

‘Activating’ the powers of law in the South Pacific

Miranda Forsyth, *The Australian National University*

Introduction

There is a global trend of increasing expectations and demands on law to bring about social change. In the two main areas I have researched for the past ten years—the regulation and protection of intellectual property and traditional knowledge in the Pacific Islands (Forsyth and Farran 2015), and overcoming sorcery accusation related violence in Melanesia (Forsyth and Eves 2015)—legal solutions have been at the forefront of debates and proposed actions. Legal solutions are also very much part of proposed approaches to many significant development issues facing the region, such as gender based violence, urbanisation and resource exploitation, leading to an explosion of pieces of legislation in recent years. As an established scholar of Pacific islands legal systems, I have spent over a decade critiquing what I have termed the ‘mythscape’ surrounding state law in the region, and articulating reasons to look beyond state law in crafting new regulatory responses to development challenges. These reasons include the limited reach of the state, the relative foreignness of the common law system for the populations concerned, and the richness of customary and other non-state legal systems. However, when critiquing the over-reliance on the law as a development tool, it is important not to swing too far in the opposite direction and neglect the role of the state legal system. Today more than ever, state law is seldom unimportant or irrelevant, and often has a range of unexpected effects even in the most geographically remote locations. Rather than either assuming that state law is a silver bullet for development or dismissing it as largely irrelevant, what is instead required is an analytical framework that provide insights into the actual role(s) of state law in the South Pacific today, and its relationship with other legal and normative orders.

The current theoretical and policy frameworks around law and development are frequently grounded in a positivist framework that start from assumed positions about the nature of state law. It is therefore hardly surprising that there a regular findings is a huge gap between the law on the books and the law in practice. This gap is often explained by identifying the factors that cause the law in practice to fall short of the idealised model of how it ought to perform based on what is in the books. Such analysis is often visualised through a modernisation framework, based on underlying assumptions about the inevitability and benefit of embracing the rule of law or as the World Bank has recently termed it, the transition to a fully modern legal system that is largely seen to replicate those established in the global North (World Bank 2017).

A more useful way to approach the issue is to take a step back and first to seek to understand what state law actually ‘is’ in the context of the South Pacific. As Davies argues, ‘Posing the ‘what is’ question in a critical and open-ended way permits taken-for-granted definitions to be openly tested and revised and highlights the politics

of theoretical delimitations’ (Davies 2017). Even for something as apparently obviously ‘law’ as legislation, assumptions about its nature in the Pacific context can obscure the roles it actually plays, meaning its achievements or non-intended consequences may be overlooked.

The contribution of this paper is to propose two keys ideas for developing a new framework for understanding the role of state law in the region. It takes one particular form of law—legislation—as its focus. The World Development Report on Governance and the Law 2017 defines positive law such as legislation as ‘laws that are officially on the books of a given state’ and as ‘essentially words on paper’ (World Bank). This paper goes beyond such a definition, and its first key idea is to start to understand ‘what is’ legislation by asking what it does in practice. This leads to an identification categories of different types of powers potentially possessed by legislation that are particularly relevant in the Pacific islands context.¹ The second key idea is the new concept of ‘activation’, which is explained as meaning that all the different powers inherent in legislation are dormant until they are brought alive (or ‘activated’). In the Pacific context this occurs most often through relational processes.

The different powers of law

Legislation is often seen by citizens and policy-makers as possessing only one power, described below as the instrumental power of law. This is the power of legislation to have impact through enforcement by officials or state institutions. For example, in reflecting on the impact of the Solomon Islands’ *Family Protection Act 2014*, Magistrate Emma Garo, the 2018 Women of Courage Award recipient, reflected that the Act was failing to achieve its lofty goals. She noted:

At the Central Magistrate’s Court here in Honiara for example, so far this year there has been an average of 2 protection order applications per month, there has been an average of 2 criminal cases filed per month which include Family Protection Act domestic violence offences, there has been an average of 7 Police Safety Notices per month filed in the court, and to date no orders made by authorised justices have been filed in court... The figures appear to suggest that the Act, three years since its introduction, is failing to have the impact that it set out to achieve (Garo 2018).

While Magistrate Garo may indeed be correct that the Act is failing to have its intended impact, it is important not just to consider the Act in terms of its instrumental power, but also in terms of many other different powers that it may possess. This part therefore identifies five different potential powers of legislation. This list must be qualified in two ways. First, the identification of these powers is separate from the issue of where law gets its power *from*, which may

include the monopoly on force, consent through acceptance of legitimacy by the population, and its congruence with the morality of the people. Second, the enumeration of the different powers is intended only as a heuristic device, and in reality the powers may be deeply entangled.

As just mentioned, the most commonly appreciated power possessed by legislation is what can be termed its **instrumental power**. This involves the written articulation by the state of rules that individuals and other legal entities are required to conform with, backed up by the threat of legal sanctions, and ultimately the state's monopoly on the use of force. It could be broken down further into a coercive power and a directive power, but for present purposes it covers all instances where people behave in certain ways due to their understanding (implicit or explicit, and accurate or not) about the content of the law and the consequences of non-compliance. The instrumental power of law is the most visible of the powers and has the most focus in the development of legislation, often to the exclusion of the other powers discussed below. When a legal gap analysis is done, for instance, it is this highly positivist approach that is most usually adopted to determine what new laws are needed to fill the gap in the words on paper. The instrumental power may be exercised in practice in a fair, arbitrary or prejudicial manner.

This instrumental power also includes what is sometimes termed the shadow of the law (Mnoonkin and Kornhauser 1979). This is the notion that individuals are aware of the provisions of the law, and seek to make their activities consistent with the legal framework in order to comply with it (as opposed to because they are generally in agreement with its substance). In the South Pacific and elsewhere, the practical effect or impact of the shadow of the instrumental power of law is greatly affected by the extent of knowledge of the law, the quality of expert opinion available, and the consistency and transparency in administration of the law.

In contrast, the most commonly overlooked power of legislation enumerated here is the **hybridising power of law**. This is the impact of legislation on other regulatory regimes or normative frameworks, such as customary law regimes or industry codes of conduct or religious legal orders. An example may be if the leaders of a particular community in the region decided to change their custom from allowing forced marriage of girls to prohibiting it, based on their desire to act in congruence with state legal principles. State legislation can have varied types and extents of influence on other legal orders, such as undermining, supporting, influencing or replacing. The hybridising power of law can be conceptualised as the difference between the operation and power of the non-state regulatory regime alone, and the operation and power of the non-state regulatory regime *combined with* the operation and power of the legislation. This difference may be non-existent, or it may be positive or negative. State law may augment the operation and power of the non-state regulatory regime or undercut the latter. Of course, measuring such a difference in practice is complicated, and is likely to differ over time and space. The hybridising power of law is conceptually

distinct from the potential of state law to strengthen or alter any of its four powers through integrating other norms or customs into legislation, through the process Bohannan calls a 'double institutionalisation of norms' (Bohannan 1967). This is because such a process is focussed on the power of state law, rather than the impact of the state law on another regulatory regime. The hybridising power of law is frequently overlooked in legal planning in the region, although the existence of non-state regulatory orders is increasingly acknowledged in both policy and academic circles.

Another important power can be termed (following Robert Cover 1982), the **narrative power of law**. This is the multiple ways in which law is incorporated into official and non-official stories about how we ought to behave and why. This power of law often draws its force from the moral association or dissonance between an individual's, community's or an institution's sense of morality, and the content of the legislation as understood by that individual, community or institution. Often it only bears a very tangential relationship to the actual 'words on the paper'. This power of law is closely connected with emotions and often an individual and community's sense of self-identity and moral worth. The narrative power of law can take on many forms in different contexts and, especially in contexts such as the South Pacific where legal literacy is low, can be only very loosely related to the actual 'words on paper'. For example, during research into traditional knowledge regulation in the region, it became apparent that the enacting traditional knowledge legislation was seen by many as being about resisting misappropriation by the global North and validating the importance of Pacific ways of knowing and doing. The draft legislation became entwined in these resistance and identity scripts in ways that made it difficult for critiques based on their instrumental effect to gain purchase. Having reflected upon this subsequently, I realise that it was because both the narrative power and the instrumental power of law were being called upon in ways that did not acknowledge their different roles.

A further power is the **jurisdictional power of the law**. This is the claiming of authority and legitimacy to regulate a particular space through the enactment of legislation. As such it really involves two assertions of power: first, that something is the subject of legal regulation and second, about who gets to regulate it. This jurisdictional power may be exercised by a state, a province or other sub-state actor such as a town council, or at the other end of the scale, by an international regime, such as occurred with the creation of the International Criminal Court. This type of power is not concerned with the contents of the legislation per se, and is often part of state-building and boundary-marking by different levels of government or jurisdictional assertion or justification by international actors. As such, it is often highly contested and political, particularly when it involves the state or international actors moving into new subject areas such as the family domain or religious practices, or into areas that have previously been regulated by other legal orders, such as may occur during processes of decentralisation or internationalisation.

The final power identified here is the **signalling power of law**. This is the use of legislation to convey messages about new standards of behaviour/expectations from the state to society. It is sometimes also called the power of law to 'name and frame'. These signals may also be sent to (and intended for) an international audience, such as much of what Hilary Charlesworth has termed the 'regulatory rituals' around states implementation of human rights treaties (Charlesworth et al 2015). An example of this signaling power are framework agreements that seem to be just symbolic with no specificity or teeth at first, but which serve a signaling role and may pave the way for the instrumental powers to be developed. The signaling power of law comes from the mere enactment of the legislation, rather than from its content or instrumental power, although like all the other powers, it can be stronger if there is congruence between a number of different powers and depending upon how the signal is activated as discussed below.

Activating the powers of law

The second key insight of this paper is that each of the powers of law need to be 'activated' in various ways in order to have effect or to come alive. In other words, it is not just through the enactment of legislation or even its implementation that the various powers of legislation can be realised or fully realised. In the Pacific context, where there is an oral legal tradition, activation usually requires a relational process, involving the formation of relationships and social practices around the legislation to give it voice, power and agency. Activation therefore occurs primarily through people orally interpreting, re-enacting and performing legislation through a variety of networks (professional, church, family, community etc), rather than solely through written communications or directives.

This argument draws upon the insight of one of Melanesia's leading anthropologists, David Gegeo-Watson who argues that in Melanesia 'all knowledge is subjective knowledge...there can be no detachment of the knower from the known as in mainstream Anglo-European epistemology' (Gegao 2001). Similarly, law also needs to be activated through webs of relationality in order to have meaning and impact within particular communities, bringing it into individuals' and communities' normative consciousness through an almost personalised connection. One of the best examples of this is the way in which many of the Constitutions were drafted in the region, which in at least Papua New Guinea and Vanuatu involved consultations in almost every village. This is certainly connected to the frequent reference to these constitutions as '*mama loa*' and it is common today to meet common villagers who will announce that they actually wrote the constitution.

The concept of activation is broader than enactment, gazettal, implementation, enforcement, or even information sharing or awareness raising, which are typically used in a positivist understanding of how the instrumental power of statute has effect. Each of these may activate some of the powers of law, but do not cover the full scope of what constitutes activation. For instance, it is possible that

particular conscious practices of *non-enforcement* of legislative provisions by officials are a way of activating law, as the law is given life through its engagement with official practice, becoming a regulating force even if as a purely negative one. As will be shown below, there are times when the *repeal* of legislation may in fact activate its powers. In contrast, legislation that simply sits as 'words on paper' and completely ignored could not be said to be activated even if has been officially promulgated.

The activating of the five different powers of law may occur in different ways and will also vary across time and space. The narrative power and the hybridising power include activation to an extent within their very definition, whilst the paths to activate the other powers may be less obvious. The extent of activation will depend on the context, individuals and networks of relationships involved, as well as the particular content of a particular piece of legislation.

The activation part of the legislative process is often overlooked or hurried in the Pacific islands region (and elsewhere), risking wasting the time and energy spent on the drafting and enactment of legislation. For all legislation there is the possibility of a lack of activation of one or more powers (and therefore a lack of impact of the legislation through that power), and the risk that powers are activated in ways that are unintended and unwanted by the creators of the legislation. These problems can be addressed by considering closely the actual activation pathways (and existing networks and modes of communication) that are likely to be the most conducive to the drafters' initial policy objectives, as well as those that are likely to spring independently into life and activate it in undesirable ways, which may need to be countered.

It is beyond the scope of this paper to detail exactly how this can occur for each of the potential powers. Instead, I will briefly illustrate some examples of activation that I have encountered in the course of conducting research into sorcery accusation related violence in PNG over the past three years. In 2013 the PNG government announced that it was repealing the Sorcery Act 1971 and replacing it with a new provision in the Crimes Act of intentional homicide upon accusation of sorcery. The Sorcery Act had provided a number of offences for pretending or holding oneself out to practice sorcery to cause harm, and provided a partial excuse in very limited circumstances for people who harmed a person on the grounds that they were a sorcerer. In reality, the Act had hardly ever been used and was not widely known. The practical effect of its repeal, however, was to give the Act a significance and power it did not previously possess.

The print and social media attention surrounding the repeal activated the instrumental power of the Act in a wide variety of ways, as it brought knowledge of the Act into broader public discourse. A general lack of awareness about what 'repeal' means however, meant that the public were often not aware that the Act had been repealed rather than enacted. Some campaigners against sorcery accusation related violence therefore incorporated reference to the Sorcery Act in their outreach and awareness about the problems of sorcery accusation related violence. For

instance, a report of a training and awareness campaign run by the (volunteer) Aiyel Vallery Sorcery Working Committee (16 October 2017) notes as a 'point emphasised in the awareness': 'We have heard of the law on sorcery in the Sorcery Act now. We (magistrates) will use this law now in sorcery cases.... Now that we have heard of the law, no one has to play hero around here, we will take you to the police or we will call the police to get you.' This is an example of law being activated through networks going from the national level down to this on the ground networks of activists who go out and talk about the law to communities, thus making it an actual force in their lives.

The narrative power of the Sorcery Act has also been active since its repeal, with a wide variety of stories circulating about what the law means about the government's relationship with sorcerers. A number of our interviewees have either stated or told us they have heard others stating that the repeal of the Act is an indication that the state is on the side of the sorcerers, and expressing concern about how they would be protected from the powers of sorcerers now.

The hybridising power of law is apparent in an interview with a survivor of sorcery accusation related violence who sought to explain why her community had supported her following the accusation (when more often those who have been accused are out-casted). She stated: 'Yeah plenty in other communities are still believing in it, like if a person dies in the community this thing starts, they start suspecting each other of sorcery. But now the Bishop told them about the law so now they are afraid.' This is an example where the authority of the Bishop is combining with the power of the law to have real impact on individuals' behaviour.

The official announcements about the repeal of the Act by government officials activated the signalling power of the law, as it responded directly to the international community that had actively demanded such changes to be made. According to some interviewees, it also signalled to sorcerers that they were now free to do their 'dirty work' without fear of prosecution by the government. However, very few justice officials or community leaders we have interviewed have made the connection between the repeal of the Sorcery Act and the state's desire to overcome sorcery accusation related violence, indicating that the activation of the signalling power in this respect is sorely missing.

The jurisdictional power of the legislation was also apparent in some interviews with police officers, particularly those who understood that they could no longer use the Sorcery Act to deal with the concerns about people engaging in sorcery that were brought to them. Many officers seemed to feel they have been abandoned by the state by its jurisdictional removal from regulating the practicing of sorcery, and are uneasy that they are being left in a situation where they have no way of responding to community concerns about use of black magic. There was also a longing expressed by a number of police officers for this difficult jurisdictional situation to be resolved—for the state to 'send the law' to clarify what it is the police are

meant to do with such cases. Legislation in this sense is perceived as a form of almost parental obligation by the state.

In sum, many of the potential powers of the Sorcery Act 1971 as legislation were activated by the publicity around the announcements of its repeal. The activation occurred largely through oral discourse about the Act within webs of relationships, and statements and performances of officials and leaders in relation to their understanding about the Act. It is these statements and performances that really brought the legislation to life, even at the moment of it being officially killed.

Conclusion

This paper has argued that in order to utilise legislation in an effective way in the pluralistic context of the South Pacific, it is necessary first of all to understand what legislation actually is in such a context. This involves unsettling assumptions about what Fitzpatrick (1984) has termed the 'holistic, unitary conceptions of law'. One way to do this is to analyse the different types of powers that legislation potentially has, and an incomplete list of five powers were suggested, many of which overlap with each other in practice. The second necessary step is to understand that in a countries with strong oral legal traditions, it is necessary for law to be activated through oral retelling and performance of the law in order for it to have meaning and effect. One part of this is people needing to have knowledge of the law, but it goes beyond this to being integrated into individual's own social practices. Often this step has not occurred in an active and directed way by those drafting and passing or repealing legislation, meaning that the potential of the legislation to fulfil policy directions has been missed.

Notes

1. It should be acknowledged that the idea of articulating different powers of law per se is not new, and indeed the World Bank does conduct such an exercise in the 2017 report just referenced. The ways in which this exercise is done here is however quite different to the World Bank's approach.

References

- Authors, B, H Charlesworth, M-B Dembour, E Larking 2015, 'Rituals of Human Rights Workshop Working Paper No 1—Introduction', Working paper 2015 http://regnet.anu.edu.au/research/research-projects/details/535/strengthening-international-human-rights-system-rights#acton-tabs-link--qt-research_project_details_qtab-ui-tabs7.
- Bohannan 1967, 'The Differing Realms of Law', in Bohannan, ed., *Law and Warfare: Studies in the Anthropology of Conflict*, 43, 47–48.
- Cover, R M 1983, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative (1983)', Faculty Scholarship Series. Paper 2705. http://digitalcommons.law.yale.edu/fss_papers/2705.
- Davies, M 2017, *Law Unlimited*, Taylor & Francis, 22.

- Fitzpatrick, P 1984, 'Law and Societies', *Osgoode Hall Law Journal* 22(1), 115–138, 118.
- Forsyth, M and S Farran 2015, *Weaving Intellectual Property Policy in Small Island Developing States*, Intersentia.
- Forsyth, M and R Eves (eds) 2015, *Talking it Through: Responses to Sorcery and Witchcraft Beliefs and Practices in Melanesia*, ANU Press.
- 'Garo on FPA Enactment' 17 July 2018, <http://www.solomonstarnews.com/index.php/news/national/item/20723-garo-on-fpa-enactment>.
- Gegeo, D and K Watson-Gegeo 2001, 'How we Know': Kwara'ae rural villagers doing Indigenous epistemology,' *The Contemporary Pacific* 1(1) 55–88, 62.
- Mnookin, R H and L Kornhauser 1979, 'Bargaining in the Shadow of the Law: The Case of Divorce', *The Yale Law Journal*, 88(5), Dispute Resolution (Apr 1979), 950–997
- World Bank 2017, *World Development Report 2017: Governance and the Law*, available at <http://www.worldbank.org/en/publication/wdr2017>, 97.
- World Bank report, above n 3, p.86