EDITORIAL

CUSTOMARY LAW AND STATUTE LAW IN THE PACIFIC
A POLICY FRAMEWORK

Throughout the Pacific those who are responsible for making policy are faced with the problem of reconciling popular sentiment in favour of retaining indigenous customary law and the overwhelming momentum to accept the reality of an introduced legal system. None of the approaches to reconciling customary law and the needs of national development have so far been entirely satisfactory. We believe that it is unrealistic to lay all the blame upon lack of political will. Unless governments are presented with a body of theoretical knowledge which is convincing, they cannot be blamed for caution or even inactivity.

We therefore, attempt to provide an analysis upon which policy decisions can be based and to make some suggestions about the options which are open to those who have the responsibility for making policy.

I CUSTOMARY LAW AND INTRODUCED LAW: ADVANTAGES AND DISADVANTAGES.

The danger in looking to customary law as a source of inspiration for legal models in a modern commercial society, or in a society whose aim is to become a modern commercial society, lies in the risk of forgetting history: not only the history of the traditional society but the history of the introduced law. It is important to remember that customary law in the Pacific is founded in a time before the modern state existed. The Common Law of its very nature is a part of the process of building a nation state, England. England was not of course, one of the first nations, but it was the first in Western Europe, from where the legal roots of the modern law of the Pacific all have come. The Common Law is as much a creature of its time and place as any other human construct. In some respects it is clearly more technologically advanced than customary law: in others it is comparatively primitive.

Policy makers in Pacific countries would like to make use of the traditional values of co-operation and interdependence, of conciliation and of customary sanctions, such as shaming, which in traditional society were so much more effective than the modern law's fine or imprisonment, because they worked on the perpetrator of antisocial behaviour through specifically fashioned sanctions until the antisocial behaviour was publicly renounced and abandoned or the culprit was physically destroyed or incapacitated.

It is not only traditional societies that have preferred mediation and conciliation to judicial settlement of disputes. Modern nations, as well as industrialists, employers, bankers, merchants and insurers prefer to settle disputes outside the judicial processess if not outside the Legal structure altogether (Avernach 1983. Abel 1982). Mediation and conciliation are in many technologically advanced countries preferred to judicial decision making in the most sensitive area: sex and race discrimination, industrial disputes, shortcomings in administration, even the assessment of income tax. Modern courts, where one party wins all and the other loses, are considered tribinals of last resort. They are still important not only to hear appeals on points of law but for the standards they set through their authoritative judgments. Yet if one looks at international contracts, they usually contain procedures for the avoidance of adjudication, at least in the first instance, preferring procedures of mediation and arbitration. It is important to remember the conceptual limitations of the Common Law. Its win or lose, all or nothing technology, which lacks (unless provided by statute) any technology of apportionment, is as unsuited to the demands of modern business as it is to the day-to-day needs of the ordinary people of the Pacific countries, who are use to what they are entitled to consider as more sophisticated methods of conflict resolution.

On the other hand the usual arguments for and against the use of customary law in the development of the law necessary for newly independent nations seeking rapid economic development cannot be gain said:

1. The rule content of customary law is insufficiently developed to regulate modern commercial relations. There is, of course, nothing in customary law which deals with speculation in futures, trust receipts or second mortgages.

2. In some countries, of which Papua New Guinea is conspicuously one, customary legal systems are so diverse and numerous that it is difficult to see how there can be any synthesis. That diversity is rightly seen as inhibiting rapid nation building. Not only does customary law differ from group to group but no group would ever be prepared to accept the law of another group as the model for the nation.

3. Understanding of and familiarity with customary law and ignorance of the introduced law, which is often seen as the incomprehensible preserve of an elite and their legal advisers, naturally makes people suspicious. This is usually thought a particularly colonial problem but the same suspicion prevails among ordinary people throughout the world, who believe that the law is an esoteric system manipulated by those with power. In Papua New Guinea, all introduced law is in a foreign language and none of it is translated.

4. The introduced law is correctly seen as the law of the former colonial power and is, rightly or wrongly, suspected of being one of the ways in which the business interests in the metropolitan countries retain an economic influence over the former colony.

5. The law of the central state is sometimes seen as impersonal and dictatorial compared with the well known law handed down by ancestors who were of the same stock and culture as the present generation and who are revered for their relevant wisdom.

II MAKING A SYNTHESIS: SUCCESSESS AND FAILURES

In many parts of the law which do not impinge on the lives of ordinary people there have been successful grafts of foreign law. Banking, insurance, international trade, carriage by sea or air seem to raise few problems, even though the foreign law was imported in an old-fashioned form and has not been kept up-to-date. Those activities are often still in the hands of companies owned internationally if not by citizens of the country of the former colonial power. Disputes rarely affect ordinary people and, if they do, an ordinary person would not expect the law to be comprehensible or familiar.

At the other extreme are matters of landholding, fishing rights, succession on death, marriage, adoption, guardianship, rights of women, sexual offences and large areas of the law of wrongs, including procedures for resolving conflicts and of compensating injuries - or rather of buying off retaliation. Introduced legal technology has been resisted and has proved not only clumsy and inappropriate but less technologically refined and certainly less effective than the traditional customary law which it seeks to displace.

In between there are no doubt legal topics which are fought over in more subtle ways. The law of the "trade store" and other small businesses, small sales and loans, methods of incorporation, family partnerships, common ownership of chattels, are topics in which the interplay of customary and introduced law may lie concealed.

The victories of customary law may be far from apparent. Neither those who have devised the schemes which accommodate the introduced law or legal or anthropological observers may realise the significance of what is happening. The introduced law in Papua New Guinea, for example, is quite clear on bigamy. If you have been married in church you cannot take a second wife. In one society at least, the answer to that problem is simple. You get excommunicated by the church and marry again by custom. Whatever agents of central administration may be near enough to take an interest in these matters seem to be satisfied by this subterfuge. The law on incest is equally unambiguous, having been laid down as forthrightly as it was incongrously by the Supreme Court: Sexual

relations with an adopted daughter are not incestuous. Try telling that to some Village Courts. Do you object that the Constitution clearly provides that no one shall be charged with an offence that is not forbidden by statute? Some Village Courts have not heard of that provision and lawyers are not permitted to appear remind them. If they were, they would have little chance of persuading those presiding that 'lineal descendants' in the Criminal Code includes only children and their children, and not the offspring of brothers or sisters.

It is notoriously difficult to be sure that a man confessing to a crime of violence is the real culprit. Imprisonment is not a customary procedure. If the act of violence was one which customary law demanded then the rational response of the customary community is to offer up to the authorities the person of the man who will least be missed and is best fitted to withstand the ordeal of separation from the group. There is, moreover, an important factor based on some traditional version of the English proverb 'What the eye does not see the heart not grieve'. A tight-knit community will deal with its own problems and, if all including the offender prefer it that way, may well escape interference from the central state.

Most people in Papua New Guinea believe in sorcery. Moreover, they believe that its use is increasing. Some observers say that growth is a customary response to the injustice allowed in part by the introduced law.

We have preferred to discuss the victories of customary law first in order to overcome the usual ready assumption that the result of the conflict between traditional and introduced law is a foregone conclusion; just a matter of time. Yet it may be possible to support that assumption by argument. If the advantages of the introduced law are allowed to continue without care being taken to test its effects, then customary law will be, if not annihilated, at least so distorted as to become a monster. And the advantages of the introduced law are powerful. Legal education and training, the ways in which legal work is done in the courts and all other forms of practice, legal texts and information services, the camaraderie of a Commonwealth-wide profession, a fair sprinkling still of opinion leaders from the metropolitan centres, the whole conceptual framework and even the vocabulary of legal thought, all handicap any rival.

It can easily be shown that it is not all a question of merit. The sensitivity and appropriateness of customary conflict resolution compared with those of the common law system are endlessly arguable. But who is there who will argue in favour of the introduced law in Papua New Guinea on contract formalities or periods of limitation? Nine years after Independence the Revised Laws which came into force on 1 January 1982 retain the Statute of Frauds 1677 and the Statute of Limitations 1623. Both require an understanding of the forms of action, abolished in England in 1852. On the other hand, there is no means of knowing what the age of contractual capacity is because it has been statutory in England

since 1874 and before that was twenty-one at Common Law. The English statute has not been adopted in Papua New Guinea. Is the Common Law applicable and appropriate to Papua New Guinea as it must be if it is to be allowed by the Constitution to be introduced? That is readily assumed in practice and teaching but it would seem unlikely. It is no longer appropriate in England or many other countries where the age of majority has been reduced to eighteen by statute. Many people in Papua New Guinea have no birth certificates or other reliable evidence of their age. No Papua New Guinean, however, has ever had any difficulty with this problem of contractual capacity in customary law, which makes capacity depend on outward appearances of physical maturity.

There is plenty of evidence of the failures of attempts to introduce modern western law into societies whose legal traditions cannot easily accept the graft. Sometimes the customary law has been swept away in political revolution of one kind or another, as it was in France and to some extent in England. Even then custom sticks tenaciously to those parts of the legal universe, particularly family and religious law, which it considers especially its own. In other places the customary law has been confined, with the people it serves, into enclaves, ghettoes or reservations. This solution cannot withstand the urge of those within to escape or the even stronger struggle of those without to get at the resources within. A third answer seems to have worked well to some extent in some places: custom is in various ways integrated into a modern legal system. The tension between the two or more systems is recognised as natural, efforts are made to avoid destructive clashes, and the best is sought of both worlds.

There are many lessons to be learned. Even the greatest comparative lawyer's work does not guarantee success, as is shown by the rejection by the people of Ethiopia of Rene David's Civil Code. (David 1963, Seidman 1978) Kemal Ataturk in Turkey imported the Swiss Civil Code but its spread to the villages is not complete even now and the trend seems backwards towards Islam of a kind, as it is in Iran. What is the status of the Civil Code in Indonesia? Some years ago it was found that only a handful of hypothecs had been registered in Jakarta, even though failure to register meant that they were invalid not only against third parties but between the parties themselves (Sudargo etal 1973). Similarly, it was hard to persuade the clerks in the registry in Taiwan to register a second mortgage, which was an anathema to their conceptual assumptions, even though such a charge was provided for in their brand new version of Article 9 of the U.S. Uniform Commercial Code (Loh etal 1983).

The nostrums of academic experts are rightly treated with the gravest suspicion. The great John Henry Wigmore, one of the United States' foremost legal scholars, who had spent many years in the East, could declare as late as 1937 that China should follow the example of Egypt and staff its courts 'in moiety by jurists of foreign nationality...it seems a pity that the young Chinese

jurists will not concede this'. Even Roscoe Pound was saying - in 1948 - that China's jurisprudence could be confidently expected to follow patterns from the United States.

III SOME TENTATIVE SUGGESTIONS

The answers to the practical problems of building genuine indigenous legal systems out of the materials of traditional and introduced law will be better found by a scientific approach than by stumbling from makeshift to stopgap. Perhaps some tentative suggestions may be helpful, if only to act as targets for destructive criticism.

1. The tasks of creating the new law that is needed by the new economy must be approached with sensitivity and humility. No source of law, traditional or introduced can be assumed without enquiry to be superior. There must be a genuine recognition that customary law has a contribution to make to the modern legal system - it is not just a stumbling block, a collection of superstitions that backward-looking people must be persuaded to renounce.

2. Where the overwhelming majority of the citizens of a country share traditional attitudes towards customary law (though the laws they follow may be diverse) then those traditional attitudes, and the traditional economy of which they are a part, are the natural infrastructure upon which to build the new legal system. Answers to legal needs, new and old, just like any other kind of new technology, may well be found in the experience of other countries but their usefulness and appropriateness must be tested against the accepting country's realities.

3. Policy must be formulated first. Legal reforms depend on political will. The government must be convinced that efficient, appropriate law is worth the cost and of high enough priority to need early attention. Even if it is sometimes considered politically necessary to disguise the realities of change, that is no justification for not "thinking" clearly.

4. The new law will be created best if both the scientists who devise it and the technologists who apply it have the advantage of a thorough understanding of the country and its people which usually is easier to find in those who have been born and brought up there. There is a great need for indigenous legal draftsmen, but the need for indigenous expertise to translate the policy of indigenous policy-makers into a brief for the draftman is even more important.

5. Whatever else makes a suitable import, prejudice does not. For example, no country which now has a Criminal Code would want to revert to the common law of crimes. Yet there is an apparent reluctance to follow the Indian example, limited though it is, and codify the civil law. It cannot be denied, however, that codification requires legal science at its most refined and competent level.

6. If law is to be respected it must "earn" respect. In Papua New Guinea, for example, most if not all lawyers think about law in English. Very few others do. If ordinary people are to give up customary law they will have to understand the law which is substituted. No laws are yet translated into TOK PISIN or HIRI MOTU not even the Constitution, let alone into the many vernaculars .

The Editors.

SOURCES

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