

Community Law-Making and the Codification of Customary Laws – New Currents

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The July 2018 Codification and Creation of Community & Customary Laws in the South Pacific and Beyond conference at The Australian National University focused on the proliferation of unofficial community law-making and other initiatives to codify customary laws in the Pacific. The significance of these developments was particularly discussed for conflict management, engaging with legal pluralism, community governance and addressing gender-based violence. Researchers and speakers from government and non-government organisations across the region presented case studies from Papua New Guinea (PNG), New Caledonia, Solomon Islands, Samoa, Fiji and Vanuatu. This In Brief identifies the main themes discussed, while recordings and summary papers are available on the [conference website](#). Several more In Briefs will follow, as will an edited collection of papers. Community law-making and codification are complex and contested phenomena particular to local sociopolitical contexts. Our initial engagement with them at the conference was deliberately broad and exploratory, and intended to help shape a longer-term research agenda.

While appearing to have intensified in recent years, attempts to write down and codify customary laws have a long history in the region going back to colonial times. Earlier codification was sometimes associated with colonial systems of indirect rule, which sought to harness customary authority to the ends of ‘native policy’, as in Fiji (Macnaught 2016). Codification was part of some indigenous strategies of resistance to colonial rule, as with social movements like Maasina Rule in Solomon Islands (Akin 2013). The revitalisation of *kastom* (custom) was also an important aspect of nationalist discourses during decolonisation in the 1970s (Narokobi 1983). Current examples of codification vary enormously in terms of their focus and form, including their territorial scope, the degree to which they involve government agencies and their underlying motivation.

Case studies presented at the conference illustrate how some codification exercises seek to record customary rules in selected communities, while others involve more ambitious attempts to document these rules across regions and, in some

cases, entire countries. Some confine themselves to particular aspects of customary regulation — for example, in relation to the rules applying to marriage, succession, sorcery accusations or dispute resolution — while others seek to be more comprehensive.

Codification may be initiated by governments or national organisations like PNG’s Constitutional and Law Reform Commission (CLRC) or Vanuatu’s National Councils of Chiefs, or more locally by community leaders, to address specific problems or governance issues. Some community law-making is enabled and regulated by national legislation, as in the case of Samoa’s Village Fono Act. Community law-making can also be wholly unofficial, with no explicit linkage to government authorities. While more usually found in rural Melanesia (Allen et al. 2013), the case study from [Mount Hagen](#) illustrates how unofficial law-making can also occur in urban settlements.

The motivations for community law-making and codification vary between places and over time. Some of the main motivations identified by conference presenters include:

Conservation through documentation. Conserving customary norms and practices through documentation for future generations in contexts where this knowledge is diminishing.

Enhancing the legibility of customary norms for purposes of national legal or judicial development. Speakers from PNG’s CLRC explained their Customary Law Codification project as a way of facilitating the introduction of customary laws in formal judicial proceedings as envisaged by the PNG constitution in the development of the underlying law.

Community-based problem solving. The case studies of unofficial community law-making from Jiwaka Province and Mount Hagen town, both in the PNG Highlands, explained it as a community-driven attempt to address particular local problems including fighting, sorcery accusations, domestic violence, possession and use of firearms and substance abuse.

Attempts to reduce friction and enhance compatibility across different legal orders. Such exercises can help clarify the responsibilities of different regulatory actors (such as chiefs, police and courts), particularly in rural areas where uncertainty

prevails about these responsibilities. This can also include issues around penalties in pluralist settings, as illustrated in the case of Ambrym Island in Vanuatu. Ambrym's draft code of customary laws seeks to substitute traditional items of value — such as mats, chickens and pigs — for monetary penalties in local dispute resolution.

Deliberate attempts to design 'hybrid laws' that draw on different socio-legal traditions to enhance environmental regulation. An example of this is the creation of the Loyalty Islands Province environmental code in New Caledonia, which involved traditional and elected leaders negotiating a system of co-management of local natural ecosystems. Similar aims inform the Nagoya Protocol to the Convention on Biological Diversity, which encourages the recognition of customary laws and community protocols relating to genetic resources and associated traditional knowledge.

Considerable variation means that each case of community law-making and each codification exercise has to be examined and evaluated on its own terms. The historical, social and political contexts of particular initiatives need to be appreciated by governments, donors and others considering whether to support or otherwise engage with them.

Challenges

The sheer diversity of customary norms presents an obvious practical challenge to codification exercises. This is particularly so in Melanesia compared to the relatively homogenous social and cultural settings in Polynesia. A recurring academic critique of attempts to convert customary norms into juridical forms is its impossibility considering the different logics, processes and sources of authority involved (Bennett and Vermeulen 1980). Customary rules cannot be neatly separated from their encompassing social orders as discrete institutions and sets of practices, unlike institutionally differentiated modern legal systems. Given the inherently fluid and embedded qualities of the former, it is argued that codification seeks to excise aspects of customary forms from their social foundations and freeze them at a particular moment in time, thereby rendering them no longer custom (Zorn and Corrin 2002).

A more practical and pressing concern of many contemporary critics relates to the broader issues of justice and equity such initiatives raise. There is the perceived risk that codification reinscribes inequalities enshrined in community values and practices, particularly those around divisions of gender, status, age or ethnicity. High levels of family and sexual violence and other significant forms of disadvantage faced by women and children provide the background to such concerns raised by lawyers, human rights organisations and domestic and inter-

national advocates for women's empowerment.

Opportunities

While acknowledging the inherent risks and limitations of both community law-making and codification initiatives, it is also important to see the potential opportunities for positive change they present. The cases of unofficial community law-making discussed at the conference were examples of energetic, creative and locally-driven approaches to problem-solving. This kind of participatory and practical problem-solving approach can entail prohibitions on certain kinds of behaviour deemed damaging to community wellbeing, but also positive prescriptions aimed at encouraging behaviour that enhances community cohesion and wellbeing, such as tree planting and ensuring children attend school. Beyond the immediate focus on preventing violence and crime, community law-making activities often have a broader orientation toward socially appropriate and participatory forms of governance in localities that are often labelled by outsiders as unsafe and dysfunctional.

Many of the codification initiatives discussed also highlighted the essential dynamism of customary domains and the willingness to adapt to changing values and circumstances. As in some of the initiatives around environmental regulation, there is often an open embrace of co-production across different social and regulatory forms. These approaches, drawing on multiple sources of authority and legitimacy, demonstrate clear promise in settings characterised by acute pluralism as well as limited and poorly-resourced state sectors.

Author notes

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