by Kenneth Brown

Succession Law in the South Pacific

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USP: IJALS, Suva 1999.

ISBN: 982-352-004-6

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This volume, the latest in the Laws of the South Pacific Series is published under the auspices of USP and the Institute of Justice and Applied Legal Studies. Previous texts have tackled the fields of Criminal Law, Torts and Civil Procedure. This enterprise is perhaps the boldest yet as it ventures into terrain where the prescriptions of custom and state law often contrast so starkly that the dissection and elucidation of all the issues is a formidable task.

Any work dedicated to a round-up of the laws of various jurisdictions is fraught with danger. In the Pacific these dangers are compounded as not only do the countries in the region have differing colonial histories but also vary in their ethnic, linguistic and cultural make-up. Succession is concerned with the personal law of the individual and in the Pacific this personal law is almost exclusively customary. The problems of approach this poses for any writer are immense. Is customary law to be disregarded? If so this diminishes the value of the final product as a true reflection of Pacific jurisprudence. Or should the author enter the quicksand of an examination of customary law? This is to plunge into territory that is largely uncharted and which is beyond the competence of most lawyers. Little is known of customary modes of succession. They may be so fluid as to be impossible to pin down with any accuracy: M P Mvunga 'Law and Social Change: A Case Study in the Customary Law of Inheritance in Zambia' (1979) African Social Research 28; G Woodman 'Studying the Laws: Respecting Customary Law in the Curriculum, (1987) 15 Melanesian LJ 118.

Professor Hughes sets out his stall early. From his foreword the wares he offers are to be limited to an examination of common law systems of succession as adopted by or applicable in Pacific nations. The core rationale for this approach is that an account of customary succession practices would make the book too large as *'custom varies so considerably within particular jurisdictions as well as between them.* (v) As noted isolating custom practices is beyond the scope of lawyers and probably the province of anthropologists. However the restatement of the common justifications for not tackling prickly customary issues; that custom is too variable, diffuse and difficult to ascertain is a shame. This is particularly so as Professor Hughes is a lucid author and as his general introduction and family provision chapters demonstrate is alive to the wider debate on succession in societies with plural regimes. Furthermore in a work designed as a reference textbook it is questionable that common law systems represent the basic law in the arena of personal law. As Woodman in 'Studying the Laws...' (1987) 15 Melanesian LJ 118 convincingly advocates, in the study and teaching of personal law subjects it is preferable to regard customary law as the basic law.

However, even if custom is the basic law, the fact is that in the Pacific the formal official impetus has unremittingly been directed more and more towards the espousal of western succession regimes. This neo-colonial trend is probably driven by the burgeoning urban middle-class. As it members increasingly accumulate private property and live in nuclear family models they are likely to have little patience with customary law that on their death allows male kinfolk to claim their wealth on communal grounds or deprives their widows by the operation of patriarchal rules. For this growing class Professor Hughes provides a valuable exposition of common law succession systems in the Pacific. As he acknowledges it is impractical to analyse the law in each jurisdiction but he covers the region with breadth and skill. He naturally concentrates on the larger jurisdictions but the 'minnows' are not neglected. He is particularly strong on the law relating to the making, revocation and construction of wills but is equally at home amongst the mechanics of intestacy and family provision. He offers well-structured, well-written and well-researched chapters on the entitlement to, and the procedure for, obtaining grants of representation and the duties imposed by law on those empowered to administer estates. The work will be a valued companion to those involved in probate practice either as advocates or court officials.

On minor housekeeping matters the relevant law on marriage in Solomon Islands is probably better stated as the *Islanders Marriage Act* rather than the *Native Marriage Regulations 1945* (British Solomon Islands). (p 83); the decision in *In the Estate of Eoaeo* is now No. 92, not 42, in the USP Law School Internet Reports and I could find no full reference for 'Mellows' referred to on pp. 154. 162 and 163.

Legally, the proposition that Public Acts are Acts of general application (p17) requires justification. Certainly it cannot be said that all Public Acts are properly classified as such. Professor Hughes maintains that UK Acts such as the Trustee Act 1925 and Administration of Estates Act of the same year apply as Acts of general application but in spite of some authority to support this view it is open to considerable doubt as *Re Sholu* 1932 Nigeria LR 37 and *dicta* at 234 in *Lilo and anor. v Ghomo* [1980/1] SILR 229.) demonstrate. Judicial opinion that the legislation applied was offered *obiter* and without full argument. It is difficult to justify the wholesale application of these Acts, based as they are on foreign models of property ownership, to jurisdictions where the manner of property holding is radically different.

Describing customary succession regimes in detail is, admittedly, not feasible. However a fuller picture of the relationship between custom and introduced law in a Pacific context would have emerged if broader analysis of the principles of customary succession had been undertaken. A resume of those principles would have counterbalanced the Anglo-centric slant of the work. The lack of reference to the following valuable local academic material is puzzling:

J A Griffin, 'Conflict of Inheritance Law and Custom in Niugini' (1970) 1 (1) Melanesian LJ 29;
• F M Kassam, 'Laws of Succession in Papua New Guinea: Some Reflections' (1974) 2 Melanesian LJ 5;
• C P Haynes, 'Succession to Land In Papua New Guinea: Choice of Law' (1981) 9 Melanesian LJ 74.

Also perplexing is the failure to cite important regional case law. The following cases would seem to demand inclusion and discussion in any text on Pacific succession:

Igolo v Ita [1982] SILR 56, accession to chiefly status;
• *Ah Choy v Registration Officer,* Fiji, CA No. 23/92, 20th August 1993 (unreported); 'inheritance' of the status of being 'Fijian' and thus registered on the roll of Fijian voters;
• *Sasongo v Beliga* [1987] SILR 91; custom denying a wife the right to inherit from her husband;
• *Tanavalu v Tanavalu and SINPF* 1998 Solomon Islands Court of Appeal, Civil Appeal No. 3 of 1998 (unreported); Parliament legislating to by-pass a common law succession model in

favour of Local Court determination likely to endorse custom;
• *Banga v Waiwo* Vanuatu Supreme Court, Civil Appeal 1 of 1996; USP Law School Internet Reports No. 2 in Court of Appeal section; observations of Chief Justice on the applicability of foreign intestacy regimes;
• *In the Estate of Doa Minch* [1983] PNGLR 558, whether a customary model of intestacy should apply to 'non-customary' property;

and finally and most critically the pivotal judgement in:

Noel v Toto Vanuatu Supreme Court Civil Case 18 of 1994; USP Law School Internet Reports No. 6; evidence of customary succession examined and disallowed on the ground that a custom rule that favoured males was unconstitutional.

These comments are not idle carping. They lay bare the fundamental questions for the future of Pacific jurisprudence: should legal teaching and scholarship revolve around the hub of customary law so as to create an indigenous common law reflecting broad community standards and demotic values? Or should these matters remain under the sway of the monolithic steamroller of an imported, alien common law?

The manifesto of USP Law School proclaims '*a commitment to the teaching of law and the undertaking of research with [a] South Pacific focus'* and thus that '*diversity is the keyword.'* (http://www.vanuatu.usp.ac.fj/about/about_main.html) If this is the lynchpin then the answer must be that texts in the realm of personal law must be founded on the cornerstone of customary law.