Renewal of custom and tradition in Micronesia's legal systems

Repairing the meeting house in Yap
Photo Credit: Joyce McClure/Flickr

by Miranda Forsyth and Robert Torres

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The beautiful Pacific Ocean connects the far-flung jurisdictions of the Federated States of Micronesia, American Samoa, the Republic of the Marshall Islands, the Republic of Palau, the Northern Mariana Islands and Guam. Two weeks ago (20-22 June), many judges of those jurisdictions discussed another thing that connects them: the role of culture and tradition in their legal systems.

The annual Pacific Judicial Council conference is now well into servicing its second generation of judges from these islands. It's a valued space for them to meet and upskill in the technicalities of evidence law or other legal doctrines. But this year's conference took a different route from usual. Instead of looking for expertise outside, it was an opportunity for reflection on the customary law, values and practices already existing in their jurisdictions. One author was fortunate enough to be invited along, having organised a similar event in Vanuatu in 2006, and the other was the main organiser of the event, and responsible for the choice of theme.

In preparation, we had looked for evidence about the role of customary law and traditions using standard legal research methods of researching statute and case law. Quite frankly, it was a disheartening experience. We found strong statements about the importance and role of customary law in the various constitutions, but little to provide much sense it was being used extensively by courts. Most of the available case law dates from the 1980s, when judges and parties seemed more interested in asking questions about how to use customary law to make the imported legal systems more relevant to the people they regulated. Over the years, the flow of cases considering these principles seemed to dry up, as Western common law jurisprudence dominated the basis of legal reasoning. Little was written about the role of traditional leaders such as chiefs either.

Yet as the event progressed, the discussions became richer and richer, revealing that much customary law and practice was continuing – just often not in forms that made its way into higher court decisions. Customary apologies are commonplace in many jurisdictions, and customary principles are frequently used in land, titles and

probate decisions. Customary adoptions, marriages and divorces are confirmed by the courts, and in some jurisdictions give rise to rights to child maintenance. Even in Guam, where the dominant narrative is that customary practices have all but disappeared, there were interesting examples of living customary principles, such as a longstanding mediation NGO based on the Chamorro principle of “ina fa’maolek” (to make peace with someone). We also heard about Chuukese community leaders using their own processes to resolve issues affecting their communities living in Guam, a new layer of legal pluralism for the jurisdiction.

It became clear that family is the basis of the customary legal system across the region. The elders of a family have the responsibility to try to resolve any matter that arises in their group – an obligation enshrined in legislation in Yap, and a matter of custom in the others. In Palau, uncles have a special role in any conflicts concerning their nieces or nephews – ensuring that individuals in trouble are not isolated from their family, but have someone who is tasked with supporting them through the turbulence.

All the jurisdictions are heavily reliant upon their marine and land environment, and it is perhaps not surprising this area was identified as one most in need of having customary values re-injected back into it. Traditionally, access to marine resources was heavily regulated, with chiefs controlling who could fish what and where. Today, unsustainable fishing practices are reducing the once-abundant marine resources. One speaker reflected, “we have always had abundant resources, that is why we have developed as a generous people”, but this happy position is increasingly under threat, especially with climate change.

Participants reflected that customary rights, such as access to beaches, had sometimes been neglected, resulting in restricted access. We learnt from the work of those in the Ka Huli Ao Centre for Excellence in Native Hawaiian Law at the University of Hawaii about how a group of Native Hawaiian scholars and activists have toiled for years to inject customary considerations into court decisions, and their recent successes in relation to water rights.

Towards the end of the three days, the judges reflected on the value of customary law in their legal systems. Many saw it as part of the legal framework and a part of their culture and heritage that needs to be preserved. Some also recognised that utilising customary law would help to preserve their unique identity and the norms that keep them united. They were, however, deeply concerned by the fast disappearance of the knowledge of customary law, and the difficulties of acquiring unbiased knowledge about it.

In terms of steps forward, there was recognition that a statutory framework is

already in place but, as one participant noted, it is like a canoe with no sails or paddles. What is required to make the canoes seaworthy will differ from jurisdiction to jurisdiction – and participants came up with long lists of possibilities. These included holding formal and informal discussions with traditional leaders about ways to work together; discussing the role of customary law and values in the legal system with local attorneys (to encourage them to use such arguments in court); looking to decisions across the Pacific rather than the US or other Western jurisdictions for guidance; and considering how customary law could be used in conjunction with increased use of the judicial guidance clause.

As the discussions drew to a close, we reflected on the many constitutions across the region that set out a vision of a truly authentic Pacific jurisprudence. We noted inspirational figures in the South Pacific's post-independence period in the 1970s, such as Bernard Narokobi in Papua New Guinea, who have spoken of the importance of developing locally crafted case law that weaves custom into its heart. This vision has stalled for several decades in most countries in both the South and North Pacific. Today, there appears to be new and growing interest in seizing this challenge with a renewed vigour. The lesson from earlier times is that simply stating the importance of customary law in states or constitutions is not sufficient. It provides a structure and gives authenticity to the journey, but people also need navigational tools to know which path to take, and to have the resources to make the journey. This is the task that now awaits.

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