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Legal pluralism: The regulation of traditional medicine in the Cook Islands

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1. Introduction

This chapter examines the role and power of law in development in countries with plural regulatory orders through a case study of the regulation of traditional medicine in Cook Islands. This case study gives rise to a series of observations relevant to regulatory theory in general—in particular, concerning the utility of legal pluralism as a theoretical framework in developing states, the need for detailed empirical research to understand the operation of non-state regulatory orders and the way in which different regulatory orders permit and foreclose different levels of agency, empower different stakeholders, reflect different institutional realities and draw on varying underlying values and principles. This chapter is based principally on fieldwork conducted in Cook Islands in November 2014¹ and, more broadly, on fieldwork conducted since 2011 in Samoa, Fiji and Vanuatu investigating the impact of intellectual property laws on development in Pacific Island countries.

1 Thirty-two in-depth interviews were conducted with a range of key stakeholders including heads of government agencies, local artists, traditional healers and customary authorities.

2. Legal or regulatory pluralism

Before delving into the fascinating details of the regulation of traditional medicine, it is helpful to set out some of the basics about the theory of legal pluralism. This is a theory that has proven extremely useful in studying regulation in Pacific Island countries (Forsyth 2009). It emerged in the 1970s as a response to what its proponents saw as an ideology of state centralism—namely, the assumption that all discussions about the law necessarily concerned only the state (Griffiths 1986). This state focus, while the basis of a positivistic account of law, was increasingly recognised as too limited, particularly in the postcolonial era. Like regulatory theory, of which it can be seen as a relative, the theory of legal pluralism is founded on the observations that, in many social fields, state law is just one system of ordering that exists, and other systems of ordering, such as customary norms or entrenched business practices, may have just as much or more impact on how people’s conduct is actually regulated (Moore 1973; Merry 1988). The early users of the theory were largely legal anthropologists, and the emphasis of their scholarship was on producing thick descriptions of the particular ordering systems at play in certain geographic contexts—often postcolonial countries. Much of the research on regulation of the Regulatory Institutions Network (RegNet) has involved using anthropological methods to study corporate regulatory culture (see Henne, Chapter 6, this volume; Braithwaite and Drahos 2000).

In the past decade, however, the theory of legal pluralism has been expanded on and has been taken in a number of different directions.² There has been a move away from the purely descriptive use of the theory to an exploration of how it can be used in a normative or instrumentalist way. This new direction has been most extensively explored in the law and development context, especially in countries just emerging from civil wars, where state institutions are weak and, often, lacking in legitimacy (Albrecht et al. 2011). This approach involves a change of mindset from seeing non-state orders as disorderly, corrupt, unimportant or potentially subversive, to viewing them as indispensable components of

2 For example, Berman (2012: 10) argues that at an international level there is a whole range of legal orders that are regulating people’s lives in an increasingly complex and networked way, and that, rather than attempting to subsume them all within higher and higher systems of global order, ‘we might deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems’. Legal pluralism is also being used in the analysis of the regulation of minority communities, such as Muslims, in First World countries (see Kutty 2014).

reform processes (Faundez 2011: 18–19). In this use of legal pluralism, non-state justice systems are viewed as another regulatory tool to be galvanised and coopted into particular regulatory agendas. There are two advantages to such an approach. First, it provides a number of different options when considering what type of regulation may work best in a particular context, meaning that responses can be more creative—and possibly more widely implemented, responsive and legitimate for the relevant community. Second, it raises awareness of the fact that focusing a regulatory strategy through just one legal system involves a high risk that it may be undermined by the other ordering systems. For example, creating mandatory jail sentences for rape in state courts may mean that chiefs or local leaders ensure that such cases stay outside the state criminal justice system.

There has been a degree of criticism of the new instrumentalist use of legal pluralism. One commentator criticises what he calls ‘executive shortcuts’ to liberal developmentalism, arguing that working with non-state actors allows donors to circumvent the state in countries where governments are reluctant to change, and thus undermines state-building (Porter 2012). Another common criticism is that it has led to donors working with non-state justice systems to try to reshape and transform them to fit in with global norms and standards, which negates the ostensible purpose of engaging with them in the first place—namely, that they respond to local and community understandings of and demands for justice. It has also been observed that any intervention by a donor will have an impact on the power balance existing between the state and the non-state justice system, and thus can prove deeply destabilising. Finally, there are frequent claims that non-state justice systems are reified and essentialised by both external and internal agents, that their patriarchal nature is overlooked and that empowering them undermines state guarantees of human rights.³

As in most theories and trends, there are lessons to be learnt from both the proponents and the critics of the instrumentalist use of legal pluralism. The challenge for users of the theory is to be mindful of the pitfalls that too narrow a conception of legal pluralism can lead to, such as romanticisation of non-state systems and unawareness of the different levels of politics at play in all levels of regulatory ordering.

³ Many of these criticisms and more are set out in the edited collection by Tamanaha et al. (2012).

Overall, however, the fundamental insights of legal pluralism remain relevant today, as is demonstrated in the case study below. As with meta-regulation, legal pluralism involves building awareness that there are numerous non-state sources of regulation in any given field that interact with and impact on each other and state regulation in ways that can be both emancipatory and oppressive.

3. The regulation of Māori medicine in Cook Islands: A regulatory challenge

Cook Islands is in the heart of Polynesia in the South Pacific. Several hundred years ago it was the centre of a busy trading route between Samoa and what is currently known as French Polynesia, but today it is more often conceived of as isolated and remote. Cook Islands comprises 12 inhabited islands spread over 2 million sq km of ocean, with a population of approximately 15,000 people. It has been self-governing since 1965 and is in free association with New Zealand. All Cook Islanders have New Zealand citizenship, making depopulation a serious issue; and there are roughly 70,000 Cook Islanders living in Australia and New Zealand.

Cook Islands is a modern state with a Westminster parliamentary system and a justice system based on a New Zealand model. However, it is also a pluralistic society whereby power and authority also reside in customary authorities and customary laws, particularly in regard to issues of land and intangible valuables such as traditional knowledge. Each tribal area in Cook Islands has its own Aronga Mana, which comprises the head chiefs, the Ariki, and their subchiefs, the Mataipo and Rangatira. There are also state-created institutions that represent the customary authorities: the House of Ariki⁴ and the Koutu Nui, a house for the subchiefs.⁵ In practical terms, the role of customary authorities is very reduced, particularly in the urban centre, although there is still great respect for their *mana* (power and prestige) and ceremonial functions.

Pluralism is also a significant feature of health and medicine in the Cook Islands. Traditional medicine (known as Māori medicine) has always been a vital component of Cook Islanders' wellbeing and it continues

4 Created by the *House of Ariki Act 1966*.

5 Created by an amendment to the *House of Ariki Act 1966* in 1972.

to play an important role today, even in the capital island of Rarotonga, where modern medical care is relatively accessible. In every community throughout the country there are expert healers (*ta'unga*) with specialised knowledge in regard to certain 'recipes' for traditional medicines based on plants and particular methods of preparation. In general, the knowledge and rights to be a *ta'unga* are passed down through families, with new apprentices chosen after careful observation of their character and interest. Knowledge is transmitted in a series of stages, with the different layers of specialisation and secrecy kept until the apprentice has proved him/herself worthy. The *ta'unga*'s powers do not come just from the knowledge of the medicinal 'recipes'; they are also related to their spiritual power. This, in turn, is associated with the notion that they have been 'chosen' as a worthwhile recipient of the knowledge or have inherited certain skills through their bloodline.

Far from being static, Māori medicinal knowledge is continually evolving and responding to new influences. New recipes are regularly being developed, often as a result of detailed dreams, and new ingredients incorporated; I was told of one recipe that included carrot and potato juice and also aloe vera—all introduced ingredients.⁶ The diverse influences of different types of Christianity also have an important effect on the spiritual dimension of the healing practices, and even on knowledge transmission—in some instances, church ministers are required to give a blessing to the end of the knowledge transfer when an apprentice becomes a *ta'unga*.

The practice of Māori medicine is currently regulated by a combination of customary norms, beliefs and established practices, such as secrecy. The fundamental guiding principle is that *ta'unga* cannot be paid for their services; rather, they are motivated 'from their hearts' with a desire to cure the sick. As such, any request for payment is said to undermine the potency of the medicine and make it fail, although healers can be gifted with food or other goods. In return for their services, *ta'unga* also gain prestige and respect—both extremely highly valued commodities in Polynesian societies. Similar beliefs regulate the transfer of knowledge over the medicinal recipes: those without the rights to make the recipes are thought to be unable to make the medicine actually work, even though they may know as a matter of practice how to make the

6 Vougioukalou (2009: 109) describes how on the island of Atiu it is common for people to experiment with the properties of newly introduced plants.

medicine. It is also believed that those who do not have the rights to make medicines will simply not be able to ‘see’ the medicinal plants that are growing when they go to forage for them (‘their eyes and their mind are blocked’). As elsewhere in the Pacific Islands, here, the power to heal is closely linked to the power to harm. In the Cook Islands, this takes the form of the ability to ‘curse’—another important regulatory tool that healers can utilise to keep control over their knowledge (until relatively recently, *ta’unga* were often referred to as ‘witchdoctors’). One *ta’unga* told me that she had taken on someone as her apprentice and had then found out that he was selling his services; in response, she cursed him by removing his powers. This same story was recounted to me from various perspectives; in one version, the man’s hands were afflicted with blisters such that he could not work.

There are very strong narratives around the importance of secrecy and a common belief is that all recipes are ‘owned’ by certain individuals and families. However, the exchange of medicinal knowledge is in fact characterised by considerable fluidity. One of the most well-known *ta’unga* in Rarotonga told me that all of her knowledge originally came from her grandmother, who was from Tahiti. She also explained that she in turn had passed on the knowledge to at least six different people on various islands, none of whom she was related to, through a series of workshops. Her motivation for doing so was that ‘if you are a true *ta’unga* you have to pass to the people who can do it’. Of great concern to her, and indeed the general population, is the lack of interest from the younger generation in receiving the knowledge, together with the rather onerous burden it places on people to make medicine for those who come for help. Another *ta’unga* commented: ‘I am all for it to be shared, then if I am not available someone is there to help a person in need.’ The sharing of knowledge and recipes has also occurred due to the considerable mixing of communities since missionisation, with many Cook Islanders today referring to themselves as ‘a fruit salad’ of different islands and also European ancestry. Difficulties in determining the origin of knowledge and who has rights over it are compounded as well by the long history of voyaging and trading between Cook Islands, Samoa and French Polynesia, resulting again in considerable diffusion of concepts of plant preparation, usage and delivery across Polynesia (see Vougioukalou 2009: 49).

This degree of disjuncture between the common narrative about the importance of secrecy and close control over medicinal recipes and the actual rather porous processes of transmission is also observed in a detailed ethnographic study of traditional medicine on the island of Atiu, Cook Islands, in 2009. Vougioukalou (2009: 133) observed that the ‘importance of family ownership of individual recipes was intensely stressed by all the informants that I spoke with’. However, she also recorded eight different types of ethnomedical knowledge transmission, including through training sessions, transmission of knowledge to the diaspora (and back again) and as required by emergency medical situations, which did not always follow strict family lines, concluding that there are ‘adapting mechanisms in place that allow for knowledge to be transmitted among highly fragmented populations’ (Vougioukalou 2009: 147). These findings accord with other fieldwork I have done in regard to traditional knowledge in Pacific Island countries over the past four years: simplistic narratives about knowledge transmission and geographical boundedness of knowledge are belied by the reality of its dynamism, diffusion and recirculation. I have also observed a trend among the actual practitioners of traditional knowledge to take a far more open approach to the need to share and pass on knowledge than the policymakers in the capitals and regional organisations, who instead stress the need to document and assign rights over it (Forsyth 2012b).

There have been several new developments in regard to Māori medicine in recent years that demonstrate both its adaptation and new challenges for its regulation. The most significant of these has been an initiative to develop a range of medicinal and skincare products based on Māori medicine, led by an Australian-based company, CIMTech.⁷ In a nutshell, the story of this development is that the director of the company, who grew up in Cook Islands and whose paternal grandmother is a Cook Islander, became interested in the bone regeneration properties of Cook Islands herbal remedies. His tertiary training in medicine made him reflect on his childhood experiences of injuries sustained on the rugby field mending astonishingly quickly. In 2003, he therefore returned to Cook Islands and conducted extensive research into the properties of plants commonly used by healers in Cook Islands to treat broken bones. While no one shared their particular recipes with him, he drew on their collective knowledge of particular plants and preparation and conducted a great deal of his own experimentation.

7 See: cimtech.com.au/index.html.

Early in his research he entered into a benefit-sharing agreement with the Koutu Nui, whereby they would be major shareholders in CIMTech. His motivation for entering into the agreement was a combination of factors, including his knowledge of the customary understandings that knowledge about Māori medicine is considered to be ‘owned’ by Cook Islanders in general, a desire to establish a business to benefit the people of the Cook Islands and recognition that Cook Islands is his family’s home and positive relationships are crucial for everyday life and for the success of the business.⁸ To date, the venture has filed a number of patents but it is still seeking funding to make it an operating commercial enterprise. As such, no actual benefits have been paid to the Koutu Nui. While there is a degree of concern raised about the lack of payment, and also questions about why the Koutu Nui was chosen to be the benefit-sharing partner rather than individual *ta’unga* or the House of Ariki, there are no widespread concerns about the initiative or narratives about biopiracy.

The point of this discussion has been to demonstrate that adopting a legal pluralist perspective to regulation enables us to ‘see’ and appreciate the existence of the non-state regulatory order around Māori medicine in Cook Islands today. This forms a relevant background to the questions of how traditional knowledge can and should be regulated, which, as we will see below, is an area with which the region is currently grappling.

4. The push to regulate traditional knowledge

There has been a strong push in the Pacific Islands for almost two decades to regulate traditional knowledge through legislation (Forsyth 2012a, 2013). However, Cook Islands is one of a few countries in the region to have actually passed legislation to date. The *Traditional Knowledge Act 2013* establishes a system whereby those claiming to be rights-holders can register their traditional knowledge and, as a result, are granted certain exclusive rights, including ‘to use, transmit, document or develop the knowledge in any way (whether commercial or not)’.⁹ The rights-holders of the knowledge are those who either created the knowledge or are the customary successor to the knowledge.

8 See: cimtech.com.au/news-and-events.html.

9 Section 7(1)(a).

The register, which records a general description of the knowledge, is to be maintained by the Secretary of Cultural Development and be available for inspection at the offices of the Ministry of Cultural Development.¹⁰

There are certain features of the Act that reflect a pluralistic approach to the regulation of traditional knowledge. For example, it delegates decisions over questions of who are the true rights-holders to a local institution called the Are Korero ('House of Knowledge'). Are Korero used to exist in all communities to facilitate the sharing of specialised knowledge of healing, fishing, navigation, chanting, weaving and so forth. The Act envisages that the Are Korero will be re-invigorated and that the relevant paramount chiefs will decide who constitutes the Are Korero for their particular island or area. This provision for making determinations about rights over traditional knowledge at local levels is a major improvement on previous frameworks that give such decision-making power to state or regional authorities (see Forsyth 2011, 2012a).

However, it is unlikely that the *Traditional Knowledge Act* in its current form will satisfy many of the expectations set for it. The general nature of the description of the knowledge to be recorded in the register and the register's relative inaccessibility make it very doubtful there will be any clarity over what traditional knowledge is actually being claimed and by whom, especially for those living in Australia or New Zealand or on the outer islands. The slight variations in knowledge from one island to another make it likely that many different variations could be registered, also making it hard to determine who the rights-holders actually are. A further problem with the Act is that it is limited in its jurisdictional reach to Cook Islands, and so will have no ability to impact on any misappropriations taking place outside the country, which was the main reason Members of Parliament and the general public wanted the legislation.¹¹ In and of itself, the Act also does not create any mechanisms to preserve or record traditional knowledge or to perpetuate its use, which was another feature desired of it. Indeed, there is a danger that these types of initiatives will be undermined by the lack of clarity around the Act, creating apprehension in all future dealings with traditional knowledge by Cook Islanders themselves that what is being done may contravene the law and attract a substantial award of damages.

¹⁰ Section 60(1).

¹¹ Although there have been negotiations for an international treaty to protect traditional knowledge since 2000 (see: wipo.int/tk/en/igc/), it seems unlikely that it will be finalised any time soon.

5. What regulatory insights does the case study offer us?

The case study demonstrates the crucial need to take non-state orders into account when developing new regulatory frameworks over areas currently regulated by non-state orders, such as traditional knowledge. For instance, as we saw above, the non-state regulatory system that governs Māori medicine in Cook Islands is a complex system of beliefs, norms and practices that is largely self-regulating. Neither customary institutions nor the state have traditionally been called on to make determinations of ownership of medicinal recipes or to regulate the proscription about receiving payment, making it ideally suited to a small population with limited human and financial resources. This regulatory framework has in fact operated astonishingly well in promoting the valuing and *mana* of *ta'unga*, protecting people's claims over their traditional recipes and facilitating the continual transmission of Māori medicinal knowledge, especially given the changes and challenges occasioned by depopulation. It has even been used to deal with the emergence of new commercial enterprises, such as those by CIMTech, by creating a strong normative expectation of benefit-sharing and yet being flexible enough to allow the details of how that occurs to evolve organically.

Second, when non-state regulatory orders are supplanted by state regulatory orders—as is potentially the case with regard to Māori medicine as a result of the *Traditional Knowledge Act*—it is important to be aware of the different values and assumptions that are also introduced. In this regard, the distinction between accounts of how systems are imagined/supposed to operate and how they actually work in practice is critical. From an idealised and relatively generalised position, the introduction of a register, the requirement to receive written authorisation for the use of traditional knowledge and the support of state courts and the force of law can be seen as merely a useful complement to the existing system of ordering. This is because in such an account there are clear owners of certain discrete parcels of knowledge and the transmission processes are straightforward. However, once we burrow into the rich ethnographic detail of transmission of Māori medicinal knowledge, it becomes clear that making determinations of rights-holders is likely to be extremely fraught. Moreover, transforming a dynamic, oral, community-based regulatory system into a fixed written system is likely to make it less responsive and adaptable. This is particularly problematic because this system is concerned with the regulation of

knowledge, which requires a balance between protecting the rights of current holders of knowledge and those of future users of the knowledge. The global intellectual property system is constantly evolving in response to these competing objectives and has important balancing features, such as time-limited monopoly rights and fair use, to ensure public access to knowledge. A similar balance is achieved in the current non-state regulatory system through its inherent flexibility, leading to what has been referred to as the porosity of the system. However, the *Traditional Knowledge Act* contains neither type of balancing mechanism, raising the real danger that it will fundamentally alter the ability of the general public to access and use traditional knowledge.

Third, it is important to be aware of the fact that different regulatory orders permit and foreclose different levels of agency, reflect different institutional realities and are based on a variety of underlying values. These differences are, however, often covered up by the ostensible neutrality of state law. For instance, the *Traditional Knowledge Act* is likely to benefit those who have the closest access to the state to register their claims. Those most likely to be disenfranchised by this process are the Cook Islanders living outside Cook Islands, who are unlikely to be aware of claims made over traditional knowledge and the need to contest them. As the registration of traditional knowledge is in perpetuity, this potentially has ramifications for generations to come. The mere involvement of the state judicial system in the regulation of traditional knowledge also empowers those who are financially advantaged. The *Traditional Knowledge Act* is also based on a state regulatory framework that implies a degree of human and funding resources that is often not available for small island nations. The values introduced in the Act through Western mechanisms, such as the need for written documentation and clear assignment of rights, are in many ways at odds with the values espoused by the *ta'unga* about the need to heal with all your heart and the importance of passing on the knowledge to those who are willing to learn. It also ignores the deeply ingrained importance of secrecy; a number of informants expressed certainty that many *ta'unga* and other experts in traditional knowledge would refuse to have their knowledge recorded in writing in a publicly accessible register. Identifying individual rights-holders who are given absolute rights over the knowledge also facilitates the commercialisation of that knowledge by a select few, thus disabling the more diffuse community-based use of the knowledge. Similar neoliberal presumptions about the importance of registering customary land have had devastating consequences across much of Melanesia (see Anderson and Lee 2010).

Finally, the Māori medicine case study is an example of the problematic emphasis that many in the development industry place on drafting legislation, which stems from a positivistic approach to regulation that ignores the importance of non-state regulatory orders. Legislation is widely seen as being a solution to almost every developmental problem, regardless of whether or not there are the resources to implement it and regardless of its effect on existing non-state regulatory orders. Although the *Traditional Knowledge Act* was passed in 2013, by the end of 2014, there were still no processes in place for its implementation and, indeed, knowledge of the Act itself was limited. As commonly occurs, the funding for the drafting of the legislation came from a regional source, but did not extend to implementation. The danger with focusing attention on legislation is that it diverts resources from actual knowledge-revival projects, sidelines existing regulatory mechanisms and gives a (sometimes) misleading impression that something is actually being done.

6. Conclusion

This chapter has identified and discussed a number of regulatory challenges surrounding the protection of traditional knowledge, and how an approach informed by legal pluralism can assist. It argues that there is a need to engage respectfully with non-state orders in developing regulatory frameworks in plural legal orders. Such respect can only come from an appreciation of the complexity of non-state orders, and a willingness to understand the contexts in which they have evolved, the principles and values underlying them and the various mechanisms by which they operate. The discussion above should not be taken as dismissing the need for a legislative response to the protection of traditional knowledge. The desire for some 'real' or hard protection from the dangers of misappropriation of traditional knowledge springs from a long history of exploitation of Cook Islanders, and, indeed, other Pacific Islanders, by foreigners who unfairly extracted, and continue to extract, both natural and human-made resources. Such a feeling of vulnerability can and should be addressed in a nuanced and well-designed regulatory framework, in which legislation can play a supporting role. However, regulatory responses in this area need to be very carefully tailored and adopt a light hand with regard to their impact on existing non-state regulatory orders.

Further reading

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