Submission No 30

Inquiry into Human Rights and Good Governance Education in the Asia Pacific Region

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Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade on Human Rights and Good Governance Education in the Asia Pacific Region regarding Fiji and Vanuatu

1. Law Reform and Good Governance

Law reform is a central area of need for the South Pacific countries. The legal systems of the South Pacific region are often portrayed as adopting or applying models of legal pluralism. In a rather loose sense legal pluralism refers to a model in which there are several autonomous or semi-autonomous legal systems or sub-systems operating at the same time. So-called 'strong legal pluralism' holds that these diverse systems (which can often be equated with customary law systems) function quite independently of the authority of the central state and, indeed ought so to function.

The weaker version, often called 'juridical legal pluralism', holds that the State is still required to perform a kind of coordinating function. According to many theorists, the juridical model accepts that whilst the State might be considered a primarily legal or law making institution, there are aspects of its law making authority which do not extend to all possible domains of legality within the general sphere of its authority. There is a multiplicity of domains of legality each of which has a kind of relative autonomy and each one functions as a legal domain or sub-domain independently of the State.

So far as South Pacific countries exist as nation States with modern constitutions proclaiming final legislative authority on a national basis, it would seem that the juridical model is the only clear alternative. The model purports to accommodate the demands for unity at the national level as well as diversity at the local or regional level. The constitutions themselves seem to entrench this idea in terms of the concessions which they make both to the establishment of a national framework of government and law and, at the same time, to the recognition of customary law.

One would think that the implementation and strengthening of such a model would have received considerable attention from South Pacific countries since they achieved independence. The juridical model seems to provide the basic opportunity to accommodate the cultural and political diversity which is well acknowledged in these countries with some sense of the newly achieved post-independence national identity. One could argue that they would be better served with federal models of government (as has been argued with respect to the Solomon Islands recently, for example) but the problem is that a federal model (which is perhaps one version of juridical legal pluralism in a formal sense) is extremely expensive and imposes a range of expectations as to the operation of regional government entities which are to some considerable extent, inappropriate in the customary environment.

However, surprisingly little has been achieved in this area. There remains a strong, and rather frustrating, dichotomy between law made or accepted by national institutions of government (which is sometimes misleadingly called 'introduced law'), on the one hand, and customary or traditional law, on the other. It is a dichotomy which is often employed to political ends because, for one thing, it provides what many see as a convenient differentiation between the residual colonial authority (introduced or foreign law) and autonomy and independence (customary law). At the same time it has to be recognized as an obstacle to law reform because the two are taken as diametrically opposed.

Whilst one can accept that the division between introduced law (or legal systems) and customary law is a common one in the South Pacific countries one needs to look more closely at the nature of the arguments here. It is frequently the case that some kind of conceptual opposition is set up between the two. The opposite categories are frequently presented as either fundamentally irreconcilable or existing in some sort of antithetical relationship. Having posited the two horns of this dilemma one seems destined to be shafted on one or the other. Hence an appeal to introduced law as against customary law is associated with the needs of modernization and development. An appeal to customary law at the expense of introduced law is put in terms of a defence of a traditional way of life and the rejection of imperialism in some particular manifestation.

From a more practical viewpoint, one might ask why there has not been a more serious attempt to achieve some kind of integration of custom and introduced law in terms of an attempt to make the juridical idea of legal pluralism more workable or realistic. It seems clear to us that neither the parliaments nor the courts have been able to seriously address this issue, although for rather different reasons. Those with some familiarity with South Pacific legal systems will have experienced the phenomenon of what can be called 'time warp'. This refers to the situation whereby laws of the former colonial country or countries are simply left in place after independence and not changed or revised. Despite the opportunities to repeal or amend colonial legislation or common law principles which were left behind at independence (and this seems to us to have been a clear expectation on the part of the former colonial powers) it is most often the case that very little has been done in the area of reform. It is perhaps ironic that the relevant laws left behind by the colonial powers at independence have since been either repealed or radically amended by the colonial country in its own jurisdiction, most

often because it is now socially and culturally irrelevant. Yet the old law continues in force in the former colony.

Associated with this is the common perception in Pacific countries that the elements of the common law system are somehow intractable and unchangeable. The underlying view seems to be that somehow this system must be maintained as British law. In order to maintain that view this body of law is best isolated in its pre-independence framework and left untouched or, perhaps, ignored. This however was hardly the intention of the colonising country in the move towards independence. The intention, if anything, was to provide to the new nation a kind of framework of law, as a stop-gap measure, pending the local institutions of government, established under the new constitutions at independence, adapting the law to the needs of their own countries as was thought appropriate.

Clearly, given the current state of the legal system, these expectations have not been fulfilled. One could perhaps be unduly cynical as to why this has not occurred. Perhaps there is political mileage for those exercising power to maintain the perceptions we have referred to for their own political advantage. The opposition between custom and tradition, on the one hand, and the introduced or colonial system, on the other, has indeed been exploited in various ways by the (usually Western-educated) elites who have generally been in control of South Pacific legal systems since independence. However, whilst this could be a factor, we think there is no single cause for the failure. It has certainly has something to do with the fact that post-independence parliaments have had other agendas which have prevented serious attempts at law reform in the interests of developing a legal system, even one framed around the common law, which reflects local cultural values and purports to more adequately reflect the place of customary law within the system . There are also resources issues which have prevented realistic attempts at law reform being placed high on the agenda.

1.1 The Parliaments

On an overview it is clear that national parliaments in the period after independence have made no great efforts to address by legislation a number of fundamental problems which exist in terms of what we could call the localisation of the legal system. What we still have is a complex mess consisting of the remnants of introduced law which is out of date and often irrelevant. Although custom is very often raised by the political elites as something which is essential to the building of a nationalist post-independence ideology, the job of integration of custom within the legal system has not been seriously addressed. Of course, as we have already indicated, custom is also used by those who wish to resist the impetus towards a centralised State system by seeking to preserve local customary power bases. That may be evidence of a stronger version of legal pluralism but we are inclined to doubt it. Most frequently this kind of argument is a convenient form of double talk promoted by politicians and other cultural leaders who are appealing for local support.

However the question still remains as to why the parliaments have not taken this question of localisation of the legal system seriously. One could hardly say that the legal systems in their current forms are working well. Perhaps it is still the case that in

the absence of a pervasive legalism, the issue of law making by parliaments is not as important an undertaking as we have been often led to believe.

1.2 The Judiciary

There is no doubt that the role of judiciary in the South Pacific countries is a vital one. One need only refer to the judicial decisions taken by the High Court of Fiji Islands after the attempted coup in Fiji Islands in May 2000 to underscore this. However that might be, one can question whether the judiciary in the Pacific countries have really taken the task of addressing the localisation of the common law and its adjustment to reflect local cultural values, as seriously or as far as might have been the case. For one thing the courts have often felt themselves constrained to intervene in custom. In Fiji, for example, the courts have long sequestered custom and refused to touch it. This is on the basis that law also applies in its own distinctive realm as something like 'introduced law'.

Similarly at the constitutional level the courts have felt themselves bound to accept the literal terms of the various constitutions, such as schedule 3 of the Solomon Islands Constitution, which assigns customary law to a subsidiary basis as against the terms of the Constitution and legislation. An alternative approach to constitutional interpretation based on historical jurisprudence which would interpret current constitutions against a background of evolved cultural and customary principles has not been adopted at all. The moment of independence under a distinctive framework of written constitutional principles has been taken to supplant the possibility of any such interpretation.

Also in this vein it is appropriate to note the refusal of the courts to apply equitable principles in any kind of dynamic way by applying it to areas which belong to the supposedly independent domain of custom. Within the common law system equity is the vehicle of flexibility and in many other jurisdictions has been used, if nothing else, as a creative device to open up new areas of synthesis and development within the legal system.

In the South Pacific jurisdictions one finds very little of this kind of development. In the area of constructive trusts for example, there has been a refusal to apply these principles to situations involving the exercise of power by custom chiefs on the basis that any such putative trust would defy the certainty of objects requirement. There has been a refusal to try to articulate relationships between customary owners and chiefs according to any kind of fiduciary or trust principle on the assumption that this would be to intervene and to render these relationships according to foreign principles. But this is in itself a denial of the flexibility of equity as much as it is a failure to address the issue of development of a localised equity with distinctive cultural characteristics.

1.3 The Need for Law Reform Agencies

Clearly if the juridical model of legal pluralism were to work at all, the possible development of areas of law with a cultural or localised basis needs serious attention by law reform agencies. That there is little such activity in the South Pacific outside Fiji

perhaps tells us something again about the relative non-importance of law on the political agenda of South Pacific countries after independence. Although Vanuatu has legislative provision for a law reform body this has never been implemented. Although **Solon** Islands established a law reform commissioner the position was unable to do anything through lack of resources.

There are some basic matters that an effective Law Reform Agency might immediately undertake.

1. Determination of which introduced legislation does or doesn't/ should or shouldn't apply within the jurisdictions. This is an extremely complicated theoretical question which often depends on trying to determine in a particular case, whether an English statute is one of general application and then whether, in principle, it is consistent with local circumstances.
2. The reform of the law to bring it into line with local customs and values
3. Improvement of the quality of legislation
4. Improvement of the law making process in so far as law reform allows for openness and width of consultation before presentation to parliament
5. Support for the parliaments which in many cases still operate without committee systems

2. Human Rights Education

This aspect of the submission concerns aspects of human rights education in the South Pacific. The School of Law makes available the subject 'Human Rights'. The LLB elective course *Human Rights* has been taught to third and fourth year law students in the School of Law at the University over the past six years. The elective course is offered on a regular basis; for example it was offered in semester 1, 2002 and semester 1, 2003. The School for Law also provides some teaching in human rights in its Public Law 1 (constitutional law) compulsory second year course and human rights themes are incorporated into other subject areas such as Property law and Family Law.

As far as we are aware there is no other formal course or courses on human rights in the South Pacific region, at least not with a focus on legal issues. The courses mentioned are available only to Bachelor of Laws students. Although the School of Law offers sub degree Certificate level courses in law, serving the needs for non-professional legal education in the region, there is no Certificate level course on human rights as such. There are a number of other informal courses or training programmes offered by NGOs and the like.

Over time we have had the advantage of gaining an insight into attitudes of student with respect to human rights issues. The students have come from any of the twelve countries which are members of USP as well as some from Federated States of Micronesia. Whilst student attitudes are not always easy to gauge, it does seem a reasonable conclusion to say that a majority of them find the idea of a regime of human rights rather strange and at odds with their own cultural values in many respects.

Human rights regimes are often perceived as something determined by alien agendas and imposed on Pacific countries from outside. They are perceived frequently as in conflict with local cultural values and to be the product of some kind of imperialist tendency on the part of so-called Western countries.

This is not confined to regimes of human rights. It is in fact a common perception of law itself, which is inevitably rights-based. There are common difficulties for students to grasp the notion that the rule of law involves government by abstract or formal principles rather than by persons. We expect that this is true in a wider social or cultural context as well. It might be true in other jurisdictions but it is widespread in Pacific cultures and, we think, one of the reasons why the rule of law is frequently misunderstood or attributed some alien status.

There is no doubt that the May 2000 crisis in Fiji have caused some turmoil and brought about some changes in Fiji's political and social landscape. The imposition of sanctions against the military-installed government of Fiji by Australia and other Commonwealth countries during the May 2000 crisis and its aftermath was one initiative that was taken ostensibly on human rights grounds. Some of our students (notably indigenous Fijians) have expressed views, inside and outside of their human rights classes, that it was high-handed on the part of Australia to impose sanctions on the then military-installed government. Yet some of these students also support the invasion and occupation of Iraq (mainly) by the United States-led coalition as a liberation. The attitudes towards the concept of human rights among some students – notwithstanding any exhortations to strive, as students of international human rights law, to be 'impartial' and detached - seems often to be influenced or derailed by pre-conceived or pre-determined notions emanating from culture, class or race.

One could project this observation to the wider community including certainly some of the elites in Fiji, Vanuatu and elsewhere. In Fiji, the racial factor more or less appears clearly to determine attitudes on the part of students, politicians and significant sections of the general public towards human rights issues. It would particularly be applicable in the case at least of some political elites where there is mileage to be made out of it in order to perpetuate their own interests and rule. For example, a Fijian member of Parliament (a Senator) made a statement in the Fiji Parliament in 2001 to the effect that Indo-Fijians are 'guests' (*vulagi*) and therefore if necessary and a last resort they could be 'expelled' from Fiji.

Recently the *Social Justice Act* in Fiji Islands was passed by the Parliament. The Act apparently intensifies the affirmative action programs for the indigenous Fijians. There have been many concerns expressed by non-Fijians that the *Social Justice Act* disproportionately favours all Fijians regardless of their financial status and that the poor non-indigenous (mainly Indo-Fijian) communities would be more disadvantaged as a result of the implementation of some of the provisions of this Act. Fiji is a State party to the 1965 *Racial Discrimination Convention.* It might be a fruitful enterprise to survey or analyse whether the recent *Social Justice Act* of Fiji fully conforms to the provisions of the *Racial Discrimination Convention*, although we express no particular view on that, or indeed the rights provisions within Fiji's own Constitution.

It appears to us that the projects carried out by the current Fiji Human Rights Commission are worthy ones. The Fiji Human Rights Commission is one institution in Fiji which should be strengthened and further supported by Australia. It appears to be doing a creditable job in conveying human rights education and in achieving wider attitudinal reforms on human rights issues.

Attitudinal change is also perhaps necessary in Vanuatu though the attempts to begin to effect a change should not merely be focused around a few political elites (as in Fiji) but in relation to the 'elders' in a 'chiefly' and custom-oriented society. Vanuatu has ratified both the 1979 *Convention on the Elimination of Discrimination Against Women* and 1989 *Rights of Child Convention.* Implementation is a problem however. There is resistance to these measures on the part of customary chiefs. Since the influence and power of the chiefs is quite pervasive the implementation of these conventions on 'the ground' has proven to be intricate and difficult. At least in Fiji, there is a Human Rights Commission which has done positive work whereas in Vanuatu and other countries in the Pacific region there is none, although the Law School is aware of an initiative to attempt to set up such a Commission in Vanuatu. Perhaps lack of financial and other structural resources have, so far, prevented the establishment of such a governmental (Human Rights) commission.

We note that some five years ago there was an attempt to set up a Pacific Centre for Human Rights. This was initiated by a Human rights fellow located in the Institute of Justice and Applied Legal Studies. This Institute is affiliated with the School of Law but is based on Laucala campus in Fiji. As we understand it the move to establish such a Centre was largely frustrated because particular countries felt that human rights was a matter which could be better dealt with by in-country centres or institutions. This view was particularly strong on the part of Fiji which was at that stage about to establish its own human rights commission. The movement towards a trans-Pacific centre effectively died when the incumbent fellow left the Institute to take up a position in New Zealand.

3. Human Rights Implementation

It is clear that whilst many South Pacific countries have been all too ready to accede to various international treaties and conventions with human rights content, the implementation of those treaties has generally failed. This failure can arise in two respects. Firstly there is commonly little effort to implement by practical means even where the treaty or convention is applied as part of domestic law. Secondly, it extends to implementation by legal means where municipal legislation is required to apply the relevant provisions as part of domestic law.

We are usually confronted by the phenomenon of empty legal formalism in cases such as this. The treaties or conventions are adopted in response to international pressures or in order to provide the impression that reform is under way. Yet behind the scenes there is either extensive opposition to the new rights regime perhaps on the grounds that it involves unwanted international interference with established cultural rights and norms, or there are other agendas or resource demands which are deemed to more

important in the local political context. For example, only Fiji, out of a number of Pacific Island countries which have signed up to CEDAW has produced a report (2002).

4. Human Rights Initiatives in the Region

Particular initiates in the human rights are generally left to NGO's which depend in turn on external funding for projects. There is very little undertaken by way of government funded initiatives. Even in Vanuatu the Department of Women's Affairs depends on aid donor funding for most rights training workshops or awareness training.

Much of the NGO activity takes place through organisations directed at and organised by women. E.g Fiji Women's Centre, Vanuatu National Council of Women and Vanuatu Women's Centre, National Council of Women in Solomon Islands. Other organisations depending on aid funding for rights awareness programmes are Wan Smol Bag in Vanuatu - which travels in the Pacific, RRT - funded by DFID and now the UNDP.

There is potential for training initiatives under IJALS, USP, and indeed the Law School. Some such activity has been undertaken in the past. For example Law School academic staff have run courses on Civic Rights Awareness in Solomon Islands, Fiji and Vanuatu. Others have provided training sessions and workshops on gender issues, legal skills, and magisterial and judicial skills. Aid organisations which have branches in the Pacific also run projects such as the current UNICEF/Save the Children Fund project on Access to Justice for Children which is meant to be taking place in the Pacific.

From Law School research into women's NGO's in Vanuatu it would seem that while there are quite a number of these and more informal groups such as church groups, efforts regarding rights awareness training is poorly co-ordinated. There is quite a lot of overlap and many groups energies are dissipated by internal politics, intra-group politics and debating internal structures. There is very little undertaken by way of lobbying for the effective implementation of national legislation to promote international or even constitutional obligations. In Fiji there is the Fiji Human Rights Commission. There are proposals to set up law reform commission in Samoa although it is not known to what extent this will relate to human rights. There is a human Rights and Democracy movement in Tonga - which seems to be a quasi political NGO, which is seeking aid funding from the Commonwealth for its cause. (Pacnews 19 March 2003)

5. Legal Rights and Complaints

The failure adequately to implement Conventions such as CEDAW or ICRC are prime examples. The legal rights of women and children need special attention in the South Pacific countries, for example with respect to medical treatment. In our view there is a need to set up independent tribunals for the hearing of complaints against health care providers and lawyers to which patients and clients respectively can complain without

payment of any fee or the fear of costs orders. There is similarly a need to set up complaints procedures for discriminatory treatment, labour matters etc.

6. Legal Professional Reform

With the outflow of graduates from the USP Law School since 1997 the number of legal professionals in the region has been expanding. In countries such as Fiji, Solomon Island Samoa and Vanuatu there are existing legal professional organisations and it is expected that the graduates will become part of them. In Fiji the structure and regulation of the profession was reformed and improved considerably by new legislation passed in late 1997.

In other countries the regulation of the profession including mechanism for the admission, disciplining, provision of continuing legal education dealing with complaints against lawyers and the like are rather haphazard. Vanuatu is currently reviewing the structure of regulation of the profession and this is a welcome development. In countries such as Kiribati, Nauru, Tuvalu, Niue and Cook Islands there is no effective professional body at all. Usually it is entirely left to the superior court. Graduates might well for the most part become government lawyers at the present time, but one can anticipate the emergence of a private profession at some time.

This would be a welcome development in so far as a private profession can contribute effectively to the overall quality of governance in a country. However we have some concerns both about the ability of our graduates to cope and our own ability to provide the skills required to prepare them adequately within the confines of our formal professional law programmes.

In respect of most South countries the lack of opportunities for continuing legal education is a concern. Not only that there is no established legal profession in many cases so that new graduates have to 'hit the ground running' and without the benefits of professional tutelage. It is, of course, unreasonable to expect that any recent graduate will have the required competence to be able to engage in legal practice. The USP Professional Diploma is longer than most being of 6 months duration. But, even so, that programme cannot provide more than the most basic skills required for legal practice.

7. Access to the Law and to the Courts

It almost goes without saying that expectations regarding the wider acceptance of the rule of law cannot be realistic without effective means of access to justice. There is clearly a deficiency in South Pacific countries in terms of the possible access by citizens to the law and to the courts. Fiji has a legal aid office but it is rather an impoverished operation and with a limited scope to provide services to the needy. Vanuatu, as with other countries, has a public solicitor's office but this is poorly staffed and cannot cope with the demand for services.

In the case of Vanuatu USP Law School has established a community legal centre in Port Vila. This words in tandem with the public solicitor's office and takes cases on referral from that office. USP law students staff the centre and are supervised by law

staff who are admitted as 'academic lawyers' in Vanuatu. Assistance is provided by an Australia Youth Volunteer. The project has been funded by AusAID since inception.

The Law School is strongly committed to the continuation of the centre as it provides, amongst other things, an opportunity for senior law students to engage in actual legal practice under supervision. However it provides an important service to the community of Vanuatu. Whether the possibility exists for a similar type of operation in countries other than Vanuatu is problematic given the location of the body of students in Vanuatu only. This possibility has been raised with the Law School by the current Attorney-General of Fiji Islands who visited the community Centre in 2002 and was highly impressed with the project. It might be that, given the wider offering of LLB courses by the School by Internet delivery, and hence the presence of law students in other countries, some possibilities in other countries might be explored in the future

8. Access to Legal Information

The School of Law, through the Emalus Campus and Laucala campus libraries of the University, makes available to students appropriate resources for teaching support in the area of human rights as elsewhere. Some material is available in hard copy whilst some also in available on the Internet. Whilst these resources are open to non-student users, they are essentially teaching collections.

Some basic information such as the number and listing of countries of the South Pacific which have ratified major international conventions regarding human rights are readily available from various sources including from United Nations documents and also from the Department of Foreign Affairs and Trade. Hence this submission will not replicate that information. Moreover, the annual United States State Department's *Report on Human Rights* provide a more detailed country report for each country of the South Pacific as indeed virtually all countries of the world (with of course the United States itself as the exception where a self-report is not made). (It is not implied here that the US State Department's Annual *Reports on Human Rights* are exemplary documents which provide a 'fool-proof' foci of reference.)

Since 1998 the School of law has been engaged making available case reports and legislation from the South Pacific countries on the Internet. This is now operated under the umbrella of the Pacific Islands Legal Information Institute which is affiliated with the Australian Legal Information Institute and other such Institutes world wide.

Initially the project was intended to serve the needs of staff and students in the law programme at USP. However it now provides the major source of law reporting for the region as well as more broadly. It provides a significant service to the regional legal community as well as to international scholars. It is contributing to the improvement of the quality of justice in the region and to the exchange of ideas and information between regional countries.

This project now provides substantial coverage of legislation and judgments from Pacific Island countries. The provision is strongest in the case of Vanuatu, Solomon Islands and Fiji at the present time. Recently an effort has been made to widen the

coverage provided and extend it to Tonga, Samoa, Niue and Marshall Islands in terms of more extensive coverage.

As well as legislation and case materials PacLII also provides access to various statutory indices, and to treaties and conventions which apply in the South Pacific countries. The objective of the project is to provide a comprehensive database of all such legal materials. The constraints to date have been in terms of the inadequacy of funding provided. This has kept the project relatively small scale, although no doubt important.

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