

Received laws and customary law in Pacific jurisprudence

Challenges in identification, access and understanding of the law within the so-called 'arc of instability'

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the islands of the South Pacific



'the arc of instability'

- Fiji – Vanuatu – Solomon Islands – Papua New Guinea – Bougainville – West Papua – East Timor
- Poverty – inequality of wealth and power – corruption – poor governance – governments failing to provide basic services
- Civil war – coups – political instability

Images of conflict in the Solomon Islands



... Only show part of the picture



The situation in Vanuatu and the Solomon Islands

- High population growth coupled with high urban drift
- Majority of population excluded from cash economy
- Poorly developed infrastructure
- Low literacy levels
- Land ownership issues unresolved

Geographic, Economic, Cultural, and Historical contexts are critical

- Geographically isolated communities
- Culturally and linguistically diverse
- Weak economic base
- High dependence on aid
- Inheritance of colonial administrative and legal structures
- Retention of traditional culture and “kastom”

Regional solutions ...

- *"A lasting solution to lawlessness and instability requires growth, employment and development that can generate investments in those basic services that help underpin government legitimacy and national unity"*

– AusAID Report

Do not necessarily address fundamental questions

- Whose laws are being imposed ?
- Are the current [inherited] government , administrative and legal structures the most appropriate for a Melanesian community?
- Should economic growth – at which individual land registration is central – be pursued at the expense of the retention of traditional values and customs?



Barriers to the awareness and understanding of introduced laws

- Geographic isolation
- Undeveloped infrastructure
- Language diversity
- Use of bislama and solo pijin as the lingua franca
- Low levels of literacy
- Irrelevance of introduced laws as custom and customary law is still applied at village level

Sources of law in the Solomon Islands

- Constitution
- Acts of Parliament of the Solomon Islands
- United Kingdom Acts of general application, in force on 1 January 1961 (if there is no local legislation on point) and customary law
- The principles of common law and equity, in force on 7 July 1978 (if they are appropriate to the circumstances of Solomon Islands and are not inconsistent with written laws or customs)

Sources of law in Vanuatu

- The Constitution
- Acts of Parliament of the Vanuatu
- Joint Regulations in existence on 30 July 1980 (until repealed by parliament)
- British and French laws in existence on 30 July 1980
- Common law and equity in existence on 30 July 1980
- Customary law

In cases of conflict with other sources of law, the prima facie position of customary law in Solomon Islands is that

- It is subordinate to constitutional provisions, incl. human rights provisions, unless specifically exempted from their protection
- It is subordinate to Acts of Solomon Islands Parliament
- It is superior to Acts of the United Kingdom parliament continued in force
- It is superior to common law and equity

However ...

- The requirement to “prove” customary law by evidence makes this hierarchy problematic and means that other sources of law prevail
- There is difficulty in expressing some customary concepts in the English language and conversely the expression of some common law concepts within a customary law context
- As a consequence customary law as a source of law is consistently ignored or overlooked

Barriers to the awareness and understanding of customary law

- Customary law is not written
- Customary law is not a homogenous body of law and varies from community to community
- The relationship between customary law and common law is “shrouded in obscurity”
- The legal profession and judiciary is substantially expatriate and trained in the common law tradition

The lack of integration of kastom into the official system demonstrated by

- Continued reliance on British and Australian case law
- The lack of any form of mediation or conciliation
- The lack of acknowledgement of kastom crimes
- The insistence that kastom must be “proved” before it is accepted as a source of law
- The adversarial nature of proceedings
- The continued use of outdated British legislation
- And the obligation for barristers and judges to wear black woollen robes in court!

“whiteman law”

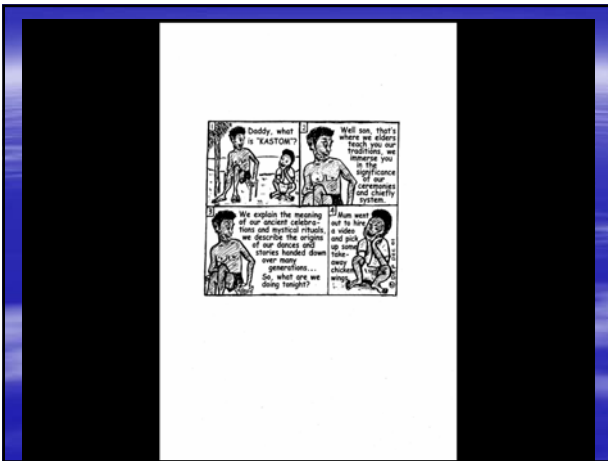
- *“People do not have time to talk about law reform. It is too abstract and technical. They tend to have this attitude because there are already local customs to regulate their daily lives. Whiteman law is not their business”*

– Solomon Islands Law Reform Commission

Common law and customary law are fundamentally different

- *“the ultimate irony of customary law is that although state law must recognise and apply custom in order to make itself a part of the culture, state law cannot use custom without turning it into something else”*

—Zorn & Corrin Care



A librarians response

- Librarians in the Pacific need to look beyond the collection of primary materials that may be available via PacLII and create, manage and provide access to information resources that assist in developing a critical understanding of the historical, economic and socio-cultural contexts of Pacific law.

Resources embedded in PacIII

- Sources of Law
- The Pacific Law Pathfinder
- The Pacific Law Journal Index
- The Pacific Law Blog

- The scope of these resources encompasses texts, journals and media items that offer a much wider perspective than purely “legal” materials.

Final comment

- *As librarians it is critical for us not just to be relevant and responsive to our perceived stakeholders. We must also play a proactive role in improving access to resources that will support a deeper and more meaningful understanding of legal issues in the general community.*
