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A Constitutional Conundrum: Reconciling Human Rights and Customary Laws in the South Pacific

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ABSTRACT

In the fifty years since island countries of the South Pacific began to achieve independence, the vast divide between introduced systems of law and government and traditional authority and practices has become all too apparent. One area where conflict has occurred is the intersection of indigenous customary laws and constitutionally enshrined human rights. These concepts have occasionally been assumed to be complementary, a stance which ignores the fundamentally different values involved. Customary laws are indigenous and, often, fragmentary (on a geographical basis). Generally, they are conservative, patriarchal and applicable only to members of the community who accept them as binding. Human rights, on the other hand, are introduced concepts, founded on liberal, egalitarian principles, and professed to be universal. Customary laws emphasise status, duties, and communal values, whereas human rights provisions emphasise individual rights, freedoms and equality.

This paper considers the conundrum facing South Pacific nations, with a constitutional mandate to preserve a unique cultural identity on the one hand, whilst upholding international human rights on the other. It sets out the means by which human rights and indigenous customary laws are promoted in the region. It also discusses the limitations placed on these regimes. The key areas of conflict are explored through a small sample of South Pacific cases. The paper concludes by putting forward some thoughts on the scope for negotiating the constitutional conundrum.