



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 pro-actively 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 Hamnergren. 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 particularly 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 2: FEDERATED STATES OF MICRONESIA COUNTRY REPORT



ANNEX 3: REPUBLIC OF MARSHALL ISLANDS COUNTRY REPORT



ANNEX 4: BIBLIOGRAPHY