

CUSTOM INSIDE AND OUTSIDE OF CONSTITUTION IN THE PACIFIC ISLAND COUNTRIES TODAY

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INTRODUCTION

One of the continuing challenges for the countries of the Pacific islands region is finding a position for customary authorities and custom within their constitutional frameworks. A common approach at independence was to provide that customary law was a source of law and to make provision for a legislative framework to be developed for the courts to be able to use the “relevant rules of custom”. Although the path of customary law into the state courts has been less well trodden than was anticipated, multiple other mechanisms have been established for facilitating the inter-operation of state and customary systems of justice and even Christianity over the subsequent decades. Combined, these paths lead to the co-constitution of today’s Pacific islands legal systems.

The theoretical argument underpinning this paper is that we need to stop thinking of state or customary systems as separate normative orders that must or must not be joined together or bridged, and instead think broadly about what makes up the normative framework in reality in Pacific island countries today. This normative framework is given concrete objective expression in in both formal and informal ways (legislation, case-law, decisions made by individuals and leaders). However, it is also comprised by multiple narratives about law that spring from many different sources – custom, Christianity, foreign (and now local state) legal systems, and international treaties – which are interpreted and combined and given meaning by different communities in different ways.² All legal decisions, by individuals as well as decision-makers,

¹ This paper is a first draft. It is made publicly available for the purposes of soliciting feedback, which would be very welcome: Miranda.forsyth@anu.edu.au

² Cover, Robert, "The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative" (1983). Faculty Scholarship Series. Paper 2705. http://digitalcommons.law.yale.edu/fss_papers/2705

involve complex conscious and unconscious fusions of these narratives, none of which springs from an entirely bounded and pure legal system.

Within this swirl of narratives there are also strongly entrenched myths about the existence of different legal systems and their unchanging forms and values, and hence people regularly talk about “custom” and “state law” as if they were entirely separate. It is important to be aware of the role such myths play in shoring up power and privilege, as well as being alive to the various impulses behind boundary-drawing. It is also necessary to identify the dynamic and interactional nature of normative development, to actively counter arguments about the incompatibility of custom and state law that are still regularly made, and indeed were made by Vanuatu’s former Ombudsman in his opening remarks to the conference this paper was written for. Rather than focusing on substantive law, this paper instead identifies some of the main institutional sites or mechanisms for the interaction of what is thought of as being state and customary law; sites of what Robert Cover describes as *jurisgenesis*, namely the creation of legal meaning.³

One of the aims of the paper is to draw attention to the continued interest amongst both the general public and law makers in finding ways to alter legal mechanisms in ways that reflect a continued commitment to both custom and the demands of state justice. It is clear that there is no less interest in this area than at independence as we can see from the multiple contemporary examples discussed below. Understanding some of the ways in which this occurs will hopefully also lead to insights into *why* they are considered desirable; and also the impacts that new laws and interpretations of law have on different interest groups within society. Seeing law making in this way - as a continuous process of meaning-making and an expression of competing visions of the future - can also hopefully open new ways forward in dealing with those cases that arise when there is seeming incompatibility between the demands of custom and state law.

All of this is not to deny that there are not times when hard decisions will not have to be made between which vision of law to follow, and the reality that these issues will sometimes be resolved in a very adversarial and non-mutually accommodating manner. An example of this occurred earlier this year in Vanuatu when a judge sent some defendants to prison for statements made arising from the context of their wearing of custom dress in court, an action the judge

³ *ibid.*

interpreted as displaying a hint of lack of respect for the court.⁴ However, even in the context of “hard cases” or seemingly intractable competing demands, an analysis that factors in time can also demonstrate that mutual accommodations can be arrived at. As we will see below, in Samoa the long debated issue of banishment appears to be edging towards a degree of resolution; aided in part by the several decades of judicial over-riding of banishment decisions by the village fono. As a participant at the conference insightfully observed, these cases led to the village fono being humiliated by the state’s claims they have no power, and generated a willingness to meet the state half-way in some restrictions of this customary power.

SITES OF MIXING

a) The Writing of By-Laws and Community Constitutions

There is an ongoing trend in many countries in the region to produce local by-laws or community constitutions. This was a sporadic practice throughout the region even before independence, but seems to have intensified recently in some countries in the region.

Some of these by-laws are being initiated by customary authorities and community leaders. For instance in 2011 the Vanuatu NCC produced a new ‘roadmap’ for the chiefly system in Vanuatu. One recommendation was to write all custom laws and rules. Certainly recently I have heard of dozens of by-laws being written throughout Vanuatu, some of which are done with the assistance of lawyers and which involve an informal process of approval by the police. In 2014 the New Caledonian Customary Senate developed a Charter of the Kanak People which purports to codify the common values of the Kanak people.⁵ Similar processes have been reported as occurring in other parts of the region as well, such as Solomon islands. In some places this process is identified as being a codification of custom, in other places it is the result of community discussions about what new laws are needed to deal with common community problems (drunkenness, disturbing the peace, adultery etc), and in many it is a combination of the two. For instance, the community of Gor in the highlands of Papua New Guinea wrote a Community Base Law in 2006 in response to recurrent election-related tribal fights, a high incidence of sorcery-related killings, and a general breakdown in law and order.

⁴ <http://time.com/4538119/judge-vanuatu-traditional-attire-contempt-court/>

⁵ <http://www.senat-coutumier.nc/le-senat-coutumier/la-charte-du-peuple-kanak>

In some places this codification is being led by the judiciary – for example the Chief Justice in PNG is leading a project to codify customary law in Manus.

In other places it is being initiated by the legislature, for example in Samoa under the new Village Fono Bill 2016 currently before Parliament, the Village Council may develop village rules and village determinations for village economic development, harmony etc of the village. They can be registered with the Ministry of Women, Community and Social Development in order for them to be recognized by the court, but importantly they do not have to be. The aim of the Bill is “to strengthen our culture to ensure stability in Samoa by strengthening the role of the Village Fono and to ensure that the exercise of the powers of the Village Fono are in accordance with the Constitution.”⁶ In Samoa for quite a long time there has been co-drafting of laws in relation to marine management, for example the Fisheries Act 1998 provides for bylaws to be developed between the villages and the Ministry for the conservation and management of fisheries. We were also told at the conference that in the Solomon Islands that two wards have just promulgated a customary ordinance through the provincial government system. It will be interesting to see determine the exact legal standing of such an instrument.

In yet another manifestation, in New Zealand a group of academics led a project which aims to assemble a compendium of historical references to the institutions and concepts of Māori customary law, the Te Mātāpunenga project.

Finally in Fiji there is currently a by-laws project being led by the Ministry of iTaukei Affairs, and appears to be envisaging a by-law developed at a national level and then rolled out to individual villages.⁷ This proposal has met with resistance from the Fiji Women’s Centre as a result of controls on dress and women’s behaviour.⁸

One issue raised by these developments is whether or not these by-laws breach provisions in Constitutions such as freedom of movement (banishment or sending back to islands is often a popular punishment) or treatment of women (eg payment of women/ children as fines). Many of

⁶ <http://www.palemene.ws/new/parliament-business/bills/2016-bills/>

⁷ <http://fijisun.com.fj/2016/10/27/village-by-laws-to-regulate-activities/>

⁸ <http://www.matauvuale.com/forum/topics/proposed-village-bylawswhats>

the by-laws I have seen have provisions that seek to control women and girls in ways that are contrary to their constitutional rights, which is a cause of great concern. It is essential to find ways to check such repressive uses of the narrative of custom so as to not allow it to become a tool of domination.

The issue of the constitutional compliance with the power of banishment is specifically dealt with in Samoa's recent reforms, and it is attempted to be overcome for by way of providing natural justice types of safeguards, however this has not been tested by the courts.

A central concern I have about these developments is that customary conflict resolution and governance are about much more than just "the rules" – they also involve a different set of values and processes for managing conflict and bringing about social order. However, the process of writing them down and making them 'look like' state laws obscures this broader reality. The focus on the "rules" of custom is also seen in various constitutional references to customary law, such as s51 of the Vanuatu Constitution.

The codification of custom has also been criticised on the basis that it 'freezes' custom in the present and hence limits its dynamic and flexible quality. The approach taken by the Kanak Senate and Tuvalu in seeking to set out the underlying values rather than the "rules" may be a better approach.

Although it is apparent that this practice is an ongoing one, and prevalent across many parts of the region, the literature about it is extremely thin. For example, we know very little about: (a) the processes of creating these laws — How are they being drafted and by whom? For what reasons? What individuals/institutions are driving them? [Is it the same sort of frustrations that are leading to rejections of liberal democracy around the world?] What if any is the role of international actors? (b) what exactly is being codified — Is it general principles? Detailed customary offences? (c) how they are being used — Are they actually being used in managing conflicts at local levels or in the state courts? If so, how? Are they strengthening the legitimacy

of community leaders? And, very importantly, what impact are they having on youth and women?⁹

b) Use of Customary Law in State Court Judgments

At independence, customary law was enshrined in the constitutions of all Pacific island countries (with the exception of Tonga) either as a general source of law or particularly in relation to land. However, there was a marked lack of mechanisms to chart the course for exactly how this was going to work in practice. The most common approach was to provide that this would be developed later through legislative enactment. For example, section 51 of the Vanuatu Constitution provides “Parliament may provide for the manner of the ascertainment of relevant rules of custom.” However, such enactments have only occurred in a handful of places.¹⁰ It appears however that this is still a live issue in the region, and we were informed during the conference that just this week the Solomon Islands had gazetted the Custom Recognition Act 2000.

It is beyond the scope of this paper to provide an overview of how the courts have incorporated customary law into their judgments in the past decades, either through the use of these legislative instruments or outside of them. However, this would be a fascinating project and very possible today thanks to the resource of PacLII.

c) Creation of Hybrid Courts

⁹ I have written a bit more about this issue here: http://ssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/IB-2014-53-Forsyth-ONLINE_0.pdf. Happily whilst searching for this reference I came across some new North American by-laws written for my own “clan”, demonstrating that this is an extremely broad ranging phenomenon; readers will surely be as delighted as I to read that ‘Whether bearing the family name of Forsyth or not, the blood of this lineage runs true and red with a definite mark of greatness that constantly comes to the forefront in all professions and all walks of life.’ *Clan Forsyth Society of the USA Constitution and By-Laws* (2009) <http://static1.squarespace.com/static/576aa31a03596e7bb3462622/t/57890346c534a56ba8edc192/1468597076089/By-Laws+2009.pdf>

¹⁰ PNG Underlying law Act , Ord. 21, r. 30 of the Western Pacific High Court (Civil Procedure) Rules 1964 applying in Kiribati and Tuvalu provides that a party who is relying on 'native law or custom' must state that law in pleadings with sufficient particularity to show the nature and effect of the native law or custom and the geographical area and the line or group of persons to which it relates; also Solomon Islands (Civil Procedure) Rules 2007, r. 5.3(d); Civil Procedure Rules 2002 (Vanuatu), r. 4.2(1)(d) (source Corrin, Jennifer (2011) Accommodating legal pluralism in Pacific Courts: Problems of proof. *International Journal of Evidence and Proof*, 15 1: 1-25. doi:10.1350/ijep.2011.15.1.366)

The creation of hybrid courts in Melanesia, such as local courts in Solomon islands, island courts in Vanuatu and Village courts in PNG have been the subject of much analysis.¹¹ They are vibrant sites of hybridisation; and have themselves given rise in some instances to further hybridised institutions. For example, my colleague Fiona Hukula describes the informal mediation processes of the Village courts outside of the “full court” context, and the involvement of village court officials in even more localised “komiti” that operate in urban areas in Port Moresby.

d) Incorporate Customary Processes into State Justice System

The incorporation of customary processes into the state justice system has mostly occurred in the criminal law correctional context, through diversion programs and community supervision orders. An interesting new development in Vanuatu has been the regular requirement to make it a requirement to perform a *kastom* reconciliation ceremony as part of a condition of parole by the Parole Board. For example in *Jeffery* [2014] VUCPB 30 (17 October 2014) it was ordered as part of the release conditions that the defendant ‘must reside at Isangel village Lenakel area, on the Island of Tanna. He must perform a *kastom* reconciliation ceremony to his victim's family.’¹²

e) State Justice System Recognises a Role for Customary Authorities

Another mechanism of mixing of state and custom law is the recognition by the state of the right of customary institutions to provide certain justice roles. This happens both formally and informally.

Informally, the classic situation is where just “turn a blind eye” to the operation of the customary system, which may in some contexts be argued to be *de facto* recognition.

¹¹ Daniel Evans, Michael Goddard and Don Paterson, *The Hybrid Courts of Melanesia* (2010) http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/06/01/000386194_20110601052126/Rend ered/PDF/620970REVISED0000public00BOX358362B.pdf

¹² *see also* Belten [2015] VUCPB 12 (20 May 2015); Lokin [2013] VUCPB 8

It is also done formally in a variety of ways, often in relation to determinations over land as is illustrated by section 48 of the Cook islands constitution¹³ and the new land laws in Vanuatu.¹⁴ The classic examples are the Village Fono Act 1990 in Samoa and the Falekaupule Act 1997 in Tuvalu (that set out detailed roles and responsibilities for customary institutions. A similar desire to involve customary institutions in interpreting and applying customary law is manifested in section 66A of the Cook Islands Constitution (inserted by constitutional amendment in 1995) which provides for a role for the Aronga Mana to make a decision on ‘matters relating to and concerning custom, tradition, usages or the existence, extent or application of custom.’¹⁵

A more recent and creative example is the MoU signed between the Vanuatu Intellectual property office and the Malvatumauri to give the Malvatumauri responsibility for the identification of customary ownership of traditional knowledge in various intellectual property registrations.

There are a number of issues arising from such a demarcation of jurisdictional boundary, pertinently: 1) What scope should be the scope of the authority of the customary authority? 2) What oversight role should and can state courts exercise over customary authorities in such contexts? The challenge is to find a way that restrains the arbitrary and unfair exercise of power by customary institutions but does not unnecessarily impact upon their flexibility and creativity – nor dictate what “fair” means! These are extremely challenging issues I have discussed (but not by any means solved) in further detail elsewhere.¹⁶

Even where oversight is explicitly provided through statute, there is often a deal of flexibility in how strictly any legislative oversight is interpreted by the judiciary. For example the recent

¹³ Section 48(3) of the Constitution now provides that ‘the Land Division shall not exercise any jurisdiction or power in relation to land or chiefly titles in any of the islands of Mangaia, Mitiaro and Pukapuka, and such other islands as may be prescribed by Act’ and ‘[w]here on any island to which subclause (3) applies, jurisdiction or power in relation to land or chiefly titles is exercised in accordance with the customs and usages of that island, the exercise of that jurisdiction or power shall be final and binding on all persons affected thereby, and shall not be questioned in any Court of law.’

¹⁴ Siobhan McDonnell, ‘Better protection for custom owners: Key changes in Vanuatu’s new land legislation’, *Pacific Institute Outrigger Blog*, <http://pacificinstitute.anu.edu.au/outrigger/2014/03/04/better-protection-for-custom-owners-key-changes-in-vanuatus-new-land-legislation/>

¹⁵ This provision is discussed extensively in a forthcoming article by myself in the JSPL entitled The challenges of legal pluralism in the Cook Islands and beyond: An insight from *Hunt and Tupou & Ors v Miguel*, Cook Islands Court of Appeal, 19 February 2016

¹⁶ *Ibid.*

statement by the Palau Supreme Court indicates the judiciary there is opting for a very hands off approach:

‘[A]lthough we have the authority to step in to resolve disputes concerning customary matters, this court opts for the exercise of the least supervision necessary.’ Supreme Court of Palau, *Nakamura v Nakamura* [2016] PWSC 13

f) **State Justice System Seeks to Regulate/Change Customary Practices**

Another way of viewing the mixing of state and custom law making narratives is in the attempts by both state and customary authorities to change customary practices. Although this is more accurately concerned with substantive law rather than institutions of law, it is helpful to briefly think about the range of situations in which this occurs. There is a lot of talk about the need to distinguish between good and bad customary practices and to support the former and suppress the latter. For example, section 5 of the 2010 Constitutional Amendment in Tuvalu states ‘Notwithstanding subsection (5), any law, or any act done under a valid law, which accords with traditional standards, values and practices shall not contravene subsection (1) above, unless the relevant traditional standard, value or practice would be regarded by an ordinary modern citizen of Tuvalu as one which should be eliminated.’¹⁷ However, as what is good and bad depends largely on perspective and the power politics at play, this exercise has not proceeded smoothly. The most common targets are bride price, polygamy, sorcery violence, payback and gender based violence.

Formal Attempts by Both the Courts and the Legislature

By statute: for example, in PNG an amendment in the *Civil Registry (Amendment) Act 2014*, allows for the registration of the first wife in customary marriages, which impacts the practice of polygamy by recognising only the first wife and her children to be the only beneficiaries to the husband.

By law reform commission: for example the Vanuatu Law Commission recently wrote a report on sexual offences and customary reconciliation and recommended that only customary

¹⁷ http://www.paclii.org/tv/legis/num_act/cotsvapaa2010783/

reconciliations that are voluntarily accepted are recognised by the courts as mitigating factors in sentencing.

By courts: for example there have been a progression of judgments in PNG whereby sorcery related killings are given heavier and heavier punishments as part of an expressed desire by the judges to stop these practices.

Informal Attempts by Agents of the State Justice System

Over the past decade or two I have also been given many accounts by agents of the state justice system about how they have informally altered the customary practices or decision-making through discussion and debate. Initiatives to change customary law have also sprung at times from customary leaders, for example as illustrated by desires by some to ensure that their by-laws are consistent with the state criminal laws.

An example of state agents impacting customary practices was recently recounted to me by a police officer in a Melanesian country. As it is not possible to prove sorcery or witchcraft in a court of law, officials in the state justice system often direct such complaints (informally/formally) to community leaders. On this occasion there were concerns that the accusations of sorcery were leading to upset in the community involved, and concern there would be violence. The customary leaders organised a meeting; and asked the police to attend to keep the peace. The police attended and indeed were needed to stop violence from breaking out. The customary leaders questioned the accused and the family of the deceased and others to find evidence of sorcery. (There is increasingly reference to the need for proof in such cases, possibly an idea brought in from the state system, another example of hybridisation). At one point during the meeting the customary leaders declared that the accused must replace a life with a life, but rather than being killed would be required to give up their daughter to the family of the deceased. The police officer then stepped in and said that this was actually against the provisions of the constitution and would lead to international outcry (invoking, you see, not just national but international justice systems). The chiefs therefore revised their decision and required the payment of a substantial customary fine, and also a return to the accused's home island. Case closed, all parties shook hands, and set a date for payment. However, the accused then went to

see a lawyer and went to the court for a protection order against those who were accusing him and also brought a defamation action against those who had accused him/her.

This example in particular highlights how futile it is to try to analyse “law” from either the customary or the state legal perspective: both need to be understood as they influence and inform the operation of each and the way in which legal subjects behave in relation to each.

g) Creation and Abolition of Chiefly Chambers/National/Regional Councils of Chiefs

Finally it is important to consider the creation and abolition of chiefly chambers/ national councils of chiefs. Many constitutions in the region created these at independence, but subsequently we have seen the creation of new ones and abolition or amendment of the powers of others.

In terms of creation, the Micronesian Chamber of Chiefs was proposed in 1990 although the proposal was defeated in 1991 constitutional referendum. Most recently there was a motion to establish a Pacific Forum for the Traditional Leaders of the Pacific, adopted by the 45th Session of the House of Ariki (Cook islands). This proposal emerged during the 50th birthday of the House of Ariki in the Cook Islands and it is to my knowledge the first time a regional customary authority has been proposed. The Ariki were joined in their anniversary celebrations by traditional leaders from the region (mostly Polynesian but also members of the Customary senate of New Caledonia). A committee has been established to come up with a draft design, functions and roles etc of the new regional council. There has also recently been an increase in powers exercised by a national chiefly council. The Vanuatu Constitutional Amendment Act 2013: (2) provided that ‘The Council must (replacing “may”) be consulted on any question, particularly any question relating to land, tradition and custom, in connection with any bill before Parliament.’

In terms of abolition, the Fiji Great Council of Chiefs was abolished in 2012.

One important issue these developments raise is the relationship of chiefly councils to the government: what types of power does a formalisation of the relationship open up and what does it close down? In relation to Micronesia, Petersen argues ‘Keeping chiefs out of government seems to have been a deliberate means of preserving both their role as protectors of the people

and the traditional structures of competing power blocs'. In other words; having them as an outside force is another "check and balance" in a Pacific islands democratic system; that may actually be more effective.

h) Individuals

Often the same person occupies a number of different roles – they may be a pastor, a judge and a customary leader all at the same time. Such individuals literally embody sites of mixing, and also of boundary drawing. It is interesting to be aware of the extent to which such individuals consciously articulate different roles and sources of authority in different contexts, and why they do so.

(i) Churches Getting into the Regulatory Space

I also wanted to briefly mention the church as a regulatory actor in the region; both being co-opted by the state and also seeking to become more regulatory agents. An example of enrolling the churches is the decision made by the government in PNG to allocate the churches responsibility for working to overcome sorcery related violence. The Sorcery Act was repealed in 2013 and the CLRC recommended that the churches play a larger role in this area. Just last week the AG explained:

‘Since the work of sorcery is a work considered to be of the devil, we have allocated the work to the churches in PNG to work on it, look it into the theological perspective and reason and teach people about Christian faith and not to believe in sorcerers’

Some churches are also making a concerted effort to get into the regulatory space, and seeking to explore the potential of using the bible to address social ills. The newest development has been the launch of the Theology of Gender Equity Handbook in 2016 which uses the words and concepts of the bible as a vehicle for changing beliefs and actions around the role of women in society and the acceptability of gender based violence.

CONCLUSION

The current picture about the significance of custom in the region today is clearly complex. The aim of this paper was to highlight the rich range of jurisprudential practices springing up left right and centre. The take-home message is that there is lots and lots of mixing and mingling of custom and state law in the region today, but mostly not in the ways envisaged by the founders of the constitutions.

Finally, during questions following the delivery of this paper Professor Paterson raised the issue of what to do about chiefs misbehaving and justifying their actions either in the name of custom or merely relying on their positions of power not be taken to account. This is a visible issue in Vanuatu but also throughout the Pacific. On reflection, my answer to this is that rather than thinking of this as we are wont to do as an issue of “custom”, a more helpful approach is to characterize the problem more generally as being an instance of arbitrary use of power. Once seen in that light, we are then able to identify what state and non-state mechanism/ factors/ institutions both enable such abuse and can and could constrain it.