THE FUTURE OF LAW IN THE SOUTH PACIFIC

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INTRODUCTION

The title of this paper is somewhat grandiose. However, I do not pretend to offer clear direction as to the future of South Pacific law. Instead the title is drawn from a final year LLB subject, Current Developments in Pacific Law. In this subject one of the activities to close the course is for students to offer short speeches on the future of law in the Pacific. My contribution in this activity is easy: to listen to what my students say. After all, the future of law in the South Pacific is not in my hands, or even the hands of the University of the South Pacific (USP) School of Law. Instead it is in the hands of our law students, who will go out to different countries, take up a variety of positions, and, hopefully, contribute to law reform and legal development in their own jurisdictions.

This paper is therefore drawn from my students' work, words and thoughts.[1] It offers an introduction to some of the "big" debate about legal systems in Pacific island countries and discusses one of the frameworks that students at USP use to help analyse this debate. As this conference provides an opportunity for sharing between USP and Otago University, this paper will first begin with a few comments on the differences between law in Pacific island countries as compared to law in New Zealand.

PACIFIC ISLAND COUNTRIES LAW COMPARED TO NEW ZEALAND LAW

Whilst the Pacific island countries of the USP region[2] and New Zealand have similarities in that the Indigenous populations are Oceanian,[3] that colonisation by Western powers occurred,[4] and that the state legal systems are based on English common law,[5] there are considerable differences between New Zealand and Pacific island countries. Whilst the below comments are generalities, not subtleties, and do not make allowance for the diversity of the various countries, they do provide a useful outline for considering the different experience of law in New Zealand as compared to smaller countries of the Pacific islands.

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[1] All student quotes are drawn from the LW 305 Current Developments in Pacific Law class in June 2008 in which students gave their speeches on the future of law in the Pacific. Further references are provided by student name and country.

[2] The USP member countries are: Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.

[3] Melanesian, Micronesian and/or Polynesian.

[4] Note that Tonga was not colonised. Its legal system is, however, strongly influenced by British law.

[5] Note that in Vanuatu French law was also adopted as a source of law on Independence. However, the form of the courts were adversarial common law courts, rather than inquisitorial civil law courts and in practice French law is rarely referred to.

One of the differences is that in the countries of the USP region the Western concept of law is not so pervasive. It affects the day to day lives of many people in very limited ways (if at all). This is, in part, because state institutions are usually more limited in scope. Geographical considerations combined with resource considerations means that many parts of state legal systems are concentrated in urban areas, and simply do not have a presence in "the outer islands" or rural areas. Further, for the majority of the populations in the USP member countries, there is a dual system of living, with the traditional system being more familiar and often more effective. But, even if there were no constraints on the scope of state laws and institutions, they may simply not be particularly relevant in providing order and mediating disputes in areas where customary law and customary authority is operating. In contrast, in New Zealand, although everybody of every culture is guided in their day to day lives by social norms arising from culture, the pervasive state law is much more central to providing order and mediating disputes.

Another difference is that in countries of the USP region Indigenous populations are in the numerical majority, and control state legislatures. Customary law is also, often, explicitly recognised as being a source of law, and various resources, most notably land, are often in explicit control of the customary land owners or customary land tenure system. This means that the nature of the relationship between the state and the Indigenous population is different. In New Zealand the Indigenous population, a numerical minority, must struggle for recognition by the state, which not only consists of the coloniser's structures and systems, but is also numerically dominated by colonisers, who may suppress the recognition of Indigenous interests. On the other hand, in the countries of the USP region, although the colonisers' structures and systems have been adopted, the struggle is not so much to get the "coloniser-style" state to provide the space for recognition of Indigenous interests, but rather to adjust the state so that it fits the needs of the Indigenous dominated country.[6]

Further, in the USP member countries the modern legal system is newer. State law is often talked about as being foreign. In the USP member countries we are constantly being confronted with questions about why state law should be respected, and how law or particular legal institutions should function. The explicit questioning of state law means that the fiction of legality is constantly being exposed. Legal order only works if people generally believe in law and consciously or, more often, unconsciously, agree to follow it. When this belief in law and (unconscious) agreement to be bound by it are lacking then the fragility of the legal order is bared. The fragility of the legal and state order is also challenged by the immense rapidity of change in the USP member countries,[7] and the desire to "develop", without clear consensus on what development can or should mean.

[6] These distinctions are discussed further, in relation to indigenous land grievances as compared to customary land disputes in Anita Jowitt, 'Indigenous land grievances, customary land disputes & restorative justice' (2004) 8(2) *Journal of South Pacific Law* http://wwwpaclii.org/journals/fJSPL/vol08no2/8.shtml (Accessed 10 August 2008).

[7] 'The law is crawling like a turtle and development is speeding like a car': Mona Ioane (Cook Islands).

So, in the USP region we are faced with the challenge of operating in an environment of legal pluralism, in which we cannot automatically assume the acceptance of Western-style state law, and developing vibrant and relevant local legal systems that will allow for development, but which may depart considerably from Western notions of state order and state development, within considerable resource constraints.

DEVELOPING LAWS AND LEGAL SYSTEMS

Whilst this challenge may seem overwhelming, it is also very exciting. Legal development in the Pacific is raw, with almost all areas being contestable. Sensitivity, imagination and creativity are the attributes needed to move our legal development forward. So, how do we start tackling this challenge? For me, one influential Pacific law scholar is Guy Powles, who wrote, 20 years ago, that

> people working in the law and the courts are faced daily with conflicts, inconsistencies and seeming incompatibilities, such as those:
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> - between traditional ideas and Christian teaching, as to what is right and wrong, or fair, or just;
> - between group-based and individual-oriented societies as to notions of responsibility;
> - between unwritten customs and written statutes – as to both the way they are expressed and the content of what they say;
> - between the authority of local chiefs, elders and councils, and that of the courts and agencies of central (and regional) governments, often called upon to deal with the same matter;
> - between courts dealing once-and-for-all with the particular act or offence in isolation, and traditional processes which address the wider context of disputes, often without attempting to achieve finality;
> - between customary manners and methods of communicating, and formal court procedures;
> - between local attitudes to statements which are accepted as proof of facts, and strict rules of evidence such as the exclusion of hearsay and the burden and standard of proof;
> - between the different backgrounds and training of personnel, such as adjudicators and lawyers, within the same jurisdiction; and
> - between the function of the court as the arbiter of isolated breaches and disputes and its function as an agent of social or government policy – to mention only some.[8]

Twenty years later this list is still relevant – we still seem to be stuck on much the same issues. 'The Solomon Islands is a 30 year old wearing the same shirt he was given when

[8] Guy Powles, 'Law, Courts and Legal Services in Pacific Societies' in Guy Powles and Mere Pulea (eds) *Pacific Courts and Legal Systems* (1988). (Sourced from http://law.usp.ac.fj/edison/la305/course-material/topic2/reading1.3/view (Accessed 10 August 2008) page numbers unavailable).

he was 1'[9] with the 'traditional system… being submerged by the introduced system.'[10] The same can be said for other USP member countries, which 'have not taken up the challenge given in the constitution… to develop distinctive jurisprudence.'[11] We continue to be faced with 'outdated laws from pre-Independence that are culturally inappropriate'[12] and lack 'operational effectiveness'.[13] This is potentially quite dangerous, because the fiction of the legal order relies on unconscious agreement/obedience that stems from respect for the law. However, 'law is in jeopardy of losing respect because of inconsistencies, ineffectiveness and outdatedness.'[14]

Here again Powles helps, with his "minimum standards":

- The law, in its broad sense of constitutions, legislation and common, civil and customary law, should be responsive and understood.
- The courts, and all dispute-resolution bodies, should be fair and effective.
- The legal services, whether degree-qualified or para-legal, government or private, should be appropriate and available.[15]

The minimum standards are useful because they can help us to identify what we do not want in legislative reform. For instance, if a legal reform:

- requires people to use lawyers in order to have their rights upheld, but lawyers are too expensive, then the reform is not appropriate as legal services are not available to everybody;

- requires people to use lawyers in order to have their rights upheld, but lawyers are mainly in town and the majority of the population lives in rural areas, then the reform is not appropriate as legal services are not available to everybody;

- requires people to go to court in order to have their rights upheld, but people do not go to court because of cost, or because they do not understand the court procedures, or are uncomfortable in the language used, or because there are no courts where they live, then the reform is not appropriate as legal services are not available to everybody;

- requires people to go to court in order to have their rights upheld, but instead matters are dealt with in customary law by customary authorities who do not recognise the law, then the reform will be ineffective;

[9] Jefferson Halu (Solomon Islands).
[10] Ibid.
[11] Tatavola Matas (Vanuatu).
[12] Mathew Lemisio (Samoa)
[13] Wayne Ghemu Kituru (Solomon Islands).
[14] Palokoa Joe (Federated States of Micronesia).
[15] Guy Powles, above n 8.

- allows people to get court orders, but then the enforcement agencies (such as the police) will not uphold those orders, either due to lack of resources, of because they think the orders are unfair, then the reform will be ineffective;

- is not used by people because they do not understand what the law is, or how to use it, then the reform will be ineffective;

- is not made because people in society want or demand it, but instead is seen to be "imposed" by outsiders, then the law is not being responsive to the needs of the people, and is less likely to be understood.

Such legal reforms have limited value. They may be expensive and time consuming to make. And, whilst they may look good on paper, they have limited impact on the day to day behaviours of people. Unfortunately, in the USP member countries we already have too many laws that sit on the books "doing nothing". These are not only old laws, but new laws that assume the existing, flawed, legal system, is fully functional. Passing of inappropriate new laws can lead to "law reform fatigue", or increase the sense that law is largely irrelevant. It can also lead to the (unfortunately sometimes correct) belief that law is somehow an "optional extra" to be followed or ignored at whim.

But, identifying conflicts, inconsistencies and problems does not necessarily help us to move forward. This is where the "mimimum standards" really prove their value. They are helpful because they provide us with a framework to think about what we do want in legislative reform. This framework, which is quite holistic, allows us to pursue the creative imagining, or re-imagining of our legal systems, or of individual law reform problems, which is the hardest work. It is this imagining, which will be done, in part, by the USP School of Law graduates, which is where the future of vibrant, relevant local legal systems lies.

CONCLUSION

One thought that I have turned over a lot, is that in the Pacific Island countries 'we are privileged, but not lucky.'[16] This rings true. So much has been received from the colonising authorities, and continues to be received through the 'neo-colonialism [of] international organisations and aid.'[17] There is a privilege in being given so much, but when what has been given does not fit the needs and aspirations of the country, and maybe also leads to a narrowed vision of how legal and political order can or should be maintained and false beliefs about how development will occur, then receiving the unsuitable and unsustainable gift is not so lucky.

[16] Kent Ture (Vanuatu).
[17] Gillian Malielegaoi (Samoa).

Instead, we need to find ways to adapting the gift of adopted laws. In doing this we need to ask not only 'Where are we now, but also where do we want to go? What are the special things that we have, that we want to keep?'[18] as well as deciding what things from Western jurisprudence have value and should be kept. A combative approach in which "foreign law" is treated as being diametrically opposed to "customary law" is not helpful. 'Instead of conflict, compromise'[19] is needed. And, maybe most important, 'rather than just talking, we need to implement, to do.'[20]

Finally, the timing is excellent for re-imagining Pacific legal systems, because at the moment there are a number of global challenges or "crises" which make the question of what is "desirable development" very contestable. The "global credit crisis", "global oil price crisis", and "global climate change crisis", which has led to a "global food crisis" all provide an opportunity for considering different development paths, and the laws and legal structures that are actually needed or desirable for sustainable development. Maybe 'we need to rethink the scale of our societies. [Maybe] we need to go local.'[21] Whatever the appropriate development path for individual countries may be, certainly now is an opportune time to be re-imagining the future of law in the Pacific Islands.

[18] Ralph Regenvanu (Vanuatu).
[19] Sefo Ainuu (Samoa).
[20] Anaseini Lomani (Fiji).
[21] Ralph Regenvanu (Vanuatu).