



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

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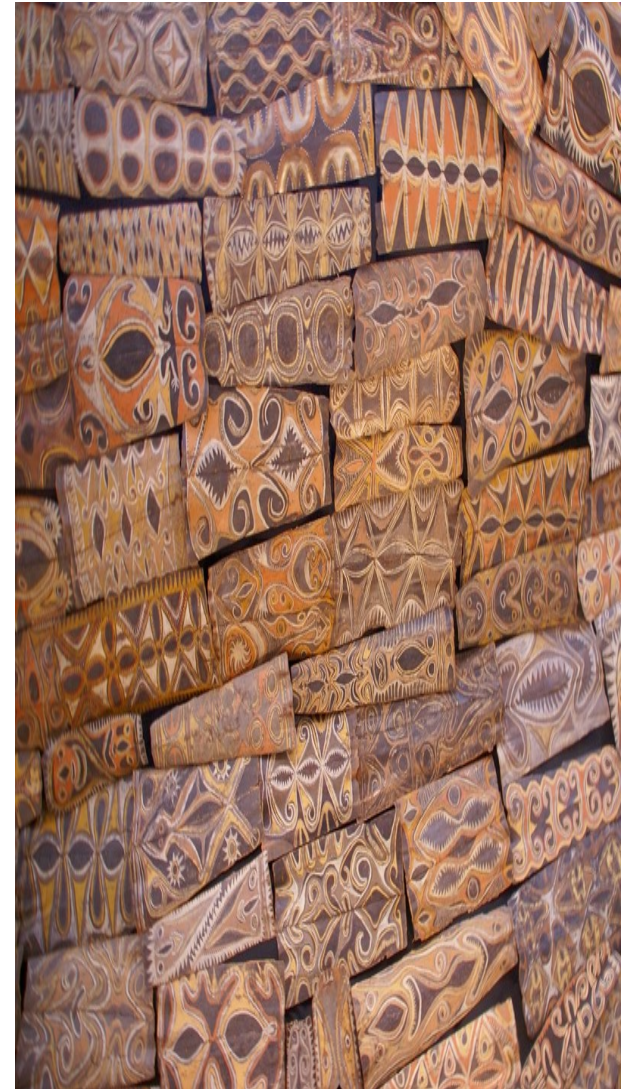
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The Constitutional Conundrum

**How can South Pacific
Courts reconcile a desire
to preserve a unique
cultural identity with
human rights norms?**

**‘An island is a piece of land
entirely surrounded by
advice.’**

Lord Shackleton, (1976)



Order of Presentation

- **Promotion of Human Rights**
 - **Constitutional recognition**
 - **Other means of promotion**
- **Promotion of Customary Law**
- **Limitation of Human Rights Regimes**
- **Key areas of conflict**
- **Case Examples**
- **Some thoughts on addressing the conundrum**



Constitutionally Enshrined Rights:

- **life, liberty and freedom from slavery and forced labour;**
 - **freedom from torture and inhuman and degrading treatment;**
 - **freedom from compulsory acquisition or deprivation of property;**
 - **freedom from search and entry;**
 - **protection of the law;**
 - **freedom of conscience, expression, assembly and association, and movement; and**
 - **freedom from discrimination and inequality of treatment.**
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Other means of promoting human rights in the South Pacific

- **International Law**
- **Human Rights and Anti-Discrimination Commission**
- **Ombudsman**
- **Human Rights Education**



- **Formal Recognition**
 - **Constitutional**
 - **Statutory**
 - **Interstitial**
- **Traditional Recognition**

Limitations on Human Rights

- **Failure to embrace rights at international level or follow up with domestic legislation**
- **Constitutional provisions shielding Customary Law**
- **Vertical application of human rights**
- **Restricted access to justice, problems of proof, and the pyrrhic victory of a judgment**
- **Narrow interpretation of rights provisions**
- **Lack of resources**
- **The mandate to promote customary law**

Key areas of conflict:

- the right to life has conflicted with the custom of ‘payback’
- the right to freedom of religion has conflicted with the right of traditional leaders to govern
- the right to freedom of movement has conflicted with the customary penalty of banishment
- the rights to protection from discrimination and freedom of movement have conflicted with the patriarchal & status based norms of customary laws
- the right to freedom of expression has conflicted with traditional authority

Case Examples

Noel v Toto [1995] VUSC 3

**Tanavalu v Tanavalu [1998]
SBCA 8**



Lo Bilong Yumi Yet, Narakobi:

[B]alanced human development requires a commitment to human rights, not as positivistic legal norms conferred by a sovereign upon its subjects, enabling each to do as he or she pleases, but with even greater emphasis on social obligations or responsibilities. If I have a right to education, I also have a duty to educate others, if not directly, then indirectly. If I have a right to life, I also have a duty to make sure others do not starve or suffer out of want which is beyond their ability to alleviate and which I am able to avert. ... In sum, there is a need to balance individual rights with group rights on the one hand, and personal obligations with group obligations on the other



It is necessary to remember that for many people the constitution is an alien transplant, and without advance publicity, careful education, and a serious attempt to make legal forums more accessible, people at whom the fundamental rights were aimed will be in no position to act on them.

Aluta Basin



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