



PACIFIC JUDICIAL STRENGTHENING INITIATIVE

SCOPING PAPER

COURTS, CUSTOM & HYBRID JUSTICE ACTORS

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Maiana Atoll, Kiribati

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**FEDERAL COURT
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Executive Summary

This scoping paper is submitted for the interim information and direction of Pacific Chief Justices at their upcoming meeting.

The purpose of this paper is to consider what additional support, if any, PJSI – or any future MFAT program – should provide to promote access to justice by raising community awareness of the respective roles and relationships of custom and law, including the role, functions and jurisdiction of the courts.¹

PJSI, and its antecedents PJEP and PJDP, have consistently operated within parameters that have focused support to the ‘formal’ sector of state-based justice through the courts of law. Since the start of PJEP, support has been extended incrementally by PJEP, PJDP and now PJSI from focusing exclusively on law-trained judges on to lay actors working in the courts in the form of training and related services as a matter of practice. Over the past twenty years, this vision has expanded in recognition that the systemic effectiveness of the courts of law to administer justice depends in significant measure on the ability of these lay actors to perform their roles.

This scoping paper builds on these foundations. Within this evolving vision, it is now timely to review the parameters of any ongoing support being extended to hybrid actors who perform substantial justice-related roles.

Within the Pacific context, there are broadly 3 classes of justice actors: those working solely in the domain of state justice (that is, judicial officers), those working solely in the domain of custom and customary justice (that is, traditional elders/chiefs), and those working at the intersection of these domains (hybrid justice actors). These hybrid justice actors perform a variety of crucial dispute resolution and justice related roles in each jurisdiction.

At the outset, it is not altogether straightforward to identify who exercises these hybrid customary-cum-formal justice roles and responsibilities or indeed the full scope and nature of these responsibilities.² Nor is enough yet known about the needs for support of these hybrid justice actors who administer justice at the intersection of customary and state law. It is for this reason that research is required. These hybrid justice actors perform a variety of dispute resolution and justice related roles in each jurisdiction. In the law courts, they may include judicial officers responsible for administering justice involving aspects of custom, notably relating to the administration of customary land and, where mandated, to reviewing the lawfulness of designated customary decisions, usually relating to land. They may include a wider variety of roles such as island/village court magistrates (however named), justice of the peace, and law

¹ The terms of reference for this project and scoping paper are attached to this report at **Annexures D** and **E** respectively. This paper builds on findings from community consultations undertaken in Kiribati during December, 2019, and preliminary research, which will be supplemented in due course by further consultations in Vanuatu and the Republic of the Marshall Islands (RMI) which are yet to be conducted.

² ‘Hybridity’ describes an entity made by combining two different elements – in this instance: customary and state law. ‘Hybrid justice actor’ describes a person whose role, functions and responsibilities operate at the intersection of customary and state law, who are responsible for maintaining ‘community peace and harmony’ (as described by custom) and/or ‘law and order’ (as described by the state). These roles are invested in part by both custom and the state, and may include village and island court magistrates or village elders and customary chiefs, such as for example, Samoa’s *pulenu’u* (village mayor) who are appointed by the state and vested with powers under the *Village Fono Act 1990* that include resolving disputes and maintaining community peace.

commissioners, etc. They may also include court clerks, court officers and registry staff when they perform routine but nonetheless extramural roles such as problem diagnosis, advice and referral.

Acknowledging the pervasiveness of custom and the crucial role of hybrid actors providing justice-related services at the intersection of the customary and state domains, this scoping paper advocates to adopt an iterative incremental approach to further evolve the support for promoting justice in the region. This support would initially be by undertaking research that enables stakeholders to make better informed decisions to improve accessing justice. This research would explore where the formal and informal justice systems intersect, and focus on identifying the needs of hybrid justice actors and how they may be supported to perform their roles to provide better access to rights-based justice more holistically.

Given the diversity and plurality of these justice related processes, there are unavoidably a range of intersections between the customary and court systems. While these intersections are generally well integrated, there are many interactions that can be categorised into 3 broad types: gaps, collisions, and duplication-alternative parallels tracks. Significantly, each of these intersections has a potential to erode the efficiency and effectiveness of the justice process. For this reason, there is a public interest to undertake research on the roles of hybrid justice actors and their needs for support in order to improve access to justice across the region.

This research will promote access to justice across the region by building the capacity of hybrid actors who operate at the intersection of custom and the courts where there are gaps, collisions, and parallel tracks in service delivery. It will enable stakeholders to build the capacity of hybrid actors, thereby promoting the effectiveness, sustainability and resilience of hybrid dispute resolution and justice related processes. More specifically, the scope of this research could be two-fold on:

- the needs of rights holders to access justice by raising awareness of the respective roles and relationships of custom and law, including the role, functions and jurisdiction of courts, and thereby improving rights holders' understanding of justice delivery options; and
- the functional roles and needs of hybrid justice actors for support to perform their justice-related roles more effectively.

It is recommended that:

Pacific Chief Justices request MFAT, and other interested donors, to consider adopting a more holistic approach to promoting justice across the region by undertaking more detailed research into the roles, relationships and capacity-building needs of hybrid justice actors to promote access to justice by resolving disputes and maintaining peace and harmony.

1.0 Introduction

This scoping paper (paper) is submitted for the interim information and direction of Pacific Chief Justices at their upcoming meeting.

The purpose of this paper is to consider what additional support, if any, PJSI – or any future MFAT program of support – should provide to promote access to justice by raising community awareness of the respective roles and relationships of custom and law, including the role, functions and jurisdiction of the courts. The terms of reference for this project and scoping paper are attached to this report at **Annexures D** and **E** respectively.

2.0 Context

To date, PJSI has focused on promoting access to justice by building community awareness of the roles of law and the courts, in order to enable citizens to exercise their rights in court. PJSI has done this through 3 projects on: *access to justice*, *public information* and *enabling rights*. These projects have supported courts to provide public information on their role functions and jurisdictions; it has trained court officers on the needs of the community for access to justice; and it has trained judicial officers on protecting and enabling the exercise of legal rights.

To the extent that PJSI is already promoting access to justice as outlined above, this scoping paper assesses whether PJSI – or any future MFAT program – should provide further support to raising the awareness of customary actors of the respective roles and relationships of custom and law, including the role functions and jurisdiction of the courts. In particular, it poses the question:

Should PJSI or any future MFAT justice-related program support hybrid actors to promote access to justice?

PJSI's *Enabling Rights* Project has been implemented over recent years to address the needs to promote access to justice across the region by raising community awareness, particularly in remote/traditional communities, of the role functions and jurisdiction of courts. This project has done so by developing the *Enabling Rights Toolkit* which was piloted in Kiribati in 2014-2015, and has been subsequently refined, updated and implemented in a number of additional PICs including the Republic of the Marshall Islands (RMI), the Federated States of Micronesia (FSM), Vanuatu and Cooks Islands – in all, 5 jurisdictions to date.

This paper builds directly on this earlier experience and a short follow-up visit to Kiribati (including consultations on South and North Tarawa, and Maiana) between 2-7 December, 2019, being the first of 3 PICs. The remaining visits to RMI and Vanuatu are yet to be finalised. Additionally, it builds more broadly on accumulated experience gathered across the Pacific region during the terms of PJDP (2011-2015), and the first phase of PJSI (2016-2018).

3.0 Overview of Custom, Customary Law and State Courts

The subject of custom is both enormous and complex. Principally for these reasons, it goes far beyond the present opportunity and resources to exhaustively consider, noting that PJSI is now in

the final year of its implementation. MFAT is also about to start considering its design approach for another program to support justice in the region. Hence, it may be timely to raise some issues for consideration in that process.

Custom (as distinct from customary law) is defined as a traditional way of behaving that is specific to a particular society, place or time. It can and does vary significantly from one location to another, even within the context of one island, as seen below in Kiribati. It may represent a diverse range of localised practices and values that are constantly changing and adapting through time. It can be seen as being Indigenous knowledge and practice and, in this sense, may be used as an overarching category describing all things 'non-Western'.³ Custom remains vibrant throughout the Pacific region and is often the main way of regulating social behaviour, particularly at the community level.

Customary law (as distinct from custom) is defined as traditional evolved rules and practices that enable community members to distinguish between acceptable and unacceptable behaviour. It includes conventions and usages that people adhere to and methods for dispute settlement. Custom and customary law overlap but they are separate. Laws need a special agency for enforcement (such as by the chiefs or police) and often involve formal punishment (such as by the courts), but custom does not. The major distinction between custom and customary law relates to punishment, that is, between those customs which are only usual practices, and those practices which have the force of law in that they will be enforced by punishments if they are not complied with. There clearly are some customs that are usually followed, but if they are not followed, punishment does not follow. Thus, in many Pacific communities, there are usual patterns and styles of weaving of mats and fans which are adopted; usual ways of lighting fires; usual ways of cooking. These are usual practices or customs. Non-compliance with such usual patterns or styles may cause surprise, a raised eyebrow, but not a punishment. On the other hand, in many parts of an island it is recognised not only that in practice a brother does not have sexual intercourse with his sister, but also, that a brother must not have intercourse with his sister, and that if he should do so, he, and his sister also, will be punished. This is a practice or custom that is enforced by punishment, and so is regarded as a customary law.

Customary laws may be very broad in their extent and be recognized throughout a whole island, and even a group of islands, and indeed an entire country. Other customary laws however may be much narrower in their extent, and be recognized only in a village, or a part, or an area, of an island. Customary laws can be classified according to their subject matter and what they regulate. In many PICs, Tonga being an exception, there are some customary laws that deal with land – the acquisition of land, succession to land, transfer of land, and use of land. In these countries, legislation expressly recognizes that rights to customary land are to be determined by custom. In many countries, however, legislation makes no provision for customary laws relating to birth, or adoption, sexual relationships, or death. In many Pacific communities, customary law is still the most relevant law for the Indigenous population irrespective of whether or not it is formally recognised by the constitution.

Since inception in PJEP, PJDP and PJSI have consistently focused support on the courts of law as organs of the state as distinct from traditional bodies that may be responsible for peace harmony

³ See for example, discussion of the meaning of 'kastom' in: The Policing and Justice Support Program (Vanuatu), *Conflict Management and Access to Justice in Rural Vanuatu*, 2016, 6-9. Consultations with Justice David Lambourne indicate an absence of local current research of relevant customary matters in Kiribati, owing in part to its oral tradition.

and the customary resolution of disputes. This focus is despite the existence of overlap between customary and state law.

This overlap is unavoidable for at least 3 reasons. Firstly, customary law is sometimes recognized in the constitution of countries creating some responsibilities for state courts to administer or oversee the administration of justice – for example, in the Supreme Court of Samoa reviewing decisions of the customary Lands and Titles Courts. Most Pacific Island Countries incorporate custom or customary law as a part of their general law (for example, Kiribati, RMI, Papua New Guinea, Palau, Solomon Islands, Tuvalu and Vanuatu). In others, it is applicable to specific areas, notably land (for example, Cooks Islands, Fiji, Niue and Samoa). In many countries, custom is subject to the constitution and specific legislation, whilst in others, gaps in the law are filled by custom (for example, Vanuatu). While customary law was traditionally unwritten, it may now appear in codifications, in sets of village rules (for example, *Village Fono Act 1990*, Samoa).

Traditionally, customary laws were applied by customary institutions – normally customary leaders deciding and acting after consultation with, and with the advice of, elders of the community. Because people traditionally lived together in villages, the leader would be the leader of the village, and (usually) he would be assisted by elders of the village. In most countries of the region, customary laws continue to be applied by customary leaders of villages. In some countries (such as Kiribati, Samoa, Tuvalu and Vanuatu), these customary institutions have been recognized by legislation. Possibly the legislation which most completely recognises customary institutions is the *Village Fono Act 1990* of Samoa.

There are a number of countries in the region where the legislation expressly states that the courts of the State are to apply custom laws in order to determine certain matters defined by the legislation (for example, Nauru, Kiribati and Tuvalu, and the *Laws of Kiribati Act 1989*). In Solomon Islands and Vanuatu, there is a general statement in the Constitution which states that customary law continues to be part of the law of the country – see, for example, the *Constitution of the Republic of Vanuatu 1980*, Article 47(1). But the Constitution does not expressly state what part of the customary law is to be applied by the courts, and nor has any legislation in these countries. Without any guidance or direction from the Constitution or the legislature, the courts in both countries have however been unwilling to venture to apply customary laws.

A second reason for overlap is the practice for the losing party in many cases of first instance, say in a Village or Island Court, to seek a better outcome by appealing to the next available court – often the Magistrates Court which, if it has the jurisdiction, may hear the case ‘de novo’ rather than as an appeal or review of the earlier decision.

Thirdly, a number of courts or related entities across the region – notably at the local level and most commonly in remote and more traditional communities – exercise what can be described as a ‘hybrid’ or mixed jurisdiction, either in theory or in practice. Examples of community-level courts exercising mixed jurisdictions can be found across the region, for example, in the Village Courts of Papua New Guinea (PNG) which are primarily customary courts, and in the Island Courts of RMI and Kiribati. Despite being primarily customary, the Island Court of RMI is nonetheless subject to the *Bill of Rights* which vest ‘fundamental rights of fair trial’ that are embodied in Article 2 of the *Constitution of the Republic of the Marshall Islands 1979*. In these courts, the judge or magistrate – whether a traditional chief or a judicial officer of the state, may be called

upon in any given situation to exercise justice which combines custom law, constitutional rights and a sound dose of common sense and fairness under the circumstances.⁴

4.0 Preliminary Findings: Kiribati Case Study

This section briefly extracts relevant findings from community consultations undertaken in Kiribati during December, 2019. For the detailed findings, see the full report in **Annex A**.

a South Tarawa [x5 participants: 4 women +1 man] – Taborio, 3 Dec:

Law and order situation - In Taborio, South Tarawa, there is a range of crime from petty theft and drunken fighting to rape and murder. These problems are most serious in Betio.

Law and order, including dispute resolution, is now handled by police and the law courts, rather than customary elders and chiefs.

b South Tarawa [x33 participants: 26 women +7 men]– Nanikai, 3 Dec:

Law and order situation - In Nanikai, South Tarawa, problems include drunkenness, assaults and family violence. Some communities operate 10.00PM curfews, where night crime and public disorder are less frequent.

Family violence is usually not dealt with outside the home, land disputes are generally resolved informally, and crime is handled by police. The traditional dispute resolution role of village elders no longer operates in this community.

c North Tarawa [x58 participants: 47 women +9 men]– Tarawaieta, 4-5 Dec:

Law and order situation - On North Tarawa, there are 8 villages of about two hundred inhabitants each. There are 8 lay magistrates, 3 police officers and 8 special constables (local police assistants). There is no court clerk at present owing to a dispute with the local mayor over supplying housing.

In a small preliminary meeting, selected informants (including village clerk, doctor, police officer and teacher) describe these communities as being safe and peaceful, with village elders generally partnering and collaborating with the police to jointly maintain law and order.

In a larger community meeting, participants reported that the main problems relate to trespass, petty theft of food and clothes, drunkenness and under-age drinking, and some fighting. Most petty crime is committed by school 'dropouts'. Most seriously, sexual assault,

⁴ Acknowledgment is gratefully made to assistance provided in the above discussion by the School of Law, University of the South Pacific (USP).

gender violence and child neglect are described as being ‘a big problem’ affecting perhaps 40% of families. A participating nurse had treated (and reported) 3 rapes over the past year.

In some northern villages, elders play a more active dispute resolution role, and women experiencing family violence obtain protection in the maneaba. In other villages, law and order and dispute resolution are initially dealt with by village elders who dispose of minor matters (such as smoking, drinking, and land disputes) and refer other more serious matters on to the police and courts. Participants estimate that about 45% of cases are disposed of by elders, 35% by police and courts, and 20% go unresolved. There are some situations of collisions, where elders abuse the human rights of offenders with corporal punishment that may then be reported to police. Since around 2015, most problems are handled by police rather than elders. Significantly, more than half of participants had no contact with or any detailed knowledge or understanding of law courts which usually sit once a week hearing different matters (ie civil cases may be heard once each month).

d Maiana [x69 participants: 44 women +25 men]– Tebwangitua, 7 Dec:

Law and order situation – Maiana is a more traditional, authoritarian and patriarchal atoll presided over by old male ‘elders’. There is 1 police officer, and a Presiding Magistrate overseeing 8 lay Magistrates who reside in each village. The court sits once each week, rotating between crime to civil and land disputes during the month. Informants describe the community as being peaceful.

In general meeting, there are reportedly few law and order issues, usually drunk and disorderly, and petty theft of coconuts. Once gender-separated, however, women are more forthcoming. They describe the situation as being unsafe, particularly for young girls who may be sexually assaulted if outside after dark, and domestic violence is ‘a big problem’. There are also fights over land boundaries. Victims can flee for the protection of the maneaba (traditional meeting hall). Offenders (drunk, theft) are fined under village rules; when breached, they flee to South Tarawa. Sometimes elders impose corporal punishment, which may be in breach of human rights. Remedies can be obtained both from elders and the police. Significantly, the elders on Maiana hold much more power than the police in practice. People go first to elders for the protection of their rights and remedies, and only secondarily to the police. There is palpable frustration among more senior articulate women at the enduring patriarchy of prevailing customary powers of the elders, invariably old men.

In due course, these findings will be supplemented by further consultations in Vanuatu and RMI, which are yet to be conducted.

Background descriptions of the courts in Kiribati, Vanuatu and RMI are attached to this report in **Annex B**. Additionally, initial scoping research data on hybrid justice actors and roles in these PICs are attached to this report in **Annex C**.

5.0 Observations

It is clear from the above findings that there is considerable diversity in the operation and relationship of law (police and courts) and custom (village elders) - even from this very limited sampling of communities on Kiribati.

The nature of justice-related issues is full spectrum even in small remote and supposedly harmonious communities. While most informants have a self-perception that they live in peaceful communities, it is evident that there are a range of 'law and order' or 'community peace and harmony' matters that routinely arise. These commonly include drunk and disorderly conduct, fighting, land-boundary disputes, and sexual assault and family violence. On occasion, however, these problems are much more serious to include homicide, rape, domestic violence and child abuse. It follows that the needs of customary actors, as much as those of rights holders, span the justice spectrum relating to land, civil dispute and crime.

From the above case study, it is evident that the 'jurisdiction' of customary actors is variable. In some communities, village elders have surrendered their traditional roles and responsibilities for maintaining peace and harmony to the state, notably the police (South Tarawa). In others, traditional responsibilities remain tightly vested in village elders (Maiana and the northern villages of North Tarawa). On Maiana, for example, '*maneaba justice*' remains very strong. Maneaba justice describes cases disposed by village elders sitting in the maneaba (traditional village meeting hall) in a customary capacity. In some communities, village elders claim and exercise an active role and responsibility to administer 'village rules' or bi-laws. This seems to depend as much on local tradition and culture as on the formal delegation of state powers. Each village has its own bi laws which regulate community peace, dress codes, observing the sabbath, drinking alcohol, curfews, etc. These bi laws and their enforcement are often formally delegated by the state to customary actors in relation to which village elders are notionally accountable to the executive rather than to the judiciary. In practice, their enforcement seems largely to be determined by local tradition and culture.

Moreover, the processes for dealing with matters varies. In some communities, hybrid processes of streaming and filtering operate: (a) streaming (*1-step*) - minor matters are directed to village elders for disposal, and more serious ones are directed to police, or (b) filtering (*2-step*) - all matters are preliminarily dealt with by village elders who deal with them, and only transfer problematic unresolved cases to police. These processes may be fluid and variable from time to time and case to case. For example, in some instances reported to this writer, homicides and rapes have been dealt with, apparently finally, by village elders without any resort to the police and courts. These processes and practices are neither formally sanctioned nor uniformly applied.

5.1 Intersections of Custom and State Law

Given the diversity and plurality of these justice related processes, there are a range of intersections between the customary and court systems. These intersections can be categorised into 3 broad types: gaps, collisions, and duplication-alternative parallels tracks. Significantly, each of these intersections has a potentiality to erode the efficiency, effectiveness, authority and credibility of the justice process, whether formal or informal:

- a. *Gaps*: there are a number of occasions when the operation of customary practices and the formal justice system fail to mesh in providing seamless coverage for needy rights holders. The most obvious example across the region is probably family and gender violence where

neither system is assured of working uniformly and well. In effect, there is usually a 'justice gap'. This gap may exist for a complexity of reasons that may include tradition, cultural taboo, social stigma, ignorance of legal rights/remedies and kinship bias, particularly in small communities.

- b. *Collisions*: Courts of law must review and rehear a number of decisions of customary actors. In doing so, there are various instances where custom and the formal justice system collide, for example, when customary actors apply corporal punishment or banishment which may breach constitutionally embedded human rights. Periodically, appeal courts find that customary actors have acted *ultra vires* by exceeding their formal lawful jurisdictions and/or acting unconstitutionally. In such cases, the authority and effectiveness of traditional actors is undermined by the courts of law, causing confusion for customary actors as well as community members, and the erosion of customary domain under circumstances where the state is usually under-resourced to step in, particularly in more remote communities.
- c. *Duplication*: there may in practice be countless examples where rights holders contemplate exercising a choice between custom and the formal justice system which while doubtless pragmatic, even unavoidable, may lead to confusion, irregular outcomes and inefficient service delivery.

At each of these intersections, irrespective of their nature, there is an overarching public interest to support customary actors and the community to know and understand the respective roles, responsibilities and relationships between custom and the courts to administer justice.

The selection process and training needs of customary and lay actors responsible for dispute resolution, peace and harmony varies in each PIC. That said, these actors are usually nominated by local communities because of their seniority and social standing. They may be chiefly or traditional elders; they may also be retired civil servants, teachers or former police officers. Over the years of working in the region and consulting with local actors, it is observed that there is a general lack of support and training of customary actors performing dispute resolution and/or justice related roles. Almost invariably they have been provided with little or no training in their dispute resolution and justice-related roles. Characteristically there is a need for training. In some jurisdictions, (more) experienced court clerks may be available to provide support and advice, but this support is not uniformly available across all jurisdictions and PICs. When consulted, local actors performing these roles most often ask for training to assist them to perform their roles more effectively specifically relating to:

- a) Decision-making
- b) Due process and procedural fairness
- c) Human rights and 'fundamental rights'
- d) Gender and family violence, among other training and support needs.

5.2 Addressing Whose Unmet Needs?

A key question for stakeholders interested in promoting justice in the Pacific is the strategic issue of focus: *who to support?* This question in turn hinges on another question: *who dispenses justice* (however defined)? Since its start in 2000 - during PJEP, PJDP and currently PJSI – donors' support has focused primarily on the courts of law as being the key agency of the state responsible for

administering justice. Notwithstanding, there have been a number of discussions among stakeholders over the years on the optimal focus and parameters for supporting justice across the region. These debates originally traversed whether support should focus on judicial officers as the primary beneficiaries, but there is now a well-established consensus that court officers are also recognised as being tantamount beneficiaries.

Beyond these central court actors, the debate has then variously considered whether more support should be extended to the bar, the prosecutors, police. This debate was resolved most recently in the design of the current phase of PJSI in the organising principle for support being court centric. That is, PJSI focuses primarily on the formal sector of justice, expanding secondarily to court professionals such as prosecutors and lawyers where there is a convergence of training needs in the courtroom, without diverting the primary focus.

Noting however that much of the lives of people living in the Pacific region remains characterised in traditional culture and traditional, particularly in non-urban areas where most live, the strategic question of focus remains poised. The question of whether PJSI or its successor should extend to the informal or customary sphere with customary or hybrid actors who exercise a dispute resolution or justice related role to maintain community peace and harmony, remains both unasked and unanswered.

Without diverting support to the courts of law to administer justice, this question considers the adequacy and sufficiency of limiting that support to actors in the formal hemisphere of justice – noting that for many, if not most people, living in the Pacific, customary processes and practices are more accessible and more often used. On any assessment, the vibrancy of tradition and culture across the region means that for many – if not most – people living in the region, the notion of justice is customary or at the least pluralistic and hybrid. While it is difficult to estimate the relative use of customary and formal justice processes, one authority estimated that in many communities across the region most and often virtually all disputes are still resolved customarily; that is, they never found their way to the courts of law but were, for the most part resolved satisfactorily. In other words, the delivery of justice and the resolution of disputes is administered by many non-state actors – notably traditional elders – and is by no means confined to the courts of law.⁵

Over the years, it has been convenient to describe the delivery of justice as comprising two hemispheres: these hemispheres have been variously described as the ‘formal’ or ‘state’ domain of the courts of law, and as the ‘informal’ or ‘traditional’ domain of customary law. This dichotomy has been convenient for stakeholders of PJSI to readily focus support to being court centric. In reality, however, this dichotomy or device is over-simplistic because it misconstrues how justice is often – indeed probably usually – dispensed across the region. In Kiribati, for example, island magistrates are non-law trained and exercise a variety of legal-cum-customary roles under the aegis of the court. At the same time, many village elders who are customary actors exercising traditional roles grapple with the impact of the constitution and human rights law on their traditional practices of corporal punishment and banishment. In effect, the notion of two separate hemispheres – informal and formal – is misleading. Customary actors cannot operate within a hemispherical vacuum of the constitution and law, just as court actors often

⁵ While difficult to quantify, Australian Aid (then AusAid) estimated that in many Pacific communities most disputes, which most commonly relate to land, are resolved customarily (>90%+/-), AusAID 1990s TBA (weblink changed during organisational restructure). See also, PJSI, 2018, *Enabling Rights & Unrepresented Litigants, Access to Justice: Cooks Islands*, Community Consultations, Mangaia, A.4. See also: PJDP, 2012, *Customary Dispute Resolution Research Project*, including detailed country reports from Samoa, FSM and RMI.

cannot operate without any appreciation of custom, notably but not confined to rights relating to land. The pluralism, hybridity and fluidity of justice delivery in practice characterises a large though under-mapped portion of justice delivery across the region. Whether this hybridity is permanent or transitional is the matter for another debate. Suffice for present purposes to observe that this state of affairs is the cause for considerable confusion among both hybrid justice actors and rights holders in the community about the nature and parameters of custom and the courts, their roles and interrelationships.

Over recent years, there has been a growing appreciation for and recognition of the importance of the roles being played by hybrid justice actors – particularly those lay actors not formally trained in law – who operate at the intersection of customary and state law. This recognition has also been evidenced by the World Bank, among others, in its *Justice for the Poor* (J4P) Program.⁶ It has also been evidenced by PJSI's stakeholders expanding the range of services to lay -non-law trained – actors working in the courts over recent years.

5.3 Hybrid Justice Actors

At the outset, it is not altogether straight forward to identify those who exercises hybrid (customary-cum-formal) justice roles and responsibilities. It is partly for this reason that research is required. 'Hybridity' describes an entity or phenomenon made by combining two different elements – in this instance: custom and state law. It describes the role, functions and responsibilities of those actors who are responsible for maintaining 'community peace and harmony' (as described by custom) and 'law and order' (as described by the state). These roles are invested through both custom and the state. They include a variety of roles that may include village and island court magistrates, as well as village elders and customary chiefs, including for example Samoa's pulenu'u (village mayor) who are appointed by the state and vested with powers under the *Village Fono Act* 1990.

Within the present context, there are broadly 3 classes of justice actors: those working solely in the domain of state justice (that is, judicial officers), those working solely in the domain of custom and customary justice (that is, traditional elders/chiefs), and those working at the intersection of these domains (hybrid justice actors). These hybrid justice actors perform a variety of dispute resolution and justice related roles in each jurisdiction. In the law courts, they include judicial officers responsible for administering justice involving aspects of custom, notably relating to the administration of customary land and, where mandated, to reviewing the lawfulness of designated customary decisions, usually relating to land. They may include a wider variety of roles such as island/village court magistrates, justice of the peace, and law commissioners etc. They may also include court clerks, court officers and registry staff when they perform routine but nonetheless extramural roles such as problem diagnosis, advice and referral.

5.4 Shared Space, Co-existence and Hybridity

PJSI, and its antecedents PJEP and PJDP, have consistently operated within parameters that have focused support to the 'formal' sector of state-based justice through the courts of law. This scoping paper proceeds within these parameters.

⁶ See, for example: World Bank 2007, 'Justice for the Poor Program: Overview', Washington, DC; Sage, C. and Woolcock, M. 2005, *Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries*, World Bank, Washington, DC; and Sage, C., Tamanaha, B. and Woolcock, M. 2009, 'Legal Pluralism and Development Policy', concept note for workshop, Justice for the Poor, World Bank, Washington, DC.

Since the start of PJEP, support has been extended incrementally by PJDP and now PJSI from focusing exclusively on law-trained judges to lay actors working in the courts in the form of training and related services as a matter of practice. Over the past twenty years, this vision has expanded in recognition that the systemic effectiveness of the courts of law to administer justice depends in significant measure on the ability of these lay actors to perform their roles.

Within this evolving vision, it is now timely to review the parameters of any ongoing support being extended to hybrid actors who perform substantial justice-related roles.

As already seen, the formal and customary 'systems of justice' intersect in a variety of ways. There are gaps, collisions and parallel operations. For the most part, the courts of law and custom have co-existed. Moreover, there are aspects of co-dependency where customary actors have received some support and oversight from the state, and where the operations of the police and courts rests on customary actors performing their roles, notably in more remote communities.

This co-existence and co-dependency generally operate smoothly. Broadly speaking, customary and court actors understand and exercise their respective roles. While some historians or anthropologists may argue about the march of modernity, this hybridity is generally stable, and it is argued should be supported to remain so. Hence this paper is not advocating to change the status quo or to accelerate the transfer of responsibilities from custom to the state. Indeed, in many jurisdictions, the state is already operating at the limits of its capacity. In Samoa, for example, this writer was assured by the then police commissioner that the police service relied and depended on the *pulenu'u* (village mayor(s)) to perform their customary roles in maintaining peace and harmony at village level, and would become overwhelmed by any failure to do so. Rather, this paper is advocating that there is a systemic need to understand more about the intersection of custom and law and, more specifically, the needs of hybrid actors dispensing justice-related services when operating within this shared space. Not enough is presently known to inform a more integrated approach to supporting the delivery of justice across the region. This will require more detailed research and analysis to enable donors interested in promoting justice to build the capacity of all actors who dispense dispute resolution and justice-related functions in both the 'formal' and 'customary' domains.

6.0 Recommendations

Given that PJSI is approaching the final year of operation, and that MFAT is in the process of scoping its future support for law and justice across the region, it is timely to outline a range of possible parameters to be considered which span 3 strategic options:

- (a) *existing* approach – this approach remains tightly framed on addressing needs of the courts of law;
- (b) *refined* approach – this approach expands the parameters to specified hybrid actors, potentially state-appointed village elders responsible for maintaining peace and harmony; and
- (c) *reframed* approach – this approach could reframe the focus of support for promoting justice to the customary domain more broadly, becoming community-centric.

While each approach may have merit, this scoping paper advocates for option (b), provided that sufficient funding is available to adequately address all needs. It is timely to adopt an iterative incremental approach to evolve the support for promoting justice in the region by undertaking research that enables stakeholders to extend the historical trajectory of PJEP, PJDP and PJSI. This research would explore the needs of hybrid justice actors, and those rights holders whom they serve, and in due course inform stakeholders on how to support these needs.

This research will promote access to justice across the region by building the capacity of hybrid actors who operate at the intersection of custom and the courts where there are gaps, collisions, parallel tracks in service delivery. It will enable stakeholders to build the capacity of hybrid actors, thereby promoting the effectiveness, sustainability and resilience of hybrid dispute resolution and justice related processes.

More specifically, the scope of this research could be two-fold on:

- the needs of rights holders to access justice by raising awareness of the respective roles and relationships of custom and law, including the role, functions and jurisdiction of courts, and thereby improving rights holders' understanding of justice delivery options; and
- the functional roles and needs of hybrid justice actors for support to perform their justice-related roles more effectively.

It is recommended that:

Pacific Chief Justices request MFAT, and other interested donors, to consider adopting a more holistic approach to promoting justice across the region by undertaking more detailed research into the roles, relationships and capacity-building needs of hybrid justice actors, to promote access to justice by resolving disputes and maintaining peace and harmony. This research will address the following research questions, among others:

- a) Identify who exercises hybrid (customary-cum-formal) justice related roles in maintaining community peace and harmony, and dispute resolution;
- b) Describe the roles, functions, responsibilities and relationships of hybrid justice actors;
- c) Undertake an assessment of the needs of hybrid justice actors to perform their roles more effectively including – but not limited to – undertaking a training needs analysis;
- d) Identify the intersections between custom and state justice delivery – specifically including gaps, collisions and parallel tracks;
- e) Undertake a review of the relevant global and regional literatures relating to hybrid justice actors; and
- f) Provide recommendations on how to address these needs for the ongoing consideration of stakeholders.

Annex A: Kiribati Case Study – Public Feedback Suggestions

1 **South Tarawa** [x5 participants: 4 women +1 man] – Taborio, 3 Dec

Law and order situation - In Taborio, South Tarawa, there is a range of crime from petty theft and drunken fighting, to rape and murder. These problems are most serious in Betio. Law and order, including dispute resolution, is now handled by police and courts rather than customary elders and chiefs.

- > *Satisfaction with police: 46.3%⁷, static*
- > ***Satisfaction with courts: 55.0%, improving***
- > *Areas of improvement perceived: 'honesty' (integrity) – (then: efficiency, fairness, competence).*

Community Identified Justice Needs:

- Community announcements on the radio on the outer islands;
- Improve customer service; be sure to do work well; talk with public on their needs;
- Explain access to justice to public; standards for court hearings;
- Train the public on the courts; visit villages to explain how courts work;
- No bias in decisions; do a better job for the people;
- Explain court proceedings to public on how to hear claims; Training – develop skills; develop code of conduct.

2 **South Tarawa** [x33: 26W+7M]– Nanikai, 3 Dec

Law and order situation - In Nanikai, South Tarawa, problems include drunkenness, assaults and family violence. Some communities operate 10.00PM curfews, where night crime and public disorder is less frequent. Family violence is usually not dealt with; land disputes are resolved informally, and crime is generally handled by police. Traditional dispute resolution role of village elders no longer operates.

- > *Satisfaction with police: 47.7%, improving*
- > ***Satisfaction with courts: 47.6%, static***
- > *Areas of improvement perceived: access and fairness*

Community Identified Justice Needs:

- Customer service (x2);
- Access (x4);
- To be trusted (relating to payment of expenses);
- Reducing adjournments;

⁷ The satisfaction of the public and court actors was measured through stakeholder polling during various workshops, using arrow cards (graphically designating improvement – up, deterioration – down, and constant – horizontal).

- Getting justice on time;
- Treat everyone equally; trust (x2);
- To always be on time during working day at court;
- Help and how to get in the court (access);
- Community awareness of court functions (x2);
- Training for court staff; staff to be smart and deal with cases promptly;
- More explanation on court system (x2);
- Completed cases remain unfinalized;
- To be fairer to unrepresented litigants who don't understand the system.

3 **North Tarawa** [x58: 47F+9M]– Tarawaieta, 4-5 Dec

Law and order situation - On North Tarawa, there are 8 villages of about two hundred inhabitants each. There are 3 police officers and 8 special constables (local police assistants). There is no court clerk at present owing to a dispute with the local mayor over supplying housing. There are 8 lay magistrates. Leaders describe the communities as being safe and peaceful, with village elders collaborating with police to maintain law and order.

The main problems relate to trespass, petty theft of food and clothes, drunkenness and under-age drinking, and some fighting. Most petty crime is committed by school 'dropouts'. Most seriously, sexual assault, gender violence and child neglect are described as being 'a big problem' affecting perhaps 40% of families. A participating nurse had treated (and reported) 3 rapes over the past year. In some northern villages, elders play a more active dispute resolution role; and women experiencing family violence obtain protection in the maneaba. In other villages, law and order and dispute resolution are initially dealt with by village elders who dispose of minor matters (such as smoking, drinking, and land disputes) and refer other more serious matters on to the police and courts. There are some cases of collisions, where elders abuse the human rights of offenders with corporeal punishment. Participants estimate that about 45% of cases are disposed of by elders, 35% by police and courts and 20% go unresolved. Since around 2015, most problems are handled by police rather than elders. Significantly, more than half of participants had no contact with, knowledge or understanding of the courts.

- > *Satisfaction with police: 53.7%, static*
- > ***Satisfaction with courts: 62.9%, improving***
- > *Areas of improvement perceived: access to justice (50%), and honesty (27%)*

Community Identified Justice Needs:

- Village elders need training on:
 - Role and function of courts;

- Community law;
- Dispute resolution;
- Conducting fair hearings fairly and impartially;
- Leadership;
- Protection of women's rights; and
- Human rights.
- Community members want education on:
 - Role of courts;
 - Access to justice; and
 - Legal rights.

4 **Maina** [x69: 44F+25M]– Tebwangitua, 7 Dec

Law and order situation – Maina is a more traditional, authoritarian and highly patriarchal atoll presided over by old male 'elders'. There is 1 police officer, and a Presiding Magistrate overseeing 8 lay Magistrates residing in each village. The court sits one day each week, rotating between crime to civil and land disputes during the month. Informants describe the community as being peaceful. There are reportedly few law and order issues, principally being drunk and disorderly, and petty theft of coconuts.

Once gender-separated, women are more forthcoming. They describe the situation as being unsafe, notably: young girls may be sexually assaulted if outside after dark; and domestic violence is 'a big problem'. There are also fights over land boundaries. Victims can flee for the protection of the maneaba. Offenders (drunk, theft) are fined under village rules; when breached, they flee to South Tarawa. Sometimes elders impose corporeal punishment, which may be in breach of human rights. Remedies can be obtained both from elders and the police. Significantly, on Maiana, *the elders hold much more power than the police in practice*. In practice, people go first to elders for the protection of their rights and remedies, and only secondarily to the police. There is palpable frustration among more senior articulate women at the enduring patriarchy of prevailing customary powers of the elders, invariably old men.

- > *Satisfaction with police: 65.5%, improving*
- > ***Satisfaction with courts: 45.7%, declining***
- > *Areas of improvement perceived: access to justice (59.6%).*

Community Identified Justice Needs:

Most community members (59.6%) have had no exposure to the courts whatsoever. Among those who have, 2 expressed satisfaction with their experiences. There is however pervasive marked uncertainty about the powers and rights of elders, parents in disciplining their children (smacking), also sex education of children, police and the role of courts; and there are substantial needs for community-based education on these issues.

- Village elders need training on:
 - Human rights;
 - Powers to enforce village bi laws;
 - Juvenile rights;
 - Women's rights; and
 - Parental disciplinary powers.
- Community members want education on:
 - Role of courts;
 - Access to justice;
 - Legal rights; and
 - Parental disciplinary powers.

5 **Key Informant Interviews:** [x2: 1F+1M]– Betio, South Tarawa, 3-5 Dec

Two detailed interviews were conducted with key informants being 2 senior lawyers who actively practise in all courts across Kiribati.

a) Informant A

Informant rates satisfaction with the present performance of the courts in aggregate (both High Court and Magistrates Court, also on the capital island of South Tarawa and outer islands) at **75%**, though rates the lay magistrates on outer islands at **60%** - both being a measurable improvement over the past 5-10 years.

He measures these improvements through:

- staff (COs) dress better, address parties in court more respectfully, and conduct cases more efficiently;
- magistrates (MOs) behave more professionally on bench, more business-like and in control, and their judgments have better structure, issues identification and analysis;
- appeals are now fewer and fail more often;
- 'you can tell all the training is making a difference'; and
- he appreciates the value of USP's Certificate of Justice in which 4-5 staff have participated during the pilot.

In assessing the performance of the courts now, he identifies the following as remaining problematic:

- efficiency, delay - which co-depends on JOs, MOs COs and lawyers - is the biggest problem;

- access - the introduction/increase of courts fees 2 years ago has created a barrier to remedies particularly for outer islands who are largely cashless;
- impartiality, recusal is no longer a problem;
- independence and integrity are fine; and
- competence is satisfactory though can always improve.

He describes I-Kiribati people as 'seeing the courts as the place to go to resolve all their disputes', though in some outer island communities, village elders perform a dispute resolution role. He sees a steady migration away from traditional dispute resolution towards the courts (a matter I've noted for my upcoming discussion paper on aligning the formal/informal justice sectors).

b) Informant B

Informant reports that delay (efficiency) has deteriorated following the recent severing of Magistrates and High Courts (30/3/19), with the introduction of new procedures by Chief Magistrate. On a positive note, she reports that the performance of the courts has improved 'a bit' over the past 5 years notably in their competence. She's aware of USP's Certificate of Justice becoming mandatory for all CO's and reports that the differences already show. This corresponds to other observations from recent visits to outer islands that lay magistrates are now more confident and competent over recent years, though there remains plenty of opportunity for further improvement.

Annex B: Background Descriptions of Courts

Kiribati⁸

PRIVY COUNCIL

The Privy Council has jurisdiction to hear appeals from any High Court decision involving the interpretation of the Constitution where application to the High Court was made on the basis of the contravention of the rights of any Banaban or of the Rabi Council under Chapter III or IX of the Constitution.

COURT OF APPEAL

The Court of Appeal has jurisdiction to hear civil and criminal appeals from any High Court decision on a question of law and appeals from the High Court exercising appellate jurisdiction in land matters.

The Court can hear criminal appeals from the High Court with leave of the Court of Appeal; and with leave of the Court of Appeal against the sentence passed unless it is one that is fixed by law. It has no jurisdiction to hear appeals from a decision of the High Court which is provided by statute to be final.

HIGH COURT

The High Court appears to have unlimited original jurisdiction in civil and criminal cases. It also has the right to hear appeals from decisions of the Magistrates' Courts. The High Court is also empowered to determine disputes as to the validity of election of any member of the House of Assembly as to the vacation of seats.

The Land Division of the High Court deals with appeals relating to land, divorce and inheritance.

MAGISTRATES' COURT

The Magistrates' Courts has jurisdiction within the limits of the district within which they are situated. The Courts may determine cases where the amount claimed or the subject matter in the dispute does not exceed \$3,000; petition for divorce under the Native Divorce Ordinance; and land matters if constituted under s7(4) of the Constitution.

The Magistrates' Courts also have criminal jurisdiction in relation to 'cause and matter' set out in Schedule 2 of the Magistrates' Court Act. The schedule stipulates that the Magistrates' Courts have jurisdiction over proceedings conducted in relation to any offence carrying a maximum punishment of a fine of \$500 or five years' imprisonment. In addition, these courts have jurisdiction in relation to specified offences contained in the Penal Code.

⁸ Extracted from PJSI's country briefing documents.

JUDICIAL POPULATION STATISTICS (last updated 2017)

No. Judicial Officer	No. Law-trained Judicial Officers	No. Lay persons	No. Women - Judicial Officers (JO) & Lay Persons (LP)
Court of Appeal - 4 High Court - 7 Magistrates Court - 154	Court of Appeal – 1 (resident) & 3 (non-resident) High Court - 3 (resident) Magistrates Court - 3 (resident)	Court of Appeal - 0 High Court - 4 Magistrates Court - 151	Court of Appeal - 0 High Court - 1 (JO) Magistrates Court - 2 (JO)

TRADITION AND CUSTOM

When Kiribati attained independence on 12 July 1979 by the Kiribati Independence Order 1979 made by the British Privy Council, it was provided with a written Constitution which was stated to be the supreme law. All existing laws were to be retained in Kiribati until repealed by the newly elected legislative body. Ten years later, the Kiribati Act 1989 was enacted to define the laws of the country, and to provide for the extended application of customary law.

There are currently express provisions for customs or customary law to be used as the basis for determining rights to customary land. However, much of what constitutes customary law is not recorded in a written form but is passed on orally by Chiefs. Particularly on remote outer islands of Kiribati, traditional customs of village elders deciding cases and determining punishment continue to remain a part of the village life. However, incidences of communal justice processes are declining due to the pressure of codified national law following the independence of Kiribati and the implementation of the Constitution.

Customary law is applied in civil or criminal proceedings in all courts except to the extent that it is inconsistent with the Constitution, or legislation or subsidiary legislation in force in Kiribati (s 5 Laws of Kiribati Act 1989).

Vanuatu

COURT OF APPEAL

The Court of Appeal is constituted of two or more judges of the Supreme Court. The Court of Appeal hears both civil and criminal appeals from the Supreme Court, and possesses the same power, authority and jurisdiction of the Supreme Court. Whilst the Court of Appeal may substitute its own judgment or opinion, it may not interfere with the exercise of discretion unless it is manifestly wrong.

SUPREME COURT

The Supreme Court consists of the Chief Justice and three puisne judges. The Supreme Court has unlimited jurisdiction to hear and determine civil and criminal proceedings; to hear questions concerning elections and similar matters; to hear civil and criminal appeals from a magistrate's court; and to hear any grievances from citizens about emergency regulations made by the Council of Ministers. It also has jurisdiction to hear appeals from island courts as to ownership of land. Its decision in such cases is final.

MAGISTRATES' COURT

The Magistrates' Court has jurisdiction to hear cases where the amount claimed or the subject matter in dispute includes:

- Does not exceed VUV 1,000,000;
- Disputes between landlords and tenants where the amount claimed does not exceed VUV 2,000,000;
- Claims for maintenance not exceeding VUV 1,200,000;
- Involving uncontested petitions for divorce or nullity of marriage; and
- Any criminal proceedings for an offence for which the maximum penalty does not exceed 2 years imprisonment.

The Magistrates' Court also has jurisdiction to hear appeals from civil decisions from Island Courts, except decisions as to ownership of land, where appeal is to the Supreme Court. However they are specifically excluded from exercising jurisdiction in wardship, guardianship, interdiction, appointment of conseil judiciaire, adoption, civil status, succession, wills, bankruptcy, insolvency and liquidation.

ISLAND COURT

Each Island Court is constituted by at least three justices knowledgeable in customary law, and one must be a custom chief residing within the jurisdiction of the island court.

JUDICIAL POPULATION STATISTICS (last updated 2017)

No. Judicial Officer	No. Law-trained Judicial Officers	No. Lay persons	No. Women - Judicial Officers (JO) & Lay Persons (LP)
Court of Appeal - 9 Supreme Court - 8 Magistrates Court - 10 Island Court - 205	Court of Appeal – 7 (resident) & 2 (non-resident) Supreme Court - 8 (resident) Magistrates Court - 10 (resident) Island Court - 5 (resident)	Court of Appeal - n.a. Supreme Court - n.a. Magistrates Court - n.a. Island Court - 200	Court of Appeal - 1 (JO) Supreme Court - 2 (JO) Magistrates Court - 5 (JO) Island Court - 27 (LP)

Kastom

Today in Vanuatu there are two legal systems: an official and an unofficial system. Although the official sector commands considerable political power and authority, the unofficial sector, along ethnic/linguistic and cultural lines, commands more loyalty. The official system is established by the State, which consists of the courts, the police, the Public Prosecutor and the Public Solicitor.

The unofficial system, kastom, encompasses the traditional norms of behaviour that are backed up by a sanction of some description (either positive or negative) administered by a member or members of the local community, or a chief at some level of the chiefly hierarchy. It also includes the processes by which disputes are dealt with – as the Chief Justice of Vanuatu has aptly put it, the basket of the law, as well as the contents of the basket.

Although not officially given any dispute-resolving duties, the chiefs in fact deal with all levels of disputes, from petty thievery to rape and other serious offences. The Constitution of Vanuatu makes provision for the continued effect of customary law as part of the law of Vanuatu. The Constitution of Vanuatu Act 1980, Article 47(1) also states: If there is no rule of law applicable to a matter before it, a court shall determine a matter according to substantial justice and wherever possible in conformity with custom.

Republic of the Marshall Islands

SUPREME COURT

The Supreme Court is a superior constitutional court of record with appellate jurisdiction and final authority of cases brought before it. The Supreme Court consists of a Chief Justice and two Associate Justices.

HIGH COURT

The High Court of the Marshall Islands has general jurisdiction over controversies of the law and original jurisdiction of all cases filed, and appellate jurisdiction over cases filed with sub-ordinate courts. This court consists of a Chief Justice and an Associate Justice.

TRADITIONAL RIGHTS COURT

The Traditional court is a constitutional court of record consisting of three or more judges selected to include a fair representation of all classes of land rights: including Iroijlaplap (high chief); where applicable, Iroijedrik (lower chief); Alap (head of commoner/worker clan); and Dri Jerbal (commoner/worker). The jurisdiction of the TRC is limited to questions relating to titles to land rights or other legal interests depending wholly or partly on customary law and traditional practices.

DISTRICT COURT

The District Court is a statutory court of record that consists of a Presiding Judge and two Associate Judges. The District Court has original jurisdiction concurrently with the High Court in dealing with all civil cases when the amount claimed does not exceed \$10,000. The District Court also has jurisdiction in all criminal cases involving offences against any law in the Republic for which the maximum penalty does not exceed a \$4000 fine or 6 month imprisonment term.

COMMUNITY COURTS

The Community Court is a statutory court of record for each of the 24 local government areas of the Marshall Islands. Each Community Court consists of a Presiding Judge and any appointed Associate Judges. Community Courts have original jurisdiction in all civil cases where the amount claimed or the value of the property involved does not exceed \$200, and criminal matters when the maximum penalty does not exceed \$4000 or an imprisonment of more than three years.

JUDICIAL POPULATION STATISTICS (last updated 2017)

No. Judicial Officer	No. Law-trained Judicial Officers	No. Lay persons	No. Women - Judicial Officers (JO) & Lay persons (LP)
High Court - 2 Supreme Court - 3	High Court - 2 (<i>resident</i>) Supreme Court - 3 ⁹ (<i>non-resident</i>)	High Court - 0 Supreme Court - 0	High Court - 0 Supreme Court - 0
District Court - 3 Traditional Rights - 3 Community Court - 19	District Court – n.a. Traditional Rights - n.a. Community Court - n.a.	District Court - 3 Traditional Rights - 3 Community Court - 19	District Court - 0 Traditional Rights - 1 (LP) Community Court – 2 (LP)

⁹ 1 Permanent part-time non-resident Judicial Officer & 2 Pro Tem non-resident Judicial Officers

Annex C: Preliminary Local Research Notes

1. Initial Research

Focus

The focus of this initial research is:

- Exploring what pre-existing research measures the population and demographics of customary actors/hybrid actors administering justice in Vanuatu, Kiribati and the Republic of the Marshall Islands (RMI);
- Ascertaining the training needs of these customary actors/hybrid actors in conducting a fair hearing, principles of due process, and similar; and
- Ascertaining how these customary actors/hybrid actors interact with the current court systems.

Summary

Kiribati, RMI and Vanuatu all incorporate customary law as part of their general law, and afford customary actors responsibility in administering justice.¹⁰

Despite this recognition of the existence and value of customary actors, little research is available on the population and demographics of customary/hybrid actors, the training needs of these customary actors, and how they interact with the current court systems.

In summary:

- **Population and demographics:**
 - Whilst the Kiribati Judiciary identifies that *unimane* (older men/elders) are the customary actors who administer justice, there is no detailed number on the population of these individuals;
 - Whilst the Vanuatu Judiciary identifies that there are 11 Island Courts, there are no recorded numbers of the chiefs implementing the *kastom* component of the administration of justice.
- **Training needs:**
 - No current training has been found to be provided to the *unimane*, with the Kiribati Judiciary choosing to prioritise community awareness and education programs on law and human rights over the training of *unimane* in these areas;
 - Training has been provided to 100 chiefs in the Ambrym Islands by the World Justice Project, and to six area councils of chiefs by Transparency International in Vanuatu.
- **Interactions with the court systems:**
 - There have been negative interactions between the Kiribati Judiciary and the *unimane*;
 - Attempts have been made in Vanuatu to incorporate the concept of *kastom* into the Island Court systems.

¹⁰ See *Defining the Formless: Customary Law in the Pacific* by Grant Follett, available [online](#).

Kiribati

The role of Customary/Hybrid Actors

Post-independence, the application of customary law was extended to allow customary actors to: address the boundaries of and titles to customary land;¹¹ to determine civil and criminal proceedings in the Magistrates' Courts provided the custom was not repugnant to natural justice, equity and conscience, or inconsistent with any other law;¹² and for all civil and criminal proceedings in all courts except to the extent that it is inconsistent with the Constitution, or legislation in force.¹³

These customary actors comprise of *unimane* (older men/elders) who, whilst not often educated in the modern sense, are viewed as a source of wisdom.¹⁴ The *unimane* has no public position, but deals with problems in the village through the *maneaba* (village 'parliament') and fulfils the role of the administration of justice.

Whilst historically the *unimane* in the village *maneaba* would be the centre of local politics, the church *maneaba* is becoming more prominent, consisting of a chairperson and committee elected by members of the church.¹⁵

In contemporary society, much of the authority attributed to the Magistrates Courts comes from the *unimane* status of the Magistrates, rather than any inherent respect for the law.¹⁶ Magistrates from the Magistrates Court and the Magistrates Court (Land) are generally *unimane*, and have jurisdiction over:

- **Magistrates:** criminal matters where the maximum penalty is five years imprisonment or a fine of \$500; civil matters where the claim concerns less than \$500; divorce between I-Kiribati;¹⁷
- **Land Magistrates:** land matters; adoption; paternity.¹⁸

Interaction between the Courts and Customary/Hybrid Actors

There have been contradictory interactions between the *unimane* and modern law, particularly with *unimane* exercising authority over their communities through corporal punishment.¹⁹ One method spearheaded by the formal courts to prevent this unchecked exercise of authority is through community awareness programs of law and human rights amongst local communities.²⁰

¹¹ *Magistrate's Court Ordinance 1978*, s 58. See also *Kiribati: Pre-Independence Laws & Post-Independence Laws* by Professor Don Paterson, available [online](#).

¹² *Ibid*, s 42(2).

¹³ *Laws of Kiribati Act 1989*, s 5.

¹⁴ See 'Traditional' Justice Systems in the Pacific, Indonesia and Timor-Leste as commission by UNICEF, available [online](#).

¹⁵ See *Kiribati: National Implementation Plan for Persistent Organic Pollutants*, available [online](#).

¹⁶ Above n 6.

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ *Ibid*.

Vanuatu

Kastom and Customary/Hybrid Actors

In Vanuatu, there is a central idea of the *kastom* system, which stipulates that the chief(s) of a community are responsible for managing conflicts, through holding a public meeting with the involved parties, discussing responsibility and potential amends, and making a *kastom* payment.²¹

This *kastom* system takes different forms: initially, it comprises of conflict resolved at a family level. Where this is not possible, the village chief(s) is consulted. Further conflict resolution can be undertaken in some communities by a ward council comprised of chiefs from multiple villages, followed by an area council (of representatives of various ward councils), and on occasion there is an island level/provincial-level chiefly council as the penultimate level. The *Malvatumauri* is the top of this structure, representing chiefs at a national level.²²

Significant challenges exist to the *kastom* system in contemporary society, namely a lack of respect for the chiefs and the decisions they make, leading to limited enforcement.²³ An attempt to address this and bring *kastom* into state law as procedure is evident in the development of Island Courts.²⁴ Island Courts are granted the ability to exercise jurisdiction over minor criminal offences (damage to property, criminal trespass, abusive and threatening language, adultery and theft), minor traffic offences (driving without due car and failure to comply with traffic signs), minor contractual disputes, and certain civil claims (tort and contract not exceeding 50 000 vatu, civil claims under provincial bylaws and applications for child maintenance).²⁵

There are 11 Island Courts in Vanuatu, and they hear a significant number of cases.

1. Erromango Island Court;
2. Efate Island Court;
3. Tongoa/Shepherds Island Court;
4. Epi Island Court;
5. Ambrym Island Court;
6. Malekula Island Court;
7. Pentecost Island Court;
8. Ambae Island Court;
9. Santo/Malo Island Court;
10. Banks/Torres Island Court; and
11. Tanna Island Court.

Data from 2009 shows:²⁶

Magistrates Courts		Island Courts	
Total cases registered	959	Total cases registered	461
Total cases completed	1392	Total cases completed	345
Total cases pending	590	Total cases pending	447

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ See *The Relationship between the State and Kastom Systems*, available [online](#).

²⁵ See *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* by Evans, D., Dr Goddard, M., and Professor Paterson, D., available [online](#).

²⁶ See *Hybrid Justice in Vanuatu: The Island Courts* by Goddard, M., and Otto, L., available [online](#).

Island Courts face significant challenges: justices sitting on this bench are often uneducated and provided little to no training; at least one of the three justices must be a chief, with all three having some knowledge in local custom; and these courts are regularly accused of favouritism and involving politics in disputes (similar allegations levelled at chiefs enacting *kastom* dispute resolution).²⁷

Training of Chiefs/Customary Actors

Some projects directed to training customary actors have been implemented:

- **World Justice Project** implemented the [*Vanuatu Chief's legal Education Pilot Program*](#), working with 100 chiefs from the three area councils of Ambrym Island to strengthen and promote the rule of law through education; and
- **Vaturisu Council of Chiefs** in Efate, working with **Transparency International**, delivered workshops on [*Adaptive Leadership Skills*](#) targeted all six of the area councils of chiefs under the Vaturisu structure.

²⁷ Above n 15.

2. Follow-up Research

Focus

The focus of this follow-up research is:

- Determining which government agencies, departments and/or ministries are responsible for managing, supporting and consulting customary actors/hybrid actors; and
- Exploring publicly available data on the populations these state agencies/departments are servicing, and assessments they have made on the needs of these customary actors/hybrid actors in relation to dispute resolution.

Summary

Vanuatu, Kiribati and the Republic of the Marshall Islands (RMI) all have state-based agencies responsible for managing, support and consulting customary actors/hybrid actors in their communities. Vanuatu has the *Customary Land Management Office*, the *Malvatumauri Council of Chiefs* and the *Vanuatu Law Commission*. Kiribati has their local councils, in addition to the *Ministry of Internal Affairs*. Finally, RMI has the *Council of Iroij* (Chiefs).

No public data is available on the populations that these state agencies/departments are servicing, or assessments of their needs.

Vanuatu

Government Agencies supporting Customary Actors

In Vanuatu, several government agencies provide assistance and support to customary actors/hybrid actors:

- [Customary Land Management Office](#) provides assistance and support in strengthening the custom governance system, particularly in relation to the facilitation of land disputes and raising awareness on the importance of the lands tribunal;
- [Malvatumauri Council of Chiefs](#) consists of custom Chiefs elected by the Island Council of Chiefs (20 nominees) and Urban Council of Chiefs (2 nominees), and aims to preserve and promote culture and languages, support and encourage customary practice, uphold custom and tradition, and ensure the effective operation of Malvatumauri through appropriate resources. Note: the Malvatumauri was established under the Constitution and operates under the *Chiefs Act Number 23 (2006)*; and
- [Vanuatu Law Commission](#) operates under the *Law Commission Act*, existing to study and keep under review the laws of Vanuatu with a view to reflecting in the law the distinctive concepts of custom, the common and civil law legal systems, and the reconciliation where appropriate of differences in those concepts.

Kiribati

Government Agencies supporting Customary Actors

In Kiribati, several government agencies provide assistance and support to customary actors/hybrid actors:

- [Ministry of Internal Affairs](#) is responsible for providing support services to Island Councils, the village bank, decentralisation, community development, cultural affairs and the outer island development program;

- **Local councils** are responsible for daily interactions with the customary actors in local villages. For instance, the Kiritimati Urban Council consults with the *Marewen Eko Kiritimati* (the Old Men Association of Kiritimati) on legislative and policy matters, and with the *Te Ekonikabanei* (which comprises of all heads of families over 50 years of age, from the Tabakea village). Similarly, the *Unimwane* (Old Men Associations) surrounding Beru Island Council are responsible for the maintenance of peace and order. The councils are: Nikunau Island Council, Kiritimati Urban Council, Beru Island Council and Makin Council.

Republic of the Marshall Islands

The role of Customary/Hybrid Actors

The RMI Judiciary incorporates customary law and decision-making into the traditional judicial structures:

- The **Traditional Rights Court** is a special jurisdiction court of record consisting of three or more judges selected to include a fair representation of all classes of land rights: Iroijlaplap (high chief), Iroijedrik (lower chief), Alap (head of commoner/worker clan), and Dri Jerbal (commoner/worker). This court has jurisdiction over land rights titles, and other legal interests depending wholly or partly on customary law and traditional practices;²⁸
- **Community Courts** are limited jurisdiction courts of record for a local government area, consisting of a lay judge with limited training and a number of lay associate judges. Jurisdiction is over civil cases not exceeding \$1 000, and criminal cases involving a maximum penalty of \$400 or imprisonment not exceeding six months. There are 24 Community Courts;²⁹
- **The Council of Iroij** (Chiefs) has a consultative function, related to traditional laws and customs, and serves as the upper house of the mixed parliamentary-presidential system in RMI. It is comprised of 12 tribal chiefs who advise the Presidential Cabinet and review legislation affecting customary law or any traditional practice, including land tenure.³⁰

²⁸ See more [online](#).

²⁹ Ibid.

³⁰ See more [online](#).

3. Feedback from In-Country Contacts

Summary

In-country supports in Kiribati and the Republic of the Marshall Islands (RMI) have been contacted in order to assist in identifying the state departments, agencies and organisations supporting customary actors who are involved in the delivery of customary law (dispute resolution and the maintenance of community peace and harmony).

Kiribati

In Kiribati, the in-country contacts are currently speaking with colleagues on which state agencies may support these customary actors, who these customary actors are, and how many exist. Where possible, an update will be provided in due course.

Republic of the Marshall Islands

The PJSI contacts in RMI have provided initial advice, to be followed by comprehensive feedback where possible, in due course:

- The **Traditional Rights Court** is managed by the RMI Judiciary (not a state-based agency) and has jurisdiction over land rights titles, and other legal interests depending wholly or partly on customary law and traditional practices;
- **Community Courts** handle only civil and criminal matters, not customary legal disputes;
- **The Council of Iroij** (Chiefs) are state-based and supported, and do not resolve customary disputes, instead serving in a consultative capacity in reviewing bills and making submissions to parliament.

4. Feedback from the Kiribati Local Government Association

Focus

The focus of this follow-up research is:

- Determining which government agencies, departments and/or ministries are responsible for managing, supporting and consulting customary actors/hybrid actors; and
- Exploring data on the populations these state agencies/departments are servicing, and assessments they have made on the needs of these customary actors/hybrid actors in relation to dispute resolution.

Kiribati

As detailed previously, in Kiribati, several government agencies provide assistance and support to customary actors/hybrid actors:

- [Ministry of Internal Affairs](#) is responsible for providing support services to Island Councils, the village bank, decentralisation, community development, cultural affairs and the outer island development program;
- [Local councils](#) are responsible for daily interactions with the customary actors in local villages. For instance, the Kiritimati Urban Council consults with the *Marewen Eko Kiritimati* (the Old Men Association of Kiritimati) on legislative and policy matters, and with the *Te Ekonikabanei* (which comprises of all heads of families over 50 years of age, from the Tabakea village). Similarly, the *Unimwane* (Old Men Associations) surrounding Beru Island Council are responsible for the maintenance of peace and order. The councils are: Nikunau Island Council, Kiritimati Urban Council, Beru Island Council and Makin Council.

The [Kiribati Local Government Association](#) CEO, Mr Rikiau Takeke, provided some initial information on the focus of this research, and the demographics of local customary actors.

- There are 23 Chairpersons of the *Unimwane* (Old Men Associations/Male Elder Associations), who represent the whole island. They have a significant role and involvement in solving disputes and, as an island-based group, have authority to solve customary disputes. Further, they often make customary laws that prevent or deal with such disputes. Their base is the village *mwaneaba* (meeting house), which acts as a court, solving disputes or issuing penalties.
- There are 23 Mayors (three female) who serve an administrative purpose primarily, but are involved in resolving customary disputes that arise between villages.

Whilst the Kiribati Local Government Association (KiLGA) does not have the resources to support with the specific resolution of disputes, it has provided resources and training to these customary actors:

- For the *Unimwane*, KiLGA has, over the years, facilitated some training on leadership and good governance, touching on peace and harmony.
- Every two years, KiLGA brings together all 23 Mayors for a General Meeting, during which training and sharing of good practices takes place.

Mr Takeke further identified the roles that other state agencies play in supporting these actors:

- Whilst the Ministry of Internal Affairs has some resources to deal with resolving conflict, other government agencies have more capacity to manage community peace and harmony (and the customary actors enacting it), particularly: the Ministry of Justice and the Courts.
- In addition, the Ministry of Women, Youths, Sports and Social Affairs manages customary conflict resolution in partnership with churches.

Finally, Mr Takeke noted the following additional support would build the capacity of both the Mayors and the *Unimwane* to effectively perform their roles and responsibilities in the areas of community peace and harmony:

- A revival and implementation of the customary laws and practices that relate to conflict resolution among individuals (eg; husband and wife), between families or clans, and between groups or communities;
- A strengthening of traditional systems that have been neglected as people value religion as more important than custom;
- Well-planned and resourced training on national legislation that has recently been approved by Parliament; and
- Providing written manuals on these roles, responsibilities and activities.

Annex D: Terms of Reference: Project 4 - Access to Justice

Purpose: To improve accessibility of court remedies to vulnerable and marginalised groups through court outreach and community legal education about the role of courts, the rule of law, and the exercise of legal rights; and by embedding strategies within PIC courts to improve accessibility.

Outputs:

1. Follow-up support / local workshop(s) provided to up to 3 Partner Courts that received support during PJSI Phase I on access to justice, community legal education and legal empowerment to develop local training curricula and outreach strategies.
2. Develop a discussion paper on promoting access to justice through the exercise of rights of citizens by raising community awareness particularly in remote/traditional communities of the respective roles and relationships of custom and law, including the role, functions and jurisdiction of Courts
3. Enabling Rights / Unrepresented Litigants Toolkit reviewed/extended and refined to include aspects relating to custom and awareness raising in remote/traditional communities based on implementation experience.

Activities: The 2-step regional/local capacity-building modality adopted in PJSI Phase I will be complimented by follow-up support to promote uptake of interim results:

- Up to 3 x Access to Justice visits to Partner Courts - one in each sub-region - to localise and embed Enabling Rights activities locally and implement community awareness raising activities (proposed locations: Cook Islands, Kiribati, and Vanuatu [TBC]). Visits will both embed enabling rights activities undertaken in Phase I and develop research/data to inform the discussion paper.
- 1 x discussion paper on promoting access to justice and raising community awareness.
- 1 x review / update of Enabling Rights Toolkit.

Annex E: PJSI 2-Year Extension Activity Plan: Access to Justice

GOAL & OBJECTIVES

As summarised above under the Technical Director Terms of Reference C.A.2 (i).

DESCRIPTION

a. Purpose

The purpose of these activities under the PJSI's Access to Justice (Project 4) is to improve accessibility of court remedies to vulnerable and marginalised groups through court outreach and community legal education about the role of courts, the rule of law, and the exercise of legal rights, and by embedding strategies within PIC courts to improve accessibility.

b. Duration and location

This short-term assignment requires the Adviser to work up to 73 input-days to fully complete all activities defined in Part f., below. Inputs will need to be undertaken between June 2019-May 2021; remotely across the region, in-country with up to three Partner Courts; and via regional activities, as specified.

c. General approach

The Adviser should adopt the following approach to completing this assignment:

- a) To transfer, build, devolve and localise capacity in all interactions with counterparts and mentor counterparts where appropriate in a culturally appropriate and respectful manner.
- b) Produce high quality, concise and accurate documentation, reports, and correspondence as required in a timely fashion and written in plain English.

d. Baseline

The Access to Justice and Enabling Rights Toolkits have been disseminated among all PICs. Following PJSI's interventions during Phase 1, four PICs appreciate the importance of, and have developed plans to improve access to justice. These plans promote: Independence; Honesty and integrity; Competence – knowledge of law and procedure; Fairness and recusal; Efficiency and delay; and Access to justice and remedies.

More specifically, the plans focus on: Increased public awareness of the role and functions of the courts; Basic-level, public education on legal rights and responsibilities; and Training for judicial and court officers about fundamental aspects of the justice system and court process including: treatment of unrepresented litigants; appropriate judicial conduct; natural justice and procedural fairness; criminal and civil procedure; and people appearing before the courts who may be 'vulnerable' or suffer a 'disability' who may, in the interests of fairness, require additional support.

Community outreach strategies have been developed and implemented in those four PICs. Three PICs are planning, and/or taking steps to implement priority changes as identified during Phase I. Given the active prevalence and need for informal means to resolve disputes, PJSI will explore; through discussion paper, how to promote the exercise of rights in informal contexts through understanding the respective role and relationship between custom and the law.

e. Outcome & Outputs

The target outcome for the *Access to Justice Project* is that 3 PICs make incremental progress towards achieving 1 priority change by June 2020, and its goal is achieved by 2021. Indicators of those outcomes are:

- Identification of a priority access to justice-related change, committed to by each Chief Justice;
- The number, nature and sufficiency of actions taken by each PIC to progress each change and achieve its goals; and
- Progress towards, and achievement of the goal is reported.

To achieve these Outcomes, the Adviser will deliver the following outputs:

1. Follow-up support / local workshop(s) provided to up to 3 Partner Courts that received support during PJSI Phase I on access to justice, community legal education and legal empowerment to develop local training curricula and outreach strategies. This should include:
 - 1.1 After an appropriate interval, following up with the participants of community outreach consultations conducted during Phase 1 to assess the extent to which they are actively, or more confident to use the courts to resolve their disputes.
 - 1.2 Agreeing with the judicial leadership of each of the 3 PICs, a priority access to justice-related change (or changes) they wish to make by the end of PJSI.
 - 1.3 Based on progress made during PJSI Phase 1, supporting the 3 PIC to develop a comprehensive plan to feasibly deliver on the agreed access to justice goal/s, cognisant of the local operating environment, capacity and resources. Integral to this is the ability to:
 - 1.3.1 Ensure the public are aware of the role and functions of the courts, and are informed about, and confident to exercise their legal rights and responsibilities; and
 - 1.3.2 Judicial and court officers understand and align their actions and court procedures to respect fundamental aspects of the justice system and court process including: treatment of unrepresented litigants; appropriate judicial conduct; natural justice and procedural fairness; criminal and civil procedure; and people appearing before the courts who may be 'vulnerable' or suffer a 'disability' who may, in the interests of fairness, require additional support.
 - 1.4 Supporting the 3 PICs to implement the plan and report on progress.
2. Develop a discussion paper on promoting access to justice through the exercise of rights of citizens by raising community awareness particularly in remote/traditional communities of the respective roles and relationships of custom and law, including the role, functions and jurisdiction of Courts.
3. Enabling Rights / Unrepresented Litigants Toolkit reviewed/extended and refined to include aspects relating to custom and awareness raising in remote/traditional communities based on implementation experience.
4. Contribute where feasible to the programmatic objectives of court performance and accountability data collection, including gender and GFV-disaggregated data.

f. Inputs & Activities

Prior to mobilisation, the Adviser will be briefed by the PJSI Team Leader. The Adviser will then develop an implementation plan for approval by the Team Leader. The 2-step regional → local

capacity-building modality adopted in PJSI Phase I will be complimented by follow-up support to promote uptake of interim results:

- Up to 3 x *Access to Justice visits* to Partner Courts - one in each sub-region - to localise and embed Enabling Rights activities locally and implement community awareness raising activities (proposed locations: Cook Islands, Kiribati, and Vanuatu [TBC]). Visits (two working weeks in-country) will both embed enabling rights activities undertaken in Phase I and develop research/data to inform the discussion paper.
- 1 x discussion paper on promoting access to justice and raising community awareness and presentation to Chief Justices' Leadership Forum for sign-off by the region's leadership (March 2020, TBC).
- 1 x review / update of Enabling Rights Toolkit.
- Remote follow-up with counterparts to support ongoing activities after in-country visit(s) and to support PJSI evaluation, as required.
- Any other activities noted in the implementation plan developed, or necessary to achieve the defined outputs.

All activities and progress within this Project are subject to approval by the region's Chief Justices and the PJSI Executive Committee. The timing of all activities will be discussed and agreed in writing between stakeholders

Milestone Description	Due Date
Requirement Ref: C.A.2 (ii) Access to Justice Adviser	
A2J1. Successful completion of localising and delivering Access to Justice / toolkit activities in 1x PIC; submission of the Activity Completion Report within 2 weeks of completion and sign-off on the Report by the Federal Court Director and Team Leader.	25 October, 2019
A2J2. Successful delivery of a discussion paper and presentation on promoting access to justice and raising community awareness at the 5 th Chief Justice's Leadership Forum for sign off by the region's leadership.	23-25 March, 2020
A2J3. Successful completion of localising and delivering Access to Justice / toolkit activities in 1x PIC; submission of the Activity Completion Report within 2 weeks of completion and sign-off on the Report by the Federal Court Director and Team Leader.	4 December, 2020
A2J4. Successful review / update of the Enabling Rights Toolkit and submission of amended Toolkit for sign-off on by the Federal Court Director and Team Leader.	October, 2020 (TBC)
A2J5. Successful completion of localising and delivering Access to Justice / toolkit activities in 1x PIC; submission of the Activity Completion Report within 2 weeks of completion and sign-off on the Report by the Federal Court Director and Team Leader.	March, 2021 (TBC)
A2J6. Submission and sign-off on the Project Completion Report within two weeks of the completion of all activities by the Federal Court Director and Team Leader.	1 February, 2021
