

Custom and the Law

Edited by Paul de Deckker and Jean-Yves Faberon

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Reviewed by Yoli D. Tom'tavala^[*]

The genesis of this book is explained by the editors at the outset, in the Preface. It was borne out of a multidisciplinary research programme at the University of New Caledonia in 1994 whereby legal, anthropological and political studies were made in order to examine 'the place of indigenous custom in the development of law in the South Pacific'. Their justification for adopting the multidisciplinary approach is pertinent and compelling, as the experience of the common law would testify that 'custom is the reality upon which the law was originally based'. The ultimate question for them is: "(h)ow does one affirm and restore the original rights of indigenous people?" This question is more telling in what the Preface does not say, viz, the long-standing failure, until recent times, of the French state and jurisprudence to recognise the distinct ethnic, cultural or customary groups that make up the Republic.

Thankfully, there is now evidence of changes in French political thought and jurisprudence which are now discernible even in the French Pacific territories. For example, the Noumea Accord of 1998 contains some measures of recognition of the rights of the Kanaky people in New Caledonia. In the light of this newly-emergent, pragmatic political philosophy, the study about the place of customs in law assumes a practical import. It is important to establish the place of customs within the structure of the legal system as an affirmation of the right to be different in a plural-State setting. Unsurprisingly, the immediate geographical focus of the study is the French territories in the Pacific comprising New Caledonia, Tahiti and Wallis & Futuna. However, to the extent that the customs of the indigenous populations in these territories have marked similarities to those of other Polynesians and Melanesians in the South Pacific, the study also focusses on countries such as Australia, New Zealand, Papua New Guinea and other South Pacific countries in order to glean lessons from their experiences as well.

The multi-disciplinary focus of the study and the book is reflected in the contributions from people of varied backgrounds: legal academics, members of judiciaries, government legal officers, sociologists and anthropologists. The contents of the book are set out under nine chapters and two appendices. The first chapter by Norbert Rouland, Professor of Legal Anthropology at the University of Aix-Marseilles III, is titled 'Custom and the Law' and sets the context of the whole book by discussing the vexed relationship between custom and French jurisprudence and legal philosophy, which have hitherto been greatly influenced by the philosopher Montesquieu who had very unflattering views of custom: the 'reasoning of fools', he is reputed to have said. The chapter dealt with issues of definition of indigenous custom, evolution of societies from kin-based customs to state-based laws (*'a la* Sir Henry Maine) and biases against customs especially from the colonial officers, jurists and academics. It also discusses pragmatic developments in New Caledonia and elsewhere which offer greater opportunities for more effective recognition and implementation of customary laws in the modern state system.

The other eight chapters are grouped under two parts. Part 1 is titled 'The position of indigenous custom in the rules applying to the French Overseas Territories' and consists of four chapters that deal with the general recognition of facets of customs in the French Pacific Territories. Guy Agniel's 'Legal adaptations to local sociological particularities' leads off by providing an overview of actions undertaken by constituents, legislators and territorial organs concerning issues of the indigenous peoples' status and political organisation that have led to greater recognition of the right to be different in the French Pacific territories.

The other three chapters in this part amplify and elaborate on customary rules in New Caledonia (Chapter 3 by the Customary Council of the Territory of New Caledonia), French Polynesia (Chapter 4 by Bruno Saura) and Wallis and Futuna (Chapter 5 by Antonia Trouilhet-Tamole and Emeli Simete). These canvass a wide range of topics such as status, social organisation, marriages, traditional leadership, land and natural resources, customary law and the future of custom. Part 2 is titled 'Indigenous custom and the jurisprudence of the French and Overseas Territories' and comprise of three articles on how the courts deal with issues of custom in New Caledonia^[1] and French Polynesia^[2]. The two appendices consist of two debates which appear to have arisen in a related conference or workshop. The first concerns the status of Wallisians and Futunese in New Caledonia and the legal status they ascribe to; in retrospect this is an issue that has flared into bloodshed and general mistrust between indigenous Kanaky and Wallisians & Futunese in certain parts of New Caledonia. The second debate concerns the unease with the use of French, English or other foreign terminology to describe customary concepts and situations, no doubt a common concern worldwide.

The book has an eye-catching cover with a picture of a tattooed Pacific Islander in the back as well as front. The phrase ***Custom and the law***, in bold, black font is printed against a yellow background. That initial glimpse gave me the impression that within the covers of the book was everything I wanted to know about customs and law in Pacific Island countries, especially of the Polynesian variety^[3]. Alas, my subsequent perusal of the contents between the covers indicated that the book has less grandiose scope and application in that it is primarily focussed on custom and law in the French Pacific Territories. Needless to say, this is not a criticism of the editors or of the book. In fact the editors and publisher ought to be highly commended for taking the trouble to translate proceedings that were initially presented in the French language and disseminate it to an English-speaking audience. For the vast majority of Pacific Islanders who are not literate in the French language, the value of this undertaking cannot be over-stated.

The issue of ascertaining the place of customs in the legal systems of states and territories is common in the Pacific Islands. The independent countries of the Pacific have been grappling with it since the time they began preparations for their independence and, for most, the picture remains as murky as ever. Now that French law and politics allow indigenous peoples of the Pacific territories the opportunity to express their distinct cultural attributes, the place of the variegated customs within these territories' legal systems become issues of practical import as well. In that light, the multidisciplinary programme at the University of New Caledonia is commendable. From the point of view of an English-speaking audience, the articles indeed constitute a useful contribution to the scholarship on customary law of the Pacific Islanders since they discuss the situation in the French Territories of which little was known about in the past. I especially found the candour in Professor Pouland's introductory article alluring and informative: it made me appreciate that there is little difference in practice between the French and English approaches to the treatment of the laws and customs of the indigenous peoples in their former or continuing colonies. In my opinion the only drawback of this book is that there is little coverage of the situations in other Pacific Island countries. This is so, despite the professed aims of the editors to be inclusive in their undertaking.

In conclusion, this is a useful book for the majority of Pacific Islanders who are not literate in the French language and may therefore be ignorant of the situation of the laws and customs of the indigenous peoples in the French-Pacific territories. Hence, I recommend this book to those who desire to have a Pacific-wide

understanding of the place of customs in the laws and especially those that pertain to the French-Pacific territories.

[*] Lecturer
School of Law
University of the South Pacific
Port Vila
Vanuatu.

[1] The discussion pertains to the Magistrates Courts in New Caledonia and is presented in two chapters; Fote Trolue, (in Chapter 6) “Custom and the magistrate: approach and practice in New Caledonia” and Bernard de Gouttes, in (Chapter 7) “The magistrate and custom: questions and answers on approach and practice in New Caledonia.”

[2] Rene’ L. Calinaud and Camelia Domingo-Neti, in Chapter 8 “Customary law and custom in Polynesian jurisprudence.”

[3] Blame these on the tattoos and the absence of any indication of the geographical coverage of the book.

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