



PACIFIC JUDICIAL DEVELOPMENT PROGRAMME

PJDP Phase 2: CUSTOMARY DISPUTE RESOLUTION RESEARCH PROJECT

Final Report to the Regional PJDP Meetings in Samoa in March 2012

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ABSTRACT - The interaction between formal justice systems and customary systems significantly influences justice outcomes for many people in the Pacific. This report examines that interaction. It concludes that judiciaries should not necessarily engage with customary systems as an end in itself. Instead, they should seek opportunities to engage with customary systems in order to improve access to justice for communities. To do this, the report details a strategy for courts to build their capacity to identify and respond to the justice needs of their communities. Given the influence of customary systems, in many instances addressing community justice needs will require working in partnership with customary systems.

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ABBREVIATIONS AND ACRONYMS

FSM	-	Federated States of Micronesia
NGO	-	Non-Government Organisation
PIC	-	Pacific Island Countries
PJDP	-	Pacific Judicial Development Programme
PNG	-	Papua New Guinea
TRC	-	Traditional Rights Court



EXECUTIVE SUMMARY

1. INTRODUCTION

The aim of this report is to provide judiciaries in the region with options for improving access to justice through strengthening the interface between formal and customary justice systems. To do this the report has examined the operation of customary systems and their relationships with judiciaries in the Pacific from an access to justice perspective.

The engagement of judiciaries with customary law has been a re-occurring issue at Pacific Judicial Development Conferences. At the 3rd Conference in 1977, for example, the Chair of the PNG Law Reform Commission stated:¹

The dispute settlement mechanisms which promoted harmony, group justice, compromise, concern for the succeeding generations, compassion, mercy, forgiveness and popular participation were replaced with narrow legalism based on professional ethics, sectarianism, the police and the court room conflict.

Judiciaries and customary dispute resolution systems are constantly interacting. The nature of the interaction affects outcomes. In some instances it can provide positive results for communities. In other instances, the impacts can be negative. Often the outcome will depend on the capacity of individuals to navigate their way through different justice systems. Acknowledging that the interface exists opens space for judiciaries to proactively identify areas for improvement to provide better services for communities.

The report consists of five parts. After an introduction, section 2 examines the operations of customary systems. Section 3 uses examples to describe the on-going relationship between custom and the work of the judiciaries. Section 4 considers areas where people may have difficulties getting justice outcomes from either system. Finally, section 5 provides some conclusions and recommends an approach that focuses on identifying the justice needs of communities and engaging with customary systems to address those needs.

Some of the issues outlined in this report have traditionally been beyond the scope of judicial engagement. Responsibilities may lie with other formal justice sector institutions or some judiciaries may feel constrained in engaging with other stakeholders in risk of compromising their independence. The approach recommended in the report recognises this. It will be up to individual judiciaries to determine the extent to which they can and should engage. The report argues, however, that the role of the judiciaries is fundamental for at least two important reasons. First, courts establish the framework in which other actors, both formal and customary, can act. Second, concrete acts improving service delivery of courts builds community demand on other justice sector actors as well.

1.1 KEY FINDINGS

The main findings of this report can be summarised as follows:

- i. **The most effective way to engage customary systems is through identifying opportunities to partner in addressing community needs.** Identifying concrete activities that respond to community needs and creating partnerships to implement targeted activities will build trust in the broader justice system. This approach focuses on access to justice 'through' engagement with customary systems.

¹ See Van Dyke, J "The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific", 22(2) *Journal of the Ninth Judicial Circuit Historical Society* 2009, 127 at 196. Van Dyke identified the reconciliation of customary law and Western law as one of six 'recurring themes' arising through eighteen Pacific Judicial Conferences held since 1972.



- ii. **Judiciaries should build their capacity to incorporate community needs in planning and allocation of resources.** A process of consulting with communities and key stakeholders, including customary leaders, can assist in planning and allocation of resources. Methods used will vary from country to country given the diversity in the region.
- iii. **Judiciaries should identify opportunities to pro-actively engage with customary systems to improve access to justice.** The interface between customary and formal justice systems provides openings to positively engage on targeted issues to improve access to justice. This engagement builds confidence and understanding in the relationship.
- iv. **PJDP is well-placed to support this process and strengthen learning from within the region.** Many of the judiciaries in the region face similar issues. PJDP is well placed to support cross-regional learning from experiences in addressing those issues. This would involve building the capacity of judiciaries to document lessons and PJDP support to distribute information.

Customary systems exert significant influence for many in the Pacific. However, this varies considerably between and within countries. The capacity of judiciaries to engage with customary systems also varies significantly. As a result this precludes a 'one size fits all' approach to engaging with customary systems.

In concrete terms, the report recommends building the capacity of judiciaries to assess, document and address community justice needs, including through engaging with customary systems.

In the absence of additional funding, PJDP should develop a pilot, initially in a small number of PIC's to build capacity to identify needs using tools developed for the local context. Pilot judiciaries would either use their own resources or resources under the Responsive Fund to implement an action plan to address specific needs identified. The results would be documented and disseminated to build demand from other judiciaries. Documented results may also positively influence donors. The documentation process would also be highly relevant to PJDP's support for monitoring and evaluation.

1.2 STRUCTURE OF RESEARCH FINDINGS

This document, the **Executive Summary**, is a condensed, 10-page document focused on findings for the regional level. It is the core document for PJDP Chief Justices and National Coordinators.

Following this **Executive Summary** are three case studies that provide practical lessons on specific issues related to customary systems. They are drafts that may be further developed as a first step in developing PJDP's potential role of encouraging cross-learning on engagement with customary systems and access to justice.

The **Overall Report** provides a more detailed, comprehensive analysis of findings from the extensive field research in three PJDP countries: Samoa, the Federated States of Micronesia and the Republic of the Marshall Islands.

2. RESOLVING DISPUTES THROUGH CUSTOMARY SYSTEMS

Customary systems play an influential role in dispute resolution processes for many across the region. Their structures, influence and relationships with formal systems vary significantly. This variation precludes the adoption of a 'one size fits all' approach to engaging with customary systems.

The first case study attached provides a snapshot for "Identifying entry points for engagement with Customary Structures – Lessons from three countries."



2.1 CUSTOM AND SOCIAL LEGITIMACY

There is limited statistical data that measures the extent of the role of customary systems or how the role affects communities. However, qualitative research shows that, overall, these systems maintain considerable social legitimacy. That is to say, customary systems are acknowledged by many as having authority and people have confidence in they way these systems operate.

The strengths and weaknesses of customary systems have been well documented. In general terms, they are viewed as being accessible and efficient. Communities are familiar with the structures and actors and approve of the emphasis customary systems place on maintaining social harmony. A number of constraints have been identified for customary systems. The primary complaint is that their processes are vulnerable to manipulation and as a result they discriminate against the less powerful. There can be a lack of certainty in the decision making process and decisions may be difficult to enforce or may contravene standards set by the state.

How people perceive customary systems will vary, not only between countries but also within countries. In particular, customary systems are heavily influenced by the quality of local leadership. Where local leaders are effectively and fairly representing their communities, as is often the case, they maintain social legitimacy. Across the research some respondents raised concerns about instances of abuse of power by local leaders.

2.2 LAND & SOCIAL HARMONY – ISSUES WHERE CUSTOM IS PROMINENT

The research identified two areas where customary systems were particularly influential: on land issues and in maintaining social harmony. Across both of these areas there is growing interaction between the customary systems and state institutions. The degree and nature of interaction varies significantly. For example, in the Marshall Islands, some customary landowners work together with the local police to prohibit the use of alcohol on specific land parcels. On land issues in the Marshall Islands cases involving commercial interests invariably make their way to court. In contrast, people with limited formal rights over their land, in urban areas a significant proportion of the population, never file disputes in court and, instead, have the matter dealt with by traditional leaders.

2.3 THE PROCESSES OF CUSTOMARY DISPUTE RESOLUTION

There is a need to develop a clearer understanding of processes utilised by customary systems in dispute resolution. Most of the focus on customary systems relates to their structures and identifying who has authority. More attention needs to be paid to how that authority is used. The limited certainty on customary processes has a significant impact on how decisions are made and presents some risks. It provides scope for more powerful community members with increased capacity to manipulate the processes.

Increased documentation and clarity about customary processes would benefit the work of courts. In a number of jurisdictions, for example, court rules require that certain cases need to be dealt with by customary actors prior to filing a case in court. However, without concrete and uniform processes it is difficult to determine what has been dealt with or not. As a result most parties make their way to court, undermining efforts to encourage use of customary systems.

The main challenge is how to encourage increased documentation. Customary leaders need to see the benefits in documenting their processes. In some countries, opportunities may exist for court administrators to partner with and support customary leaders who are already, voluntarily, are improving documentation. Court administrators could build the capacity of customary leaders to document their processes and provide tools that encourage consistency across customary systems.



2.4 THE CHANGING NATURE OF CUSTOM

Customary systems are constantly adapting to respond to changes in social norms. This change process is largely unstructured. Importantly, there is significant variation across the region on the extent to which these changes broadly serve communities or reflect the needs of a more influential minority. In some countries, there is extensive public debate on the future role of customary processes. Elsewhere, although changes may be occurring the public to influence the change is more limited.

3. THE ENGAGEMENT OF JUDICIARIES WITH CUSTOMARY SYSTEMS

The interaction between judiciaries and custom in the region is complex and constantly evolving. Engagement occurs across a broad range of issues. The consequences of the engagement are not always clear. In many instances engagement changes both custom and the processes of the formal system. The paper highlights two areas where engagement is most prominent.

3.1 RECOGNITION OF CUSTOMARY PRACTICES IN COURT DECISIONS

Customary practices heavily influence the judicial decision-making process. The constitutions of most states involved in PJDP recognise in some form the role of custom in their legal system. A number of academic articles have debated the extent to which these types of constitutional provisions have been effective.

In practice, on crucial issues such as family law, aspects of criminal law, land law and constitutional law judicial decisions are already incorporating custom. The research highlights three examples. First, across each of the three countries where research was conducted, judiciaries have developed guidelines for accommodating traditional apologies in criminal proceedings. Second, courts have also significantly amended rules relating to family law to accommodate local custom. Court recognition of customary adoptions in some countries, for example, has changed the nature of custom and also impacts on government social welfare policies. Finally, across the region courts have been challenged to balance the perceived authority of customary leaders with constitutional provisions protecting human rights.

Many of the issues facing judiciaries in engaging with custom are similar across countries. At a regional level, judiciaries can learn from the different experiences and approaches across countries on similar issues. At a national level, judiciaries should consider strategies to communicate difficult decisions, including the fundamental human rights cases, to communities. In Samoa, for example, some court staff met customary leaders following decisions to explain the implications of the decision and options in terms of complying with decisions.

3.2 HYBRID INSTITUTIONS

The report identifies two categories of courts that draw on customary systems: those dealing with land²; and local-level courts.

Land courts in the region effectively draw on the respective strengths of both formal and customary systems. In countries such as Samoa and the Marshall Islands, they enjoy legitimacy precisely because they define clear spaces for both custom and law to play important roles. Their existence does however change customary processes, including by reducing the role of traditional leaders in resolving land disputes.

A number of countries across the Pacific have local-level courts using local (including customary) leaders as the lowest level of the state court hierarchy. Governments (both the executive and judiciary) face significant

² Note that in many countries land courts also have jurisdiction over chiefly titles. See, for example, the Land and Titles Court in Samoa and the Traditional Rights Court in the Marshall Islands.



challenges in resourcing and ensuring the sustainability of these courts. In a number of locations they exist in name alone or act with limited oversight. The solution is not simple. Their establishment in the first place was a response to the limited resources available to the state. Those resource challenges have not changed and so the effectiveness of the local courts is constrained by the inability of the government to provide support or oversight.

The second case study attached looks at "Using customary actors as Local Courts – Issues for Sustainability"

4. BEYOND CUSTOM AND THE FORMAL SYSTEM – ACKNOWLEDGING GAPS IN THE INTERFACE

For some people, gaps exist in the relationship between customary systems and the formal system. Improving access to justice requires identifying those community members who may be incapable of having their grievances satisfactorily addressed and developing strategies to overcome the gaps.

It is a real challenge to measure whether or not people are capable of addressing their justice issues. If people are not capable their grievances are not reported. The first step is to test the assumptions that exist about the justice needs of communities. This involves undertaking periodic assessments. The manner in which this is done will vary from country to country depending on a range of factors. The third case study attached examines "Community Needs Assessments – What types of tools work in what Context".

These consultation processes add an important, third tier to the monitoring and evaluation work being developed under PJDP. In addition to focusing on internal court administration and perspectives of courts users, this process can build the evidence base on needs of community members more broadly.

4.1 TYPES OF CASES WHERE INACTION OCCURS

There are specific types of cases that are more likely not to be reported. The primary examples of these cases are family disputes and in particular issues such as domestic violence. These types of disputes often remain unresolved. Customary leaders see family disputes as being beyond their scope of responsibility except where they have broader impacts on social harmony. There are strong socio-cultural pressures against reporting these cases to the formal system. As a consequence victims find it challenging to have their grievances addressed.

4.2 SOCIO-ECONOMIC FACTORS RESULTING IN INACTION

There are also a range of socio-economic factors that influence the capacity of some people to report their grievances. It was apparent in the research that there are members of communities who, due to their socio-economic standing, are not sufficiently empowered to engage with the formal system and are reluctant to take on the influence of the customary system. The presence of free legal services is an important tool in addressing this but is not always sufficient.

There is a longer-term need to empower individuals to have the confidence to follow up on their grievances. These are, in part, socio-economic concerns that should be addressed by the executive branch of government. But judiciaries can also send an important message. Showing communities that courts are accessible and responsive to the needs of community members irrespective of their position in society places demand on other institutions to deliver similar services.



5. CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

The interaction that occurs between the formal justice system and customary systems plays a significant role in determining justice outcomes for people in the region. The interaction that occurs is ongoing and changes both the customary and formal justice systems. These changes are largely unstructured. They result from people seeking to use the different systems to their advantage.

Several themes emerge through the report. **First, although the interaction between customary and formal systems is largely unstructured it does provide opportunities for structured, positive engagement.** Courts and other actors can develop strategies for improving access to justice through identification of openings in the relationship between custom and the formal justice sector.

Second, for vulnerable members of communities this unstructured interaction presents risks. There are members of communities who have less capacity to engage with different systems and as a result are left at a disadvantage.

Third, processes are important. Putting in place clear and transparent processes responding to community needs can build confidence in the broader justice system. This includes improving certainty in the processes of customary systems.

5.2 RECOMMENDATIONS

Given the diverse nature and influence of customary systems across the Pacific it is not possible to adopt a 'one size fits all' approach to engaging with these systems.

The report recommends that, for courts, the most effective way to engage customary systems is through identifying opportunities to work together in addressing community needs.

A three-step process is recommended:

i. Identifying Community Needs:

Courts should undertake periodic assessments of community justice needs. These assessments can support court-planning processes. A broad range of tools are available to support courts in assessing community needs. The exact tools used will vary from jurisdiction to jurisdiction.

PJDP can support courts to build their capacity to develop these tools and undertake assessments.

ii. Implementation:

Based on the assessments, courts should identify 1-2 concrete, practical initiatives they can address within a given timeframe. These initiatives may not always require additional resources. In many instances it would focus on improving the quality of on-going processes.

As this report has highlighted, given the centrality of customary actors in community justice needs, implementation would likely include engaging with customary systems. Some principles for engaging with customary systems are identified below.

iii. Documentation and Dissemination:

Courts should define targets for these initiatives and develop tools to measure performance. Performance should be communicated to the public. Providing communities with evidence that their needs are being addressed can be a powerful tool in strengthening confidence in the justice system. The documentation



process also enables courts to periodically review progress, make modifications where required and generate learning from the process.

At a regional level, PJDP should facilitate dissemination to stimulate learning amongst judiciaries across the region on similar issues they may be faced with.

Implementation of this three-step approach would have the following benefits:

- Improve the quality of service delivery by identifying community needs and allocating resources to address those needs;
- Where courts are seen as addressing community needs, this can place pressure on other justice sector institutions. As judiciaries sit at the apex of the broader justice system their actions have considerable influence over other justice sector agencies;
- The collection of routine data on community justice needs provides a strong platform for developing policy. In addition, this data can be used to influence government and donors of the need for resources to address specific issues; and
- The documentation process supports cross-learning. Many judiciaries in the region are addressing similar issues. Courts can learn not only from the results of other initiatives in the region but also from the process.

There will clearly be some community justice needs that will be beyond the jurisdiction of the judiciaries. On the basis of the assessments, courts will be able to identify concrete needs where they are able to engage. Some of these needs will require partnerships with other stakeholders, including customary actors and these should be encouraged. Socio-political context or resource constraints may limit the ability of some courts to engage on some of these issues. The implementation plan proposed for PJDP below addresses these concerns.

An Implementation Plan for PJDP

The framework above focuses on strengthening the capacity of judiciaries in the region to plan and use resources based on identified community needs. It also will develop learning and toolkits that can be disseminated throughout other courts in the region. There will be some judiciaries who may feel constrained in their capacity to undertake such an approach. This along with the limited resource envelope within PJDP, articulates a case for incremental implementation.

It is recommended that PJDP pilot this approach in a small number of PICs. It can progressively be rolled out more broadly based on results and demand from leadership in the region.

Implementation would appear as follows:

i. *Year 1:*

One-two countries identified as pilot countries. Countries selected on basis that they have own resources to implement access to justice initiatives or are willing to use Responsive Fund for that purpose. PJDP supports the community needs assessment process. Based on that process an implementation plan is developed in partnership with judiciary to address 1-2 issues identified. PJDP also supports documentation of results and dissemination;

ii. *Year 2-3:*

Pilots on-going in pilot countries and annual consultations held with stakeholders. 5 additional PJDP countries participate in process. Toolkits developed in pilot countries adapted for new countries. Process develops to include a year-on-year database of findings from public consultations. This along with documentation of results from pilots used to support cross-learning between courts in region; Results from initial pilots enable judiciaries (with support from PJDP) to identify alternative funding sources. PJDP supports dissemination of results to bilateral and multilateral donors active in the region.



iii. *Year 4-5:*

Remaining PJDP countries participate in the process. Resource centre exists across the region that provides comparative information on needs, lessons learned from initiatives and progress against indicators. The resource centre also supports development and dissemination of 'knowledge' products.

Principles for Engaging With Customary Systems

The recommendations have focused on improving access to justice. Efforts to engage with custom should be encouraged given the importance of customary systems in the region. However they will be dependent on the local social, economic and political context. Both the context and the extent to which judiciaries can and should engage vary significantly across the region.

The report does however identify four overarching principles for engaging with customary systems. These principles should guide the development of initiatives to implement the recommendations above.

i. *Identify Appropriate Entry Points:*

In most instances an incremental approach to engaging with customary systems will be more effective than large-scale, top-down reform efforts. This means identifying initiatives that already exist and building on strengths whilst seeking to address weaknesses.

ii. *Acknowledge the Political Nature of Customary Systems:*

Because customary systems have influence they are subject to manipulation by local elites. An awareness of this, assists in developing appropriate responses to address the justice needs of communities. In some instances it will also determine the extent to which judiciaries can and should engage.

iii. *Promote Dialogue and Build Partnerships:*

Public debate focusing on competition between customary and formal systems often drowns out ongoing and positive engagement. It is important to identify and build on constructive areas of engagement, emphasizing the complementary nature of the systems. The report has highlighted some areas where this can be achieved.

iv. *Encourage Documentation:*

Improved documentation within the customary system will ultimately strengthen the customary system by improving certainty. It will also enable greater engagement with other systems as it builds the evidence base of the strengths and weaknesses of customary systems.

KEY RECOMMENDATIONS

The report outlines three strategic recommendations for discussion at the leadership meetings to take place in Samoa in March 2012.

The Chief Justices of the countries participating in the PJDP agree to build capacity of judiciaries in the region to address access to justice issues, including through engagement with customary systems. To this end the Chief Justices agree:

- i. to build the capacity of the judiciaries in the region to assess and document community needs and use this information to support judicial planning and allocation of resources to address access to justice issues;



- ii. to implement recommendation 1 through a PJDP pilot in a small number of PICs to be determined by the Chief Justices. In the pilot:
 - a community needs assessment process will be undertaken;
 - an implementation plan will be designed and implemented to address 1-2 access to justice issues identified through the assessment process;
 - results will be documented and disseminated internally and to other PICs.

- iii. To the guiding principles for engaging with customary systems outlined above and seek ways to adopt these principles, including through the recommendations identified in the body of the report.



CASE STUDY 1: IDENTIFYING ENTRY POINTS FOR ENGAGEMENT WITH CUSTOMARY SYSTEMS – LESSONS FROM THREE COUNTRIES

Outlined below is a summary of factors that would need to be taken into consideration in determining how to engage with customary systems across the three countries where research was conducted for this report.

	Structure	Opportunities	Constraints
Samoa	Well-defined village level structure. Authority provided for under legislation. Uniform system across the country.	Clear actors & structures to engage with at village level; Links already exist with government (through pulenuu); Routine Village Council meetings can facilitate engagement. Legislative provision for judicial oversight.	Some actors may resist engagement & documentation; Risk of politicisation of village leaders; Representation of women slowly increasing; Reducing authority in urban areas.
Yap (FSM)	Well-defined hierarchical structure across state. Structure influences executive system, including authority under constitution. Customary actors on paper act as municipal court	Clear structure with easily identifiable points of engagement; Hierarchical nature provides appeal process; Strong social authority and mandated to act in judicial capacity	Customary system already exerts significant authority; Issues on checks & representation of vulnerable communities; Geographic constraints in engaging with remote islands
Chuuk (FSM)	Family/clan structures, some have broken down; Stronger on outer islands; Authority based on individuals rather than systems	Demand from communities for social order; Respect for some customary & religious leaders. Some examples of effective social mobilisation (eg: women's groups restricting alcohol sales)	Weakening structures makes it difficult to identify leaders. Reduced respect for authority. Geographic constraints for outer islands. Limited resources to engage social systems.
Kosrae (FSM)	Customary system no longer strong. Family groups and church organizations exert considerable social authority	Limited through customary system. Some scope to engage church organizations. Clear structures and involved in maintaining social harmony	Reluctance from church leaders to use structures for state purposes. Church can be traditional on some social issues (eg: gender and child protection).
Pohnpei (FSM)	Customary structures exist but becoming ceremonial. High chiefs have authority. Less at village level. Structures still strong on remote islands.	Structures exist and communities know high traditional chiefs. Municipal government replacing role of village level chiefs.	Limited day-to-day role except on outer islands. Can play important role in ceremonial & reconciliatory processes.
Marshall Islands	Strong, hierarchical system. Identifiable leadership (chief and land owner positions) with significant authority. Structure clear (and mandated through legislation) but processes open to interpretation.	Significant authority & leadership. Some leadership (including at land owner level) open to reform and introducing own initiatives. Interpretation of custom could support marginalized (eg: provision of social goods)	Significant authority & ambiguity in process challenges accountability; Lack of incentives to reform for some can undermine efforts; Challenges of urbanisation & engaging remote islands.



CASE STUDY 2: USING CUSTOMARY ACTORS AS LOCAL COURTS – ISSUES FOR SUSTAINABILITY

This case study looks at the sustainability of local level courts based on examples from the Municipal Courts in Yap and Pohnpei and Village Councils in Samoa.

Municipal Courts, Yap

The Municipal Courts in Yap are provided for by the State Code. The chief traditional leader is the presiding judge. It appears that some courts operate and others are less active. The courts do not receive financial support from the government, although some judges have attended training organized by the judiciary. It is difficult to distinguish between cases that are resolved with the traditional leader sitting as a Municipal Court judge or as a traditional leader.

Municipal Courts, Pohnpei

The Municipal Courts in Pohnpei are also established under State Codes but are funded by municipal governments. The courts recruit full-time salaried judges. Although lay judges, many appear to have backgrounds as court clerks or prosecutors. The courts are kept busy dealing primarily with small civil claims and misdemeanours under local government ordinances. Judges have drafted court rules and formed an association. Although not customary leaders, the position of judges holds some standing in their municipality.

Village Councils, Samoa

The Village Councils in Samoa are not formally part of the judiciary. They are, however, provided with authority under legislation and their decisions are appealable to the Land and Titles Court. The monthly meetings of village councils appear to deal with numerous issues, including some of a quasi-judicial nature. Council members are not paid but have significant authority in the village. They also have the capacity to collect funds from the village for council activities. There are formal linkages to the government through a village representative.

The snapshots above highlight two key factors in determining sustainability of local level courts. First, there needs to be demand for their work. That is, they need to have a sufficient number of cases that requires the court to meet on a routine basis. This institutionalizes their role, making decisions those of the institution rather than of local leaders who happen to hold judicial positions. It may be the case that some jurisdictions simply do not have sufficient need for the services.

Second, there is some need for institutional links with the state. In some cases, this means being resourced by the state. In Pohnpei, municipal governments view the courts as a necessary public service. They also receive revenue from the courts in the form of fines levied. In Samoa, the state doesn't provide direct funding to the village council but provides a clearly defined space for the authority of village councils. In Yap, municipal courts and customary leaders occupy similar responsibilities and in fact are the same actors. The lack of clarity affects the operations of the municipal courts.



CASE STUDY 3: COMMUNITY NEEDS ASSESSMENTS – WHAT TYPES OF TOOLS WORK IN WHAT CONTEXT

There are a number of ways that community justice needs can be measured. The actual tools used will depend on court resources and local factors such as size of the population, geographic access and capacity of organizations to conduct surveys. This case study provides examples of options available.

Statistical Surveys

This involves issuing standardised surveys to a broad cross section of the population. Representative surveys (where the sample is sufficient to represent the population) have covered some justice issues in the Solomon Islands and in PNG. The process is expensive and requires trained surveyors. In some countries modules on specific justice issues have been added to broader socio-economic surveys. For example, the Demographic and Health Survey in the Marshall Islands includes information on violence against women.

Non-representative Surveys

These are survey tools that provide courts with a snapshot of information. The client user surveys in Palau that have been referred to in the Monitoring & Evaluation work are an example of this. They are not representative but provide the court with information on which they can draw conclusions. A community justice needs survey was piloted in the Marshall Islands and provided insights on perceptions of justice actors, legal awareness and actual dispute experiences. The benefit with these tools is that they can be tailored to address local issues. The data is not, however, easily compared between countries or across years.

Focus Group Discussions/Stakeholder Consultations

In minimalist approach is to hold annual consultations with different stakeholder groups. This would, for example, include consultations with customary and religious leaders and representatives from groups including women, youth, people with disabilities, ethnic minorities. The discussions would focus on policy level issues relating to challenges faced by segments of the community. This approach is easier to facilitate and does not require significant resources. It has some limitations though. First, open discussion is not always easy in these types of forum. It is also crucial to point out that organizations may speak on behalf of groups but they do not always accurately express true needs of groups. As a result it is often useful to ask these organizations to facilitate access to their members.

In many jurisdictions, a combination of stakeholder consultations and targeted surveys would be appropriate to create an accurate perception of community justice needs.



FINAL REPORT

"People think they can beat the system. They may be able to beat the courts but they can never beat the customary system. That system has been developed over such a long time. There is no way an individual can beat custom."

Respondent, Federated States of Micronesia

1. INTRODUCTION

For communities across the Pacific, interaction between the state and other social governance systems is a fact of life. Across a broad range of issues both formal justice sector institutions and other social governance actors provide services to address the justice needs of their communities. The ability of people to access justice and the quality of justice they receive is more often than not determined by their capacity to navigate between these different actors.

For judiciaries in the region, opportunities exist to improve access to justice, including for the most marginalized, by strengthening the interface with customary systems. This requires developing an understanding of the scope of engagement between the formal justice system and social governance systems. Such an understanding will also include acknowledging that there may be areas where deficiencies exist in both systems, limiting the quality of justice services for communities.

This report aims to provide judiciaries with a practical approach to improving access to justice for communities through strengthening the interface with other social governance systems. In many countries in the Pacific this primarily means customary dispute resolution mechanisms. Neither judiciaries nor customary dispute resolution mechanisms operate in a vacuum. These systems are constantly interacting and adapting. The nature of this interaction affects outcomes. In some areas it can provide positive results for communities. In other areas, the impacts can be negative. Acknowledging that the interface exists opens space for the judiciaries to pro-actively identify areas where the interface can be strengthened resulting in better services for their constituents.

The report is based on fieldwork conducted in three jurisdictions in the Pacific (Samoa, the Federated States of Micronesia and the Republic of Marshall Islands) in 2011. The report is structured as follows:

- In this introduction a theory for examining justice issues in the Pacific is put forward. The section also includes some comments on definitions and information on methodology used in the preparation of this report;
- **Section Two** examines the operation of customary justice systems in the Pacific context. The section focuses on the dispute resolution processes of customary systems as these are of most relevance to the work of judiciaries in the region;
- **Section Three** focuses on areas where the judicial system engages with customary systems. The section highlights two areas, the acknowledgement of customary practises in judicial decision-making and the presence of hybrid institutions, where acknowledgement of customary practices has been particularly prevalent;
- **Section Four** examines areas where gaps exist in the interface. The section identifies several areas where communities have difficulties accessing services from either formal justice sector institutions or the customary system;
- **Section Five** draws together the preceding sections and identifies recurring themes on the relationship between judiciaries and customary system. It then provides recommendations to support the work of the judiciary in improving service delivery to communities.



1.1 FRAMING THE ISSUE

1.1.1 BACKGROUND

The engagement of judiciaries with customary law has been a re-occurring issue at Pacific Judicial Development Conferences since their inception in 1972.³ In a paper to the 3rd Conference in 1977, the chair of the Papua New Guinea Law Reform Commission, Bernard Mulu Narokobi stated:

The dispute settlement mechanisms which promoted harmony, group justice, compromise, concern for the succeeding generations, compassion, mercy, forgiveness and popular participation were replaced with narrow legalism based on professional ethics, sectarianism, the police and the court room conflict.⁴

At the 12th Conference in 1997, the then Chief Justice of the Federated States of Micronesia, ended his presentation on the subject by stating:

We are not done with the tasks before us. Our job is continual and we must always keep in mind those two goals of promotion of economic endeavours, and protection of customs and tradition, and balance our decisions so that one does not become eclipsed by the other.⁵

The Pacific Judicial Development Programme, which works with judiciaries in 14 countries in the region, is supporting judiciaries in addressing this issue through research on customary dispute resolution mechanisms. The objective of this research is:

To promote access to justice by enabling the region's judicial leadership to assess, plan and direct an integrated process of judicial development for both customary and formal justice service providers.⁶

This report outlines the findings of the research.

The objective is broad. At the global level, the relationship between formal justice systems and customary systems is attracting significant debate. The United Nations-supported Commission on Legal Empowerment of the Poor, for example, released a report in 2008 arguing that:

Four billion people around the world are robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law.⁷

The report argued that the lack of access to formal justice systems for a significant proportion of the world's population makes them reliant on informal mechanisms, impeding their economic development.

Terminology such as 'formal' and 'informal', 'state' and 'non-state' and 'modern' and 'traditional' in the academic literature has led to a portrayal of systems that operate in parallel universes and, at times, in competition. This categorisation has also influenced other debates at the global level that are also of relevance to the Pacific. For example, the categorisation feeds into another debate between the compatibility of custom and human rights that is the subject of much literature. In another example, increased attention to the 'non-state' has led some to argue that the international development community should progressively

³ See Van Dyke, J, "The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific", 22(2) *Journal of the Ninth Judicial Circuit Historical Society* 2009, 127 at 145. Van Dyke identifies the reconciliation of customary law and Western law as one of six 'recurring themes' arising through eighteen Pacific Judicial Conferences held since 1972. The other themes are (1) independence of the judiciary; (2) the education of judges; (3) the sharing of materials; (4) Pacific island regional court of appeals; and (5) expatriate versus local judges.

⁴ *Id* at 196.

⁵ Amaraich, A, "Adapting a Western System of Jurisprudence to an Emerging Island Nation: The Micronesian Experience", Proceedings of the 12th South Pacific Judicial Conference, Sydney, 1997, p93 at 107.

⁶ PJDP Implementation Plan.

⁷ Commission on Legal Empowerment of the Poor, **Making the Law Work for Everyone**, New York, 2008, p 1.



focus assistance on these systems in response to the limited evidence of impact assistance to the formal sector has had.⁸

These debates have some significance to many countries in the Pacific. Despite the diversity of cultures across and within countries involved in PJDP, all have experienced the challenges of melding traditional social structures with imposed institutions of a state.⁹ Examples from the Pacific re-emphasize how the distinctions between traditional social structures and institutions of the state are not always clear.

This report sidesteps these theoretical and contentious debates. The report shows that a number of actors play important roles in delivering justice outcomes in most, if not all, the countries where PJDP is active. These actors include the purely formal justice sector institutions. They also include actors who have no association with the state.¹⁰ In between lie a range of other actors who are vested with a varying degree of state and social legitimacy. These include customary leaders, religious leaders, local village chiefs, civil society organizations and even judges from lower level courts.

There is constant interaction between these different systems. The nature of the interaction will, more often than not, heavily influence outcomes for people in the Pacific. As a result, the report articulates a position that the systems mentioned above all form integral parts of an overall justice system. They do not operate in isolation. Opportunities exist for improving the quality and delivery of justice services in the Pacific, through targeting the interaction between different systems, strengthening aspects that work well and addressing limitations.

1.1.2 AN APPROACH

If we investigate how disputes are settled in fact, then a realistic understanding of the role of custom in each country can be made. Examining how disputes are settled and the role of custom in settling those disputes is at the heart of developing a contextual approach to law in the Pacific.¹¹

This report focuses on issues of access to justice in the Pacific. It does so from a particular perspective. The report identifies customary systems as playing a significant role in providing justice services for many across the Pacific. As a result, efforts by formal justice sector actors to improve access to justice will be significantly strengthened by acknowledging the role of customary systems and seeking to engage with the services they provide.

Acknowledging the role of customary systems will, by necessity, also lead to an identification of areas where deficiencies may exist, either in the formal system, amongst customary actors or across both. Overcoming these deficiencies can be obvious starting points for initiatives aiming to improve access to justice.

The approach adopted in this report draws on a growing body of literature that grounds justice sector initiatives in the social context in which they operate. It is best laid out by Sen, who states that efforts to improve justice systems should be:

Based first on assessments of social realisations, that is, on what actually happens; and second, on comparative issues of enhancements of justice (rather than trying to identify perfectly just arrangements).¹²

⁸ For a more detailed discussion refer to Cox, M, et al, "Emerging Findings from ODE Law and Justice Evaluation", Discussion Paper, AusAID ODE, August 2011.

⁹ For a comprehensive summary of the academic discussion relating defining legal pluralism and the relationship between normative systems with specific relevance to the Pacific see Forsyth, M, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu*, PhD Dissertation, ch3.

¹⁰ These may include neighbours, family friends or local leaders vested with no state authority.

¹¹ *Supra* n2 at 45



The report seeks to lay out some key themes relating to the operation of customary systems. Following this, the report examines how judiciaries in the region engage with customary systems. Finally, the report identifies areas where people may be missing out in support from both the customary systems and formal justice sector institutions. Based on this assessment, the report provides some options for the judiciary in improving access to justice through strengthened engagement with customary systems.

Several points need to be clarified at the outset. First, both judiciaries and customary systems both provide a range of justice and broader governance services. As Dr Hammergren's report points out, these services are both ends in themselves and means to broader societal goals.¹³

This report focuses primarily on access to justice issues and does so by looking at dispute resolution processes. There are several reasons for doing this. First, the report's primary audience are judiciaries in the Pacific region. A much broader range of state and social governance actors are involved in delivering justice services. However, when focusing on the relationship between courts and customary actors the most significant interaction is centred on dispute resolution processes. This includes the role of judiciaries in delineating the jurisdiction for different actors and providing oversight of dispute resolution processes. The report therefore focuses on justice issues of most direct relevance to the work of judiciaries. Second, dispute resolution is a critical element of the work of judiciaries. Improving the performance of this function is an important end in itself.

Although the focus is on the interaction between the judiciary and customary systems in dispute resolution processes there may be lessons from this focus affecting justice issues more broadly. Across the Pacific there are a range of justice issues that are beyond the jurisdiction of courts or social governance systems for that matter. Implementing and documenting processes to improve the quality of dispute resolution may be of relevance more broadly.

The second point to note is that, in relation to formal justice sector agencies, the report is primarily focused on the work of the courts. Again, this is the audience for the PJDP program. Other institutions, including prosecutors and police play a critical role. However, it is beyond the scope of this report to provide a comprehensive analysis of service delivery across these other justice sector agencies. In addition, in examining the work of judiciaries in the region, the report focuses specifically on engagement of courts with customary practices, including the identification of potential gaps in that engagement.

Finally, the report does not seek to undertake a detailed mapping of customary systems, their norms and processes in the Pacific or even the countries where research was conducted. Such work already exists in many of the jurisdictions.¹⁴ As has been highlighted above, the report is more focused on how an understanding of customary systems can support efforts to improve access to justice.

¹² The proposed approach draws on the work of Sen, A in *The Idea of Justice*, Allen Lane, 2009. Sen argues that improvements to justice systems should be based "first, on assessments of social realisations, that is, on what actually happens; and second, on comparative issues of enhancements of justice (rather than trying to identify perfectly just arrangements)" at p410.

¹³ Hammergren, L, "Institutionalization of PJDP and Related Issues: A Second Cut on the Themes", paper prepared for PJDP, January, 2012 at p9-10.

¹⁴ For the countries covered by this research see, for example: Samoa: Vaai, A, "The Rule of Law and the Faamatai: Legal Pluralism in Western Samoa", thesis dissertation, 1995; Huffer and So'o (ed), **Governance in Samoa**, Asia Pacific Press, 2000; FSM: Ushijima, I, "Political Structures and Formation of Communication Channels on Yap Island: A Case Study of the Fanif District", in **Cultural Uniformity and Diversity in Micronesia**, Senri Ethnological Series, 1987; the different publications under *Micronesian Counselor* (available at www.micsem.org); Marshall Islands: Kabua, A, **Customary Titles and Inherent Rights – A General Guideline in Brief**, 1993 report; Tobin, J, **Land Tenure in the Marshall Islands**, Pacific Science Board, 1956.



1.1.3 TERMINOLOGY

Defining many of the terms covered in this report can be a heavily contested area. The report aims to steer away from some of these debates. The main reason for this is that, in practise, in many areas of the Pacific the actors and institutions this report will refer to draw their legitimacy from a range of sources simultaneously, be they customary, judicial, executive, religious or other sources. The box below provides an example of the authority of the *village fono* in Samoa.

Box 1. The Village Council in Samoa – defining its status

A *Village Fono* (or Village Council) exists in every village in Samoa. The *Fono* is open to all the *matai* (titleholders) of the village, that is, representatives from each of the families. The *Fono* itself and the procedures followed are based on custom. However, its existence and authority is provided for in the *Village Fono Act* (1990). This includes the right to appeal decisions to the Land and Titles Court. Each *Village Fono* also nominates a government representative (the *pule'nuu*). This position, created under the *Internal Affairs Act* (1995), both represents the village to the government and acts as the government's representative in the village.

In June 2011, the author was invited to attend the monthly *Village Fono* meeting in A, a village on the island of Upolu. On this occasion, 13 issues were decided on over a two-hour meeting. The decision-making covered administrative, judicial, customary and religious facets of village life. Issues included updates on government-sponsored roadwork, water supply and village tidiness programs; punishments for pigs not being locked up, disturbances created by operation of a pool table in a village store; an application to review the banishment decision imposed on a family; efforts to increase participation in church services; and the need to introduce sanctions to force village members to participate in women and youth committees.

Just penalize them. They can't live in the village and not participate in village life. They are from my family. I know who you are talking about and I support you so just penalize them. If they still don't respond bring it back to the *Fono*. Then they will respond.

Respondent, Samoa

The authority of the chiefs on the *Fono* are considerable and their sources of legitimacy are varied and defy easy categorization. They, themselves, do not differentiate between judicial, executive, administrative or customary decisions.

The report has already used the term **social governance** on a number of occasions. This refers to the broad range of systems, processes and institutions that exist beyond formal state agencies and play a role in regulating social behaviour and resolving disputes. Customary systems are influential social governance systems in the Pacific. Other systems, such as religious organizations, also exist and play important roles. The report focuses predominantly on customary systems.

'Customary systems' in the context of this report refers to:

norms and practices that are repeated by members of a particular group for such an extent of time that they consider them to be mandatory,.... customary systems are as much social or political orders as they are legal orders."¹⁵

The report chooses to use the term 'customary systems' because the concept of custom is one that is still readily identifiable for many if not most people in the Pacific. Others have used different terms to cover similar concepts. For example, the New Zealand Law Commission Report decided on using 'community justice bodies'. This term also has its advantages because it potentially captures a broader definition of institutions than those that are purely 'customary'. However, unlike customary systems, it is limited in that it

¹⁵ Harper, Erica, 2011a. *Customary Justice: From Program Design to Impact Evaluation*, Rome: IDLO. Available at: <http://www.idlo.int/Publications/CustomaryJustice1.pdf> at 14.



is a term that would probably require explanation for most people in the Pacific. The terms 'non-state', 'informal' and 'traditional' systems are also common. These terms tend to oversimplify the complexity of the systems in question.

1.2 METHODOLOGY

This report is based on research conducted from May – December 2011. In accordance with the PJDP design, this involved field research in three countries covered by PJDP: Samoa, the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (the Marshall Islands). Approximately 6 weeks was spent in each country.

Across the three countries over 190 interviews were conducted. Respondents can broadly be categorised as follows:

Formal Justice Sector	Other Justice Sector	Other Government	Civil Society
Judicial Officers; Court Staff; Prosecutors/Attorney Generals Office; Police	Legal aid/Public Defenders; Bar Association; Private Attorneys; Ombudsman/Law Reform Commission	Community Development; Land Departments; Council of Chiefs; Local Government;	Representatives from Chiefs; NGOs: women, youth & community; Religious representatives; Community members; Academics; Donor organizations.

The research in each country was adapted to respond to particular requests of the judiciaries in each country and to suit the local context. Some of the adaptations include:

- **Samoa:** field visits were conducted to two villages, one on Upolu island and the other on Savai'i. At the request of the judiciary, some time was spent examining court-facilitated mediation approaches;
- **FSM:** at the request of the judiciary some time (1-2 weeks) was spent in each of the four states of FSM (Yap, Chuuk, Kosrae and Pohnpei);
- **Marshall Islands:** research focused predominantly on the use of customary systems in an urbanised context. A small legal empowerment survey was developed to facilitate discussions with community members.

A review of relevant literature was conducted for each country. This included reviewing legislation, relevant cases, academic articles and reports on development issues. In each country the literature review also included media monitoring of the local print media.¹⁶

A country-specific report was prepared and presented to the judiciary in each country where research was conducted. These reports also became background papers in preparation for the regional report. They are attached as **Annex 1** (Samoa); **Annex 2** (the Federated States of Micronesia); and **Annex 3** (the Marshall Islands).

¹⁶ Media monitoring involves creating a database of newspaper articles that address any of the following issues: custom & public policy; religion & public policy; land; criminal law; family law; commercial law; other relevant. The newspapers identified were *The Samoa Observer*, *The Kaselehlie Press* (FSM), and *Marshall Islands Journal*. As the later two are weekly newspapers the database covers all 2011. The database for the *Samoa Observer*, a daily newspaper, covers the two months of field research.



A literature review was also undertaken as background for this regional report. A bibliography for regional and country-specific reading material can be found at **Annex 4**.

The initial framework for this report was presented to a meeting of Chief Justices from the region and a meeting of PJDP National Coordinators. Both of those meetings were held in October 2011. Feedback from those meetings guided the development of this report.

2. RESOLVING DISPUTES THROUGH CUSTOMARY SYSTEMS

Across most of the countries in the Pacific, customary systems play an important role in regulating social order. This section documents the influence of custom and its diversity. The section examines four key areas before providing a summation.

First, the section examines issues relation to the social legitimacy of customary systems in the Pacific. This includes outlining the strengths and weaknesses of these systems. Although difficult to verify with empirical data, across the countries where research was conducted customary systems have significant legitimacy. The legitimacy varies considerably though, and is often dependent on the capacity of individual leaders.

Second, the section identifies two primary areas where custom continues to play a significant role. These are on issues relating to land and the maintenance of social order. It is important to understand the increasing interaction that is occurring between customary actors and formal justice sector institutions on these issues.

Third, the lack of clarity on processes of customary systems is a serious challenge for communities. The ambiguity that exists in relation to processes makes the systems heavily dependent on the quality of customary leaders.

Finally, the constantly evolving nature of custom is discussed. This evolution is largely unplanned and comes from a variety of sources. The degree to which there is broad participation in the changes that are occurring varies significantly across the region.

The recurring theme throughout this section is that much of the discourse that exists around customary systems focuses on who has authority within those systems. Just as important is the issue of how authority is used as this affects outcomes for communities. Focusing the issue more broadly on how authority is used will also increase participation of a broader range of voices on the question of who has authority.

Prior to progressing it is important to re-emphasize the obvious. Custom is not uniform across the Pacific. Significant variation on the importance people place on custom exists between countries in the Pacific and within countries.

2.1 CUSTOM AND SOCIAL LEGITIMACY

Where effective customary decision-making remains intact, there is little likelihood that issues within the jurisdiction of the customary decision-makers will find their way to the courts.¹⁷

Quantifiable data is not readily available on the degree of social legitimacy that exists in customary systems. From the literature that does exist, overall, it would appear that communities maintain considerable confidence in these systems but that perceptions vary significantly both across and within countries.

¹⁷ King, E, "Law and Custom in the Federated States of Micronesia", paper presented to ASOA Conference, February 2011, at 10.



At a theoretical level, the strengths and limitations of customary systems have been well documented. The box below provides a brief summary.¹⁸

Box 2: The Strengths and Weaknesses of Custom Dispute Resolution Systems

Customary systems are often preferred for a range of reasons. Commonly identified reasons are:

- *Accessibility*: they are located in communities and operate in the local language. They are also often cheaper than using the formal system;
- *Familiarity*: the systems and the actors involved are familiar to community members. The proceedings lack the formality of court proceedings. Processes and punishments are culturally appropriate.
- *Timeliness*: parties do not need to wait a long period of time for hearings to resolve disputes;
- *Non-Adversarial*: the main focus is on restoring social harmony. The bodies try to seek resolutions that all parties can agree to and that represent the collective interests of the community. Processes are often participatory.
- *Avoiding the State*: using the customary system allows parties to avoid using the state system, a system that may be foreign or inaccessible to communities.
- Customary systems do face some constraints. Constraints that are frequently raised are:
 - *Inequitable Processes*: customary systems are vulnerable to manipulation by those with power. Parties may feel excluded from the process. The strength of familiarity can be seen as a weakness where conflicts of interest are present;
 - *Discriminatory*: the rights of particular groups may be ignored. The needs of victims can be compromised. The voices of women and minority groups are at risk of not being heard;
 - *Uncertainty*: decisions may lack predictability. They may also contravene standards, including human rights standards, accepted by the state;
 - *Enforcement*: some bodies find it difficult to enforce decisions. Standards of punishments can differ considerably from standards perceived as appropriate by state institutions;
 - *Localised*: customary systems can be constrained because of their localized nature. Effective dispute resolution between villages or with outside interests can be challenging.

Each system across the region will probably reflect some of the strengths mentioned above and some of the weaknesses. Strengths and weaknesses vary depending both on the quality of leadership and the perception of who is asked. As Harper notes:

The evaluation of whether or not customary justice is broadly disadvantageous is not a black and white issue, but is context-specific and relative, and requires a nuanced and case-by-case analysis. Criticisms need to be understood as rooted to some extent in individual perceptions of justice, and inseparable from the broader social and economic context.¹⁹

Empirical data is difficult to come across on the role of customary systems in the region. Limited data was available from the three countries where research was conducted. A review of literature more broadly across the region identifies only one dataset that provides information on the role of traditional leaders. **The People's Survey 2010** in the Solomon Islands touches on the subject in dealing with dispute resolution trajectories. It finds that 'big men' or 'chiefs' were the most common source of help for respondents who actually experienced disputes (44%), well above the next most common (police at 27%).²⁰

¹⁸ The box draws on both Supra 16, (Harper) at 22-26 and supra 2, (NZLC) at 29-30. Both these documents are consistent with broader literature documenting customary systems.

¹⁹ Id (Harper) at 26.

²⁰ ANU Enterprise, **Government of the Solomon Islands-RAMSI People's Survey, 2010**, April 2011, at p136. A similar dispute resolution survey is currently being conducted in PNG. The Government of PNG's 2010 household income and expenditure survey included a dispute resolution module. See



Qualitative research emphasizes the confidence communities continue to vest in customary leaders. This was notable across the three countries where research was conducted for this study. The country background papers examine the degree of legitimacy that exists in customary systems for each of those countries.

It is important to understand that the way people perceive customary systems depends significantly on the quality of the individuals who are local leaders representing these systems. Where local leaders are effectively and fairly representing their communities, they maintain social legitimacy.

The *alap* and *iroj* here still have a lot of power. They have more legitimacy than the government or the court... But the problem is what if an *alap* is doing something wrong. Who can say anything against that? No one will say anything in court against that. I know the son of an *alap* is doing the wrong thing. I know this and everyone knows this. What can we do? We stay silent. People don't know what to do.

Respondent, the Marshall Islands

One of the key challenges for customary leaders is to ensure that communities continue to have confidence in their leadership. As these systems are often dependent on individuals, there are instances where local leaders attempt to benefit from their position in customary systems or do not have the capacity to effectively implement their responsibilities. Across the research a number of respondents raised their concerns about these types of instances.

2.2 ISSUES WHERE CUSTOM IS PROMINENT

There are two broad areas where customary systems maintain the most prominence, land and social order. This section identifies some key issues relating to both.

2.2.1 LAND

Land touches on everything. At the end of the day the traditional owners can determine everything because of their ownership of land.

Respondents, Marshall Islands

The influence of custom is strongly linked to the continued existence of traditional land systems. There has often been a perception that custom remained more relevant in rural communities and was losing influence in urban areas. The research indicates however that rather than an urban-rural divide, the on-going influence of custom is more closely connected to the type of land system in use. Where communal or customary land systems remain prevalent customary leaders continue to exert influence over other aspects of social order. The box below shows an example where custom continues to play a strong role, even in an urbanised environment. Where the land systems have moved towards individual ownership, customary structures become less influential.

Box 3. Land and custom in downtown Majuro²¹

In 2005, a comprehensive social and economic household survey was conducted in one of the villages close to the centre of downtown Majuro. Jenrok village is comprised of five *weto* (or land parcels) owned by four separate *alap* (traditional landowners). These land parcels house 215 households or approximately 1850 people at an average of 9.5% people per house.

<<http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/PNGWebsiteDownload.pdf>> accessed at 5 February, 2012.

²¹ Information in this box comes from Chutaro, B, "Social and Economic Baseline Survey: Jenrok Village, Majuro", IWP-Pacific Technical Report 15, 2005.



The governance of Jenrok lies mainly with the traditional landowners. They have greater influence on how the community is governed than the MALGOV (Majuro Local Government) and the national government. Although there is an elected councilman for Jenrok, his influence is checked by the landowners.

According to the survey, 80% of the people living in Jenrok do not have rights to the land they live on. They live at the invitation of the traditional landowners. This is a reciprocal arrangement. The traditional chief is also a chief in Mili and Arno Atolls, where most of the families in Jenrok come from. Allowing them to live in Jenrok strengthens the linkages. For the inhabitants, they are entitled to live rent-free. Ad hoc contributions are made to the *alap*. As the quote below highlights, the inhabitants live subject to the authority and decision of the *alap*.

The land I live on in Majuro I lease. There are many people who live here who don't lease the land. They just ask the *alap* and the *alap* let's them use the land. But in those instances they are subject to what the *alap* says. If the *alap* wants something they need to do it. It makes them vulnerable.

Respondent, Marshall Islands

Those cases that affect people living on land that isn't their land, they never come to court. They are resolved by the traditional leaders. I don't know how they are resolved but they get settled.... People come to us and ask for our support in these cases. There is nothing we can say except they should see the traditional owners.

Respondent, Marshall Islands

It is also important to note that there is a growing interaction between courts and customary systems on land issues. In many states an increasing number of land disputes involving commercial interests are making their way to courts. However, for poorer or less powerful community members without the means or the capacity to take matters to court, customary systems are prominent and the decisions of titled elders, on land usage and land disputes are likely to be determinative. In the Marshall Islands, for example, where a significant proportion of the population in urban areas lives on land to which they have limited formal rights, disputes relating to these arrangements never make it to court but, instead, are dealt with by traditional leaders.

2.2.2 MAINTENANCE OF SOCIAL ORDER

The maintenance of social order is the second broad area where customary systems continue to exert significant influence. Customary leaders become involved in disputes that impact on social harmony at the local level. These are disputes that go beyond the family network or family disputes that disturb the broader community.

"This is part of the Ministry of Police and Prisons crime prevention strategy that targets non-traditional villages. 'Instead of focusing on villages that have strong Alii and Faipule leadership that assist in such matters, the project is aimed at villages that have non-existent village councils.'"²²

In many countries the state recognizes the significant contribution customary leaders play in maintaining social order. In Samoa, for example, the *Village Fono Act* provides village councils with authority to regulate on matters relating to village hygiene and economic development in accordance with custom. It also provides the village council with the power to punish village members who fail to follow instructions of the village council. A number of respondents in Samoa mentioned that the small police force was only possible because of the authority of village councils in maintaining social order. As the quote above from the Assistant Police Commissioner identifies, this allows police to focus on other areas where customary systems have less influence.

If someone ends up in hospital, they will report it to the police... But apart from that usually the chief is in the position to provide advice. The chief helps determine if the police should get involved.

²² "Neighbourhood Watch", *The Samoan Observer*, Thursday, 26 May, 2011



Respondent, FSM

In a number of countries there is semi-structured engagement between customary leaders and local law enforcement to work together on maintaining social harmony. This engagement seeks to draw on the respective strengths of each system. The box below provides one example from the Marshall Islands.

Box 4: Regulating Alcohol Use on Land Parcels in Majuro

Across a number of land parcels in Majuro *alap* prohibit the use of alcohol. In many instances the *alap* will file notice of this decision with the local government. This then becomes a local government ordinance. Where the ordinance is violated communities call the local police instead of disturbing the *alap*. As one respondent noted:

We call the police because they can resolve the problem quickly. The *alap* can't help because he is too old.

Respondent, Marshall Islands

The police are able to charge people for violating a local government ordinance and these cases appear in the District Court.

The most recent case was with that house next door. The son was drunk and making trouble so I told them they had to leave. Actually it wasn't a one off thing. I gave the family two warnings. The third time they had to pack their bags and go.

Respondent, Marshall Islands

In addition to this, the *alap* can still impose the ultimate punishment, demanding the family move off the land. Given the severity of this form of punishment, the threat itself is normally sufficient. Most *alap* noted they were rarely required to enforce it.

2.3 THE PROCESSES (AND IMPACTS) OF CUSTOMARY DISPUTE RESOLUTION

In custom, the victim and offender really don't play a role. They subject themselves to the wishes of the head of the family. The main role is the negotiation process between the respective heads of the families, facilitated by chiefs. The chiefs play the key role in determining whether they can resolve cases or they should be handled by more senior chiefs or enter the formal system.

Respondent, FSM

Much of the information that exists on customary systems focuses on their structures. Numerous country-level studies exist focusing on the structures and genealogies of custom and the relationships between different actors. These are important, as they place individuals and families within a broader communal network.

Of equal importance is information on how these dispute resolution systems operate and what type of outcomes they provide for communities. This type of information on the processes involved in customary systems is not readily available. Across the research, respondents would refer to 'consensus-based decisions', 'reconciliation between families', 'mediation' and so on. When asked how that is achieved and the steps involved there is less clarity.

Box 5: Decision-making Processes for Stealing Betel Nut

C, a 16 year-old male in a village in the FSM, was accused of stealing betel nut. It wasn't the first time he had been in trouble in the village. According to one village elder, a previous incident should have been settled through a village meeting but C's age meant that a meeting was held between his family and the family of another clan instead. On this most recent instance it was alleged that C's mother knew about C's actions as she helped him sell the betel nut.



A village meeting was held amongst the men. C's father didn't attend. Apparently this was common, enabling the family to avoid shame. The village leaders immediately wanted to exile all of C's family from the village. As the main village chief was not present no final decision was made.

We had a second meeting. Because I attended a court training I thought differently....I told the village elders they should only expel the mother and son,... The majority finally agreed with me but some still disagree. They believe that this is not how it was done in custom. In custom exiling one person meant exiling the whole family.

Respondent, FSM

At a second meeting, the main chief argued only C and his mother should be expelled. After a long discussion this decision held. C and his mother returned to his mother's village. C's father continues to live in the village.

Divergent views exist relating to the decision. Those in favor claim the father didn't know. They also argued that expelling males decreased manpower in the village and resulted in families losing land, an extreme punishment. Others felt the decision undermined the centrality of the family in custom. In addition, they felt the decision went against women. Chiefs, it was argued, could not recognize men as heads of households and then absolve them of their responsibility.

The example above highlights the key reason why a focus on the processes of custom is important. The norms of custom are broad and often open to interpretation. Customary decisions can have a significant impact on the lives of individuals. Decisions can differ substantially depending on the process. In the case above had a second village meeting not been held the decision would have been substantively different. The presence of a representative from the family of the accused may also have changed the decision.

There are some people who benefit from the ambiguity that is created when codification doesn't exist.

Respondent, Marshall Islands

A lack of certainty about the process creates ambiguity. This benefits customary leaders. It allows them the flexibility to shape decisions to the needs of their communities. However, it also presents significant risks. It provides more powerful community members with increased capacity to manipulate the process and influence customary leaders. This in turn increases the vulnerability of community members with weaker bargaining positions. The presence of clearer guidelines on customary processes can act as a check and balance against these potential abuses of power.

Increased documentation and clarity about customary processes would also benefit the work of courts. In a number of jurisdictions, for example, court rules require that certain cases need to be dealt with in the customary system prior to filing a case in court. However, without concrete and uniform processes it is difficult to determine what has been dealt with or not. As a result most parties are capable of filing cases in court, undermining mechanisms to encourage use of customary systems.

The main challenge is how to encourage increased documentation. Externally-driven efforts often meet with resistance from customary leaders who benefit from the ambiguity. In a number of jurisdictions courts are already becoming repositories of custom. In some countries, opportunities may exist for court administrators to partner with and support customary leaders who are already, voluntarily, seeking to improve documentation. Court administrators could build the capacity of customary leaders to document their processes and provide tools that encourage consistency across leaders. This may build demand for other leaders to participate in the process.



Key Finding:

There is insufficient documentation on the processes relating to customary dispute resolution.

Recommendation:

That PICs seek ways to work with customary systems to improve documentation and certainty relating to customary processes. Options include:

- where local level courts incorporate customary leaders encourage improved capacity to document results and processes;
- in some countries where customary leaders are voluntarily strengthening documentation court administrators could support this process.

PJDP may want to consider developing toolkits for judiciaries to support documentation of local level courts and customary systems.

2.4 THE CHANGING NATURE OF CUSTOM

On the surface there will be changes. People will wear western shirts and eat steaks. But we have internalized the (*customary*) system in such a way that it is not going to change or go away.

Respondent, Marshall Islands

As the quote above indicates, many believe the on-going influence of customary systems is a given in many countries across the region. Although the presence of the systems may be permanent, their interpretation and application is constantly changing and adapting. By acknowledging the changing nature of custom and understanding the manner in which these changes occur it may be possible to engage pro-actively to influence positive changes and mitigate against changes with negative social impacts.

The research highlights a number of ways through which changes can occur. In most cases the changes are not necessarily planned. First, individuals with vested interests are frequently trying to influence processes to maintain the status quo, increase their authority over customary systems or decrease the role of customary systems. Second, as will be highlighted in the section below, change can occur through new social norms that lead to increased community demand for particular types of actions. A third way change has occurred in the region is through the introduction of government initiatives. These can range from smaller, executive acts such as the use of traditional leaders as Community Justice Supervisors in Samoa, to legislative reforms such as the introduction of a Land Registration Authority in the Marshall Islands and constitutional convention processes experienced in the FSM, where the role of customary leaders is frequently on the agenda.

How the public engages with these change processes varies significantly across the region. A mapping of media stories in relation to custom in research countries highlights the different levels of participation that exist in public discussions on the role of custom in societies in the Pacific. As the box below indicates the Marshall Islands and Samoa show two extremes. In the former, the role of custom receives limited debate in public media whereas in Samoa it was a deeply contested issue.²³

²³ For information on the newspaper mapping see the Methodology Section above, supra 16. It should be noted that there are a variety of reasons why a newspaper may or may not follow customary issues. These include demand from readers, a newspaper's style and government or self-censorship. It should also be noted that the period of research in Samoa coincided with election petitions where the issue of gift-giving as a customary or political act was hotly contested, including through court cases. The use of media-monitoring to comment on social processes is an evolving area. For a discussion on its strengths and weaknesses see Sharpe and Wall, "Media Mapping: Understanding Communications Environment in Aceh", *Indonesia Social Development Series 9*, April 2007.



Box 6: Public Engagement on the Role of Custom

Tracking newspaper articles through *The Marshall Islands Journal* and *The Samoan Observer* provides an interesting contrast of public engagement on issues of custom. In both papers, judicial processes receive prominent coverage.

All of the benefits come to the elites so it benefits them not to have these discussions. Customary issues are discussed in public but only when it benefits the interests of those in power.

Respondent, Marshall Islands

In the Marshall Islands, over the course of 2011 the research identified 215 articles relating to legal issues. Well over half of these (125) were related to criminal cases before the court. There is, however, much less discussion in the media on the role of custom. Tracking identified only four articles relating to custom. These articles primarily recounted customary stories rather than debating policy issues.

In comparison, tracking in Samoa identified a lively debate on the relationship between custom and the rule of law. Over a third of the 31 articles recorded dealt with issues surrounding the relationship between custom and a modern state.²⁴ This included front-page coverage. Titles like "Change the Law or Samoan Custom" and "Culture vs Law" given an indication of the hotly contested nature of the debate in the Samoan press.

Recognising this variety is important as it influences both the identification of issues where courts can engage in the dialogue and how that engagement is undertaken. In some countries this may involve encouraging increased public dialogue on issues involving custom or participation from different groups whereas elsewhere it may involve developing a consensus between divergent views.

Key Finding:

Perceptions of the relationship between custom and the law are heavily influenced by public debate and the media.

Recommendations:

Courts consider developing appropriate strategies to explain to the public through mass media court decisions and implications of those decisions.

2.5 SUMMARY

No one person is the head of everything. There is always a check. The system says "If I am not conducting myself as I should be conducting myself, somebody else has authority over me."

Respondent, FSM

The section has highlighted that customary systems play a key role across issues that are central to the livelihoods of people in the Pacific. The exact nature of this role varies significantly not only between countries but also within countries. It is, to a large extent, dependent on the social legitimacy people place in customary leaders and, as a result, the quality of local leaders available.

Viewing customary systems as part of an approach to improving access to justice requires going beyond focusing purely on the structure of the systems. Just as importantly, this means examining how processes in decision-making impact on the lives of communities under the influence of customary systems. Anecdotally, it would appear that processes are subject to a significant degree of fluidity and discretion on behalf of

²⁴ As noted in the methodology, the tracking for Samoa covered a six-week period of a daily newspaper. In the Marshall Islands, analysis was done over newspapers from January-November 2011 of a newspaper published weekly.



customary leaders. Empirical data is not readily available on the issue. From an access to justice perspective, this places people at risk of being victims as customary systems are manipulated.

In this context, as others have noted, customary systems should not be romanticized or treated any differently to other forms of governance systems.²⁵ Maintaining effective accountability mechanisms is central to the continued legitimacy of customary systems. Many systems have developed, over time, internal checks and balances to manage the risk of abuse of power.²⁶ As the next section highlights, in addition the increased interaction with formal justice systems is also capable of providing oversight.

Engaging with customary systems therefore requires balancing providing customary leaders with the space to utilize authority with adequate checks to ensure such authority is being utilized in an appropriate manner. The section has highlighted how customary systems are constantly adapting to changing social conditions. In this context, the balance between authority and appropriate oversight will also be fluid and requires constant dialogue and negotiation to ensure the needs of communities are best met.

Key Finding:

There is significant variety in how customary systems operate and how this influences justice outcomes

Recommendations:

At a national level courts can undertake an institutional analysis of customary systems in their jurisdiction that may identify entry points for engaging with these systems. This does not necessarily need to be a public or formal exercise. It could be undertaken as part of strategic planning processes of courts.

²⁵ See for example, Clark, S *et al* "Reducing Injustice? A Grounded Approach to Strengthening Hybrid Justice Systems: Lessons from Indonesia" in Ubink (ed), **Customary Justice: Perspectives on Legal Empowerment** IDLO, Rome, 2011 p.67 at 72.

²⁶ In many villages in Samoa, for example, three high chief positions exist on the village council to ensure no one individual had a monopoly on power. A complex system of structured relations within and between villages in Yap provides appeal mechanisms for communities.



3. THE ENGAGEMENT OF JUDICIARIES WITH CUSTOMARY SYSTEMS

The introduction of the courts has diminished the role of traditional leaders. It has usurped their power. Before their decisions had to be respected. People couldn't go anywhere else so they respected the decisions of the elders. Now they have another option. If they don't like the decisions in villages they take the matter to court.

Respondent, FSM

The interaction between judiciaries and custom in the region is complex, multifaceted and constantly evolving. Engagement occurs across a broad range of issues. In some instances it is planned or initiatives are introduced in a top-down manner. Elsewhere it evolves in response to demand in the form of cases filed by community members or local elites. The consequences of the engagement are not always clear. In many instances engagement changes both the custom and the processes of the formal system. This is all part of an on-going, unstructured dialogue. Acknowledgement of the existence of this process can open space to influence the dialogue in a way that benefits communities more broadly.

This section identifies two broad areas where the interface is most evident. First, customary practices have been acknowledged by courts across the Pacific and now form part of jurisprudence. Most areas of the law in the Pacific have been influenced by customary practices in some way. This section will examine how this has occurred using three of the more prominent areas, customary adoptions, traditional apologies, and human rights issues as examples. Second, in numerous states, judicial bodies have been created that draw significantly on customary systems. This has been done primarily to deal with land and title issues or as local courts dealing with minor cases as the lowest level of the judicial hierarchy. Documenting these areas of engagement can provide some important lessons for improving the interface in the future. Some key lessons are identified at the end of the section.

3.1 RECOGNITION OF CUSTOMARY PRACTICES IN COURT DECISIONS

The judges are all Micronesians and, whatever their legal training, they remain Pacific islanders to their core. The cases they handle involve real people in their communities with personal backgrounds and family histories that are well known to the judges. The presiding judges are more likely to ponder the impact of their decisions on the people who stand before them in court than they are to contemplate the abstract standard of justice that ideally imbues the thinking of Westerners.²⁷

Across the Pacific courts have sought to acknowledge custom in judicial processes. Given that custom is a reflection of social norms and practises it is not surprising that customary practices are recognized by courts. The section highlights how this has occurred drawing on three substantive areas as examples. Judicial acceptance of customary practises can also change the nature and importance of the custom.

The constitutions of most states involved in PJDP recognize in some form the role of custom in their legal system.²⁸ This has been done in a number of ways. The first, and, most prescriptive, approach is where the Constitution requires courts to take custom into consideration in judicial decision-making. The Federated States of Micronesia, provides an example of this through its 'judicial guidance' clauses:

Court decisions shall be consistent with this Constitution, Micronesian customs and traditions and the social and geographical configuration of Micronesia. In rendering a decision, the court must consult and apply sources of the Federated States of Micronesia.²⁹

²⁷ Hezel, F, "Settling Disputes", *Micronesian Counsellor*, 39, Jan 2002.

²⁸ Vaai, AAVS, "The Rule of Law and the Faamatai: Legal Pluralism in Western Samoa", unpublished PhD Dissertation, ANU, 1995 provides a list outlining constitutional recognition of custom at p29.

²⁹ Article 11 of the FSM Constitution.



Another approach, used by PNG and Vanuatu for example, is to provide for custom to the extent that it is not inconsistent with other laws.³⁰ A more limited recognition includes providing a role for custom in the preamble of the Constitution, as is done in Samoa.³¹

Some academic debate exists on the extent to which constitutional provisions have supported the incorporation of custom into judicial decision-making. The box below provides a snapshot of this debate.

Box 7: Custom in Pacific Jurisprudence – Recognition short of Adoption?

Custom's role in a modern state was the centre of detailed, and often heated, discussions in constitutional drafting processes across the Pacific.³² In this respect it was a process of engagement that was planned and subject to extensive consultation, at least amongst the political elite.

There is now literature on the extent to which courts in the region have implemented constitutional provisions requiring an acknowledgement of custom. The consensus is generally that courts have taken a light-handed approach, recognizing custom but not going so far as to adopt it. King, CJ, the former Chief Justice of the FSM, has written extensively on the subject both through court decisions and in academic journals:

Lest we be misunderstood, and interpreted as holding that this Court, ... must affirm and support custom in all of its manifestations, we are compelled to point out that the judicial guidance clause requires that our decisions be consistent not only with customs and traditions but with the balance of the Constitution as well.³³

This view is similar to the conclusion reached by Forsyth in reviewing Pacific jurisprudence. She proposes that the approach taken can be characterized as "'weak' legal pluralism' with states recognizing customary norms but not institutions."³⁴

Others have argued that the result has been largely symbolic, and that the incorporation has occurred to the extent that the customary norms can be fitted with Western principles.³⁵

The following analysis shows that the influence of custom has, in practise, been more extensive on judicial proceedings. Practises that are consistent with social behaviour in Pacific countries have progressively become accepted in judicial decisions. In some instances, judicial decisions have also challenged custom to change or called into question the social norms custom purports to uphold. In these instances, judiciaries play an important role in outlining the 'shadow of the law', that is to say, defining parameters within which customary actors can exercise their authority.

³⁰ See, for example, *Constitution of Papua New Guinea*, sch2.1.1 that provides for the application of custom through an underlying law to the extent that it is not 'inconsistent with a Constitutional Law or statute or repugnant to general principles of humanity.' The approach in Vanuatu is also similar. Art 47(1) of the *Constitution of Vanuatu*, for example, provides "a court shall determine the matter according to substantial justice and, whenever possible, in conformity with custom."

³¹ *Constitution of Samoa* (1960). The preamble states: "Samoa is an independent State based on Christian principles and Samoan custom and tradition." The definition of 'law' in the Constitution also covers custom to the extent that it is recognised by an Act of Parliament or the judgment of a Court.

³² Tamanaha, B, for example, provides a detailed examination of the Constitutional Conventions for the FSM and the state of Yap. See, for example, "The Role of Custom and Traditional Leaders under the Yap Constitution" *University of Hawai'i Law Review* 10 (1988) at 81.

³³ King, E, "Custom and Constitutionalism in the Federated States of Micronesia", *Asian Pacific Law and Policy Journal* 3(2) (2002), 249 at 275.

³⁴ Forsyth, M, *A Bird that Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu*, PhD, Canberra, 2007 at 94.

³⁵ See, for example, Sharma, A, "Customary Law and Received Law in the Federated States of Micronesia" *Journal of South Pacific Law*, 10(1), 2006.



3.1.1 TRADITIONAL APOLOGIES AND CRIMINAL LAW

I can assure you that if a person tenders an apology to a village that will be a much more difficult act than admitting guilt in Court. So no one will do an apology just for the sake of the court case.

Respondent, FSM

Traditional apologies are just 'made up stuff'. They are being used to get people out of responsibility.

Respondent, FSM

A clear example of customary practices influencing judicial decision-making is in the role provided for traditional apologies in many Pacific Island countries. Traditional apologies are part of the custom in many countries in the Pacific and play an important role in maintaining social relations. Formal justice sector institutions have acknowledged the existence of traditional apologies and are attempting to find a place for them in their judicial processes. On the other hand in some countries, customary leaders still exert social authority over what enters the formal system.³⁶

From a legal perspective, judiciaries have generally adopted a form of middle ground in their recognition of traditional apologies. It has become common practice for courts to ignore the presence of a traditional apology in determining guilt but to take the apology into consideration as mitigation in the sentencing process. In some states in the FSM, for example, court staff document the details of any traditional apology as a key aspect of pre-sentencing reports.

Courts may determine how traditional apologies should be applied in the eyes of the law but from a social perspective, the relationship is more complex. The traditional apology is often accompanied by considerable pressure from families and local leaders for victims to withdraw their claims or not give evidence. As the box below indicates, government policies have attempted to play a role in changing this but changing social behavior can take time.

Box 8. Traditional Apologies and 'No Drop' Policies

In some states, prosecutors talk about a 'no drop' policy for traditional apologies. For offences of a serious nature, the prosecution will not drop the case even if requested by the victim.

When victims are related, victims will ask the government to dismiss the case... It is up to the prosecutors as to whether to accept their request or not. This occurs before the court process.

Respondent, FSM

The policy seeks to protect the victims and increase confidence in the criminal justice system. Implementation can, however, be a challenge.

We recently dealt with a sexual abuse case. The defendant was the cousin of the victim's mother. The victim's father didn't want to accept the apology but the victim wouldn't give evidence. So we sought a plea agreement. The father was still uncomfortable with the deal but ultimately we discovered the mother's family pressured him to accept the case. The grandfather wouldn't allow the case to be brought to court.

Respondent, FSM

A victim's refusal to testify can seriously compromise the prosecution's case. In many instances, the prosecutor will seek to negotiate a plea bargain as a result.

³⁶ Note, the role of traditional apologies in Pacific cultures and in legal systems across the Pacific is something that has been well documented. See, for example, Dinnen, S (ed), **A Kind of Mending: Restorative Justice in the Pacific Islands**, ANU E-Press, Canberra, 2010; and Tuala Warren, L, "A Study in *Ifoga*: Samoa's answer to Dispute Healing", *Te Matahauariki Series* No.4, 2002.



In this sense the role of traditional apologies is an example of the broad grey area that exists between purely legalistic versus customary approaches. This grey area is subject to negotiation. The box above shows how social pressure influences the role of the prosecution.

We advise our clients to organize an apology but we don't get involved in the negotiations. This would bring our position into conflict as it would involve dealing with the victim.

Respondent, FSM

Lawyers also encourage the negotiation of traditional apologies on the grounds that they can support the case of their clients. This has led some judges to more closely scrutinize the nature of the apology, to ascertain the extent of remorse shown by the defendant. Some have argued this has also strengthened the hand of customary leaders as traditional apologies become an accepted part of the formal criminal justice system. It should be noted, as the quote at the beginning of this section highlighted, throughout the Pacific, many still feel that undertaking a traditional apology is more significant than any court proceedings.

This negotiable space has two broader influences on justice systems. First, the presence of traditional apologies affects other parts of the judicial process. There are strongly divergent views on whether parties should be allowed to bring civil proceedings where traditional apologies already exist.³⁷ Some claim it undermines the traditional apology whereas others believe the option is required to ensure traditional apologies are not manipulated by the parties involved.

Second, it is possible, that judicial developments can lead to the creation of custom. In the case of traditional apologies, for example, in the Marshall Islands despite what appears to be a limited history of these practices they are starting to be introduced in court motions. There is some possibility, that lawyers in the Marshall Islands are using the concept in their pleadings despite limited evidence of traditional apologies forming a part of Marshallese custom. This may be coming about through interaction in regional networks or regional education facilities such as the University of South Pacific.³⁸

3.1.2 CUSTOMARY ADOPTIONS CHANGING JUDICIAL PROCESSES

Family law is another area where there has been significant acknowledgement of customary practices in law. This has occurred across the spectrum of family issues. This section uses, as an example, customary adoptions. It is a useful example because it highlights how the interface between courts and custom can be driven by unstructured, community demand. It also shows how judicial recognition can lead to a change in customary practises.

In a number of countries across the Pacific there is a long-established culture of customary adoption. They often involved the exchange of a child between members of an extended family. The practise developed as a means to strengthen social networks within small communities.³⁹ In some countries, such as the Federated States of Micronesia, the practise of customary adoptions has challenged the rules-based nature of state institutions, requiring court recognition of otherwise informal adoptions. This formalization can have

³⁷ This was evidenced by a recent negligence case involving the death of a young girl in Pohnpei who was hit by a taxi. The case was successfully pursued despite the presence of a traditional apology. Elsewhere, in the state of Yap, for example, it has been claimed that the operation of traditional apologies makes it highly unlikely that a civil action would be filed in court.

³⁸ This issue is discussed in more detail in the Marshall Islands Country Report. This is but one of what may be a range of factors as to why traditional apologies are gaining recognition.

³⁹ Customary adoptions were common in each of the three countries where research was conducted. Depending on who is asked, they serve a number of social purposes. Families who aren't able to have their own children adopt. They act as a social security mechanism for children from poorer families or for children born out of wedlock. It has also been argued that these practices strengthen land linkages amongst clans by placing one family member in the family of another.



unforeseen broader affects on social and economic processes and change the nature of custom as outlined in the box below.

Box 9. Evolution of Customary Adoptions and Judicial Recognition in FSM

In FSM, the custom of adopting children within extend families has adapted to the global environment. Previously, very few adoptions would be registered. This has changed, as travel, social security and the like require formal proof of guardianship. People are increasingly filing applications in court to register their adoptions. Court rules imply that a customary adoption has taken place, unless a party puts forward evidence to the contrary.

In the past we would pass on children just through agreeing between parents,... Now adopting parents need to formalize the adoption to allow the child access to benefits such as social security. This is an area where the two systems work together.

Respondent, FSM

As families formalized adoptions unintended consequences emerge. Some families realized their children would be able to access benefits available to the adopting family. This, in turn, led to a change in customary practices. For example, in the state of Chuuk, it was claimed there was an increase in grandparents adopting their grandchildren and formalizing the adoption through the courts. As a dependent this would make the child eligible to inherit the social security benefits of the grandparents.

To overcome this, the state government was now requiring additional proof of adoption, including evidence of financial contributions to the welfare of the child.

3.1.3 HUMAN RIGHTS – THE CHALLENGING CASES

Most, if not all, of the courts in the region have had to face challenging cases involving customary practices that come into conflict with the formal legal system. These cases, often relating to constitutional human rights guarantees, are heavily contested and attract significant public attention. They often form part of the political discourse at both the national and local level. The issues that frequently come up include freedom of religion, rights of customary leaders to banish people and the use of physical violence in customary punishments.

Often at the core of these types of cases are issues of power. Rulings by the courts are seen as limiting the authority of customary leaders. A number of respondents mentioned that by questioning the legitimacy of customary leaders in these cases the Courts were encouraging individuals to ignore customary processes. There is a concern that the judicial process will eventually erode the powers of local leaders.

The difficulty is that as soon as the state intervenes it overrules the villages and makes them powerless. Where one person decides to take a decision of the village council to court it sets an example for other people in the village, thereby making the village council powerless.

Respondent, Samoa

It is important to differentiate between two types of cases in relation to these issues. There are some instances where cases are portrayed as a conflict between two systems, but should more accurately be described as maintaining checks on the use of power in a particular system. The outcomes of customary systems are subject to the quality of leadership of those systems. In some villages, leaders may abuse the power they seek to exercise and portray this as a challenge between the formal and customary systems. There is a difference between protecting customary systems and protecting the powers of leaders within those systems. By placing checks on powers of leaders, court decisions are often protecting the longer-term legitimacy of the customary systems.

There will inevitably be some instances where there are some inherent tensions between the two systems. Court decisions that appear to curtail the power of the customary system will inevitably face resistance. These decisions also receive significant media coverage adding fuel to the public discourse. It is important to



recognize, as the box below highlights, the influence these debates at the national level have on the discourse at the local level as well.

Box 10: High Profile Cases Influencing Perception at the Local Level

A handful of cases on the relationship between custom and human rights have attracted significant attention in Samoa. These cases pit the decisions of village councils against court decisions. The more high profile cases have involved the right of village councils to prohibit new churches in villages and to use banishment as a form of punishment in contradiction to Constitutional guarantees on freedom of religion and movement respectively.

Over the last five years there has been a major difficulty between village rules and the issue of rights. Every village has its own rules. About 10 years ago, the Government, especially the courts started to use people's rights. So now the government has to look at how to change this. Many years ago, people in the community followed what the village decided.

Respondent, Samoa

The quote above was the beginning of a wide-ranging, 2-hour discussion had with a high-ranking *matai* in a village in Upolu. The rest of the discussion focused on much more mundane issues of land and livelihoods for people living in his village. At the end of the discussion we returned to the chief's opening comment. He acknowledged that neither he, nor his village, had personally faced a challenge on these issues. His concerns were built on what he had heard from other villages and what he had seen in the media. If he continued to use his authority in an appropriate manner to the benefit of all in his community, in accordance with custom, it is unlikely he would ever face such a challenge.

Tensions between the two systems are natural. Importance should be placed on the processes that operate to reduce these tensions. In many instances, as highlighted above in relation to the cases of misuse of power, the tensions can arise from misunderstandings. De-mystifying the law through identifying opportunities to encourage greater engagement between the legal system and communities, including customary leaders, can play an important role in this process. One respondent in Samoa highlighted the important role court staff could play in meeting with village leaders after the court decision and explaining the decision, the implications and the consequences of further actions.

Key Finding:

Many courts in the Pacific are dealing with similar issues in relation to incorporation of custom into judicial decisions.

Recommendation:

PJDP facilitate cross-learning on substantive issues relating to how courts incorporate customary practices into judicial decision-making and the impacts of those decisions. Possible ways to do this could include comparative briefing notes, seminars at regular PJDP meetings or virtual working groups of judges interested in similar issues.

Key Finding:

Some areas will continue to face challenges over authority between the formal and customary systems.

Recommendation:

Jurisdictions that face challenges from customary leaders who reject court decisions in contentious cases may consider developing a communications strategy to deal with these decisions in the future. In some jurisdictions, court staff have found it useful to meet with customary leaders following the decision to explain the implications of the decision and risks in failing to comply with the decision.



3.2 HYBRID INSTITUTIONS

A certain ambivalence exists among legal purists towards these community justice mechanisms because they defy easy classification. However, I have no such qualms and regard them as the first tier of Courts.⁴⁰

Across the Pacific there are a range of judicial bodies that draw significantly on customary systems. This report identifies two main categories that have a solid foundation in custom. The first are the various judicial bodies that have been created to deal with matters relating to land and titles. The second are local level courts that are formed drawing on the expertise and respect of customary leaders. For want of a better term the report refers to these categories as 'hybrid' institutions.

3.2.1 LAND AND TITLES

Land provides a clear example of states in the Pacific significantly incorporating customary practises into their judicial systems.⁴¹ Customary land is still the main form of land ownership across the Pacific.⁴² To deal with land disputes, states in the Pacific have developed both their own jurisprudence and, in many instances, special judicial bodies.

The Traditional Rights Court in the Marshall Islands provides a good example of a judicial body that has been created to draw on the strengths of both custom and the formal system.⁴³ The box below outlines how this has been achieved.

Box 11. The Traditional Rights Court in the Marshall Islands

The Traditional Rights Court (TRC) was established by the Constitution to deal with matters relating to the unique and complex customs of the Marshall Islands. Three judges are present on the Court, each represents the different levels of interest that exists in all land plots across the country⁴⁴ (the *irojj* or chiefs; the *alap* or traditional land owners; and the *dri jermal* or workers).

Disputes relating to land and titles are filed in the High Court. If the dispute involves a matter of custom claimants are required to state:

What action, if any, has been taken to obtain a determination of the plaintiff's rights through traditional Marshallese channels, and the result of those efforts, or why the plaintiff considers it useless to try to have the matter determined through those channels.⁴⁵

In theory, the rule aims to ensure matters are dealt with customarily prior to cases being filed in court. However, concern was expressed that, despite the rule, traditional leaders were not being used.

⁴⁰ Madraiwiwi, J, "The Way Forward: How the Discourse May Develop" presentation delivered to the *State-supported Community Justice Workshop*, Honiara, October 2011 <www.worldbank.org/justiceforthe poor> accessed 10 January, 2012.

⁴¹ It is not the intention of this report to provide detailed documentation on land management across the Pacific, a vastly complex area. At a regional level both AusAID and the Pacific Islands Forum have recently published reports on land based on extensive research (see AusAID, *Making Land Work*, Commonwealth of Australia, Canberra 2008; and PIFS, *Customary Land Management & Conflict Minimisation: Guiding Principles & Implementation Framework for Improving Access to Customary Land & Maintaining Social Harmony in the Pacific*, PIFS LMCM Project, Suva, 2008).

⁴² A recent report from the Pacific Islands Forum highlighted that customary land in Forum Island countries varies from a low of 50% in Kiribati to approximately 99% in the Cook Islands. *Id.*, PIFS at p37.

⁴³ Note, a similar body, the Land and Titles Court existed in Samoa and land courts were present in two of the four FSM states (Pohnpei and Kosrae).

⁴⁴ With several exceptions, all land parcels (or *weto*) in the Marshall Islands have multiple 'owners' or levels of interest in the land.

⁴⁵ Rule 1, *Special Rules of Civil Procedure*, The High Court of the Marshall Islands



The High Court refers matters relating to custom to the TRC for a decision on the custom. That decision is subsequently taken into consideration when the High Court rules on the case. Invariably, the High Court will adopt the interpretation of the TRC. In several instances, the High Court has referred matters back to the TRC to provide greater clarification or address issues the High Court felt had yet to be addressed. In this way, the High Court, comprised of legally trained judges, is able to guide the TRC in relation to matters of law whilst ensuring the TRC remains the primary interpreter of matters of custom.

A key to the legitimacy of these institutions is that they define clear spaces for both custom and law to play important roles. Formal legal procedures are reduced for parts of proceedings. Judicial officers are not legally trained. Rules relating to the introduction of evidence are often relaxed. In the case of the Land and Titles Court in Samoa, lawyers are precluded from participating in proceedings. However, in both examples, legal oversight remains. As noted above, decisions of the TRC need to be adopted by the High Court in the Marshall Islands. Appeal mechanisms exist in Samoa.

Importantly, the presence of legal oversight also strengthens the enforceability of decisions from these bodies. These institutions enjoy social legitimacy because they are capable of making enforceable decisions. As a result parties direct their disputes immediately to these judicial bodies, by-passing the authority of customary leaders.

Why did we go to court? Because their family said that the land boundary was in that location but the land boundary was not in that location... It is very difficult for the *matai* (village chiefs) to solve this problem. The village council is not involved. This is a serious problem. The Court provides the final solution. There is a saying in Samoan "*Ele Ele ole fa a sinamanga*" – "Land is the core element of our heritage".

Respondent, Samoa

This leads to the second lesson that can be taken from these hybrid institutions. Their presence changes customary processes. The discussion above has highlighted how the authority of land courts has changed the incentives for traditional leaders in relation to land disputes. Several chiefs questioned why they should burden themselves with mediating disputes for no pay when a paid alternative (the court) existed and losing parties would invariably appeal to the courts in any case.

Many of the cases involve the *iroij* (chiefs) signing consent for rightful owners to more than one person for the same piece of land. We are so closely knit here that there is social pressure to sign documents. They know everyone so they can't say no. It is easier for them to sign something and then let it end up in court later.

Respondent, Marshall Islands

A more negative view is that it has led some traditional leaders to misuse their position. The presence of courts has resulted in some leaders no longer accepting responsibility for their decisions, acting in ways that may further reduce confidence in the customary system.

Key Finding:

Several courts are concerned that the presence of land courts has reduced the incentives for customary leaders to play a role in the dispute resolution process, despite court initiatives to encourage this role.

Recommendation:

Identify courts in the region that have established referral mechanisms or court rules that effectively encourage customary leaders to play a role in dispute resolution prior to filing cases in court and learn from that experience.



3.2.2 LOCAL LEVEL COURTS

Local-level courts are the second category of hybrid institution developed by governments in many countries across the Pacific. In the context of this section what is referred to here are “community courts that are part of the state court hierarchy”.⁴⁶ Although there is significant variation across the Pacific in respect to these courts, a World Bank report into hybrid courts in Melanesia identifies that they have three common traits:

First, they are all presided over by laypeople and have a mandate to apply their communities’ unique customs. Second, civil and criminal jurisdiction is limited so that they hear only minor matters, typically those that are appropriate for community-based resolution. Finally, none of the courts apply formal rules of evidence; instead, a method of review and appeal ensures a degree of state judicial oversight.⁴⁷

In the countries covered by the research for this report, provisions existed for hybrid courts in the form of Municipal Courts in several states in the FSM (Pohnpei, Yap and Chuuk) and as Community Courts in the Marshall Islands. The extent to which they were operational varied significantly.⁴⁸

Governments across the region are all faced with the similar challenge of resourcing and ensuring the sustainability of these courts. Local-level courts face the same constraints that governments sought to overcome through their establishment. They were initially established to provide dispute resolution services to communities who, through geographic constraint, lived beyond the reach of state services. The government provided state authority to local-level customary mechanisms. The objective was to extend the services of the state to the local level without having to finance state institutions at the local level.

Ensuring operational local level courts requires finding the right balance between state assistance and oversight and the legitimization of local actors in responding to community dispute resolution needs. In many jurisdictions the effectiveness of local level courts is constrained by the ability of governments to provide support and oversight to these courts. The provision of support in the form of training, guidance on procedural aspects and administration and in some instances operational and infrastructure funding is required. Such assistance requires both human and capital resources that are not always available.

In the 5 years I've been a judge I've only handled 2 cases. But I've handled a number of other issues. They don't go through the municipal court. In the same time I've probably been involve in about 50 cases.

Respondent, FSM

Where state resources are not available, the distinction between local level courts and other, less official, dispute resolution mechanisms is not always clear. As the quote above shows, judges on local level courts are likely to wear several hats in their community. In some cases, such as in Yap, they are appointed to be judges on the basis of their customary position. It is not always clear in what capacity community members are approaching these leaders in seeking assistance for the resolution of their disputes.

This overlay of positions has some repercussions. Local level courts generally have a limited jurisdiction. However, if local leaders are acting in various capacities they may exceed their jurisdiction under the local level court. In other words, complainants may approach a judge believing that the judge is acting in their judicial capacity, whereas, the judge may instead be acting in his capacity as a traditional leader.

Key Finding:

It remains unclear what are the key factors that contribute to sustainable local-level courts dispensing good quality justice outcomes across the region.

⁴⁶ *Supra* n 2, (NZ Law Commission) at 148.

⁴⁷ Evans, D *et al*, “The Hybrid Courts of Melanesia: A Comparative Analysis of Village Courts of Papua New Guinea, Island Courts of Vanuatu and Local Courts of Solomon Islands”, World Bank, 2010 at p.3.

⁴⁸ For a variety of reasons, in particular logistics, it was not possible to view the courts in operation as part of this research. Meetings were held with judges from municipal courts in several states in the FSM.



Recommendation:

PJDP support the development of a guidance note on sustainability and administration of local-level courts in the region.

3.3 SUMMARY

This section examined how courts in the Pacific region have engaged with customary processes. Two broad areas were identified where this engagement is most pronounced: the development of a Pacific-based jurisprudence and the evolution of judicial bodies that build on both formal judicial and customary systems. Within these two areas several specific examples were identified to highlight the nature of the interaction between customary systems and judiciaries.

There are a number of key lessons that can be identified from the above. First, the interaction between customary systems and the judiciary is extensive and complex. The section has highlighted a number of examples where custom and the formal system complement each other. For example, some of the hybrid institutions combine strengths from both systems and as a result enjoy considerable social legitimacy.

Second, the interaction that does occur is largely unstructured. It occurs as a result of a number of influences. It can be driven by community demands as in the example of the rise in recognition of customary adoptions in the FSM. Changes can occur as a result of influential individuals trying to obtain the optimum benefit from the different systems at their disposal. They can also be as a consequence of government policy or executive action as evidenced by the processes of establishing hybrid institutions.

Third, the interaction between the different systems ultimately changes the nature of both the customary system and the formal system. Both these systems are not static. They are constantly evolving and responding to changing social norms.

These factors highlight that changes are occurring irrespective and are to be expected. The judiciary will not be able to control all aspects of the interface between customary systems and the judiciary, and as a result all the changes. As has been noted, many are unplanned or in response to the initiatives of individuals or a handful of local actors. Acknowledging the interface, however, provides considerable scope for judiciaries and partners to pro-actively engage in improving access to justice through building the relationship between customary systems and the formal system.



4. BEYOND CUSTOM AND THE FORMAL SYSTEM – GAPS IN THE INTERFACE

A large part of it is a lack of knowledge on how to access institutions. People wouldn't know what to do if they had a problem. They don't know what different institutions are and what their functions are. For marginalized groups, most people would think 'who am I' and that would stop them going somewhere for help. They don't think they have an opportunity to access institutions, so ultimately justice is only given to those who can afford it.

Respondent, Marshall Islands

The previous two sections looked at the operation of customary systems and judicial engagement with these systems. If the focus is on improving access to justice, the development of a strategy to strengthen the engagement between customary and judicial systems also needs to be taken into consideration in areas where neither system may adequately be providing services to communities. This section examines this possibility. The research identified a number of areas where some people are likely not to act on any justice issues they may face. These are categorised in two ways. First, there are specific types of cases where this applies. Second, there appear to be segments of populations across the Pacific where doing nothing is the only choice due to socio-economic factors.

4.1 TYPES OF CASES WHERE INACTION OCCURS

We (*alaps*) don't really hear of domestic disputes or problems. These are private things. If things like that are happening, that is their own problem. Their families will deal with that. The extended family is there for that.

Respondent, Marshall Islands

There are specific types of cases that appear more likely not to be followed up on. The primary example of cases where limited grievance mechanisms exist are family disputes, in particular issues such as domestic violence. Across the research these disputes were identified as a concern by respondents. This was the case both because of the prevalence of these types of issues and because of the limited options available in resolving these disputes. At the outset it should be noted that the challenge of dealing with these types of disputes is not unique to the Pacific.

As data is available, the case of the Marshall Islands provides an example of the gap that exists between incidents and cases. A comprehensive health survey found 22% of Marshallese women claimed to have experienced physical abuse at least once over a 12-month period.⁴⁹ Statistics on disputes reported to customary leaders is not available. Anecdotally, respondents emphasized that these types of cases would not be referred to traditional leaders. The survey noted that half respondents don't do anything with their dispute, 32% seek help and 16% tell someone. It was claimed approximately 80 assault and battery cases (including sexual assault) were reported to the police in 2009. Of those cases 10 assaultive behaviour and 2 sexual assault cases were filed in the High Court, according to the 2009 Annual Report of the Judiciary.

These types of disputes are not generally dealt with through customary systems. Customary leaders across the research countries felt that these disputes were beyond the scope of their responsibilities and best dealt with within the family. The exception to this is where the family dispute spills out into the open and beginnings to have a broader impact on social harmony in the community. At this level customary leaders may become involved. However, their involvement will be focused more on addressing the threat to social harmony rather than the underlying causes of the dispute.

There is a strong socio-cultural reluctance to report these disputes to authorities. As the data above from the Marshall Islands highlights, few of these disputes are reported to police and even fewer make their way to

⁴⁹ EPPSO, *Marshall Islands Demographic and Health Survey*, 2007 at p.243.



court. Reporting the case to the police can have significant social repercussions on victims and their family. Increased socialization, including through programs such as the Pacific Prevention of Domestic Violence Programme, is leading to an increase in awareness of these issues and as a result reporting to the formal sector.

In some of the countries visited courts are playing a leading role in reducing the stigma involved in reporting domestic violence. In Kosrae, the judiciary has suggested the passage of a domestic bill. Similarly, judges on the High Court of the Marshall Islands have used their judicial decisions to emphasize the change in social norms no longer accepting gender based violence. They have done this with the realisation that such statements will obtain media coverage further strengthening these changing processes.

Box 12: Accepting Disputes as a Part of Life

A is a lady in her forties who lives in one of the downtown suburbs of Majuro and no more than a kilometer from government services. A didn't graduate from high school. She has four children and lives in a small house with her husband, children and several others. They live on the land at the invitation of the *alap*. A works in one of the few low paying manufacturing jobs on the island.

In a test survey conducted as part of the research, A was asked to identify disputes she had actually experienced in the last 2 years. She identified five forms of dispute: fighting, land disputes, family issues, domestic violence and sexual assault. A was asked to identify which of these disputes had the most severe impact on her life. She responded that all those disputes except for the land dispute were actually the same issue. A's husband drinks. When he drinks he comes home and fights with A and everyone else in the family.

A has never sought assistance in this issue. She discusses it with her closest friends but has come to believe that there is little she can do about the problem. She does not believe the authorities can help her. As a result the problem is on-going.

Despite the initiatives change will take time. As a result, families end up playing the predominant role in dealing with family disputes. This provides some challenges in that the social structure responsible for dispute resolution, the family chief, may often be at the centre of the dispute or reluctant to act or acknowledge the wrong doing. Similarly, family resolutions may mean that the victim suffers for the sack of broader family harmony, harmony that may not always last in any case. As one respondent noted:

Women can't win. If they don't say anything the violence will continue. If they tell family members the family will intervene and make decisions without taking them into consideration. So they won't get a result they want either. In the end they fear saying anything.

Respondent, FSM

Key Findings:

There are still significant constraints for some community members when it comes to having family disputes resolved satisfactorily.

Recommendations:

Courts should continue their efforts to strengthen the rights and capacity of women in relation to family disputes. In addition to initiatives already underway courts may consider referring to an interpretation of local custom that respects and protects women in their decision-making. There may also be steps courts can take to reduce the social stigma women face in giving evidence.

4.2 SOCIO-ECONOMIC FACTORS RESULTING IN INACTION

You will notice one thing when you are here. There are no real poor people. We value the extended families and that connection plays an important role in protecting people.



Respondent, Marshall Islands

Although the level of absolute poverty is not high, access to basic services and economic opportunities are limited, especially in the rural areas and remote outer islands. Available data suggests that across the Pacific, on average, one in four households is living below the respective national basic needs poverty lines.⁵⁰

There are pockets of communities across countries in the Pacific who lack the capacity to defend their rights. The concept of poverty is one that sits uneasily with many in the Pacific. Despite this, the research identified that lower socio-economic groups face challenges in acting on their justice issues. These are not challenges faced by geography or availability of free legal services. They are rather challenges originating from broader social indicators. In essence, issues such as low literacy rates, high unemployment and lack of access to the formal economy has left pockets of communities disempowered and lacking the capacity to act on their justice issues.

The cost involved in addressing disputes is one aspect of this. People may choose not to pursue cases through formal channels because they cannot afford the costs of lawyers or court fees. Similarly, customary proceedings sometimes require financial contributions that poorer people may find difficult to meet. In a number of countries in the region the government provides free legal assistance. For example, the Micronesian countries have developed comprehensive legal assistance programs in the form of the Office of the Public Defenders and Micronesian Legal Services Corporation.⁵¹

However, the presence of free legal services is not in itself, sufficient to overcome access issues for poorer communities. Much more difficult to measure is the impact economic stress has on the capacity of people to seek redress to their grievances. There are mixed views on this. On the one hand, there is a belief that close social networks mean that the vast majority of Pacific Islanders are able to access some support mechanism should they need to. Most, if not all, would have a relative who is able to represent their interests in times of need. This view was common amongst educated respondents interviewed who were part of the formal economy.

(My neighbours) don't have jobs and they have quite a big family. They would always have disputes but never seek help. They resolve everything themselves. They were quite traditional and would feel embarrassed to call the police.

Respondent, FSM

Alternatively, the research identified community members whose economic (and social) status precluded them from acting on their grievances or protecting their rights. The box below provides one example from the FSM of how a person's limited capacity makes them vulnerable in engaging with institutions.

Box 13: Being Pressured to Admit Guilt

B is a young high school student from one of the states in FSM. One afternoon a thatch shed at the local high school went up in flames. B was identified by the police as the culprit because he had been seen drinking on school grounds (a violation of his parole). On a Friday night the police took B to the station for questioning. Despite efforts by B's guardian the police threatened to keep B in custody for the weekend.

There was no reason for them to act the way they did. It was just because they could...I was amazed at how little this boy knew about his rights. Really, he had no idea what was going on. He didn't know what he was agreeing to.

Respondent, FSM

⁵⁰ UNDP, "MDGs in the Pacific", UNDP Pacific website

<http://www.undp.org/fj/index.php?option=com_content&task=view&id=37&Itemid=74> accessed 7 February, 2012.

⁵¹ The Constitution of the Republic of the Marshall Islands even prescribes the Government obligation to provide legal services along with health care and education (ArtIII, s15).



Some believed the police were making B's life difficult. A lawyer was called but was refused access because the guardian didn't have proper documentation as guardian and police claimed B didn't ask for a lawyer. Much later in the night B was released.

B was ultimately charged with arson, drinking and breaking his parole. He still claimed his innocence. B agreed to a suspended sentence as part of a plea bargain. Others advised him not to given the significant implications a criminal sentence, including a charge of arson would have for him but he just wanted to get the thing over with.

Key Finding:

The formal presence of legal aid is an important but not always sufficient step to ensuring all members of society can access the justice system. There may be more systemic structural constraints preventing access.

Recommendations:

Periodic assessments of community justice needs will determine the extent to which legal assistance is effective. Courts should work with legal aid providers to address gaps that may arise.

4.3 SUMMARY

This section has highlighted areas where both customary systems and formal justice sector agencies face challenges in delivering justice services to people. In effect it means that on specific issues and for specific segments of society, people are forced not to act on justice issues they may be facing. Alternatively, they may be incapable of protecting themselves from the actions of others. The section emphasizes the vulnerability some sections of society face in accessing justice.

There are significant challenges for dealing with this issue. For obvious reasons, there is limited data on the prevalence of these types of issues. If disputes are not reported it is difficult to measure their occurrence. Without accurate data it is not always evident that a problem may exist. Acknowledging the limitations of some in accessing dispute resolution mechanisms can also be confronting. It can be perceived as a criticism of existing mechanisms. It also may lead institutions to have to deal with issues that have traditionally been beyond their jurisdiction.

The issue is also closely related to broader socio-economic challenges and comes down to a question of empowerment. There are some who feel disempowered from participating fully in society. One consequence of this is that they are not able to demand the justice services available to them. Addressing the core underlying causes of this is beyond the work of the judiciary. However, as the final section below identifies, there are ways judiciaries can engage on the issues and, in the process, build confidence for communities to demand similar services from other institutions.

Key Findings:

Across the research locations there are some members of society who face constraints in having their grievances heard by either formal or customary systems. This includes people whose capacity to access justice is constrained.

Recommendations:

These are complex systemic issues. Courts should seek to undertake community justice needs assessments to determine the extent to which this is an issue.

Based on these assessments courts can develop strategies to address the justice needs of communities. PJDP should build the capacity of courts to undertake assessments of community justice needs and support the development of toolkits for this.



5. CONCLUSIONS AND RECOMMENDATIONS

The aim of this report is to provide judiciaries in the region with options for improving access to justice through strengthening the interface between formal and customary justice systems. To do this the report has examined the operation of customary systems in the Pacific through an access to justice perspective and from the point of view of the work of judiciaries. The following section outlines the main conclusions emerging from such an examination. It then includes a series of concrete recommendations for judiciaries in the Pacific region as they continually strive to improve access to justice for the communities they serve.

5.1 CONCLUSIONS

The inequity that exists is the cause of most of the problems here. It is fundamentally a problem of fairness... There are no secrets here. So when you give someone else a better deal you are signing up for trouble.

Respondent, Federated States of Micronesia

Box 14: Main Conclusions

Justice outcomes are determined by the interaction between different justice systems. In the Pacific, the formal system interacts with customary and other social governance systems. How these systems interact affects justice outcomes for communities. The interaction is continually occurring and changes both customary and formal justice systems. The changes result from people seeking to use the different systems to their advantage.

Although the interaction is largely unstructured it does provide opportunities for structured, positive engagement. Courts and other actors can develop strategies for improving access to justice through identification of openings in the relationship between custom and the formal justice sector.

For vulnerable members of communities the interaction presents risks as they have less capacity to engage with the different systems. Ambiguity between the different systems can be manipulated by parties with stronger bargaining positions. An awareness of this can allow courts and other partners to put in place appropriate checks and balances.

The process is as important as the outcome. Communities should have a say in the type of justice system they have. The research indicates strong demand exists from communities. Processes to engage communities may meet resistance from entrenched interests. To overcome this they need to be participatory and driven by the local context. There are similarities in justice issues faced by many judiciaries in the region highlights the potential for cross-learning.

This report set out to assess opportunities for improving access to justice in the Pacific region through better understanding the linkages between customary systems and the judiciary. The report examines the large amount of, predominantly unplanned, engagement that already occurs. Mapping this engagement identifies opportunities to provide better justice services to communities through building on the interface. It also identifies gaps where community needs exist but may not sufficiently be addressed by either system.

There are four main themes that are re-occurring throughout the report.

i. Justice Outcomes are Determined by the Interaction Between Different Justice Systems

In the Pacific, for most people, the formal justice system co-exists with a range of social governance systems, including customary systems. The relationship between these different systems is complex and constantly evolving. However, it is also an influential factor in determining the justice outcomes for people.

The report has highlighted the broad range of ways in which the interaction between different systems affects outcomes. It can be direct, case-by-case influence such as when social pressure and a traditional apology make a witness withdraw their testimony. It can be more indirect, as in the case of training provided



to a customary chief affecting his decision in dealing with a youth accused of stealing betel nut or judicial oversight of human rights cases. There are examples of high-level policy reforms such as the establishment and operation of land courts. There are also examples of changes driven through community demand, such as registration of customary adoptions.

The dialogue between customary systems and the formal justice system is occurring constantly and is not always clear. This ongoing process changes both custom and the formal justice system. This is not surprising as justice systems by their nature are continually evolving to respond to changing social norms.

ii. Although the interaction is largely unstructured it does provide opportunities for structured, positive engagement

There is significant focus on tensions that exist between customary systems and state systems. These systems are susceptible to manipulation by individuals who seek the best possible outcomes for their grievances or have a vested interest in either changing the process or maintaining the status quo. It is important to be aware of these risks and to develop appropriate checks and balances in response to these risks.

This suggests that differences between state law and *kastom* law may similarly be able to be negotiated, both because people are used to doing so, and also because the content of substantive *kastom* laws has changed over time anyway, incorporating state laws and Christian laws.⁵²

The on-going interface should also be seen as an opportunity. It provides space in which judiciaries can engage with a range of stakeholders, including customary leaders, to improve access to justice. The way this is done will vary from country to country. It will be determined by a range of factors, including: the justice issues communities are facing; the scope for judicial engagement; and the nature of relations with other stakeholders.

iii. For vulnerable members of communities the interaction presents risks as they have less capacity to engage with the different systems

Empirical data highlights that across much of the Pacific there are segments of communities who face socio-economic challenges. These vulnerable groups include people from lower socio-economic standing or community members who are not sufficiently empowered to use institutions even if where they are accessible. As a result these people have a reduced capacity to protect their rights or seek resolution of their grievances.

There are challenges both in identifying the extent of this problem and addressing the issue. As these issues are largely unreported it is difficult to get a picture of how scale or nature of the problem. Developing responses to the issue can also be a challenge. Traditional approaches of institutional strengthening are not always the solution, if these members of the community are not using the institutions in question.

iv. The process is as important as the outcome

The report has highlighted that justice outcomes matter, but the processes are equally important. This is particularly the case in the Pacific where many communities are closely knit. As the quote at the beginning of the section emphasizes, people are more readily aware of when other people are being treated differently. The report has highlighted several examples of where perceptions have affected the outcome.

In practice this means that people are provided with adequate opportunities to have their voice heard in a culturally appropriate manner. It also means that information is shared with stakeholders and is readily accessible in user-friendly formats. There are a number of important reasons why there is a need to emphasize the importance of processes:

- Processes that are responsive to community needs build confidence in the system;

⁵² Supra, n 10 (Forsyth), at p198.



- It provide space for people to feel that their grievances have been listened to;
- It strengthens accountability mechanisms in the system;
- Well-functioning processes manage community expectations;
- They provide scope for documenting and sharing lesson and articulating cases for additional resources.

5.2 RECOMMENDATIONS

The strong lesson from Melanesia is that the most successful interventions,... are those that deliberately create space for local participation and leadership, and that empower weaker parties to actively engage, express their preferences and achieve greater control.⁵³

Box 15: Main Recommendations

The most effective way to engage customary systems is through identifying opportunities to partner in addressing community needs. Identifying concrete activities that respond to community needs and creating partnerships to implement the activities will build trust in the broader justice system and between different stakeholders. This approach focuses on access to justice 'through' engagement with customary systems. Engagement with customary systems becomes a secondary objective as opposed to an end in itself.

Build capacity to support judiciaries incorporate community needs in planning and allocation of resources. A process of consulting with communities and key stakeholders, including customary leaders, can build trust in the justice system and assist in planning processes and allocating resources. Methods used will vary from country to country given the diversity in the region. The process can empower communities to expect quality service delivery from justice sector agencies.

Identify opportunities to pro-actively engage with customary systems and other actors to improve access to justice. The interface between customary and formal justice systems provides openings to positively engage on targeted issues to improve access to justice. Doing so in partnership with customary systems also builds confidence and understanding in the relationship.

PJDP is well-placed to strengthen learning from within the region. Many of the judiciaries in the region face similar issues. PJDP is well placed to support a process that encourages cross-regional learning from experiences in addressing those issues. This would involve building the capacity of judiciaries to document lessons and PJDP support to disseminate information across the region.

The recommendations are laid out in three parts. The **first part** provides a strategy on engaging with community justice needs, including through customary systems. The **second part** applies the strategy to an implementation plan for PJDP. Instead of providing a detailed strategy on engaging with customary systems, the **third part** identifies some core principals for working with customary systems.

The approach outlined below goes back to the initial objective for this activity outlined by PJDP:

To promote access to justice by enabling the region's judicial leadership to assess, plan and direct an integrated process of judicial development for both customary and formal justice service providers.

The report recommends placing the emphasis on the 'promotion of access to justice'. This requires developing empirical data on the broader justice needs of communities and engaging communities on how those needs may best be addressed. Given the strong role of both customary and formal justice actors in the region, it is evident that in most cases responses will require collaboration between actors.

⁵³ Dinneen, S *et al*, "Conflict in Melanesia: Themes and Lessons", **World Development Report 2011: Background Report**, 2010 at p.28.



5.2.1 A FRAMEWORK FOR ADDRESSING COMMUNITY NEEDS

The report recommends that increased emphasis should be placed on ensuring justice services, broadly defined, meet the needs of all in the community, including those who are most vulnerable. A key part of this process is seeking broader community participation in developing the types of justice systems that best address their needs. Some community members already have an influential voice in this process. Others will need support to empower them to articulate their needs and ensure that they are heard. Judiciaries can put in place processes that will better enable this to occur in relation to the work of courts. These processes, if developed in a participatory manner, will also involve actors from customary systems. This is inevitable given the important role customary systems play across most of the Pacific. As recommended above, judiciaries should pro-actively seek to encourage this.

Outlined below are three steps that form a strategy to better enable courts to plan and allocate resources based on community needs. These processes take time. Implementation should involve an incremental approach that trials the process, convinces partners of the benefits through measuring impact and expands best on demand.

i. Identifying Community Needs

The first step is to build the capacity of judiciaries to better integrate community needs into court planning processes. The method for doing this will vary from jurisdiction to jurisdiction and will depend on the size of jurisdictions, the human resource and financial resources available and the socio-political context within which courts operate. A broad range of tools are available for supporting courts in assessing community needs. As a minimum, the process should include periodic (eg: annual) consultations with representatives from different stakeholder groups, including customary leaders, representatives from marginalized groups and church leaders. Ideally, some form of consultation would occur directly with community members. This can either be done through qualitative means or, for larger jurisdictions or where resources are available, through representative surveys.

In the past judiciaries have been reluctant to engage in such activities because it may be perceived as compromising the independence of the judiciary. As has been noted above, there are ways of alleviating these concerns. The first is to focus consultations with organizations on policy issues as opposed to individual cases. The second is to partner with local organizations or facilitators to undertake the consultations on behalf of the judiciary.

It should be noted that this process complements the internal planning processes undertaken by courts. It adds an additional, and important layer, to the approach encouraged by PJDP to date of (i). building internal, institutional capacity of the judiciaries (through activities such as the court administration diagnostic); and (ii). Progressively seeking views of court users (through the work of the M&E Adviser). This approach would then cross-reference these approaches to the needs of the community more broadly.

ii. Implementation

The judiciaries would seek to implement initiatives based on the needs identified in the planning process. The approach is aimed at improving the quality of on-going processes through making them more responsive to needs of communities. In this sense, it is envisaged that most activities originating from this approach would be funded through recurring budgets of courts in the region rather than additional resources.

In some instances the consultation process may identify needs for new activities. These are resourcing issues that would require the consideration firstly, of courts (and the executive as budget holders) and second of donor programs, including PJDP. Articulating a case for resources is significantly enhanced when it is based on evidence of need as collected under the first step above.



A participatory planning process will inevitably lead to implementation that requires engagement with a range of actors. This will include opportunities to engage the interface between courts and customary systems. Opportunities to pro-actively and in a planned manner work in partnership should be encouraged.

Given the participatory nature of the process it is not possible to pre-empt the nature of the intervention for any particular country. However, the types of activities that may arise from such an approach would include:

- targeted training and accreditation to customary leaders (including judicial officers in hybrid courts);
- legal awareness campaigns and dissemination of accessible legal information to vulnerable communities on key issues;
- amending court rules or procedures based on needs identified by communities;
- facilitation of public dialogues on community needs and responses of different justice sector actors; and
- influencing development of Strategic Plans and other key institutional documents developed by judiciaries.

iii. Documentation and Dissemination

Documentation and dissemination is an essential component of this approach for two reasons. First, it provides an evidence base through which courts can assess the extent to which activities have been successful. This enables courts to periodically review progress, make modifications where required or, where successful, expand the initiative or articulate a case for additional resources.

Second, documentation can stimulate a learning process both within countries and amongst judiciaries across the region. Similar issues are faced by many judiciaries in the region and similar approaches are being taken to address these issues. An appropriate documentation and dissemination process can improve the capacity of judiciaries to learn from each other.

The research for this report identified a number of areas where countries are faced with similar issues. As the first-step in the process of documenting and disseminating lessons learned, attached to this report are several, draft briefing papers on different issues that may be of interest to judiciaries in the region and relevant to this research. The briefings are drafts and comments and contributions would be welcome prior to finalization. The topics covered are as follows:

- Identifying Entry Points for Engagement with Customary Structures – Lessons from Three Countries;
- Community Needs Assessments – What types of tools work in what context;
- Using customary actors as Local Courts – issues for sustainability and quality;
- Gender-based Violence – using custom to develop strategies to better protect women.

In taking into consideration this three-step plan, a number of legitimate questions will be asked about the potential benefits of such an approach and why courts should be responsible for its implementation. There are a number of ways to address these issues:

- It is envisaged that such an approach will improve the quality of service delivery by identifying community demands and allocating resources to address those demands. The approach builds on a service delivery model of judicial performance. However, in addition to focusing just on court users it views the judiciary's authority as extending to the community more broadly and as such takes into consideration community needs;
- Similarly, where courts are seen as addressing community needs, this can place pressure on other justice sector institutions, as communities demand a similar level of service delivery. This is particularly the case as judiciaries sit at the apex of the broader justice system. Their actions often have considerable influence over other justice sector agencies.
- There will clearly be some community justice needs that will be beyond the jurisdiction of the judiciaries. On the basis of the assessments, courts will be able to identify concrete needs that they



are able to engage in. Some of these needs will require partnerships with other stakeholders, including customary actors and these should be encouraged;

- The collection of routine data on community justice needs provides a strong platform for developing policy initiatives. In addition, this data can be influential in convincing government and donors of the need for resources to address specific issues;
- The documentation process supports cross-learning. As this report has indicated, many judiciaries in the region are addressing similar issues. Courts can learn not only from the results of other initiatives in the region but also from the process;
- Some courts may feel constrained in extending their engagement to issues beyond cases filed in court. The socio-political context in countries or resource constraints may limit the ability of courts to engage in some of these issues. The implementation plan proposed for PJDP below addresses this concern.

5.2.2 AN IMPLEMENTATION PLAN FOR PJDP

The framework above moves engagement in the area of access to justice towards an approach that is broadly in line with recommendations outlined in the report on 'Institutionalisation' by Dr Hambergren. It focuses on strengthening capacity of judiciaries in the region to ensure greater participation in planning processes. It also will develop 'knowledge' – that is to say tools, models and lessons learned will be developed that can be disseminated throughout other courts in the region.

The main recommendation to pro-actively engage more with stakeholders, in particular in planning processes will require a change in approach for some countries in the region. Given this and the limited resources available through PJDP, it is recommended that such an approach is initially piloted and then progressively rolled out based on results and leadership from judiciaries in the region.

A roll out under PJDP would appear as follows:

i. Year 1:

Two judiciaries identified as pilot countries for implementation of approach over 12-month period. Judiciaries either have resources to implement initiatives aimed at addressing access to justice and/or are willing to use their responsive fund budget towards this end over the 12-month period (and the funds in the responsive fund are sufficient). PJDP supports the planning and documentation phase.

Identifying Community Needs undertaken with assistance from PJDP. Based on local context will involve development of tools/modules and facilitation of consultations with community members, customary leaders and representatives of marginalized groups.

Implementation occurs based on design following participatory planning process. Design addresses an access to justice issue identified in planning process, ideally requiring engagement with customary system. Judiciary responsible for overseeing implementation over course of operational period.

Documentation and Dissemination occurs with assistance from PJDP. Further consultation is undertaken with initial stakeholders and beneficiaries to learn from initiative and document results. Documentation across two pilot countries enables cross learning. Findings disseminated more broadly across PJDP.

ii. Years 2-3

Initiatives in pilot countries on-going. Annual consultations with stakeholders to report on progress and/or identify new areas.

Target of 6 additional PJDP countries participate in process outlined in (i) above. Adaptation of toolkits from pilot countries for new countries. PJDP provides support in the form of capacity building for assessments.



PJDP plays active role in documentation and dissemination of findings from initiatives. Commencement of development of a year-on-year database of findings from public consultations on access to justice issues across the region. Database and qualitative reports on results of initiatives (including comparative assessments) used to support cross-learning between courts in the region. Evidence also used by judiciaries in region to engage with donors more broadly on additional funding for initiatives. PJDP could facilitate this process.

iii. Years 4-5

Cycle outlined above on-going in the countries that have already received support.

Remaining PJDP countries participate. Resource centre now exists across the region that provides comparative information on needs and progress against indicators. In addition the resource centre supports development and dissemination of 'knowledge' products – findings from assessments, toolkits, survey modules, lessons learned reports and the like.

5.2.3 PRINCIPLES FOR ENGAGING CUSTOMARY SYSTEMS

The region's diversity precludes a 'one size fits all' approach to engaging with custom. Any efforts to engage with custom are dependent on a deep understanding of the local social, economic and political context. The context in relation to custom varies significantly across the region. The extent to which judiciaries can and should engage also varies significantly from country to country. Four overarching principles are identified for engaging with custom in the region:

Identify Appropriate Entry Points

The entry point for engaging with customary systems will vary from country to country. Large-scale, top-down efforts to reform customary systems require: local ownership and leadership; extensive and participatory consultation with a broad cross-section of society; and objectives consistent with improving justice outcomes. Without these conditions reform initiatives can risk strengthening the status quo or adversely affecting marginalized communities.

In many instances, an incremental approach will be more effective. Such an approach builds on and adds support to initiatives that already exist whilst seeking to address identified weaknesses.

Acknowledge the Political Nature of Customary Systems

As has been highlighted throughout this report, the issue of authority is often central to any debate about the role of customary systems. This can make engagement sensitive, depending on the socio-political context. Engaging custom requires an understanding of potential supporters and opponents and incentives and constraints for institutions involved in the process.

It also needs to be acknowledged that changing custom impacts the lives of people. In particular, marginalized groups often have limited capacity to influence the types of changes but can be negatively impacted by the change. Where possible their views should be sought. It is not always the case that people 'speaking on behalf of' the most marginalized (chiefs, church leaders, civil society) actually best represent the views of the marginalized.

Promote Dialogue and Build Partnerships

Negative aspects of the relationship between custom and the formal system often dominate the public discourse. However, as this report has highlighted, neither system is static. It is important to identify constructive areas for engagement and emphasize the complementary aspects of the different systems. One way to do this is to view both the customary and formal systems as a subset of a broader justice system rather than being in competition.



The practice of building partnerships and engaging other stakeholders may be challenging for some judiciaries in the region. Some may view the practice as compromising the values of judicial independence. This may particularly be the case in smaller jurisdictions where conflicts of interest quickly arise. Ways to minimize this risk include focusing the dialogue solely at the policy level, using court staff as opposed to judicial officers to lead the dialogue, and ensuring a broad range of stakeholders and open and transparent processes.

Encourage Documentation

Leaders in customary systems should be encouraged to document the decisions they make, including the steps involved in the process. Documentation is important for a number of reasons. For customary leaders it provides an opportunity to learn from lessons, more easily share lessons with other leaders and increase certainty. It also creates an evidence base that can be used amongst the community and more broadly, including in articulating a case for resources. For judiciaries and others stakeholders (including donors), the evidence base can support policy development. It also provides a basis for identifying strengths of systems and issues that may need to be addressed.

The key lesson to learn about documentation is that people will not do it if they do not obtain a direct benefit from the process. For this reason, means of documenting need to be developed where the benefit outweighs the effort involved in undertaking the documentation. Such tools are available and can be tailored to address the context in different countries.

5.3 SUMMARY OF FINDINGS AND RECOMMENDATIONS IN NARRATIVE

The narrative includes key findings and recommendations across specific issues. These are summarized for ease of reference here.

Key Findings	Recommendations
There is insufficient documentation on the processes relating to customary dispute resolution.	That PICs seek ways to work with customary systems to improve documentation and certainty relating to customary processes. Options include: - where local level courts incorporate customary leaders encourage improved capacity to document results and processes; - in some countries where customary leaders are voluntarily strengthening documentation court administrators could support this process. PJDP may want to consider developing toolkits for judiciaries to support documentation of local level courts and customary systems.
Perceptions of the relationship between custom and the law are heavily influenced by public debate and the media.	Courts consider developing appropriate strategies to explain to the public through mass media court decisions and implications of those decisions.
There is significant variety in how customary systems operate and how this influences justice outcomes	At a national level courts can undertake an institutional analysis of customary systems in their jurisdiction that may identify entry points for engaging with these systems. This does not necessarily need to be a public or formal exercise. It could be undertaken as part of strategic planning processes of courts.
Many courts in the Pacific are dealing with similar issues in relation to incorporation of custom into judicial decisions.	PJDP facilitate cross-learning on substantive issues relating to how courts incorporate customary practices into judicial decision-making and the impacts of those decisions. Possible ways to do this could include



	comparative briefing notes, seminars at regular PJDP meetings or virtual working groups of judges interested in similar issues.
Some areas will continue to face challenges over authority between the formal and customary systems.	Jurisdictions that face challenges from customary leaders who reject court decisions in contentious cases may consider developing a communications strategy to deal with these decisions in the future. In some jurisdictions, court staff have found it useful to meet with customary leaders following the decision to explain the implications of the decision and risks in failing to comply with the decision.
Several courts are concerned that the presence of land courts has reduced the incentives for customary leaders to play a role in the dispute resolution process, despite court initiatives to encourage this role.	Identify courts in the region that have established referral mechanisms or court rules that effectively encourage customary leaders to play a role in dispute resolution prior to filing cases in court and learn from that experience.
It remains unclear what are the key factors that contribute to sustainable local-level courts dispensing good quality justice outcomes across the region.	PJDP support the development of a guidance note on sustainability and administration of local-level courts in the region.
There are still significant constraints for some community members when it comes to having family disputes resolved satisfactorily.	Courts should continue their efforts to strengthen the rights and capacity of women in relation to family disputes. In addition to initiatives already underway courts may consider referring to an interpretation of local custom that respects and protects women in their decision-making. There may also be steps courts can take to reduce the social stigma women face in giving evidence.
The formal presence of legal aid is an important but not always sufficient step to ensuring all members of society can access the justice system. There may be more systemic structural constraints preventing access.	Periodic assessments of community justice needs will determine the extent to which legal assistance is effective. Courts should work with legal aid providers to address gaps that may arise.
Across the research locations there are some members of society who face constraints in having their grievances heard by either formal or customary systems. This includes people whose capacity to access justice is constrained.	These are complex systemic issues. Courts should seek to undertake community justice needs assessments to determine the extent to which this is an issue.
	Based on these assessments courts can develop strategies to address the justice needs of communities.
	PJDP should build the capacity of courts to undertake assessments of community justice needs and support the development of toolkits for this.



ANNEX 1: SAMOA COUNTRY REPORT

Annex 1: Country Report Samoa

1. Introduction

The Pacific Judicial Development Programme (PJDP) is supporting a research activity aimed at understanding how customary dispute resolution systems operate in the Pacific region and the extent to which courts are engaging with these systems. The research activity will involve in-country research in three countries in the region over six months in 2011 and literature review and consultations covering the region more broadly with a view to informing the possible development of a regional judicial development approach to these issues.

This report was developed following research in Samoa, the first of the three countries where in-country research will be conducted. The aim of this report is to document the findings from the research to support development of the ultimate regional report. Given research was conducted over a six week period in Samoa between 1 May and 18 June, the report also may provide some interesting and useful information for partners in Samoa. The report, therefore, also includes some initial analysis which, it is hoped, will be of use to partners in the Government of Samoa.

The report is divided into the following sections:

- Section 1: following this introduction this section provides a hypothesis for understanding customary mechanisms. The section then lays out the methodology used in conducting the research in Samoa and provides summarizes a literature review conducted.
- Section 2: Section two covers two crucial elements of the justice system in Samoa. First it examines the important role of the family as the first port of call for most community members in resolving issues they may have. The section then examines the contribution of the village council and other actors at the village level in supporting the justice system. This includes a discussion on the relationship of village institutions with the government beyond the village.
- Section 3: The Land and Titles Court plays an important function in Samoa. This section examines some of the non-judicial aspects of the Court. In particular the section looks at how mediation plays a role in the resolution of disputes involving land or titles;
- Section 4: this section examines the role of custom in the civil and criminal jurisdictions of the Court. In relation to civil matters, the section discusses the role of customary processes in the mediation system of the court. The section also touches on how custom is used in criminal processes, in particular in relation to sentencing provisions.
- Section 5: In the conclusion the report details three areas:

- i. The report places the research undertaken into the context of the Government of Samoa’s Law and Justice Sector Strategy and provides some insights in this context;
- ii. The section revisits some of the details in the report relating to mediation and draws some lessons that may be of use to the Government in terms of developing an overall mediation framework; and
- iii. The section provides some comments on the importance of empirical data in supporting policy making processes, especially given the important role customary processes play in the broader governance context of Samoa.

The scope of this report is broad. Given this the report does not claim to be either definitive or comprehensive. The objective of the report is to document aspects of the dispute resolution process that occur outside the formal confines of a courtroom and how community members in Samoa engage with those aspects. As such, the extent to which the report examines the jurisdictions of the courts, it does so with a focus on engagement with the customary system.

As this report forms a part of a broader regional research activity, comments, feedback and clarification are welcome.

1.1. Starting Hypothesis

“Generally, there are four such governance systems in Samoa and they relate to the four types of service (tautua) a Samoan would normally render in one’s lifetime. They are service to one’s family, village, church and the national government.”

Human Development Report, 42.

A lively public debate exists in Samoa on the relationship between custom and human rights. The debate often portrays an inherent clash between Samoa’s custom and the role of the state in a global society. This has been highlighted in issues relating to freedom of movement and freedom of religion and most recently in the hearing of election petitions in the Supreme Court. As will be discussed below a focus on these tensions at the national level re-enforces itself at the village level.

This report starts from the premise that a number of different social/governance systems operate in Samoa. These systems interact and the manner in which they interact affects the overall quality and delivery of justice. The systems do not exist in a vacuum. Such an approach requires a focus:

first, on assessments of social realizations, that is, on what actually happens; and second, on comparative issues of enhancements of justice (rather than trying to identify perfectly just arrangements).”

The quote at the beginning of this section identifies four governance systems in operation influencing social interactions in Samoa. The importance of each of these governance systems is recognized in Samoa’s normative framework. The preamble to Samoa’s Constitution provides that Samoa is an “independent State based on Christian principles and Samoan custom and tradition” where custom and tradition defines the operation of the family and village governance systems. The Constitution does provide that these governance systems are subject to the operation of the Constitution as the “supreme law of Samoa.”

The Government of Samoa's national development plans also emphasize the importance of each of the governance systems. As the **Strategy for the Development of Samoa** highlights:

To maintain **social coherence and harmony** in the community, the Government, Non Government Organisations (NGOs), Village Councils and Churches have important roles to undertake. Government via its court system requires close coordination with the Village Council, the paramount authority in a village which is empowered by the Village Fono Act.

The **Law and Justice Sector Strategy** further develops the importance of the interrelationship between these systems. The Strategy identifies three core elements for the Law and Justice Sector: the law, custom and the community. In addition, one of the four thematic issues of the Strategy focuses on improving the quality of customary and community-based justice. The fact of co-existing governance systems also influences the other thematic issues: community safety, access to justice and integrity and good governance.

This report therefore starts from the premise that each of these governance systems are essential elements to the overall delivery of justice services in Samoa. The report aims to highlight areas where these systems complement each other or work together towards a more effective overall system. There will inevitably arise issues where the systems are perceived to be in competition or where tensions arise between the systems. Some of these areas will be examined in the following section. Where tensions exist there will be instances where the tensions arise as a result of misinterpretation of the governance systems in question (for example, instances of abuse of power). There will also be issues where inherent tensions do arise and negotiated solutions need to be found.

1.2. Methodology

This report draws on six weeks of field research in Samoa. The research was conducted over two trips between 1-20 May and from 30 May – 18 June. In the first week of the visit to Samoa, the consultant worked with the Supreme Court and the Ministry of Justice and Court Administration to develop a workplan suitable to the Court. This involved some balancing between the consultant's Terms of Reference, focusing on customary dispute processes, and the Ministry's stated desire for support in developing the Court's mediation processes. The workplan that was developed would attempt to take a case-based approach to examine non-judicial decision-making processes.

The report draws on over 60 interviews conducted with key stakeholders over the research period. A list of interviewees is attached as an annex to this report. Interviews were conducted with judicial officers, government officials from justice sector agencies, representatives from the legal profession, academia, churches and civil society organizations and donor representatives.

The research involved some field research. The consultant was privileged to sit in on a village council meeting in a village in Upolu. In addition the consultant spent two days in another village in Upolu and two days in a village in Savai'i. In both the visits the consultant had the opportunity to interview a range of community members, including senior matai, the pule nuu (village government representative who are also referred to now as *Sui o le Nuu*), church representatives and community members. In addition the consultant spent a day at the Court building in Savaii.

The work plan proposed a case-study approach, involving documentation of cases across each of the Court's jurisdictions. This proved more difficult than initially envisaged. First, there were issues with confidentiality precluding approaching parties who had been involved in mediation cases. Second, given the sensitivities involved in family law matters, it was difficult to obtain approval from civil society organizations to meet with their clients. Finally, given the time constraints it was challenging meeting more than one party involved in cases and as such triangulating information relating to specific cases was not always possible. Despite this, significant information was obtained on actual cases. However, as this was not always possible to verify, the information obtained should be treated as perceptions of community members as opposed to fact.

The interviews, field visits and case-studies were complemented by a literature review and some limited media-mapping. A bibliography of articles read is annexed to this report. During the course visit in Samoa, any newspaper articles relevant to this research were identified and documented. The newspaper source was the Samoa Observer. A list of articles collected is annexed to this document.

1.2.1. Findings from Literature Review

A significant body of literature exists on the role of custom in Samoa. This includes both works from a legal perspective and research living more comfortably in the social sciences field. There is, especially, substantial focus on social structures, the importance of titles and the relationship to land, including a number of detailed attempts to document the operation of the Land and Titles Court.

Most of the available research focuses on documenting the structures of customary governance systems and, in some instances, the processes found within those social structures. With some exceptions, the available literature examines how society is structured through these systems, providing general overviews of the social systems with a significant focus on the role of leaders (in the Samoa context *matai*). This includes some literature on how these governance systems respond to processes of modernization.

There is limited research examining the results of these governance systems for communities, the impact of the social structures on community livelihoods. That is to say that whereas some effort has been invested in understanding the structure of the governance systems and, to some extent the processes, less evidence is available taking the next step to document the effects of those operations on communities. There are some exceptions. Both a PhD dissertation by Dr Vaai and an article by Prof So'o for Samoa's Human Development Report provide observations on the influence of the customary governance system on communities. A detailed quantitative research conducted by USP following the 2001 election also provides some incredibly useful responses on community perceptions of governance systems and community priorities. A specific survey on Domestic Violence conducted under the auspices of the Pacific Prevention of Domestic Violence Programme provides some initial detailed information on community and leadership views relating to domestic violence.

Assuming that customary and church governance systems play an important role in Samoan society, initiatives to engage with these systems would benefit greatly from

empirical research examining not only how the systems are currently structured but, more importantly, what that means for communities. Such information would prove valuable for Government policy making, such as current efforts to review the *Village Fono Act*.

Several points should be noted in this regard. First, using research on local governance systems to influence local policy should be a local process. It requires detailed knowledge of local custom and society. A locally driven process will lead to greater buy in for research findings amongst policy makers. The risk is that local institutions may find it difficult to adopt the degree of objectivity required in assessing these governance systems. Elsewhere, there has been a tendency to either romanticize custom and the processes involved or to pay insufficient respect to these institutions. In Samoa, several institutions exist that could play an important role in undertaking policy-orientated research. These include formal government institutions such as the Law Reform Commission of Samoa or academic institution such as the Centre for Samoan Studies.

Second, resource costs would need to be taken into account in building the capacity of local institutions to undertake such research. Supplying policy makers with empirical data on which to base policy can be an expensive undertaking. The costs of investing may sometimes appear to outweigh the benefits obtained from such research. These are considerations for policy makers in determining where to invest finite resources.

2. Local-level dispute processes

“At every level of Samoan society therefore, authority of matai is either influential or determinative... At the village level are the chiefs and orators and other institutions appurtenant thereto and operating in support thereof. In the corporate family structure the heirs of matai interact and employ authority in exercising their rights.” (Vaai 59)

The structure of customary governance systems is well documented in Samoa. The dissertation of Dr Vaai provides an excellent comprehensive overview. A valuable summary is outlined in USP’s paper on the results of the election survey. This report will not go into details on these structures. Instead several general observations will be made prior to examining the family, village and church systems in more detail.

The relative homogeneity of Samoa means that the underpinning principles and the structures that exist are similar across most of both islands. Numerous respondents confirmed that the principles of custom apply across the country. Some of the processes may vary from village to village, based both on interpretation of history and culture and on the capacity of individuals within the governance systems. The population living in urban areas in and around the capital are living beyond the domain of customary systems and as such would be the main exception to the influence of these systems.

There are some principles that are often identified as central to custom in Samoa. They are summarised below, noting that significant literature exists on these principles elsewhere:

- The important role of *matai* (chief) titles within the governance system. These titles are bestowed upon leaders of families. Once individuals are bestowed a title they represent their families within communities and command significant authority within their family;

- An important link exists between titles and land. 80% of land in Samoa is customary in nature. Whereas land belongs to families, authority to use the land is bestowed upon the titled representatives of the family;
- Traditionally titles are bestowed on family members based primarily on the notion of *suli* or being an heir. The concept of *tautua* or service also plays an important role;
- Village structures are relatively similar across Samoa. The customary structures are generally comprised of four institutions. The first, and most prominent, is the Village Council comprised of all *matai* from the families with land within the village boundaries. The Village Council operates in a heavily regulated way according to custom and is hierarchical in nature. Particular families will hold senior chiefly titles within the village council by nature of the history of their family. Despite this, the processes of village councils, are supposed to provide all *matai* with any opportunity to contribute. The other institutions that exist include the women's committee which draws on a traditional structure of the daughters/unmarried women of the village, a wife's group comprising of wives of the *matai* (who traditionally marry from beyond the village) and the untitled men's group, comprised of men (often young) who have yet to become *matai*.

The following section will examine three governance systems in the dispute resolution process. First, the role of family will be touched on. Following this, the institutions in the village context will be examined. Finally, the section will briefly touch on the role of the church.

2.1. The Family

“Generally, before someone can bring a matter to court, family considerations are first and uppermost in their minds.... whatever you do, whether offending (your whole family carries the shame and contribute to the penalty too) or an achiever (your whole community, families and families of families celebrate with you as you have raised their reputation and made them proud), these can impact on the decision on what dispute resolution mechanism is to be employed” (respondent email)

The family structure plays a central role in the customary governance system. Broader social structures, such as the village, are built on representations from families. Families, in their traditional construct, are defined more broadly than the immediate family and include extended family structures. While a number of titled positions may exist in the family, the head of the family, the *sa'o*, has the most influence. This is reflected by the fact that the exercise authority in land associated with the family. That is to say they determine the division of customary land amongst family members.

The family structure is still perceived as the first port of call in dispute resolution processes. Family members will turn to their elders to seek support in the event of dispute and will place some degree of importance on the decisions of the elders. Despite this the family structures in Samoa are being influenced by Samoa's increasing engagement in the global community. A number of studies have examined the influence of urbanization, migration and remittances on family structures in Samoa. The diminishing role of the family is particularly being examined in the context of increasing urbanization and impacts on youth and crime around Apia. The challenge is for Government to develop policies that draw on some of the key strengths of custom whilst also acknowledging that difficulties with urban youth may

also be, to some extent, a result of challenging family structures in rural communities that fail to adequately address the needs of marginalized youth.

2.1.1. Custom in a present-day family

A fair amount of literature exists on the pressure that modernization is placing on custom. A number of media reports over the course of May and June looked at the issue of youth crime in peri-urban areas, with some blaming a lack of respect for custom and family social structures as an influencing factor. Custom, however, is constantly evolving, and this has often been identified as a strength of custom. The evolving nature of custom leaves it open to many different interpretations. The box below highlights an interpretation from a young, educated male, likely to become a customary leader at some stage.

Modernity and Custom from the Viewpoint of a Young Elite

As a young, titled male, it is A's responsibility to protect his family's significant land holdings. A dispute is ongoing between A and B, whose family was invited to live on a small parcel of the land by A's grandfather a generation ago. Although the parcel is small it is not without value, being on the beach and having tourist potential. A's immediate response is to draw on his family's title and ask B and their family to leave the land.

A tertiary educated man, with a passion for Samoan custom, A draws on his family's title and petitions the Land and Titles Court to evict B from the land. Speak to A and he will articulate the importance of custom in his case against B, including the burial of his grandparents not far from the block and his rights, as a representative of the family to do with the land as he wishes. He will also mention that, as per custom, B is a member of a family and as such must have access to family land elsewhere (on the other island in Savai'i in this case).

Little mention is made of his ancestor's decision to invite B's ancestors to live on the land in the first place. A decision that probably was a result of *tautua* or service provided by B's ancestors to A's family. Both the concept of service and respect for the decisions of your ancestors are principles widely acknowledged as playing a central role in Samoan custom. Neither has A sought a negotiated settlement, despite the strong emphasis on consensual based decision making in Samoan custom.

As the eldest son from a rural community in Samoa A can draw on his knowledge of custom to enjoy other benefits. In a family setting, it led to bestowal of a *matai* title at an early age without clear indication of the traditional requirement of service having been provided; significant influence over younger siblings, who both wait for you to complete university prior to them getting an opportunity and respond to your commands in serving you on a daily basis; and access to the best parcels of land for your agricultural pursuits. A modern education allows A to selectively interpret custom, claiming his rights and ignoring those aspects that are less convenient.

2.1.2. Domestic Violence

As in many societies, there are some disputes that families will have difficulties overcoming, but where there are strong incentives to ensure the disputes do not go beyond the family structure. This is particularly the case for domestic abuse. As identified in the Pacific Prevention of Domestic Violence Programme (PPDVP)

country report on Samoa, domestic abuse is perceived as a significant issue. The challenges for disputes relating to domestic abuse are that the social structures generally responsible for dispute resolution, family chiefs, may often be at the centre of the dispute. In addition, the risk of bringing shame upon both the family and the victim places significant pressure on victims not to report or escalate the dispute.

Reports such as the survey from the PPDVP indicate that village councils play important roles, where families are not capable of resolving their domestic disputes. However, initial research indicates that village councils are reluctant to become involved in these types of disputes. Village councils will generally only become involved where the dispute starts to impact on the social harmony within the village. In the limited occasions where the village council does intervene, their focus will be to attempt to limit the impact on peace in the village rather than trying to resolve the underlying causes of the dispute. In addition, family representation on the village council will be through the *matai*, who may be the cause of the dispute.

Families, therefore, play the predominant role in dealing with domestic disputes and acts of domestic violence. Although village councils have been identified as potential actors, their role is limited. There is an increased reporting of domestic disputes to police. The PPDVP survey shows a reluctance among community members to take these matters to police due to social pressure and shame. The reports also indicate some continuing belief amongst police that these issues should be resolved within the family. There appears to be an increase in reporting to police on these matters. This does not necessarily mean that there is an increase in number of acts that are occurring. Instead, it would indicate some success in awareness campaigns that are being conducted both by the Government and by civil society organizations such as Mapusaga o Aiga and Samoa Victims Support Group. In many villages throughout the country posters calling on community members to report domestic violence are prominently placed.

Several anecdotal stories of serious cases of sexual violence were discussed during the research. In both cases the respondents specifically requested not to divulge information relating to the case. In one instance, the case was reported to the police and assistance was provided to the victim from civil society. The case led to a prosecution, however, family pressure remains on the victim due to the social consequences that are a result of the acts and the case. The other case involved an act of sexual violence by one community member from an influential family to a minor. The case was not reported and was resolved through a traditional apology. This highlights that such approaches continue to occur may lead to different sets of rules for different members of the community depending on their status or capacity to manipulate a situation.

To summarize, domestic violence issues remain the preserve of the family in resolving. Although the village council is seen as playing a role, in practice this role is limited to instances where the acts lead to disturbance of broader community peace. Police are a fall back and increased socialization is leading to an increase in reporting and use of police resources. Reporting these instances to the state does have social consequences for victims within the village. These issues are challenging in the sense that power imbalances make it difficult for victims to resolve the issue: family

resolutions often mean that the victim suffers for the sack of broader family harmony, harmony that may not always last. As one religious minister commented:

I have learnt from experience that if you don't involve the police these cases will never end. They are very hard to counsel on. You can find a solution and in two weeks the same thing occurs again. (52)

The alternative is to report the case to the police which can have significant social repercussions. Civil society organizations are playing a constructive role working with the police to support victims in overcoming some of these social repercussions and removing the stigma around reporting cases.

2.1.3. Corporal Punishment

The issue of disciplining children is an issue that receives some attention in the local context. Some have argued that the development of human rights law, in particular the Convention on the Rights of the Child, is not consistent with Samoan tradition which allows for the disciplining of children, including through corporal punishment. As one respondent noted, some believe that:

If violence is absent from any family, then that family has no stable foundation. (31)

Changes to practices such as limiting corporal punishment, are relatively recent developments in international society and take some time to lead to behavioral change in society.

A combination of increased mobility and education and an increased awareness relating to the issues will highlight that issues such as these do not manifestly emphasize a clash between custom and human rights. One respondent articulately made the case that using custom was the most effective way to challenge customary leaders who argued that physical punishment was part of Samoan custom. This respondent highlighted the importance of belief in God and religion as an essential part of custom. He then used bible references to protecting and loving one's children. In his opinion, these proved much more effective than drawing on provisions in some international convention. Others have also emphasized that the protection and nurturing of the young is at the heart of Samoan custom and highlighted examples of phrases to support this view.

2.2. The Village

The village governance system plays a dominant role in the lives of community members. The system is complex, having evolved over hundreds of years to meet the needs of communities. At the core of the village governance system is the role of the village council, where all the *matai* from a particular village are represented. Although the village council provides for representation from all *matai* in a village, it has a hierarchical structure with some titled positions holding more influence than others.

The state recognizes the significant contribution the village council makes to state-society relations. The role of the village council is provided for under legislation in the *Village Fono Act*. Section 5 of the Act provides the Village Council with the power to make rules relating to hygiene and economic development of the village in accordance with custom and usage within the village. Section 6 provides the Village Fono with the power to punish village members who fail to follow instructions of the Village Council. The Act provides for a right to appeal decisions from Village Councils to the Land and Titles Court. The increasing role of the State in village

affairs, including through implementation of the *Village Fono Act* and through village development activities overseen by the Ministry of Women, Community and Social Development naturally also influences village affairs, including the functioning of village councils.

2.2.1. Types of Issues

The village council undertakes numerous roles that, were it not present, would require the intervention of the state. The police have emphasized the important role of village council's in maintenance of law and social harmony in villages. The village council also represents the interests of its community in liaising with the government. Village Councils meet on a monthly basis. Box X below provides a snapshot of the types of decisions a council may make over the course of one of its monthly meetings.

The Role of the Village Council

The village council in Village X meets on a monthly basis. It is on the main road between Apia and the airport meaning that it is accessibly to town, where a number of its villagers work. In addition, because of the size of the village, village council's meet at a sub-village level with each sub-village council acting like a village. Village council meetings bringing together different sub-villages are infrequent. List below are a translation of the decisions made on the day I attended over a two and half hour period:

1. The Village Council discussed the need to repair the Women's Committee building. Every family was asked to contribute T150. An untitled male was dispatched to collect the money from those who had not yet paid;
2. The *pule nuu* informed members the Government was holding a competition for villages on the main road to improve tidiness along the road. Villagers were asked to ensure they did their part. A discussion was held as to whether sub-village X could partake as it's own small village. The alternative was depending on the other sub-villages to work together. A committee was formed to support the activity;
3. The problem of pigs roaming freely in the village was discussed. The T15 fine was not encouraging villagers to invest in pens.
4. As part of the Government's ongoing road work on the road going inland, the *pule nuu* reminded the village council that access to the road needed to be clean.
5. The Women's Committee was called to explain why they weren't maintaining building. They revealed that their savings (T17,000) had been lent to members. The committee was having difficulties collecting this from members and couldn't finance the building. The Village Council resolved to look after the building itself. The Council emphasized the importance of the appearance of the building in the village's negotiations with the Government.
6. The school was broken into recently. A *matai* updated the Council on the status of the investigation;
7. The same man updated the Council on a proposal to build a sports field;
8. The lack of constant water for inland houses was discussed. This is a routine discussion at meetings;
9. The Council considered how to force members to attend church. The Council discussed the merits of the Council imposing fines on villagers who did not attend. Ultimately, the Council resolved that as each family in the Council were also members of the different churches different families should monitor participation by denomination as they were more familiar with their congregation;

10. The committee responsible for overseeing the curfew apologized for its failure to ensure the curfew was being implemented and would report at future Council meetings;
11. The Council considered a request from a member whose store included a Government license to operate a pool table. A previous Council meeting prohibited use of the table as it was disturbing the peace. The *matai* requested a review of the decision as it was affecting his livelihood. The Council noted the man's license and provided permission for operating the pool table up to curfew, on the condition the *matai* monitored behaviour and limited the sale of alcohol around the table;
12. The Council considered the request of one member that his relative, another *matai*, be permitted back into the village. The Council noted that its consideration of the request should be based on acts by the banished man showing remorse or change of behaviour – ie: the onus lay on the banished man;
13. Untitled men were asked to appear. They were informed about the decisions of the meeting, including a new fine of T120 if they did not support cleaning of the village. The untitled men requested advice from the Council in making people participate in the untitled men's group. One family was not participating. A High Chief, knowing it was members of his family closed the meeting by stating: "Just penalize them. They can't live in the village and not participate. They are from my family. I know who you are talking about and I support you so just penalize them. If they still don't respond bring it back to the Council. They will respond to me. They are under my family."

As can be seen from the list of issues above, the powers of the Village Council are broad ranging. The decisions issued above cover a range of functions legislative, executive and judicial in nature. The primary objective for the Village Council is the maintenance of social order and harmony in the community.

There are several areas where the Village Council is reluctant to become involved. The first is on land issues. The Council is unlikely to become involved in a land dispute within a family or between families within the same village. In both these instances disputes will likely go directly to the Land and Titles Court. Numerous respondents mentioned the capacity of the Land and Titles Court to issue determinative decisions as the reason why these disputes went straight to court. The Village Council's do play prominent roles in inter-village disputes over land. As will be discussed below, they also play a restorative role in local land disputes.

As was discussed in the previous section, the Village Council rarely involves itself in family disputes or disputes involving domestic violence. Village Council's are still predominantly male in representation. The limited female representation may be one reason why these issues are not addressed in any significant way by village councils. The exception to these cases is where the disputes threaten the social order and peace within the village. In those instances the Council may become involved, but are likely to make determinations to resolve the issues relating to social disturbance without examining the root causes of the dispute.

2.2.2. Village Council Processes

Village councils deliberate on issues, but you should put a question mark around the word 'deliberation'. I do not necessarily mean that this is done in a democratic process. (40)

The Village Council decision-making process has been developed over an extensive period of time. At the core of the process is an objective of maintaining peace and social harmony within the village. As such the system provides for a deliberative and consultative process.

In principle the representation of all families in the village on the village council enables all community members to bring matters to the village council for consideration. In addition the openness of the deliberation process and the provision for all *matai* to represent their family's point of views provide for a transparent decision-making process. Ultimately, *matai* will be answerable to the social pressure of their family and their communities for the decisions that are made.

Much literature exists on the consultative nature of the village council process. This also includes extensive literature on the power of *deferment* as a decision-making tool. There exists a tradition of putting off difficult decisions where consensus cannot be reached in order to provide more time for discussion with family members and consideration of options available.

Village councils are social institutions. Although common principles may exist across village councils their actual performance is determined by the capacity of the individuals involved in the process. There is no doubt that many village councils provide valuable services and genuinely represent the interests of all members of their communities. There are, however, also instances of where village councils (or their members) lack legitimacy based on their actions. As one commentator has noted:

Their effectiveness is as good as the calibre of the village *matai* and their leadership abilities (Notes 25)

In addition, although the process is deliberative, power is ultimately vested in the hands of 2-3 high chiefs in the village. These titles are hereditary and the title-holders will have the final say in the decision-making process. As such the quality of decisions is even more dependent on the capacity of these handful of individuals. Some mechanisms exist that provide for checks on this power. In one village in Savaii a case had been on-going over a village council's decision to banish a high chief as the village council believed the high chief was too authoritarian in his decision-making process.

The consensus-based approach, the emphasis on social harmony and composition of village councils, has meant that a form of self-regulation exists in terms of the nature of the decisions that are made and the issues examined. As has been mentioned above, some issues such as land and domestic disputes remain beyond the realm of the village council. The personalized nature of such disputes would lead to inevitable divisions within the village council. The difficulties in achieving consensus over broader village development planning also leads to a devolution of the more difficult decisions back to individual families. This is despite the intentions of the *Village Fono Act* that aimed to provide villages with increased responsibility for the economic development of their village. The case below documents this in the instance of one well-known development in Savai'i.

Decisions by Consensus and Community Interests?

In a well known case a village in Savai'I is benefiting from securing investment from an American businessman. The investment comes in the form of a long-term lease for community land covering the three sub-villages of the village. As the deal involves leasing customary land, the agreement required the approval of the Government. The deal involves annual contributions by the investor over an initial lease period of 30 years, in exchange for access to land where the development of a resort has been promised.

Without commenting on the legitimacy of the proposed development, the deal represents an interesting case of village council decision-making. As was explained by one *matai*, the investor would provide the village \$120,000 per year for the first five years. This amount would then increase on a percentage basis over the duration of the lease. The village council is a party to the lease and received legal advice in its negotiation. The sums involved are not insignificant for a village in Samoa and would be split between 3 sub-villages, with the larger sub-village receiving 50% and the other two receiving 25% each.

The village council in the largest sub-village was responsible for managing the fee involved. Ultimately, the village council decided to distribute the sums amongst the various stakeholders. Each *matai* would receive a set amount for their families (nominally \$1,000). The three church pastors would receive a larger amount (\$5,000). The women's committee and the youth group would then each receive an equal share of what was left (\$15,000). One *matai* noted that it was easier to divide the amount up in this way than to develop an overall plan for the benefit of the community. He did note however, that the risk was that most of the funds would be spent on contributions to ceremonies and alcohol.

As was commented:

Putting the money towards longer-term objectives makes a lot of sense, but it could never work here. People need immediate costs. They always need to cover the costs of some form of ceremony. So this money is always immediately spent, often on a church activity. If it is not spent on a church ceremony it is spent on vodka. So everyone is happy to receive the money but it is not used for anything productive. Everyone takes a little bit of it. Anyway it is still a lot of money and good for the village.

2.2.3. Engagement with the Government

In a formal sense, the relationship between the Government and the village is through the *pulenuu*. The *pulenuu* is a representative of a village, nominated by the village and appointed by the Government to represent the village. The powers and duties of the *pulenuu* are defined by the *Internal Affairs Act 1995*. In essence they play two functions, representing the needs of the village to the Government and representing the views of the Government to villagers. *Pulenuu* sit in on the village council as they must also be *matai* of the village.

In theory, the role of the *pulenuu* is similar in nature to the role of a functionary. They are responsible for administrative duties such as validating births and deaths certification processes, and certifying land and title documents in relation to Land and Title Court processes. They are also the point of contact for the police when engaging with a village. Their position is overseen by the Ministry of Women, Community and Social Development and they have monthly meetings with the Ministry.

The *pule'nuu* for me is an important position. As I saw it, it provided me for an opportunity to strengthen my rights and responsibilities within the village council. Most minor *matai* in our village have no voice in the village. There are several high chiefs and they decide everything. So this position provided me with a voice in the decision making process. (47)

As the quote above identifies, the position is not without status. The hierarchical nature of the Village Council limits the opportunity for ambitious, younger males to become involved in the decision-making process. The *pulenuu* is one position that is open for these people. Although not a position that has been long established in custom, its presence may alter customary processes in villages, in particular providing greater government engagement in those processes.

As the role of the *pulenuu* develops and there is increased government engagement on community development issues, so to does the influence of the Government, through the Ministry of Women, Community and Social Development, in village affairs. These increased links can be effective in providing structures through which to disseminate information or undertake community development activities. They also potentially face challenges leading to the increased politicization of social structures.

The functions of the village council also overlap with the role of formal justice institutions in other ways. The village council's concern with social harmony means it plays an important role in restorative aspects of the justice system. For example, much has been written of the *ifoga* process relating to criminal justice and the importance of apologies in Samoan custom.

Another example of this process is the role of village chiefs in land disputes. As noted above, the village council does not generally become involved in the decision-making process in land disputes. If these disputes cannot be resolved within the family they are taken to the Land and Titles Court. Village leaders do however play a different, important role. As the box below highlights, they are called upon to facilitate the restoration of peace between disputing parties in parallel with the court process. This process played an important role traditionally. It is now however subject to manipulation as is highlighted in the example below.

The Restorative Role of Custom and its Current Application

A was involved in a land boundary dispute with her cousin, B in a rural village in Upolu. Efforts to resolve the dispute within the family failed so A made an application to the Land and Titles Court. As the court process was nearing completion, the parties gathered in court to hear the decision. As is tradition the parties invited *matai* from the area, both within their village and from other villages in the district, to attend the hearing and show their support.

A had managed to convince about two-thirds of the *matai* to support her case. The others came in support of B. Each party promised payment for the *matai*. Some received T1400, some T1300, ostensibly as a cover transport and meal costs.

After the court decision was handed down both parties and all the *matai* gathered outside for a *tapuaiga* or restorative process. Speeches were made to apologize for the inconvenience the dispute had caused to the village and asking on the parties to

forget the past and move forward. The financial contributions of both parties were gathered and then distributed by the parties

We give money to village *matai* and district *matai* who come to court. It's because they love the money. It is more than enough to cover their travel and food. (35)

Although this is viewed as an important part of the restorative process, as the quote above shows, it has become susceptible to manipulation by chiefs with the emphasis as much on the financial outcome then the restorative aim.

3. Land & Titles Court

For the average Samoan, mention the judicial system and the Land and Titles Court is likely to be their first point of reference. The Land and Titles Court's jurisdiction encompasses disputes over land and disputes over titles as laid out under the *Land and Titles Act*. It also covers complaints against decisions of the village council as provided for under the *Village Fono Act*. The court's decisions are based on custom and tradition. Court hearings are conducted without the presence of lawyers.

The importance of the Land and Titles Court has been well documented. The Court rules on issues central to Samoan custom and is readily accessible by community members. In disputes relating to both lands and titles, communities preferred taking matters direct to the Court rather than seeking settlement at the village level. The popularity of the Court highlights several interesting contradictions in perceptions of customs in the discourse in Samoa.

First, Samoan custom is portrayed as a system emphasizing consensus and resolutions satisfying all parties. This is often identified as a priority for communities. As one member of the Land and Titles Court mentioned:

It is shameful for brothers and sisters to face each other in court so it is more appropriate to encourage mediation. (50)

However, on matters that are central to Samoan custom, disputes relating to land and titles, the vast majority of people would prefer to seek resolution through the Land and Titles Court, a judicial mechanism with adversarial aspects. Land and titles issues are both central to Samoan identity and have a consequence for the future generations of families. For these reasons respondents preferred to seek a determinative decision and it is only the Court that can provide this decision.

Second, there is little evidence to suggest that the heavily contested nature of disputes relating to land and title in Samoa leads to contestation in other areas. There is significant literature that exists elsewhere on the role small, on-going grievances can play in igniting broader social instability.¹ In many cases these grievances relate to land disputes. Land and titles disputes appear common in Samoa. The court list is full and most respondents had had direct experience with at least one court case relating to these issues in the past. These cases are strongly contested and involve competing interests amongst families and neighbours. A high appeal rate indicates parties wanting to contest the decisions as long as possible. Despite this they do not appear to lead to broader social unrest. With some exceptions, the final decisions appear to be accepted and parties move on with their lives.

¹ Find references – WDR on conflict is good starting point.

The perceived ability of communities to reconcile following contested land and titles disputes is worth further examination. There may be a range of factors influencing this. The restorative role of custom or the influence of respected leaders in seeking peaceful reconciliation may be important. It is possible that the changing nature of parties to the disputes and in particular, cases brought by heirs who no longer live in the villages under dispute, may mean that once a case is resolved it is no longer of day-to-day importance to them. It is also possible that there is simmering on-going resentment within communities relating to these disputes but that the community structures are strong enough to deal with this or that the resentment is not being documented and dealt with. A range of other factors probably also exist. A more detailed examination of this area would be of some use, especially for understanding why similar mechanisms in other countries in the region are less successful in minimizing broader social tensions.

3.1. Mediation in the Land and Titles Court

The Ministry of Justice and Court Administration is able to resolve a significant proportion of claims relating to lands and titles prior to the matters going to court. The Ministry's Annual Report for 2008-2009 provides some statistics for mediation relating to land and titles matters. This includes 246 cases referred to mediation in the Savai'i Office (with 37 cases successfully mediated but only covering a 3 month period) and 190 mediation meetings in the Upolu registry. This is in comparison to the 205 decisions handed down by the Land and Titles Court over a similar period. Numerous respondents in the Ministry place the figure of number of cases settled through 'mediation' at between 60-70%.

The term 'mediation' in the context of the Land and Titles Court has a broad meaning. It is used to cover anything from a pre-trial meeting to explain party's rights to a complex and prolonged mediation process involving numerous parties. Whereas court staff note that all cases filed with the court will be subject to some form of mediation process, some respondents did not recall this occurring in the actual disputes they experienced. This highlights the different understanding of the definition of mediation. In some instances, parties may see registrar staff involvement pre-trial as an administrative process or as information providers, whereas the court staff define this as a step in the mediation process.

A more detailed understanding and documentation of the 'mediation' role within the land and titles jurisdiction would support the development of a mediation framework for the Ministry of Justice and Court Administration. It would also provide valuable guidance on developing a broader mediation system across the jurisdictions of the Court with Samoan characteristics.

A number of respondents noted that the mediation process varies significantly in terms of type of communication and that the success rate depends significantly on the type of case. In order to obtain a more detailed understanding, the starting point should be examining the mediation process through a typology of cases handled by the Land and Titles Court. This would also identify where mediation is successful, providing important information on allocation of court resources.

During the research an indicative typology was presented as follows:

- Cases involving family disputes over customary land: these cases are relatively easy to resolve, especially where a previous decision exists relating to the title of that land. In these cases, the court registrar checks the file and the title-holder is presumed to have authority over how the land is divided. This information is conveyed back to the parties by the court registrars in more of an explanatory role than a mediation role;
- Cases involving more than one family relating to boundary disputes over land: these cases are more difficult to resolve. Attempts at mediation are undertaken. The mediation attempts can involve land survey assessments by the court as well;
- Cases involving chiefly titles with authority over land: these cases are heavily contested. Mediation may be attempted however the success rate is much lower. Many of the cases progress to the Land and Titles Court;
- Cases involving titles without authority over land: these cases can be more successful in mediation. In the past, this has included a practice of obtaining consensus through splitting the titles;
- Cases involving appeals of village council decisions: these cases are difficult to mediate and generally progress to Court hearings.

In addition to a more detailed examination of the typology of cases in land and titles disputes, there are several aspects of the pre-trial communication process that are identified as being factors in supporting mediated solutions in the Samoan context.

These factors include:

- The fact that the Land & Titles Mediation Division identifies a staff member to liaise with the parties to assist in finding a solution. Formally, the parties do not have much of a choice in accepting the court staff member assigned to the case. In assigning staff, it appears that the court registry takes into consideration the complexity of the case and the status of the parties;
- Court staff insist on ensuring that all parties involved in the case are present at meetings. Court staff are reluctant to meet parties individually without other parties being present. This is considered crucial in maintaining the trust of parties in seeking a resolution. It does, however, also affect the time taken to resolve cases as it is not uncommon for parties to fail to attend meetings or defer their involvement;
- The use of customary processes to facilitate the meetings. Court staff emphasized the importance of using Samoan customary processes. This included the importance of appropriate greetings and introductory statements, providing all parties with an opportunity to present their side of the story and respecting the status of parties.

The status of mediators is one factor that does not necessarily draw on Samoan customary traditions. As mentioned above the village council is a hierarchical structure with decision-making undertaken by high chiefs. Although registrars involved in mediation are all *matai* they do not necessarily all have high titles. This does not however appear to limit their legitimacy in the eyes of the parties. Instead parties view their status as government officials as being sufficient standing to assist in resolving the disputes.

4. Civil and Criminal Jurisdiction

This section will examine the influence of custom in relation to the court proceedings under the civil and criminal jurisdiction of both the District and Supreme Courts. At the request of the Ministry of Justice and Court Administration the section will also examine mediation processes as provided for under the *Alternative Dispute Resolution Act*. First, matters relating to civil law will be examined. This will be followed by an examination of the role of custom in criminal jurisdiction. Finally, the section will touch briefly on several of the issues that are perceived as being particularly challenging for the relationship between custom and the courts and have been subject to Supreme Court judgments and significant publicity.

4.1. Civil Matters

The potential role of custom is an important part of a detailed discussion within the court on strengthening the role of alternative dispute resolution in civil processes. There is general acknowledgement that Samoa's tradition of consensus-based decision-making could play an important role in the judicial process. Important steps have been taken to this end, including passage of the *Alternative Dispute Resolution Act* and training of accredited mediators. Despite these steps, the use of mediation has yet to achieve its full potential.

There are several ways to categorize mediation in civil matters. Formally, the definition of mediation covers cases that have been referred to mediation in accordance with section 7 of the *Alternative Dispute Resolution Act*. The Court maintains a list of these cases. Since the commencement of the Act a total of 34 cases have been referred to mediation under the Act. Of these, approximately half are still awaiting meditation. The cases cover both family and civil matters.

Respondents noted that mediation occurs beyond this formal construct. In some cases judges have encouraged parties to pursue private mediation prior to the case being heard in court. Both the Law Society and other formal justice sector agencies also note that there have been instances where they have pursued mediation and emphasize the role of a range of stakeholders in developing a mediation system. At a less formal level, Ministry staff are involved in communicating with parties and some have defined this as a mediation-type role. For example, in custody and maintenance issues court staff are involved in encouraging the parties to obtain an amicable solution prior to matters being filed in the court.

There are two separate but related issues aimed at improving the effectiveness of the use of mediation. The first involves making greater use of the provisions provided for under the *Alternative Dispute Resolution Act*. The second relates to making mediation more effective by ensuring it draws on the social and culture norms of Samoa.

4.1.1. Making more use of mediation

It is beyond the scope of this research to provide a detailed technical analysis on the mediation system.² Throughout the course of the research, however, a number of respondents provided their views on the mediation process in Samoa. This section summarizes some of these views.

² The *Report on Pacific Mediation Project: Samoa* prepared by Julian Heteyey provides some detailed and technical recommendations on mediation, many of which may still be relevant.

Both amongst actors within the courts and external actors, there is a common acceptance that a stronger alternative dispute resolution process would assist the court. Internally, several challenges were identified. First, several staff trained to conduct mediation no longer work with the courts. This has left a limited pool of staff capable of conducting mediation.

Second, and related to the above point, conducting mediation is currently not a core aspect of duties of individual court staff. Court staff conducting mediation do this in addition to their daily duties. This places limitations on their capacity to offer their time when the Court requests the services of mediators. The Court is currently in the process of attempting to rectify this situation through having staff assigned specifically for mediation duties.

External stakeholders identify similar challenges. Respondents commented that the limited number of qualified mediators makes it difficult for parties to agree to a mediator. Respondents also noted that the establishment of a system for mediation required the participation of a broad range of stakeholders. At the core of creating a successful mediation system is the need to put in place the appropriate incentives to encourage parties to want to seek out of court settlements. Without those incentives there is a risk that mediation an additional step parties may need to undertake in their journey towards the court.

Strengthening public confidence in an effective mediation system could include some of the following steps:

- Evaluating the system to date: there are now sufficient cases that have been handled to gain feedback from parties on their experience with the system. A short survey has been developed. The responses from actual parties may be of use in guiding the Court in strengthening the current system. The survey would collect information on: types of cases that are successfully mediated; duration of mediation process; satisfaction rates with process; and strengths and recommendations for improving system.
- Putting in place the framework for mediation needs to go hand-in-hand with increasing the pool of qualified mediators. The establishment of a mediation division with core staff will go some way to ensuring that the Court can respond to cases once they have been referred to mediation;
- Other stakeholders have expressed similar interest in the importance of mediation. The Law Society is seeking to train some of its members in mediation. In some instances the court has already encouraged parties to seek private mediation. Professionals from beyond the legal community could also play an effective role. The success of mediation will require the active participation of a broad range of actors, including other Government departments such as the Attorney General's Office, the Ombudsman and the Law Reform Commission and members of the legal profession. Engaging these actors could increase the pool of available mediators, thereby providing court users with a greater range of options.
- A number of respondents noted that an important aspect to an effective mediation system involves reviewing cases at an early phase to identify those cases that could benefit from mediation. A referral mechanism to mediation appears to occur effectively in the Land and Titles Court.

4.1.2. Strengthening mediation through a contextualized approach

Mediation is seen as a favourable option for dispute resolution in Samoa because of the country's long tradition of consensus-based decision-making. Drawing on Samoa's custom in developing a mediation system can strengthen the system by removing the lack of familiarity that court users may have with the system. There are a range of options available in ensuring that Samoan custom plays an important role in the development of a mediation system.

The first starting point would be to learn from the experiences of the mediation process in the Land and Titles Court. Several lessons are outlined at 4.1 of the report above. These include as much as possible encouraging all parties to be present in meetings and making mediation accessible through the use of Samoan protocols, introductions and language.

Second, as additional training is provided it will be important to build the capacity to have the training conducted primarily by Samoans. This can include pairing international trainers with co-trainers or eventually handing sessions over to previously trained staff and developing a contingent of Samoan trainers to train the future generation of mediators.

There may be value in examining ways to draw on the experience of senior customary leaders. This could include inviting senior customary leaders to share their experiences in mediator training sessions. Other options could also include inviting customary leaders to participate in training and building their potential skills as mediators or even, in some circumstances, it may be appropriate to have co-mediation where a formal accredited mediator is partnered with a customary leader to support the dispute resolution process.

4.2. Criminal Matters

This section will examine two areas where custom interacts with the legal system in relation to criminal matters. The first is in instances when the state and customary processes are in conflict as both systems seek to exert authority in regards to a criminal case. Second, customary processes play an important role in supporting the criminal justice system in sentencing, in particular in relation to restoring relations between affected parties and rehabilitation.

4.2.1. Competing authority

Both the State and customary institutions play an important role in maintaining social stability. There are instances however where the State's responsibility for ensuring social stability through maintaining a criminal justice system will be challenged by customary practices that seek to resolve disputes locally. These instances can be challenging as they may result in double jeopardy for offenders, being punished twice for the same crime. They may also lead to competing claims of legitimacy, in many cases couched as a state's concerns for individual rights versus an emphasis on social harmony claimed by customary systems.

These challenges were discussed in some detail in section 3.1.2 above relating to domestic violence. In some offences, there are significant social barriers towards reporting an offence to the police and pursuing the offence through the courts. In some of these instances there are also concerns about the operation of the customary

systems and the extent to which they represent the interests of communities. As was discussed at length above, customary systems are reliant on the individuals in leadership positions within those systems and as a result they can lead to flawed decisions. How to resolve these challenges will be analysed below.

4.2.2. Sentencing and Restorative Justice

The criminal justice system in Samoa provides a role for customary processes in dealing with issues relating to sentencing. It currently does this in two ways. First, in determining sentencing for offenders the Court is permitted to take into consideration the degree to which a formal apology has been conducted and accepted according to custom. In Samoan custom an *ifoga* or traditional apology plays an important role in restoring peace and harmony between disputing parties. The *ifoga* process has been well-documented before. It includes an act requesting forgiveness from the offender's family and *matai* to the family of the victim. If conducted appropriately this act is generally accepted by the victim's family and the offence is no longer discussed.

In a criminal case, the court will request a pre-sentencing report be completed. That report will include reference to the extent to which a customary apology was completed. The Court will generally take this into consideration in determining a sentence as a sign both of the offender's remorse and that a restorative act has been conducted towards the victim and their family. The traditional process emphasizes the importance of seeking social harmony between families following an offence.

The Court has also sought to work more closely with customary processes in the rehabilitation process for offenders, in particular for young offenders. With the passage of the *Community Justice Act*, the Government of Samoa is seeking the support of community leaders in rehabilitating young offenders. In the past, offenders placed on parole would be subject to the direct supervision of the MoJCA's probation staff. Under the act, in certain cases this responsibility is now delegated to community justice supervisors (CJS), generally either a parish priest or a senior *matai* such as the *pulenuu*. Young offenders will be placed under the supervision of the CJS where the offender's situation makes it difficult for them to visit the court for the monthly probation reports (either through distance or cost) and a suitable CJS is available in their community.

The CJS program is still relatively new. It is currently the subject of detailed analysis as part of a PhD dissertation. It draws on the community fabric to oversee the rehabilitation of an offender. Although initial signs are positive, the system does require concrete commitment from community leaders and at this early stage does not compensate them for their involvement. The system is also heavily dependent on the efforts of the offender's family in providing support. Where such support exists this is clearly a positive. It should be recognized, however, that in some instances the offender's initial acts may have been caused as a result of weaknesses in their social fabric in the first place.

4.3. Fundamental Rights Cases

There are issues on which there are serious tensions between the development of a formal legal system and the maintenance of custom in Samoa. These issues obtain a significant amount of media coverage and are frequently discussed as part of the political discourse at both the national and local level. The two issues that are most frequently mentioned in referring to this tension relate to the right of villages to

banish village members and to determine the religious institutions that can practice in their villages. Both of these issues have faced Supreme Court challenges questioning the extent that village council actions in this area violate constitutional rights to freedom of movement and freedom of religion. The recent electoral petitions heard by the Supreme Court also led to claims of conflict between the law and customary practises. The box below highlights that, despite the rulings of the Supreme Court, these challenges continue to exist at the village level.

Box X: Freedom of Religion

A and her family are practitioners of one of the smaller religions in a village in Savai'i. A's parents converted when she was still young. At that time her family was banished from the village. For a year the family lived in a small shed about four kilometres inland. As the children grew up the family purchased land in Apia and moved to Apia. A married and decided to return to her village.

The only people in this village who can afford to give their children a good education are the priests.... Everyone else has to give them money. People need to prioritize but the pressure to provide money is very strong. The village council passes regulations for this.

A is an active practitioner of her faith and would like to encourage others to join. Although the village allows A's family to practise their faith, the Village Council issued a decision prohibiting other village members to convert and A feels aggrieved by this decision, claiming she knows a number of people who would want to convert were it not for the pressure of the village council. As she notes above, A also feels annoyed that she needs to contribute to the ceremonies of other churches. Despite these restrictions A lives with the village council's decisions.

At the core of these types of cases are issues of power. Rulings by the courts are seen as limiting the authority of village councils. A number of respondents mentioned that by questioning the legitimacy of the councils in these cases the Courts were encouraging individuals to ignore village council decisions. As the quote below indicates there is a concern that the judicial process will eventually erode the powers of the village council.

The difficulty is that as soon as the state intervenes it overrules the villages and makes them powerless. Where one person decides to take a decision of the village council to court it sets an example for other people in the village, thereby making the village council powerless. (32)

It is important, however, to differentiate between two types of cases in relation to these issues. There are some instances where although the cases are portrayed as a conflict between two systems, they can actually more accurately be described as maintaining checks on the use of power of a particular system. As has been mentioned above, the outcomes of customary systems are subject to the quality of leadership of those systems. In some villages, leaders may abuse the power they seek to exercise and portray this as a challenge between the formal and customary systems. The recent decision in the case of Alii and Faipule of Laulii vs Ramona Ash is an example of where traditional leaders sought unfettered authority. The well-documented case involving the village council of Tanugamanono provides another example. Custom, like any other system, is subject to manipulation.

It needs to be acknowledged that there will inevitably be some instances where there are some inherent tensions between the two systems. Court decisions that appear to

curtail the power of the customary system will inevitably be resisted by some. These decisions also receive significant media coverage adding fuel to the public discourse. As the box below highlights these debates at the national level are heavily influential in the discourse at the local level as well.

Box X: The Media, Public Discourse and the Relationship between Law and Custom

The approximately 6 weeks of research in Samoa included a media analysis of the main Samoan English language newspaper, the Samoan Observer. Twenty-nine articles were identified that commented on the relationship between law and society. Of these articles eleven were classified as ‘Custom and Public Policy’.³ Some of the titles speak for themselves: “Change the Law or Samoan Custom”; “The *Aiga* Test”; and “Law vs Custom” were but three of the articles that invited debate on the relationship between law and custom. It should be noted that a number of these articles related to the Supreme Court hearings on the election petitioners dealing with these issues.

Over the last five years there has been a major difficulty between village rules and the issue of rights. Every village has its own rules. About 10 years ago, the Government, especially the courts started to use people’s rights. So now the government has to look at how to change this. Many years ago, people in the community followed what the village decided. (36)

The quote above comes from a high-ranking *matai* in a village in Upolu. It was not uncommon to hear similar concerns expressed by respondents. Asking the *matai* specifically how such cases had affected his village and he admitted that his village had never faced a challenge on these issues. His concerns were built on what he had heard from other villages and what he had seen in the media. Others commented that the principles that underpin both custom and the law were both similar, and based on notions of respect. Focusing on the similarities as opposed to the tensions could be one way of improving the relationship between the two systems.

Tensions between the two systems are natural. Similar tensions exist wherever a number of different systems co-exist. Importance should be placed on the processes that operate to reduce these tensions. In many instances, as highlighted above in relation to the cases of misuse of power, the tensions can arise from misunderstandings. De-mystifying the law through identifying opportunities to encourage greater engagement between the legal system and communities, including customary leaders, can play an important role in this process. One respondent highlighted the important role court staff played in a case involving banishment, meeting with village leaders after the court decision and explaining the decision, the implications and the consequences of further actions.

5. Conclusion

This report is the first step in a regional research program aimed at understanding the relationship between custom and formal justice systems in the Pacific region. The report’s primary objective is to document experiences from one country to inform the development of a broader regional report. As such, it was never the objective of this report to provide detailed recommendations at the country level.

³ Articles were kept across six topics: 1). Custom and Public Policy; 2). Religion and Public Policy; 3). Land; 4). Criminal Matters; 5) Family; and 6). Other.

The report outlines the extensive role custom continues to play in governance in Samoa. It also emphasizes the continual interaction that exists between the formal legal system and custom in Samoa. Both systems co-exist and have similar objectives, as core components of the overall justice system. Outlined below is identification of concrete issues that may be of assistance to the different agencies across the law and justice sector.

A comprehensive set of social and government structures already exists in Samoa. These structures can provide convenient entry points for building on new initiatives. The analysis below provides ideas for utilizing and building on existing structures.

5.1. The Law & Justice Sector Strategy

The Law and Justice Sector Strategy provides a comprehensive plan for the development of the sector across a 5-year period. The Strategy addresses needs of both formal justice sector agencies and customary institutions. Goal 3 of the Strategy specifically deals with “Customary and Community Justice Based Justice”. Goals 1 & 2 also touch on the relationship between custom and the formal system including through identifying a need to review the *Village Fono Act* and through increased community awareness. Progress has been made across a number of these aspects including: efforts to establish a Community Legal Centre, the establishment of a Law Reform Commission and the establishment of a team to undertake community outreach.

The research above highlights the importance of facilitating interaction between the formal system and customary mechanisms wherever opportunities exist. This interaction is crucial for demystifying the formal system and reducing the degree of distrust that may exist between systems. In the process it will improve state oversight of local mechanisms and strengthen the local influence in the formal systems. This process is occurring naturally in some villages. The presence of professionals as *matai* in the village council meeting described in Box X influenced how the meeting made decisions.

This can be strengthened through further implementing the relevant aspects of the strategy encouraging engagement between the formal system and customary actors. The Strategy lists several entry points: the relationship between the police and the *pulenuu* and the *alii and faipule*; and a socialization/public awareness campaign that has commenced through a working group on customary justice. These could be built on including through:

- More systematic use of institutional structures such as the *pulenuu* monthly meetings with the Ministry of Women, Community and Social Development and the village council monthly meetings to disseminate information;
- Using the institutional structure to seek responses from *pulenuu* and *matai* more broadly on their views of the formal system and subjects where additional information would be useful;
- Making resources available on demand for outreach to village council meetings where they may seek advice on legal issues.

In addition, the public awareness and community outreach aspects of the Strategy could be further built on. This could include increasing socialization activities of the customary justice working group and supporting community outreach for

organizations such as the to be established Community Justice Centre, existing NGO's such as *Mapusaga o Aiga* and SVSG, and institutions such as the Law Reform Commission. Again, institutional structures exist through which information can be disseminated. These include the village council and women's councils, the church and media such as the radio. SVSG has successfully shown how it is possible to raise awareness about an issue broadly through their campaigns against sexual abuse. They key involves identifying community needs and disseminating messages in a media that reaches the right target audience. A sector wide public awareness strategy could assist in this regard.

The Strategy makes several mentions to amendment of the *Village Fono Act*. Given the significance of customary institutions in Samoa and the influence the *Village Fono Act* has on how those institutions operate and are subject to the law, a more detailed empirical understanding of how village councils operate across the board and how communities perceive their role would be useful.

5.2. Mediation

The Ministry of Justice and Court Administration is currently in the process of drafting a mediation framework covering all aspects of mediation relating to the Court's work. In this context, the report covers some insights gained from the research in relation to mediation. As has been mentioned above, this should not be viewed as a comprehensive analysis of the mediation system in Samoa. However, broadly speaking there may be three areas of further work that could be of assistance to the Court in developing a mediation framework.

First, there are important lessons to be learnt from the experience of the Land and Titles Court in handling mediation. Some of these are detailed in section 4.1 of this report. They include the potential benefits in having more detailed information on the mediation process broken down by types of cases. They also include learning from the Samoan nature of mediation in these cases and how this can be applied to mediation in the civil jurisdiction.

Second, mediation in the civil jurisdiction has been functioning for several years now. It would be beneficial to obtain the feedback of court users to understand the extent to which the system has met their needs and how the system can be improved. A similar survey of land and title mediation clients may also be of use. Given the number of stakeholders interested in mediation in the civil jurisdiction, the system would benefit from on-going cooperation between these stakeholders. This will also assist in getting a sustainable pool of trained mediators who may come from a variety of sources.

Third, developing a Samoan-based approach to mediation can benefit from a multi-pronged approach. First, this can include drawing on lessons from the approach with land and titles matters and from the experience of civil mediations to date to insert Samoan characteristics into the mediation process. Second, the issue should be addressed in training curriculum, including through developing Samoan mediator trainers. Finally, engaging with experience traditional mediators in the courts mediation work will strengthen the Samoan context of the court mediation system and also ensure that customary approaches are more consistent with the formal system. More detailed discussion on these points is contained at 5.1.2.

5.3. Building the Evidence-base

Finally, the report emphasizes the importance of customary processes in Samoa, as a key element of the overall justice system. Significant initiatives exist where the formal system works in cooperation with customary processes. There are also a number of government policy making initiatives currently in planning, such as the review of the *Village Fono Act*.

In several areas, the report identifies that these policy-making processes could benefit from the availability of empirical data on issues relating to customary processes. Significant information exists on the structure of customary institutions and the nature of the processes. Information on the impact of those processes on communities and expectations from communities would also be of use. Such an effort would need to be contextualized and as such requires implementation through local institutions. Several institutions, such as the Law Reform Commission and the Faculty of Samoan Studies at NUS, have a mandate in this area. Section 2.1.2 of the report outlines more detailed information on the importance of empirical data.



ANNEX 2: FEDERATED STATES OF MICRONESIA COUNTRY REPORT

Annex 2: Country Report Federated States of Micronesia

This report is one of three country background papers being prepared to inform the development of a regional paper outlining the relationship between the judiciaries and customary dispute resolution processes in the Pacific region. The paper documents research findings from research undertaken in the Federated States of Micronesia.

In most countries, if a community member has a dispute, three options are normally available. The first option is to use the formal justice sector. The second option is to use dispute resolution processes that lie beyond the formal justice sector. In the Pacific region this often means local leaders, including customary leaders who play an important role in this context. Options one and two are not mutually exclusive. Both can be used either at the same time or sequentially. The third option is to do nothing.

A range of factors will influence which options a community member takes. These factors will include:

- ability to access formal justice sector institutions and confidence that those institutions will act efficiently and fairly on the issue;
- existence of an alternative, ability to access that alternative and confidence that the alternative is capable of resolving the issue;
- the types of cases involved; and
- probably the most important determinant, the socio-economic factors.

This report examines how these options apply to communities in the Federated States of Micronesia (FSM). The local context is key to determining which option a person will choose out of the three options available. The reason is that the local context influences each of the factors listed above.

This report is structured as follows:

- i. Section 1** provides an introduction to the report. This includes outlining a hypothesis as part of an analytical framework. It also includes providing information on the methodology used in conducting the research;
- ii. Section 2** briefly outlines the context in FSM, focusing on identifying similarities that exist across the FSM and also the diversity between each of the States;
- iii. Section 3** focuses on the extent to which the formal system is accessible for community members, including perceptions of the system. It then discusses efforts made by the formal system to improve accessibility by engaging with customary systems;
- iv. Section 4** looks at the system that lies beyond formal justice sector institutions. In particular it examines the role of customary leaders;
- v. Section 5** discusses the choice that some community members are faced with of doing nothing.
- vi. Section 6** examines some of the factors that influence how people seek to resolve their disputes. This section focuses on geographic, economic and socio-cultural factors as issues relating to confidence in the various systems are discussed in sections 4 to 6.
- vii. Section 7** provides some initial observations based on the preceding sections.

Included as an annex is a description of how custom is covered in the constitutions and judiciary acts of each of the states. This also provides a brief examination of the judicial guidance clauses.

1. Introduction

The Pacific Judicial Development Programme (PJDP) is supporting a research activity aimed at understanding how customary dispute resolution systems operate in the Pacific region and the extent to which courts are engaging with these systems. The research activity will involve in-country research in three countries in the region over six months in 2011 and literature review and consultations covering the region more broadly with a view to informing the possible development of a regional judicial development approach to these issues.

This report was developed following research in the Federated States of Micronesia (FSM), the second of the three countries where in-country research will be conducted. The aim of this report is to document the findings from the research to support development of a regional report. Given research was conducted over a six week period in FSM between 5 July and 23 August, the report also may provide some interesting and useful information for partners in the FSM.

The scope of this report is broad. The objective of the report is to document aspects of the dispute resolution process that occur outside the formal confines of a courtroom and how community members engage with those aspects. As such, the extent to which the report examines the jurisdictions of the courts, it does so with a focus on engagement with the customary system.

As this report forms a part of a broader regional research activity, comments, feedback and clarification are welcome.

1.1. Starting Hypothesis

This report uses the work of Amartya Sen as the starting point for understanding how justice systems function.¹ Sen's framework starts from the premise that no perfect justice exists that is applicable to all situations. Instead, the delivery of justice is defined by how different systems (both state and non-state) interact based on the specific context of any given society. Improving the delivery of justice therefore depends:

“first, on assessments of social realizations, that is, on what actually happens; and second, on comparative issues of enhancements of justice (rather than trying to identify perfectly just arrangements).”

In summary improving the delivery of justice is a two-step approach. First, it requires an understanding of the social context in which justice systems operate. Second, it involves identifying opportunities to progressively improve those systems consistent with the social context.

This regional PJDP research activity is focused specifically on understanding how the judiciaries in the region engage with customary dispute resolution processes. Instead of providing a descriptive analysis of customary processes in FSM, this report will use as a starting point **communities**. It will examine the options available to

¹ Sen, A, **The Idea of Justice**, Allen & Lane, London, 2009 at 410.

communities in resolving their disputes and factors affecting those options. The reasons for adopting this approach are as follows:

- i. Customary structures across the four states of FSM (Yap, Chuuk, Pohnpei and Kosrae) are incredibly complex and varied. This limits the benefits of undertaking a descriptive analysis on each of the states given the complexities of the systems and the limited amount of time spent in each state;²
- ii. The judiciaries in FSM are in the initial stage of developing a longer-term strategic plan. Most judicial strategic plans include a focus on issues of access to justice. In discussions with the Chief Justices from the National Supreme Court and the State Courts it was felt that this research could support the development of access to justice aspects in the strategic planning process;
- iii. A regional report will be produced as a result of this research. The regional report will draw on the findings of in-country research in three countries, as well as a broader literature review. Specific country reports are being produced for each country where in-country research is being conducted. This provides an opportunity to test different approaches with judiciaries in each country and to learn from that process prior to defining a framework for the overall regional research;
- iv. This approach is consistent with the overall PJDP design that defines customary dispute resolution processes in the context of supporting improved access to justice for judiciaries in the region.

1.2. Methodology

This report draws on over seven weeks of field research in the FSM. The initial plan was to spend an equal amount of time across three states, Yap and Kosrae, representing the two extremes with regards to on-going use of custom and Chuuk, representing the most populous state and, like Pohnpei, lying somewhere in between Yap and Kosrae in terms of the influence of custom. Ultimately, due primarily to flight availability a varying amount of time was spent in each State. The research schedule was as follows:

State	Dates
Yap	6 – 19 July
Chuuk	20 July – 5 August
Kosrae	5 – 16 August
Pohnpei	16 – 23 August

Developing the parameters of the research was greatly assisted by commencing in Yap at the time of a National Law Day event. This provided an opportunity to discuss the research with the Chief Justice of the FSM Supreme Court (who is based in Yap), three of the four State Chief Justices and Kapilly Capelle, the PJDP National Coordinator for the FSM, who happened to be in Yap for the National Law Day.

The research draws on interviews with approximately 70 respondents and approximately 10 focus group discussions (interviews involving 3 or more participants), across the four states. Across each of the four states a similar range of respondents was interviewed. These can broadly be categorized as follows:

² The time spent in each State varied from 2 ½ weeks in Chuuk to 7 days in Pohnpei.

Formal Justice Sector	Other Justice Sector	Other Government	Civil Society
<ul style="list-style-type: none">• Judicial Officers;• Court Staff;• Land & Municipal Court;• Prosecutors;• Police	<ul style="list-style-type: none">• Public Defenders• Micronesian Legal Services Centre;• Private Attorneys	<ul style="list-style-type: none">• Governors/advisers;• Community Development dep'ts	<ul style="list-style-type: none">• Representatives from chiefs;• Women's & Youth Associations;• Religious representatives;• Community representatives;• Donor organizations.

The research involved limited village level research. Several village visits were conducted, however, it was not perceived as particularly effective in the context. There are two reasons for this. First, with the exception of the outer islands, most villages are relatively accessible to the main administrative centres in each state. People therefore move frequently between villages and the administrative centres, working in town and living in the villages. It was therefore possible to meet with people (at least those with jobs) in town. Second, village structures are centred on family networks, and in the observation of this researcher, the family domain is relatively private. This limited opportunities to meet people living in villages, except for those with jobs in town.

No research was conducted in the outer islands of any of the States. Interviews were held with a number of respondents who were residents of the outer islands, however, this is not sufficient to provide any detailed documentation of the situation in the outer islands.

1.2.1. Literature Review

The research included an examination of secondary sources on the Federated States of Micronesia. This included relevant legislation and case law at the national and state level. It also included a review of back issues of the Kaselehlie Press, the only locally produced newspaper, published in Pohnpei fortnightly. The media review covered all of 2011. Journal articles and reports relevant to the topic were also examined. A full list of sources is annexed to this report.

Several comments should be made in relation to the available literature on customary dispute processes and access to justice issues in the FSM. First, as a country that has adopted, in large parts, access of the US justice system, case law and codes similar to those used in the US are readily available. This is particularly the case at the national level. In addition, a comprehensive digest exists at the national level, providing easy to access summaries of court jurisprudence, including on issues relating to court interpretation of custom.

Second, empirical data on areas relating to the relationship between law and society is not easily accessible. Limited studies have been conducted on the social impacts of legal development in the FSM. More broadly speaking, there is limited quantitative data available on social development issues. As part of the FSM's Compact of Free Association with the US, periodic reviews are conducted that provide macro-level data on government service delivery. This data generally focuses more on issues relating to economic performance, including analysis of state budgets, investment and job creation. Given the Compact's emphasis on health and education, macro-level

data also exists on these issues. Both UNDP and the ADB have done some analysis on poverty issues, but this is also at the macro-level and provides less detailed analysis on the links between poverty and access to other services.

The lack of empirical research on social development issues means that there is limited readily available information on how governance structures (both state and social) operate and the impact this has on community livelihoods. The one exception to this is a series of excellent articles that have been produced over a period of over two decades by the Micronesian Seminar examining social issues across the FSM, but with a particular emphasis on Chuuk and Pohnpei. There was also a debate in academic journals that occurred in the 1990's on issues relating to legal pluralism in the FSM.

Policy initiatives would benefit greatly from more detailed empirical data on the implications of changing social structures and governance systems for communities in the FSM. This needs to be placed within context though. First, social research can be expensive. This is particularly the case in the FSM, where costs of doing research across the islands, and including more remote islands, could be significant. In addition, this needs to be weighed against the already tight operational budgets of government departments. Second, the smaller population size of the states, and in particular Kosrae and Yap, means that although it may not be documented, policy makers may be intuitively aware of the social issues as they remain close to communities. In these cases however, it may be possible that the needs of certain segments of the population are not being captured because their needs are not being brought to the attention of policy makers.

2. Setting the Scene

A justice system does not exist in a vacuum. It is but one component of broader social structures that govern how society operates. As such it is important to also understand how those broader social structures operate. As Fr Hezel has argued:

If we wish to explore human behaviour in a Pacific Island society, therefore, we would do better to focus on the mechanics of that society rather than attempt to peek into the brain of the individual. Likewise, when we find patterns of behaviour changing for the worse,.. we can safely assume that the social structures, which govern so much of the behaviour of an island community, have been altered.³

This section provides a brief analysis of some key development issues that affect how communities engage with judiciaries across the four states in the FSM. It is beyond the scope of this paper to provide an extensive description. Instead this section will provide a brief description of the role of custom and social systems, emphasizing both similarities across the states and the distinctions between states.

2.1. Similar institutions

There are strong similarities in the institutional structures across the four states of the FSM. This is a result largely of a long period of governance as a Trust Territory under the United States, commencing in 1947. In developing the National Constitution of 1979 and establishing institutional structures leading up to independence in 1986, the FSM drew on its familiarity with the US legal system.

³ Hezel, F, "Chuuk: A Caricature of an Island." Pacific Places, Pacific Histories, Edited by Brij V. Lal, Honolulu: University of Hawaii Press, 2004: 102-119

Across each of the four states, and at the national level, a complete range of justice sector institutions exists. In addition to the institutions of the judiciary, the Attorney General's Office and the police, this also includes functioning Public Defender's Offices and the Micronesian Legal Services Centre, providing free legal services for civil claims across a range of issues.

Budgetary constraints affect the ability of institutions to support programs to strengthen the delivery of justice. The budget for justice sector institutions is provided for through each state's budgetary process. The overall budget for each state relies heavily on funding under the Compact of Free Association. Budgets are therefore available for on-going institutional and operational costs. To a varying degree across the states it would appear that these are becoming more constricted.

The challenge for the courts, and other justice sector institutions, lies in the delivery of programs beyond operational and institutional costs. In one state, for example, an anecdote noted that the police had only sufficient funds for petrol to do the tour of the island once on a daily basis. Funds are limited for such activities in the annual budget cycle. Courts need to either request supplementary funds from the state legislature or seek support from other avenues, such as training and capacity building allocations proposed by the Pacific Judicial Council and overseen by the 9th Circuit Court of the US. Thus, a crucial consideration in proposing any different initiatives is the degree to which they would be sustainable under budgetary allocations.

There are several exceptions to the institutional framework presented above. First, as property rights vary across the states, each state has developed its own approach to dealing with land disputes.⁴ Second, municipal courts are provided for in three of the four states (Chuuk, Pohnpei and Yap), although the degree to which they remain active varies significantly between these states. Third, the Constitution of Yap provides for a fourth branch of government being the Council of Chiefs.⁵ This branch of government oversees the work of the legislature and maintains a veto proposed legislation.

2.2. Diverse cultures

Despite this similarity of institutional structures, there is significant diversity in the social structures across the states. The brief summary in the box below does injustice to the complexity of the social structures that have developed over centuries across the states. However, it aims to provide some form of framework for considering these issues throughout the rest of the report.

Custom and Social Structures across the four States

The customary system in **Yap** continues to play a strong role in defining social relations. A complex and sophisticated system developed over centuries, the

⁴ In Kosrae and Pohnpei, Land Courts have been established to deal with land disputes. In Chuuk, the Land Commission is responsible for land registration with disputes being appealed to the Supreme Court. Land disputes in Yap are predominantly handled by traditional chiefs either in their capacity as chiefs or as judges of the Municipal Courts.

⁵ It is actually two Council of Chiefs, the Council of *Pilung* representing the main island and the Council of *Tamol* representing the outer islands.

customary system defines relations between individuals within families, between families within villages and between villages across the main island and the outer islands. Each estate (land holding) is overseen by an elder. Certain estates hold more authority and the elders of those estates hold higher chiefly positions. The chiefs of these estates are responsible for maintaining social harmony within the villages. In addition, certain villages may play a more authoritative role at the municipal level. As a result, the high chiefs from those villages may, at times, become municipal leaders.

The clan is very important conceptually. But how often do we get together? Very rarely. Funerals are probably the thing that brings us together most frequently. That and elections. The clan is no longer the support system it used to be.

Respondent

There was probably always a certain tension between the lineage and the households, but the balance of power today has clearly swung towards the household.⁶

In **Chuuk**, the customary system is centered around the role of the clan (extended families). Unlike Pohnpei and Yap, historically, Chuuk has not developed institutionalized networks between clans. Clans maintained significant autonomy. As a result, above the clan level there is little in the way of customary leadership. Most families continue to have access to clan land and as such, the clan head has authority in distributing the land. However, many nucleus family units also have access to purchased land, reducing the influence of clan heads. As the quote above indicate the role of the clan is progressively diminishing.

Like Yap, **Pohnpei** also maintains a hierarchical system with 5 kingdoms existing on the main island. Municipalities have been created to reflect the boundaries of these kingdoms. The high chiefly positions at the municipality level still exert some authority and maintain social legitimacy. These high chiefs bestow titles on other community members, including village chiefs. The role of these titles has become increasingly ceremonial. This may, in part, be due to the introduction of individual ownership of land in 1912, separating land from the authority of title holders.

The customary system in **Kosrae** was erased with the introduction of missionaries from approximately 1850 onwards. Family structures still play an important role. In addition, the church is influential in social structures and developing social policy.

Two points are worth touching on from the above. First, the family structure continues to play a dominant role in social relations across all of the four states. The family structure here is a broader structure, commonly referred to as the clan, covering numerous relatives with, generally, one identifiable head of the family unit, invariably an older male with the exception of the system in Pohnpei where the clan system is headed by women referred to as *Limesekedil*. However, the role of this family structure is changing as people move increasingly towards living in smaller nucleus family units.

Second, as the above indicates, customary structures remain strongest where land and title are linked. The move towards individual ownership of land is progressively leading towards a more ceremonial role for customary positions. As Ushijima notes “in Yapese society land is the principle determinant of political power.”⁷

⁶ Innocente, O, The Changing Family In Chuuk: 1950-1999, Micronesian Counselor 14, March 1994
⁷ Ushijima, I, “Political structures and formation of Communication Channels on Yap Island: A Case Study of the Fanif District” in Cultural Uniformity and Diversity in Micronesia at 177.

3. The Formal Justice System

Overall, the courts throughout the FSM maintain a high degree of social legitimacy. They have progressively become the primary option for many in resolving disputes. This section analyses two issues. First, based on public perceptions of the judicial process, it analyses one of the key challenges for the courts and justice sector institutions more broadly. This challenge relates to the efficiency and understanding of the judicial processes amongst communities. Second, remembering that the justice system was effectively transported from the US, the section examines areas that have adapted to local practices.

3.1. Perceptions of the Judicial Process

If I have a case no matter how nice a harmonious resolution may be I'll look at something to fill my pocket and not to fill my mind.

Respondent

Many in the community increasingly look to the courts to resolve their legal disputes. Throughout the research, respondents emphasized the fact that an adversarial system was imported into the FSM and did not sit comfortably with local culture. The traditional approach placed importance on maintaining social harmony and finding consensus across a group rather than focusing on the rights of an individual. In theory, many deemed this appropriate given the small communities across the FSM. In practice, as the quote above indicates, increased familiarity with the adversarial system has led to a change in this mentality and an increased reliance on the court system.

A key challenge facing the judiciary across the jurisdictions relates less to impartiality of decisions and more towards the efficiency of the overall system. There is a disconnect between the complexity of institutional structures and rules and processes that exist within the system and the capacity of the institutions to efficiently and effectively represent clients using those rules and processes.

This issue, in many ways, goes beyond the control of the courts themselves. It was noted in several of the states that delays stem from the limited capacity of other integral parts of the system. This included the capacity of police to investigate offences and collect evidence that is admissible in court and the capacity of legal counsel to prepare the cases and pursue them efficiently through the court. There are limited numbers of legally qualified attorneys across the states. As a result, admission to the bar does not require formal legal qualifications. In addition, the presence of free legal services reduces incentives for clients to require efficiency from their lawyers and reduces competition amongst lawyers to provide high quality services.

Numerous court personnel across the states noted the challenge in ensuring attorneys were familiar with the rules of evidence and introduced evidence in appropriate ways in their cases. This needs to be balanced with court rules adopted from the US that are not necessarily always easy to understand for western-educated lawyers with English as a native language, let alone local counsel who may not have had the opportunity to formally study law.

This is a challenge that, it should be noted is neither unique to the FSM nor to the justice sector. The system that was adopted includes numerous procedural elements that have been developed over time in a different context and act as checks and

balances within that original system. Others have noted that challenges in institutional capacity can lead systems to over-emphasize the procedural elements so as not to draw attention to substantive, capacity issues.⁸ These procedural elements as a result become sources of delay within the system where people, including government officials and legal counsels, are not familiar with the procedures. As one respondent noted relating to land conversion processes:

The conversion process is convoluted. There are so many steps and each step takes months. It is all nonsense. It takes 8 months. There is no need for all those processes.

Respondent

In addition of delays due to lack of capacity, they can also lead to abuse of process as the box below indicates.

Being Pressured to Admit Guilt

B is a 17 year-old high school student from one of the islands. He was on probation for a previous drinking offence. One month before the end of his probation he was drinking at school, which is an offence. Not far from where he was sitting a thatched shed went up in flames.

On the Friday night the police arrested the boy. They held him for questioning. Despite the efforts of his guardian the police threatened to keep the boy in custody for the week-end as they wouldn't be able to access an investigator. According to the guardian, the police were making B's life difficult. The guardian called a lawyer but he claimed the lawyer wasn't allowed to see B because he didn't have proper documentation as a guardian, and B didn't ask for a lawyer. Later that night they released B.

There was no reason for them to act the way they did. It was just because they could. So they did it.

B was ultimately charged with arson, drinking and breaking his parole. He still claimed his innocence. A plea bargain of a suspended sentence was provided to B. According to the guardian, they explained to the boy the significant implication a criminal sentence, including admitting to arson would have. But he just wanted to get the thing over with so he agreed to the deal.

I was amazed at how little my boy knew about his rights. Really, he had no idea what was going on. He didn't know what he was agreeing to.

Simplifying the procedural elements is not always the magic bullet as this runs the risk of weakening the checks and balances. One approach, albeit long-term, is to follow the approach being undertaken by the Attorney-General's Office in Chuuk of working closely with a new generation of local attorneys to build their capacity and familiarity with the system. As one respondent noted:

If we set the standard too high here initially we will be left with nothing. There are so few attorneys here who could pass the national bar. The flip side of this is that leaving the standard low creates mistrust in the law. So we have to start working with what we have to improve the standard.

Respondent

There is another factor that affects the efficiency of the justice system. In more complex cases, the system's adversarial characteristics sit uneasily with traditional,

⁸ See for example, Scott J, **Seeing like a State**.

non-confrontational approaches to dispute resolution that are more common in small island communities. One commentator on social issues in the FSM has noted:

The judges are all Micronesians and, whatever their legal training, they remain Pacific islanders to their core. The cases they handle involve real people in their communities with personal backgrounds and family histories that are well known to the judges. The presiding judges are more likely to ponder the impact of their decisions on the people who stand before them in court than they are to contemplate the abstract standard of justice that ideally imbues the thinking of Westerners. Like anyone else in an island society, the judges would prefer to wiggle out of making a tough decision that they know will invariably alienate many people in their community.⁹

Complex land cases are an example of this approach. The adversarial system will result in a definitive decision leading to at least one party losing rights to land. The cultural importance of land and the fact that some of these disputes may be on-going for generations with many contested versions of the facts, creates incentives on all sides to delay resolution of these types of disputes.

3.2. Engaging the Local Context

This section will analyse several areas where the courts have engaged with local, more traditional dispute resolution approaches. The section looks at five areas: the municipal courts, mediation, traditional apologies, family law and land.

3.2.1. Municipal Courts

Municipal Courts are provided for in Pohnpei, Yap and Chuuk. These courts are staffed by lay-judges. In Chuuk and Pohnpei their jurisdiction is limited to minor civil matters, misdemeanours and enforcement of municipal law. In Yap, they are only authorised to deal with land issues.

It would appear that the operation of municipal courts is largely dependent on demand and government capacity to allocate budgets. In Pohnpei, the courts are functioning, provided for under municipal constitutions and receive budgets from municipal governments. Judges are salaried, appointed by municipal governments and full-time staff. In Yap, judges, who also happen to be municipal chiefs or their delegates, are do occasionally rule on cases, however, this is ad hoc. As the quote below highlights, the chiefs are more likely to be involved in their capacity as chiefs.

In the 5 years I've been a judge I've only handled 2 cases. But I've handled a number of other issues. They don't go through the municipal court. In the same time I've probably been involve in about 50 cases.

Respondent

In Chuuk, it is understood that some municipal courts may continue to function but this depends significantly on the extent to which they receive budgets from municipal governments.

It is interesting to compare the process for selecting judges of municipal courts in Yap and Pohnpei. Under Yap's Judiciary Act, presiding judges of each municipal court become presiding judges by virtue of their membership to the Council of Chiefs and, as a result, enjoy a co-joined role as both member of the Council of Chiefs and judge. They may also appoint associate judges. This system builds on social structures that already exist. Judges have some degree of social legitimacy due to their status as chiefs and may also have prior experience in dispute resolution. However, as the

⁹ Hezel, F, "Settling Disputes", *Micronesian Counsellor* 39, Jan 2002.

quote below emphasizes, a chief's capacity to handle dispute resolution should not be assumed merely from their position.

Chiefs have a role in resolving disputes. But they do not develop skills for this role. Their skills are not important. The title plays much more importance in this process than the skills of the individual.

Respondent

In Pohnpei, it would appear that judges are selected based on their experience. The judges interviewed predominantly appeared to be males with extensive work experience in government, often including in the justice sector. As such they had some knowledge of the legal system and sought to formalize their positions through drafting of court rules and procedures.

3.2.2. Mediation

Across several of the states, courts were interested in introducing mediation processes. In Kosrae, mediation was introduced several years ago. The objectives in introducing mediation included to reduce costs involved in litigation and it was felt, compared to the adversarial system, mediation was more consistent with Kosraen culture. Court orders were passed in 2007 that provided for a mediation process for the State Court and Land Court. The court advertised through the radio and social networks requesting for members of the public to attend training. A total of 14 participants passed the training and were certified as mediators in late 2009. It appears that the mediators are primarily educated professionals who work either in government or in educational facilities such as the College of Micronesia and are active in social networks such as the church. Of the 14 who were certified approximately 10 remain active, with the others having moved off the island. The certified mediators formed a committee, electing representatives from those certified. Initially it was envisaged that the committee would take responsibility for administration of the mediation program. This has not occurred and the mediation program is now administered by court staff.

Following the certification of mediators, it took some time for the program to become active. The mediation process provides for two types of referrals. The court can refer cases to mediation or parties can directly request mediation. In the later case a mediation file is created but no court fees are charged. Initially, the mediation process relied primarily on court referral cases and the number of cases was minimal. As outlined in the box below, a socialization process was undertaken in early 2011. This led to a significant number of non-court referral cases being filed with the mediation coordinator.

Socializing the role of Mediation in Kosrae

In early 2010, the Chief Justice decided to undertake a targeted socialization campaign for the mediation program. The Court organized for meetings with senior citizens groups in each of the six villages in Kosrae. The meetings were advertised over the radio so other community members could attend. The meetings included a question and answer session that showed a high degree of interest in the program.

Following the socialization over a hundred new cases have been filed with the Court. Most of these cases are small debt disputes registered by businesses or the local government.

To date the mediators have handled over 100 cases. The cases are collected over several months. The mediation coordinator will then convene the mediators and distribute the cases randomly amongst them. To date each of the mediators has handled over 10 cases and feel comfortable with their responsibilities.

With one or two exceptions, all the cases to date have involved small claims matters. These are primarily claims by either municipal governments or small shops against individuals seeking payment of fees or debts. It appears that in most cases the respondent has not questioned the legitimacy of the claim but rather is not in a financial position to make the repayments. As such the task of the mediator becomes focused on negotiating mutually agreeable repayment schedules.

Mediators identified two challenges in relation to their task to date. First, the mediators mentioned the difficulty of arranging meetings with parties. The mediation process could become time consuming, as parties would re-schedule at the last minute or not show up to meetings. Second, the issue of enforcement of mediation agreements was identified as a challenge. After an agreement had been finalized, the mediator was on occasion required to follow up with parties to identify why the agreement wasn't being followed. In those instances, provisions exist for filing the case in court. It should be noted that these constraints are those identified by mediators. It would be useful to obtain the views of parties to strengthen the system.

The mediation process in Kosrae is now at a crucial stage. A sufficient number of cases have been handled by mediators to build their capacity and confidence. These cases were not necessarily challenging and all involved debt-collection. The program appears well received and has received the support of the legislature. An opportunity exists to extend the program to more challenging cases. This opportunity is currently in progress, with some small criminal and land issues being referred to mediation.

3.2.3. Traditional Apologies

In a society such as ours group rights are important. They are at the centre of the social structures. Individual rights are new concepts that have been imported into our society and they lead to conflicting interests. They result in conflicts with the traditions of group rights.

Respondent

Traditional apologies are still extensively practised throughout the states of the FSM and are an integral part of the criminal justice system. An on-going debate exists about the degree to which the traditional apology influences the criminal justice system. This is a debate that is not unique to the FSM. Numerous respondents discussed the differing objectives of the formal criminal justice system and the traditional system. The formal system prosecutes individuals on behalf of the state. It aims to maintain law and order through punishing individuals and sending a message to others in the community. The traditional system emphasizes social harmony through restoring relations between affected families and the use of restitution.

The formal line across each of the states of the FSM is that a traditional apology will not affect the status of a criminal prosecution but will be taken into consideration and, indeed may play an important role, in the process of sentencing. In felony cases the court will ask a court officer to undertake a pre-sentencing report. The pre-sentencing report will invariably include reference to the degree to which a traditional apology

was conducted and accepted by the victim's family. In serious cases, traditional apologies are common.

The reality is that customary apologies serve different purposes depending on who is asked. The traditional view is that they are something separate from the formal criminal justice system and, according to some, more powerful, important and difficult to implement.

I can assure you that if a person tenders an apology to a village that will be a much more difficult act than admitting guilt in Court. So no one will do an apology just for the sake of the court case.

Respondent

In most cases, the traditional apology plays a role that is complementary to the formal sentencing process. In those cases, the views of the victim and the victim's family are taken into consideration. Adequate remorse on behalf of the accused and their family is likely to result in a reduced sentence.

Some argue that traditional apologies have become part of the negotiating process that takes place in preparing criminal trials and that this has reduced the legitimacy of traditional apologies. Although most states proclaim to have a 'no drop' policy meaning that traditional apologies will not affect the decision on whether or not to prosecute a case. The reality is that they do affect the substance of cases. Victims often are either unwilling to testify or pressured by their family to accept the apology and not testify. This makes it difficult for prosecutors to pursue the case and as a result they are more likely to seek plea bargains.

Traditional apologies are just 'made up stuff'. They are being used to get people out of responsibility.

Respondent

As the quote above highlights, the apology is also subject to abuse based on social or economic status. Parties with stronger bargaining positions are able to leverage this power to pressure other parties to accept apologies, affecting the consequences they may face through the criminal justice system.

The traditional apology also affects other aspects of the legal process. First, it is of interest to note that the presence of a traditional apology does not seem to have been used as an admission of guilt in criminal proceedings. Second, the traditional apology also affects the civil proceedings that may stem from criminal or negligent acts. In Yap, it was claimed that these type of civil cases were rare primarily because traditional apologies existed to undertake this function. In Pohnpei, a recent case involved the death of a young girl after she was hit by a taxi. A traditional apology was undertaken and accepted, however the parents of the girl subsequently filed a civil case for damages. The case generated a significant amount of debate. Some felt that the filing of the case and the court's decision undermined the legitimacy of the traditional apology. Others felt cases such as these were necessary to ensure that traditional apologies weren't manipulated and were fair for all the parties involved.

3.2.4. Family Law

Another area where the law has progressively come into contact with social behaviours and led to changes in those social behaviours relates to customary adoption. Throughout the FSM there is a long-established culture of customary adoption, whereby family members would adopt their children to others in the

extended family. The practise was built on strengthening social networks. It served a number of purposes, including providing children to families who weren't able to have their own, providing opportunities to children from poorer families or who were born out of wedlock and strengthening land linkages amongst clans by placing one family member in the family of another.

The customary adoption process is progressively changing to fit modern needs. As family members travel overseas, or through an increase in teen pregnancy the process is responding to these issues. Court rules imply that a customary adoption has taken place, unless there is evidence to the contrary. These adoptions were not necessarily registered. However, social security and travel requirements now necessitate proof of adoption. As a result, the cases are coming to the court. In terms of numbers of cases, they represent a not insignificant proportion of the court registry, although they are generally procedural and can be disposed of quickly.

Some have seen avenues for benefitting from this system. It is claimed that older people were adopting their grandchildren so they would be eligible as dependents to social security benefits, placing an increased burden on government social welfare funds. Government social welfare agencies were requiring court certification of the adoption. In addition to court orders some state governments now also require additional proof that the adoption is real, including evidence of financial contributions to the welfare of the child.

3.2.5. Land

Land is an area where the introduction of a western-based system does not sit easily with traditional social practises. As the box below highlights, the introduction of land certificates provides some complex challenges for communal ownership of land. The land certification process works well where land is held by individuals or a small number of joint owners. In the FSM, land has traditionally held jointly by extended families and this has created challenges both for public acquisition of land and for private investment, as has been noted by organizations including the ADB and the US GAO. These are difficult issues to resolve. Both systems have their strengths and weaknesses.

Land ownership, inheritance and communal rights

The land titling process was adopted from systems where land is owned by individuals or a small number of co-owners. It is being implemented in a context where numerous family members may have equal rights to ownership.

In Kosrae, A's father passed away several years ago. All of the father's heirs (both children and grandchildren), totaling over 10 people, have equal rights over the property. Any action relating to the property requires all of their consent. This is particularly challenging where, as is common, one of the parties moves overseas. Court efforts to act on the estate have been hampered by the inability to receive instructions from one of the beneficiaries.

These provisions have various flow-on affects. First, it makes it more difficult to transfer the land or divide ownership. This can be positive because it protects parties to the land. As can be seen in Chuuk, where a notice board in the Court has numerous affidavits identifying long lists of joint owners of communal land who are required to provide consent prior to any transactions relating to the land.

It can also provide some challenges, not only in transferring the land but also in making use of the asset. Respondents noted that financial institutions require consent of all parties in order to use the land as guarantee for loans. Similarly, the US Department of Agriculture is a significant provider of grants and loans for housing renovation for parties that cannot access loans from financial institutions. Its rules similarly provide for consent of all parties.

The public thinks that we take a lot of time to issue certificates but they don't understand the reason for this delay.

As the quote above highlights, one judge also noted that these provisions impact on the public perception of the courts for reasons beyond their control.

4. Customary Systems

When you talk to people about custom make sure you get both what has been practiced before in the past and what is practiced now. The younger generation hasn't experienced the custom, they have only heard about it. Sometimes the older generation will speak of custom back then as if it was practiced now. It is not. What is practiced now is only references to the custom.

Respondent

The introduction of courts has diminished the role of traditional leaders. It has usurped their power. Before their decisions had to be respected. People couldn't go anywhere else so they respected the decisions of the elders. Now they have another option. If they don't like the decisions in villages they take the matter to court.

Respondent

Across the states the following elements were identified as being key to traditional dispute resolution approaches: (a). family representation of the individual; (b). use of rituals to signify respect and humility; (c). use of respected elders or chiefs as mediators; (d). payment as restitution; (e). a symbolic agreement between families to restore peace. In some of the states there was a sense that customary systems no longer have the same influence that they used to. The presence of the courts provides respondents with alternatives that many now use.

Traditionally, the systems incentivized resolving disputes using extended family networks. In Yap, where customary social institutions still play an important role, parties are encouraged to seek the assistance of their family elders first. The complex social structure provides for access to village and municipal leaders however, as the quote below indicates, these leaders are seen as the last point of call.

If you take it to the village you will need to provide shell money and other goods. If you need to take things to the village or municipality it becomes an issue. And if it is your issues it means you need to provide lots in return for asking others to resolve your issue. You can probably tap the village once. Tapping a second time will cause you and your family problems.

Respondent

This process is provided for under Yap's Judiciary Act. S164(a) requires parties to exhaust local remedies 'in accordance with tradition and custom by exhausting means within the appropriate family or families and village or villages' prior to bringing a case to court.

No one person is the head of everything. There is always a check. The system says "If I am not conducting myself as I should be conducting myself, somebody else has authority over me."

Respondent

Through a process of trial and error over an extended period of time, traditional systems also developed mechanisms to mitigate against the potential of conflict of interest. In Yap, chiefly positions are divided amongst different males within a village each with different responsibilities. Three chiefs hold overall authority, acting as checks as absolute authority. In addition, growing up people develop strong cultural ties with the sister of their father who maintain a degree of authority over the children. As in any system, these checks are however prone to abuse. It has been argued that the decrease in population in some of the states in the FSM has placed further pressure on these checks as power leadership roles become concentrated.

Although the customary practises still hold considerable authority in Yap several factors are starting to affect their influence. First, there is less incentive for local leaders to become involved in dispute resolution. They receive little financial benefit by becoming involved and increasingly less social recognition. In addition, the courts provide an alternative.

Second, there is increasing contestation of the interpretation of custom. The box below highlights how different community members may interpret custom in different ways.

Penalties for Stealing Betel Nut – Interpreting Custom

C was a 16 year-old male in a village in Yap. He had been in trouble with the village authorities on numerous occasions before and his family had been issued with warnings. Earlier this year, C was accused of stealing betel nut, a common crime on the rise in Yap due to the increased price of betel nut. It was alleged that C's mother knew about C's actions as she helped him sell the betel nut.

A village meeting was held amongst the men. As is often the case, to avoid shame, C's father didn't attend. The village leaders immediately wanted to exile all of C's family from the village. As the main village chief was not present an additional meeting was held. The village chief convinced the other elders to only expel C and his mother. After a long discussion the others followed this decision. C and his mother were expelled and returned to his mother's village. C's father continues to live in the village.

Those advocating to expel only C and his mother had several arguments to support them. First, it was claimed that C's father wasn't aware of the theft. Second, manpower in villages in Yap is decreasing and expelling active males affected the village's capacity. Third, expulsion of a male also meant that they would lose access to their land and the land would be handed over to the village. For these purposes, in the past expulsion had been used as a local political tool to gain access to another person's land.

Others have argued that interpretation of custom adversely affects women. It was claimed that custom could not have it both ways. On the one hand emphasizing the central role of the family and the importance of the man as the head of the household, yet, on the other hand, absolving a male of these responsibilities when it was not in the interests of the village.

Customary systems were seen as important mechanisms for resolving serious disputes and, in particular, disputes that threatened to spill over into broader social unrest. This was the case not only in Yap but also in Chuuk and Pohnpei. In cases involving

serious injury or murder, or violence between extended families, senior customary leaders were asked to play mediating roles. Some saw these roles of peace-maker as being the domain of women, as the box below identifies.

Women as Peace-makers

Less than ten years ago members of E's mother's family were involved in an argument with her father's family over land. The land dispute had been on-going for some time. On this occasion one of E's relatives stabbed and killed a member of her father's family. Family members from both sides came in threatening to turn the dispute into a broader conflict. About 50 people from E's mother's family were surrounded in the family home.

At this stage, E's grandmother stepped in. She went, on her hands and knees and protected by uncles, pleading for forgiveness from the family of the victim. This intervention led to peace and was followed by an official apology. The apology included a transfer of land. When the funeral occurred, the whole clan from the family of the accused entered the church to pay their respects. As one mentioned:

Behind my grandmother we entered the church to pay our respects. It wasn't a walk, it was more of a crawl.... I continue to feel the tension all the time. They are in the same village so I walk past them all the time. For social occasions we will get together... There is tension. If you to a large family gathering you can feel the tension.

The man who committed the stabbing was convicted of murder. The land dispute was filed with the Land Commission some time ago but still has not been resolved. As the quote above highlights, although the violence has been stopped, tensions continue under the surface.

The box also highlights one of the limitations of these dispute resolution processes. They are perceived as being highly effective in removing tension from a system and enabling feuding parties to continue to live together. On the other hand, there are some who argue that they do not resolve the situation and, as a result, the tension continues to simmer under the surface.

Finally, it should be noted that the church also plays an influential role in facilitating the resolution of disputes in communities. The church maintains a relatively high degree of social legitimacy, with some variation from state to state. In Kosrae, the church has replaced custom as the most important social institution. It was mentioned that in Kosrae, some churches maintained their own committee responsible for resolving disputes, although this was more focused on dealing with disputes members may have with their church. It was also suggested that across the states church leaders may be called on to assist in family disputes but that this would normally be done at the invitation of the family.

5. Where no suitable options Exist

There is a third option available to parties. This is where community members decide to use neither the formal system nor alternatives and live, often silently, with the consequences of the dispute. A number of respondents in the research provided examples of cases that had occurred against them that they had either not pursued or commenced action but reluctantly withdrawn their case subsequently. A broad range

of cases was mentioned, ranging from theft and local disorder to alleged serious sexual assaults and land disputes.

“The inequity that exists is the cause of 90% of all the problems here. It is fundamentally a problem of fairness. These are small islands. There are no secrets here. So when you give someone else a better deal you are signing up for trouble.”

Respondent

In these instances, parties mentioned a range of reasons for why they didn't pursue their case. These included concerns about the amount of time and hassle reporting a case to formal justice sector actors would involve, lack of confidence in the objectivity of local level leaders, power differentials between the parties and socio-economic factors. In several instances, as the quote above highlights, people felt that a sense of impunity might exist for some members of society, precluding others from bringing cases against them. A number of these factors will be discussed in the section below.

The box below provides an example of an innovative response resolving a dispute, relying on neither the customary nor the formal system.

Seeking Justice on One's Own

Several years ago, D, a young lady returned back from studying overseas. She decided to open up a small store. In the first year that the store was open it was broken into three times. D reported the matter to police on each occasion but there was no follow up from them. Instead, D asked around the community and was told that a young man with substance abuse problems had done the damage.

I called him and threatened to report him to police. We could take against him but it wouldn't solve anything. It would take two years to get to court. So I did a deal with him instead

D contacted the young man. As D explained in the quote above after threatening to take the matter to court, D negotiated a deal with the man. Instead of reporting the matter to the police, the man agreed to come to the store once a week and help clean the store. D was happy with the arrangement because she was getting something out of it. She eventually decided to temporarily close the store, but the man still shows up once a week to clean the premises.

Although D was young, she also came from one of the more prominent families on her island. This no doubt assisted her in negotiating the agreement as the young man would have been aware of her status.

6. Factors affecting the Systems One Chooses

The FSM National Strategic Development Plan, 2004-23, identifies (in relation to women's rights) a key challenge in enabling the enjoyment of rights as being:

Lack of understanding the difference between the principles of 'de jure' and 'de facto' equality.¹⁰

The report has already identified that institutions exist that provide for 'de jure' equality. The above also highlights the different paths that individuals can choose to resolve their disputes. The factors that influence their choices determines the degree of 'de facto' equality. The beginning of this report laid out a number of factors that influence the options people choose. Factors relating to the legitimacy and

¹⁰ Strategic Development Plan of the FSM, 2004-23, at 518.

accessibility of institutions have been discussed in the sections above. This sections will focus on geographic, economic and social factors.

6.1. Geographic Constraints

In three of the four states (Yap, Chuuk and Pohnpei) there is a section of the community, living on outer islands. These communities are geographically restricted from accessing institutions in the justice system. This research did not come across verifiable data of the percentage of the population in each of those states who live on outer islands. In interviews it was indicated that the figures were as follows: over 30% of people in Yap live in outer islands; approximately 20% of the population in Chuuk live beyond the atoll; and over 10% of the population in Pohnpei live on more remote islands.

In passing,.. where effective customary decision making remains intact, there is little likelihood that issues within the jurisdiction of the customary decision makers will find their way to the courts. For example, most outer islands resolve their own internal disputes, calling on the courts for assistance only rarely.¹¹

Practical constraints limit the ability of formal justice sector institutions in providing services to the outer islands. In the outer islands in Pohnpei and some of the outer islands in Chuuk Municipal Courts exist to deal with minor matters. Many of these islands are however accessible only through periodic boat services and the costs involved can be prohibitive. Although the research did not involve visits to the outer islands, it is understood that this has meant, as the quote above highlights, that communities resolve disputes outside of the formal system, amongst themselves.

On occasion, as occurred in Pohnpei during the course of the research, the court will visit the outer islands to deal with serious cases. As the quote below outlines, the police may also be called to visit the islands where required.

The ultimate punishment in the islands is a communal physical punishment. If you have committed a severe offence or are continually getting into trouble the village chiefs can order this. There is no worse punishment. They do this or they order to destroy all your belongings. But I can't recall the last time these punishments were used. A warning would be provided to the clan beforehand. It is the clan's responsibility to control the individual. Now, people are more willing to go to the police than to implement the ultimate sanctions. Actually the police would be called before the village imposed such harsh sanctions. For example, my cousin is always in trouble. He's known as a troublemaker in the village. The village men have discussed it, and what needs to be done. Some have said they need to look back to the traditional ways of punishment. But on the last occasion the village decided he would be given a last warning and if he misbehaved again we would call the police from Yap.

Respondent

6.2. Economic Constraints

Poverty in the FSM context does not mean hunger or destitution in the traditional sense of understanding. It means rather that many households are struggling to meet their basic living expenses on a daily or weekly basis, particularly those expenses that require cash payments.¹²

An analysis of quantitative data indicates that there are still families, living on the main islands, who may face constraints to accessing legal services. A proportion of the population faces challenges in participating in the formal economy and live below

¹¹ King, E "Law and Custom in the Federated States of Micronesia" paper presented to ASOA Conference, Feb 2011

¹² UNDP, "FSM Analysis of the 2005 Household and Income Survey" at p6.

the national poverty line. The table below outlines both percentage of the population, by state with employment in the formal economy and household poverty statistics. It should be noted that these figures do not differentiate between households living on the main islands and those living on outer islands.

Population, poverty rate, unemployment rate and employment numbers

	Population*	% below Poverty line **	Unemployment #	Employment (all sectors) ##	Employment (public admin)
National	107,008	22.4%	22%	15,416	6,389
Yap	11,241	11.4%	4%	2,487	1,108
Chuuk	53,595	23.1%	34%	4,165	2,203
Pohnpei	34,486	24.4%	12%	7,444	2,429
Kosrae	7,686	27.1%	17%	1,320	649

*FSM Strategic Development Plan, from 2000 Census

** Proportion of HH with Weekly Per Capita Adult Equivalent Expenditure less than Basic Needs Poverty Lines, FSM Analysis of 2005 Household and Income Survey

2000 Census figures – unclear if this includes employment in agriculture

US Department of Interior, “FSM Fiscal Year 2008, Economic Review”. Figures do not include employment in household agriculture.

It is difficult to cross-reference the figures above because they cover different data sources across different years. However, they highlight several issues. First, except for Yap, over one in five households lives below the official poverty line for basic needs. In the Pacific context, this does not mean they have difficulty in accessing food. Instead, it means that these households have limited access to cash and therefore face challenges meeting financial expenses such as health costs and costs associated with sending children to school.

These figures imply that a proportion of households, even living on the main islands, live beyond the formal sector.

In the village where I moved I have some neighbours. They don't have jobs and they have quite a big family. They would always have disputes but would never seek help. They resolved everything themselves. They were quite traditional and they would feel embarrassed to call the police.

Respondent

Anecdotal data is unclear as to whether these households face practical constraints in using formal systems. A number of respondents indicated that most families would have some social network through which they could access information about free legal services available to them. However, these respondents were predominantly part of the formal sector. As formal justice sector agencies only deal with cases that are reported to them, their perspective may be limited to that segment of the population who have the capacity to access institutions. As the quote above indicates, there may also be a silent segment whose access is more limited. As a result, they would rely either more on customary mechanisms or may be forced into choosing not to follow up on disputes.

6.3. Socio-Cultural Factors

In our culture people pretend they don't see things. When the place is so small and everyone knows everything, people ignore what goes on. So if you are doing something wrong and you are hiding it that is perceived as being OK. People will ignore what you are

doing because they are non-confrontational. But when it cannot be ignored anymore than it explodes. Because when the person is found out, everyone else who has been ignoring that act is also found out.

Respondent

Socio-cultural factors also affect the decisions people make in deciding how to resolve their disputes. As is common in many societies, on specific issues there is considerable social pressure to avoid the legal system and either resolve the issue informally or ignore it. There are some cultural reasons for this. As numerous respondents noted, the island nature of each of the states necessitates a culture of non-confrontation. It is a common understanding that in these island cultures, people will go out of their way to avoid dealing with issues that may require confrontation in order to maintain peace and social harmony. It can be a challenge balancing these social norms with the risk that some problems may be ignored or not dealt with in an adequate way.

There are two examples of issues where these socio-cultural factors play an important role in the FSM context. First, actions against more powerful members of the community may face social consequences. Several anecdotes were provided by respondents noting that on occasion the acts of senior community members, such as chiefs, pastors or local political elites have been immune from prosecution. It is difficult to verify the extent to which this is the case. However, some respondents mentioned that traditional apologies are prone to misuse by more powerful parties who force apologies on less powerful victims as one way of minimizing the risk of prosecution for crimes committed.

The second area where socio-cultural factors play a strong role relates to particular types of disputes. In particular, family disputes, including domestic violence, were highlighted as one area at risk of being silenced as it did not fit comfortably in either the formal or customary system. Across each of the states, a number of respondents expressed concern both at the level of gender-based violence and at the way it is dealt with. It is uncommon for these types of cases to be reported to police or make their way to the courts. As with many societies, there is still significant social pressure placed on victims to resolve the issues within the family. This often means the victim pays the consequences for the benefit of the broader family unit. The box below highlights some of the views that were expressed in the course of the research.

Dealing with domestic violence

Domestic violence was identified as an area of concern for some. The issue was strongly linked to alcohol abuse within families. As in most societies, domestic violence is an issue that is often hidden and hard to confront. There were strong advocates for this issue remaining within the family sphere of influence. Some felt that within small island communities, exposing cases publicly through the courts, resolved little and created greater tension.

Women can't win. If they don't say anything the violence will continue. If they tell family members the family will intervene and make decisions without taking them into consideration. So they won't get a result they want either. In the end they fear saying anything.

There are challenges though with resolving these issues within the family. First and foremost, is the fact that in many instances the family member with the most power in the resolution process, the elder male, may also be the culprit. As the quote above

indicates, women and children suffer the most and their interests are often forgotten in the resolution process. Women are also pressured to not pursue cases. Extreme examples exist such as claims that a teenage girl who after giving birth to a child by her biological father was pressured into not making a statement so a case could not be pursued.

Some have argued that the traditional customary practices provided some protection for women in these instances. Several respondents commented on the ease in which partners separate, allowing women to return to their families when they face difficulties. Others noted that the large clan homes traditionally limited opportunities for violence to flare up due to the presence of numerous family members. As the quote below indicates, others view custom as an excuse for on-going practices.

The right of a male to physically abuse their spouse has been warped by culture. In the past,... the man would do his best to protect his spouse but if he felt he could not control himself anymore he would send her back to her parents. What is known as 'culture' now is a man marries a women and she becomes his property.

This shows the contested nature of these issues. The influence of social structures in these types of cases emphasizes the importance of engaging with these social structures. Efforts to interpret custom and religious norms in ways that protect women and children can be effective in this respect. Similarly, public consultations on proposed domestic violence bills, as is currently occurring in Kosrae and Pohnpei, is also a strong step forward, even if the consultations may lead to resistance from male elites.

7. Conclusion

So what does the work of Amartya Sen have to do with all of this? The first chapter of this report introduced a hypothetical framework focusing on a). an understanding of the social context within which justice systems operate; and b). identifying practical opportunities to progressively improve justice systems or, as Sen himself states:

“advancing justice through the removal of,... cases of injustice.”¹³

The chapter draws some conclusions from the analysis above on the FSM. It examines each of the two aspects of Sen’s framework. Prior to this though it identifies an important ‘threshold’ question relating to defining the scope of the judiciary’s jurisdiction.

This report is part of a broader research activity aimed at better understanding the relationship between custom and the judiciary across the Pacific region. The primary objective of this report is to document experiences from the FSM, to inform development of the broader regional paper. It is hoped the report may be of some assistance to the courts across the FSM as well.

7.1. Defining the Parameters of Jurisdiction of the Judiciary

The work of Sen focuses on the justice system as a whole. PJDP works with a specific counterpart, the judiciary, within the justice system. An important initial question therefore relates to defining the scope of the judiciary’s responsibility. Practically speaking this will vary depending on the local context.

¹³ Sen, supra 1 at 266.

A narrow reading of the judiciary's jurisdiction suggests that courts can ultimately be held responsible only for cases that are brought before them. Where weaknesses exist in the system beyond these processes, they are the responsibility of other justice sector agencies. An adoption of this definition would leave the courts with responsibility only for those community members who choose to use the first option outlined above in this paper. Some have put forward legitimate arguments for using this narrow reading. In some instances judges spend considerable energy attempting to maintain their judicial independence. Going beyond this narrow reading could be perceived as interfering in the jurisdiction of other agencies undermining efforts to maintain their judicial independence.

A broader interpretation of the scope of jurisdiction would include oversight of all institutions that function within the justice system, both formal and those that lie beyond the state. This interpretation could be argued on a number of grounds, including constitutional provisions that mandate equality before the law and equal access to institutions and the role of the courts in providing the 'shadow of the law', that is establishing a benchmark of legal certainty within which other dispute resolution processes can occur. Under this broader interpretation, the courts play a role across all three of the options presented in this paper.

7.2. The social context

The substantive sections of this report examine the first aspect of Sen's framework. The report focuses on understanding the delivery of justice services from the perspective of a community member. It emphasizes several factors. First, community members have several options available to them in dealing with disputes that they may face. The first option is to engage with formal justice sector institutions. The second option is to seek alternative actors to assist in resolving their disputes. In the Pacific context, this will often mean traditional leaders. The third option is to do nothing.

Second, the options that are available to community members are not always 'choices'. The ability of a community member to pursue any of these particular options will depend on a range of factors. These factors include the legitimacy and accessibility of institutions, both formal and customary. The types of cases will also affect the options that people have available to them. Finally, socio-economic and geographical factors heavily influence the options available to community members, with some people having better options than others.

There is limited empirical data that exists in the FSM to quantify the extent to which people are using different systems and the factors that influence these decisions. Without this empirical evidence it is challenging to develop policy initiatives to respond to needs. Empirical data supports the identification of key issues faced by community members in using justice services and as a result the types of approaches required to address these key issues. In addition, such data can prove effective in articulating a case for additional budget resources in negotiations with the legislature and donors.

There may be some ways to conduct court user surveys or perception surveys of communities more broadly that are not overly expensive. Given the population size in several of the states the surveys would not need to be extensive. Alternatively they

could be focused at discussions with representatives from different marginalized groups.

7.3. Enhancements of Justice

Our budgets and compact money are heavily geared towards meeting recurrent costs. This means that even if people want to develop programs there are restrictions in implementation. Initiatives need to take this into consideration.

Respondent

The second aspect of the framework uses the understanding of the local perspective developed through empirical data to identify opportunities to incrementally improve the delivery of justice services. As Sen notes, it is about identifying injustices and addressing those on an issue-by-issue basis. The types of issues the judiciary can address will depend heavily on how the judiciary perceives its jurisdiction as discussed under section 7.1 above. This section documents several initiatives that have been tried by judiciaries in the FSM and provides insights for additional opportunities. As the quote above notes, this needs to be placed in the context of the resource basket available to courts. Whereas operational resources are available, although in some instances diminishing, through budgetary processes, additional resources for programmatic responses are limited.

7.3.1. Enhancements within the Formal Judiciary

Across each of the states mediation was identified as one area that judiciaries were considering to improve service delivery to court users. A number of reasons were identified for why mediation would be suitable. First, it was felt that mediation was more conducive to the non-confrontational culture in the FSM. Linked to the above, many felt that mediation would provide a more satisfactory outcome for court users. Some also linked mediation to potential efforts to reduce backlog in courts by steering particular types of cases to mediation.

There are some useful lessons that can be learned from the example in Kosrae. First, in order to develop a mediation program it is important to identify the issue that mediation aims to address. In Kosrae, the program has been well received and there is demand for the services of mediators. To date the vast majority of cases have involved small claims. It is not clear if this was the primary objective of the program, or how these cases were being dealt with before. It does not appear that they were being filed in court. As a result, if one objective of mediation is to reduce the backlog it is unclear that the Kosrae example will be directly relevant.

Identifying the objective of the mediation program will determine the types of mediators required and the structure of the program. In Kosrae, the lack of customary systems meant that the program attracted mediators who were engaged community members in other social networks, such as the church and youth education programs. The mediators have yet to deal with complex issues and as such have been able to easily handle the tasks assigned to them. Developing a mediation program to deal with more complex issues such as land may require different capacity of mediators or a different form of training. Where systems already exist, such as customary systems in Yap, it may be possible to build on these systems rather than establishing a new stand-alone program.

Numerous other examples existed within the judiciary of initiatives to improve the quality of service delivery. It is beyond the scope of this paper to document those

initiatives. In Chuuk, for example, a concerted effort was being undertaken over the last several years to reduce the backlog of cases pending before the court. Significant inroads had been made in this regard. Elsewhere, state and national courts provided some capacity building to municipal court judges and it is understood that municipal court judges from Pohnpei participate in an annual training program organized by the National Supreme Court of FSM. A comprehensive website had also been established to make information available from each of the jurisdictions.

7.3.2. Enhancements beyond the Formal Judiciary

There are also initiatives that are and can be undertaken by judiciaries that go beyond actual cases that are handled by the courts. Several examples exist relating to socialization activities where the courts have engaged with communities. These include the National Law Day debates and the socialization undertaken for the mediation program in Kosrae. In these instances the judiciaries aim to increase legal awareness of communities and increase the engagement of communities with the system. They also highlight that social networks exist through which to socialize information and that these can be built on to increase community awareness more broadly.

Using the framework developed above, empirical evidence on the justice needs of community members would be used to identify targeted areas where the courts could focus attention on improving justice service delivery. Identifying the areas of focus and the targeted beneficiaries are necessary in order to develop a strategy to address specific issues. During the course of this research several issues were identified as being of potential importance. One of these issues related to the need to build the capacity of other justice sector agencies, including legal service providers, the police and in some instance prosecutors to provide services to clients. This may fall beyond the scope of the judiciary. Other areas focused on substantive issues such as domestic violence, youth crime and substance abuse or overcoming complex and long standing land disputes. The specific areas would differ from state to state depending on both the context and the resources and capacity available to implement such plans.

Annex 1: Customary Provisions under the Constitutions and Related Legislation

Legal framework

Constitutions at both the national and state level across the FSM provide for both protection of individual rights and recognition of customary rights. The section will also consider some areas of judicial interpretation of customary rights. This will include an examination of jurisprudence relating to the Judicial Guidance clauses.

Statutory Recognition of Custom

Although the FSM adopted codes largely drawn from the US, one area that received significant attention in Constitutional Conventions at both the national level and across the states was the extent of recognition custom should be granted. For those unfamiliar with the FSM, it should firstly be noted

Under the FSM loose federation principle, the FSM national government does not hold central authority.... The unique legal and political set-up has, to this day, maintained a system of governance and leadership that is rooted in state sovereignty....¹⁴

The table below provides information on the degree to which the Constitutions of the FSM and each of the states, and the State judiciary acts provide a role for custom in the law of the land.

	FSM	Yap	Chuuk	Pohnpei	Kosrae
Individual Rights	Art 4	Art 2	Art 3	Art 4	Art 2
Traditional Rights	Art 5	Art 3	Art 4	Art 5	#2
Provision for separate Chamber of Chiefs	Art 5	Art 5			
Define crimes & penalties subject to custom	Art 9				
Judicial Guidance	Art 11	Art 7 JA 102	JA 1002	Art 10	Art 6
Land subject to Custom		Art 13			
Customary use of natural resources		Art 13	Art 4		
Municipal Courts - Chiefs as judges; - Exhausting customary remedies		JA 161 JA 161 JA 164	JA1071	#1	
Role of Council of Chiefs		TCA			
Importance of Family Obligations				Art 5	
Articles from Constitution unless otherwise noted. JA – Judiciary Act TCA – Traditional Chiefs Act	#1: Each Municipality has its own constitution in Pohnpei with provision for Municipal Courts; #2: Art 1 of the constitution provides for individual rights to extent consistent with custom & state right to legislate to protect custom				

Several points should be noted from the above. The first point is that it becomes immediately apparent that, even at the time of developing these Constitutions in the 1970's and 80's the drafters were aware of the need to develop frameworks that

¹⁴ Takashi, T, "Federated States of Micronesia: Country Report on Human Rights" 2004 40 (VUWLR)

balanced individual rights with custom and tradition. Each of the Constitutions developed their own formulas for defining this balance, however, consistent across all five of the Constitutions are provisions that both guarantee individual rights yet provide for a role for local customs and traditions.

Second, two of the Constitutions (FSM and Yap) allow for a separate chamber of chiefs as a constitutional branch of government. At the national level this provision has never been implemented. In Yap, as has been previously noted, the Council of Pilung and the Council of Tamol play an important role in advising the government. The Council has a right to approve or reject all bills prior to becoming legislation. This power has been used once, in relation to an urban planning bill that would redistribute land amongst municipalities. Despite its limited use, the power, however, is not a superficial one. Chiefs have veto power to veto bills that adversely affect traditions and customs. It is unlikely that the Government would pursue legislation that it knew would be rejected by the Council of Chiefs.

It is of interest to note that the Constitutional Convention in Chuuk developed a draft constitution that provided for a council of traditions chiefs, which was subsequently rejected by voters. It was argued that the main grounds was:

Chuuk never had a cohesive traditional structure that linked all the islands into a political unit. Even on each island, the highest political units are the villages,... The Chuukese felt that the traditional ground of their chiefs' formal inclusion in the government did not exist and that it was better to confine them to their traditional base in the village.¹⁵

The Judicial Guidance Clause

Even among Micronesians there is no consensus on precisely what role custom should assume in their legal system. There is also a substantial question whether the merging of custom with a Western legal system and concepts can even be done.¹⁶

A significant number of court decisions have dealt with the extent the courts should take into account custom in the decision-making process. The constitutional provisions, commonly referred to as the 'judicial guidance' clauses require that Court decisions:

shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia.

The National Supreme Court digest provides an excellent summary of judgments that have sought to deal with the application of custom by the courts. The initial cases dealt with issues where courts are traditionally challenged on competing claims between the law and customary practises, in particular the challenge of dealing with traditional forms of punishment. In these instances the courts recognized the importance of custom but placed parameters over the extent to which such practises could be held compatible with the formal legal system.

More recently, cases have covered a range of issues. The most recent case to reach the Supreme Court on this issue dealt with a wrongful death case in which the applicant's son was killed whilst working for the defendant. The defendant argued that the

¹⁵ Haglegam, "Traditional Leaders and Governance in Micronesia" State, Society & Governance in Melanesia Project, Discussion paper 2/98

¹⁶ Tamanaha, "A Proposal for the Development of a System of Indigenous Jurisprudence in the Federated States of Micronesia" *Hastings International & Comparative Law Journal* 13(1989) 71 at 91.

applicant lacked standing as a next of kin. However, the court found that Chuukese custom extended to including parents as next of kin, providing the applicant with standing to pursue the case.

Initially, the challenge of interpreting the judicial guidance clause was in the hands of foreign judges who made up the composition of the Supreme Court. Over the years this has changed and now almost all judges at both the national and state level are local judges, providing added legitimacy in interpreting questions of custom. In addition, the position of the Judicial Ombudsman was initially created to assist the court, at least at the national level, in interpreting custom. Nowadays, this role appears to be limited to documenting the extent to which traditional apologies have been conducted in providing pre-sentencing reports in criminal cases.

The one limitation that may currently arise in developing court practises relating to custom is that in a number of instances, court staff counsels, who are almost invariably American, contribute significantly to drafting of court judgments. On many occasions they will have limited knowledge of custom, affecting the manner in which such issues are taken into consideration in judgements.

Annex 2: Summary of Recommendations

Outlined below is a summary of potential options for consideration by the judiciaries in the Federated States of Micronesia. The options are based on research conducted through the Pacific Judicial Development Programme, the findings of which are outlined in the FSM CDR Country Report. They provide the judiciaries with a process, through service delivery of justice outcomes can respond to needs of community members.

The process involves three steps:

- i. identification of areas that require improvement;
- ii. adopting initiatives to address those areas; and
- iii. measuring the impact of those initiatives to either build on positive impacts or address less successful results.

The judiciaries, themselves, should be responsible for identifying areas that require attention. The options below provide suggestions on how this can be done. It does not identify the specific areas for the judiciaries. The approach ensures that the initiatives have the commitment of leadership of the judiciaries who choose to adopt the approach, thereby strengthening sustainability.

There are some generic suggestions that are relevant to each jurisdiction. These are laid out first. Specific options for the national level and several of the state jurisdictions are also provided.

Attached to this document are also examples of tools from other countries that may assist the judiciaries in relation to some of the recommendations. It is beyond the scope of PJDP, at this stage, to provide additional resources to address these options through PJDP. Should State Courts however be interested in pursuing some of the suggestions, the consultant would be happy to provide advice and support through email to refine possible tools and support the courts to make them relevant to the local context.

General Options

The courts maintain legitimacy across each of the states. The challenge is that, for some pockets of the community (in particular the most vulnerable), there is a reluctance to use justice institutions to resolve disputes. The reason for this is two-fold. First, people believe the process will be time-consuming and, in some instances, have limited confidence in the capacity of other justice institutions (including police, prosecutors and some members of the legal profession). Second, economic and socio-cultural factors limit the ability of specific pockets of community members (the most vulnerable) to use justice institutions. In effect this means that, those most in need of justice services are not always able to have their needs addressed. The flip side of this is that some believe that they are able to act with impunity against more vulnerable members of the community.

1. Courts could build their understanding of why certain members of communities, in particular the most vulnerable, are not using formal justice sector institutions. This will assist in designing justice services that can better address the needs of those community members. There are two possible ways to do this:

- i. A cost effective way is to hold routine (annual) focus groups discussions (FGD) with members from different vulnerable groups. This involves working together with organizations that exist such as womens, youth and church organizations to hold annual discussions with representatives from vulnerable groups. The results should be documented, inform court initiatives and reviewed annually to see where there has been progress;
 - ii. a more systematic (and therefore expensive) way is to conduct targeted surveys of ‘non-court users’ to identify their needs. Examples of surveys for different contexts are attached.
2. Develop initiatives based on the results of the focus group discussions. These initiatives do not need to be expensive. They may include:
 - Public outreach with different segments of communities depending on the issues identified. The socialization process for mediation in Kosrae is a good example of a cost effective public awareness campaign.
 - Improved Public Information: making brochures and leaflets available to community members/court users providing easy to understand information in the local language on key issues identified through the focus group discussions;
 - Capacity building of court staff: where the FGDs identify barriers to using the courts, build the capacity of court staff to overcome those barriers, through awareness raising, amending court rules and related activities.
3. Across each of the states a range of views existed on traditional apologies. They clearly play an important role in maintaining social harmony. The current approach of taking traditional apologies into consideration in mitigation for sentencing is a solid approach. Stronger use of ‘no drop’ policies by prosecutors should be encouraged, in particular where power differentials exist between parties. Courts can also support this by putting in place initiatives to support victims in giving evidence.

Specific Jurisdictions

4. The FSM Supreme Court is currently facilitating the development of a Strategic Plan. The Strategic Plan provides a strong opportunity to put in place mechanisms to better understand the needs of all community members (see option 1 above). Most strategic plans for judiciaries include a component on access to justice. Mechanisms outlined in option 1 above could be encouraged under that component.
5. Although noting the independence of each judiciary, information collected through Option 1 could also possibly be stored centrally with the FSM Supreme Court to facilitate the sharing of information and lessons learned.
6. The FSM Annual National Law Day provides an excellent example of public awareness raising on the role of courts. This can be built on. First, the Court may wish to identify a topic for the next Annual Law Day that impacts on the daily livelihoods of vulnerable members of the community. Examples include a focus on the legal consequences of alcohol abuse, domestic violence or dispute resolution for remote communities. Second, as the event brings together court officials from across the FSM, this could be a good opportunity to hold focus

group discussions within the state hosting the event with targeted community groups both to disseminate information and receive feedback on needs.

7. In Yap customary leaders continue to play a strong role in many types of dispute resolution. The Supreme Court of Yap has previously encouraged documentation of municipal court decisions. This should be continued and, where possible working with the Council of Pilung and the Council of Tamol, extended to encouraging chiefs to document decisions made in their capacity as customary chiefs (as opposed to in their role as Municipal Court judges). There are two keys to encouraging documentation. First, is to develop documentation tools that are not burdensome for the chiefs. Second, is to ensure that the chiefs feel the documentation benefits them in their role as decision makers. Two options exist:
 - i. To provide chiefs with short forms that they fill out at the completion of each case. This information is then collected periodically (eg: quarterly);
 - ii. A less burdensome process for chiefs is to provide them with a log-book where they document key points about a case. An appointed court officer or facilitator then sits with individuals chiefs routinely (eg: quarterly) and fills out a more detailed template based on this discussion. This approach requires more intensive resources from the courts.For both approaches the results are collated and then re-discussed with chiefs through routine focus group discussions to identify training needs or areas where court procedures can be strengthened. Examples of documentation tools (used in an Indonesian context for village level paralegals) are attached.
8. Option 7 may also be relevant to the outer islands of Pohnpei and Chuuk where it is understood that customary chiefs also continue to play an important role in dispute resolution processes.
9. The Chief Justice of the Supreme Court of Chuuk has expressed interest in adopting an alternative dispute resolution mechanism. It would be useful to base the determination of the type of Alternative Dispute Resolution mechanism to be implemented on an assessment of caseload. This would identify the area where the biggest need is AND the type of alternative dispute resolution mechanism that is likely to succeed in addressing this need. One way of doing this is through a caseload audit. Some examples of conducting caseload audits are available. Should the Chief Justice be interested, the consultant can work with the PJDP Judicial Administration Diagnostic Adviser to identify appropriate examples.
10. In Chuuk a program to build the capacity of attorneys and trial counsellors is currently in place. Documenting and sharing the outcomes of this positive initiative may provide useful lessons for other state jurisdictions.
11. The mediation process in Kosrae has been well received on small claims cases and is now looking at being used for a broader range of cases. Given that a sufficient number of cases have now been handled it would be useful to receive feedback from actual clients to inform the expansion of the program. As discussed with the Court in Kosrae a short survey of randomly selected users (eg: 10 or 20 respondents each from claimants and defendants) could assist in this respect. A similar survey document has been developed for Samoa and is attached for information. The findings of this survey could also be disseminated

to other State Courts in the FSM to inform their potential efforts in developing mediation programs.



ANNEX 3: REPUBLIC OF MARSHALL ISLANDS COUNTRY REPORT

Customary Dispute Resolution Research
Annex 3: Country Report
The Republic of the Marshall Islands

Executive Summary

This report is one of three country background papers being prepared to inform the development of a regional paper outlining the relationship between the judiciaries and customary dispute resolution processes in the Pacific region. The paper documents research findings from research undertaken in the Republic of the Marshall Islands.

The Republic of the Marshall Islands maintains a unique and complex customary land system even in the heavily urbanized centres where the majority of the population lives. This report examines the relationship between these customary structures and the justice services communities receive in urban Majuro. As one of three country studies for the Pacific Judicial Development Programme's Customary Dispute Resolution research the report aims to document this relationship as background for a regional report that will be prepared for PJDP. Given the time spent in the Marshall Islands it is hoped the report may be of interest to members of the judiciary and others working on these issues in the Marshall Islands.

The substantive sections of this report cover two areas of focus. First, two sections examine dispute resolution processes that occur and the justice services offered to communities. The formal justice system engages with customary issues in a variety of ways in the Marshall Islands. The report documents how this is done in relation to land matters and the criminal jurisdiction of the High Court. For land matters, it is argued that the court is engaged with only the most complex of land cases, in particular, when commercial interests are involved. The presence of a Traditional Rights Court reduces the incentives for traditional leaders to get involved themselves.

Beyond the formal system traditional structures also continue to exert significant authority. The degree of this authority is influenced by the type of issue and the relationship between the traditional leaders and the disputants. The fact that an increasing proportion of the population in Majuro rely on traditional leaders to provide them with land over which they have no rights strengthens the authority of the traditional leaders.

There are also disputes where both the formal system and traditional leaders will be reluctant to get involved. Part of this is by nature of the issues involved, in particular domestic disputes. It is, however, also a result of a perceived culture of entitlement that results in some in the community being disempowered.

Finally, the report looks at the policy dialogue that occurs in the Marshall Islands when it comes to customary matters. This is done through both tracking public discourse on customary matters through the print media and through documenting lessons learned from several initiatives that have been undertaken by the government to engage with custom.

The research in the Marshall Islands highlighted a number of important issues that are of relevance to the regional research. These include:

- balancing a focus on practical areas of engagement for the judiciary with an understanding that some important justice issues relating to customary structures go beyond the scope of engagement for courts;
- a more detailed understanding of how customary structures continue to maintain legitimacy and exert authority even in urbanized settings, emphasizing the relationship between land and social structures;
- understanding that the concept of poverty is considered foreign to many in the Pacific, there are members of communities facing increased vulnerability. The research provides important information on how to increase knowledge of how these community members access and use justice services;
- documenting lessons learned from government initiatives to engage customary structures, including the importance of developing appropriate processes to engage on these issues in addition to the desired end result.

1. Introduction

The Pacific Judicial Development Programme (PJDP) is supporting a research activity aimed at understanding how customary dispute resolution systems operate in the Pacific region and the extent to which courts are engaging with these systems. The research activity involves in-country research in three countries in the region over six months in 2011 and literature review and consultations covering the region more broadly with a view to informing the possible development of a regional judicial development approach to these issues.

This report was developed following research in the Republic of the Marshall Islands (hereinafter ‘the Marshall Islands’), the third of the three countries where in-country research was conducted. The research was conducted over two periods of approximately three weeks each in duration, between 7 – 30 September and 3 – 25 November, 2011.

The aim of this report is to document the findings from the research to support development of a regional report. Given research was conducted over a six-week period the report may also provide some interesting and useful information for partners in the Marshall Islands.

This report is structured as follows:

- i. Section 1** provides an introduction to the report. This includes outlining a hypothesis as part of an analytical framework. It also includes providing information on the methodology used in conducting the research;
- ii. Section 2** briefly outlines the context in the Marshall Islands with a focus on introducing current issues relating to socio-economic development and customary frameworks;
- iii. Section 3** focuses on the formal system. In particular the section examines areas where the formal system engages with customary processes, with specific reference to land issues and traditional apologies in criminal cases;

- iv. **Section 4** looks at how cases are dealt with beyond the formal system. In particular, this section focuses on the role of traditional leaders on land and social order issues;
- v. **Section 5** provides an overview of how community members deal with cases beyond both the formal and customary systems. This includes an examination of the challenges in dealing with family disputes;
- vi. **Section 6** highlights lessons that can be learnt from several efforts by the state to engage with customary processes;
- vii. **Section 7** provides some initial observations based on the preceding sections.

The scope of this report is broad. It documents aspects of the dispute resolution process that occur outside the formal confines of a courtroom and how community members and the judiciary engage with those processes. As such, the extent to which the report examines the jurisdictions of the courts, it does so with a focus on engagement with the customary system. The report may provide the judiciary and other stakeholders with a different perspective on how communities engage with justice services. Although it does not provide specific recommendations it does highlight tools that may be of use to the judiciary in delivering services to the community.

As this report forms a part of a broader regional research activity, comments, feedback and clarification are welcome.

1.1. Starting Hypothesis

This report uses the work of Amartya Sen as the starting point for understanding how justice systems function.¹ Sen’s framework starts from the premise that no perfect justice exists that is applicable to all situations. Instead, the delivery of justice is defined by how different systems (both state and non-state) interact based on the specific context of any given society. Improving the delivery of justice therefore depends:

“first, on assessments of social realizations, that is, on what actually happens; and second, on comparative issues of enhancements of justice (rather than trying to identify perfectly just arrangements).”

This report aims to contribute to a more detailed understanding of the first aspect of this framework, that is an assessment of social realizations in the Marshall Islands.

Several parameters need to be laid out in relation to the scope of this report. First, the Marshall Islands is made up of numerous atolls spread over an extensive area of the Pacific. Despite the fact that the majority of the population now inhabits the two main urban atolls, there remains a significant minority who live in remote outer atolls. The justice issues these communities face and the services they receive differ considerably to populations in Majuro and Ebeye.

The scope of this report is limited to documenting justice service delivery for the proportion of the population living in the urban areas of Majuro. Irrespective, such an analysis provides important lessons for the broader regional research. It provides an opportunity to examine how custom influences justice systems in an urban

¹ Sen, A, **The Idea of Justice**, Allen & Lane, London, 2009 at 410.

environment. In particular, the research highlights the crucial linkages between traditional land ownership systems and broader justice service delivery.

Second, this regional PJDP research activity is focused specifically on understanding how the judiciaries in the region engage with customary dispute resolution processes. Several detailed anthropologies exist detailing the customary structures that exist in the Marshall Islands. This research aims to shed some light on how such structures affect the justice outcomes of community members. It does not aim to define or interpret the customary structures.

Related to the above, it is beyond the scope of the research to provide a detailed assessment of service delivery across justice sector agencies or even across the judiciary in the Marshall Islands. The sections dealing with the formal sector instead focus on how courts in the Marshall Islands have adapted their systems to engage customary processes.

1.2. Methodology

The first step to conducting the research was to develop a workplan. The workplan was presented to the Chief Justice of the High Court in the first week of research. The High Court of the Marshall Islands identified two issues that would be of use to the court in examining in the course of the research:

- i. the operation of *Special Rule of Civil Procedure No.1* that requires plaintiffs to document action taken ‘to obtain a determination of the Plaintiff’s rights through traditional Marshellese channels, and the result of those efforts’ in seeking to involve the jurisdiction of the Traditional Rights Court;
- ii. the existence of traditional apologies in Marshallese custom and the nature of these processes.

These issues are addressed in the report, in particular under section 3.

The research draws on interviews with approximately 55 respondents. Respondents can be categorised broadly as follows:

Formal Justice Sector	Other Justice Sector	Other Government	Civil Society
<ul style="list-style-type: none"> • Judicial Officers: High Court, Traditional Rights Court & District Court; • Court Staff; • Police. 	<ul style="list-style-type: none"> • Public Defenders • Micronesian Legal Services Centre; • Private Attorneys 	<ul style="list-style-type: none"> • Cabinet Ministers; • Council of Iroij; • Commission on Customary Law; • Land Registration Authority; • Ministry of Interior Affairs; • Majuro Local Government 	<ul style="list-style-type: none"> • Representatives from Alaps; • Civil Society: youth & women’s NGOs; • Religious representatives; • College of Marshall Islands representatives; • Community representatives; • Donor organizations.

A small ‘justice survey’ was prepared in order to facilitate discussions with community members. This was conducted instead of adopting a case-based approach as initially suggested in the workplan. Interviews were conducted with 17 respondents using this survey (in addition to the 55 interviews above). The survey provided incredibly useful information on justice service delivery from the perspective of

community members. Although the number of respondents was limited and in no way representative, it also provided an opportunity to test the survey tool. The survey tool is available for use should either justice sector agencies or civil society organizations wish to follow up on this approach in the future. [Attachment 1](#) provides a summary to the survey process; a numerical breakdown of results from the sample; and comments on the effectiveness of each question for future reference.

1.2.1. Literature Review

The research included examination of secondary documents. A review of all editions of the Journal of Marshall Islands, a weekly newspaper, for 2011 was conducted to examine the extent to which legal issues are covered in the press. A ‘Newspaper Tracking’ summary is included at [Attachment 2](#).

The research included reviewing legislation, judicial decisions and articles covering legal and socio-economic relevant to the Marshall Islands. A bibliography is covered at [Attachment 3](#). Should any of the attached articles be of interest to readers most can be made available electronically.

Several points arise from the literature review. First, comprehensive studies exist detailing customary structures. The works of Kabua, A and Tobin, J are essential reading. A substantial body of jurisprudence from both the Traditional Rights Court and the previous Trust Territory Courts also document customary rules.

The available research is more limited in two respects. First, in detailing the processes/mechanisms that govern how those customary structures should or do operate. Second, there is limited literature available that examines the implications of those customary structures on present day communities in the Marshall Islands.

Socio-economic data is available through a variety of sources. Annual financial contributions made by the Government of the United States of America through the Compact of Free Association (CFA) ensure that, to a certain degree, extensive economic and social data exists. Much of this data is specific to sectoral needs under the Compact and as a result focuses at the macro-level on economic, education and health needs. It is more challenging to obtain a picture of socio-economic needs at the household level although some studies, such as the *Demographic & Health Survey* and the *Social & Economic Baseline Survey of Jenruk Village* provide excellent detailed snapshots on some key issues. The following section will analyse some of this data. The forthcoming findings from the 2011 Census will also respond to data limitations.

The weekly print media in the Marshall Islands does an excellent job of providing information on developments relating cases before the courts, with each edition devoting generally 1-2 pages on such cases. The articles are not limited to updates of decisions but also provide concise explanations of court processes, raising awareness amongst readers and increasing familiarity with the justice system. In contrast, as will be discussed in the final section, there is limited public discourse, at least in the media, on the role and functioning of traditional or customary structures.

2. Setting the Scene

The situation at the moment is not, not working. It is functional but it is extremely stressed out. Something will eventually give... There are two ways to view the Compact as it stands. Many people here see it as an entitlement. Something to which they are entitled. Others are trying to paint it as an opportunity. Something through which we can address our issues.

You will notice one thing when you are here. There are no real poor people. We value the extended families and that connection plays an important role in protecting people.

This section lays out some important socio-economic characteristics facing the Marshall Islands currently. Although it is beyond the scope of the report to provide a comprehensive socio-economic analysis, the analysis aims to place the operation of the justice system in a broader context of some of the development challenges facing the Marshall Islands. Throughout the research, the notion of ‘entitlement’ was raised on numerous occasions by respondents. This section touches a little on the inverse of this notion, that is, in a society where some feel entitled there must, as a result, also be some who are disentitled. The section also briefly places customary structures in this context.

Like a number of small island states in the Pacific, the population of the Marshall Islands is facing a number of challenging socio-economic issues. The recent census of 2011 confirmed an overall population of 52,558, with almost three-quarters living in the urban atolls of Majuro (52%) and Ebeye (22%) and the remainder spread amongst the outer atolls.² This section deals primarily with some of the socio-economic characteristics of the capital, Majuro.

It is difficult to obtain an overall picture of household characteristics from reading the available socio-economic data available on the Marshall Islands. The data indicates that the Government receives approximately two-thirds of its annual budget from foreign grant funds including funds provided under the CFA. This budget enables the Government to be the largest employer, with approximately 46% of those currently employed working for either national or local government entities. The workforce is however restricted, data indicating that only 39% of those of working age are actively employed.³

Large, extended households provide a form of social safety net. According to a survey conducted in 2007, the average household size was 7.2 persons and that, in urban areas, one-third of households had more than 9 members in living in the house.⁴ Although difficult to quantify, a combination of household size and employment figures indicate that many households will have at least one salaried employee able to support other household members. As the quote below indicates, however, reliance on one individual places considerable stress on household welfare and employment.

Job loses at Kwajalein doesn't help the situation. If you look at the dependency ratio the loss of 400 people affects a significant number of people, when there are 9 people to a household, all dependent on one salary.

In addition, there are growing pockets of vulnerability within urban areas. In these areas communities are faced with entrenched, low education indicators along with

² Marshall Islands Journal, “Not Much Growth for RMI in 12 Years”, 16 November, 2011, pg8.

³ Of the Government's FY2010 budget of \$137.4 million direct US aid accounted for 61.3%. US State Department, “Background Note: the Marshall Islands”, available on line.

⁴ EPPSO, *Marshall Islands Demographic and Health Survey*, 2007 at 11.

limited employment opportunities and related social risks such as high alcohol abuse and teen pregnancy. It is crucial to acknowledge and understand the existence of such populations as these conditions necessarily influence the manner in which people access and utilize justice services. The box below provides a snapshot of one of the less privileged communities, Jenrok village, using an excellent household survey conducted in 2003.⁵

Jenrok: Life of the less than privileged

Jenrok village is in down-town Majuro and comprises five *weto* (or land parcels) owned by four separate *alap* (traditional landowners) and covering 215 households. With a total population of 1,847, household sizes are larger than average at 9.47 people per house and 65% of the population is under 25 years old.

“The governance of Jenrok lies mainly with the traditional landowners. They have greater influence on how the community is governed than the MALGOV and the GRMI. Although there is an elected councilman for Jenrok, his influence is checked by the landowners.”⁶

The vast majority, 80%, of people in Jenrok do not have land rights. They live at the invitation of the landowners, with only 2% having formal leases. This is a reciprocal arrangement. The traditional chief is also a chief in Mili and Arno Atolls, where most of the inhabitants come from. Allowing them to live in Jenrok strengthens this relationship. For the inhabitants, they are entitled to live rent-free, with ad hoc contributions being made to the *alap* although they are subject to the authority and decisions of the landowners. The lack of formal land rights precludes the inhabitants from accessing Government housing programs such as the USDA loan and grants.

Debt levels are high. Over half the households have debt and the debt to income ratio is more than a third of income. Inhabitants identified basic needs (19%) and costs of traditional funerals (17%) as the main reasons loans were obtained. The debt levels also affect service delivery. Only half the households are linked to electricity and water and of those over two-thirds are over 90 days late in payment of bills.

The survey also identified justice issues more directly affecting the courts. Jenrok had one of the highest rates of adoption, with 19 in 2003 from a total of 97 reported with the Court.⁷ In addition, respondents reported 53 cases of violence with the vast majority involving violence against women. Of those only 16% were reported to police. 96% of respondents identified alcohol abuse as a problem in their community.

Within this context customary structures of governance continue to play an important role in the Marshall Islands. The unique land ownership structure that exists heavily influences this. The Constitution recognizes the traditional rights and responsibilities of three separate interests on land across the country. These interests are those of the *iroij* (or chiefs), the *alap* (in effect representatives of the traditional owners) and the *dri jermal* (the workers).⁸ The complex land structure was developed over an extended

⁵ Chutaro, B, *Social and Economic Baseline Survey: Jenrok Village, Majuro*, IWP-Pacific Technical Report 15, 2005.

⁶ *Ibid*, p45.

⁷ It should be noted that the figures outlined in the *Jenrok Report* do not appear consistent with court figures. Court figures indicate a total of 175 legal adoptions from 2001 to 2010 with 32 in 2003.

⁸ This article does not aim to provide a detailed description of these positions and the differing interpretations of the relationship between these positions, including transfer of title. Other works, including those of Kabua and Tobin and the recent codification draft undertaken by Prof Van Dyke

period of time to respond to the unique geographical features of the Marshall Islands. The structure provides for differing levels of interests in the land and checks and balances on divesting those interests.

Across the course of the research respondents highlighted the challenge involved in developing a system that allows for the co-existence of these traditional rights with increased economic and social interconnectivity in the global economy. In particular, respondents noted the influence a cash-based economy has had on customary structures.

Contemporary land tenure in the Marshall Islands defies simple description. Social and economic changes, particularly in the last quarter century, have challenged the resiliency and flexibility of traditional tenets of the system.⁹

At this stage, as part of the overview, it is suffice to point out that the customary structures of governance remain strong and exert significant influence on other governance structures and development in the Marshall Islands. Defining an overall system that supports the needs and ambitions of all Marshellese needs to acknowledge the influential role of custom and, where possible, engage communities broadly in a discussion on how customary structures can best work together with state institutions to support the development needs.

3. The Formal Justice System

The judiciary in the Marshall Islands maintains a high degree of legitimacy and respect. This section examines two broad aspects of the work of the judiciary. First, the section describes the framework that exists for community access to justice institutions. Second, the section examines areas where the judiciary engages with aspects of custom.

3.1. A Structural Framework for Accessing Justice

The Government of the Republic of the Marshall Islands recognizes the right of the people to health care, education and legal services and the obligation to take every step reasonable and necessary to provide these services.¹⁰

A sound structural framework exists for accessing justice services in the Marshall Islands. The framework starts at the constitutional level, includes detailed strategic plans, access to provision of free legal services and a judiciary held in high regard. The Constitution places access to legal services on the same level as health care and education in terms of guarantees to citizens.

The free legal services are delivered primarily through the Office of the Public Defender and the Micronesian Legal Services Commission (MLSC). These services are accessible and funded through government budgets. MLSC also receives funding

fulfil that aim. For those not familiar with the Marshall Islands however several points are worth noting. Titles are, in general, handed down along matrilineal lines. People of *iroij* lineage are represented in title by the *iroijlaplap* (or paramount chief) and *iroijedrik* (existing on some parcels as representatives of the *iroijlaplap*). The *alap* represents interests of all clan members who have an interest in a particular parcel of land. Every Marshallese has an interest in land somewhere and as such, in theory at least, has the opportunity to become *alap*. The workers are represented by a *senior dri jermal* in transactions relating to land.

⁹ Stege, K, “An Kora Aelon Kein (These Islands Belong to the Women): A Study of Women and Land in the Republic of the Marshall Islands” in PIFS **Land and Women** at 6.

¹⁰ Constitution of the Republic of the Marshall Islands, Article II, section 15.

as part of a Micronesia-wide program of support. The organizations will support clients on most matters. Means tests are set using external income levels so the vast majority of Marshallese can access these services. There are some arguments to suggest that this affects the incentives in the delivery of legal services. First, the private bar is required to compete with a relatively comprehensive legal aid system that most people can access. Some have argued, however, that the cases that are dealt with through legal aid would not necessarily appeal to private attorneys. Second, access to free legal advice provides little disincentive for clients reviewing whether or not to pursue a case.

The judiciary has developed a detailed strategic plan, *Tiljek Im Mol Nan Ekajet Jimwe (Committed to Justice)* to guide its work from 2007-2012. One of the five strategic priorities of the strategic plan is to ensure that the judiciary is ‘accessible to all’. The strategic plan identifies several key areas to improve accessibility including provision of justice services to communities living in remote atolls in a cost effective manner through building the capacity of Community Courts; improving access to legal counsel and quality of legal services available to the public; and improving access to information on judicial processes and legal forms, including in Marshellese.

As has been noted above, the judiciary is able to provide detailed coverage of its activities through the local print media. In addition to providing updates on court proceedings, this media coverage is also effective in demystifying court processes and emphasizing the important role the court can play in setting social standards. A recent example involved the Court rejecting a plea bargain in a domestic violence case on the grounds that “the court is part of the larger community and is mindful of public concern over domestic violence.”¹¹ Despite the relatively small circulation of the Marshall Islands Journal, it is understood that readership is significant as editions are shared by numerous readers. It should be noted, however, one survey estimates that a small minority of Marshellese (18% of women and 14% of men) have no exposure at all to any form of mass media.¹²

The role of the court in providing legal information was also acknowledged in the community survey. Over 40% of respondents said they would go to the court should they need legal information, well above the next source, MLSC/Public Defender. Some care is required in interpreting this response. It is likely that respondents over identified with the court on the grounds that the interviewers identified themselves as being associated with the court at the beginning of the interview.

3.2. Engaging the Local Context

The most recent annual report for the Marshall Islands provides a break down of cases filed over 2009.¹³ Of the 257 civil cases filed in the High Court, 113 involved domestic matters (customary adoptions, legal adoptions, divorces, child custody, guardianships and appointments of personal representations), 37 were related to citizenships cases; 85 there were 85 collection cases filed and 9 land rights cases. All 24 civil cases filed in Ebeye were related to domestic matters.¹⁴ Criminal cases

¹¹ “Chief Justice says No to Plea Bargain”, *The Marshall Islands Journal*, 5 August, 2011 at 4.

¹² EPPSO, *Supra* 4 at p39.

¹³ At the time of this research, *The 2010 Annual Report* was being completed. Data for that period is now available at the website of the judiciary, www.rmicourts.org

¹⁴ *Judiciary of the Republic of the Marshall Islands: 2009 Report* at p5.

covered assaultive behaviour (10 cases), forgery/embezzlement (3) and two cases each for obstructing justice, sexual assault, smuggling goods, conspiracy and burglary/larceny. Of the 287 cases pending over the period 2005-2009 over half were collection (6) or land cases (51). Civil cases filed with the district court were solely related to small claim cases.

This section will specifically examine the influence of custom on two of areas of the Court's jurisdiction. First, the work of the Traditional Rights Court on land matters will be discussed. Second, in relation to criminal matters, the section will focus primarily on the role of traditional apologies.

Much of the debt problem is created by holding onto customary practices in a monetary economy... The value of the customary practices are given a monetary sum and this places a burden on people to meet these contributions. That is without even mentioning the contributions the churches ask them to make in addition.

It should be noted that customary processes also affect the work of the court more broadly. For example, a significant proportion of civil cases filed are in relation to debt issues.¹⁵ As the quote above indicates, some respondents believe that customary practices play a role in increasing debt.¹⁶ Similarly, family law in the Marshall Islands has developed taking into consideration customary practises in relation to issues affecting marriages, separation, custody of children and adoptions.

3.2.1. Land and Titles

(With land,) parties won't seek solutions. They will go to court but won't pursue cases. No one wants to settle it once and for all. But this is in conflict with development. People won't invest if there is no clear title.

Although land cases comprised only 4% of cases filed in the High Court in 2009, they made up over 25% of cases pending over the 2005-09 time period. This difference highlights the complexity of land cases and the consequences of failure. It is often in the interests of parties to prolong cases rather than risk an adverse decision.¹⁷

Land issues are worthy of a paper in and of themselves. This section will analyse two specific aspects relating to land issues. First, a description of the Traditional Rights Court is provided. Second, the section outlines the types of land cases likely to reach the courts in the Marshall Islands. In this respect, the section assesses the role of Special Rule 1. As they exist beyond the realm of the judiciary two other land aspects will be examined later in this paper – land disputes settled beyond the courts and the establishment of the Land Registration Authority.

The Traditional Rights Court

The Marshall Islands has developed its own unique, judicial response to dealing with land matters. The Constitution provides for the establishment of a Traditional Rights Court. The Traditional Rights Court is formed of three judges representing each of the levels of interest in land (the *iroij*, the *alap* and the *senior dri jerbal*). Disputes in

¹⁵ According to the 2009 Annual Report almost 1/3 of civil cases filed in the High Court were collection cases and all civil cases in the District Court were small claims.

¹⁶ This is backed up to some extent by the survey conducted in Jenrok, identifying church (31%) and funeral expenses (16%) as the two issues having the greatest impact on a family's financial situation, supra n5 at p16.

¹⁷ It should be noted that there are probably various reasons for comparatively lengthier court processes for land cases. The fact that the Traditional Rights Court was inactive for some of the 5 year period, for example, would also explain some of the delay in these cases.

relation to land and titles are filed with the High Court. The High Court will refer matters relating to custom to the Traditional Rights Court for a decision on the custom. That decision is subsequently referred back to the High Court to be taken into consideration in resolving the dispute.

Invariably, the High Court will adopt the interpretation of the Traditional Rights Court. In several instances, the High Court has referred matters back to the Traditional Rights Court to provide greater clarification or in instances where it is felt that the interpretation provided by the Traditional Rights Court did not adequately address the issues involved in the case. In this way the High Court, comprised of legally trained judges, is able to guide the Traditional Rights Court in relation to matters of law whilst ensuring the Traditional Rights Court remains the primary interpreter of matters of custom.

The Court rules aim to ensure the authority of traditional leaders is not reduced through the establishment of the Traditional Rights Court. Rule 1 of the *Special Rules of Civil Procedure* require plaintiffs in land cases to state:

What action, if any, the plaintiff has taken to obtain a determination of the plaintiff's rights through traditional Marshallese channels, and the result of those efforts, or why the plaintiff considers it useless to try to have the matter determined through those channels.

In theory, the rule requires that parties to a dispute seek a determination from the *iroij* prior to filing a matter in the court. Concern was expressed by a number of respondents that the objectives of the rule were not being met. In other words, the traditional leaders were recusing themselves from decision-making processes due to the existence of the Traditional Rights Court.

The Cases that Come to Court

You never see cases that don't involve money coming to court.

Traditional leaders don't want to resolve disputes. The *Iroij* doesn't want to get involved so he will tell the parties to go to the Traditional Rights Court. They would rather remain neutral than get involved. If they could resolve their disputes with the *Iroij* then nothing would come to court.

As has been noted above, some have argued that the number of land disputes being filed in the courts indicates weaknesses in the capacity of traditional leaders to resolve the disputes themselves. There are several sides to this story.

First, although this research did not involve a comprehensive audit of land cases before the court, it would appear that the types of land disputes that do make their way to court are complex and often involve considerable financial interests. Many of these are likely to involve title disputes, for example, drawing into question the authority of landowners to enter into lease arrangements or requiring clarification of transfer of titles. The box below provides a breakdown of land disputes mentioned in *The Marshall Islands Journal* over the course of 2011, highlighting the considerable interests involved in these disputes.

Land Disputes – what makes it to Court

Over the course of 2011, 19 articles in *The Marshall Islands Journal* were related to land issues. Of those articles, 11 reported on cases before the court and 8 covered government negotiations on land or opinions on land policy.

The 11 articles commenting on cases including 6 cases relating to distribution of benefits arising from the Kwajalein Land Usage Agreement (LUA) negotiations. This included threatened legal action by *iroij* in the process of negotiation and cases disputing the accuracy of titleholders (*alap* and *dri jermal*) listed as beneficiaries under the LUA. Several articles followed a family dispute involving transfers of titles covering prominent commercial land in Majuro. Three articles covered disputes relating to government lease payments to land owners in Majuro.

Of the 8 articles commenting on government police relating to land, 5 were in relation to government negotiation of the LUA in Kwajalein.

Only certain types of land disputes make it to court. These are generally land disputes where considerable sums of money are at risk, involving land either in the commercial parts of Majuro or that receive benefits under the LUA. They are also, invariably, disputes over the status of titles to some of the more prestigious *weto* (or land parcels). As will be discussed below, by implication, other forms of land disputes either don't exist or are being resolved outside the court system.

Second, it is unclear the extent to which cases that do progress to court have gone through traditional dispute resolution processes prior to filing in court. The court rules provide that a party must show that a determination was sought through 'traditional Marshallese channels' and the result of those efforts. Although detailed material is available on customary structures and genealogy there is more limited documented information defining what processes are required in 'traditional Marshallese channels'. This lack of clarity relating to the process ensures the requirements for fulfilling Rule 1 under the Special Rules are minimal.

Third, the lack of a more concrete definition of the process involved under 'traditional Marshallese channels' provides both the parties and the traditional leaders with incentives to recuse the traditional leaders from the process. Respondents identified a variety of reasons why traditional leaders were no longer at the forefront of the resolution of these disputes. As the quotes both at the beginning of this section and below highlight, from the traditional leaders point of view referring matters directly to the Traditional Rights Court has benefits. It means they don't have the headache of having to resolve the matters themselves. Alternatively they may be conflicted because the problems may stem from their actions in the first instance. From the perspective of the parties, the courts may provide more objectivity than seeking the involvement of traditional leaders, who will themselves frequently be involved in the cases they are asked to resolve.

Many of the cases involve the *iroij* signing consent for rightful owners to more than one person for the same piece of land. We are so closely knit here that there is social pressure for the *iroij* to sign documents. They know everyone so they cannot say no. It is easier for them to sign something and then let it end up in court later. That is an easier path.

As mentioned above, the presence of the Traditional Rights Court provides an alternative allowing traditional leaders to abrogate themselves from their responsibilities. One possible way to seek greater engagement of traditional leaders in the dispute resolution process would be to develop minimum criteria on the definition of steps required under 'traditional Marshallese channels'. Such an approach would require reaching a consensus with traditional leaders in defining the processes that are practised.

3.2.2. Criminal Law – the Traditional Apology

It is possible that you are asking the wrong question. Everyone here knows forgiveness is a part of our culture. So maybe when we speak about traditional apologies it is actually forgiveness people are referring to.

Much has been written about the role of traditional apologies in other Pacific cultures and the extent to which criminal justice systems should incorporate these apologies into sentencing processes.¹⁸ The courts in the Marshall Islands acknowledge the potential role of traditional apologies. For example, when defendants enter into a plea agreement, a Court-administered “Change of Plea Form” requires defendants to note if a traditional apology forms part of the plea agreement. The existence of such a question indicates that such practices are currently part of social norms. Two questions arise. First, from where do these practices come? Second, to what extent do they serve a valid purpose? This section addresses the first question.

Unlike in other jurisdictions in the Pacific it is unclear the extent to which traditional apologies played a significant role in Marshallese custom and culture. The apologies do now have a role in the Court’s criminal jurisdiction. In several recent cases, defendants have introduced evidence of an apology in the sentencing process. This includes a recent case of involuntary manslaughter, where a taxi driver’s apology to the family of the man who died as a result of an accident the taxi driver caused was taken into consideration in mitigation.

There is limited evidence of a ritualistic approach to apologies in Marshallese culture. In the two other countries where research was conducted (Samoa and the FSM), traditional apologies involved elaborate ritualistic processes requiring an exchange of gifts and specific roles for different family members. People were familiar with these processes. Stories of traditional apologies, including detailed descriptions of the process involved, had entered into cultural mythology.

It is possible in the old days that the *iroij* and the *alap* would get involved in organizing traditional apologies. There could have been retribution and the chief would try and make peace,.. Now everything goes to court and we’re not aware of traditional apologies.

In the Marshall Islands such familiarity with stories of apologies was not present. In addition, an examination of a case digest of cases from the Marshall Islands from the Trust Territory period does not indicate evidence of practice of formalized traditional apologies over that period. The concept is also not mentioned in a draft report on codification of custom prepared by the Commission on Customary Law and Culture.

Respondents provided three explanations for the current practice of traditional apologies. First, as highlighted in the quote at the beginning of this section, the practice has some similarity to other practices that are part of Marshallese custom. As several respondents noted, the concept of ‘forgiveness’ is an important role in Marshallese custom. The concept can be seen in the elaborate funeral processes of the Marshallese that include opportunities for community members to offer apologies and receive forgiveness.¹⁹ In this context, the concept of *jelok ao bwird* (or ‘throwing away my mistake’) and a practice of spreading rocks around a grave three to seven

¹⁸ See for example, Tuala-Warren, L, “A Study in *Ifoga*: Samoa’s Answer to Dispute Healing”, Te Mahauariki Institute, Occasional Paper 4, 2002.

¹⁹ See Niedenthal, J, **For the Good of Mankind: A History of the People of Bikini and their Islands** for information on funeral processions in Marshallese culture.

days following a burial to symbolize forgiveness were raised as examples of the important role forgiveness plays in Marshallese custom.

Second, several respondents contended that traditional apologies were introduced into the Marshall Islands through the introduction of Christianity and has become part of custom over time. Third, the lack of reference to the traditional apology in Trust Territory cases may indicate that the practice has been introduced more recently. It may even be possible that the practice has been introduced by lawyers familiar with the importance of the practice elsewhere in the Pacific region. It should be noted that it is entirely plausible that there is a degree of validity to each of these theories.

Irrespective of the customary history of traditional apologies, it may have a relevant role to play in contemporary criminal justice system in the Marshall Islands. This is a separate question beyond the scope of this research. The examination above, in comparison to the role of traditional apologies in the FSM and Samoa also raises a fascinating question for anthropologists – what are the social structures/geographical characteristics that exist that lead some cultures to develop a need for ritualized traditional apologies where others do without.

4. Beyond the Formal System – Customary Leaders

The *alap* and *iroij* here still have a lot of power. They have more legitimacy than the government or the court... But the problem is what if an *alap* is doing something wrong. Who can say anything against that? No one will say anything in court against that. I know the son of an *alap* is doing the wrong thing. I know this and everyone knows this. What can we do? We stay silent. People don't know what to do.

The next two sections examine the range of legal issues that are resolved beyond the realm of the courts and the formal legal sector. There are indications that only a small proportion of overall legal issues make their way to court. It should be noted that this situation is neither unique to the Marshall Islands nor necessarily a negative, in the sense that in most jurisdictions only a proportion of cases reach court and courts would be severely overburdened should that change significantly.

This section looks at one of the options available to community members should they choose not to pursue cases through court. Traditional leaders are still perceived as playing an important role in dispute resolution processes. The section begins by briefly examining public perception of traditional leaders in this role. The extent of the authority of traditional leaders appears to vary significantly depending on the type of issue involved. The section examines two areas where traditional leaders continue to have authority, namely over land matters and in relation to public/social order. There are areas where traditional leaders have less authority, such as family disputes and these are examined in the following section.

4.1. Perceived Authority of Traditional Leaders

Land touches on everything. At the end of the day the traditional owners can determine everything because of their ownership of land.

The small survey undertaken as part of this research indicates that traditional leaders maintain a relatively high level of legitimacy. The survey asked several questions that examine the public's confidence in traditional leaders. Respondents had positive views on the ability of their *alap* to assist them in resolving disputes (71% agreed and 6% strongly agreed with the remainder with the remainder being neutral). This compared

favourably with perspectives on the courts, which 53% of respondents believed treated everyone fairly (with 24% neutral and 18% negative). Similarly, given a choice, a majority of respondents (53%) felt that the best way to receive legal information would be through traditional leaders. This is significantly higher than the next best option, radio (24%).

For the reasons outlined in the attachment on the survey, these responses need to be treated with considerable caution. It is not uncommon in these types of surveys for inconsistencies to arise between questions relating to traditional leaders. In this case, for example, the positive feedback above needs to be compared to other responses. For example, not a single respondent mentioned that they would visit a traditional leader if they needed legal information (compared to 41% who said they would go to court and 24% go to MLSC/Public Defender). In asking about actual experiences, few respondents who had experienced cases identified referring the cases to their traditional leaders.

The power of traditional leaders varies significantly from clan to clan.

As with any governance institution, the authority of traditional leaders also varies considerably depending on the capacity and leadership skills of the individuals in those positions. As the quote at the beginning of this section emphasizes, community members are very aware of instances where traditional leaders misuse the authority entrusted to them. Although the ability to follow up on instances or challenge decisions in court may be limited, the sense of unfairness and injustice that such actions imbed in communities risks undermining the legitimacy of the customary governance structures.

4.2. Land & Dispute Resolution Processes

Those cases that affect people living on land that isn't their land, they never come to court. They are resolved by the traditional leaders. I don't know how they are resolved but they get settled. Actually on a couple of occasions we have had people come to us and ask for our support in these cases. There is nothing we can say except that they should see the traditional owners.

Anecdotal evidence indicates that a significant proportion of the population in urban areas live on land where they have no interest in or rights to the land. As noted above, 80% of the population of Jenrok have no land rights. These *weto* however are probably at the extreme end. It is highly likely that there is significant variation across villages. Almost 60% of respondents in the survey have no rights in the land on which they live and are living at the invitation of the traditional owners.

The land I live on in Majuro I lease. There are many people who live here who don't lease the land. They just ask the *alab* and the *alab* let's them use the land. But in those instances they are subject to the *alab* and have to listen to the *alab*. If the *alab* wants something they need to do it. It makes them vulnerable. We have a formal lease for our land. It means that all our requirements are governed by the lease.

Under Marshallese tradition, it is common for traditional landowners to grant permission to families to live on land. In many instances, those moving onto the land will not be required to pay rent, although they may be asked to provide financial contributions on certain special occasions that will be collected by the *alap*.²⁰ The extent of these payments varies significantly between *weto*. This system of land use

²⁰ It should be noted that landowners will charge rent to businesses and government institutions that may wish to lease the land. In addition, some tenants (including foreigners leasing land) will often enter into lease agreements and pay rent.

obviously provides families with opportunities to live rent-free on land. As will be discussed in the next section it also acts as an important form of social control and strengthens social networks between clans.

For those living under these arrangements, disputes in relation to land rarely make it to court. In this respect, rule 1 of *The Special Rules of Civil Procedure* is functioning effectively and traditional leaders are dealing with all these land issues. Very little documentation exists though as to the range of issues faced by communities and the process for resolving disputes. Most commentators have identified that although customary practices exist, these are not rigid. As Tobin notes “the custom is sometimes honored in the breach.”²¹ There appears to be some variation in how traditional owners deal with disputes relating to land.

This summary, however, will attempt to identify some commonalities in the processes used for resolving land disputes. First, it appears that there are relatively clear lines of authority between issues requiring consideration of the *iroij* and matters the *alap* can directly deal with. The general demarcation is that *alap* will seek the consent of the *iroij* where the matter involves division of the land parcel, such as providing permission for a new family to move onto the land. The *iroij* will also be involved where a dispute involves more than one *weto*.

I could make that decision myself. Those types of decisions I make and the people will obey the decision. We have an agreement with the *iroij*. It is a written document that means that all the activities with the land the *alap* can make the decision. Here is the document. The *iroij* signed it with all the *alap* from this suburb. It was filed with the local government and allows us to deal with those issues. So it is my right as an *alap* to make these decisions.

For all other matters relating to land management, such as boundary disputes between neighbours or building of new structures within existing boundaries, the *alap* is entitled to deal with these issues but may seek the support of the *iroij*. In some instances, as highlighted by the quote above, this demarcation of responsibilities has been agreed to in writing. These are responsibilities that have significant impact on the day-to-day lives of communities. For example, *alap* approval is a prerequisite for mundane but important matters such as connecting electricity or telephones or obtaining home loans.

Actually just a few days back I went to the *Leroij* because two of the families on the *weto* were having a dispute. Actually it was about the boundary over the *weto*, so someone living on a *weto* I am *alap* for and another *weto*. The *leroj* was asked to settle the dispute. The *leroj* called the land surveyor came and the *leroj* and both *alap* met and oversaw the work of the surveyor. We then met afterwards and the *leroj* settled the dispute. The people living on the land weren't involved. They won't be involved in these meetings.

Second, decision-making processes provide for absolute authority in the hands of the traditional landowners. Western notions of due process would not easily be found in the dispute resolution processes explained by respondents. Several respondents mentioned that it is not necessary to seek the views of parties involved in the dispute where they do not have a formal interest in the land. Decisions are made by the traditional owners and then communicated to those who may be affected by the decisions. However, some forms of checks do exist. It would appear that some form of warnings is generally provided to disputants prior to final decisions being handed down. In addition, the role of the *alap* is overseen by the *iroij* and in extreme

²¹ Tobin, JA, “Land Tenure in the Marshall Islands” p18.

circumstances an *alap* can be replaced.²² Finally, ultimately, families can choose to move where an *alap* may prove to be too authoritarian, although this option may be more theoretical than practical.

Third, the role of the traditional leaders is predominantly reactionary. Little evidence was presented of routine community meetings being held for inhabitants of particular *weto*. Rather, traditional leaders appeared to respond to problems as they arose and would call meetings as the need arose or to address specific issues. The one example where routine meetings were held, under the ADB-supported *Traditional Environmental Management* project, seems to have been successful however was dependent on external facilitation and ceased to continue following completion of funding.

Fourth, there is limited evidence that *alap* are provided with opportunities to formally strengthen their capacity as traditional leaders. There is limited evidence that *alap* have received training either from *iroij* in receiving their title or from the government. Several *alap* mentioned that they learnt their skills from watching their predecessor. Despite this, of the *alap* interviewed, they were confident in their ability to handle disputes and claimed not to have been overwhelmed by their responsibilities.

There are also areas where significant differences exist in how traditional leaders undertake their functions. Primary amongst these are how *bwij* (or clan families) structure their families to provide for decision making within the clan. Numerous models exist, ranging from the traditional model where the current *alap* has ultimate authority to modern-day structures where foundations are created to provide for inclusive decision-making, greater accountability and transparency in the division of financial benefits. A study that examines the range of structures in use and the impact different structures have on the livelihoods of occupants living on the *weto* could be of considerable interest.

The council of *alap* has an important role. Each position knows their role and the *alap* would not be reluctant to voice their opinions to the *iroij*. They may do so in different ways but you can be assured that their opinions would be expressed.

Various opinions exist relating to the management of the relationship between *iroij* and *alap*. Some have argued that although cultural practices limit the opportunity to criticize *iroij*, traditionally consultation processes between *iroij* and *alap* provide a forum for open feedback to be provided.²³ These consultation processes are best reflected in the council of *alap* that have been created in some atoll. It was claimed that a council along these lines met in Majuro over the last several years to develop consistent principles for dealing with land across *weto*, however, it was not possible to obtain more detailed information on the nature of the meeting or the outcomes.

²² It should be noted that respondents could not recall an instance of this occurring. As one respondent noted "I cannot think of any examples of where the *iroij* has replaced the *alap*. At least no examples where the *iroij* has replaced an *alap* because the *alap* wasn't representing the interests of the *dri jermal*. But there are instances where the *iroij* has replaced an *alap* because the *alap* wasn't representing the interests of the *iroij*."

²³ See Poyen, L, "Ethnography and Ethnohistory of Taroa Islands – Marshall Islands Ethnography", Micronesian Resource Study, 1997 at p78.

4.3. Social Order

For things like small crime we would report it to the police. You don't want to disturb the *alap* too much. But it is not likely that you would get much response from the police. So it would just sit there.

Customary structures play an important role in maintaining social order in communities. Although the practical aspects of this role may be changing, the influence still exists. In practice, to varying degrees of success, the role of traditional leaders overlaps with local governments and, in particular, the local government police to maintain social order over their *weto*. As the box below highlights, this is particularly the case in relation to alcohol related public disturbance.

Regulating Alcohol Use

Across a number of land parcels in Majuro *alap* have decided to prohibit the use of alcohol. In many of these instances the *alap* will file the decision with the local government. This then takes the form of a local government ordinance. Where the ordinance is being violated communities appear to more comfortable with calling the local police instead of disturbing the *alap*. As one respondent noted:

We call the police because they can resolve the problem quickly. The *alap* can't help because he is too old.

The police are able to charge people for violating a local government ordinance and these cases appear in the District Court.

In addition to this, the *alap* still can still impose the ultimate punishment, being to demand the family move off the land. Given the severity of this form of punishment, the threat itself is normally sufficient and a number of *alap* noted that they were rarely required to enforce it. It is known to occur however as the quote below shows:

The most recent case I had was with that house just next door. The son was drunk and making trouble so I told them they had to leave. Actually it wasn't a one off thing. I gave the family two warnings. The third time I told them they had to pack their bags and go.

As noted in the box above, the threat of expulsion from the land is a significant form of punishment. This provides the *alap* with considerable control over the lives of community members. It ensures a significant disparity in bargaining position between the traditional landowner and the occupants of the land, especially for those with no right to the land.

We don't call the police anymore. Nothing comes of it.... So now we put the word out. Our landlord is very helpful, so we don't have too many problems.

It should be emphasized that the control of the *alap* varies considerably depending on the individual capacity of different *alap*. In fact, in some instances, they are effective in maintaining social order, as the quote from one small business owner above indicates.

Alcohol is allowed on this *weto*. The store down the road will sell beer, vodka to anyone who wants it. Actually, it is the *alap*'s brother who owns the store so the *alap* won't intervene. That's why we call the police.

In other instances the *alap* themselves are seen as the source of the problem. In addition, as the following section highlights, there are issues where the traditional leaders will rarely become involved.

5. Beyond the Formal and Customary Systems

A large part of it is a lack of knowledge on how to access institutions. People wouldn't know what to do if they had a problem. They don't know what different institutions are and what their functions are. For marginalized groups, most people would think 'who am I' and that would stop them going somewhere for help. They don't think they have an opportunity to access institutions, so ultimately justice is only given to those who can afford it.

In any society, supporting the disenfranchised requires an awareness of their existence and an understanding of the context in which they live. As has been noted in section 2 of this report, socio-economic data indicates that there may be a proportion of the population that lives beyond the formal economy and real access to formal institutions, even in urban parts of Majuro. However, it is difficult to measure the extent to which this is the case and identify the nature of their needs.

This section examines issues where there may be community members who have challenges in addressing their justice needs. The section begins by providing a breakdown of actual disputes recorded in the survey. Following this the section will examine an area that is not uncommon in most jurisdictions but is challenging to confront, issues relating to domestic disputes. A number of these were recorded in the survey. Finally, the section returns to issues of lack of entitlement and, providing as an example of the United States Department of Agriculture programs, shows how efforts to address community needs can end up disenfranchising those most in need even more.

5.1. A Breakdown of Disputes

One section of the survey was focused on actual disputes experienced by respondents in the last 2 years. Although the survey was quite limited,²⁴ the responses do provide a snapshot of legal experiences faced by respondents. Over a third of respondents had not experienced a dispute in the last two years. Of those who had experienced disputes 24% had experienced two disputes, 18% five or more disputes and 12% one dispute. The most common disputes experienced were fighting, land, money issues and domestic violence, each experienced by approximately 30% of respondents. Care needs to be taken in interpreting these results. For example, some respondents identified 'fighting' as neighbours in their village fighting and as a result they are not direct parties to the dispute.

Where respondents had experienced disputes, they were asked to identify the dispute that had the most serious impact on their lives. Several following on questions were subsequently asked. Some general observations can be made from the responses. First, two cases involved courts or lawyers. The first was a land case involving failure to pay rent. The second was a serious sexual assault within a family. Where there was public disturbance in villages, the police were generally called on. Their actions were seen as effective in ending the disturbance in the short-term but they were likely to be recalled whenever the disturbances recommenced. In disputes between family members, seeking assistance from third parties was rarely an option. The exception to this was the serious sexual assault where a minor had been assaulted by her uncle. Her family failed to act when she reported it to them so she went directly to the police.

²⁴ Attachment 1 provides a detailed explanation of the survey, including important context on the limitations of the sample and definitional issues relating to each question.

5.2. Family Disputes – who provides support?

With regard to the prosecution of sexual crimes and violence against women and children, the Marshall Islands provided an update on progress it made in specific cases... The country noted that it was actively prosecuting such crimes, but that, in some instances, the prevailing extended family structures in the Marshall Islands inhibited reporting. The Marshall Islands was fighting concepts of family privacy and family pride insofar as they inhibited reporting, but acknowledged that further efforts needed to be made.²⁵

In most jurisdictions, family disputes and, in particular, domestic violence, are likely to be the types of cases where victims find it most difficult to seek justice. As the quote above from the periodic review mechanism of the UN Human Rights Council indicates, this is no different in the Marshall Islands. There is a significant difference between reporting of domestic violence and actual incidences. The Annual Report of the Judiciary reports 12 assault, battery and sexual assault cases filed in 2009. In contrast, 22% of Marshallese women claimed to have experienced physical abuse at least once over a 12-month period according to the DHS survey.²⁶ The case of A in the box below is one example of the limited ability of community members to act on these issues.

Accepting Disputes as a Part of Life

A is a lady in her forties who lives in one of the downtown suburbs of Majuro and was happy to respond to the survey. A finished school halfway through high school. She has four children and lives in a small house with her husband, children and several others. They live on the land at the invitation of the *alap*. A works in one of the few low paying manufacturing jobs on the island.

From a list, A was asked to identify disputes she had actually experienced in the last 2 years. She identified five forms of dispute: fighting, land disputes, family issues, domestic violence and sexual assault. A was asked to identify which of these disputes had the most severe impact on her life. She responded that all those disputes except for the land dispute were actually the same issue. A's husband drinks. When he drinks he comes home and fights with A and everyone else in the family.

A has never sought assistance in this issue. She discusses it with her closest friends but has come to accept that there is little she can do about the problem. She does not believe the authorities can help her. As a result the problem is on-going. Periodically, A's husband will come home drunk, a fight will occur and her husband will disappear leaving A to look after the children.

According to the DHS survey half the women who experience violence never tell anyone, compared to 14% who tell someone and 26% who seek help. The table below shows the most common sources of support for the 26% of women who seek help.

²⁵ Human Rights Council, "National Report for the Republic of the Marshall Islands", Nov 2010, p10.

²⁶ DHS survey, supra n4 at p243.

Source where help was sought	Type of violence		Total
	Any physical	Any sexual	
Own family	69.9	(58.6)	68.4
In-laws	11.3	(7.9)	11.2
Friend/neighbor	39.0	(52.7)	38.1
Doctor/medical personnel	0.0	(0.9)	0.4
Police	2.9	(0.0)	2.8
Other	3.5	(9.0)	4.6
Number of women	77	35	81

As the table indicates, very few people who experience domestic violence report the incidence to actors in the formal sector. This may commence to change as organizations such as Women United Together Marshall Islands (WUTMI) actively seek to increase awareness about domestic violence.

We (*alaps*) don't really hear of domestic disputes or problems. These are private things. If things like that are happening, that is their own problem. Their families will deal with that. The extended family is there for that.

The quote above also indicates that traditional leaders do not consider that they have a role to play in these types of disputes. The one exception may be where these disputes are disturbing the peace more broadly, in which case the *alap* may warn the family but will not get involved in trying to resolve the underlying dispute.

5.3. Where efforts to assist increase inequality

The report has previously commented that a number of respondents identified a culture of 'entitlement' as being an important justice issue in the Marshall Islands. As one respondent commented:

The social structures have changed. And the biggest change is that some in the elites have forgotten about the concept of reciprocity. For them it is now all unidirectional. All of the benefits come to the elites.

The box below provides an example of where customary structures and the monetary system have combined to affect how programs aimed to assist those in need end up benefitting all except for the most needy.

Accessing USDA Grants

The United States Department of Agriculture administers a home loan and grant program in the Marshall Islands. The program enables the public to receive loans and grants (for pensioners) to renovate or build a home. The loans are at low interest rates. The program is designed on the same program USDA administers in the United States. It is means tested and the criteria to access the loans are similar to those in the US. Because the means test threshold is the same as that in America, just about everyone in the Marshall Islands is able to access the program. However, the criteria require proof of ownership or land rights over the property. At a minimum, a long-term lease is required. But, as has been mentioned previously, many in Majuro do not have formal land arrangements over their land. As the Jenrok study highlighted, this is particularly the case in poorer villages.

Some time ago the Government examined the possibility of broadening access to the program. This would have involved the Government entering into formal leases with landowners on behalf of those living without leases. The Government would have then subleased the land to tenants who could then access the USDA program. However, this was unsuccessful because the landowners were reluctant to enter into

the leases. They believed it was in their better interests not to formalize the informal arrangements covering their *weto*.

As a result, whereas those with formal rights to the land on which they live enjoy the benefits of the program, those most in need continue to miss out.

It is important to stress that this issue does not necessarily directly affect justice sector actors. It is a ‘justice issue’ in the sense that it affects how people perceive an overall system that, in some aspects, benefits some and not others.

6. Learning from Approaches to Engaging with Custom

On the surface there will be changes. People will wear western shirts and eat steaks. But we have internalized the system in such a way that it is not going to change or go away.

The previous sections provided information on how individuals engage with justice systems, both the formal system and customary systems. The section examines the policy dialogue that occurs in marrying a customary system with institutions of a modern state. In documenting several examples, it is hoped that this section can provide lessons at both the regional level and also for ongoing efforts to engage custom in the Marshall Islands. The first part of the section examines the public discourse that is occurring on the role of custom, through the print media in the Marshall Islands. The second part documents lessons from government initiatives relating to customary structures.

6.1. Public Discourse on the Role of Custom

The level of discourse present in the media on issues relating to custom varies significantly from country to country in the Pacific. In tracking the discourse it is possible to draw some conclusions on the degree to which a public and inclusive policy dialogue is occurring on these complex issues. The box below examines the discourse, providing some comparison with media coverage in Samoa.

Public Engagement on the Role of Custom

The research includes tracking of newspaper articles related to issues that affect the justice sector. In the Marshall Islands this involved reviewing all back issues of *The Marshall Islands Journal* for 2011.

As has been noted above, *The Marshall Islands Journal* does an excellent job of providing the public with information on court proceedings. Most of this information is focused on criminal cases before the court. Of the 215 articles published over the course of 2011 relating to legal issues, well over half (125) were related to criminal cases before the court.

There is, however, much less discussion in the media on the potential role of custom. Tracking identified only four articles relating to custom, primarily recounting customary stories. There were also 18 articles dealing with land issues. These articles dealt primarily with either disputes over customary title or negotiation of the Land Usage Agreement for Kwajalein.²⁷

In comparison, the media tracking in Samoa identified a lively debate on the relationship between custom and the rule of law. A third of the articles dealt with

²⁷ It should be noted that the media reporting only covered a snapshot in time. Land cases, for example, are claimed to have generated significant more media interest in previous years.

issues surrounding the relationship between custom and a modern state. The same amount as covering criminal issues.

It should be noted that there are numerous reasons why such a differentiation would occur between countries. One reason, relevant to this report is that the public space available for discourse may be more constricted in the Marshall Islands. It should also be noted that the style of print media in Samoa and the Marshall Islands varies significantly. In this sense the nature of the articles, to some extent responds to the interests of the readership. Similarly, the period of tracking in Samoa (daily newspapers over a much more intense period of 2 months) differed from that in Marshall Islands and the tracking occurred over a time where there was a lively debate in the media about the legality of the custom of gift giving in election periods.

6.2. Learning from Initiatives to Reform Custom

Involving the traditional system needs to be part of progress here. The land tenure system plays such a central role that there is no alternative but for it to be part of progress.

Efforts have been and continue to be undertaken to define the relationship between traditional and modern governance structures in supporting the development of the Marshall Islands. A Land Registration Authority was established a number of years ago with the objective of increasing certainty in land transactions. A Commission on Customary Law and Culture has also been established and is seeking to codify custom through the civil code to improve certainty. A smaller, programmatic example includes attempts to engage *alap* on community waste management on Majuro conducted through an ADB project. These efforts may provide important lessons on developing processes to engage with custom.

Establishing a Land Registration Authority

In 2003 the Government passed legislation to establish a Land Registration Authority (LRA). Amongst its objectives, establishing the LRA was seen as an effort to promote economic development through increasing certainty in land transactions.

Many landowners don't want land ownership to be codified. They see that it would not be in their interests because they benefit from ambiguity. The LRA stumbled from a perception issue.

The system was voluntary and it was transparent. These were seen as positive aspects but here we are a decade later and it still hasn't been widely used.

Although the LRA exists it has faced some challenges in encouraging participation. The quotes above highlight some of the challenges the LRA has faced. Some have argued that there was reluctance on the part of traditional owners to register their land. The registration process has also been seen as encouraging disputes as it led to competing claims. Since its inception approximately 30 claims have sought registration. Of those it is claimed only 4 have been granted clear title.

It is not the place of this report to comment on the validity or otherwise of the LRA initiative. This case study emphasizes, however, that perception is an important issue in the success or otherwise of these initiatives. The reluctance of landowners to use the system and the number of contested claims upfront led to a reluctance of others to register their land. In discussing the LRA a number of respondents referred to it as the ADB-supported LRA, creating a perception that it was an initiative drive by external advisers. Irrespective of whether or not this is accurate, and respondents closely involved in developing the initiative contend otherwise, these perceptions can influence the success or otherwise of initiatives.

Despite the efforts of the LRA not being as successful as initially envisaged, it should not preclude any efforts to change customary processes. Custom is constantly changing in any case. Many have commented on the ad hoc changes introduced over time by customary leaders.²⁸ The experiences do emphasize the importance of including traditional leaders in the process. It also emphasizes that the ultimate outcome often depends significantly on the process. The box below provides examples of a program that benefited significantly from engaging customary leaders but also highlights a constraint in doing so.

Traditional leadership in Development

The Traditional Environmental Management (TEM) Project was developed with the support of the ADB to improve the environment and waste management in Majuro. From early on the project identified a possible risk of *alap* feeling that the project may seek to dilute their authority, leading to resistance. As a result, the project sought to engage with the *alap* through their participation in workshops and encouraging beautification of their *weto*, through competitions and community work days. The TEM project completion document claims that this approach ‘has resulted in renewed respect for both the leaders and the traditional values’.

Although this approach has its strengths, it is claimed that one weakness related to sustainability of the project. Routine meetings and activities were well attended during program implementation but as soon as the project (and funds) finished, fewer incentives existed to encourage participation.

Providing traditional leaders with too much of a say and can affect the ability of others to voice their opinions. Traditional leaders already have their own forums for providing advice.

Others have argued that the participation of traditional leaders is vital, but it needs to be organized purposefully. As the quote above highlights, the active participation in traditional leaders in open sessions may reduce the incentives for others to contribute.

7. Conclusion

The report is part of a broader research activity aimed at better understanding the relationship between custom and the judiciary across the Pacific region. The primary objective of this report is to document experiences from the Marshall Islands, to inform development of the broader regional paper.

It is hoped the report may be of some assistance to the judiciary in the Marshall Islands as well. The substantive sections of this report are divided into four parts. The first part (Section 2) provides a brief socio-economic summary and attempts to highlight the position of marginalized community members living in the urbanized environment of Majuro.

²⁸ See, for example, Transparency International’s “National Integrity Report: RMI, 2004” that includes a list of efforts both formal and adhoc to reform customary processes. This includes a defeated draft legislation to do away with the role of the *alap* in the 1990’s and increasing ‘attempts by *iroij* and others to move away from matrilineal patterns of inheritance to inheritance in the male line,.... The debate over this issue raises matters of self-interest.”

Section 3 examined areas where the judiciary engages on issues of custom. In particular this section looked at issues relating to the functioning of the Traditional Rights Court and aspects of relevance to the High Court's criminal jurisdiction. For the former, the section examines the functioning of the rule 1 of the *Special Rules of Civil Procedure*, in relation to encouraging dispute resolution by traditional leaders. The section argues that for these complex cases the presence of the court provides incentives for traditional leaders (and parties) to abrogate from the responsibility of the traditional system. In relation to the criminal jurisdiction, the section looks at the presence of customary apologies. It is argued that although 'traditional apologies' may not take the form of ritualistic processes that occur elsewhere in the Pacific, from the perspective of notions of forgiveness they are not unfamiliar to Marshellese custom.

Section 4 of the report analysed options available to communities in dispute resolution beyond the formal system. The options are essentially two-fold. First communities can seek to use customary systems that still exist and exert significant influence. These systems are particularly influential for land disputes, especially where no significant commercial interest is at stake and in areas of maintaining social order. In land disputes, the section attempts to identify some commonalities in the processes that are used in resolving these disputes. The authority of leaders on social issues stems from their control over land. On these issues they are progressively working more closely with local governments. However, for many in the community with no land rights, the ultimate threat of eviction remains a strong form of social order.

The second non-formal option available to communities is to accept the dispute as a fact of life, rather than seeking to resolve it. This was an option identified as a not uncommon occurrence, particularly in relation to family disputes where there is significant pressure against reporting disputes. In examining these options, lessons are drawn from the small community survey that was undertaken in the course of the research. The point to emphasize is that despite the presence of accessible and free legal services this is not always sufficient to overcome culture and social pressures.

Finally, the paper looked at policy engagement on issues of custom. This included a snapshot of the public discourse on the role of custom in society. It was noted that the level of public discourse, at least in the print media is not as sustain as other countries in the Pacific region. The paper also documented some of the initiatives that have been undertaken to engage with custom, by both government and donor programs. These experiences emphasize the importance of working with customary leaders but focusing on appropriate and open processes in addition to the end outcome.

There are specific areas of this report that deal with justice issues but that may not necessarily be directly relevant to the work of the judiciary. This has been a point that has been highlighted across the region since the start of this research. Examining customary structures goes beyond their engagement with the judiciary and there is a limit to which the judiciary can engage on some of the critical issues identified in this report.

The report does however identify some areas that may be worthy of consideration. First, the report presents an understanding that there is a proportion of the population

that do not engage with the formal system despite having justice needs. This may be determined by a range of factors including the type of issues faced by the population and socio-economic factors. For people living on outer atolls geography is certain to be a factor. An increased awareness of the range of justice needs faced by these people, the reasons why they act beyond the formal system and the services they receive beyond the formal system enables government institutions to respond by better tailoring their services.

This increased awareness can be obtained in a range of ways. This research issues a small survey. This could be refined and built on as part of a community consultation process. Alternatively, there is significant value in having routine (eg: yearly) consultations with different marginalized groups to obtain their views on needs, identify activities that can address these needs and review progress. These consultations could be facilitated through civil society organizations, however, it is important that the voices of marginalized community members themselves are heard and not only the leadership of organizations that represent those members.

Second, at the request of the judiciary, the report examines the operation of traditional owners in relation to land issues, including through the lens of making better use of rule 1 of the *Special Rules on Civil Procedure*. It is clear that traditional owners are heavily involved in the dispute resolution processes for a range of cases, in particular those not involving commercial interests. It is less clear how those processes operate. In addition, traditional owners perceive the Traditional Rights Court as impinging on their authority but in some instances are reluctant to use their authority in accountable ways themselves and receive limited guidance on how that authority can be used.

There may be some benefit to reaching out to traditional owners, in particular *alap*, to enter into a discussion on how they utilize their authority and the type of support the judiciary may be able to provide. This would focus at the policy level. Initial steps could include asking some *alap* to document the land decisions that they are involved in, in particular the processes involved. That documentation could be used as a reference point to discuss appropriate methods to settle disputes, the benefits and weaknesses of different approaches and jurisdictional issues for the customary and formal system. As mentioned in the report, a review of the responses in the filings of plaintiffs on invoking special rule 1 may also provide some interesting results.

Efforts to codify custom are ongoing in the Marshall Islands. The report provides some lessons from the experience with the Land Registration Authority. It is important to note that the process is important. If parties believe that the outcome is not in their interests they can use interpretations of the process to weaken legitimacy in the outcome. Efforts to engage on customary issues need to both obtain the buy in and support of traditional leaders and obtain the views of the public. Adopting open and consultative processes is empowering for the public at large as it enables them to feel as if their views have been heard and respected. This, in itself is an important outcome.

Attachments

Attachment 1: PJDP Community Survey, RMI: Results and Commentary

Attachment 2: PJDP Newspaper Tracking, RMI. *The Marshall Islands Journal*
January January – November 2011;

Attachment 3: Bibliography, The Republic of the Marshall Islands

Attachment One – PJDP Community Survey, RMI: Results & Commentary

Introduction

From 22 – 25 November a short survey was issued to 17 respondents on the atoll of Majuro. The survey document was developed with the input of Chief Justice Ingram, Associate Justice Plasman and Ingrid Kabua. Travis King provided excellent assistance in implementing the survey. The survey document uses approaches taken from a number of different legal empowerment surveys. It has been adapted taking into consideration lessons from other social surveys undertaken in the Marshall Islands. The questionnaire is designed to ensure that it can be issued in under 30 minutes. The survey document is divided into three, roughly equal, parts:

- a. A background section: asking respondents information on their socio-economic background;
- b. A knowledge/perceptions section: asking respondents information on their familiarity with justice issues and access to information; and
- c. An actual experience section: asking respondents questions on actual disputes they have faced in the last two years.

Implementation of the survey was in no way representative. The number of respondents surveyed is limited and as such limits the ability to draw conclusive results. In addition, given the limited number of respondents it is not possible to cross-tabulate results to highlight differences in responses between segments of communities with particular socio-economic characteristics. The results below do not provide this information.

The survey helps in two ways. First, it is a tool to open discussion with general community members about justice issues they may face. In this way it acts as a snapshot for respondents surveyed about how they engage with the justice system.

Second, this limited can potentially be seen as a test survey. The survey document can potentially be used for a broader survey should either the courts or other organizations (including NGOs) be interested in this process. To this extent for each of the questions below, comments are provided on the effectiveness of the question and possible recommendations for improving the survey tool.

The survey was implemented in five areas as follows:

- Rita, 22 November: 4 respondents (3 male, 1 female);
- Jenruk, 23 November: 4 respondents (3 female, 1 male);
- Near the airport, 24 November (am): 3 respondents (2 female, 1 male);
- Delap, 24 November (pm): 4 respondents (2 female, 2 male – 1 male interviewed under courthouse);
- Behind NTA, 25 November (am): 2 respondents (1 female, 1 male).

It should be noted that respondents were selected randomly. This means that there is an over-emphasis on respondents who were at home in the daytime and had time (ie: housewives and unemployed).

Percentages are provided for ease of reference only.

Survey Results

Introduction Dear Respondent

Hello. My name is Matthew Zurstrassen and I am working with the High Court of the Republic of the Marshall Islands. We are conducting a small survey that asks women and men about various legal and justice issues. We would very much appreciate your participation in this survey. The survey usually takes approximately 30 minutes to complete. Whatever information you provide will be kept strictly confidential and will not be shown to other persons. If we should come to any question you don't want to answer, just let me know and I will go on to the next question; or you can stop the interview at any time.

Comment: The survey would benefit from a clear sentence on the objective – to support the delivery of court services by understanding justice issues faced by communities. A number of respondents were interested in the objectives when asked if they had questions at the end of the survey.

Section A Background Questions Individual

1. Age

18 - 25	26 - 35	36 - 45	>45
2	6	3	6
12%	35%	18%	35%

Comments Clear

2. Place of Birth

Majuro	Other	List
59%	41%	Utrik atoll, Ebon, Arno, maloelap, Arno, maloelap, mili

Comments Clear

3. Sex

Male	Female
47%	53%

Comments Clear

4. Highest Education Attained

Elementary School	4	24%
Attended High School (did not graduate)	8	47%
Graduated High School	3	18%
Some college (did not graduate)	1	6%
Associate degree		
Bachelor's Degree (or above)		

One other: still in High School

Comments: Clear

5. Married Status

Single	3	18%
Married/Living with Partner	13	76%
Divorced/Separated	-	-
Widowed	1	6%

Comments: i). May consider separating married and living with partner (traditional marriage) although not clear if this separation has any implication on family law related issues.
 ii). The document does not capture previous marriages. Responses on other questions (including children living elsewhere) indicate a number of respondents have had previous marriages.

6. How many children do you have?

0	1	2	3	4	>5
2	2	3	2	2	6
12%	12%	18%	12%	12%	35%

Comments: i). Translation in Marshallese version is incorrect – should read 'do you have' as opposed to 'are living with you'.
 ii). Consider providing two options: biological/natural & adopted.

7. Of those under 18 y/o do they all live with you?

yes	No	Mixed	(2Y +1 Majuro), (4Y+1Outer), (1Y+1outer), (1Y+2Majuro)
8	-	4	
66%	-	33%	

Comments: This question could be cut. It does potentially show a). extent to which people depend on outer island networks for raising children; b). previous marriages where other children are in Majuro. Not sure if such information is useful for justice issues. They question is often asked to identify potential issues relating to health/education services where divorces/separations are common

Household

8. How many people live in the current house where you live?

1 - 5	6 - 10	11 - 15	16- 20	> 20
1	8	4	3	1
6%	47%	24%	18%	6%

Comments: Some respondents were unclear of number and had to count out residents. This indicates frequent movement of occupants in houses. Respondents in houses with large number of occupants should be encouraged to count out number as it varied significantly from estimated guess. One occupant guessed 30 and then revised to 18 based on actual number.

9 How many people in your house are under 18 years old

1 - 5	6 - 10	11 - 15	1 Don't Know
9	6	1	
53%	35%	6%	

Comments: Clear

10. Which of the following best describes the house you live in?

10	The land belongs to me	2	12%	Note one 5 is gift land. Land provided to husband from alap. Women is widowed. Original alap also deceased.
	The land belongs to someone else living in the house	5	29%	
	I pay rent for the house	-	-	
	Another person living in the house pays rent	-	-	
	We have permission to live on the land without paying rent	10	59%	

Comments: Clear

Employment

11. Which of the following best describes your current employment and the employment of other adults living in your house

	Gov't	Company	Part-time	Self-employed	U/E	Other
Respondent	1	2		1	10	3
	6%	12%		6%	59%	18%

Comments Categorisation is unclear. Recommended categorisation: i). national government; ii). Local government; iii). Company (professional); iv). Company (support); v). part-time; vi). Self-employed/subsistence; vii). Unemployed; viii). Housewife; ix). Other (student, retired,...).
 Current responses – number of housewives identify as unemployed. A separate list includes individual responses (R1,..) + responses for other adults living in their house (other) – available on request.

Section B

		Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1.	If I had a dispute I know where I could find help	-	2	3	11	1
			12%	18%	65%	6%
2.	I feel I understand my rights well enough	-	1	2	12	2
			6%	12%	71%	12%
3.	If I had a dispute my alap would be able to help me	-	-	4	12	1
				24%	71%	6%
4.	The courts here treat everyone fairly and equally	-	3	4	9	-
			18%	24%	53%	
5.	Family disputes should never be reported to the police or courts		11	4	2	
			65%	24%	12%	

Comments: i). differentiating between strongly disagree & disagree; and agree & strongly agree is not effective. Respondents take a measured response. Change categories to be: disagree; neutral; agree; and not sure;
 ii). Negative question in 5 was effective. Respondents would consider the question more carefully. Include an additional negative question in the list;
 iii). Respondents felt that questions 1 & 2 were too general. When asked question 1 they wanted to know what type of dispute. Suggestion to remove question 1 and have more detailed question for question 7 below.

6. Organizations exist that can provide me with free legal advice

Yes	No	Not Sure
11	1	5
65%	6%	29%

Comments: Clear

7. If I needed legal information I would:

Ask my family or a friend	-	-
Ask my alap or another traditional leader		
Ask a religious leader		
Visit an NGO	1	6%
Visit the Public Defender or MLSC	4	24%
Visit a private lawyer	-	
Go to the police/court	7	41%
Don't Know	5	29%

Comments: This question was not particularly effective. It could be the mention of 'legal information' in the question was too formal. Also the fact that we identified ourselves as being from the court may lead respondents to identify the court as best response.
 If future surveys are to be conducted divide this question into 4-5 subject hypothetical questions and ask where they would go for assistance on each, reading out a list of responses:
 i). Your neighbour and you are arguing about the boundary to your land.
 ii). Some boys in your village get drunk and are fighting.

- iii). You guaranteed a loan. The person who received the loan has moved to the US and the bank wants you to pay.
- iv). A male in your house comes home drunk and is violent.
- v). you have a claim to some land but are arguing with a family member about the title.

8. If you could receive more information on legal issues which of the following would you like information on?

Crime/Theft/Public Security	3
Land issues	3
Employment/wages	2
Delivery of public services	2
Family (adoption, divorce,..)	4
Inheritance	1
Domestic Violence	1
Money (debt/contracts/loans)	1

Note respondents could answer 1 or 2 subjects. 2 responded 'all'; 1 responded 'other – good governance'; and one didn't respond
 Comments: Respondents felt the list was too long and confused by options available. Reduce list and don't include multiple options in some categories (eg: crime/theft/public security). Instead of allowing multiple responses request respondents identify a first preference and then a second preference.

9. The best way for you to receive information on legal issues & rights is:

The radio	4	24%
The newspaper	2	12%
Brochures and posters	-	
Small community meetings	1	6%
NGOs	-	
Community leaders	9	53%
Other	1	No respons

Comments: Clear

Section C: Actual Disputes

1. In the last 2 years have you experienced any disputes relation to the following issues?

Number of disputes per respondent

Disputes	0	1	2	3	4	>5
Respondents	6	2	4	1	1	3
% of respondents	35%	12%	24%	6%	6%	18%

This tabulation provides information on the number of disputes each respondent claimed to have experienced. So 6 respondents claim not to have experienced a single dispute whereas 3 respondents claim to have experienced 5 or more disputes.

Respondents experiencing particular type of dispute.

	% of respondents	
Theft	3	18%
Fighting	5	29%
Land dispute	5	29%
Money (debt, contract, loan)	5	29%
Employment/Wage	1	6%
Inheritance	1	6%
Family (adoption/divorce)	3	18%
Domestic Violence	5	29%
Delivery of public services	1	6%
Sexual Assault	2	12%

% column = more than 100%. Respondents were able to identify more than one dispute

- Comments:
- i). clearer definition of 'experiencing dispute' needs to be provided to the respondents. The survey should define whether this means the respondent is a party to the dispute; the dispute has been experienced by a member of the household; or a dispute occurred that has affected the respondent. For example, a number of respondents identified fighting as a dispute. These disputes were invariably between neighborhood youth. The respondents were not directly involved but were affected by the dispute. Commonly, surveys ask for experience by household member. Although if the respondent is not personally involved it affects the ability to answer the other questions accurately.
 - ii). The translation of inheritance should include the term *kalimur* (or will).
 - iii). The term 'domestic violence' was in one instance misunderstood to include fighting in the neighbourhood;
 - iv). The translation of sexual assault uses a word 'latibnol' which is not commonly understood. 'Rape and koman nana' are more common terms.

- 2-9 Outlined below are the responses to questions 2-9 for each respondent who identified at least one dispute. Respondents were requested to identify the dispute that had most significant impact on their life. Question 8 & 9 were not answered because in most cases dispute was on-going or respondent was directly involved in resolution process

Respondent 2, 22 November 2011.

2. Description: dispute involves fighting between youth in respondents weto and from neighbouring weto. Fighting occurs whenever youth are drinking.
3. Parties: youths from neighbouring weto

4. Sought assistance of third party
5. Police
6. No response
7. Dispute is ongoing. The fighting reignites every time the youths start drinking again

Respondent 1, 23 November 2011

2. Respondent selects five different types of disputes (fighting, land, family, domestic violence & sexual assault). Four of those disputes involve family tensions between respondent and her husband. Respondent selects 'family' as dispute having most impact. Whenever husband gets drunk he fights with the family and then leaves, leaving the wife to look after the children.
3. Husband
4. Nothing
5. No response – never sought assistance of third party
6. N/A
7. No resolution, ongoing. The dispute reignites whenever the husband drinks.

Respondent 4, 23 November 2011

2. Dispute involved payment of rent for land. Brother of respondent was alap and began court proceedings to evict tenant who was not paying rent. Court case in favour of brother. Brother dies and respondent becomes alap. Lawyer tells respondent to occupy the tenants house so as to enforce court decision. Respondent not directly involved in dispute.
3. Between respondent's brother and tenant
4. Sought assistance of third party
5. Court through lawyer
6. Respondent wasn't directly involved in dispute so cannot answer
7. Yes, satisfactorily resolved
8. N/A. Respondent not directly involved in dispute.

Respondent 2, 24 November 2011

2. Respondent identifies dispute over money as main dispute. Respondent claims she social security benefit in her name. Routinely she will fight with her mother over access to benefit. On occasion her mother withdraws cheque covering benefit from the bank even though the benefit is in her name.
3. Respondent's mother
4. No action taken
- 5&6. N/a
7. No, the dispute is ongoing and respondent hasn't sought assistance to resolve dispute.

Respondent 3, 24 November 2011

2. Respondent identifies experiencing theft and land dispute. Doesn't select dispute as claims neither had a significant impact on his life.

Respondent 4, 24 November 2011

2. Respondent has been married numerous times previously. He identified divorce/family issues as having most significant impact on life from 4 disputes acknowledge (theft, inheritance, family & domestic violence). Respondent's most recent wife has left him to live with another man because respondent drinks too much.

3. Respondent's wife
4. No action taken by respondent

Respondent 5, 24 November 2011

2. Dispute having most significant impact is defined as being 'domestic' but is actually 'fighting'. Youths in village are drinking and disturbing the peace.
3. Youths in village
4. Sought assistance of third party
5. Police.
6. We call the police because they can resolve the problem quickly. The alap can't help because he is too old. The police will come more quickly and resolve the dispute. Alcohol is allowed on this weto. The store down the road will sell beer, vodka to anyone who wants it. Actually, it is the alap's brother who owns the store so the alap won't intervene.
7. Police resolve dispute satisfactorily whenever it occurs.

Respondent 6, 24 November 2011

2. Identifies domestic violence as most significant impact from five disputes (theft, fights, money, inheritance & domestic violence). One of the people living in the respondent's house drinks too much. Whenever that happens he comes home and makes trouble, damaging the house and being violent.
3. Family member
4. Sought assistance of third party
5. Have called both local and national police.
6. No response.
7. The dispute is not resolved. The police come and stop the violence but it will only restart whenever he starts drinking. It depends on the alcohol. Some weeks he won't drink and there won't be any problem. The next week he is drinking and it causes problems again. I don't know what there is that we can do. All I do is pray that one day it will stop.

Respondent 7, 24 November 2011

2. Young people in village were fighting. Respondent not actually involved in dispute but went to see what was happening. Local police called to resolve dispute but not by respondent.

Respondent 1, 25 November 2011

2. Respondent acknowledges two disputes – money and domestic violence. Selects dispute involving money. Respondent's husband is a teacher at middle school. A co-worker applied for a loan from the bank and asked the husband to co-sign the loan. The loan was for over \$1,000. The co-worker moves off island and the bank forces the husband as guarantor to repay the money.
3. With Bank
4. Direct negotiation with other party.
7. The dispute was resolved because the bank forced respondent's husband to repay loan.

Respondent 2, 25 November 2011

2. Respondent identifies 5 disputes – land, money, employment, family and sexual assault. Disputes at household not individual level. Sexual assault has largest impact on respondent's life. Respondent's uncle is accused of sexually assaulting his 15 year old daughter on Arno.

3. Dispute between respondent's uncle and their daughter.
4. Sought assistance of a third party.
5. Daughter makes complaint to police.
6. Daughter initially reported act to family members but they refused to take any action. The girl then went straight to the police herself and respondent's uncle was charged.
7. Unclear if resolved. Uncle either awaiting trial or has pleaded guilty.
- 8&9. For me the dispute has left me feeling embarrassed for our family. I get really mad when I think about it.

**Attachment 2: PJDP Newspaper Tracking, RMI. *The Marshall Islands Journal*
 January – November 2011-12-15**

Journal of Marshall Islands - Court/legal related Newspaper Articles 2011

- Reference Code
- | | |
|---------------------------|-----------------------------|
| 1. Custom & Public Policy | 2. Religion & Public Policy |
| 3. Land | 4. Criminal Law Matters |
| 5. Family Law | 6. Commercial Cases |
| 7. Other | |

Date	Ref	Pg	Heading	Topic
1/7/11	4	2	Business Man Charged in Theft	Case involved attempt to defraud government including with staff from Ministry of Finance
	4	6	David: Heads have to Roll	Relates to lack of transparency at Ministry of Finance
	4	7	Four Up On Charges in Chief Justice's Court	Identifies four criminal cases before Chief Justice: - obstructing an immigration officer; - sexual assault & battery; - assault & battery; - forgery and grand larceny against government
	4	25	Wase: Thefts started in '06'	Discusses missing funds in Ministry of Finance
	4	27	Zedkaia backs Prosecutions	President backs prosecution into missing funds
1/14/11	4	2	Police Investigate Smuggling	Investigation of three women for smuggling on docks.
	4	4	Two to be Charged in Ongoing Fraud Case	Update on charges for fraud against ministry of finance
	3	7	Cost of Land Leases to Soar?	Land leases for use of port facilities to rise based on new survey that changes size of land – seeking back payment. “The President, who approved the cabinet minute seeking an increase in the payment, is also the iroij of the land.”
	4	13	Big Rise in Number of Sexual Assault Cases	Comments on criminal cases from Annual report – increase from 17 in 2009 to 34 in 2010. Lists change in different types of cases
	3&5	13	Adoption & Land Leases Cases Decline	Again using annual report discusses trends in civil cases. Collection cases dropped by 60%.
1/21/11	4	2	AG Files new Theft Charge	Six charges filed against Jae Guk Lee for theft against RMI.
	6	3	MISSA hits businesses for lack of tax payments	
	7	6	Kun: Citizens only at PDs	Refers to the disqualification of PD in representing client – PD adopts new policy on clients it can represent
		6	Chen Court Hearing Derailed	Conflict of interest in PD in hearing case relating to prostitution charges.

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	1	13	Time to Step up and Lead	Role of women in leadership positions. Cultural concept of different society members understanding roles and responsibilities.
	6	14	Court to Decide on Old Lowe Tax Case	Tax case against American attorney
1/28/11	4	1	New Theft Charges Filed	New charges filed in MGAS case – relating to misappropriation of \$400k. In addition to charges against Ministry of Finance, Ministry of Health also charged. 28 criminal charges. Investigation by US agencies.
	4	2	Hwang has difficulty in getting local attorney.	Conflict of Interests for potential attorneys of MGAS defendant.
	3	12	Landmine Issue	Suggestions in opinion page on dealing with land disputes – joint ownership over areas that are in dispute.
2/4/11	4	2	More cases filed in RMI theft probe	Provides update on gov't theft probe - additional 28 charges laid against MoF and MoH officials.
	5	7	WUTMI - Domestic Violence in RMI	Provides results on domestic violence from DH Survey 2007 in English and Marshellese
	4	10	Wanted: A Functioning Parole Board	Editorial highlighting potential benefits of parole board in reducing stress on jail system and benefits to prisoner
	4	11	Improvements Noted at Jail & Prison Talk	Short comments on renovations to prison - preparation of female prison. "Marshellese have traditionally held women in special regard so it is only fitting they be accorded special consideration." Costs of preparing special jail.
	6	12	KALGOV-MISSA Bullocks	Editorial on KALGOV missing payments to MISSA and limited response available to courts in enforcing payments
	4	12	Piracy in Majuro	Theft on sailing boats - impossible to get response from police - don't answer phone or coming out to seen. No sign of investigation. Affect on tourism
	3	14	LRA gets Nitijela Focus	LRA system benefits rich. All costs bourne by applicant and then it takes just one complaint to stop the process. Costs then associated with court process. Nitijela introduces Bill 81 to repel LRA - 'undermines Marshellese culture & tradition', "families take these disputes to courts and battle it out in front of foreigners. Our traditional leaders should be the ones who decide." "Customary issues need to be dealt with customarily." Question how Parliament wants to interpret custom.
	4	18	Police gear up for lagoon patrols	Police Commissioner response to yacht bulgary articles - claims investigations made
	6	20	\$4.4m owed to MISSA & High Court rules on KALGov case	KALGov owes over \$4.4m for non-payment since 2000 on retirement and health fund contributions. Includes 100% penalty for non-payment

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2/11/11	4	3	Drug case to court Monday	AG brings forward case pending for 3 years to get police to produce evidence on marijuana use.
	6	3	Lowe case to get ruling from Ingram this month	Court hearing on tax evasion charges from 2001.
	7	8	Who will hear Ingram's case?	Need to appoint judge for case against CJ.
	7	8	Attorney Conflict	Case delayed as attorneys have conflict of interest in theft
	4	12	Ensuring the Safety of the Yatching Community	Letter from George Lanwi in response to bulgary concerns.
2/18/11	4	1	RMI to US on Fraud Case: We have it under Control	US requests up date on investigation on grounds funds are from Compact
	4	2	Six in Court for Grand Larceny	Update on cases of 6 government officials relating to larceny
	4	3	Marijuana trial set for August	update on trial awaiting report from police
	1	9	Women are the Propellors of our Soul	Role of women traditionally and how that has changed over time.
	7	4	Driver to court on Friday	
	7	5	Tanya to court in driving case	
2/25/11	7	1	Chamber of Commerce Challenges Nitijela: 'Face up to Fraud'	Speech by Chamber of Commerce at Convention against Corruption workshop - affect of corruption on investment.
	4	2	Chief Justice says no to Discrimination	Public Defender order to defend Chinese client - policy on Marshellese citizens is not consistent with constitution
	7	6	Tax debtors laughing because of lack of lawyers	Comments on Courts adoption of code of conduct in 2008. Then focuses on why tax office hasn't filed any collection cases - lack of prosecutors.
	4	6	Resolution to bring in US investigators	Nitijela considers bill resolving to allow US investigators in fraud case.
	6	8	Court upholds MISSA Argument & Case filed Against KALGov	MISSA argues why necessary to add 100% penalty - standard practice to encourage rapid payment. Also new case from Social Security Admin filed for failure to pay tax.
	7	14	Judges, staff training in Majuro	Article on judicial training under Compact program
	4	16	Call to bring in US Fraud Investigators	Letter to editor laying out reasons for allowing US investigators.
3/11/11	4	3	Prosecutor responds to Ad	Prosecutor response to ad by defendants in fraud case requesting court motion that they don't comment publicly on case.
			US Auditors Being work	Two auditors arrive to investigate theft
	6	4	MISSA sues five local firms	small claims against five stores for failure to pay tax.

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	4	5	Charges refiled against Lin	Criminal charges dismissed because AG doesn't hold preliminary hearing in time. Dismissed w/o prejudice.
	4	5	Soye bundles six cases	Two articles on fraud case - AG files to combine 6 of the cases
	4	5	Plasman puts Mantiera case on hold	
	7	6	Court calender fills up for April	Lists cases before court for April
	3	14	Lobotin sage starts with '75 quit claim	Outlines recent history of transactions relating to land that houses public docks,... GOOD CASE STUDY FOR REPORT
4/1/11	4	3	Clanry Charges dropped by CJ	Man accused of reckless driving & involuntary manslaughter has charges dropped
	3	4	Land Dispute on Majuro Properties	Land dispute over confirmation filing with LRA on division of 40 weto of land following death of iroij. Claim filing not consistent with tradition.
	7	10	American Judge will Hear Case	Appointment of American judge to hear case against CJ.
	4	16	Fraud Case	Update on case against Jomuly, 11 charges of defrauding RMI Gov't
	4	16	Three in Hearing	Motion to combined preliminary hearings of three cases
	4	16	Tanya trial date	information on trial of lady who killed pedestrian
	7	16	Kayser Challenge	motion against attorney's powers to represent
4/8/11	4	1	Row over Fraud Suspects	Claims PSC had ordered MoF to continue salary payments to MoH officials accused of fraud.
	4	1	CJ Dismisses four 'stealing' cases	AG requests delay to preliminary hearing. CJ dismisses cases.
	4	3	Five cases bundled	Judge combines 5 criminal cases over same offence of defrauding RMI gov't.
	7	3	Aikuij pleads no contest	Plea agreement for charge of negligent driving that killed man
	5	6	WUTMI - Know your Rights	Information page on domestic violence and constitution in RMI - walk to support draft bill
4/15/11	7	1	ROC Boat Posts \$100k bond	Boat detained and charged with 28 counts of breaking fishing regulations.
	4	8	Brown refiles fraudster case	12 charges against 12 defendants charged with conspiring to defraud RMI
	4	8	Mary Chen case goes to Trial	charged with promoting prostitution - case proceeds to trial.
	7	15	We Should Give the Voice to Voters	Supreme Court case relating to electoral dispute (filing vacancy of mayoral post) for KBE
	4	15	Jumuly needs lawyer for CMI case	Attorneys have conflict of interest in CMI fraud case
4/29/11	3	1	Iroij Imata Kabua: I want my day in Court	Argues government never sought permission of traditional owners in finalizing Kwajalein leasing agreement. Negotiations haven't been successful

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	7	9	Ingram wants Cases Dismissed	AG argues that cases against CJ should be dismissed: failure to meet procedural requirements, judicial immunity,..
			Plaintiff molested by stranger	Same case
		6	Lowe's Case revised	Tax case against American attorney
		7	Judge Switch	Judge recused from casing involving AG because AG acting for judge on another case and attorney requested recusal.
	4	15	Candi Leon waives her right to hearing	One of accused in fraud case - cooperates with government. Article provides detailed explanation of preliminary hearing process
	4	15	Judge allows AG to correct errors	Fraud case involving MoF and MoH. Denies motion to amend cases but agrees AG should correct errors - errors in evidence presented.
	4	16	Lin Charged in CMI case	Charge of grand larceny - illegally depositing checks from CMI and RMI
	4	16	Easy Life Just Got Harder for Ben Lin	Charge of grand larceny - illegally depositing checks from CMI and RMI
	4	16	Mary to Trial in June	trial dates set for lady accused of promoting prostitution - no jury trial
5/6/11	3	1	We want to TellUA story	Negotiation of LUA. Return to negotiation of agreement. Difference between current and new agreement held in escrow - \$32m.
	4	1	Morton not insane	Potential use of insanity defence unlikely in Morton murder trial - murdered wife
	3	2	Calvert files to dismiss civil suit	Family dispute relating to land. Files to dismiss because original motion didn't include all relevant parties. Note document distributing <i>iroj erik</i> title divides title amongst different parties depending on weto
	4	3	Candi being helpful	Update on pre-trial preparations of defendant awaiting trial on fraud.
	7	25	Our Human Wrongs	Summarises in detail 2010 US State Department Human Rights report on RMI.
	7	25	Police Trained to Deal with Domestic Abuse	AG responses to several of issues raised in US HR Report. "Family and community action is the essential ingredient to reducing the (domestic violence) problem.:"
5/13/11	3	1	\$32m smiles: LUA signed after 8 years	Outlines signing of new LUA that updates MUORA agreement on land use of Kwajalein outlined in Compact. LUA distributes rights to landowners as opposed to government. Also provides specific funding packages as outlined on pg 4. 84 landowners eligible to receive rental payments including 4 iroj.
	4	3	Nathan's Plea Rejected	Plea agreement between AG and man charged with killing taxi driver in traffic accident rejected by the High Court.
	7	16	USAKA: Un Unequal Employer	Claims of discrimination by US military base at Kwajalein - prioritising termination of Marshellese workers and training opportunities for US.

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	4	17	CJ: Wang Wrong	Man found guilty of obstructing an immigration official
	4	17	Fraudster Case moves forward	Case against three accused for defrauding gov't of \$80k moves forward. 3 cases consolidated.
	4	17	No Hwang Case	preliminary hearing against MGAS owner waived. Status conference scheduled for planning trial.
	7	17	Judge Judged	Date set for case involving Chief Justice
5/20/11	4	3	Makoro to be sentenced on June 15	Plea bargain on murder of wife. Judge confirms arrangements of plea deal.
	4	3	Wang pays up after airport fracas	Sentence for man charged with obstructing immigration official handed down
	3	4	Majuro VIPS sign LUA	Signing releases funds from escrow account. "The MoF issued cheques to the four iroij late last week, with payments being made for the alap and dri jermal this week."
	7	6	Officials learn how to protect borders	Training for FSM and RMI police on border protection
	4	6	Lanwi: Prison Conditions much Improved	Response to US HR report. Additional funds allocated to address prison conditions. Also improvements in police response to domestic violence - specific training.
5/27/11	4	3	Aneab Makes Plea Bargain	Sexual assault against a minor case. Court to consider plea bargain made with prosecution. Family of victim accept agreement.
	4	4	Crime Capital rivalry escalates	Compares recent criminal activities against businesses (eg: computer thefts,...) between Majuro & Pohnpei
	4	4	Komen serves 18 months for sexual assault	Man charged with 1 count of sexual assault on 16 y/o. 5yrs with 3 1/2 years probation.
	7	7	Hilda: Let's Remove Cancer of Reliance	Speech at CMI graduation. "She asked if dependency on foreign countries for people's livelihoods is the only option available to the Marshall Islands."
	4	8	Case of \$47k checks continues	Update on trial preparations for 6 accused of defrauding gov't of \$49k.
	7	14	AG's Contract	Editorial noting AG's contract expires month before election and need to extend to deal with potential legal issues relating to election.
6/3/11	7	1	Rash of Suicides	Notes that rate of suicide in May concerningly high.
	4	3	Transport Minister Kedi Charged with misconduct	Charged with 10 counts of theft and misconduct - double claiming goods (eg: airtickets, furniture) obtained for public use.
	4	4	Andrike Hearing Next week	Update on hearing of assault and battery case - postponed by a week
	4	4	Johnston agrees to plea bargain deal	Man charged with sexual assault agrees to plea bargain 7 years with 3 on probation. Incident occurred in 2008. Potential of work release from prison

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	1&3	12	LUA or not Life on Ebeye is Hard	How LUA will affect average person on Ebeye. Belief that payment will be similar to Bikini. Gov't says it is upto to landowners how they use money - no guaranteed distribution. "If the money only goes to the senior title holders nothing will change,...the landowners will just take the money go (overseas)." "Most of real owners are away the caretakers are rarely given permission by the landowners." "We are not controlled by RMI here,... (the government) is here voluntarily. The government doesn't own the land, it's the land owners and they have given permission to the government to be here."
	3	21	2 LUA cases filed in Court	Two cases filed in High Court following signing of LUA: * Jajo, complaint, claims iroij appointed him dri jermal. Files motion for injunction to stop payment but then withdraws motion seeking 'customary settlement' * Bank sues recipient and their lawyer to determine who money is owed to. Lawyer has claim against outstanding fees.
	7	21	Capelle demands back pay & Nashon sues CMI	two cases filed against CMI on unlawful dismissal.
6/10/11	7	1&2	Kayser slams RMI Court methods	Ongoing case filed against CJ and other defendants. Hearing by ad hoc judge commences.
	7	1	Witten Phillip: Ken is Not Guilty	Update on case involving Minister. Lawyer claims innocence. Initial hearing to commence.
	7	14	No one is Above the Law	Opinion page congratulating charges against Minister - upholds rule of law
6/17/11	4	1	Murder Trial Moved to August	Makroro sentencing hearing delayed - first to renew contract of AG handling case; then to give AG more time to prepare witness list.
	4	4	Kedi's Bail set at \$100	Preliminary hearing of Minister misappropriation of funds case. Bail set.
	4	4	Ading: what you have done is illegal' & 'Papers show Ken Repaid Money'	evidence from case show letters between MoF and accused Minister. Accused minister claims acts were appropriate because they were common practice but still repaid money anyway.
	7	8	Wilbur Allen sues 3 PSC Officers	Employment dispute filed.
6/24/11	4	1&2	Lin Cleared by Court	Preliminary hearing against Lin in case of 6 defrauding RMI. Lin cleared - prosecution can't prove intent. Being boss of company not sufficient
7/1/11	4	2	Judge rules Nashion & Samuel will go to trial	Case involving defrauding govt of \$80k. Preliminary hearing of two defendants - case to go to trial.
	4	2	Prostitution Charges	Charges laid against Zhou Fang: illegal employment of alien, running bar. Unclear if prostitution charges rejected.

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	4	3	Janson charged with stealing from MIR	Employee charged with stealing \$9,000 from hotel.
	4	3	Nathan gets 18 Months	Plea bargain for drunk driving that led to death - involuntary manslaughter. Court approves 3yr sentence (18mth probation) & restitution of \$100 per month to family until children reach 18.
	5	7	Violence against women goes far beyond injuries	WUTMI 3-year program. Community awareness programs. Need for referral system. "Our culture has rationalized and socialized domestic violence and accepts it as a private matter."
	4	22	Kedi to Trial on 10 Counts	Trial set for Minister on 10 counts including grand larceny, theft. Intent to defraud government present.
7/8/11	4	1&2	30 Jailed in Raid	Raid on apartments on suspicion of illegal immigrants/overstaying visa. Claim excessive force used & money disappeared. Bail hearings for 7 people.
7/15/11	4	3	Police Raid 'Unconstitutional'	Two members of parliament argue police raid on apartments unconstitutional - AG disagrees - entitled where suspicion exists.
	4	3	Minister Kedi pleads no contest	Plea bargain with AG for 3 misdemeanours. Other charges dropped. Fine & suspended sentence. Minister's comments fail to accept wrong-doing.
	4	3	Jeh man stabbed: RMI police make arrest	Police travel to Ailinglaplap to arrest man on charges of assault.
	7	4	Majuro Motor's workers tiff	Dispute between employer and migrant workers from Fiji over termination of contract.
	4	15	Warrantless searches are a grave concern	Editorial - provisions of gaming law allowing warrantless searches where suspicion exists violate constitution and subject to abuse.
	6	20	Cabinet Backs New Loan Laws	Banking Commission aim to bring down debt dependency through restricting loans.
7/22/11	6	1	Disputed Loan Law is Killed	Gov't overturns loan law from Banking Commission. Failed to follow required procedures - consultation with Banks
	4	22	Prostitution Case set for Sept Trial	Sufficient evidence for 4 charges to go to trial - prostitution & employing non-resident. Also case highlights potential of bribery of immigration official.
	4	22	Txt sbjt uf crmnl cs	Charge of disturbing the peace - threats
	4	15	Candi: Why Ken is Still There	Letter to editor arguing why Minister maintains set after being convicted if other govt officials fired after being charged
7/29/11	4	3	AG revises charges to identify Jeston Lang as main actor in stolen goods	Defendant charged with theft against Payless. 11 others had charges dropped against them.
	7	15	RMI should focus on humane work conditions	Letter to Editor on conditions faced by Fijian contract workers. Argues inadequate protection provided to migrant workers.

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	6	16	Is RMI's plan to halt loans	Opinion piece on recent loan bill - looks at loans to large enterprises and consumer loans. "At this point almost all consumer loans are in breach of the 80% directive."
8/5/11	4	1	Judge drops charges against Cathy	Charges against one of defendants in theft against MoH case dropped. AG failed to show defendant participate in conspiracy.
	4	3	Thefts ring case moves ahead	Preliminary hearing dates set for case against 6 accused of defrauding \$380k from MoH.
	4	4	Judge sending case to trial	Case relating to theft against MoH to be sent to trial. Unclear if same case as above. Different amounts but same defendants.
	4	4	CJ says no to Plea Bargain	AG negotiated plea bargain on domestic violence case involving stabbing. Suspended sentence & fine. CJ rejects plea bargain 'mindful of public concern over domestic violence.'
	4	6	Court mulls Morton Murder Sentence	Three articles on sentencing hearing for Convicted who killed wife.
	4	25	Ex-wife Charged with Forgery & Larceny	Women charged with forging former husband's signature on cheques
	1&2	26	Funerals are a big part of life in Marshalls	Two page article on process of funerals in the RMI. Explains customs. Mention of scale but not costs.
8/12/11	4	1	Chen found Guilty	Lady found guilty of prostitution charges. Sentencing date given but judge also expresses concern on lack of adequate female prison facilities.
	7	3	Jordan disputes PSC leave directive	Candidate for election files case against directives requiring govt employees to take leave. Another article: AG can't represent PSC because of conflict
	7	4	US judge prohibits Kaysers from filing suit	Judge dismisses civil suits brought by Kaysers, restricts future suits.
8/19/11	3	1	Kids Locked out of DES: Landowners 'We've been waiting 8 years'	Landowners block access to elementary school. Argue lease for land fails to cover school. Alap spokesperson (also employed by school) "8 years is a long time to wait for payment. Is that right." President: "I'm aware of the situation and have talked to the traditional landowners,... Let's not discuss this matter here (nitijela)." IE: customary not political issue.
	7	4	Judge rejects TRO	Restraining order against PSC prohibiting them requiring candidates take leave rejected. Case to proceed
	4	7	Mantiera's Words Stand	Defendant seeks to have evidence (including confession and statement from 3rd party) suppressed. Rejected by court.
	5	21	Enforcement key to 93	Three articles on Bill 93 on domestic violence. SPC issues comments on bill - viewed bill as narrow, specifically focusing on legal/enforcement aspect. 2 articles on failure of nitijela to pass bill.

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8/26/11	4	1	Morton gets 11 years	Killed wife - Convicted of murder and charged to 20 years, 11 before parole.
	4	4	Thousands of \$\$ stolen from police	Police station in Uliga broken into.
9/2/11	7	1	Jack wants to work: Court seeks more info from PSC	Plaintiff files against PSC directive for candidates to take leave. Claims discriminatory as nitijela not required to. Govt fear misuse of office.
	4	2	3 Assaults on Ebeye	initial hearing of three assault & battery cases on Ebeye.
	5	3	Women want Bill 93 Now	Nitijela public consultation on Domestic Violence Bill. Leroij representative states traditional leaders in favor of Bill. Bill enforces 'no drop' policy.
	4	4	Ebeye guy waits for driving victim's testimony	Plea bargain on negligent driving case leading to injury. Court wants to hear victim's testimony before accepting plea bargain.
	4	11	Jury finds Mantiera Guilty	Guilty of eight felony charges for defrauding MoH. First of number of cases to go to trial.
	4	11	Jakobot pleads guilty to sexual assault	Fourth degree sexual assault on Ebeye. Sentenced to 6 months in prison, 30 days suspended.
	4	11	Two defendants' charges dropped' & '4 more move on trial'	Preliminary hearing charges dropped against 2 defendants in alleged theft through R&L. Insufficient evidence. 4 others go to trial. Evidence shows good cause for conspiracy.
	3	17	Judge Denies Calvert Call to Dismiss case	Muller land case relating to title of iroij elik following death of iroij. Presence of relevant parties. Also allocation of rent payments whilst case is ongoing.
9/9/11	7	4	MLSC Public Hours	Comments about MLSC closing office to new cases in afternoon.
	3	7	Amy, Roseann claim Kwaj land	Dispute over alap title filed in court. Relates to title over 5 weto. Claim rent payments should go to claimant.
	4	7	Teenager Stabbed in Laura	Man charged with stabbing in Laura. Released on bail.
	6	8	Push to Enforce RMI Minors law	Law on sale of tobacco/alcohol to minors. Prevention project sees teams visit vendors.
9/16/11	7	3	AG Suspends Colleague	AG suspends Chief Prosecutor relating to filing of criminal charges against lawyer. CP responds to PSC claiming that actions of AG in pursuing cases are arbitrary.
	4	10	Did Cops take Jaluit material	Women's group obtains grant in Jaluit. Ships good via MISC. Goods disappear on arrival. Claim either MISC or police responsible.
	3	15	Helena wins Court Ruling	Claim relating to signing of commercial lease on Kemman Island. Preliminary injunction granted on grounds of contention relating to status of alap. Claims alap who signed lease is not actually alap and defendants responses had inconsistencies.
9/23/11	4	1	Judge's Cell Block	Sentencing of Chen delayed due to conditions of cell for female prisoners.

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	4	3	Kios wants jury trial	Kios charged with aggravated assault. Pleads not guilty and requests jury trial.
	1	30	Mona: Liktanur and Jabro worked together	Opening of WUTMI annual conference. Uses traditional story of Liktanur and Jabro to emphasize need for men and women combining efforts.
	7	31	Kaysers claim there is conspiracy against them	Plaintiffs argue conspiracy in appointment of adhoc judge for case
9/30/11	7	2	Jorbon drops law suit against PSC on leave	Case relating to requirement candidates must take leave from public service. Injunction against PSC rejected.
	6	3	MISSA files suit against airline	claim breach of promissory agreement for repayment of debts.
	4	8	Bimen pleads guilty on assault	Charged with 4 sexual assault related charges enter plea deal. Deal waiting for CJ approval
	7	8	Cabinet approves judges new term	New term for Judge Plasman
	4	8	Court delays fraud case	Case against David Lin for defrauding MoH delayed.
	7	13	AG office rules Balos candidacy as invalid	2 articles on attempt by Balos to be included on ballot for Kwajalein. AG claim nomination invalid because papers didn't include signature.
	7	16	103 reasons to remove Judge Bill	Opinion piece on Nitijela proposal to remove cost of living allowances for judges.
	7	30	Plan to cut judges money sparks debate	Bill to reduce cost of living allowance for judges introduced in Nitijela. Argues contravenes constitution b/c reductions in judges entitlements only permissible if part of broader reform.
10/7/11	7	1	AG Office in Chaos	AG on leave prior to term ending, CP appointed acting AG. Insufficient lawyers.
	7	3	Nitijela passes bunch of Bills	9 bills passed. Include new Criminal Code Act, Domestic Violence Bill and repeal of COLA Act for judges' allowances.
	7	14	Constitution violation	Opinion piece on COLA act and how goes against advice of AG and CJ that such act would be unconstitutional.
	4	20	Hideki up for assaulting Dad	Man charged for assault and battery against father. Bail set.
10/14/11	4	3	Acting AG Brown pushes investigations ahead	AG short stuffed but investigations into fraud of gov't funds ongoing. Investigation extended to MoE in addition to MoH
	4	4	Sending out smoke signals	53 citations issued for violation of prohibition of sale of tobacco to minors. All will appear before District Court, sentence upto \$100 & 30days jail. Joint NGO police project
	2	19	High Marks on Religious Freedom	US State Dept annual report states generally respected religious freedom.
	7	22	Canavor: A Champion of the Rule of Law	Opinion piece on former AG whose contract wasn't extended - claimed enforced law and acted with integrity, including pursuing investigations into fraud.

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10/21/11	4	1	Tony blasts lack of action on fraud	Senator criticizes government for failing to staff AG sufficiently to follow up on fraud cases. Gov't responds trying to identify suitable staff. Also claims cooperation with US in investigation.
	3	8	Landowners' anxiety over late payment	Delays in payment of first quarterly rent for Kwajalein. 2 articles, one explaining disbursement process. \$17m to 90 land owners.
	3	14	Dispute over Eru payments	Suit filed relating to title of dri jermal for Kwajalein land case. Claims iroij confirmed title of claimant.
	6	14	Alvin: BOMI suit is political	Bank of MI files suit against speaker claiming company he is CEO has failed to repay bad loans.
	4	14	Not enough staff	short article stating shortage of staff at AG has seen decrease in number of criminal cases at court
	6	14	Mary sues AG, MOF, Nack family	Chen files suit claiming she is beneficiary to estate of Nack as he had debts owning. Claims MOF should hold LUA entitlements in escrow or direct to repay loan.
10/28/11	4	6	AG boldly attacks fraud cases	Letter from acting AG stating department is continuing to process fraud cases.
	4	8	Double stabbing stops traffic	Man accused of stabbing wife and then himself.
	1	14	Elmer sets record straight	Letter to editor: accusations of bribery to withdraw from election race rejected and viewed as insult to custom
	3	23	Title dispute over Bijinkur Island hits the High Court	Claim of alap and dri jermal title to land in kwajalein. Claim asked defendant to leave land but no result. Argue title provided through will approved by Iroij.
11/4/11	3	2	Body moved, embalmed before police could act	Death of women initially thought suicide but now considering murder. Police hindered by moving of body after death.
11/11/11	4	3	AG finding fraud in many more areas	Ongoing fraud investigations. Relationship with two businesses being investigated.
	5	18	World uniting to eliminate violence	activities to celebrate international day to eliminate violence against women.
	6	26	Boken Ep goes to High Court	Claim against MISC for failure to pay against services rendered in maintenance of boat.
11/18/11	7	1	Balos back on ballot	Following advice from AG candidate reinstated on ballot. Also three articles on page 20.
	4	4	Trial dates set for fraud cases	trial dates set for four accused on conspiring to steal from RMI. Cheques issued to Jiang Hu Repair converted to cash.
	7	12	Kun heads Pacific human rights group	Public Defender elected as executive officer of Pacific Islands Lawyers for HR Network.
	4	17	Stiff Sentence	Opinion piece claiming custodial sentence harsh for Mary Chen despite AG recommendation of suspended sentence. Claim may be related to ethnicity of victim.

Attachment 3: Bibliography: PJDP CDR Research, RMI

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ANNEX 4: BIBLIOGRAPHY

**Pacific Judicial Development Programme
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