



SCHOOL OF LAW

COURSE NAME: CUSTOMARY LAW

COURSE NO: LA322

TIME ALLOWED: Three (3) Hours

READING TIME: Ten (10) Minutes

NUMBER OF PAGES: Four (4), including cover

NUMBER OF QUESTIONS ON PAPER: Six (6)

NUMBER OF QUESTIONS TO BE ANSWERED: Four (4)

MARK ALLOCATED FOR EACH QUESTION: All questions carry ten (10) marks each

TOTAL MARKS: Forty (40) Marks

MATERIALS PERMITTED IN EXAMINATION ROOM: None

SPECIAL INSTRUCTIONS:

You are required to do only **FOUR** questions: the compulsory question in "Section A" and any three (3) questions in "Section B".

Approved by Head of School of Law:

Date:

Please do not turn over any page until you are told to do so.

Approved
[Signature]
2/15/04

SECTION A

The sole question in this section is compulsory and is worth ten (10) marks. The length of answers is left to your discretion but, ideally, should not exceed three pages.

QUESTION ONE

Explain the concepts of **legal positivism** and **legal pluralism** and state their respective views on the nature of "customary laws". In your discussion refer to the main personalities, published treatises or studies which underpin or illustrate these concepts. Then, relate the practical import of these views on the recognition of customary laws by formal laws in Pacific Island countries. In your discussions on the latter, furnish examples from provisions of statutes or cases from Pacific Island countries.

(10 marks)

SECTION B

You are to answer only **three** (3) questions from this section. Each question carries ten (10) marks so this section is worth thirty (30) marks altogether.

QUESTION TWO

Explain the meaning and scope of "**positive**" and "**negative**" measures which states may adopt in regards to customs. In your discussion cite legislative provisions or cases examples which illustrate these measures in Pacific Island countries.

(10 marks)

QUESTION THREE

Identify and explain **four** points where the philosophy and functioning of formal criminal justice systems differ from customary systems for social control. Explain what you perceive to be some practical consequences of these differences in the criminal laws of Pacific Island countries today.

(10 marks)

QUESTION FOUR

Sheila was born of indigenous parents in a village in your country some thirty years ago. She grew up on the island and did her primary and secondary education there. About a decade ago, she went 'south' to pursue tertiary studies and after her graduation obtained a job there. She is now fed up with the hustle and bustle of city life abroad, so she returned to the island a month ago to live with her parents. She intends to marry a local bloke and set up an eco-tourism operation on the island. You met her at kava yesterday and she sheepishly admitted that he has forgotten a lot of the customs of her people and was unsure if certain customs were legally recognised. She asks you to advise what the position, under the laws of your country, is on the following issues:

- (a) Would Sheila legally marry her newly-found island sweetheart by custom alone?
- (b) Would Sheila legally adopt her elder sister's daughter by custom alone?
- (c) Would Sheila be able to use the piece of customary land that the family allocated to her for her eco-tourism venture as security to obtain a bank loan?
- (d) Would Sheila have any legal ground to challenge in court a decision by the village chief's council requiring financial contributions and personal labour from the villagers towards the completion of the village church house?
- (e) Would the magistrate's court enforce Sheila's late grand father's oral stipulations concerning the distribution of his canoe, taro plot and other traditional valuables?

(10 marks)

QUESTION FIVE

Explain the extent to which existing formal laws recognise the participation of traditional leaders in legislative or executive and dispute settlement roles in any **three** of the following countries:

- (a) Fiji Islands,
- (b) Marshall Islands,
- (c) Samoa,
- (d) Solomon Islands,
- (e) Tonga, and
- (f) Vanuatu

(10 marks)

QUESTION SIX

There are two general views concerning customs or customary laws and their place in the legal systems of modern states.

According to one, customs are out-dated, irrelevant or inappropriate in modern societies. This is because they developed in societies with distinct social, economic and political systems. As such they are of little use in modern societies where the social, political and economic settings are different. Further, customs are viewed to be regressive because they reflect 'old' values and may contradict modern values, such as human rights norms. Therefore, in modern states customs must give way to formal laws.

Conversely, it is argued that customs or customary laws still have a place in the legal systems of states, including those in the Pacific region. This is justified on the basis that customs or customary laws are still important in the lives of segments of populations of states and should thus be recognised, if not revitalised.

Which view do you subscribe to?

Discuss your preference and in doing so, refer to legal or policy sources or materials, life experiences or current events to support your arguments. These may pertain to your own society, your country, the Pacific region or globally.

(10 marks)

End of Paper

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Good Luck with it