

## THE NATURE AND FUNCTIONING OF PACIFIC LEGAL SYSTEMS

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### A STORY OF PACIFIC LAW

To help to understand the reality of Pacific legal systems<sup>1</sup> I want to start with a story, which began with a phone call I received in March 2009, on the same day I began to think about this paper. A ni-Vanuatu husband and wife were adopting a ni-Vanuatu baby. The mother of the baby agreed to the adoption as did her parents. The new parents had signed papers that they also agreed to the adoption. The husband had gone to collect the baby. Three uncles were refusing to allow the baby to be handed over unless they were paid 20,000 vatu (about NZ\$300). Apparently some sort of custom right was being asserted as the basis for this demand. I was asked whether this was legal. Some quick research showed that in Vanuatu the *Adoption Act 1958* (UK) applies.<sup>2</sup> Under this Act either giving payments for a baby or demanding payments for a baby is illegal.<sup>3</sup> As a solution to the immediate problem might involve the police, who may not be sure of their authority if the law being broken is not the *Penal Code* [Cap 135] I also checked this law, and found a provision prohibiting extortion.<sup>4</sup> The criminal law lecturer provided the contact of a very helpful sergeant in the child protection unit of the police force.

Armed with this information I got back on the phone, only to be faced with a number of problems. First, it turns out that the birth mother and the baby lived on a totally different island from that of the adopting parents. Getting the police and driving over to the place of the dispute<sup>5</sup> (which is what I had assumed we would be able to do) was not going to be a solution. Second, the papers the adopting husband and wife signed were with the husband who had gone to the baby's island to collect the infant, and the wife had no copies. The husband had no access to fax services or computer services so getting copies of the papers was going to be difficult. However as the police may not ask for evidence before intervening, the wife went to the police station and asked to see the sergeant. The

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<sup>1</sup> The Pacific legal systems that I am most familiar with are those of the University of the South Pacific member countries: Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. The discussion of Pacific legal systems is therefore limited to these jurisdictions.

<sup>2</sup> On Independence Vanuatu adopted, as a source of law, 'British... laws in force or applied in Vanuatu immediately before the Day of Independence... to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.' (*Constitution* Art 95(2)). The *Adoption Act 1958* (UK) has been accepted by the courts as forming part of Vanuatu law. See, for example, the recent case of *In re Estate of Molivono* [2007] VUCA 22 <http://www.paclii.org>.

<sup>3</sup> Section 50.

<sup>4</sup> Section 138 *Penal Code* [Cap 135].

<sup>5</sup> Police sometimes do not respond because "there is no fuel for the truck", so physically collecting police is sometimes a good strategy.

next problem was there had been a killing of a ni-Vanuatu man by a French man the night before. “Sorry”, the wife was told, “All the police are busy, come back tomorrow.”

The wife managed to get 20,000 vatu together. She also managed to get access to some pigs in the event that a custom payment was asked for.<sup>6</sup> However, based on past experience, the wife had a fear that if they paid once, the birth family would demand payments on an ongoing basis. That night the wife rang the husband and told him, “I have sought legal advice and we are not allowed to pay for the baby. If they want money we do not want the baby.” The next day the wife again went to see the police and asked to see either the particular sergeant or any other police officer. She was again told, “Sorry, we are too busy, come back on Monday.” The story is going happily at the moment as a custom resolution was reached. The uncles paid the husband a pig and a mat and the husband had to break one wing of a live rooster.<sup>7</sup> The baby is now with her new family.

There is, however, one chapter to go. The papers that have been signed, which confirm that the mother of the child and her family are willing to give the baby for adoption are still on the other island. The wife has been told by the police that once she gets the papers all she needs to do is to take them to be registered at the civil status department in order to make the adoption legal. This is not in accordance with the *Adoption Act 1958* (UK), which requires that the court make an adoption order before children can be entered into the Adopted Children Register.<sup>8</sup> The *Civil Status (Registration) Act* [Cap 61] (Vanuatu), is silent on the registration of adoptions. Once the wife gets the paperwork we will see if we can get the adoption registered or whether we need to make an application to the Supreme Court in accordance with the *Adoption Act 1958* (UK).

### **Readings of the story**

This story tells us many things about the legal system in Vanuatu, and can have many readings. It could be a story about how people will try to assert State prescribed legal rights if they perceive that injustice is being done, even if that injustice is in accordance with custom. Alternatively it could be a story about how “custom” can be abused and how money distorts custom.<sup>9</sup>

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<sup>6</sup> Whilst this would also be in breach of s 50 of the *Adoption Act 1958* (UK) it is arguable that in interpreting the statute a custom payment would be seen not as payment for the baby but a ceremonial gift.

<sup>7</sup> I am not sure of exactly what custom resolution has been reached. The husband and wife are from a different island from the baby and her family, and the islands do not share identical customs. The wife had never heard of a ceremony in which the wing of a live rooster gets broken, and was not sure if this ceremony symbolises that the dispute is finished, or symbolises that the ties of the baby to her birth village are permanently broken.

<sup>8</sup> Section 20(1) *Adoption Act 1958* (UK).

<sup>9</sup> The Vanuatu National Council of Chiefs have decided that custom payments should only be made in custom money. (Reference to this policy can be found in the Objectives and Activities of the 2007 Year of the Traditional Economy <http://www.vanuatuculture.org/documents/KastomEkonomiAktivitiListEng.doc> (Accessed 10 April 2009)). “True custom” would therefore presumably not involve a demand for a money payment.

It could be a story about people not understanding what the law is and how the law works,<sup>10</sup> or a story of how the adopted State law is not appropriate for the Vanuatu situation as it fails to recognise the prevailing customary practice.

It could be a story about how geography hinders responses by State legal services, or the lack of availability of legal remedies. It could be a story about inadequacy of response by the police, or it could be given a gendered reading and tell a story of how local women get treated by the police. It could be a story about lack of authority of the State legal system or a story about how custom is the actual source of authority that provides legal order.

In all except for the first reading a notable theme is the absence of the State legal system.<sup>11</sup>

### **WHY DO WE GET COMPLEX PACIFIC LAW STORIES?**

In Vanuatu, and other countries in the Pacific, we are faced with stories of State laws being absent, or working in unexpected ways, every day. Why is this? Part of the answer relates to resources. All of the University of the South Pacific (USP) member countries are developing nations,<sup>12</sup> with limited financial and human resources. The reach of institutions of the State is constrained by these resource limitations and this hinders both the coercive ability of the State and development of understanding about what State law is and how it works.<sup>13</sup> But, even if Pacific countries had unlimited resources I would not expect to see State law being consistently followed.

Part of the reason is the colonial histories of Pacific Island States and the consequent newness of the State legal systems. All USP member countries' legal systems are not

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<sup>10</sup> In this story the husband and wife, who thought they had a "legal adoption" had just signed some papers. The wife had no clear idea of what those papers were. Whilst a custom adoption would be "legal" as custom is recognised as being a source of law, (*Constitution* Art 95(3)) enforcing a custom adoption through the State courts could be problematic as it is not clear how custom is to be proved. The wife wanted, and thought she had, something more than a custom adoption. The uncles demanding payment either did not understand that they were not allowed to do this, or, maybe, understood perfectly but knew that there was little that the authorities would do to stop them.

<sup>11</sup> When people do not voluntarily follow State law (for whatever reason, whether it is because of ignorance of the law, disagreement with the law, or deliberate breach of the law), the state needs to have the means to encourage, and if need be coerce, compliance. In this situation the State was absent in the sense that it had no means to encourage or coerce compliance. With the gendered reading, a woman was unable to receive an active police response to her problem.

<sup>12</sup> Whilst there is no clear definition of what attributes a country needs to display in order to be 'developing', there is a general consensus that all small island Pacific States are developing, or 'least developed'. They appear on developing countries lists produced by the IMF and the UN and are also classified as developing by Australia. (See, for example, Ausaid, 'List of Developing Countries as declared by the Minister of Foreign Affairs for the purposes of the Overseas Aid Gift Deduction Scheme' [http://www.ausaid.gov.au/ngos/devel\\_list.cfm](http://www.ausaid.gov.au/ngos/devel_list.cfm) (Accessed 20 March 2009)).

<sup>13</sup> In this I am reminded of a story that I think was told to me by my mother, who is an Indian from Fiji and who grew up in the colonial days. At school they were taught the song "Run rabbit", complete with actions. She could sing along, and mime the actions, but could not understand the song or actions, as she had never seen a rabbit.

autochthonous, but are transplants from their former colonial masters. People within these countries had about 100 years of colonisation<sup>14</sup> to get used to at least some of the notions of a common law legal system, in which rules of common law and equity, supplemented by legislation are used by courts to settle disputes through an adversarial trial process.<sup>15</sup> The colonial period was not, however, entirely useful for embedding the State legal system into culture. First, during the colonial period, as now, the colonial authorities had limited reach, and parts of the population would not have engaged with the colonial authorities. Second, during the colonial period countries often had special rules and systems for administering justice to the native population<sup>16</sup> so this period introduced a “watered down” common law legal system to the colonised populations. Third, during colonisation, indigenous populations did not participate in the development of legislation and, whilst there were some native magistrates, assessors and assistants, by and large they were powerless subjects within the colonial legal system. A vibrant participatory democracy is a necessary condition for the development of legislation within a well functioning common law legal system. Fourth, the role of the powerless subject does nothing to develop an understanding of the rule of law. This doctrine is described by Graham Hassall as follows:

The doctrine states that all people must be treated equally before the law... The doctrine states, furthermore, that power will only be exercised in accordance with law. In other words, power will not be used arbitrarily. Additionally, the doctrine presumes the presence and desirability of a number of fundamental rights of citizens... To speak of the rule of law, in other words, is to conjure a matrix of legal rules, values, institutions, and procedures, the absence of any one of which will lead to calls for the restoration of/ adherence to/ upholding of the rule of law.<sup>17</sup>

By not treating people equally, arbitrarily imposing laws and not recognising fundamental rights, or even citizenship, the period of colonisation, rather than helping to imbed, instead undermined the development of values which contribute to the complex matrix which makes up the rule of law.

Post Independence countries have had less than 50 years of managing their own legal systems.<sup>18</sup> As well as grappling with the colonial legacy of lack of trust of the State legal system, people are not always familiar with: the style of laws, which includes the content of rules or structures for enforcing rules; their legitimate role in the development of laws;

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<sup>14</sup> Tonga was a British protected State from 1900 -1970. It was never colonised, but its legal system was strongly influenced by Britain.

<sup>15</sup> It can be noted that Vanuatu was governed both French and British colonial authorities.

<sup>16</sup> For example the *tikina* courts in Fiji and the native courts in Vanuatu.

<sup>17</sup> Graham Hassall, ‘Governance, legitimacy and the rule of law in the South Pacific’ in Anita Jowitt and Tess Newton (eds) *Law Society and Change* (2003) 51, 54.

<sup>18</sup> The date of Independence of the USP member countries is: Cook Islands 4 August 1965 (free association with New Zealand); Fiji 10 Oct 1970; Kiribati 12 July 1979; Marshall Islands 3 Nov 1986 (free association with USA); Nauru 31 Jan 1968; Niue 19 October 1974 (free association with New Zealand); Tokelau not independent, territory of New Zealand; Tonga was never colonised, 4 Nov 1875 *Constitution* made; Tuvalu 1 Oct 1978; Samoa 1 Jan 1962; Solomon Islands 7 July 1978; Vanuatu 30 July 1980.

and, in some cases, the concept of centralised authority.<sup>19</sup> This lack of familiarity affects not only “the grassroots”, but also people who may be expected to enforce law or to develop law.

The lack of familiarity is complicated by the sources of law. On Independence countries adopted constitutions as the supreme law, and existing laws, including common law and equity, colonial laws and statutes of general application that existed in the UK as their body of legal rules. Some countries also recognised customary law as a general source of law.<sup>20</sup> This adoption was intended to be a transitional measure until countries developed their own laws, however legislatures did not embark on large scale revision of the body of adopted statute law. Some colonial or UK law remains in force, and the question of whether particular UK laws are part of the laws of USP member countries can be difficult to determine.<sup>21</sup> Even statute law that has been enacted by local Parliaments post-Independence has tended to keep a “foreign flavour”. In part this is because legislation has largely been developed to take account of changes in the economic and technological environment, often at the encouragement and assistance of, aid donors. Further, there is often resistance to “codifying custom”, which may have made legislatures cautious about developing statutes that are more closely based on local values and practices, and so more familiar in content, if not in form.<sup>22</sup>

It was, maybe, to be expected or hoped that, in addition to law making by legislatures, the courts would develop the rules of common law and equity and interpret statutes in light of local circumstances, particularly in countries that adopted customary law as a general source of law or countries in which a cut off date for the adoption of common law and equity was specified.<sup>23</sup> In these countries case law up to a particular date, but no later, was adopted, presumably to allow local courts to then develop the common law in their own direction. In practice this has tended not to happen. Some reasons for this might be because: judges, particularly if they are not indigenous, are not familiar with custom; judges and lawyers have been trained in common law so have come to treat that as “real

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<sup>19</sup> The latter factor is a greater issue in Melanesia, where customary authority rests in the “big men” of local units, than in Polynesia, where centralised authority is part of customary rules (as expressed, for instance, in the Kingdom of Tonga and the Kingdom of Hawaii that ruled prior to 1893). This may help to explain why Polynesian governments are more stable than their Melanesian counterparts which, in recent years have been labelled “the arc of instability”.

<sup>20</sup> For more on sources of law in the USP member countries see Jennifer Corrin Care, Tess Newton and Don Paterson, *Introduction to South Pacific Law* (1999).

<sup>21</sup> For instance, the issue of whether the *Adoption Act 1958* (UK) is a statute of general application in the Solomon Islands has recently been the subject of judicial attention, with the judge *In re Tiokobule Bero (an infant)* [2007] SBHC 94 <http://www.pacii.org> deciding that it was not a statute of general application. This was later overturned in *In re Noeleen Aba Miria (an infant)* [2007] SBHC 138 <http://www.pacii.org>.

<sup>22</sup> For an expression of this view see Michael Ntumu, ‘The Dream of a Melanesian Jurisprudence’ in Jonathan Aleck and Jackson Rannells (eds), *Custom at the Crossroads* (1995) 7.

<sup>23</sup> See above n 18. See also Jennifer Corrin Care, ‘Cultures in Conflict: The role of the common law in the South Pacific’ (2002) 6 *Journal of South Pacific Law* <http://www.pacii.org/journals/fJSPL/vol06/2.shtml> (Accessed 10 April 2009) discusses issues cut off dates and the relationship between common law and customary law.

law” at the expense of customary law;<sup>24</sup> it is difficult to prove what customary law is under the rules of evidence; people do not often bring cases that involve questions of the relationship between custom and State law to court;<sup>25</sup> and that there has been inadequate law reporting making it impossible to develop local precedent.<sup>26</sup>

## CONCLUSION

Despite there being considerable difficulties for courts or legislatures to develop distinctive solutions to issues of legal order, it is clearly happening, slowly but surely. Familiarity with the law is, in part, time dependent, and as more people gradually get the time to interact with the legal system in different ways State law becomes more a part of peoples lives, and one of a range of options that can be used to resolve disputes. At the same time technological changes, changes in economic organisation, greater interaction with other countries, increased education and a greater range of civil society activity, much of which, in “formal” civil society is aimed the promotion of human rights, have contributed to a rapidly changing culture. As time goes on, more local lawyers are practising and more local judges are being appointed. Unlike local lawyers and judges from 15 years ago, these legal personnel do not have to travel to Australia, New Zealand or the UK for their education, but can now remain in the Pacific and receive their legal training at USP,<sup>27</sup> in an environment that acknowledges the particular context in which Pacific legal systems are developing. Law reporting is much more comprehensive now than it was even 5 years ago, and this allows for judges and lawyers to use local precedent, rather than relying on precedent from the UK and elsewhere.<sup>28</sup>

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<sup>24</sup> This point has at least two dimensions: the written nature of State laws preemptively reify them; and lawyers do not argue customary law issues, so even if judges were predisposed to consider custom, they are not given the scope to take custom into account when decision making.

<sup>25</sup> Again this point has a number of dimensions, including that: people might not bring such cases to court because they have no need to because custom is, by and large, working to resolve disputes; access to the State courts for the resolution of day to day (non commercial or criminal matters) is blocked by barriers including costs, language, and unfamiliarity; people who have had the dispute heard in custom but are unhappy with the outcome might want to consciously use a system that provides different rules and might therefore provide a different outcome.

<sup>26</sup> See Corrin Care, above n 20; Guy Powles, ‘Common Law at Bay’ (1997) 21 *Journal of Pacific Studies* 61.

<sup>27</sup> The USP School of Law, which was the first law school in the USP region, produced its first LLB graduates in 1997.

<sup>28</sup> In 2002 it was commented that ‘Law reports are out of date in every South Pacific country, and in a tropical climate it is very difficult to store paper records... Lack of information has been a barrier to efficient legal practice in the region, with public prosecutors and solicitors facing a shortage of up-to-date information about previous decisions and legislation.’ (Janet Toland and Fuatai Purcell, ‘Information and communications technology in the South Pacific: Shrinking the barriers of distance’ (2002) Dec *Development Bulletin* 91, 91) and Whilst it remains the case that hard copy law reports and volumes of legislation are published sporadically in most USP jurisdictions, the advent of online law reporting through the Pacific Islands Legal Information Institute, PacLII, has significantly improved access. Whilst in 2002 it was the case that ‘The development of PacLII is still at an early stage...’ (Toland and Fuatai, 91) , and PacLII is still not fully comprehensive, there is now a large amount of primary legal material from a number of Pacific jurisdictions easily available through PacLII. Some countries also maintain their own websites for publishing legislation and cases.

We can now see more legislation being developed locally and more case law setting lines of precedent that bring local values and practices into part of the law or settle issues of hierarchy. Legal systems are not operating perfectly, of course, and stories like the one I began with are common. However, it should be remembered that what makes this story notable is that one of the people involved sought to use the legal system, even though she was unfamiliar with, and quite frightened by, it. This suggests that the State legal system is becoming better integrated as one of a plurality of institutions that exist in any society to maintain order.