jurisdictional issue was raised by the fourth appellants. This was the question of whether or not amendments to the Constitution in 1995 removed the court's jurisdiction over all matters concerning customary titles.¹⁰ As this ground of appeal raised an important constitutional issue, the court requested the assistance of the Crown Law Office.

The relevant amendment provides:

66A. Custom –

(4) For the purpose of this Constitution, the opinion and decision of the Aronga Mana of the Island or Vaka to which a custom, tradition, usage or value relates, as to matters relating to and concerning custom, tradition, usages or the existence, extent or application of custom shall be final and conclusive and shall not be questioned in any Court of Law.

Hunt and Tupou & Ors v Miguel is the first time this provision has been the subject of judicial interpretation. The fourth appellants submitted that Article 66A(4) gives them as the Aronga Mana jurisdiction to determine matters of custom and that the Court cannot make any orders involving custom without their consent or direction. Further, they argued that in absence of a separate customary law court under Article 66A(4), the customary law of the Cook Islands relating to chiefly titles must be left to the customary authorities themselves.

What are the limits of customary authority recognised by section 66A(4)?

The issue raised in this case concerning which institution – customary or state – is the appropriate forum for determining and administering customary law is one that legal pluralists have grappled with for many decades. Some theorists draw a distinction between weak or state law legal pluralism (where the state courts administer customary law) or deep legal pluralism (where the jurisdiction over customary law is exercised by customary authorities).¹¹ Put simply, the question for the court was whether s66A(4) of the Constitution an instance of state legal pluralism in which the state officially recognises some specific norms or institutions from the sea of strong legal pluralism as having legal force, subject to the specific legal limitations of that system.

A number of different interpretations of section 66A(4) were advanced before the court, but the Court finally preferred that of the Crown, which did not involve a shift in type of legal pluralism. This interpretation was that “if a properly constituted Aronga Mana makes a relevant ruling or finding as to a point of custom or usage in their respective area/vaka, then as a matter of evidence that opinion must be treated as final and conclusive by the Court and the Court is unable to go behind it.” The court drew a distinction between the “evidentiary basis for and identification of custom on one hand, and judicial application of custom on the other.” This relegation of s66A(4) to questions of

¹⁰ Constitution Amendment (No 17) Act 1994-1995, s.7.

¹¹ See John Griffiths, 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism 1; and Gordon Woodman, 'The idea of legal pluralism.' Pp. 3-19 in B. Dupret, M. Berger and L. al-Zwaini (eds.), *Legal Pluralism in the Arab World*. The Hague: Kluwer Law International.

identification of custom - leaving intact the court's role in the application of the custom - meant that, as the court itself noted (with a perceptible sigh of relief), s66A(4)) was "less radical than it may at first appear."

Applying this interpretation of s66A(4) to the question of determination of Ariki title, the Court held:

This interpretation would not, moreover, mean that the Court is unable to exercise its traditional function under s 409(f) of the Cook Islands Act 1915 to determine whether a person has properly been appointed to a customary title. It would simply mean that, as an evidentiary matter, if evidence is given of an opinion or decision by the Aronga Mana as to the custom or usage to be followed in the appointment of a chief or other native title, that submission must be treated as "final and conclusive".

In the event, the Court was not satisfied that the fourth appellants had produced sufficient evidence to justify the court accepting that they are an Aronga Mana or have the competence to advise the Court on the custom of appointing the Makea Nui Ariki.

As a further limit of the role of customary authorities, the court held that it was still responsible under s 409(f) for determining whether the relevant custom has been properly complied with in the appointment of the chief or other native title. In other words, where there is an authority the Court considers can legitimately call itself an Aronga Mana, this authority does have the final say over the *substance* of custom or usage. However the courts have the final say over the *application* of that custom or usage to a particular case. This interpretation does appear to be at odds with the plain meaning of the words of the section, namely the reference to "the existence, extent **or application of custom**. [emphasis added]," which suggest that it is the role of the Aronga Mana to decide whether or not the Kopu Ariki had correctly followed custom. However, the Court's interpretation of s66A(4) means that for now the courts retain their role as the final arbiters in determining whether the relevant customary authority has, in fact, properly applied custom.

The case's broader relevance for questions of legal pluralism

This case illustrates many of the conundrums associated with many forms of legal pluralism in the Pacific islands today. In a number of countries in the region, from pre-Independence until today, there is evidence of a popular desire for customary authorities to have more control over matters related to custom, coupled with a hesitation to dispense entirely with the role of the state courts, leaving uncertainty around the respective roles of the different institutions. This can be seen in relation to the creation of so-called hybrid courts at the local level in Papua New Guinea, Solomon Islands and Vanuatu (in which chiefs and those knowledgeable in custom are invited as decision-makers),¹² the recognition of the powers and role of the village fono through the *Village Fono Act 1990* in Samoa and the *Falekaupule Act 1997* in Tuvalu that governs the area of authority of each Kaupule (traditional assembly of elders). More recently in Vanuatu the new land reforms introduced in 2014 give a far more central decision-making role to customary level authorities but preserve

¹² Daniel Evans, Michael Goddard and Don Paterson, *The Hybrid Courts of Melanesia* (2010) http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2011/06/01/000386194_20110601052126/Rendered/PDF/620970REVISED0000public00BOX358362B.pdf

certain oversight functions of the courts as discussed below.¹³ McDougall observes “Despite often-expressed concerns about the apparent incompatibility of custom and human rights, especially women’s rights, the diffuse powers of global governance in a neoliberal age seem to be increasingly turning to “customary authority” as a panacea for problems of governance in so-called “weak” states.”¹⁴

In the Cook Islands the desire to minimise the role of the courts in relation to customary matters is evident in the statements of the Prime Minister during the first reading of the 1995 amending bill, quoted by the court in the judgment: “We all know that each individual islands [sic] have their own customs. Those customs Mr Speaker are good, however they tend to be overruled by modern day Courts. What we are trying to do in this Bill Mr Speaker, is protect our customs through over [sic] constitution.” The Prime Minister continued as follows (although these statements were not included in the Court’s judgment):

“We need to make others understand that our traditional laws are different from the foreign laws that are affecting us. However, we can all see that our traditional laws are being dominated by foreign laws. We are not trying to run down foreign laws, but there are some cases where these laws do not agree to our Maori traditions. These foreign laws ought to complement our customs and traditions through the Constitution. That is what we are trying to do were [sic].”¹⁵

The Prime Minister’s comments highlight the difficult question of how differences in form, values and ontological underpinnings of customary and western legal systems can and should be taken into account when analysing, legislating and interpreting plural legal orders. There is a body of literature already on this subject,¹⁶ and the intention here is very limited. What I would like to discuss is how the court (and to an extent the legislature) in this case seems to have approached this issue, and the difficulties it led to, and flag some possible alternative approaches.

First it is helpful to set out what some of these differences are, and I draw from a range of (largely anthropological) accounts that are neither complete nor represent the nuance and complexity involved. It also needs to be stated and re-stated (because this is often forgotten by practitioners in all systems) that both state and customary systems are dynamic and develop, intertwine and modify each other’s operations and even underlying values in a multiple of ways in different contexts.¹⁷

¹³ Siobhan McDonnell, ‘Better protection for custom owners: Key changes in Vanuatu’s new land legislation’, Pacific Institute Outrigger Blog, <http://pacificinstitute.anu.edu.au/outrigger/2014/03/04/better-protection-for-custom-owners-key-changes-in-vanuatus-new-land-legislation/>

¹⁴ Debra McDougall, “‘Tired for Nothing’? Women, Chiefs and the Domestication of Customary Authority in Solomon Islands’ in *Divine Domesticities: Christian Paradoxes in Asia and the Pacific* ANU Press (2014), pp 199 – 224; p.200

¹⁵ From the Official Report (Hansard) of the Cook Islands Parliament Session 1995 Volume No 16 Prime Minister of the day Hon Sir Geoffrey Arama Henry K.B.E on the Constitution Amendment (No 17) Bill Second Reading at pages 1944 - 1945

¹⁶ Particularly in the context of Melanesia, much has been written about custom and customary law: see for example Melissa Demian, On the Repugnance of Customary Law, *Comparative Studies in Society and History* 2014;56(2):508–536.

¹⁷ The literature on hybridity and hybrid legal orders is a particularly useful reminder of this; see Bruce Baker, Hybridity in policing: the case of Ethiopia, *The Journal of Legal Pluralism and Unofficial Law* Vol. 45, Iss. 3, 2013; World Bank, *World Development Report 2011*; Boege, Volker; Brown, M. Anne; Clements, Kevin; Nolan, Anna. ‘States Emerging from Hybrid

These accounts do, however, indicate that it is worth enquiring into how custom operates, rather than assuming similarities with state-based systems.

As an over-simplification it can be said that at their heart customary systems are relational, concerned overall with maintaining correct relationships between people, place and even the spirit world. Levine comments in relation to Maori class hierarchy, “the power of traditional chiefs rested on their claims to supernatural power embedded in an ideology of genealogical links of their descent from gods. In such an autochthonous Polynesian society where kinship linked all (except slaves) chiefly power remained limited by the bonds of kinship itself.”¹⁸ The New Zealand Law Commission also observes that customary systems in the Pacific are “invariably concerned with establishing and maintaining relationships and with restoring relationships that have been disrupted.”¹⁹ In the related context of Melanesia, anthropologist Joel Robbins goes so far as to argue that the Melanesian model of justice “treats relationships, rather than individuals or groups, as the most important bearer of rights.”²⁰ Dixon notes in his careful observation of resource management on the island of Mangaia in Cook Islands that principles of mutuality and reciprocity have and continue to characterise decision-making.²¹

Many customary systems in Polynesia also tend to be based on achieving consensus. In discussing the operation of Samoan Village Fono, the New Zealand Law Commission notes “Fono operate on the basis of consensus, but how this consensus is achieved will vary not only between villages but also depending upon the circumstances of the case. The achievement of consensus does not necessarily denote a full and free agreement. For example, junior title-holders may feel obliged to defer to their seniors.”²²

A final important feature of customary systems is their non-written form and the importance that is therefore placed upon performances (such as ceremonies) that have legal meaning. Frame and Meredith argue that Maori law should be understood as being performative, and set out a number of importance consequences that follow from that. Relevantly for the present discussion, they observe that customary law is dynamic, and that this “is arguably reflected in the performative inclination to think of law not as things but as acts, not as rules or agreements, but as processes constituting rule or agreement. A performative contract, for instance, is not an object but a routine

Political Orders: Pacific Experiences’, *The Australian Centre for Peace and Conflict Studies Occasional Papers Series*, No. 11, 2008

¹⁸ Hal Levine, ‘Status Rivalry and the Politics of Biculturalism in Contemporary Aotearoa New Zealand’ *Oceania*, Vol. 86, Issue 2 (2016): 174–185, p. 182

¹⁹ New Zealand Law Commission, *Converging Currents*, Law Commission Study Paper 2009, p. 153

²⁰ Joel Robbins, ‘Recognition, Reciprocity and Justice: Melanesian Reflections on the Rights of Relationships’ in Kamari Clarke and Mark Goodale (eds) *Mirrors of Justice: law and Power in the Post-Cold War Era* (2004) Cambridge University Press, pp 171 – 190, p 174. Debra McDougal also observes in the Solomon islands “[t]he work of straightening disputes, however, did not proceed in the fashion of court cases, with much more emphasis on restoring amiable relations between the sides, affirming that everyone was related, and organising reciprocal forms of exchange of cash or shell money.” P. 218.

²¹ Rod Dixon, ‘I uta I tai – a preliminary account of ra’ui on Mangaia, Cook Islands’ in Tamatoa Bainbridge (ed) *The Rahui: Legal Pluralism in Polynesian traditional management of resources and territories* ANU Press (2016), pp 79 – 103.

²² New Zealand Law Commission, *Converging Currents*, Law Commission Study Paper 2009, p. 153.

of words and gestures...Likewise, members of performance cultures tend to think of justice not as something that simply is, but rather as something that is done."²³

The relational focus of customary systems is very different to the western concepts of legality that inform common law state systems, and its derivative principles, such as generality, non-retroactivity, promulgation etc.²⁴ In the classic positivist view law is seen as a system of rules, and the aspiration is to be, in the words of John Adams, "a government of laws and not of men". These principles have led to fundamental procedural doctrines underlying the western legal system, such as *res judicata*, precedent and the evidential rules concerning relevance.²⁵

There is no doubt that there are profound changes occurring in both state and customary systems throughout the region, and also in ideas about what constitutes justice more broadly. In Samoa, Meleisea and Schoeffel argue "There is clearly no consensus today about what the customary rules are, and the evidence is that each family does as it prefers to do. Practices are gradually becoming customs."²⁶ Such changes in many ways complicate, but in no way negate, the importance of considering how the differences between various systems should be taken into account both in the courts and through policy and legislative developments.

The remainder of this paper identifies and discusses two particular instances where such issues emerged in *Hunt and Tupou & Ors v Miguel*: the courts' focus on the identification of a customary "rule"; and the question of the limits of judicial oversight of customary institutions.

(a) The relevance of distinguishing between rules and their application to considerations of custom

In many customary systems the processes of determination, such as consultation and discussion and consensus building, combine questions of rule-identification and application. Frame and Meredith comment that in the context of Maori law "laws and men are virtually coincident."²⁷ The question of whether it is possible and/or desirable to attempt to extract rules from custom is therefore very real one. This issue arises both in the ongoing constitutionally-mandated role of the courts in the region to apply custom, and also the movement identified in the introduction to create custom-based registers and also to codify custom through by-laws and local constitutions.

In the present case the court very determinedly focussed on identifying a rule of custom, and the rule/ application distinction is apparent throughout the judgment. This approach has characterised the approach of the courts in relation to determination of customary title over the past century, as demonstrated by the Court's statement: "The issue before this Court is whether the primogeniture rule is the custom of Makea Nui as determined by the Native Land Court in the High Court decisions

²³ Frame and Meredith, above p.136

²⁴ Lon L. Fuller, *The Morality of Law*, rev. ed. New Haven CT: Yale University Press, 1969, pp. 33-38;

²⁵ Corrin, Jennifer, "Barava Tru - Judicial Approaches to the Pleading and Proof of Custom in the South Pacific" [2002] UQLRS 1; (2002) 51(3) International and Comparative Law Quarterly 611-639, <http://www.austlii.edu.au/au/journals/UQLRS/2002/1.html>; Miranda Forsyth, *A Bird that Flies with Two Wings: Kastom and State Courts in Vanuatu*, ANU Press 2007.

²⁶ p.31

²⁷ Alex Frame and Pau Meredith, Performance and Māori Customary Legal Process, *The Journal of the Polynesian Society*, Vol. 114, No. 2, June 2005: 135-155.

since 1923.”²⁸ This distinction between “rule” and its “application” is also found in the wording of s66A(4) itself, as discussed above.

All of the appellants had argued that the primogeniture rule had no application as it had changed substantially over time and that there have been so many exceptions it cannot be considered a rule. However, the Court disagreed and held that the Kopu Ariki “is required by custom to apply the primogeniture rule unless one of the three exceptions . . . apply.” These exceptions are:

- (i) There exists an arrangement requested by the deceased Ariki and approved by the Kopu Ariki before the Ariki’s death;
- (ii) The person is unsuitable to be the Ariki;
- (iii) The person otherwise entitled has left the tribe and/or is living abroad.²⁹

It further held that the election of an Ariki selected by the Kopu Ariki can be challenged in the High Court if the primogeniture rule has not been applied, or if the reason for departing from it does not fall within the exceptions referred to above.

The difficulties with the court’s focus on finding “rules” of custom which can then be applied to facts are demonstrated by the court’s struggle to make sense of the variety of ways that customary decisions have been made over the question of the Ariki title over the past century. In the present case the court reviewed the various decisions made about the Ariki title since 1871. It upheld the decision in a previous case that “the basic rule” is that “[t]he custom is that the eldest surviving child of the deceased Ariki, or in default of issue, the eldest of the next branch, whether male or female, should succeed.” However, it noted that this rule has not always been followed for a variety of reasons including “arrangements between the parties concerned; usurpation by a line more powerful than the true Ariki; unfitness for office; conquest; the settling of new land and the lack of male heirs when the entitlement went to males.” This catalogue of occurrences supports the comments of anthropologist Goodman who in 1955 observed:

Polynesian societies are founded upon social inequality and, despite an aristocratic doctrine of hereditary rank, permits its members to compete for position, for prestige, and for power. In one way or another then, the history of every Polynesian society has been affected by status rivalry, and under the proper conditions the effects of this rivalry have been felt in every final center of the culture...³⁰

The court noted that it was important to remember that custom is not immutable, and gave as an example the fact that only since the missionaries arrived in 1823 have women been able to hold the Ariki title. However, by creating fixed rules with limited categories of exception and preferring written records over contemporary oral testimony,³¹ there is a strong likelihood that the flexibility of custom will be diminished. This is illustrated in the present case by the way in which the court’s

²⁸ *Hunt and Tupou & Ors v Miguel*, para 119.

²⁹ At [169]

³⁰ 1955:680

³¹ See [98], [188]. At [118] the court notes the remarks of a judge in an earlier related decision “that a large body of evidence that the primogeniture rule applied in the Cook Island could, if necessary, be obtained from the books of missionaries and others who had lived for a considerable amount of time in the Cook Islands and had become experts on the question of native customs and useage.”

primogeniture rule ruled out the appellants' arguments that the primogeniture rule was just one factor of many in coming to a decision about succession, and that it requires flexible application. As such, it ruled out the argument that the issue of succession required going back to an earlier Ariki line.³² It was also argued that the courts' rigid focus on the primogeniture had led to a succession of erroneous decisions, errors which had then been perpetuated through the doctrine of precedent. Another example of the way the court's approach has limited the flexibility of custom is that it prevented the consideration of any role of the Mataiapo in determining the Ariki title. Rather than considering what customary practices might be today, the court relied upon historical records and earlier judgments to find that historically the Mataiapo in Rarotonga had not been involved in the appointment process. The original Makea migrated from Tahiti to Rarotonga in haste and with no time to organise a large expedition with other canoes (who would then have been the Mataiapo) and Mataiapo only started to join after 1830.³³ This does however illustrate the difficulty in determining what is meant by "custom" today, as the courts have also been involved in the process of selecting a new Ariki since early last century.

One possible alternative approach to the attempt to identify customary rules is that which has been adopted in New Caledonia by the Kanak Senate, and this is to identify customary principles.³⁴ Focussing more on underlying values rather than extracting fixed rules may be a way to recognise the flexibility of custom but also respond to the legitimate desire to ensure that it is not imposed arbitrarily. Such a process must, however, be founded upon an understanding that customary principles do and should change over time, and also that certain presentations of what is custom are preferred by certain groups of society. A workable strategy to neutralise the power dynamics that will be involved over determinations of which values are articulated is therefore essential. Another approach is to consider what sets customary practices apart from state practices, and as discussed below what safeguards either exist or can be incorporated to prevent potential abuses of power.

What oversight role can and should courts exercise over customary authorities?

This case also highlights questions about what oversight role state courts should and can have over customary authorities if they are recognised by the legislature as playing a role of some sort in the country's judicial system.³⁵ There are a number of different alternative approaches that have been adopted around the region. First, the legislature may decide to give complete control over a particular issue in a particular geographic location to a customary authority and to exercise no

³² A USP Law student, who is also from the Kopu Ariki of Makea Nui, relates in an assignment for her customary law course that one of the factors that required looking back was that as a result of the arrival of the missionaries and their banning of polygamy, one of the main ancestors of the Kopu Ariki (Pori) had put aside his principal wife (whose son would be in line for succession in the most usual way) and married his youngest wife. See Noeline Browne, *Whether Customary Law or the Common Law is Trumps when Determining Tribal Titles in Rarotonga?*, 17 May 2013.

³³ See [142].

³⁴ See footnote 2.

³⁵ It should be noted as an aside that such opportunities have been created in many pieces of legislation across the region but are seldom used due to questions over how exactly they will operate in practice. The most recent one I came across is in relation to determining ownership of expressions of indigenous culture for the purpose of the Vanuatu Trademark Act. The scope of the role of the National Council of Chiefs and the relevant state authorities is unclear, meaning that the clear desire that such questions are determined by customary authorities is frustrated.

oversight. It is rare that this occurs explicitly (the most usual case being the state just disregarding particular regulatory functions that are assumed or continued by customary authorities), but one example occurred through another amendment to the Cook Islands Constitution introduced at the same time as s66A(4). Section 5 of the Constitution Amendment (No 17) Act 1994-1995 unambiguously created a situation of deep legal pluralism with regard to land and title disputes in three of the islands that make up the Cook Islands. Section 48(3) of the Constitution now provides that “the Land Division shall not exercise any jurisdiction or power in relation to land or chiefly titles in any of the islands of Mangaia, Mitiaro and Pukapuka, and such other islands as may be prescribed by Act” and “[w]here on any island to which subclause (3) applies, jurisdiction or power in relation to land or chiefly titles is exercised in accordance with the customs and usages of that island, the exercise of that jurisdiction or power shall be final and binding on all persons affected thereby, and shall not be questioned in any Court of law.” These provisions, incidentally, are a strong argument for the position that s66A(4) was not intended to remove all control from the courts, as s66A(4) is not nearly as unambiguous as s 48(3).

However, as is more common, complete control is not relinquished to customary authorities. This provides an avenue for Court oversight over customary processes. Such oversight can arguably be justified on the grounds that additional checks on arbitrary use of power are necessary in all systems, and many of the traditional checks and balances on customary power have today been eroded. For example, the geographical movement of people today means that community pressure for good behaviour of leaders is no longer so prevalent, as today there is the option of *moving away* from bad leaders.³⁶ In the Cook Islands the vast depopulation of the country as a result of outward migration to New Zealand has also fundamentally changed the foundations of many customary institutions and resulted in a loss of inter-generational knowledge transmission. The state’s assumed monopoly on the use of force also plays a role; as Levine notes in a pan-Maori context, “Chiefs related to their people and acted not as owners but guardians and trustees of group assets. They used the pronoun taua (two of us) to refer to themselves and their people and could be replaced or assassinated if they acted against their wishes.”³⁷ Finally the development of a cash economy has changed local political economies in profound ways, making community members and leaders far less mutually reliant than in the past. In such circumstances of continuing change, finding effective ways to check the arbitrary use of power is clearly a continuing issue. It requires a revisiting of the possible mechanisms over time, the involvement of the state being an obvious option in the context of hybrid legal orders.

Where the need for court oversight is accepted by the legislature, the question arises as to what the limits and form of that oversight should be. Herein lies a great difficulty: a valid and major concern of both the court and also parliaments in legislating oversight for legal pluralistic arrangements is to ensure that institutions or individuals do not exercise power in ways that are arbitrary and unfair. Legal philosopher Martin Krygier, for example, argues that reduction in arbitrariness in the exercise of power is the central value underpinning the rule of law.³⁸ Yet imposing certain oversights by state courts run the risk of impacting upon the flexibility, mutability and creativity of customary systems. This is because as discussed above these systems are based on relational models of justice where

³⁶ This was of course an option before given the exceptional Polynesian navigational skills, but is easier today.

³⁷ Hal Levine, p.181.

³⁸ Martin Krygier, *Legal Pluralism and the Value of the Rule of Law* in Andrew Halpin and Nicole Roughan, eds., *Jurisprudence without Borders*, Cambridge University Press (forthcoming 2016)

justice depends upon a different range of factors that a western legal system characteristically allows for with its limitations of rules of relevance. It is for these reasons that scholars such as Goddard, Evans and Paterson have observed in the context of the hybrid courts of Melanesia: “since hybrid courts are expected to apply “custom”—meaning, realistically, to be sensitive to dynamic and changing local values and mores—and that the latter are significantly variable among the many hundreds of small societies of the Western Pacific, oversight should not extend to interference in the way courts come to decisions over disputes.”³⁹

The most common forms of oversight in the region are usually concerned with ensuring that customary authorities are not exercising their power in ways that are contrary to the constitution, and that due process and natural justice have been followed. The most complete examples of such systems are arguably Vanuatu’s new land reforms⁴⁰ and in Samoa with regard to their village fono and the Land and Titles Court.⁴¹ Indeed the number of cases brought before the courts in Samoa that have found fono powers exercised in breach of basic human rights demonstrates the importance of such mechanisms.⁴²

One aspect of natural justice oversight involves ensuring that the customary authority itself has been properly constituted. This also raises difficult issues as a frequent type of dispute in the region is entitlement to wield customary authority, arising from uncertainty created by many of the societal changes discussed above. In the present case, the court found that it had to follow a determination of custom made by a properly constituted Aronga Mana. However, the Court went on to observe that it is “a matter of regret” that the Constitution does not define what is meant by an Aronga Mana, how it is to be constituted, and by what mechanism it is to express its opinion or decision about custom. Nor could any real guidance be found in any statutes as those which do define it do so very generally. Indeed this confusion over exactly what an Aronga Mana is was also apparent in the parliamentary debates when s66A(4) was introduced, with one Member of Parliament observing that it is a term that has many different meanings, including “people with power” and “people with magic power.”⁴³ The court did however suggest that evidence of the custom of who comprises the Aronga Mana could be accepted to verify the legitimacy of an Aronga Mana, which is useful going forward.

The Court noted that the lack of Constitutional guidance about what constitutes an Aronga Mana should be “contrasted with the extensive procedural mechanisms contained in the House of Ariki Act 1966 dealing at length with matters of appointment of Arikis to that House.” This illustrates another conundrum for pluralistic systems: the more state-institution-like customary authorities can make

³⁹ Goddard, Evans and Paterson, p. 30

⁴⁰ The new lands package is available on the Ministry of Lands and Natural Resources website; see <https://mol.gov.vu/index.php/en/acts-and-laws/232-the-new-land-laws-2014>. For a discussion of this see Siobhan McDonnell, ‘Better protection for custom owners: Key changes in Vanuatu’s new land legislation’, Pacific Institute Outrigger Blog, <http://pacificinstitute.anu.edu.au/outrigger/2014/03/04/better-protection-for-custom-owners-key-changes-in-vanuatus-new-land-legislation/>

⁴¹ Village Fono Act 1991. See a recent discussion of this Act: Leulua’lali’l Tasi Malifa, Village Fono Act Reforms, paper prepared on topic of the Samoa Law Society Biennial Law Symposium, December 3-4 2015, available at http://www.samoaoobserver.ws/en/20_12_2015/sunday_reading/491/Village-Fono-Act-Reforms.htm.

⁴² One of the main issues has been banishment, for a recent discussion of this see *Punitia v Tutuila* [2014] WSCA 1

⁴³ Hansard 31 March 1995, page 1949, Hon MP George.

themselves, the more state courts are likely to be able to see them as legitimate. Conversely, the more state-institution-like that customary institutions become, the more removed they become from their original sources of legitimacy and authority. In addition, the types of mechanisms that are used to make them appear relevant and legitimate to the state, such as codification of appointment and decision-making processes, is also likely to result in less dynamism and flexibility than has traditionally characterised them.⁴⁴

A third and more extensive type of oversight power was applied by the Court in the present case. This is the power to ensure that custom “has been properly complied with” by the customary authority acknowledged as entitled to apply it (in this case the Kopu Ariki). In the present case in dismissing the claim of the third appellant to have been appointed by the Kopu Ariki, it held “the evidence relied upon does not satisfy this court that there was any type of arrangement which could satisfy native custom. There was not adequate notice of meetings, no evidence of custom being discussed or adopted at meetings that were held, voting was not in accordance with the custom and no evidence that a majority vote in her favour had been properly obtained.”⁴⁵ There was no discussion in the judgement about whether or not such customary requirements *are* in accordance with “native custom”, although evidence may have been led about these matters that was not referred to in the judgment.

The type of oversight power recognised by the courts in this case sets the courts up for an almost impossible role as it requires them to be experts in customary practices and procedures. Section 66A(4) was introduced in order to address the problem that “customs . . . tend to be overruled by modern day Courts.” The present case is a perfect example of this concern being realised, as it shows the court developing a very narrow rule about right to succeed to the Ariki title that contains restrictions that seem to bear little relevance to the concerns of the Ngati Makea today. This lack of good fit between the court’s view of how the Ariki title should be filled and the workings of the Kopu Ariki has led in the current case to over two decades during which the title has been unable to be filled despite many applications to the court. Just as concerning is the observation by the court in the 1995 decision that “there have been disputed successions coming to the courts in respect of the past four holders dating back to 1921.” On any view, the current arrangements seem to be expensive, time consuming and failing to lead to certainty. For the judge in the 1995 decision the repeated cases before the courts led him to “regret” “that the people have been unable to settle the matter between themselves and within the tribe in accordance with traditional Maori custom.” Yet this approach seems to discount completely the role an appeal option to a state court can have in prolonging disputes. As Corin has noted, “Judges expect cases to end once the round of appeals has been exhausted. Pacific Islanders are of the view that no dispute is ever entirely settled. Any disagreement can – and will – be re-opened whenever either party sees an opportunity to gain an edge, or whenever disagreements over other issues have re-instituted ill feeling between the

⁴⁴ For instance McDougall amongst many others points to the “flexibility of local institutions and ingenuity of local people” in her description of the engagement of women in chiefly councils in Solomon Islands; McDougall Op Cit p205.

⁴⁵ Para [152]

parties.”⁴⁶ One clear problem with the broad oversight function assumed by the Cook island court in this case is that it is likely to result in many cases being appealed to state courts, leading to overcrowding of the courts and undermining the very purpose of the relegation of the issues to customary determination.

Conclusion

In conclusion, the case of *Hunt and Tupou & Ors v Miguel* raises many important questions concerning legal pluralism that legislatures across the region should pay heed to when legislating roles for custom and customary authorities. It illustrates the critical need for clarity about the nature of the oversight role (if any) the courts will have, and has highlighted the difficulties with the high levels of procedural oversight this decision found exists in the Cook Islands. It also is an illustration of the difficulties of conceiving of divisions of adjudicatory power and responsibilities between state and customary authorities in ways that do not fully take into account the fundamental differences between the two, as enumerated above. These questions need to be thought through in detail in order to realise the potential a truly pluralistic legal system in the region. One way forward may be to revisit the many occasions in constitutions around the region where references are made to the incorporation of customary law and the role of customary authorities, with a view to exploring in detail how this may be achieved in practice in a way that strengthens justice overall. As noted above, this may involve identifying key customary values and customary processes rather than “rules”. This exercise will be immeasurably benefited by adopting an approach that is informed by independent contemporary research about the actual operation of state and customary institutions today, their underlying values and the way they protect or undermine the interests of all sectors of society, including women and youth.⁴⁷ The flexibility and potential for change in both customary processes, as well as their ability to be used to enfranchise certain groups at the expense of others, needs to be investigated in more detail. This is an important area for both law and anthropology students and scholars both inside and outside the region as there is a thin evidence base on which to base such crucial legal policy.⁴⁸

⁴⁶ Corrin, Jennifer, "Barava Tru - Judicial Approaches to the Pleading and Proof of Custom in the South Pacific" [2002] UQLRS 1; (2002) 51(3) International and Comparative Law Quarterly 611-639, <http://www.austlii.edu.au/au/journals/UQLRS/2002/1.html>

⁴⁷ The Court in the present case noted that it had not had any independent expert evidence as to customary law concerning Ariki titles and related matters. [162].

⁴⁸ This gap was demonstrated in the case where the Court noted [162] “It is appropriate to record that in the Court below there was no independent expert evidence as to customary law concerning Ariki Titles and related matters.”