THE PAST IS PRESENT : DUMPING, DEMOCRACY, AND LES DROITS IN VANUATU

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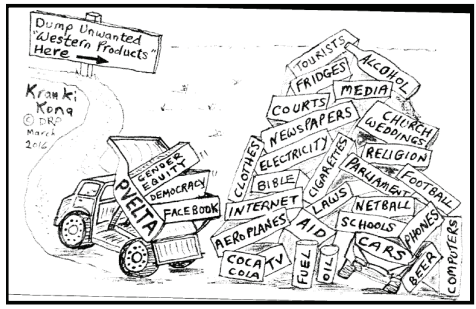
Introduction



Legal history, like cultural history, is a story of complexity or, as I'll explain, hybridity. This is particularly obvious in colonial and post-colonial contexts like Vanuatu. Here, kastom and the state's laws – both internally diverse rather than unitary – are products produced jointly by native and newcomer alike, at least if we attend not only to texts, but contexts. The Ni-Vanautu nation is no less a colonial construct, owing as much to the arbitrary borders of contiguous geography and to the Anglo-French Condominium, as any Melanesian commonalties.

This isn't difficult for Westerners to understand. We see rather easily the difference or distance between "our" ways and those of others. But it's easy to forget that such complexity is also true of, and barely any more distant in time for, Western states and nations. Indeed, even for the West, colonialism was a

unifying force. Its grip and its greed – not to mention its gold – would change everything, not least its laws.

Dumping

As recent events here in Port Vila illustrate, the colonial past and the neo-colonial present remain live, contested issues. This was, in fact, literally illustrated in the above editorial cartoon, part of the Kranki Kona series in the *Vanuatu Daily Post*. Indeed, the theme – the very selective rejection of Western culture – has appeared there time and again for more than a decade. To put it more sympathetically, locals walk a tightrope between tradition (in a context very different from the pre-colonial past) and modernity (without the moderately well-functioning forms of Western politics).

Locals will know that early in 2016, a woman who criticised the city's bus drivers and taxi drivers on Facebook was abducted and beaten by some of that number[1]. The response of our communities was overwhelming hostile to the culprits. But the *Port Vila Efate Land Transport Authority* (PVELTA) President apologised in a very peculiar manner[2]. Suggesting the drivers weren't entirely to blame, he said that "[t]he incident [was] also caused by the victim with criticisms in Facebook as people of Vanuatu [sic] : men, women, girls and boys", he wrote, "must know their identity"[3].

It's obvious, of course, that what he meant was that they should "know their place'. Indeed, the Vanuatu Daily Post reported that the PVELTA President and the PVELTA "did not agree with the new laws and Western products adopted by the Vanuatu Government such as Facebook and Gender Equality"[4]. The PVELTA President is quoted as saying that they'd "[a]ppeal[] to the Government to seriously re-consider all these new products from the western countries"[5].

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[1] D. McGarry, Kidnapped, Beaten, *Vanuatu Daily Post* (14 March 2016), available at http://dailypost.vu/news/kidnapped-beaten/article_e7e3ed9e-c09a-50e4-ab9b-ed20635e4971.html (no pagination).

[2] M. Takona, KPVELTA: Sorry, *Vanuatu Daily Post* (18 March 2016), available at http://dailypost.vu/news/pvelta-sorry/article_3dece310-0ee6-5009-83d9-c441b0cc7572.html (accessed on 10 October 2016, no pagination).

[3] *Ibid*.

[4] *Ibid*.

[5] *Ibid*.

Now this incident may well be more complex than the *Vanuatu Daily Post* suggested[6]. And the role of Western "products" - or even expatriate academics, business people, and judges – might well deserve review and re-evaluation. Indeed, much has been written recently about the lessons that Pacific Islanders may have for Westerners, not least in moving from gross measurements of Gross Domestic Product to a more meaningful happiness index. The Pacific Nations were also essential to progress at the recent Paris Conference on climate change.

But leaving aside the question of agency, the point of the cartoon is that the desire to dump these "Western products" is highly selective, seemingly oblivious to the great many aspects of modern Ni-Vanuatu culture that are borrowed from the West. Even if one is sympathetic to more modest, and moral, defences of tradition, it may be naïve to believe that it's possible to pick-and-choose in such a way. The truth, a difficult truth perhaps, may be that both *globalisation* – including the negative commodification of human life in community – and *universalism* – including rights that we call natural, but that have rarely been recognised in the past – flow from the same source. Damming one may stop the other.

Plurality

With respect to law, all contemporary legal traditions in the world are hybrid creations, an on-going mix of nominally native elements and borrowed features. In this sense, none are islands, all are intersections between rippling waves of influence that may be mastered – maybe ? – but cannot merely be made or manufactured. In the West, this may be masked by nineteenth-century developments that led to the unity, or apparent unity, of legal orders and the creation of modern legal systems. But Western legal history is, again, a story of pluralities. Normative and legal ordering was multi-centric for most of our past, with disparate competing centres of power and persuasion. Legal regimes rarely expected to govern their rivals[7].

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[6] In October, the Supreme Court sentenced four drivers for kidnapping and unlawful assembly. See T. Marango, Kidnappers Sentenced, *Vanuatu Daily Post* (4 October 2016), available at http://dailypost.vu/news/kidnappers-sentenced/article_1438b66f-9c30-5713-8078-06fd06b92bc4.html (accessed on 10 October 2016, no pagination).

[7] See, e.g., S.P. Donlan and D. Heirbaut, "A Patchwork of Accommodations": Reflections on European Legal Hybridity and Jurisdictional Complexity for Donlan and Heirbaut (editors), *The law's many bodies: studies in legal hybridity and jurisdictional complexity, c1600-1900*, Duncker & Humblot, 2015.

For a long time, such regimes included multifarious *folk-laws*, local and particular *iura propria*, the romano-canonical "learned laws" and other trans-territorial iura communia, as well as meaningful non-institutionalised normative practices and orders. And, of course, norms and laws could be bent by the practical pressure of power and governmentalities : here from the king, there from the local aristocracy, there from the church. Over time, laws and orders begin to be seen as reliant on the sufferance of the maturing state. *Legality* was confused with state legality. And especially after the French revolution, laws and legal institutions would undergo profound change. The long nineteenth century witnessed, that is, a move from poly-juralism to organised, centralised, and exclusive systems of *common national laws*. Indeed, it was a period in which both many nations and modern states—along with mature legal nationalism and legal positivism—were created.

And Europe's colonial encounters were central to those developments. Colonial administration significantly improved with a common law, whether that of England or the *Coutume de Paris*. This development fed back into the creation of uniform laws in the mother countries, helping to generate legal unity, monism and centralism. These apparently holistic laws were then overlaid on other traditions and often subsequently replaced them, at least formally. Many customary traditions, whether meaningfully pure or transformed by the colonial experience, continued to operate in practice: some *intra legem* (within the state legal regime), some *praeter legem* (tolerated by state law), and some *contra legem* (against the law).

The *decolonisation* process further complicated this picture, not least in the New Hebrides. It was possible, of course, to shake off that foreign name – interestingly, unlike Francophone New Caledonia, where an Anglicised version of a Latin name for Scotland persists – but other legacies were more difficult to dispense with. The people of these islands, named by Westerners after other Scottish islands, would alter the state's name on independence, though even here the words – for *home* and *stand* – are not common. As you know, the eighty plus islands of this state host over a hundred languages. The new name was, for many, as foreign as the old.

Post-colonial independence brings the complexities of the *Kranki Kona* cartoon. The "Western Products" there did not include language, including the English in which the PVELTA President wrote. None of the three official languages is native. Two were imposed; they carry the complex taint of the colonial past and the promise of participation in a wider community of learning

and fellowship with others who speak English and French around the globe. Indeed, I understand that the number of French speakers may well surpass that of English speakers in a few decades. And Bislama, which is far more important as a common language than I realised before arriving, is a pidgin born, in significant part, from the "Blackbirding" practices of the past. This common languages all carry the contamination of colonialism.

Legally, both the Anglo-British and French traditions are important in the South Pacific. And they obviously intersect in Vanuatu: as I understand it, Port-Vila was destined to be a French-owned plantation and was briefly the independent municipality of Franceville (from 9 August 1889-June 1890). While only white males could hold office, universal suffrage was practiced "without distinction of sex or race"[8]. An American seems to have been one of its presidents ; I don't know if he's to blame for it falling apart within a year.

In any event, Port Vila is an obvious place for conversations, in both English and French, between these great (plural) traditions. But the relevance of the institutions of state law to daily life in the Pacific is more unclear. This is as much a practical problem with the weaknesses of state institutions here, as a legal-cultural disconnect. But both in law and culture, what we get is not so much an oscillation between poles of diversity and unity, as a more complex and contested hybridity.

Hybridity

Perhaps appropriately for our location, the Latin word *hibrida* originally referred to the cross-breeding of a wild boar and domestic pig. In English, a *hybrid* is still commonly seen as a complex individual entity, a singularity, from two parents. But in recent decades, the term has become far broader in application. In *post-colonial studies*, the concept – as identified in the work of Homi Bhabha – serves as part of a critique of binary, reified thinking about cultures and their members. It emphasizes the deep, dynamic complexity of *individual* identities in colonial and post-colonial contexts[9].

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[8] Wee, Small Republics: A Few Examples of Popular Government, *Hawaiian Gazette* (1 November 1895), p. 1, as cited in Franceville, New Hebrides, *Wikipedia*, available at https://en.wikipedia.org/wiki/Franceville,_New_Hebrides (accessed on 10 October 2016, no pagination).

[9] The idea is most frequently associated with Bhabha, *The Location of Culture*, Routledge, 1994.

Western legal traditions are parents to much of the state law around the globe and continue to dominate comparative legal literature. Complexity is projected as an unenlightened, or pre-Enlightenment, other, or to colonial confrontations with less "civilised' peoples; as measured, of course, by our own standards. But legal traditions that are explicitly mixed – including Western elements – make up the majority of the world's legal systems, a fact occluded by the Western focus on its own laws and the common error of assuming that those laws and legal orders are meaningfully unitary.

These *mixed legal systems*, as we label them, include not only my native Louisiana – a mix of American, French, and Spanish laws – but some quite exotic hybrids. Most were, for better or worse, the result of colonialism, Western expansion and the *diffusion* of its political institutions and laws. But the scholarship of these mixed jurists is still focused on the complex origins of its state laws. It acknowledges *mixity* – or, in French, *mixeté* – but fails to attend to non-Western legal or normative orders.

These alternative methods of dispute resolution are better captured in so-called *legal pluralism*. But many pluralists have little real interest in state law, the conceptual analysis of law or the established conventions related to these subjects. Their focus is often limited to unofficial non-state norms or to those norms that arise outside the state, but are officially tolerated by it.

Vanuatu has both; custom is both within and without the state. But no small number of pluralists maintain a (not-so-)latent romanticism about native traditions, a belief in cultural essentialism that is no less neat than that of mixed (positivist) jurists. But the recognition of *hybridity* goes deeper. It better explains the process by which the Ni-Vanuatu – defined merely practically or politically - don't merely maintain the beliefs of the past or replicate other cultures so dominant in the present, but instead create a new blend and new significance of the old in new contexts.

To suggest, that is, that we oscillate between poles of diversity and unity would, if taken literally, be a false choice: there are instead multiples shades of isolation and interaction, engagement and entanglement, borrowing and rejection. This is not merely *mixeté*, but *métissage*. It is not merely about the transference or temerity of traditions, but of creolisation and cultural compromise. There are no pure types.

Les Droits

Legal hybridity is closely connect to the *diffusion* of laws already discussed. Legal comparatists have generated a bewildering, *occasionally enlightening*, vocabulary to explain this process: *receptions, transplants, transfers, contaminations, irritants, migrations,* and the t*ransfrontier mobility of law. Comparative legal history* provides numerous examples of laws from one tradition moving abroad, with varying degrees of success. But the best modern jurists, themselves borrowing from existing analyses in the social sciences, recognise that the movement of laws is neither unidirectional (as the name might imply) nor limited to the institutions of the state.

In contrast, Pierre Legrand – the contemporary jurist, not the seventeenth-century pirate – suggests that law is so encultured as to be essentially incommensurable with other traditions[10]: this is a nonsense, not least in Legrand's native Quebec, a tradition both mixed and plural. Indeed, this reminds me of Pierre le Grand the pirate. He was said to have drilled a hole in his own ship to encourage his men to take another. The jurist Legrand's argument is odd, not least when made and published in English. Coincidentally, the pirate was said to have emigrated to Montreal.

But such nonsense is more often associated with les Anglo-Saxons. English-speakers, both the British and their various colonials, have often expressed a belief in Anglo-exceptionalism and uniqueness. This has much to do with arrogance born of political and military power. But in its open nature and use of transnational, pan-European bodies of law and legal doctrine, much of English legal history is similar to that of jurisdictions across the Channel. English jurists were in constant communication with, and selectively incorporated elements of, the wider European jurisprudential-juridical legal culture. Even the courts of common law only achieved their slow hegemony by borrowing from and absorbing rival jurisdictions, both nominally foreign and superficially domestic.

Even before Montesquieu's majestic *l'Esprit des lois or The Spirit of the Laws* (1748), the concern about the gulf between a nation's laws and its culture was commonplace. But Montesquieu appeared to add a prescriptive directive that the "government most comfortable to nature is that which best agrees with the

[10] E.g., European Legal Systems are not Converging, *The International and Comparative Law Quarterly*, 1996, Volume 45, n°1, pp. 52-81.

humour and disposition of the people in whose favour it is established"[11]. An obvious corollary was that law, he said, "should be adapted in such a manner to the people for whom they are framed … it should be a great chance if those of one nation suit another"[12].

These comments should not be confused with popular self-government; they are as much about the practicalities of governance, as about what the nineteenth century would label culture. Nor should it be understood as nationalistic; eighteenth-century France was still a place in which, as Voltaire put it, "[e]very town, every hamlet has its own laws. What is just in one village is unjust two miles farther, and you change laws as much as you change post-horses"[13]. It was, in fact, well into the nineteenth century before the French language was spoken by a majority of people in France. There, as elsewhere, the nation – defined largely around a common language – was, like the new state, something of a novelty.

But we might reasonably wonder about the relevance of either English or French law in Vanuatu. Do they "agree[] with the humour and disposition of the people" ? Are they appropriately "adapted … to the people …" ? I have some uneasiness about promoting these foreign laws. This is the result, perhaps, of my background, both cultural and scholarly. My research predisposes me to be suspicious of Anglophone prejudices. I am also almost intuitively sympathetic towards French legal traditions – where have they gone ? – as well as the customs of colonised peoples. I'm also a romantic.

But one lesson of European history, both legal and intellectual, seems to me to be not to obsess about the origins of laws, but the needs of the people.

Democracy

Concluding, another lesson from legal history comes to mind. Writing in opposition to the codification of German law before the establishment of a meaningful *German* state, the nineteenth-century "*historical* school" maintained that some laws were innate to a people ; others were foreign and consequently

[11] Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, J.V. Pritchard, 1952 (originally 1750), translated by T. Nugent, Section i.3.

[12] *Ibid*.

[13] Quoted in Letter IV : Of the Civil Law of the Hebrews, *in* A. Guénée, *Letters of certain Jews to Monsieur Voltaire: containing an apology for their own people, and for the Old Testamen*t, William Young, 1795, translated by P. Lefanu, 341.

inappropriate. The movement's leading figure was Frederick Carl von Savigny, a descendent of French Huguenot refugees. Coloured by his century's nationalism, Savigny's celebration of the *Volksgeist* – t*he spirit of the people* – resembles the most vulgar, and romantic, of common law prejudices. But Savigny concluded, surprisingly, that Roman law, through its early reception and long naturalisation in centuries past, had been so absorbed and assimilated that it – rather than the "Germanic' traditions – was natural to the German nation and ought to be instantiated in the new German state.

As recent events illustrate, the colonial past and the neo-colonial present remain live, contested issues. But laws, and even more cultures, are never pure. The origins of the laws, that is, matter little; what is important is to have some meaningful sense of possession over law-making and governance. The peoples of Vanuatu, whose national identity is fluid and dynamic, require unitary institutions that provide for meaningful debate from it diverse viewpoints. Decisions made by embedded individuals, attuned to and unafraid of internal and external critique, are more important than rote allegiance to tradition. Perhaps ironically, democracy is the best hope for protecting the communitarian virtues of *wantokism*.

With meaningful engagement and within the limits in which all cultures labour, the *new hybridities* of the culture may make the law into whatever *new hybridities* it requires.