

PACIFIC COMPARATIVE LAW AT MONASH

by Guy Powles*

Studying law in the region

The study of law in the South and Central Pacific region reflects historical and political realities. Legal education is dominated by university law schools situated on the perimeter, where the problems of the island states and territories of the essentially Third-World region do not attract high priority.¹

Courses of study for a degree or qualification to practise in law fall into four main categories:

1. The university law schools of the predominantly British/North American-oriented jurisdictions of Australia, New Zealand and Hawaii provide curricula for law degrees which are structured along conventional lines and designed primarily for use within those jurisdictions. Recently, a small number of courses, of which *Pacific Comparative Law* at Monash is one, have been added to curricula to provide a "Pacific" perspective (and perhaps for other pedagogical purposes which, in the case of Monash, will be discussed below).
2. The University of Papua New Guinea Faculty of Law offers education for local conditions, but it is distinctive for two reasons. It is the only Third World law school in the region (located in a non-European setting, and lacking some of the facilities and resources which are taken for granted in the other law schools of the region). In addition, it seeks, as a matter of policy, to work towards a degree curriculum which will also be of relevance for students from other jurisdictions who wish to return home to practice. To this end, it is building up substantial holdings of regional legal materials.
3. Law courses are offered at the Pacific Law Unit of the University of the South Pacific, which, it is hoped, will be accepted towards law degrees elsewhere. The Unit is located in Vanuatu but uses the University of the South Pacific network of extension centres throughout the region. The Centre d'Etude de Droit in Noumea has for some time provided the first stages of the French law degree, which must be completed in France.
4. Law courses not intended for a law degree are taught at different levels for a range of purposes. For example, some law subjects may be taken at many universities towards degrees in commerce or public administration. More importantly for the region, law courses may be provided for certificates or licences in law — as qualification for appointment as a local magistrate or judge, or for licence to practise (such as a pleader in Nauru or an advocate in Tonga).

The need for court training as a top priority is well established.² Important moves to meet the need are being made by the Pacific Law Unit (above), the law schools of the Universities of Hawaii and Papua New Guinea, and by government training programmes

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1. G. Powles, *How Might Law Schools Respond to the Legal Education and Information Needs of the South and Central Pacific?* Occasional Paper No. 2, Commonwealth Legal Education Association, London, 1984; and 'Legal Education and Information Needs' (1984) 12 (1) *Pacific Perspective* 17-23.
2. G. Powles, 'Court Systems of the South Pacific' in G. Powles, R. Crocombe and M. Kite (eds) *Pacific Courts and Justice* U.S.P. and C.M.A., Suva, 1977; and 'Law, Courts and Legal Services in Pacific Societies' in G. Powles and M. Pulea (eds) *Pacific Courts and Legal Systems* (forthcoming).

such as those of the Village Courts Secretariat of Papua New Guinea and the Island Courts of Vanuatu.³

Having regard to the size and needs of the region, what is the value of a single "Pacific-related" course offered as part of the law degree curriculum at a university on the perimeter — such as *Pacific Comparative Law*, taught at Monash University, Melbourne? In order to answer the question, it is necessary first to examine some of the dimensions of the law of the region.

Challenges

Characterized as it is by diversity and change, the law of the South and Central Pacific confronts student and teacher with a number of challenges:

1. **Systems of law and styles of government:** In addition to Australia and New Zealand, there are nine fully independent states each with a distinctive constitutional structure; five states in "free association" with greater powers;⁴ and a large number of less-than-independent entities each possessing a different degree of autonomy or constitutional relationship with the greater power.⁵ Furthermore, it is no longer possible simply to divide the region into spheres of British, American and French law and political style — and leave it at that. Of equal, if not more, importance for the lawyer today are the unique traditional legal culture and particular colonial experience of each Pacific entity. Potentially, therefore, the quantity of law and law-related material to be studied is enormous.
2. **Education in culture and political organization:** It is a trite comment that, in order to understand law, one must understand the society in which it operates. In the Pacific, considerable gulfs in understanding and perception exist, not only between "European" and "Island" values and attitudes, but also between different Island societies and groups. A further dilemma here is that, while there are sizeable bodies of anthropological and historical literature suitable for students taking courses in those disciplines, the law student seeks courses tailor-made for the study of aspects of the law and legal development of the society in question. Similarly, the close relationship between law and political organization requires that the law student should have basic political studies of an analytical nature available for examination (and in a region of rapid political change, these need to be up-to-date).⁶
3. **Legal literature:** The region is notorious for the paucity of legal literature available for study, both within and outside each jurisdiction. The reasons are obvious and understandable. Maintaining stocks of legislation (including binding, annotating and reprinting) and publishing judicial reports are expensive enterprises; so also is the transmission of such materials overseas to other jurisdictions — and law schools. Colonial administrations are largely self-serving or do not care. Independent and semi-autonomous governments are encouraged not to spend money unless it is directed towards economic development. Lawyers working in Island jurisdictions,

3. These developments are discussed by D. Paterson, J. Kaburise, S. Njuba, M. Le Brun and B. Russell in *Pacific Courts and Legal Systems* (above).

4. At the time of writing, the constitutional validity of the Palau-U.S.A. Compact of Free Association is still in doubt. The other associated states are Federated States of Micronesia and Marshall Islands, with the United States, and Cook Islands and Niue, with New Zealand.

5. For an analysis of the relationships, see G. Powles, 'Law and Government in the South and Central Pacific' [1985] *LAWASIA Journal* 110-130.

6. The wide range of political accounts published by the Institute of Pacific Studies of the University of the South Pacific is valuable material. For the law student, a straightforward analysis of political structure and process is also required.

mainly in government, are usually too few and too busy to be able to achieve much improvement in the supply of legal literature — and, in any case, the inevitably parochial nature of legal work acts as a disincentive. (What ought to be regarded as more obvious — and indeed, alarming — is the connection between ignorance of the law and breakdown in the rule of law.⁷)

In the face of these obstacles, plans went ahead at Monash for the teaching of a Pacific law course.

The course at Monash

In 1981 the Faculty approved *Pacific Comparative Law* as a new course in both the undergraduate and graduate programmes. In the former, it is an optional, one semester length, subject for the LL.B. or B.Juris. degree. It is designated one of the perspective subjects (in Foreign, Comparative and International Law, Legal History and Legal Philosophy) of which the B.Juris. student must complete two. In accordance with Faculty policy, the subject is one of those which is offered, on average, once every two years.

For LL.M. or Diploma, *Pacific Comparative Law* is a course-work subject requiring students to achieve the appropriate academic standard.

The course has two principal objectives:

1. to provide opportunities —
 - (a) for the study in depth of aspects of the law (defined below) of one or more of the societies of the South and Central Pacific, and
 - (b) for the study of legal relationships between states and territories in and related to the region, and international legal relations affecting the region; and
2. to encourage the development and use of techniques of comparative analysis which facilitate the study of structures and processes in the societies in question, and enhance the student's understanding of his/her own society.

Of course, "law" is used in its broad sense to include legal, judicial and governmental systems; law founded in local socio-political organization and customary practices as well as that which has been introduced; and evolving legal and political cultures.

The subject areas for study are described in terms of major themes, such as:

- (a) the law of governments and constitutions, which includes the growth and adaptation of institutions of government having regard to traditional political systems, the colonial imprint, the power of chiefs, the theory and practice of constitutions, the decentralization of government, the role of courts, and constitutional and traditional techniques for checking power;
- (b) the nature and status of customary law, the application of statute and common law, conflict of laws and the concept and operation of pluralist legal systems;
- (c) dispute resolution and law enforcement, courts and other techniques for the settlement and management of conflict;
- (d) property law, including examination of the kinds of value attached to property and the characteristics of pre-European, Aboriginal and early Pacific systems of interests, rights and tenures, the introduction of colonial policies, conflicts between traditional and imported concepts, group rights, underlying sovereignty, and relevant questions such as the law relating to foreign investment and the control of natural resources and the environment;

7. For example, if ethnic Fijians had been fully aware of the extent of the protection guaranteed to them in the express terms of the *Constitution of Fiji* 1970, there may well have been less support for the 1987 coup and succeeding regime.

- (e) legal issues of current importance in the region, such as decolonization, international legal status, the control of militarization and initiatives concerning the law of the sea, environmental protection, human rights and regional organization.

The course method combines classroom instruction and discussion with individual research and writing. Features are —

Research paper: during the first fortnight and after consultation, the student chooses a topic for the paper which will be produced at the end of the semester for 80% of the assessment. Length is approximately 7,000 words (undergraduate) and 10,000 (graduate). The paper is required to have regard to the course objectives (above), as well as to the proper standards of formal legal writing.

Classes: topics for the two 1 hour or three 1 hour classes per week (offered as seminars or lectures) are drawn from the major themes (above) and designed with student research topics in mind.

Work-in-progress presentations: During the second half of the semester, students each present orally to the class a synopsis of his/her research topic and an outline of research completed and tentative conclusions reached. The presentation is based on the student's notes of not more than 800 words. Together with class participation in discussion, it is valued at 20% for assessment.

Supervision and feed-back: Lectures, seminars, group discussion and specific teacher criticism of each student's oral and written efforts are intended to integrate classroom and research as far as possible. Students are also encouraged to seek assistance with research problems and, if there is time, to present draft papers for comment.

Resources

The collection and maintenance of adequate resources and materials for the course is an on-going task. The student is provided with a "bibliography" of Research References to material available at Monash in the Law and Main Libraries. The Law Library maintains good collections of Fiji and Papua New Guinea legal materials.⁸ In the case of Kiribati, Solomon Islands, Tonga, Tuvalu and Western Samoa, specialist collections are being expanded to provide more comprehensive coverage.

The comments made above in relation to the difficulty of obtaining current materials apply to Monash. There is no substitute for periodic visits to the Island jurisdictions! As a matter of top priority, I would like to see the regular exchange of lists of relevant library holdings between the law schools of the region.

Conclusion

Pacific Comparative Law has been offered on four occasions, and some excellent research papers have been produced. The topics of papers range across the major themes (above), and reveal not only considerable interest in topical regional issues but also the desire to probe the implications of contrast, conflict and accommodation in pluralist systems. It is likely that, from time to time, opportunities will be found for publication of the better papers.

For Australian students, the course appears to meet a need. Graduates say that they have found their introduction to Pacific law useful, as in employment in the region and in the Department of Foreign Affairs. On the campus and in the wider city, the presence of staff,

8. The Papua New Guinea collection was begun in the early 1970s by former Professor Gerard Nash, who then taught a subject 'Law and Practice in Papua New Guinea'.

students and resources with a Pacific focus contributes a significant dimension to learning and discussion for Australians conscious of a growing orientation towards our region.⁹

It is hoped that ways may be found whereby more students from Papua New Guinea and Island countries can be assisted to study at Monash, thereby making our curriculum and resources more directly available to regional personnel, and considerably enriching our course by their contributions.

9. Inter-disciplinary research projects are encouraged and a Law and Politics study on the legal control of militarization in Micronesia is about to be published. A South Pacific Studies Network has been formed at Monash, with support from a number of departments.