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Introduction Rationales of Ownership

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The makers of the Papua New Guinea Constitution put a remarkable instrument into place when they determined that the underlying law of the new country was to be both English common law (as it existed at the time of Independence) and customary law.¹ Both are built up through precedent; neither have blanket applicability. Where conflict arises, they are subordinate to national laws on the statute book and to principles enshrined in the Constitution.² In the case of customary law, this leads to an outcome as significant at the beginning of a new century of international agreements as it was important at the beginning of Papua New Guinea's history as an independent state.

The outcome sounds obvious: customary law enacts a presumption of diversity. Rather than customary law being incorporated through a set of generalised axioms about traditional practices and expectations implying some kind of consensus, it is left as an open and uncodified field. It is up to the litigants and judges in each individual case to plead and determine the relevance of specific customary practices to the case in hand. As a consequence, however regional or local their occurrence, no customary practice is too 'small' for consideration; if it can be taken as a set of facts relevant to the case, then it carries the weight of law. This conserves the diversity of local practices without legislators having to draw up a national schedule or reducing the practices to the lowest common denominator in order to achieve consistency across the country – neither possible in practical terms, nor for that matter desirable. There are two general implications here, for which this