

# COUTUME AUTOCHTONE ET ÉVOLUTION DU DROIT DANS LE PACIFIQUE SUD

*Paul de Deckker (Editor), First Edition, L'Harmattan, Paris, 1995, 304pp.  
Reviewed by A H Angelo\**

This book is the product of a colloquium on indigenous custom and the development of law in the South Pacific, held in New Caledonia in July 1994. The papers presented at that colloquium are complemented in the book by a record of the discussions that followed each session. Together the papers and discussions provide an excellent commentary and resource book on customary law in the South Pacific, with particular reference to the French territories of French Polynesia, New Caledonia, and Wallis and Futuna.

The conference had the support of the Australian and French governments and of international agencies and private sector interests and was hosted by the French University of the Pacific at its Noumea campus. The book is presented by Professor Paul de Deckker, Professor of Cultural and Social Anthropology at the French University of the Pacific.

The list of contributors is impressive<sup>1</sup> and many are known in both the English-speaking world and the French.<sup>2</sup> The book is in French, but several of the papers — those on the

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1 Jean-Yves Faberon, Paul de Deckker, Norbert Rouland, Guy Agniel, the Customary Law Council of New Caledonia, Bruno Saura, Antonia Trouillet-Tamolet, Emeli Simete, Fote Trolue, Bernard de Gouttes, Rene Calinaud, Camila Domingo-Neti, Olivier Aimot, Murray Chapman, John Ah Kit, David Baragwanath, Henri Okole.

2 Apart from the English speakers, mention may be made of — Jean-Yves Faberon (Professeur de Droit public, Université Française du Pacifique, Tahiti), who usefully brought together the governing laws of New Caledonia, French Polynesia and Wallis and Futuna in *Le Statut des Territoires d'Outre-Mer* (Centre de Recherches Juridiques, Noumea, 1992); Norbert Rouland, Professor d'anthropologie juridique, Université d'Aix-Marseille III, Founder President of AFAD and author, inter alia, of *L'Anthropologie Juridique* (PUF, Paris, 1990) which is now available in English as *Legal Anthropology* (translated by Phillip G. Planel, Athlone Press, London, 1994); Guy Agniel (Maître de conférences de droit public, Université Française de Pacifique), and Fote Trolue (Judge of the Tribunal de première instance of Noumea), for their contribution on "Customs and State Laws in New Caledonia", in *Pacific Courts and Legal Systems* (USP, Suva, 1988) 207.

anglophone territories of the Pacific — were originally in English<sup>3</sup> and have been translated by the efforts of Paul de Deckker and (for the Baragwanath paper) of Laurence Kuntz.

The colloquium was in three sections — one dealing with indigenous custom in the legislation of the French Overseas Territories, the second with indigenous custom in the case law of the French Overseas Territories, and the third with indigenous custom in English-speaking countries of the Pacific. The overview given by Professor Rouland is, as readers have come to expect, masterly. He both set the context at the beginning of the colloquium and provided a summary at the end of the proceedings.<sup>4</sup>

Amazingly, because of the role indigenous peoples play in the societies of the South Pacific, law and custom is still frequently not seen as an acceptable subject for academic study for lawyers, nor even is it seen as a particularly fashionable one.<sup>5</sup> It is often seen rather as something of a fringe activity for a few eccentric academics. The impact of indigenous peoples law is, however, being felt worldwide and in the South Pacific in the context of the development of natural resources, the reclaiming of traditional lands, and as an area of tension with international human rights concepts. These are no longer matters solely for anthropologists or linguists.<sup>6</sup> State governments and multi-national corporations are now all involved and critically concerned with aspects of indigenous law. Earlier attention to these customs and less to the imported structures of law may well have eased the transition from a life of self-sufficiency in the villages to the pressing internationalism of the twentieth century.

There are many intellectual challenges in dealing with law and custom, and there are also a great number of practical challenges which range from matters of interpersonal law to resource management and resource exploitation law.

Professors Faberon and Rouland trace the classical French view of human rights in its relationship to indigenous people and minorities and documents the change in French

3 Murray Chapman on the *Mabo* case; John Ah Kit on the Jawoyn of the Northern Territory of Australia; David Baragwanath on the Treaty of Waitangi; and Henri Okole on custom and mining rights in Papua New Guinea (the Panguna Mine).

4 Pages 19-49 and 297-302 respectively.

5 The High Commissioner in New Caledonia Alain Christnacht at first sought to discourage the organisers from proceeding with this conference because of his view of the lack of interest of the subject. Despite that view he did, nevertheless, support the colloquium and the result is telling proof of the role of the university within society, and confirms the existence and place of the French University of the Pacific in this region. See pages 7-9, opening statement of the High Commissioner.

6 For some discussion of translation problems see p.190.

thinking in this matter to the present flexible stance.<sup>7</sup> It is interesting to note that the classical French position is similar to the basic position of the New Zealand government in the relationship to Maori rights and the operation of Maori customary law.<sup>8</sup> Professor Rouland explores the theme and indicates that the reality is different from the rhetoric.<sup>9</sup> He further predicts that the rhetoric will change, and the signs everywhere are that the important question is not whether government attitudes<sup>10</sup> will change in respect to the limitation of rights to individuals (as distinct from groups) but when that will happen. The progress on the Universal Declaration of the Rights of Indigenous Peoples is highly pertinent to this political evolution.

Rouland begins his paper with the epigraph<sup>11</sup> —

7 See page 20 note 3 "The French nation ... admits no distinction based on ethnic characteristics, and consequently rejects any idea of minority" (Letter from the French Permanent Mission to the Director of the Human Rights Division of the United Nations, 16 September 1976); "In conformity with its constitutional structure, France has found it necessary to state as often as is necessary, that there are no legally recognised minorities within its territory ... only individuals are the subject of rights and duties .. and it is therefore necessary to reject any reference to the collective rights of minority groups" (Report of the French Minister of Foreign Affairs, 1991). "The principle of the indivisibility of the Republic, combined with the principle of equality, demand the unity (or oneness) of the French people and itself prevents any differentiation between citizens who make up the same nation" (Note 7).

The more flexible developments are discussed on page 38 in footnote 64 and on page 44 and following in particular. At page 38 footnote 64 it is noted in particular that: "In 1992, the General Assembly of the United Nations adopted *without vote* resolution 47/26, in which it is noted "... the decision to create a Melanesian cultural centre in order to preserve the indigenous culture of New Caledonia" (the same words "indigenous culture" are found in resolution 48/50 of 1993).

8 Eg *Mana Tangata* (Te Puni Kokiri, Wellington, 1994) 7: "There is no doubt in its [the NZ Government] mind that indigenous peoples have the right to exist as a distinct community with their own cultural identity, that their relationship with the land is special and must be taken into account by those who arrived after them, and that they must be involved in determining their own economic and social destiny.

...

Another general principle on which the Government has based its views is that the new Declaration must be in harmony with the existing United Nations human rights instruments. Because the draft Declaration develops rights of people considered as belonging to separate cultures, there is a danger that these collective rights could be interpreted as overriding the rights enjoyed as individuals by members of indigenous groups. The Government wants to be sure all existing human rights are safeguarded, by ensuring that the Declaration makes it clear indigenous people continue to enjoy all the protection under international law conferred by the United Nations Charter and existing human rights instruments. The Government does not want existing human rights standards to be undermined in any way."

9 The text (pp 19-49) also provides ample footnote references to the richness of current French studies in this area.

10 Eg of France or New Zealand.

11 Page 19 J. Bodiri, *La République*, V-1 (1577): "L'un des plus grands et peut-être le principal fondement des Républiques est d'accommoder l'Etat au naturel des citoyens, et les édits et ordonnances à la nature des lieux, des

A prime and perhaps the most important foundation of republics is to adapt the state to the nature of the citizens, and the edicts and laws to the nature of the places, people and the time ... which requires also that the state of the republic must vary with the variety of places, following the example of the good architect who adapts the building to the place where it is to be erected.

The later observation<sup>12</sup> that the ascendancy of law over custom moves in step with the centralisation and specialisation of political power, is a feature of colonial rule which appears to have been well appreciated in the heyday of colonialism. At the present time, the importance of this fact is perhaps only just being reassessed by states and, for instance, by New Zealand<sup>13</sup> as it contemplates the moves of Tokelau towards self-determination under the aegis of the United Nations in an era sympathetic to the rights of indigenous peoples. Several new states in the region, and the Melanesian states in particular, recognised this ascendancy factor in their constitutions<sup>14</sup>, but many of those states have themselves, after independence, shown a preference for centralisation and specialisation to the detriment of the development of custom within the legal system. Comparisons may also be made with the Cook Islands and French Polynesia where the House of Arikis and the Council for the Archipelagos have respectively been weak or non-functional.<sup>15</sup>

There is, despite the positivist statements to the contrary, much custom in operation in every modern state. In some countries, custom has been overridden by the State law and operates, if at all, in a subordinate and unofficial role. In others, as in New Caledonia and Wallis and Futuna, the laws of the indigenous peoples do have status.<sup>16</sup>

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personnes et du temps [...] qui fait aussi qu'on doit diversifier l'Etat de la République à la diversité des lieux, à l'exemple du bon architecte qui accommode son bâtiment à la matière qu'il trouve sur place."

- 12 Page 26. "En fait, l'histoire et l'anthropologie du droit paraissent prouver que l'ascension de la loi dans la hiérarchie normative va de pair avec la centralisation et la spécialisation du pouvoir politique."
- 13 See the statements on legal development in the *Report of the Administrator of Tokelau for the year ended 30 June 1993* (Wellington, 1994), and also in the same Report for the year ended 30 June 1994 (Wellington, 1995).
- 14 Section 54 of the Constitution of Solomon Islands; Part VIA of the Constitution of Papua New Guinea; ss82-83 Constitution of Vanuatu.
- 15 See sections 8-11B of the Constitution of the Cook Islands and art 89 bis Statut du Territoire de la Polynesie Française (Loi n 84-820 of 6 September 1984).
- 16 The Solomon Islands Constitution provides for custom as a source of law. See ss75-76 and Schedule 3 s3. The role of custom is frequently discussed. One example is *K v T and K U* [1985] SILR 49. In this case the reason the judge gave for not following custom was that a precedent case had applied the English statutory provision that the welfare of the children is paramount. However, after admitting that the children would be equally looked after in either home, the judge ignored custom and gave custody to the mother. He also stated that custom must be proved beyond the balance of probabilities and by an independent and impartial expert. Reference may be made also to the many cases in New Zealand courts where customary law perceptions are considered eg *Re Adoption of A* [1992] NZFLR 422.

Professor Agniel reports specifically on the personal law of the indigenous inhabitants of New Caledonia and Wallis and Futuna. There are potentially 86,000 people in New Caledonia and 14,000 in Wallis and Futuna<sup>17</sup> who have special civil status, which means that customary law could apply in respect of, for instance, their marriages, births, deaths, and adoptions. There are many interesting court cases on the matter and these are explored by Agniel in the context of interpersonal conflict of law situations.

The discussion of the operation of the constitution and laws in the Territory of Wallis and Futuna provides much of comparative interest for students of Pacific affairs, in particular in the operation and interrelationship of the three kingdoms of this territory, the ways its customs are protected, and the constitutional protection for its religion.<sup>18</sup>

From the 1840's in Wallis and Futuna there was, as a result of missionary influence, a written code of laws which dealt, inter alia, with the reservation of the land to the indigenous people, the nemo index rule, and principle of the rule of law.<sup>19</sup>

The French territories of the Western Pacific deal with the problem of customary law and its enforcement by the use of lay assessors at the first instance level. These assessors are elected by their communities for a term and are unsalaried.<sup>20</sup> Wallis and Futuna are interesting not only because of the use of lay judges from the community, but also in the traditional dispute resolution procedures which are reported on. The use of traditional dispute resolution procedures for individuals is one thing; the commentary about inter-kingdom disputes raises different questions and provides the base for further comparative study.

Judge de Gouttes speaks of the judicial dilemma in respect of custom in New Caledonia. He also notes that the development of individual rights within a community depends on the development of the perception of the individual as the subject and controller of personal and economic rights. This potentially puts the spotlight on article 33<sup>21</sup> of the draft Universal

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17 See pages 52-94, 132-158, 175-189.

18 Wallis and Futuna. Loi No. 61-814 of 29 July 1961, Article 3.

19 The Bataillon Code p176. Eg "If a chief makes a law in his village it is not valid. If he first asks the government and they accept it the law is valid. It is forbidden for the judge, whether chief or government official, to judge his son, daughter, wife, brother, sister-in-law, or either of his parents. The Law of the Uvean government states that everybody who lives in Uvea is subject to the Law of Uvea: the Whites, the Chinese, and all others from different countries who live in Uvea. They are all equally subject to the law of Uvea.

20 Page 184. They do however receive an expense allowance from the State.

21 "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards."

Declaration of the Rights of Indigenous Peoples and the likely tension between indigenous group rights and existing international human rights.

De Gouttes reports that victims of crimes have usually been the first to use state law, as distinct from their customary rights, and that those resorting to the courts have been especially the victims of sexual attacks.<sup>22</sup>

Saura, and Calinaud and Domingo-Neti in their chapters deal with the very different operation of the French legal system in French Polynesia. Interesting observations are also made about judicial attitudes: Is it just that some judges apply the law exactly as they would in Dunkirk, and that others apply the law in a manner adjusted to the needs of the local people?<sup>23</sup> This useful study supplements the historical accounts available elsewhere in English.<sup>24</sup>

The chapter on the Australian case of *Mabo*<sup>25</sup> is presented by Murray Chapman of the Aboriginal Commission for Traditional Land and the Environment. That Australian material is supplemented by a commentary by John Ah Kit of the Jawoyn Association on the Jawoyn of the Northern Territory and the process they followed for cultural protection and the lessons that may be of value to other indigenous communities. The paper by David Baragwanath<sup>26</sup> gives a summary of the position in New Zealand as it relates to the Treaty of Waitangi. The Henry Okole paper on Papua New Guinea deals specifically with matters relating to Bougainville and mining law.

This is a book to read, it is also a book to go back to as an educational resource and as stimulus to thought on the complex issues of the day. It has a great advantage over many other books on the topic — it is a book of the region. It is an important contribution to the literature on the subject of law and custom, and presents in an accessible French much data not available elsewhere. It is a text which deserves to be available also in English. The book is worthy of a place in all libraries in the region.

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22 Here again there are interesting parallels with the New Zealand experience, the cases discussing customary law (other than Maori custom) have most often involved physical violence of one form or another. Eg *R v Talataina* (1991) 7 CRNZ 360, *Tugaga v Police* (HC - Chch, AV 225/89, 14/12/89), *R v Semisi* (1990) 6 CRNZ 360.

23 Page 166.

24 Eg the articles by Yves-Louis Sage on courts in Tahiti 1842-1945 in 18 VUWLR 367 and 19 VUWLR 295, and by B Gille in *Essays on French Law in the Pacific* (VUWLR, Wellington, 1993).

25 *Mabo and Others v Queensland (No 2)* (1992) 107 ALR 1; 175 CLR 1.

26 Then QC, David Baragwanath has since been appointed as a temporary Judge of the High Court of New Zealand.