BOOK REVIEW

Kenneth Brown, *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu*. Darwin, Australia: Charles Darwin University Press. 2005. 248 pp.

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This is a study of the plural laws of two states in a region where explicit state law pluralism is universal but where the phenomenon has been even less studied than elsewhere. As Dr Brown notes, studies of customary law in Africa, recognised by state law within which it coexists with received law, multiplied in the 1960s. They have continued to the present, with South African law in its post-apartheid manifestations especially well represented. From the 1970s there was a surge in studies of actual or potential state recognition of the customary laws of indigenous minorities in western countries such as Australia, Canada and the USA, encouraged by the involvement of the International Labour Organisation in indigenous peoples' claims. There had long been studies of personal laws in South Asia, although these were not widely known outside the region, and of *adat* law in Indonesia, known outside largely in the Netherlands. Interest in this form of state law pluralism in the South Pacific developed in Papua New Guinea from a time shortly before Independence in 1975. But only in the past two decades has the subject been studied in detail for other states in this region. These studies have grown particularly as a result of the institution of law courses at the University of the South Pacific. (See the bibliography in New Zealand Law Commission, 2006). The work under review, based on the author's Ph.D. thesis at the Northern Territory University (since 2003 Charles Darwin University), Australia, is a substantial contribution to work on this subject in the region.

Brown is a lawyer with experience in a number of common law countries. He has been engaged in legal practice in Solomon Islands, and appeared in some of the leading cases on customary law which he cites. This book is a study of the relationship between two formal sources of state law. First, many different systems of customary law, or 'custom' (and the two terms tend to be used interchangeably in the state laws of the Pacific) are observed by the many ethnic groups in Solomon Islands and Vanuatu. Secondly, 'received law' introduced in the colonial

period is comprised of English law in Solomon Islands and both English and French law in Vanuatu. The other principal source of state law in each country is modern statute law, including the Constitution. Both Constitutions contain detailed provisions on the place of customary law in the state legal systems, and support the view that the intention of the Constitution-makers was to give customary law a prominent, even a dominant place in the legal hierarchy. The customary laws are examined in this work as they are regulated by statute and interpreted, sometimes in surprising ways, by the superior courts. The local courts are not given much attention because there are few records of their proceedings, and they appear not to have much influence on the formal content of the state law – although they almost certainly have far more influence than state law on the daily lives of the inhabitants. The fields of law specifically studied in this work are family law (primarily marriage and divorce), child custody, and succession. These are the fields in which relations between customary law and the other components of state law are most problematic, regulated by complex rules which give difficulty in interpretation.

This book will serve well as a textbook on the sources of the laws of these two states. It provides a thorough account and analysis of the legislation and the leading cases, and so is especially helpful for these jurisdictions in which legislative texts are not always easily available, and the law reports are slow to appear and not widely distributed. Compared with such textbooks for other countries this will be difficult to study, but this is unavoidable. The law governing the sources of law, set out in the Constitutions and Acts of Parliament, is extraordinarily complex and opaque, and it has been both elaborated and thrown into even greater doubt by the interpretations of the courts. Brown rightly finds it necessary to set out the difficulties and to argue for the solutions which he considers the best. The focus is on the present state of the law, although it is necessary for explanatory purposes to consider the past regulation of state law pluralism out of which the present law arose.

The principal general issue for argument is to what extent customary law should feature as a source of state law. Brown states: “A keystone thesis of this work is that customary law must be elevated from the nether levels of the legal domain and be accorded prominent standing in the legal system in accordance with the formula decreed by the *Constitution*” (65, in relation to Solomon Islands but representative of his view for Vanuatu also). He is critical of the colonial powers for treating customary law as “an inferior adjunct to the received law system” (42). But he also argues that since Independence the judiciary has taken a similar “very

restricted view of the standing of custom within the framework of the applicable laws" (90, in an analysis of a judgment of the Chief Justice of Vanuatu in 1996).

The other general issue is concerned with the compatibility of the customary laws with human rights, as expounded in a series of international conventions to which Solomon Islands and Vanuatu are parties, and in the states' constitutions. Here Brown seems to take a less certain position. He suggests that customary law could in many instances be modified to accord with human rights, especially those of women and children. But he also argues that the values represented in customary law should not always be subordinated to those of human rights. His uncertainty here sometimes leaves some lack of clarity as to what developments he would recommend when, for example, he argues against the deep-rooted patriarchy of customary law, for a unification of customary and received marriage laws, but for the need to preserve custom (122-24). On the other hand he argues firmly that in child custody cases exclusive deference to the principle of 'the best interest of the child' is not supported by the applicable statutory provisions, and entails a preference for the values embodied in human rights over customary values which is not self-evidently justified (Chapter 6, on custody of children).

Despite the detailed analysis of a number of cases, the book does not contain an account of the substance of any of the customary laws in these countries. Consequently there is no detailed exploration of the transformations of social normative orders necessary to adapt them for inclusion in state-enforced orders. The difficulty of achieving suitable adaptations is illustrated when it is pointed out that state legal systems assume that a marriage under any law must be formed by a celebration at a particular moment and place, whereas in many customary laws marriage is a lengthy process, the effect of which may remain contestable for a long period (109, 127). There is mention of the complicating factor for the recognition of practised customary laws that they are constantly changing (23-24). But these general (and instructive) observations are not often related to specific examples in substantive customary laws. This general lack of information on the substantive customary laws occurs in part because the preliminary question whether customary law is applicable in various types of cases is still often the main, and controversial issue. Hence much of the book is necessarily concerned with the applicability in state courts of customary law. (Chapter 4, "The constitutional prescription of customary law" comprises more than 25% of the text.)

The predominance of debates about applicability rather than accounts of application are not a result only of the disinclination of the states to recognise customary law. In the countries of the Pacific there appear to be too many different bodies of customary law, and too little appears to be known about any particular customary law outside the community where it is observed, despite a century of research by anthropologists, for full accounts to be given. There seems no prospect in the foreseeable future of bodies of customary law becoming 'established' as parts of state law by authoritative legislative or judicial statements of its content, or even legal scholars' expositions of them. The picture seems to differ from that in Africa. Are Pacific communities more varied, more widely dispersed, more lacking in representatives who can restate their customs? Is it possible that many African societies have adapted more fully to the demands of western-influenced modernisation, adjusting their customary laws to forms which are less unsuitable for state recognition?

It would seem that one route to further development of the themes which emerge in this book is through comparative study. Brown, like the other scholars working in this field (see e.g. Farran, in this number), makes reference to good effect to Papua New Guinea, and to some African experience. More comparison might be fruitful. The development of customary law in the courts of Vanuatu, with its French as well as British history, would have been illuminated by comparison with the development of the neighbouring French New Caledonia, thoroughly and skilfully analysed by Lafargue (2003). The possibility of giving legal effect to long-term relationships not formalised by legally recognised marriage (mentioned at 140-41) could be illuminated by reference to developments in some Caribbean jurisdictions.

But eventually most discussion of the course of legal improvements in such countries is apt to reach an impasse. Many enlightened law-makers and scholars argue that customary law should be respected, but needs to be changed to meet modern practical requirements and values, as does Brown in his conclusion (215-222). Yet virtually every discussion about the recognition of customary law demonstrates that state law-makers and scholars cannot themselves generally bring about social changes within the communities which observe customary law. In this field we can preach but we cannot practise, we can analyse but we cannot act. However sympathetic we may be, we are almost invariably outsiders. Only insiders can produce the social changes we advocate.

References

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