

BEYOND BLACKSTONE: THE MODERN EMERGENCE OF CUSTOMARY LAW

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INTRODUCTION

Modern laws are normally enacted by a legislature or developed by a judiciary. However, there has been another traditional source of social order throughout history—customs, which are “popular, normative pattern[s] that reflect the common understandings of valid, compulsory rights and obligations.”¹ Although such customs and customary rights have long been part of the law applicable to land, water, and resources connected thereto, the Supreme Court of the United States’ decision in *Lucas v. South Carolina Coastal Council*² has elevated the importance of custom by naming it as a potential defense to categorical takings claims.

A customary—or customary law—most broadly defined, is a practice or right of use exercised by a discrete and identifiable group of people (a tribe or native peoples, for example) over a particular area of land for a very long time and is recognized for certain purposes in a local court or tribunal. In most countries, the customary law may be modified or abolished by statute, ordinance, or rule enacted by government, generally through a legislative act. Thereafter, the precise definition and scope of custom as law usually depends upon the nature and history of the nation in which customary rights are claimed or exercised.

This Article summarizes the modern emergence of customary law in the United States and internationally. It discusses two distinct forms of customary law, the first being custom, as recognized in English common law and discussed by Blackstone and the second being “native customs” that are exercised by indigenous peoples. Section II discusses Blackstone’s definition of custom and the importance of

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1. Peter Orebech & Fred Bosselman, *Sustainable Development and Customary Law*, in *THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT* 43, 60 (Cambridge Univ. Press 2005).

2. 505 U.S. 1003 (1992).

custom in real property as a source of law in derogation of so-called common law. Section III explores native custom, with emphasis on the State of Hawai'i, which constitutionally protects the "traditional and customary" rights of Native Hawaiians, and on select foreign jurisdictions in which custom, often exercised by or in favor of indigenous peoples, plays a strong role in the law relating to land, water, natural resources, and self-government. Section IV analyzes the significance of custom within the United States as a background principle of a state's law of property, which gives state and local government a safe haven from liability under the categorical or total regulatory taking rules set out by the Supreme Court of the United States in *Lucas*. As this Article will demonstrate, poorly defined customary law runs the risk of intruding onto fundamental property rights such as the right to exclude. Judicial adherence to some form of the Blackstonian criteria for good customs would significantly ameliorate such dangers.

I. ENGLISH CUSTOM

A. Background

The most common and universal definition of custom finds its roots in the writings of the English legal scholar William Blackstone. It is described in his legendary *Commentaries on Laws of England*, many editions of which were published shortly after the middle of the eighteenth century.³

Blackstone wrote his commentaries, at least in part, as a polemic in favor of the common law and to buttress it against anything that might serve to weaken it. It is in this context that his commentaries on custom must be read. Indeed, Blackstone recognized three forms of customary law: common law ("general custom") by which he presumably meant common law as we view it today, court (procedural) custom of particular tribunals or courts, and "particular customs" practiced by and affecting the inhabitants of a defined geographical area. It is this third, or "particular," custom that Blackstone took care to carefully define and delimit, arguably because he viewed it as a threat to the common-law tradition that he espoused and for which he argues in the *Commentaries*.

3. Although not to the extent of another similar doctrine, the public trust doctrine.

Blackstone set out seven criteria that a customary right or practice must meet if it is to be a “good” custom—that is, one which is enforceable against a common-law principle or tradition, say, of exclusive possession of private land (a situation in which many of the disputes over custom arose). But Blackstone did not draw these seven principles from the air. Although he cited comparatively few cases, he was declaring the law pretty much as it had developed by the middle of the eighteenth century and, indeed, as it continued to develop well into the nineteenth century. To be valid, to be enforceable, to result in a right of an individual despite common-law principles to the contrary, a custom had to be immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent. Even today, the law of custom is hedged around by requirements, most of which derive directly from Blackstone’s seven criteria.

Thus, for example, a recent volume of Halsbury’s Laws of England⁴ describes the essential attributes of custom as follows:

To be valid, a custom must have four essential attributes: (1) it must be immemorial, (2) it must be reasonable, (3) it must be certain in its terms and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to effect, (4) it must have continued as a right and without interruption since its immemorial origin. These characteristics serve as a practical purpose as rules of evidence when the existence of a custom is to be established or refuted.⁵

Even so practical a source as a standard reference book of law for local government councilors has the following entry:

Custom

If a right is given to or an obligation imposed upon all the Queen’s subjects, it must be established by authority of the general law. A local custom can therefore never be general and a customary claim in the name of the general public will fail. Similarly a custom must be capable of definition, and so the courts will not

4. 12(1) HALSBURY’S LAWS OF ENGLAND (1998).

5. *Id.* ¶ 606, at 160. This entire section on custom is a superb explanation of custom today, prepared by one of the preeminent scholars in legal history, Professor J.H. Baker, Fellow of St. Catharine’s College, Cambridge.

uphold a claim on behalf of a class whose membership cannot be ascertained.⁶

It is the seven rules or criteria applicable to particular custom (not common law, not special court rules, but land rights in derogation of common law particular to a particular and limited jurisdiction and exercised by a small and definite population) which courts have dealt with, and which still form the basis for English discussion and categorization of customary law.⁷ These are:

1. Immemoriality

That is have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist.⁸

For centuries, “time out of memory” had a fixed, well-defined, and accepted meaning. The phrase is a common one in setting up a custom as a defense against what would otherwise be an unlawful act.

2. Continuity

It must have been continued. Any implementation would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. As if I have a right of way by custom over another’s field, the custom is not destroyed, though I do not pass over it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.⁹

3. Peacefulness

It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to

6. CHARLES ARNOLD-BAKER, LOCAL COUNCIL ADMINISTRATION 35 (Butterworths, 4th ed.1994).

7. See HALSBURY’S, *supra* note 4.

8. 1 WILLIAM BLACKSTONE, COMMENTARIES *76–77.

9. *Id.* at *77.

common consent, their being immemorially disputed either at law or otherwise is a proof that such consent was wanting.¹⁰

4. Reasonableness

Customs must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is always, as Sir Edward Coke says, to be understood of every unlearned man's reason. but of artificial and legal reason, warranted by authority of a law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus, a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor first put in his, is unreasonable, and therefore bad: for per-adventure the lord will never put in his; and then the tenants will lose all their profits.¹¹

The early twentieth-century cases of *Mercer v. Denne*,¹² upholding custom of the inhabitants of a parish (fishermen) to use a piece of land covered with shingle to spread and dry their nets as in favor of navigation, permitted the exercise of the custom to change with the times so long as the burden on the landowner was not unreasonable:

The tanning, clutching or oiling of nets [new] belonging to fishermen tend to preserve the nets and make them useful for a longer period, and the subsequent drying of nets seems to me to fall within the reasons thus assigned for the custom. It is laid down by Holt, J. in *City of London v. Vanacore*¹³ [a late seventeenth-century case] that "general customs may be extended to new things which are within the reason of those customs." There is not, in my opinion, evidence from which it ought to be inferred that the practice of tanning or clutching has arisen within the time of legal memory. But it was said that, so far as related to the drying after oiling, the use has extended over a period of from twenty-five to thirty-five years only, and, moreover, that this user was

10. *Id.*

11. *Id.*

12. 2 Ch. 534 (1904); 2 Ch. 538 (C.A.) (1905).

13. 12 Mod 270, 271 (1699).

more burdensome than the old user for drying after tanning or cutting. I think, however, that the law as laid down by Lord St. Leonards in *Dyce v. Hay* cited by Farwell J., applies, and that those who are entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations *so long as they do not thereby throw an unreasonable burden on the landowner*.¹⁴

Again, “[i]t must not be forgotten that the persons claiming under the custom are bound to exercise their rights reasonably and with due regard to the interest of the owner of the soil.”¹⁵

5. Certainty

Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner’s blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom, to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a years improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain. For the value may at any time be ascertained; and the maxim of the law is, *id certum est, quod certum reddi potest*.¹⁶

(a) Certainty of Practice

(b) Certainty of Locale

(c) Certainty of Persons

6. Compulsory

Customs, though established by consent, must be (when established) compulsory; and not left to the option of every man, whether he will use them or not. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every many is to contribute thereto

14. 2 Ch. 538, 581 (1905) (emphasis added).

15. *Id.* at 584 (1905).

16. 1 WILLIAM BLACKSTONE, COMMENTARIES *78.

at his own pleasure, is idle and absurd; and, indeed, no custom at all.¹⁷

The concept that a custom must be compulsory in order for it to be good is for the most part self-evident; a law is not a law if it is not obligatory to the parties. This issue is rarely addressed separately because most of the cases on custom assume that a custom is compulsory.

7. Consistency

Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For, if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.¹⁸

As with the compulsory requirement, the criterion of consistency is largely self-evident and does not appear often in the cases on customary law.

These, then, are Blackstone's seven criteria for "good" customs, as interpreted by both contemporaries and later courts in England. Since customary rights in land are in derogation of common-law rights in land—particularly the fundamental right to exclude others—it makes sense for such customary rights to be limited in their exercise. Blackstone's criteria present such reasonable limitations. Moreover, most courts cite Blackstone as authority for their customary law. It is not altogether apparent that they understand it, however.

B. The Current State of Customary Law in the United Kingdom and the Republic of Ireland

It is clear that courts within the United Kingdom—as well as within other countries directly influenced by English common law,

17. *Id.* (emphasis added).

18. *Id.* (emphasis added).

such as the Republic of Ireland—continue to give customary practices the force of law when applicable.

In *Spread Trustee Company Ltd. v Sarah Ann Hutcheson & Others*,¹⁹ the Court of Appeals of Guernsey considered the issue of whether managers of a trustee were permitted to include a clause in the trust instrument that excluded liability for gross negligence.²⁰ In 1989, Guernsey had passed a trusts law (“The Trust Statute”), amended in 1990, which had prohibited the exclusion of liability for gross negligence in trust instruments.²¹ However, the gross negligence at issue had occurred in transactions prior to 1989, before the Trust Statute and amendment were passed.²² Therefore, the court undertook to discover the law regarding the exclusion of liability for gross negligence in trust instruments in Guernsey prior to 1989. The court noted that there were no prior Guernsey statutes regarding trusts and no court cases on point.²³ It therefore looked to Guernsey customary law.²⁴

Both parties attempted to introduce favorable evidence about Guernsey customary law.²⁵ The court, after reviewing the common law of Guernsey, found that there was no reliable evidence on the customary law. It considered a letter that the Guernsey Finance Committee sent to the Guernsey President, which noted uncertainty regarding the law of trusts in Guernsey and stated that the Trust Statute was intended to replace Guernsey customary law on the subject.²⁶ The court concluded that the best evidence of Guernsey customary law on trusts prior to 1989 was the text of the Statute that replaced the customary law.²⁷ Accordingly, the court held that prior to the enactment of the Trust Statute, Guernsey customary law contained the same prohibition against including a term in the trust instrument that excluded liability for gross negligence.²⁸

19. *Spread Tr. Co. Ltd v. Hutcheson*, [2011] UKPC 13 (Guernsey). Official Press Summary available at [http://www.bailii.org/uk/cases/UKPC/2011/13.\(image1\).pdf](http://www.bailii.org/uk/cases/UKPC/2011/13.(image1).pdf).

20. *Id.* at [4].

21. *Id.* at [2].

22. *Id.* at [4].

23. *Id.* at [12].

24. *Id.* at [13]–[16].

25. *Id.*

26. *Id.* at [15].

27. *Id.* at [37].

28. *Id.*

*Crown Estate Commissioners v. Roberts & Anor*²⁹ provides another example of the contemporary use of customary law by courts within the United Kingdom. In 2002, the Pembrokeshire County Council applied to the Crown Estates Commissioners in order to register leasehold titles to a large part of the foreshore of the Pembrokeshire coastline, operating under the assumption that the foreshore and sea in the area belonged to the Crown.³⁰ Mr. Roberts, as successor in title to the Bishop of St. Davids, alleged that he had estate over the area as a result of a charter of 1115 AD.³¹ In addition, Mr. Roberts argued that he had rights to the area as a result of ancient usage.³² Mr. Roberts claimed the rights to the following: sea wrecks, wharfage, sporting, a private fishery, treasure trove, profits, estrays, and other rights.³³ The England and Wales High Court, Chancery Division, decided the case.

In assessing most of the rights, the court looked to the charter and other subsequent treaties and legislative acts.³⁴ However, the court considered Welsh customary law antedating the Norman conquest in evaluating Mr. Robert's asserted fishing, treasure trove, and estray rights. The court noted that Welsh customary laws survived in a collection of manuscripts known as the *Hywel Dda*.³⁵ The charter granting the land to the Bishop of St. Davids in 1115 AD had granted "any existing customary rights" to the Bishops. Mr. Roberts argued that existing customary rights granted by the charter included exclusive fishing rights to the sea.³⁶ After considering evidence of Welsh customary law, the court determined that ancient Welsh princes did not assert a right to a private ocean fishery, which meant that the Bishop of St. Davids, and by extension Mr. Roberts, possessed no such right.³⁷ In considering a customary right to treasure trove, the court found that customary law, in keeping with modern law, granted the right to treasure to the Crown.³⁸ However, the court did mention in

29. *Crown Estate Comm'ners v. Roberts & Anor*, [2008] EWHC 1302 (Ch), *available at* <http://www.bailii.org/ew/cases/EWHC/Ch/2008/1302.html>.

30. *Id.* at [3].

31. *Id.* at [4].

32. *Id.*

33. *Id.* at [5].

34. *Id.* at [39].

35. *Id.* at [85].

36. *Id.* at [84].

37. *Id.* at [90], [115].

38. *Id.* at [129].

dicta that it was willing to accept that Mr. Roberts had a customary right to estrays.³⁹

Similarly, the Republic of Ireland continues to adhere to the common law tradition of recognizing customs as law. In *Walsh & Anor v. Sligo County Council*,⁴⁰ the High Court of Ireland considered a case in which the plaintiff bought an enormous property that included popular access paths. The plaintiff installed a gate across the paths, thus blocking out the general public, and filed suit seeking a declaration that no public right of way existed over his property.⁴¹ In its counterclaim, the County Council argued that the plaintiff's predecessor in interest dedicated the paths to the public. However, in the alternative, the Council argued that the public had customary rights through long usage to pass over the property.⁴² Although the court noted that the onus was on the defendants to prove the existence of any customary right,⁴³ it did not reach the issue of custom because it held that the path had been acquired by prescription.⁴⁴

However, as noted in the introduction, the United Kingdom's legislature retains the power to alter or abolish a custom. For example, the United Kingdom has enacted statutes to regulate town and village greens ("TVGs"), an area traditionally governed by custom. According to the common law, TVGs were theoretically established by customary recreational usage since time immemorial.⁴⁵

In 1965, the legislature enacted the Commons Registration Act, which brought TVGs under statutory protection.⁴⁶ Section 22(1) of the Commons Registration Act of 1965 contained a definition of a TVG as land "on which the inhabitants of any locality have a customary right to indulge in lawful sports or pastimes."⁴⁷ Despite this recognition, the Commons Registration Act explicitly ended the traditional

39. *Id.* at [92].

40. *Walsh & Anor v. Sligo Cnty. Council* [2010] IEHC 437 (Ire.), available at <http://www.bailii.org/ie/cases/IEHC/2010/H437.html>.

41. *Id.* at [6].

42. *Id.* at [7].

43. *Id.* at [31].

44. *Id.* at [299].

45. *Oxfordshire CC v. Oxford City Council* [2006] 2 WLR 1235 (Eng.) (describing the traditional legal status of a village green as an area "that by immemorial custom the inhabitants of the town, village, or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation").

46. *R v. Oxfordshire Cnty. Council ex parte Sunningwell Parish Council*, [2000] 1 AC 335 (H.L.).

47. *Id.*

role of custom in the establishment of TVGs. Instead, the Commons Registration Act brought the creation of TVGs into a state regulatory framework by mandating that TVGs would not be legally recognized unless registered by a certain deadline.⁴⁸

The Commons Act of 2006, which replaced the Commons Registration Act, was enacted by the legislature to “modernize the law on commons and town and village greens.”⁴⁹ The Commons Act made, among other things, procedural changes to the process of registering TVGs established by prescription.⁵⁰ The Act did nothing to reintroduce the role of customary law in the establishment of TVGs and thus solidified the fact that statutory law exclusively governs TVGs.⁵¹

II. NATIVE CUSTOM

Fred Bosselman and Peter Orebeck have argued that “[c]ustomary law exists whenever people act as if they were legally bound to accept customary rules . . . [and that no] endorsement by any legislative, judicial, or administrative body is needed to create customary law if people accept rules as the law.”⁵² In this sense, “native customary law” can be loosely defined as the complex networks of customs that ordered behavior, defined social norms, structured economics and politics, and regulated natural resources in many indigenous societies. In much of the world, colonization by Europeans replaced indigenous systems of customary law with Western-style positivistic law. However, many native groups continue to structure their lives and identities around traditional customary law, and some have begun to strive for formal legal recognition of that fact. The following selected case studies, from within the United States and abroad, explore the complexities that result when native customary law is resurrected in nations that are governed by modern common law and statutory frameworks.

48. *Id.* (explaining that the under the section 2(2) of the Act, “no land capable of being registered under the Act was to be deemed to be common land or a town or village green unless so registered . . . mean[ing] that unless they were registered within the prescribed time-limit, they could not be registered as such thereafter”).

49. Alec Samuels, *The Commons Act 2006*, J. PLANNING & ENVTL L. 1652, 1652 (2006).

50. *Id.*

51. *Id.*

52. Fred Bosselman & Peter Orebeck, *Conclusion: Customary Law in a Globalizing Culture*, in *THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT* 445, 445 (Cambridge Univ. Press 2005).

A. Hawai'i

Customary law in Hawai'i represents a harder and certainly more sweeping situation than is the case with the English custom discussed above. Hawai'i presents more difficulty because there is no question that some tradition of customary rights exists from the days of the various kingdoms, rights that include gathering, access, and religious customary practices. This tradition predates not only statehood but also territorial days and annexation towards the end of the nineteenth century. The size of applicable territory is usually broader and the class far larger than Blackstonian custom would tolerate, although, again, long-standing—if not ancient—practice is usually a prerequisite, and formal governmental action to the contrary generally takes precedence.

As explained in *A Treatise on Native Hawaiian Law*, “[a]n important foundation of law in Hawaii is the doctrine of custom.”⁵³ Until the establishment of the Western-style kingdom of Hawai'i in 1839, Native Hawaiians lived in a traditionally organized society governed entirely by “ancient Hawaiian custom and usage.”⁵⁴ Access rights from the mountains to the sea and along the coastline,⁵⁵ as well as religious, cultural, and subsistence-gathering practices, were important customs that sustained native tenants.⁵⁶ Even as Western influence radically transformed Native Hawaiian society, many traditional customary rights were codified in the first constitution and statutory compilations of the Kingdom of Hawai'i from 1839 to 1842.⁵⁷ Moreover, between 1845 and 1855, laws recognizing the customary rights of native tenants “were an integral part of the transformation of Hawaii’s ancient communal land tenure system to a modern property regime incorporating Western concepts of private property rights. . . .”⁵⁸ Accordingly, although modern property law in Hawai'i is primarily based on Western common law, it also incorporates Hawaiian custom and usage.⁵⁹

53. Susan K. Serrano & David M. Forman, *Traditional and Customary Access and Gathering Rights*, in *A TREATISE ON NATIVE HAWAIIAN LAW* *17 (MacKenzie, Serrano & Sproat, eds., Univ. of Hawai'i Press & Kamehameha Publishing, 2014).

54. *Id.* at *2.

55. *See id.* at *3.

56. *Id.*

57. *Id.* at *7–11.

58. *Id.* at *11.

59. *Id.* at *15.

Over the last thirty years, the Hawai'i Supreme Court has interpreted the state constitution and several state statutes to confer distinct legal status on Native Hawaiian customary practices, often to the detriment of Western-style absolute property rights. The court has recognized a specific right for Hawaiians to practice customary subsistence gathering of certain items,⁶⁰ as well as a broader right to exercise traditional and customary rights on undeveloped private property.⁶¹

1. Modern Legal Bases of Native Hawaiian Customary Rights

a. Section 7-1

In 1850, the Kingdom of Hawai'i enacted the Kuleana Act, which provided that Native Hawaiian tenants could acquire fee simple ownership over lands that they traditionally cultivated.⁶² In order to ensure that native tenants could use their new lands sustainably, section 7 of the Kuleana Act granted such tenants the right to gather enumerated items such as firewood and house-building supplies from elsewhere within the *ahupua'a*⁶³ of his or her residence.⁶⁴ Section 7 is the sole provision of the Kuleana Act that remains in force in the modern statutory scheme, now codified as Haw. Rev. Stat. section 7-1.⁶⁵

In the 1982 case of *Kalipi v. Hawaiian Trust Co.*,⁶⁶ the Hawai'i Supreme Court held that gathering rights could be exercised pursuant to section 7-1 if three conditions were satisfied. As explained by *A Treatise on Native Hawaiian Law*, the three conditions are as follows: (1) the tenant must physically reside within the *ahupua'a* from which the item is being gathered, (2) the right to gather can only be exercised on undeveloped lands within the *ahupua'a*, and (3) the right must be exercised for the purpose of practicing Native Hawaiian traditions and customs.⁶⁷ Section 7-1 is limited in scope; it only authorizes

60. See *infra* notes 61–64 and accompanying text.

61. See *infra* notes 66–85 and accompanying text.

62. See Serrano & Forman, *supra* note 53, at *17 n.72.

63. An *ahupua'a* is a traditional designation of land in Hawai'i, which usually runs from a mountain valley to the adjacent ocean.

64. *Id.* at *19.

65. *Id.* at *18–19.

66. 656 P.2d 745 (Haw. 1982).

67. See *id.* at 749–50; see also Serrano & Forman, *supra* note 53, at *24.

Native Hawaiian practitioners to gather the items enumerated within the statute and only within the ahupua'a of their residence.⁶⁸ Accordingly, it could be better characterized as a statutory provision protecting a few narrowly defined customary rights than as one establishing custom as an independent source of law.

b. Section 1-1

Section 1-1 of Hawai'i Revised Statutes offers a broader legal foundation for Native Hawaiian customary rights. Enacted in 1892, it adopts English common law as the law of Hawai'i, except as "otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or *established by Hawaiian Usage*."⁶⁹ Although section 1-1 does "not directly relate to traditional or customary gathering rights[,]"⁷⁰ it does explicitly codify customary Hawaiian usage as a source of law.⁷¹ Accordingly, in recent years the Hawai'i Supreme Court has cited to it as the basis for extending formal legal status to customary gathering rights.⁷²

In *Kalipi v. Hawaiian Trust Co.*,⁷³ the court interpreted Haw. Rev. Stat. section 1-1 broadly, holding that it "may be used as a vehicle for the continued existence of those customary rights which continue to be practiced and which worked no actual harm upon the recognized interests of others."⁷⁴ Whether a Hawaiian tradition would be legally recognized as a Hawaiian usage under section 1-1 depended on a case-by-case analysis into the practice of the custom in the particular area and a balancing of the "respective interests and harm. . . ."⁷⁵ If a Hawaiian usage had, "without harm to anyone, been continued . . . [section] 1-1 insure[d] [its] continuance for as long as no actual harm [was] done thereby."⁷⁶ However, the court found that the plaintiff,

68. See Serrano & Forman, *supra* note 53, at *34.

69. HAW. REV. STAT. § 1-1 (2013) (emphasis added).

70. See Serrano & Forman, *supra* note 53, at *17.

71. *Id.* at *18.

72. *Id.* at *17.

73. 656 P.2d 745 (Haw. 1982).

74. See *id.* at 751–52; see also Serrano & Forman, *supra* note 53, at *18.

75. See *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 751–52 (Haw. 1982); see also Serrano & Forman, *supra* note 53, at *18.

76. See *Kalipi*, 656 P.2d at 751; see also Serrano & Forman, *supra* note 53, at *26.

Kalipi, could not take advantage of the section 1-1 because there was insufficient evidence to find that the traditional gathering rights that he asserted extended beyond the ahupua'a in which he lived.

In *Pele Defense Fund v. Paty*,⁷⁷ the court expanded the scope of Haw. Rev. Stat. section 1-1 by finding that customary and traditional gathering rights “may extend beyond the ahupua'a in which the Native Hawaiian practitioner resides. . . .”⁷⁸ The court held that gathering rights could be exercised for subsistence, cultural, or religious purposes outside of the practitioner's ahupua'a as long as “such rights have been customarily and traditionally exercised in [that] manner.”⁷⁹ *Pele Defense Fund* was expressly reaffirmed in *Public Access Shoreline Hawaii v. Hawaii County Planning Commission* (“PASH”),⁸⁰ in which the court held that customary rights exercised pursuant to Haw. Rev. Stat. section 1-1 went beyond the “tenant's” gathering rights enumerated in Haw. Rev. Stat. section 7-1 and were “dependent on the particular circumstances of the case.”⁸¹ The court clarified that section 1-1 “represents the codification of custom as it applies [in Hawai'i]” and concluded that such custom renders the “western concept of exclusivity . . . not universally applicable” within the state.⁸²

c. Article XII, Section 7 of the Hawai'i Constitution

Finally, traditional and customary rights are protected under Article XII, section 7 of the state constitution of 1978.⁸³ Article XII, section 7 was intended as a provision encompassing and reaffirming “all rights of native Hawaiian's such as access and gathering” but was not intended to “remove or eliminate any statutorily recognized rights . . . of native Hawaiians. . . .”⁸⁴ Importantly, the Hawai'i Supreme Court has held that section 7 imposes a constitutional

77. 837 P.2d 1247 (Haw. 1992), *cert. denied*, 507 U.S. 918 (1993).

78. See Serrano & Forman, *supra* note 53, at *26.

79. *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1272 (Haw. 1992), *cert. denied*, 507 U.S. 918 (1993); see also Serrano & Forman, *supra* note 53, at *27.

80. 903 P.2d 1246 (Haw. 1995).

81. See Serrano & Forman, *supra* note 53, at *29 (citing *Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n*, 903 P.2d 1246 (Haw. 1995)).

82. *Id.* at *29 (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1268).

83. See Serrano & Forman, *supra* note 53, at *16.

84. *Id.*

obligation on the state judiciary to preserve and enforce Hawaiian traditional rights.⁸⁵ The effect of this constitutional mandate is that “any argument for extinguishment of traditional rights based simply upon possible inconsistency . . . with our modern system of land tenure must fail.”⁸⁶

Courts have often invoked Article XII section 7 in conjunction with Haw. Rev. Stat. section 1-1. Thus, the court in *Pele Defense Fund* held that traditional and customary rights practiced for subsistence, cultural, and religious purposes on undeveloped lands were not only authorized by section 1-1 of the Hawai'i Revised Statutes but also protected by the constitution.⁸⁷ Similarly, in *PASH*, the court clarified that this constitutional obligation extended to protecting customary rights generally, beyond those “normally associated with tenancy in an ahupua'a.”⁸⁸

2. The Substance of Hawaiian Customary Gathering Rights—a Defense to Trespass

In sum, Native Hawaiian customary gathering practices have formal legal status in Hawai'i. Section 7-1 provides statutory authority for the continuance of certain customary gathering practices, although its scope is limited. Section 1-1 provides that Native Hawaiian customs and usage are a legitimate source of law in Hawai'i. Courts have interpreted section 1-1 to offer broader protection for the exercise of traditional rights beyond those enumerated in section 7-1. Finally, Article XII, section 7 of the Hawai'i Constitution obligates the state to protect “legitimate customary and traditional practices . . . to the extent feasible. . . .”⁸⁹

The most striking effect of the Hawai'i Supreme Court's recognition of customary rights is on the property rights of landowners within the state. Because “Hawaii property law protects the exercise of traditional and customary rights and the concomitant limitation of the

85. See *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 748 (Haw. 1982); see also Serrano & Forman, *supra* note 53, at *26.

86. See *Kalipi*, 656 P.2d at 748; see also Serrano & Forman, *supra* note 53, at *34.

87. See *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1272 (Haw. 1992), *cert. denied*, 507 U.S. 918 (1993); see also Serrano & Forman, *supra* note 53, at *27.

88. See *Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n*, 903 P.2d 1246, 1269 (Haw. 1995); see also Serrano & Forman, *supra* note 53, at *29.

89. See *Pub. Access Shoreline Hawaii*, 903 P.2d at 1272; see also Serrano & Forman, *supra* note 53, at *34.

owner's right of exclusion[,] . . . the owner of land in Hawaii acquires title that is uniquely subject to the rights of native tenants."⁹⁰ The custom-imposed limitation on the owner's right of exclusion is best exemplified by the fact that the Hawai'i Supreme Court has recognized that Native Hawaiian gathering rights can be asserted as a defense to trespass.

In the 1998 criminal case of *State v. Hanapi*,⁹¹ the state charged Hanapi, a Native Hawaiian, with trespass after he repeatedly entered a neighbor's private property.⁹² Hanapi, appearing *pro se*, asserted Native Hawaiian customary rights as a defense, arguing that he entered the property in order to "perform religious and traditional ceremonies to heal the land" following the neighbor's grading and filling of an area near two traditional fishponds.⁹³ Although the Hawai'i Supreme Court convicted Hanapi of trespass, it nonetheless recognized the viability of the customary rights defense. The court identified three elements that a defendant must meet to render a trespass constitutionally protected as a Native Hawaiian right.⁹⁴

First, the defendant must qualify as a Native Hawaiian.⁹⁵ In *PASH*, the Supreme Court defined a Native Hawaiian as a descendant of Native Hawaiians who inhabited the islands prior to 1778, rejecting a definition based on blood quantum.⁹⁶ The *PASH* opinion did not reach the issue of whether non-Hawaiian family members of Native Hawaiians would qualify.⁹⁷

Second, the defendant "must establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice. . . ."⁹⁸ The Supreme Court of Hawai'i has determined that a custom must have been established in practice by November 25, 1892.⁹⁹ In *Hanapi*, the court held that the custom or usage could be proven by *Kama'aina* witness testimony.¹⁰⁰

90. *See id.* at *15.

91. 970 P.2d 485 (Haw 1998).

92. *See id.* at 492; *see also* Serrano & Forman, *supra* note 53, at *36.

93. *See State v. Hanapi*, 970 P.2d 485, 486, 488–89 (Haw. 1998); *see also* Serrano & Forman, *supra* note 53, at *36.

94. *See Hanapi*, 970 P.2d at 493–94; *see also* Serrano & Forman, *supra* note 53, at *37.

95. *See* Serrano & Forman, *supra* note 53, at *37.

96. *Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n*, 903 P.2d 1246, 1270 (Haw. 1995).

97. *See* Serrano & Forman, *supra* note 53, at *37.

98. *Id.* at *37–38 (quoting *Hanapi*, 970 P.2d at 494–95).

99. *Pub. Access Shoreline Hawaii*, 903 P.2d at 1272.

100. *Hanapi*, 970 P.2d at 494–95.

Finally, the defendant must prove that the right was exercised on undeveloped land. . . .¹⁰¹ In *PASH*, the court explained that customary rights may be exercised on land that is undeveloped or “less than fully developed.”¹⁰² However, courts have not yet pinpointed the precise point in the development process at which land becomes “fully developed.”¹⁰³

More recently, in *State v. Pratt*,¹⁰⁴ the Hawai‘i Intermediate Court of Appeals held that the three *Hanapi* elements are merely “the minimum a defendant has to show in support of a claim that his or her conduct was constitutionally protected [against trespass] as a native Hawaiian right.”¹⁰⁵ The Supreme Court of Hawai‘i affirmed and held that once the *Hanapi* elements are met, the court must apply a “totality of the circumstances test” to balance the competing interests of the practitioner and the state.¹⁰⁶

3. Consistency with Blackstonian Custom

Custom has been “incorporated into Hawaii’s statutory framework for over a century.”¹⁰⁷ The *Kalipi* court, in holding that Haw. Rev. Stat. section 1-1 codified the Hawaiian usage exception to the common law, analogized to the English doctrine of custom, although it recognized that “[not] all the requisite elements of the doctrine of custom were necessarily incorporated. . . .”¹⁰⁸ More recently, *A Treatise on Native Hawaiian Law* has further explored the relationship between classic Blackstonian custom and customary law in Hawai‘i.¹⁰⁹ The authors of that Treatise analyzed the Supreme Court of Hawai‘i’s opinion in *PASH* and discerned seven elements of Hawaiian customary law to

101. See Serrano & Forman, *supra* note 53, at *38 (citing *Hanapi*, 970 P.2d at 494–95).

102. See *Pub. Access Shoreline Hawaii*, 903 P.2d at 1272; see also Serrano & Forman, *supra* note 53, at *18.

103. See *Pub. Access Shoreline Hawaii*, 903 P.2d at 1272; see also Serrano & Forman, *supra* note 53, at *18.

104. 124 Haw. 329 (Ct. App. 2010).

105. *Id.* at 355.

106. *State v. Pratt*, 277 P.3d 300 (Haw. 2012).

107. See Serrano & Forman, *supra* note 53, at *18.

108. See *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 750–51 (Haw. 1982); see also Serrano & Forman, *supra* note 53, at *25.

109. See Serrano & Forman, *supra* note 53, at *30–31.

be contrasted with the seven elements of Blackstonian custom. The seven elements of Native Hawaiian usage are as follows:

- (1) “The date by which Hawaiian usage must have been established is fixed at November 25, 1892, rather than . . . time immemorial.”¹¹⁰
- (2) “The right of each ahupua’a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site . . . continuous exercise [of the right] is not required: the custom is not destroyed . . . it only becomes more difficult to prove.”¹¹¹
- (3) The PASH court found that, at least in the context of Haw. Rev. Stat. section 7-1, there is no requirement that the practice be peaceable and free from dispute.¹¹²
- (4) “[R]easonableness concerns the manner in which an otherwise valid customary right is exercised—in other words, even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no good legal reason against it.”¹¹³
- (5) “[A] particular custom is certain if it is objectively defined and applied. . . .”¹¹⁴
- (6) In Hawaii a usage need not necessarily be compulsory, because “[t]he state has the authority under article XII, section 7 of the Hawai’i Constitution to reconcile competing interests . . . once land has reached the point of ‘full development’ it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights . . . [however,] the State does not have unfettered discretion to regulate these rights . . . out of existence.”¹¹⁵
- (7) “Consistency is properly measured against other customs, not the spirit of present laws. . . .”¹¹⁶

110. *Id.* at *30 (discussing *Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm’n*, 903 P.2d 1246, 1272 (Haw. 1995)).

111. *Id.* (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1262 n.26, 1272).

112. *Id.* at 31 (discussing *Pub. Access Shoreline Hawaii*, 903 P.2d at 1267).

113. *Id.* (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1268 n.39).

114. *Id.*

115. *Id.* (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1262 n.26, 1272).

116. *Id.* (quoting *Pub. Access Shoreline Hawaii*, 903 P.2d at 1268 n.39).

Notwithstanding the unquestionable legal and historical basis for some Native Hawaiian customary rights, these seven elements of Hawaiian usage clearly exceed the traditional bounds of Blackstonian custom. For example, the defined class and applicable territory of Native Hawaiian rights are both much broader than would be the case with customary rights as defined by Blackstone. However, there is some overlap as well; Native Hawaiian practices must be long standing and are subject to some reasonable government regulation.

Hawai'i is far from the only area experiencing a resurgence of native customary law. The following case studies demonstrate that the re-emergence of customary law is truly a worldwide phenomenon. Customary law in Norway and Greenland were thoroughly analyzed in the *Role of Customary Law in Sustainable Development*, which traces the history of customary law, assesses the continued viability of custom as a source of law in contemporary societies, and argues that customary law may play a valuable role in sustainable development. The following sections build off of that book by providing updates on the status of customary law in both Norway and Greenland and also introduce studies into the role of native customary law in South Africa and New Zealand.

B. Norway

1. Customary Law in Norway—Generally

Norwegian courts generally recognize local customs as law if the usage meets the general prerequisites of (1) longevity, (2) non-interruption, (3) freedom from dispute, and (4) reasonableness.¹¹⁷ *The Resurrection of Customary Laws*, by Peter Orebech, provides a current and comprehensive analysis of recent applications of general customary law in Norway.¹¹⁸ Additionally, the customary laws of the indigenous population of northern Norway, the Saami, have also received some recognition in recent years.

For example, in 2005, the Norwegian government enacted the Finnmark Act, which transferred ownership of 95% of the land of the

117. Peter Orebech, *How Custom Becomes Law in Norway*, in *THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT* 224, 240 (Cambridge Univ. Press 2005).

118. Peter Orebech, *Western Scandinavia: The Resurrection of Customary Laws*, 48 *TEX. INT'L L.J.* 405 (2013).

northern district of Finnmark from the state to a new legal entity called the Finnmark Estate.¹¹⁹ Section Five of the Finnmark Act recognizes the customary basis for this transfer by stating “through prolonged use of land and water areas, the Sámi have collectively and individually acquired rights to land in Finnmark.”¹²⁰ Similarly, Saami reindeer pastoral rights were affirmed by a 2001 court case on the basis of “immemorial usage.”¹²¹ Despite these and other successes, indigenous groups seeking to have their traditions recognized as law generally face an uphill battle, as the following case study of Saami fishing rights demonstrates.

2. Saami Fishing Rights as Customary Law

The indigenous coastal Saami of the northern district of Finnmark have traditionally practiced “open access” to the fisheries of that area.¹²² In modern times, many Saami fishermen would like to have their tradition of open access to fisheries recognized as customary law¹²³ in order to overturn conservation quotas imposed in 1992.¹²⁴ Peter Orebech argues that the Saami practice of open access fishing can achieve the status of customary law based on the uniformity of fishing practices within the geographic region.¹²⁵ Moreover, he argues that the local fishing practices in Finnmark meet the formal Norwegian prerequisites for recognition as customary law.¹²⁶

119. See Øyvind Ravna, *Sami Rights and Sami Law in Norway*, in *THE POLAR LAW TEXTBOOK* II 269–89, 288 (Natalia Loukacheva ed. 2013).

120. *Id.* at 276.

121. *Id.* at 280 (discussing the *Selbu* case).

122. David Callies, Peter Orebech & Hanne Petersen, *Case Studies: Hawaii, Norway and Greenland*, in *THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT* 43, 60 (Cambridge Univ. Press 2005). Under the open access doctrine, all local fishermen were afforded equal access to ocean resources. *Id.*

123. *Id.* at 57.

124. *Id.* The Saami feel that the fishing quotas exclude local small-scale fishermen in favor of large-scale commercial fishing, while the national government favors fishing quotas in order to protect dwindling fish populations. *Id.* at 58.

125. See Callies et al., *supra* note 122, at 60.

126. (1) The longevity requirement is met because the open access approach to fisheries can be proven to be at least over one hundred years old, (2) the non-interruption requirement is met because the fishermen of Finnmark repeatedly confirm steadfast joint usage and have engaged in open access practice annually without interruption, (3) the peaceable and free from dispute requirement is met because local fishermen who were interviewed universally regarded the ocean as open access, and (4) the reasonableness requirement is met because the practice would

However, Norwegian courts have yet to recognize the Saami tradition of open access to fisheries as customary law—in fact, there has been no notable jurisprudence on the subject.¹²⁷ Moreover, the Norwegian government has legislatively rejected the idea of special Saami rights to the fisheries of Finnmark.¹²⁸ In 2006, the Norwegian government appointed a joint Saami-Norwegian Coastal Fishing Commission (“The Commission”) to investigate the marine fisheries rights of the Saami and other residents of Finnmark.¹²⁹ In 2008, the Commission unanimously drafted and proposed the Finnmark Fishery Act, which stated that all inhabitants of the geographic area of Finnmark, regardless of ethnicity, had equal rights to utilize the fisheries as well as priority over non-residents.¹³⁰ Interestingly, section thirteen of the Finnmark Fishery Act contained a reservation stating that it did not infringe upon existing individual or collective property rights to the sea established by custom or usage.¹³¹

However, the Norwegian government declined to enact the Finnmark Fishery Act.¹³² In 2009, the Fisheries Minister spurned the central conclusion of the Commission by denying the existence of special fishing rights for the people of Finnmark.¹³³ In 2012, the Norwegian Parliament officially struck down the proposed Act by a vote of 106 to 34.¹³⁴ The government agreed to implement modest measures protecting Saami access to maritime resources but, unlike the Commission, rejected the idea of general customary rights to the fisheries.¹³⁵

give fishing a stable and predictable framework. David Callies, Peter Orebech & Hanne Petersen, *The Case Studies Revisited*, in *THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT* 411, 417–20 (Cambridge Univ. Press 2005).

127. U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Report on Indigenous Fishing Rights in the Seas with Case Studies from Australia and Norway* 18 (2010), available at <http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.2EN.pdf>.

128. See *supra*, note 127 and *infra* notes 129–30 and accompanying text.

129. Svein Jentoft, *Governing Tenure in Norwegian and Sami Small-Scale Fisheries: From Common Pool to Common Property?*, 1 *LAND TENURE JOURNAL* 91, 100 (2013), available at <http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/viewArticle/75>.

130. *Id.* at 101–2. The right of the people of Finnmark to use such fisheries was “based on historical use and the rules of international law on indigenous peoples” as well as on a constitutional duty to protect Saami culture. See *Report on Indigenous Fishing Rights*, *supra* note 127.

131. Camilla Brattland, *Mapping Rights in Coastal Sami Seascapes*, 1 *ARCTIC REV. ON LAW AND POL.* 28, 35 (2010).

132. See *Report on Indigenous Fishing Rights*, *supra* note 127.

133. See Svein Jentoft, *supra* note 129, at 104.

134. See *id.* at 113.

135. See *id.* at 103–04.

The fate of customary law as a means of regulating Norwegian fisheries is uncertain. The Norwegian government, like most governments, would clearly rather approach Finnmark fisheries law from within the framework of state legislation and management than create room for customary law.¹³⁶ Even the Commission, which advocated for recognition of the traditional rights of local Finnmark fishermen, only discussed custom as a source of legal rights in one paragraph of the sixteen-part proposed Act.¹³⁷ Similarly, under the proposed Act, those claiming private or collective rights to fishing grounds were to direct claims to the Finnmark Commission¹³⁸ rather than to a court.¹³⁹ In sum, the Saami tradition of open access does not appear likely to achieve political recognition as customary law as long as the government continues to approach the issue through a state regulatory framework. Meanwhile, the role of Saami customary law in Norwegian courts remains undeveloped.¹⁴⁰

Some Saami continue to work towards securing recognition of traditional fishing rights through the political process.¹⁴¹ Others feel that the Norwegian courts should recognize fishing rights as customary law,¹⁴² as advocated for by Peter Orebech.¹⁴³ Alternatively, the *UN International Labour Organization and Tribal Peoples Convention No. 169* and the *UN Declaration of the Rights of Indigenous Peoples* may provide an international law basis for recognition of customary fishing rights.¹⁴⁴

136. See Svein Jentoft, *supra* note 129, at 110.

137. The Commission was pushing towards a “regionalized, co-management model” of fisheries governance. See Svein Jentoft, *supra* note 129, at 108.

138. The Finnmark Commission is a government entity established in 1995 to resolve Saami land rights issues. See Camilla Brattland, *supra* note 131, at 35.

139. *Id.*

140. “To date, the use of Sámi customary law as a source of law in the courts is still in its initial phase. It therefore remains difficult to draw robust conclusions on its ultimate legal significance. Thus far, case law points to the fact that Sámi law has faced significant problems in working harmoniously with Norwegian law.” See Øyvind Ravna, *supra* note 119, at 288.

141. See Svein Jentoft, *supra* note 129, at 105.

142. See Svein Jentoft, *supra* note 129, at 106.

143. See *supra*, notes 126–27 and accompanying text.

144. Norway is a party to ILO Convention No. 169. See *Report on Indigenous Fishing Rights*, *supra* note 127. According to ILO Convention No. 169, Saami customs should have greater weight than Norwegian law in Saami rights questions. See Camilla Brattland, *supra* note 131, at 48. Despite international pressure to “finalize the process of clarifying Sami land and resource rights[,]” the Norwegian government regards its commitments as sufficiently fulfilled by the measures agreed to in 2011. See Svein Jentoft, *supra* note 129, at 110.

C. New Zealand

1. Background

On the other side of the world—in a situation somewhat similar to that of the Saami—the indigenous Maori of New Zealand are also fighting for recognition of their customary laws. Tikanga Maori, or the Maori system of customary laws,¹⁴⁵ is comprised of oral traditions, rituals, and practices rather than codified statutes.¹⁴⁶ Tikanga Maori is rooted in core values that define right from wrong and underlay the formal rules of traditional Maori society.¹⁴⁷ The Maori relied on tikanga Maori to inform decisions regarding leadership, social roles, access to resources, and to define various other rights, relationships, and practices.¹⁴⁸

The Maori cite to a number of historic authorities in arguing that tikanga Maori is recognized as law by New Zealand.¹⁴⁹ First, the common law doctrine of Aboriginal Rights theoretically allows Maori customary law to be incorporated into the common law legal system.¹⁵⁰ Second, section II of the Treaty of Waitangi recognized the protected status of Maori customary law through the promise of “tino rangatiratanga.”¹⁵¹ By 1896, the Waitangi Tribunal interpreted this clause to require preservation of “all Maori valued customs and possessions,” a mandate which arguably extends protection to tikanga Maori.¹⁵² Third, tikanga Maori has been acknowledged, at

145. “Tikanga Maori and Maori customary law are terms (not necessarily interchangeable) that embody the values, standards, principles, or norms that indigenous Maori had developed to govern themselves.” Linda Te Aho, *Tikanga Maori, Historical Context, and the Interface with Pakeha Law in Aotearoa/New Zealand*, 10 Y.B. N.Z. JURIS. 10, 10 (2007).

146. Robert Joseph, *Recreating Legal Space for the First Law of Aotearoa-New Zealand*, 17 WAIKATO L. REV. 74, 83 (2009).

147. *Id.* Although the values differ from tribe to tribe, the core values include “(1) the importance of genealogy, (2) authority over who might exercise certain rights, (3) reciprocity, (4) sacredness and secularity, and (5) stewardship.” See Linda Te Aho, *supra* note 145, at 11.

148. Caren Fox, *Access to Customary Law: New Zealand Issues*, 13–14 Y.B. N.Z. JURIS. 224, 228 (2011).

149. See Robert Joseph, *supra* note 146, at 75–78.

150. The common law doctrine of Aboriginal rights recognizes the continuation of local native law following British annexation. “Elements of Aboriginal rights maintained were those not repugnant to common law and which did not interfere with or challenge the new sovereign.” *Id.* at 75.

151. *Tino rangatiratanga* is translated into English as “the full exclusive and undisturbed possession of their . . . other properties.” *Id.* at 76.

152. *Id.* at 75.

least peripherally, by various statutes.¹⁵³ Whether New Zealand will actually interpret these authorities in a manner that awards sweeping and formal legal status to tikanga Maori remains uncertain.¹⁵⁴

Meanwhile, the common law of New Zealand has gradually conferred limited legal status on Maori customs and usage. As early as 1847, New Zealand courts recognized the validity of native title to land,¹⁵⁵ although the seminal 1877 case of *Wi Parata v. Bishop of Wellington* initially denied the existence of Maori customary law.¹⁵⁶ The legal status of Maori custom was revived in 1901 when the Privy Council recognized that Maori customary law could be used to prove land tenure.¹⁵⁷ Soon after, in 1908, *Public Trustee v. Loasby* held that Maori customs could be raised at common law if a three-element test was met.¹⁵⁸ Realistically, because New Zealand operates under a comprehensive system of codified laws, the second element of the *Loasby* test severely limits the application of tikanga Maori.¹⁵⁹ Despite these and other recognitions of Maori rights in the common law, mainstream courts generally disfavor recognition of these customs as law.¹⁶⁰

Additionally, the New Zealand parliament has “struggled with the notion of customary law and has consistently legislated to nullify the impact of any court decisions that it believes threatens its sovereignty as the penultimate source of all law concerning Maori.”¹⁶¹ The enactment of the 2004 Seabed Act provides an example of the parliament proactively legislating to supersede Maori customary rights recognized by courts.¹⁶² In *Ngati Apa v. Attorney General*, Maori

153. *Id.* at 64 (discussing the historic and contemporary statutes that recognize Maori customary law).

154. See Caren Fox, *supra* note 148, at 229.

155. The case of *R v. Symonds* recognized native title to land. See Linda Te Aho, *supra* note 145, at 12.

156. “Prendergast CJ found that the Maori had ‘no settled system of law’ and that an Act referring to the ancient custom of the Maori ‘cannot call what is non-existent into being.’” See *id.*; see also Robert Joseph, *supra* note 146 (discussing in detail judicial denial of Maori custom).

157. See Linda Te Aho, *supra* note 145, at 12.

158. (1) Whether the custom could be factually proven by experts, (2) whether the custom was contrary to statute, and (3) whether the custom was reasonable from the judge’s perspective. *Id.*

159. *Id.* at 13.

160. See Caren Fox, *supra* note 148, at 228.

161. *Id.* at 237.

162. See Linda Te Aho, *supra* note 145, at 14 (summarizing the court decision in *Ngati Apa v. Attorney General* and the subsequent Seabed Act 2004); see also R. P. Boast, *Foreshore and Seabed, Again*, 9 NZJPIIL 271 (2011) (discussing in detail the Seabed Act and the 2011 Marine and Coastal Area Act that replaced it).

customary rights to the foreshore and seabed were found to exist, to have survived British sovereignty, and to have not been explicitly extinguished by legislation.¹⁶³ The parliament responded with the 2004 Seabed Act, which unambiguously extinguished the asserted Maori customary rights.¹⁶⁴

The Waitangi Tribunal and the Maori Land Court are two legal institutions that currently attempt to integrate tikanga Maori into their operations.¹⁶⁵ The Waitangi Tribunal was established in 1975 to hear claims asserted by Maori regarding violations of the “principles of the Treaty of Waitangi.”¹⁶⁶ The Waitangi Tribunal actively considers evidence of tikanga Maori when evaluating claims.¹⁶⁷ It also allows testimony in the Maori language, considers evidence of custom by traditional witnesses,¹⁶⁸ and “brings together a mix of historical, legal, and tikanga Maori experts who analyze early settler and official accounts with oral history.”¹⁶⁹ Similarly, the Maori Land Court considers tikanga Maori when determining rights and interests in land¹⁷⁰ and is experimenting with new procedures and policies to further accommodate Maori values and practices.¹⁷¹

2. Customary Law in Sustainable Development

The role of tikanga Maori in the management of New Zealand’s fisheries provides a perfect example of the importance that customary law can play in achieving goals of sustainable development, as explored by Valmaine Toki.¹⁷² The Maori world-view inseparably links

163. See Linda Te Aho, *supra* note 145, at 14.

164. *Id.*

165. These are the “two legal systems most closely aligned to the revitalization of tikanga Maori.” See Caren Fox, *supra* note 148, at 231.

166. *Id.* at 231.

167. *Id.* at 233.

168. This policy appears similar to the concept of the *kama’aina* witnesses in Hawai’i. See *supra* note 101 and accompanying text.

169. See Caren Fox, *supra* note 148, at 232.

170. Maori Tikanga has been applied “in relation to ascertaining rights and interests in land, including hearing evidence of Maori customary adoptions, Maori customary title, Maori succession practices, customary marriages, Maori genealogy, sacred sites, fishing grounds, and other places of importance.” *Id.* at 234.

171. These measures include involving traditional experts in the court, appointing judges versed in tikanga Maori, and requiring judges to attend annual Maori language and educational seminars. *Id.* at 235.

172. Valmaine Toki, *Adopting a Maori Property Rights Approach to Fisheries*, 14 N.Z. J. ENVTL. L. 197 (2010).

humans and the natural environment in a unified cosmic order.¹⁷³ Therefore, many aspects of tikanga Maori emphasize the sustainable management of resources.¹⁷⁴ Under tikanga Maori, fisheries were collectively utilized, but access and use was regulated in order to protect the resource itself and to ensure its availability for future generations.¹⁷⁵

In 1986, New Zealand enacted the Fisheries Amendment Act, which introduced a fishing quota in order to protect dwindling fish populations.¹⁷⁶ The Maori appealed the Fisheries Amendment Act to the Waitangi Tribunal and the courts, arguing that it violated their customary fishing rights.¹⁷⁷ The Waitangi Tribunal issued two reports that “recognized that customary Maori fishing rights had a commercial component and that such rights were capable of evolving as recognized commercial rights in fishing.”¹⁷⁸ The Waitangi Tribunal further stated that the fishing quota had violated Maori customary rights and interfered with the Maori right to develop the fishery resource.¹⁷⁹ New Zealand courts adopted the findings of the Waitangi Tribunal.¹⁸⁰ In 1992, the Crown and the Maori entered into a settlement agreement that established both Maori commercial fishing rights and customary gathering rights.¹⁸¹

The Maori Fisheries Act was passed in 2004 to allocate commercial fishery assets to the Maori.¹⁸² Each Maori tribe received shares in a Maori-owned fisheries company, cash, and fishing quotas.¹⁸³ Essentially, Maori customary rights to fisheries were converted into private property rights under Maori control.¹⁸⁴ Maori tribes and organizations, now endowed with commercial interests, are attempting to develop organizational models that can balance financial objectives with

173. *Id.* at 200.

174. *Id.*; see also Linda Te Aho, *supra* note 145, at 11.

175. See Valmaine Toki, *supra* note 172, at 200.

176. This quota created a transferable private property right in commercial fish species. *Id.* at 206.

177. *Id.* at 207.

178. *Id.*

179. *Id.*

180. *Id.*

181. See *id.* at 208 (discussing the settlement terms).

182. *Id.* at 207.

183. The Maori company, Aotearoa Fisheries Limited, in turn, was granted partial or full ownership in a number of other large fishing and processing companies. *Id.* at 209.

184. *Id.*

customary values and sustainable outcomes.¹⁸⁵ The Maori Fisheries Act mandated that Maori organizations receiving assets have parallel commercial and traditional structures and prohibited transfer of assets away from the tribe.¹⁸⁶ The Maori Fisheries Act also codified the protected status of Maori customary fishing and gathering.¹⁸⁷

New Zealand's recognition of Maori customary rights to fisheries and the subsequent transfer of commercial assets to Maori organizations represent an interesting blend of traditional and modern considerations. This synthesis of customary and corporate values and organizations may provide a new framework for the sustainable development of resources.¹⁸⁸

D. South Africa

Large segments of the South African population continue to live under customary law,¹⁸⁹ which is derived from oral tradition and emphasizes familial and communal values over individualism.¹⁹⁰ The goal of customary law is reconciliation between parties in conflict, and to that end, the law is non-specialized, often blending criminal and civil type cases.¹⁹¹ Customary law was comprehensive before colonization but increasingly concerns only tort offense and family law.¹⁹²

Customary practices become customary laws in one of two ways in South Africa. First, some traditional courts look to "living customary law."¹⁹³ Living customary law is derived from actual practices and usage in the community.¹⁹⁴ In this framework, customs and values are dynamic and are given the force of law because they are the true

185. See Linda Te Aho, *Corporate Governance: Balancing Tikanga Maori with Commercial Objectives*, 8 Y.B. N.Z. JURIS. 300 (2005) (discussing the role of tikanga Maori in Maori corporations); see also Valmaine Toki, *supra* note 172, at 210.

186. See Valmaine Toki, *supra* note 172, at 212.

187. *Id.*

188. *Id.*

189. Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT'L L. 63, 70 (2003).

190. *Id.*

191. *Id.*

192. *Id.*

193. Craig Bosch & Chuma Himonga, *The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?*, 117 S. AFRICAN L.J. 306, 338 (2000).

194. *Id.* at 319.

source of authority and organization in a community.¹⁹⁵ Scholars and activists often advocate for living customary law because it adapts to changing conditions, thus eliminating outdated practices and staying relevant.¹⁹⁶ This conception of custom as law is criticized because it is inherently flexible and inconsistent, as there is no requirement that the practice be ancient.¹⁹⁷ Accordingly, common law courts in the country, which favor customs that are certain and readily ascertainable, will not usually apply living customary law.¹⁹⁸

Rather, South African common law courts apply what regional academics refer to as “official customary law.”¹⁹⁹ Official customary law is determined by reference to customary practices that have been codified in court cases, secondary sources, anthropological reports, and government studies.²⁰⁰ Critics feel that official customary law is Westernized, stagnant, and undemocratic.²⁰¹ However, official customary law is clearly favored by government authorities, as it is readily ascertainable and more in line with legal positivism.²⁰²

1. Treatment of Customary Law in Colonial South Africa

Colonial governments in the geographic area that is now South Africa often had difficulties with traditional customary law.²⁰³ Colonial authorities sometimes recognized the right of traditional leaders to apply customary law yet at other times forced European legal systems onto indigenous populations.²⁰⁴ When the British and Dutch settlers of the region did recognize local customs as law, it was for pragmatic reasons, as the settlers believed both that recognition was necessary to keep native populations complacent and that European law was too sophisticated to be applied to indigenous cultures.²⁰⁵

South Africa was unified into a single nation in 1910. In 1927, South Africa solidified and defined the position of traditional customary

195. *Id.*

196. *Id.*

197. *Id.* at 325.

198. See Ludsin, *supra* note 189, at 73.

199. *Id.* at 72.

200. See Bosch, *supra* note 193, at 329.

201. *Id.*

202. *Id.*

203. *Id.* at 307.

204. See Ludsin, *supra* note 189, at 66.

205. *Id.*

law with the passage of the Black Administration Act.²⁰⁶ The Black Administration Act applied only to native Africans, and was “designed to be comprehensive in reach, regulating administrative, judicial, and substantive matters such as the appointment of chiefs, establishment of courts and jurisdiction, legal status, land tenure, marriages, and succession.”²⁰⁷ It created a parallel system of traditional courts that were authorized to apply customary law,²⁰⁸ which was comprised of “Chiefs and Headsman’s Courts,” with appeals heard by “Native Commissioner Courts.”²⁰⁹ The traditional courts only had jurisdiction in cases in which both parties were black and in civil and minor criminal cases.²¹⁰ The application of customary law was severely limited by the requirement that customary law could not be repugnant to “principles of public policy or natural justice.”²¹¹

In 1988 South Africa passed the Evidence Amendment Act,²¹² which obligated all courts in South Africa to recognize customary laws “when applicable[,]” even if a party was not black.²¹³ The application of customary law was made subject to two conditions: (1) it had to be proven with reasonable certainty, and (2) it could not be repugnant to principles of public policy or natural justice.²¹⁴ The Evidence Amendment Act reinforced the legal basis for indigenous custom as law.²¹⁵ However, the inclusion of the repugnancy clause ensured that customary law was relegated to a subordinate position.²¹⁶

206. See Bosch, *supra* note 193, at 307.

207. Sanele Sibanda, *When is the Past Not the Past? Reflections on Customary Law Under South Africa’s Constitutional Dispensation*, 3 HUMAN RIGHTS BRIEF 17 (2010).

208. Chuma Himonga & Rashid Manjoo, *The Challenges of Formalisation, Regulation, and Reform of Traditional Courts in South Africa*, 3 MALAWI L.J. 157, 161 (2009).

209. See Bosch, *supra* note 193, at 307.

210. See Ludsin, *supra* note 189, at 71.

211. See Bosch, *supra* note 193, at 308. “The Public Policy to which the courts would refer was an embodiment of the sentiments of the small, dominant, white population of South Africa.” *Id.*

212. The Evidence Amendment Act states in relevant part:

(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

See Bosch, *supra* note 193, at 307.

213. *Id.*

214. *Id.* at 308.

215. *Id.* at 307.

216. See Ludsin, *supra* note 189, at 67.

In sum, during colonial and apartheid South Africa, customary law enjoyed official status. However, the jurisdiction of traditional courts applying customary laws was limited to cases in which customary law “was applicable.”²¹⁷ In practice, customary law was usually applied in family- and tort-type cases and was restricted from regulating important areas of law such as land title or succession.²¹⁸ Additionally, the repugnancy requirements of the Black Administration Act and the Evidence Amendment Act prevented the application of customary law in areas where it conflicted with common law. For example, in the 1983 case of *Ismail v. Ismail*, a South African court struck down a traditional polygamous marriage performed under customary law as being against public policy.²¹⁹ Customary law and the traditional court system were arguably used as “instrument[s] for entrenching a uniform system of indirect rule in South Africa, whereby traditional leaders became state agents in administering the affairs over whom they were appointed to rule.”²²⁰

2. Legal Bases in the 1996 Constitution of South Africa

With the fall of apartheid in South Africa, the crafters of the new government agreed to strengthen the status of customary law in South Africa.²²¹ The Interim Constitution of 1993 gave “relatively wide recognition to customary law and its institutions, thus ensuring a distinct elevation in its status in the national legal system.”²²²

The Constitution of the Republic of South Africa Act 108 of 1996 (“Constitution”) further formalized the position of customary law.²²³ The Constitution’s Chapter Twelve on Traditional Leaders implicitly and explicitly provides a legal basis for customary law in numerous sections.²²⁴ First, sections fifteen, thirty, thirty-one, and thirty-two collectively provide for “a right to culture.”²²⁵ The right to culture

217. See Bosch, *supra* note 193, at 307.

218. T.W. Bennett & C.H. Powell, *Restoring Land: The Claims of Aboriginal Title, Customary Law, and the Right to Culture*, 16 STELLENBOSCH L. REV. 431, 440 (2005).

219. See Bosch, *supra* note 193, at 308.

220. See Sibanda, *supra* note 207, at 32.

221. See Ludsin, *supra* note 189, at 68.

222. See Bosch, *supra* note 193, at 309 (discussing the provisions of the Interim Constitution in great detail).

223. See Ludsin, *supra* note 189, at 68.

224. *Id.*

225. Section 31, for example, provides that “[e]very person shall have the right to use the

arguably includes the right to live by culturally based customary laws, because culture is often defined to include legal systems.²²⁶ Second, sections 211(1) and (2) “recognize the institution, status, and role of traditional leadership, according to customary law[,]”²²⁷ and allow traditional leadership to govern locally, “subject to custom and legislation.”²²⁸ Third, section 212 calls for future legislation to empower traditional leaders to deal with “customary law and the customs of communities observing a system of customary law.”²²⁹ Fourth, customary law and common law are mentioned as equals in Section 39(2) and (3).²³⁰ In particular, section 39(3) allows for people to raise claims of rights conferred by customary law, although it does not grant an affirmative right to customary law.²³¹ Fifth, and most significantly, section 211(3) explicitly mandates that “the courts *must* apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”²³² This mandatory duty imposed by section 211(3) distinguishes it from similar language in the Black Administration Act, which left the application of customary law to the court’s discretion.²³³

However, the potential application of customary law under the Constitution is limited by several clauses. For example, section 211(3) provides for the mandatory application of customary law only “when applicable.”²³⁴ In many situations it is not clear whether customary or common law should apply, and there are few existing authoritative

language and to participate in the culture of his or her choice.” See Bosch, *supra* note 193, at 310; see also Ludsin, *supra* note 189, at 68.

226. See Bosch, *supra* note 193, at 310.

227. *Id.* at 313.

228. *Id.*

229. *Id.*

230. *Id.*

In terms of s 39(2): ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’ Whereas in terms of s 39(3): ‘The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’

Id. at 313 n.4. (emphasis in original).

231. See Ludsin, *supra* note 189, at 68.

232. See Bosch, *supra* note 193, at 313.

233. See Ludsin, *supra* note 189, at 68 n.28.

234. See Bosch, *supra* note 193, at 314.

guidelines.²³⁵ Likewise, section 211(3) provides that customary law is applied subject to the Constitution, which includes the Bill of Rights. Proponents of customary law fear that aspects of customary law that run counter to principles of equality in the Bill of Rights may be struck entirely.²³⁶ Such proponents advocate instead for the courts to “develop” customary laws until they are in line with the “spirit” of the Bill of Rights.²³⁷ Similarly, Schedule 6, section 2 of the Constitution holds that all legislation adopted prior to the Constitution remains in force until repealed.²³⁸ Thus, the repugnancy clause of the Evidence Amendment Act of 1988 may survive and further limit the application of customary law.²³⁹ Finally, there is no explicitly stated affirmative right to be governed by customary law in the Constitution.²⁴⁰

3. *Substantive Developments Since 1996*

Despite its ambiguities, the Constitution has reinvigorated the standing of customary law in South Africa by forming the legal basis for contemporary developments and reforms of customary law.²⁴¹ However, the status of customary law, and the form that it should take, are still the subject of debate.²⁴²

South African Courts have struggled to apply customary law in a manner that is consistent with the Bill of Rights. The three cases discussed below demonstrate the complex legal landscape that courts must navigate when applying customary laws while at the same time attempting to uphold constitutionally protected gender equality rights.

The 1997 case of *Mthembu v. Letsela* considered the viability of the practice of primogeniture²⁴³ as customary law.²⁴⁴ The plaintiff was a widow with one daughter, while the defendant was the father of the

235. *Id.*

236. *Id.* at 317.

237. *Id.*

238. See Ludsin, *supra* note 189, at 68.

239. *Id.*

240. *Id.*

241. See Sibanda, *supra* note 207, at 32.

242. *Id.* at 34.

243. The customary practice male primogeniture mandates that the eldest male descendant inherits property “to the exclusion of female relatives and younger male relatives” in exchange for the obligation to provide for dependents. *Id.* at 33.

244. See Bosch, *supra* note 193, at 332.

plaintiff's deceased husband. The plaintiff had married her husband under customary law and did not dispute that customary rules of succession applied. However, the plaintiff argued that under the new Constitution the rule of primogeniture was gender discriminatory.²⁴⁵ Accordingly, the plaintiff asked the Court to modify the customary law in order to allow her daughter, as the deceased's sole heir, to inherit the property.²⁴⁶ The High Court, after considering evidence of customary practices in the form of archives and testimony from expert witnesses, determined that primogeniture was not gender discriminatory, because it required the male inheritor to provide for any widows and female descendants of the deceased.²⁴⁷ The Court thus upheld primogeniture as customary law and applied the law accordingly. This decision was superseded by the decision of the Constitutional Court in *Bhe v. Magistrate Khayelitsha* and the "RCSA" of 2009.²⁴⁸

In 1997, a South African court considered the case of *Mabena v. Letsoalo*.²⁴⁹ *Mabena* involved a dispute between a widow's family and the deceased husband's family over the validity of the customary law marriage between the couple.²⁵⁰ The husband's family argued that the customary marriage was invalid because the mother of the bride had negotiated it, while traditionally the father performed such marriage negotiations.²⁵¹ The court noted that males traditionally arranged customary marriages, according to official records on customary law.²⁵² However, the court also considered evidence that in contemporary culture the custom had shifted to allow women to perform marriages.²⁵³ The court upheld the validity of the marriage, thus modifying the customary law of marriage to comport with the Constitution and shifting community practices.²⁵⁴

The Constitutional Court recently modified the customary marriage practice of polygamy in the 2013 case of *Mayelane v. Ngwenyama*

245. *Id.*

246. *Id.*

247. *Id.*

248. See Himonga, *supra* note 208, at 179; see also *infra* notes 267–69 and accompanying text.

249. See Bosch, *supra* note 193, at 335.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 336.

*and the Minister for Home Affairs.*²⁵⁵ The court invalidated a man's marriage to a second wife based on the finding that his first wife did not consent to the second marriage.²⁵⁶ In doing so, the court held that the first wife's consent was necessary for a valid polygamous marriage.²⁵⁷ The court considered this the best compromise in order to bring the customary law of polygamous marriage in line with the requirement of gender equality in the Reform of Customary Marriages Act and the Bill of Rights.²⁵⁸

Additionally, in the decades since the end of Apartheid and the passing of the Constitution, the South African legislature has considered, and sometimes passed, a number of bills specifically relating to customary law.

The Recognition of Customary Marriages Act of 1998 ("RCMA") extends official State recognition to traditional marriages performed under customary law.²⁵⁹ The RCMA created a system of registration for customary marriages, including polygamous marriages, and applies to marriages entered into before and after passage of the Act.²⁶⁰ The legislature brought the customary laws regarding traditional marriage in line with the Bill of Rights by making women equal partners in marriage and mandating that ownership of property be shared.²⁶¹ However, critics point out that beyond "idiosyncratic tinkering to accommodate polygyny . . . there is now little substantive or procedural difference from the common law when it comes to customary marriage."²⁶²

The Traditional Leadership and Governance Framework Act of 2003 ("TLGFA") lays out the powers and responsibilities of traditional leaders.²⁶³ The TLGFA aims to restore the legitimacy of traditional leaders, stating that they should be appointed according to

255. Chuma Himonga, *Mayelane v. Ngwenyama and Minister for Home Affairs: A Reflection on Wider Implications*, CUSTOM CONTESTED (Jan. 25, 2015, 3:00 PM), <http://www.customcontested.co.za/mayelane-v-ngwenyama-and-minister-for-home-affairs-a-reflection-on-wider-implications/>.

256. *Id.*

257. *Id.*

258. *Id.*

259. See Sibanda, *supra* note 207, at 33.

260. *Id.*

261. *Id.*

262. *Id.*

263. See Himonga, *supra* note 208, at 162.

customary practices and should work to clarify and develop customary law.²⁶⁴ The TLGFA attempts to bring traditional leaders in line with the Constitution by requiring gender equality and a one-third presence of women in traditional councils.²⁶⁵

The customary succession practice of male primogeniture, under which the eldest male descendant inherits property “to the exclusion of female relatives and younger male relatives” in exchange for the obligation to provide for dependents, was declared unconstitutional in the 2007 Constitutional Court case of *Bhe v. Magistrate Khayelitsha and Others*.²⁶⁶ The Reform of Customary Law of Succession Act and Regulation of Related Matters Act of 2009 (“RCSA”) codified the *Bhe* court’s finding and statutorily overrode customary law by requiring that female and younger male relatives inherit their fair share.²⁶⁷ It is argued that succession under customary law now mirrors its common law counterpart.²⁶⁸

The South African legislature has struggled to pass a bill that would redefine the role of traditional courts²⁶⁹ applying customary law.²⁷⁰ The South African Law Reform Commission (“The Commission”) began investigating the role of customary law and traditional courts in 1996. The Commission did extensive research, consultations, and studies on how best to reform traditional courts and in 2003 submitted a report and draft bill to the South African Department of Justice. In 2005, the Legislature repealed the Black Amendment Act but temporarily extended provisions regulating traditional courts until replacement legislation was passed.²⁷¹ The Department of Justice did not introduce the Commission’s draft bill to the Legislature and instead began its own review and drafting process in 2006.²⁷² In 2008,

264. B. Mmusinyane, *The Role of Traditional Authorities in Developing Customary Laws in Accordance With the Constitution: Shilubana and Others v Nwamitwa*, POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD 161 (2009), available at <http://www.saflii.org/za/journals/PER/2009/15.html>.

265. *Id.*

266. See Sibanda, *supra* note 207, at 33.

267. *Id.*

268. *Id.*

269. As discussed above, traditional courts were established by the Black Administration Act of 1927 and are viewed by many as having been used as a tool of oppression. See Sibanda, *supra* note 207, at 162; see also Ludsin, *supra* note 189, at 71.

270. See Himonga, *supra* note 208, at 163.

271. *Id.*

272. *Id.* at 166.

the Department of Justice's Traditional Courts Bill was introduced into the legislature, in which it generated enormous and divisive controversy.²⁷³ The Traditional Courts Bill failed to pass in 2009 and again floundered upon its reintroduction in 2011.²⁷⁴ To date, the legislature has not passed the Traditional Courts Bill.²⁷⁵

The Legislature's difficulty with the Traditional Courts Bill highlights contemporary debates on the role of customary law in South Africa.²⁷⁶ Almost all sides in the dispute agree that the Constitution recognizes traditional justice systems and customary laws. There is also a general consensus that the State should support customary law systems and work to bring customary laws in line with the Constitution.²⁷⁷

The devil is in the details. For example, stakeholders disagree about whether individuals should be able to opt out of the customary law system.²⁷⁸ Likewise, they disagree on whether appeals from decisions of the traditional justice system should go to higher traditional courts or directly to common law courts.²⁷⁹ The degree of female participation that should be required in traditional courts is at issue.²⁸⁰ Whether legally trained attorneys or traditional individuals should staff courts is also a point of contention.²⁸¹ Additionally, some see the Traditional Courts Bill as an attempt to put the indigenous population under the control of broadly empowered traditional leaders.²⁸²

E. Greenland

Native populations do not always seek to elevate their traditional customs to formal law. For example, in Greenland, customary law has

273. *Id.* at 166.

274. *Traditional Courts Bill (TCB)*, CUSTOM CONTESTED (July 18, 2014, 3:00 PM), <http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/>.

275. *Id.*

276. See Himonga, *supra* note 208, at 163.

277. *Id.* at 166.

278. *Id.* at 167.

279. *Id.* at 167.

280. *Id.* at 167. The current wording of the Traditional Courts Bill ensures that women may participate in court but does not ensure that they will be decision makers. *Id.* at 172.

281. *Id.* at 172. Currently, in traditional courts lawyers are barred, and the traditional leaders cross examine witnesses themselves. See Ludsin, *supra* note 189, at 71.

282. See Sibanda, *supra* note 207, at 34.

been largely abandoned even though the ruling government is almost entirely composed of indigenous persons. Much like in South Africa, the situation in Greenland provides a good example of the complex relationship between customary practices and modern realities among some indigenous populations.

In the first part of the twentieth century, customs largely defined life in Greenland.²⁸³ In particular, hunting was closely linked with the customary way of living.²⁸⁴ As Greenland has developed, customary ways of living have been replaced by more modern lifestyles, especially in the most populous parts of the island.²⁸⁵ Although Greenland has a large indigenous population and has been under indigenous home rule since 1979,²⁸⁶ the government of Greenland has neglected to implement custom as a source of law.²⁸⁷ Custom has not been integrated into law due to foreign elements in the central government, the strongly local nature of customs, apathy towards customary life among young Greenlanders and women, and the fact that the government has no need to rely on customs in order to achieve legitimacy.²⁸⁸ In particular, the transformation from hunting-based lifestyles to a modern society has revolutionized gender roles, which has had a negative effect on the continued viability of certain gender-based customs.

However, some Greenlandic customs survive as myths and watered-down traditions that have become integrated into modern ways

283. Custom largely determined ways of living within extended families, organization in communal activities such as hunting and sharing food, and defining gender roles. *See Callies et al., supra* note 122, at 72.

284. Greenlanders hunted seals, whales, and caribou. Hunting was seen as a means of survival, an important public activity, a cohesive way of structuring the community, and a source of identity. *See Callies et al., supra* note 122, at 70–72.

285. Under Danish rule, “a social democratic, modernized, industrial way of life” was introduced as a “political, economic, and legal model.” *See Callies et al., supra* note 122, at 66.

286. Until 1953 Greenland was a Danish colony. From 1953 to 1957 Greenland was an equal part of the Danish realm. From 1979 to 2009 Greenland had home rule, under which a Greenlandic parliament and government were established while judiciary remained Danish. *See Callies et al., supra* note 122, at 66.

287. The Greenland government has adopted a Danish legal system because it is heavily dependent on imported academic staff from Denmark and looks to outside models of governance for guidance. *See Callies et al., supra* note 122, at 67.

288. *See Callies et al., supra* note 122, at 68–69. “Especially in the early years of home rule, the mere fact that representatives were Greenlandic, endowed them with a strong legitimacy, which probably did not need a strong underpinning through explicit and formal consideration of customs in home rules regulations.” *Id.*

of living.²⁸⁹ Greenlandic customs often emphasize dependence on nature and sustainable practices.²⁹⁰ Curiously though, Greenlanders do not necessarily regard customary practices as superior in achieving sustainability.²⁹¹

In 2009, Greenland achieved “Self-Rule,” which replaced Home Rule.²⁹² The Self-Rule Act granted Greenland expanded power to exercise executive, legislative, and judicial power in a number of fields.²⁹³ The Act also established procedures for the eventual independence of Greenland.²⁹⁴ The expanded autonomy under Self-Rule, especially in the area of the courts, may allow for greater integration of customary law into Greenland governance.²⁹⁵

For example, customary law may play a role in the future of the Greenland judiciary. Greenland utilizes a Danish-style justice system and has not yet created a separate indigenous legal system.²⁹⁶ However, local customs play an informal role in the justice system.²⁹⁷ Under the judicial system created in 1956, Danish-style laws are administered, but lay assessors and lay judges administer local courts.²⁹⁸ These lay judges informally incorporate customary laws into the judicial system by taking traditional ways of thinking into consideration when rendering discretionary decisions.²⁹⁹ As of 2010, the courts remained under the control of Denmark but, under the provisions

289. See Callies et al., *supra* note 126, at 424.

290. See Callies et al., *supra* note 126, at 424.

291. In fact, many customary practices, such as hunting, may conflict with environmental regulations and a Western idea of sustainability, although such hunting practices were traditionally sustainable. See Callies et al., *supra* note 126, at 427.

292. This Act was passed by the Danish parliament following two Self-Rule Commissions and a referendum in Greenland. Mininnguaq Kleist, *Greenland's Self-Governance*, in THE POLAR LAW TEXTBOOK I 171, 171 (Natalia Loukacheva ed. 2010).

293. THE GREENLAND SELF-GOVERNMENT ARRANGEMENT, STATMINISTERIET, http://www.stm.dk/_a_2957.html (last visited June 1, 2015).

294. *Id.*

295. However, some academics doubt that true Inuit self-governance, in terms of customary law, can ever occur under the framework of a foreign, Western-style government. See NATALIA LOUKACHEVA, THE ARCTIC PROMISE: LEGAL AND POLITICAL AUTONOMY OF GREENLAND AND NUNAVUT 64 (Univ. of Toronto Press Inc. 2007).

296. *Id.* at 79. The Inuit possessed a legal framework that depended on myths, elders, shamans, traditional ceremonies, and self-restraint to maintain order. *Id.* at 85.

297. *Id.* at 91.

298. Lay assessors and lay judges have limited legal training but are recruited from the local population and speak Greenlandic. *Id.*

299. *Id.*

of the Self-Rule Act, will eventually be transferred to Greenland,³⁰⁰ a transition that some academics hope will allow for greater incorporation of Inuit customary law into the court systems.³⁰¹

The state of customary law in Greenland provides an interesting contrast to the other nations discussed in this section. Although Greenland's government is comprised of an Inuit majority that is sensitive to Inuit concerns and working towards autonomy,³⁰² native traditions, structures, and values continue to play a minimal role in the governance of Greenland.³⁰³ Clearly there is a complex interplay between native customary law, formal Western-style government, and indigenous populations.

III. THE APPLICATION OF CUSTOM IN U.S. TAKINGS LAW: "BACKGROUND PRINCIPLES" SAFE HAVEN FOR GOVERNMENT IN TOTAL REGULATORY TAKINGS

A. *Lucas* and "Background Principles"

The most significant and far-reaching effect of customary law in the United States exists in the context of land use. In the 1992 case of *Lucas v. South Carolina Coastal Council*,³⁰⁴ the United States Supreme Court created its now famous "categorical rule" for regulatory takings. Pursuant to the Fifth Amendment to the United States Constitution, the rule requires the government to provide just compensation whenever it denies a property owner all "economically beneficial use" of land.³⁰⁵ Neither the purposes behind the denial nor the circumstances under which the land is acquired can diminish the government's liability.³⁰⁶

The *Lucas* Court did, however, establish two exceptions to the otherwise inflexible "categorical rule," declaring that the rule does not apply if, first, the challenged regulation prevents a nuisance or, second, the regulation is grounded in a state's background principles of

300. See Mininnguaq Kleist, *supra* note 292, at 184.

301. See NATALIA LOUKACHEVA, *supra* note 295, at 79.

302. *Id.* at 64.

303. *Id.* at 65.

304. 505 U.S. 1003 (1992).

305. *Id.* at 1019.

306. See, e.g., *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354 (Fed. Cir. 2000).

property law.³⁰⁷ Because the law of nuisance is full and comprehensive as well as comprehensible, the first exception presents little difficulty.³⁰⁸ Leaving nothing to chance, the *Lucas* Court explained that the nuisance exception would allow the government to prohibit the construction of a power plant on an earthquake fault line or the filling of a lake-bed that was likely to result in flood damage to a neighbor without incurring takings liability.³⁰⁹ By contrast, the Court was silent with respect to the meaning of the second exception of “background principles of state property law.”³¹⁰

A major and often unexplored question in takings law is the extent of the background principles exception. The subject is important for two distinct reasons. First, it is not always easy to discern what comprises such background principles. Second, once defined, the principles can, when subject to expansive interpretation, seriously erode the basic *Lucas* doctrine meant to provide compensation for regulatory takings that deprive an owner of all economically beneficial use of land. A related issue is the extent to which background principles analysis overlaps with the continuing discussion of the role of investment-backed expectations in *Lucas* situations (there should be none) and the so-called “notice” rule arguably raised by pre-existing state statutes in either total (*Lucas*) or partial (*Penn Central Transportation*) taking analyses.

Although *Lucas* failed to provide explicit guidance concerning the definition of the background principles exception, it noted that restrictions premised upon such principles “inhere in landowner’s

307. *Lucas*, 505 U.S. at 1020–32.

308. See, e.g., *M&J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995) (holding that the coal company had no right to conduct nuisance-like activities while surface mining in West Virginia); *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025 (Colo. Ct. App. 1996) (holding the same under Colorado nuisance law); see also *Colo. Dep’t of Health v. The Mill*, 887 P.2d 993 (Colo. 1994) (en banc) (holding that federal statutes restricting the disposition of uranium mine tailings fell within the background principles exception so as to deny a landowner use of a sixty-one acre parcel, even though the applicable statutes were enacted after the landowner acquired the property). For a collection of recent exemption cases (and a summary of takings law generally), see ROBERT MELTZ ET AL., *THE TAKINGS ISSUE* 167–95 (1999); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523 (1999).

309. *Lucas*, 505 U.S. at 1029.

310. *Id.* at 1029–30.

title itself.”³¹¹ On the basis of this statement, governments³¹² and commentators³¹³ have turned to state common law property doctrines to identify underlying title limitations and, thus, background principles. From this scrutiny, it is now clear that at least three sources of state property restrictions may qualify as background principles within the meaning of *Lucas*: statutory law existing prior to the acquisition of land,³¹⁴ custom,³¹⁵ and public trust.

B. The Oregon Cases on Custom

Several courts in the United States have declared public rights or rights of a huge class of strangers to cross private land based exclusively on some version of customary law. Perhaps the most famous of these is *State ex rel. Thornton v. Hay*,³¹⁶ in which plaintiffs sought to prevent the Hays from constructing improvements on the dry-sand beach portion of their lot between the high water line and the upland vegetation line. Rejecting the proffered bases of prescriptive rights and easements, the court decided in favor of the plaintiffs *sua*

311. *Id.* at 1029.

312. See Michael M. Berger, *Inverse Condemnation and Related Governmental Liability*, ALI-ABA Course of Study, Annual Update on Inverse Condemnation 11, 35 (Oct. 1996) (noting that “[s]ince *Lucas*, government agencies have been combing their archives in search of arcane matters that might be said to have been part of a property owners’ title and that severely restricts the use of land”).

313. See Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995) (arguing that the public trust is a “background principle” that allows regulation of barrier beaches without just compensation); Katherine E. Stone, *Sand Rights: A Legal System to Protect the “Shores of the Sea,”* 29 STETSON L. REV. 709 (2000) (arguing that the public trust doctrine can be expanded to restrict development on non-trust lands for the purposes of preserving public beaches without triggering a taking).

314. See generally R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001) (discussing the role of pre-existing statutes in regulatory takings analysis).

315. See David J. Bederman, *The Curious Resurrections of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10003 (2000); Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai‘i*, 20 U. HAW. L. REV. 99 (1999) (discussing the analysis of custom, including its application to takings).

316. 462 P.2d 671 (Or. 1969).

sponte, extending customary rights to virtually the entire population of Oregon along its entire coastline:

Because many elements of prescription are present in this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.³¹⁷

Lest the reach of custom be misunderstood in a *per se*, total regulatory takings context under *Lucas*, the same court in *Stevens v. City of Cannon Beach*³¹⁸ responded to a takings claim over the refusal of local government to grant a seawall permit on customary rights interference grounds and held that the customary law of Oregon preventing such construction was a background principle of state property law and therefore an exception to the categorical total taking rule when a property owner was left with no economically beneficial use of his land.

CONCLUSION

Custom is rising Phoenix-like from the ashes of Blackstone's limitations on the English common law that forms the basis of common law in the United States. It arises both from renewed interest in the rights of Native Americans and from the background principles of state property law exception to the doctrine of regulatory taking.

In the first, custom can provide a means for guaranteeing certain rights of native peoples in lands owned (technically held in fee simple) by others. The argument that a true customary right survives transfer from one owner to another is strong, although, as the cases in the foregoing sections demonstrate, custom is always subject to control and destruction by legislative act. The growing recognition of native

317. *Id.* at 676.

318. 854 P.2d 449 (Or. 1993).

customary rights has assumed global proportions. However, as the above international case studies demonstrate, it can be difficult to integrate systems built around indigenous customary laws into modern statutory schemes.

In the second, custom can provide a basis for a local, state, or federal land use regulation that will survive constitutional challenge as a taking of property without compensation even if it leaves a landowner with no economically beneficial use of the land. Akin to its twin nuisance exception, such a background principle of a state's law of property is not a part of the landowner's bundle of ownership sticks to begin with, so that its "taking by regulation"—like the perpetration of a nuisance—is not protected by the Constitution's Fifth Amendment.

Property rights, however, and particularly private property rights, are hedged with restrictions governing rights in the land of another such as easements, profits, licenses, and covenants. One with no right to enter the land of another is a trespasser, as is demonstrated by a majority of land cases. This right to exclude is a critical part of American jurisprudence with respect to private property rights. As the American Law Institute noted in its *Restatement of the Law of Property*:

A possessory interest in land exists in a person who has a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.³¹⁹

Another commentator describes the "notion of exclusive possession" as "implicit in the basic conception of private property."³²⁰ The Supreme Court has many times made the same point. Thus, in *Kaiser Aetna v. United States*³²¹:

In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is

319. RESTATEMENT OF PROPERTY § 7 (1936).

320. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985).

321. 444 U.S. 164 (1979).

exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the . . . servitude . . . will result in an actual physical invasion of the privately owned marina. And even if the Government physically invades only an easement in the property, it must nonetheless pay just compensation.³²²

Again, in *Loretto v. Teleprompter Manhattan CATV Corp.*³²³:

Moreover, an owner suffer a special kind of injury when a stranger directly invades and occupies the owner's property. As [another part of the opinion] indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent or nature of the invasion.³²⁴

Indeed, the right to exclude has achieved international status with the 1999 opinion of the European Court of Human Rights in *Case of Chassagnou and Others v. France*.³²⁵ Before the Court was the French *Loi Verteille*³²⁶ which provides for the statutory pooling of hunting grounds. The effect on the plaintiffs (three farmers) was to force them to become members of a municipal hunters' association and to transfer hunting rights to the association, with the result that all members of the association may enter their property for the purpose of hunting.³²⁷ The government of France claimed that the interference with the applicants' property rights was minor since they had not been deprived of the right to use their property, and all they lost was the right to prevent other people from hunting on their land.

However, the Court found that while it was "undoubtedly in the general interest to avoid unregulated hunting and encourage the

322. *Id.* at 179–80 (citations omitted).

323. 458 U.S. 419 (1982).

324. *Id.* at 436 (citations omitted; emphasis included).

325. 3 Eur. Ct. H.R. 23 (1999)

326. Law No. 64-696 of July 10, 1964.

327. Chassagnou, 3 Eur. Ct. HR. 23, ¶ 13.

traditional management of game stocks,”³²⁸ (clearly the purpose of the *Loi Verdeille*), the interference with the applicants’ fundamental right to peaceful enjoyment of their land was “disproportionate”:

[N]otwithstanding the legitimate aims of the *Loi Verdeille* when it was adopted, the Court place the applicants in a situation which upsets the fair balance to be struck between protection of the right of property and the requirements of the general interest. Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified.³²⁹

Such obvious intrusions on private property—in particular the well-documented right to exclude needs—must comply with certain restrictions and criteria common to the concept of custom. Blackstone provides such criteria not only as a matter of reason but also as a matter of law because he is almost always cited in the reported American cases on custom and customary law.

As the discussion in section IV of this Article demonstrates, American courts usually get it wrong. Of the seven criteria set out in the *Commentaries*, the most critical appear to be certainty, reasonableness, and continuity. Contrary to the language in the *Thornton* case from Oregon, reasonableness is not a matter of present use but of original legal unfairness at its inception. Customs that unduly burden property rights of the landowner or which favor unduly one group or person over others are unreasonable. If a custom is reasonable in these terms at its inception, then it is reasonable. Thus the court’s statement that “reasonableness is satisfied by evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community”³³⁰ is beside the point and wrong.

The Blackstonian criterion of certainty goes to the clarity of the customary practice or right, the restrictive certainty as to locale (some legally recognized division like a county, a city, a town, or a village), and certainty as to a class of persons or section of the public. The

328. *Id.* ¶ 79.

329. *Id.* ¶ 85.

330. 462 P.2d 671, 677 (Or. 1969).

Thornton court's statement that "certainty is satisfied by the visible boundaries of the dry sand area and by the character of the land, which limits the use thereof to recreation uses connected with the foreshore"³³¹ is vague as to the first requirement, far too broad with respect to the second, and altogether fails to deal with the third.

As to continuity, the court says that a "customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right."³³² True for the first part, false for the second part. As Blackstone (and the cases) make abundantly clear, it is the *right* of use which must be continuous. The use itself goes to evidence of that continuity of right, but the use itself is otherwise irrelevant.

To sum up, American courts cite (appropriately) Blackstone when finding custom as a basis for permitting what would otherwise be a trespass on private land. Unfortunately, they usually get it so wrong that the basis in custom must certainly fail. Without another basis for justifying such invasive intrusions on private property, those exercising such rights are trespassing, and governments that permit (or require) such trespass are taking private property without compensation contrary to the Fifth Amendment of the Constitution.

Custom is amorphously defined somewhat differently when referring to customary practices of native and/or indigenous people. Native customs are usually defined as a usage or practice over time that is universally recognized as a rule governing behavior by most if not all people affected by it. Some add that the custom responds to specific societal needs over time. Others, like the expert and commentator Peter Orebech, would argue that the practice needs to be public, justified, reasonable, and morally well founded.³³³ In Hawai'i such indigenous customs have been recognized as a defense to trespass, although they are subject to certain criteria and limitations.

It is clear that the proper role and scope of custom as a source of law will continue to be an important and controversial topic both in the United States and abroad well into the twenty-first century.

331. *Id.*

332. *Id.*

333. Peter Orebech, *How Custom Becomes Law in Norway*, in *THE ROLE OF CUSTOMARY DEVELOPMENT IN SUSTAINABLE DEVELOPMENT* 224, 233–40 (Cambridge Univ. Press 2005).

