Paper Promises?

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The constitutional prescription of customary law in the Northern Territory.

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Contemporaneously with the 1998 Federal General Election the Northern Territory electorate voted on a Statehood referendum. The voters narrowly rejected the Territory government's call to seek Statehood. During the referendum campaign the government dispatched a propaganda pack to all voters promoting the 'Yes' case for Statehood. This pack included a glossy Draft Constitution for the State of the Northern Territory. The draft included clauses defining and providing for the recognition of Aboriginal customary law. This is not surprising as between 25 and 30% of the Territory's population claim an Aboriginal affiliation. Sadly the prescription for embedding customary law was seriously flawed on several counts. The flaws in the blueprint will be analysed after discussion of the challenge of effectively grounding customary law in a constitution and a review the experience of nearby jurisdictions.

Customary law derives its authority and authenticity from actual social practice. It owes nothing to the reasoning or advocacy of lawyers, the art of legal drafters, the programs of politicians or the rulings of formal courts. Nevertheless where plural legal systems exist its formal prescription is essential to prevent it being swamped by the common law. Implementing effective prescription has proved a daunting task.

This article examines the constitutional prescription of customary law in two neighbouring jurisdictions, Solomon Islands and Vanuatu. They respectively became independent in 1978 and 1980 with Constitutions enshrining explicit formulae for the application of customary law. However the post-independence fortunes of customary law have been mixed and do not reflect a fulfilment of the constitutional promise.

All constitutional scrutiny should be alert to Duchacek's cautionary observation that constitutions:

> ... may be expected to contain erroneous interpretations of past experience, false analyses of existing national and international realities, faulty estimates of future developments and some deliberate deception.[1]

This injunction is appropriate to the development of customary law in Solomon Islands and Vanuatu. The inhabitants of both countries are overwhelmingly Melanesian and adherents of customary law. It might then be supposed that customary law is pre-eminent in the legal pecking order but its progress has been hampered by various factors. In many respects the common law still holds sway despite constitutional restrictions on its applicability assigning it a lower rank than customary law.[2] Why then is customary law beleaguered in jurisdictions that should represent its heartland? The answers to this query may reveal valuable lessons to those who may be charged with the fashioning of any future Constitution for the State of the Northern Territory to ensure that Aboriginal customary law is established on a proper foundation.

The power and resilience of the common law

As Chanock has observed: 'The law was the cutting edge of colonialism'.[3] The common law — sure, familiar and predictable —

met the interests of colonial entrepreneurs and was a potent agent in promoting the economic exploitation of Empire. It served the interests of the rulers rather than the indigenes. At independence it had become so rooted in the legal soil that it retained a position of influence. The common law, monolithic and jealous of alternative orders however is not an ideal bedfellow or well suited to the demands of a legally plural society. In *Banga v Waiwo*[4] the Chief Justice in determining whether to apply customary law or the common law to the assessment of damages for adultery, unreservedly plumped for the latter. His rulings in this decision and an earlier dispute with a purely custom factual matrix where he had also declined to apply custom effectively demoted customary law to a source of last resort. These views probably depict the high watermark of the school proclaiming the pre-eminence of the common law, but nevertheless they attract many followers.

The perceived nature of customary law

Customary law is regarded as formless; lacking in structure or rules and so ill-fitted to meet the demands of the modern nation state. Customary law is not rule dominated but flexible, subtle and constantly able to adapt. The imperial authorities and courts were dismissive of these valuable inherent qualities and only willing to grant recognition to custom if they could isolate fixed customary rules. Custom was judged wanting as, being unwritten, it was difficult to ascertain. Judges before and after independence regularly refused to apply custom unless it was certain or universally applicable throughout the jurisdiction.

An added perception portrayed customary law as far too diffuse and diverse. Since custom varied from group to group, the argument ran, it became impossible to apply it as a coherent system. The tried and tested common law, unified and with a process to find a rule to solve every dispute, was infinitely preferable.

The reluctance of lawyers and judges to adjust

Lawyers are notoriously conservative and consequently revel in the common law. They are at home and comfortable with a familiar system. Years of training and conditioning render them so steeped in the mystique of the common law that there is little inclination to understand, still less advocate, the principles of an alien custom. Even local advocates and judicial officers are immured in common law training. Judicial reluctance to apply customary law attained its apogee in the comments of the then Chief Justices of Solomon Islands and Vanuatu respectively in *Allardyce Lumber Company Limited v Laore*[5] and *Willie Assal and Chief Francis Assal v Chief Pierre Vatu, the Council of Chiefs of Santo and Santo Regional Council.*[6] In *Allardyce* the Chief Justice commenting *obiter* reflected:

> Schedule 3 of the Constitution provides that customary law shall have effect as part of the Law of Solomon Islands except where it is and to the extent that it is inconsistent with the Constitution or an act of Parliament. It has been stated many times by this court that, if custom is to be relied upon, it must be proved by evidence and proved each time. I would comment that the terms of paragraph 3(3) to the Schedule incline me to the view that these earlier rulings may have gone too far and that, until an act of Parliament provides for the proof and pleading of customary law, it should not be considered by the courts.

Not only is this observation inaccurate, it restates a perennial hurdle placed in the path of customary law: namely that customary law remains a question of fact to be proved like any other such issue. This results in the bizarre irony that in nations where the indigenous population represents over 90% of the total, a foreign legal system is accepted as one that is self-proving whereas the home grown order must be established by evidence.

In Vanuatu the question at issue was the right to receive tourist revenue derived from the attraction of watching the traditional 'nangol jump'. This ancient ritual, the forerunner of bungee jumping, involved young men, as a test of manhood, diving headfirst from a large wooden platform with only a supple measured vine tied around the ankle to prevent headlong contact with the ground below. The Chief Justice pertinently observed that: 'There can be nothing more 'Custom' than the nangol jump' but then noted that 'this is not a custom court but a court of law'. In an extraordinary passage brusquely dismissive of custom he noted:

> As far as Nagol jumping is concerned there is no 'rule of law' that is 'applicable' to it ... Since there is no rule of law governing the matter, I must have recourse to section 47(1) of the constitution, I shall have to determine the matter according to 'substantial justice' and, if at all possible, in conformity with custom.

He clearly views a 'rule of law' as one of foreign origin and considers recourse to custom appropriate only after exhausting other avenues. His comments represent the extreme spectrum of opinion as they lead to the conclusion that only imported law is true law and that custom is something less than law.

A failure of political will

Independence signals not only a political but also a legal watershed. In the colonial era custom had always been considered inferior to received law and only applicable at the discretion of the rulers. The raising of indigenous consciousness demanded a recognition for custom that was unconditional. The constitutional embedding of custom as a primary source of law thus bears witness to its importance as a cultural symbol.

Political and economic considerations have, however, militated against too wide an endorsement and applicability of customary law. Post-independence politics from the beginning were seduced and obsessed by the notion of the benefits of economic development. The pursuit of economic progress hampered the implementation of any real program to establish customary law, regarded as too inflexible and conservative in the promotion of modernisation. The allure of progress has proved a powerful magnet for the political controllers and the interests of the metropolitan business elite have been preferred to those of the village dweller. Customary law has been largely ignored in this process. It is considered unfit as a legal regime compatible with the rush for economic expansion. Customary law as a symbol of the past has been marginalised in favour of a unified imported law understood by the modern business community.

Pacific politics are dominated by local factors. Loyalties are to family, language and kin groups first, home-island second and the new nation state third. Customary law as the law of small-scale communities represents parochial interests hostile to the post-independence quest for national unity. Politicians with a vested interest in promoting the new nation state thus are inclined to view customary law with disfavour depicting it as divisive.

The prospects for customary law in a new State of the Northern Territory

In a word the prospects for customary law in a new State of the Northern Territory are bleak. If the recognition and applicability of custom has been fraught with such trauma and challenge in Melanesian nations where its fiat should run automatically what chance has it of acceptance in a Northern Territory where the ruling entrenched political elite have instinctively adopted an unsympathetic attitude to Aboriginal issues. This elite is captivated and obsessed by the charms of economic growth. It repeatedly denounces Aboriginal interest groups as representing a hindrance against progress towards this golden grail. Indigenous voices are repeatedly condemned as hostile to mining, agricultural and aquacultural development.

If the formula crafted in the 1998 Draft Constitution for the recognition of customary law remains unaltered, the prospects for customary law are even bleaker. The fault lines in this formula are massive and reveal either an innocent misunderstanding of the nature of customary law or a deliberate strategy to sideline it. The major fault lines are now examined.

Subordination of customary law

Part 6 of the Draft Constitution headed *'Legal System of the Northern Territory'* is separated into two divisions. *'Division 1 Laws of the Northern Territory'* catalogues the sources of the laws commencing with *'this Constitution'* and ending with *'the common law.'* Customary law merits no mention in the first division, an indication of the inferior regard in which it is held. Lip service is paid to customary law in the second tier titled *'Division 2 Aboriginal Customary Law'*. The contrivance of divisions creates an inherent subordination of customary law. Is this adoption of a formal hierarchy an intentional manoeuvre to denigrate customary law? It is difficult to draw any other conclusion. If any useful status was intended for customary law its inclusion somewhere in Division 1 seems mandatory.

Fetters and conditions on recognition

The Pacific experience confirms that even if customary law is firmly grounded constitutionally this is no guarantee of viability. The Draft Constitution imposes a critical time restraint on recognition. It further provides that recognition is subject to a program of negotiation and consultation and then to an additional political process. To appreciate the draconian effect of the triple conditions to be satisfied before customary law is off the starting blocks, the relevant clause of the Draft requires examination. Stated in full it reads:

> 6.3 CUSTOMARY LAW
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> (1) Aboriginal customary law is recognised as a source of law in the State to be enacted as the written law of the State (within 5 years of the commencement date or such further period as Parliament determines) by the Parliament passing laws in substantial accordance with the results of negotiations and consultations between the State government and representatives of the traditional Aboriginal structures of law and governance of the Aboriginal peoples of the Northern Territory providing for the harmonisation of the customary law with other laws in force in the State, including the common law.

The defects in this process are obvious.

- It bestows no automatic recognition on customary law.
- It subjects the process to political control. Parliament can regulate and, if it sees fit, delay indefinitely any implementation program. This is unacceptable particularly in a polity where a party with an unfriendly spirit towards Aboriginal concerns enjoys perpetual power.
- It imposes an open-ended negotiation and consultation procedure designed towards harmonisation not applicability.

Is harmonisation synonymous with surrender?

The classic definition of harmonisation in the context of customary law is that of the eminent Professor Allott that:

> By harmonisation is meant the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law.[7]

If this is the benevolent intent of clause 6.3 then to criticise smacks of carping. However the wording forcefully suggests something less benign. It implies a process whereby customary law endures alteration, trimming and pruning to conform to other sources of law. It is doubted that the government intends, anticipates or will allow customary law to operate and be applicable as a self-sufficient body of law. Hostility by the political elite to any application or recognition of customary law was demonstrated by their strident public attacks on the decision of a Territory magistrate in 1998 in recognising a defence founded on Aboriginal custom.

Summary and suggestions

The implementation of customary law is bedevilled by a plethora of complications. These centre on the nature of customary law itself, designed as it is for small-scale communities and being process, rather than rule, predicated. As an unwritten code these difficulties are compounded in Western eyes. In a short article it is impossible to indicate all the problems, but resolving conflict of laws issues remains a formidable challenge. Notwithstanding the indisputable challenges the efforts of the Draft Constitution can only be marked as an abject 'fail'.

Any redrafted document must if it is even to receive a 'pass' incorporate the following suggestions:

- The separation into divisions must be discarded and customary law established as a primary source of law. Theoretically no cogent reason merits any standing for customary law below that of the common law.
- Any provision rendering the recognition of customary law to political control must be expunged.
- If there is to be any negotiation/consultation process to 'discover' customary law it must be inclusive. The colonial experience of consultation with indigenous groups invariably revolved around those in control of indigenous structures so that the version of customary law that evolved reflected their interests.
- Any approach to harmonisation *must* set forth from the standpoint that no value system is inherently superior to the other. This is critical as in past conflicts between the common law and customary law the devotees of the former have assumed its intrinsic superiority over the latter.

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the role of economic development and corporate greed in the victimisation of backpackers and consider the possibilities for undertaking the prosecution of corporate or state offenders.

Conclusion

Backpackers form a significant client group for the tourism industry in Australia. They are particularly important to remote and rural regions that are too far off the beaten track for conventional international tourists. Unfortunately, there are good reasons to believe that backpackers are vulnerable to various predatory and property crimes. Their vulnerability stems, in part, from their age, their budget, the ways they travel, the places they go and the kinds of accommodation they seek. Australian tourism and criminal justice institutions might respond to the threats to backpackers by trying to limit what backpackers do. All they would have to do is proffer the same kinds of crime prevention advice traditionally targeted at other vulnerable groups such as young women and the elderly. Apart from harming the tourism industry, however, these kinds of responses would do nothing to address the underlying causes of victimisation. These may range from poor regulation of the tourism industry, through corporate greed to the prevalence of various sexist and racist attitudes in our society. If we are serious about trying to reduce the victimisation of backpackers we need to develop strategies that respond to the needs of backpackers and are far more sensitive to *why* people backpack. Future research needs to investigate how and why backpackers might be vulnerable, how they can and do respond to threats of victimisation, and how institutions and societies that wish to promote backpacking might be able to help reduce both victimisation and its effects.

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Conclusion

Customary law will remain significant to its adherents whether or not it receives formal endorsement in a constitution. The majority of those subject to customary law would regard a constitution as an exotic document. Thus intensive explanation and discussion with those whose interests are directly affected is essential in any process towards agreeing a formula for cementing customary law into the legal structure. Pluralism spawns weighty difficulties that demand both effort and tolerance if they are to be resolved. What is inexcusable is to create a hierarchy of sources that belittles customary law.

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