

CUSTOMARY LAW IS A LIVING LAW

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Customary law is a living law. It has a direct connection to the people.

—Mange Matui¹

INTRODUCTION

Without customary law, our society would not have survived more than 50,000 years. Customary law has enabled our multicultural environment to structure, organize, and maintain itself through the test of time. The Underlying Law Act (2000) defines customary law as “the customs and usages of the indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.”²

Customary law has been the source of strength, power, vitality, and inspiration to the people of Papua New Guinea since before the arrival of Europeans on its shores. With the arrival of Europeans came new laws, customs, norms, ways of life, and social-political order. These began a process of colonization that saw the replacement,

1. Mange Matui (lecturer in law of jurisprudence at the University of Papua New Guinea), personal communication with author, 16 July 2013.

2. Underlying Law Act 2000 (No 13 of 2000).

alienation, and erasure of Papua New Guinea’s native customary law. This essay seeks to recognize customary law, give it the privilege it deserves, and illustrate its connection to the people of the land.

PAPUA NEW GUINEAN WAYS

In the Preamble of the Constitution of the Independent State of Papua New Guinea, it is clear that Papua New Guinean ways are privileged. In his book, *Foundations for Nationhood*, Bernard Mullu Narokobi elucidates the basic principle behind this goal, that Papua New Guineans are a people, a race, and a nation with worthwhile pursuits in the cultural ways that define them: “An emphasis on Papua New Guinean ways seeks to give encouragement to the discovering genius of our people.”³ Custom is recognized as one of the laws of the country under the Constitution. As Mange Matui, a lecturer focusing on law of jurisprudence at the University of Papua New Guinea, states, “Therefore, custom is the state law,” which means, “Customary laws and the state laws both apply at the same time and control behaviors of a person in the society.”⁴

The Constitution encourages us to develop ourselves through the use of Papua New Guinean forms of social, political, and economic organization. What it appeals to is that in whatever way we do things and engage ourselves we must first look at what we already possess as our innate characteristics or abilities as a people with a long, deep ancestral foundation in this land. In our endeavors, we must keep in mind the following goals and principles:⁵

The cultural, communal and ethnic diversity of our people is recognized as positive strength. There should be fostered a respect and appreciation for traditional ways of life and culture—including language—in all their richness and variety and a willingness to apply these ways dynamically and creatively for the tasks of development.

In 1983, the Law Reform Commission of Papua New Guinea published *Customary Law in Papua New Guinea: A Melanesian View*, edited by Richard Scaglione.⁶ This publication was based on research data assembled on customary law practices in Papua New Guinea.

3. Bernard Mullu Narokobi, *Foundations for Nationhood* (Port Moresby: UPNG Press, 2010), 35.

4. Mange Matui, *The Handbook on Papua New Guinea Laws* (Port Moresby: UPNG Press, 2012), 1.

5. Narokobi, *Foundations for Nationhood*, 33.

6. Richard Scaglione (ed.), *Customary Law in Papua New Guinea: A Melanesian View* (Port Moresby: Law Reform Commission of Papua New Guinea, 1983).



University of Papua New Guinea student researchers worked in their home areas over their long vacations in either 1979–80 or 1980–81 and had this research published. For the first time, it became possible for students in different provinces to collect materials with relevance to customary law. The documentation project has proven that, if given the opportunity, our customary laws can help people see the importance of cultural mapping and documentation.

CUSTOM AND LAW IN MELANESIA

The more pronounced discussion on law and custom is in Narokobi's *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (1989).⁷ A starting point in his discussion is the general consideration of law in most Melanesian communities. Narokobi writes, "In discussing law in classical Melanesian, we are concerned about the ways of the people in their total environment, both physical and meta-physical, tangible and intangible, concrete and abstract."⁸

7. Bernard Mully Narokobi, *Law Bilong Yumi Yet: Law and Custom in Melanesia* (Goroka and Suva: The Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific, 1989).

8. *Ibid.* 14.

① Custom of bridal payments among the Nagum Boikens. © Steven Winduo

The discussion that Narokobi is making here arrests the notions we hold about law and its application in the conventional sense of the term. Narokobi cautions us from taking such a path in placing law in classical Melanesian societies:⁹

But if the law is used to refer to ‘specific social technique’ which consists of the bringing about of the desired social conduct of man through the threat of a measure of coercion which is to be applied in case of contrary conduct, then we would prefer not to use the term ‘law’ and instead use the English approximations of fashion or the way of doing certain things to represent the law.

As a foundation, our laws must have a set of carefully described rules and key starting points for the proper conduct and way of doing things in society.

In his view, Narokobi leads us to regard law in Melanesian societies in a very specific way. He argues, “Law in modern states is seen as coercive power. It suggests punishment with a corollary of a promise of a reward. Good is rewarded with a place in heaven while evil is punished with damnation in hell.”¹⁰

Law is understood here in the sense of doing and living life in the right way, within the bounds of what constitutes “good” rather than that which would lead to “bad” or negative characteristics. In typical Melanesian societies existence of law means that behavior, attitude, and manner are curtailed within the limits that define such qualities as being acceptable, ethical, and, above all, respectful of others. Narokobi discusses the burden of law in Melanesian societies as follows: “Melanesian societies existed without an independent idea of law or rule of law. Coercion or consequence flowing from human conduct were independent and ancillary to the inevitability of human survival without law.”¹¹ Melanesian societies have their own ways of rewarding good and punishing evil without the need for modern law. Yet formal notions of law or justice regulate all modern states. Without them, societies face anarchy, complete chaos, and perpetual collapse.

9. Ibid.

10. Ibid.

11. Ibid. 15.



UNVEILING THE CURSE

For close to fifty years I lived with a family curse, the same curse affecting other siblings in my family. This curse was made through the utterance of a great maternal uncle (*wawo*, in Nagum Boiken language). The maternal uncles are the most powerful people in a person's life. Whatever they say or do affects one's life forever. Never make the maternal uncles curse you.

I did, or inadvertently did, by ignoring the concern of my great maternal uncle (my mother's eldest first cousin) that I did not compensate him for saving my life close to fifty years before.

I was about a year old when I crawled into the men's latrine pit. At that time my mother was with her parents in their hamlet known as Jonkwinumbo, within the greater sphere of the Kubalia village known as Ulighembi, perched atop the Prince Alexander Mountain Ranges of the East Sepik Province.

Florian Lihofi, my great maternal uncle and a venerated elder in my village, saved me from dying in the latrine pit. That day someone cried out that a child had crawled into the latrine. A woman cried in vain for someone to help rescue the child. Lihofi ran as quickly as he could

2 Settling a customary conflict in Ulighembi Village, East Sepik Province. © Steven Winduo

to the men's latrine, jumped into the shit-filled pit, and pulled me out before I sank into it. He jumped out, dashed to Yalim, the nearest river, and washed me clean from the shit and all the worms that covered my skin. Without his timely rescue, I would have been dead.

Uncle Lihofi saved my life. All this happened to me at an age when I remembered nothing. I have no memory of it. Even the story itself seemed unreal to me. Within me I know that such a thing happened, but the memory of it was never there for me to make sense of it.

As it turned out, since that moment I have journeyed out of the jungle hamlet into the modern cities of neon lights and skyscrapers, living a life of respect and meaning, earning a good salary, and enjoying a good life. It turned out the child saved had done well in life. It so happened that I have become what I am today, someone whom the world knows and appreciates.

It turned out I did not fail on my path to my goals. It turned out I did not become a drug addict, a criminal, a loser, or a bad person in society. It turned out I was not one of those people struggling in life. It turned out I was not someone who brought disrepute to my family, clan, tribe, or community. The life I had was and is full of blessings. I had completed all the degrees I needed in my field, had gotten married, and had raised children, grandchildren, a home, and all the material needs in life. The life I have now is full of rich and inspiring moments that I sometimes share with others in my life.

In spite of all these, though, I had to deal with the one person living a ghostly life within my conscience. That person was Lihofi. He complained that I had to compensate him for saving me. He heard of my visiting Wewak every now and then, but I failed to pay him my respects and compensate him for my life.

His utterances became a curse over my life and that of my younger siblings. On the day I cleared my mother's name after her passing, only one demand was left unattended to because I had refused to pay compensation to my great maternal uncle. My argument was that it was his duty as my maternal uncle (*wawo*) to do all he could to see me grow up, even at the cost of his own life. I reasoned that as a

result of that cultural expectation there was no need to compensate my wawo for what he had done.

I was wrong. My refusal enraged Lihofi to the point of becoming incensed. His utterance became a curse on all of my mother's children. We began to experience all kinds of misfortunes and missed opportunities. Many times we found our lives taking the wrong turns and moving away from the correct paths. Some of us felt that Lihofi was unreasonable in cursing everyone. The cultural reasoning, though, is that as the first born child of my mother, I shouldered the blame that affected others behind me by birth.

I took the opportunity on 16 February 2014 to lift the veil or curse on me and my family. Before my arrival in Ulighembi, I had sent word to my great uncle Lihofi that I would compensate him for what he had done to save my life less than fifty years before. I arrived in Ulighembi from Wewak on the date mentioned with a truck-load of family members and relatives. We sorted out the money at my paternal uncle's hamlet, where my paternal/maternal uncles (*wawo/ngus*) and brothers/cousins (*niumi/mandes*) also contributed toward the compensation, which was described as a "soap and towel" to wash himself clean from the shit and filth that had covered him when he had saved my life from the latrine in Jonkwinumbo Hamlet.

The event took place at my great uncle's hamlet and ceremonial ground, known as Helisoho, along the Sepik Highway. Speeches were made to explain the event, and as tradition dictates, all sides were in agreement with the compensation. We shook hands before Lihofi spit-sprayed all my family members with the secret bark he had brought out for the occasion. He was sorry for cursing us and hoped that our paths would become clear from then onward.

I am taking the time to explain this event and its significance because so many times we forget to honor our tradition and customary obligations. Our people still live the way our ancestors lived thousands of years ago. Our traditions will continue to be part of our lives.

CONTEMPORARY MELANESIAN JURISPRUDENCE

The challenge Narokobi issues in his work is for the indigenous jurists and scholars to construct a contemporary Melanesian jurisprudence. How is this possible? What are the elements that are intrinsic to such a construction? Is it possible to identify concepts of law in Melanesian societies that are clear foundations for the development of a Melanesian jurisprudence? The challenges Narokobi makes are important in our considerations. “Contemporary Melanesian jurisprudence,” according to Narokobi, “is neither the ‘pure’ classical Melanesian jurisprudence, nor an adoption of an Anglo–Australian jurisprudence. It is a combination of the classical and the contemporary or the new ideas, whatever their sources or origins.”¹² It is a consistent occurrence and observation of rules that are universal in nature among the Melanesians. Sometimes classical Melanesian jurisprudence exists in the primordial past without making sense to the present. Yet that same law is conceptualized in new ways, taking on board the new and old, the introduced and the practiced jurisprudence that insists on serving as the basis of a new Melanesian jurisprudence.

Narokobi proceeds to the consideration of the cultural basis for Melanesian jurisprudence. The following socio-cultural units form the basis of “law” in non-Melanesian terms: “There must be a community of people living within a reasonably well-defined territory,”¹³ where there is a sense of common identity and recognition. In other words: “Various elements of social units form the basis for recognizing common origins, sharing of common values, and usually (not always) sharing a common language and space.”¹⁴

CUSTOMARY LAW IN PAPUA NEW GUINEA

Many Papua New Guinean societies share similarities and common perspectives of what law is in Melanesia. One of the conclusions derived from the research on customary law in Papua New Guinea is that broad similarities exist in procedure rather than substantive law. As Scaglione notes, “The specifics of land law vary widely from culture to culture.”¹⁵ Land is communally owned and there is

12. Ibid.

13. Ibid. 18.

14. Ibid.

15. Scaglione, *Customary Law in Papua New Guinea*.

rarely total alienation of land, especially where usufruct rights are concerned,¹⁶ which “may be granted in virtual perpetuity as long as users hold to the original terms of agreement. . . . In general, multiple rights in land are recognized in customary law: firewood gathering rights, fishing or hunting rights, rights of thoroughfare, etc.”¹⁷ Land rights remain with each family, clan, or tribe. Each community agrees on who owns the land, uses it, and has access to it in whatever activities are carried out on the land.

CUSTOMARY LAW IN NAGUM BOIKEN SOCIETIES

The Nagum Boiken societies in the Wewak–Kubalia area of East Sepik Province have their own customs that form the foundation of traditional laws known as indigenous jurisprudence. Our discussion takes the model that Raymond Kamanabi developed to document customary law practice among the Amahop (Balif) Arapesh of East Sepik Province.¹⁸ The broad areas of discussion include land, ownership and property, authority and power, ritual life, sex and prohibited relationships, family law, housing and residence, social obligations, and dispute settlement.

Land

Among the Nagum Boikens, land is the source of strength and vitality in the lives of those who live on it. Land ownership remains with each family and clan. Land is owned under the lineage line: “There is no individual ownership except in the case where a man had cleared away a section of the land for the first time without the help from other relatives.”¹⁹ There is of course joint ownership of other pieces of land under various lineages or communal affiliations: “The latter actually applies to land communally owned such as hunting grounds, for instance.”²⁰

16. “Usufruct,” in Roman law, means the right of using and taking the fruits of something belonging to another. It was understood to be given for the life of the receiver, the usufructuary, unless a shorter period was expressed, and then it was to be restored to the owner in as good condition as when it was given except for ordinary wear and tear. See Mick Woodley (ed.), *Osborn’s Concise Law Dictionary*, 11th edition (London: Sweet and Maxwell, 2009), 427.

17. *Ibid.* viii.

18. Raymond Kamanabi, “Amahop (Balif) Arapesh, East Sepik,” in *Customary Law in Papua New Guinea: A Melanesian View*, Richard Scaglione (ed.) (Port Moresby: Law Reform Commission of Papua New Guinea, 1989), 8-23.

19. Richard Scaglione, “Seasonal Patterns in Western Abelam Conflict Management Practices,” PhD thesis, University of Pittsburgh, 1976: 9-13.

20. *Ibid.*



In the land tenure system among the Nagum Boikens, permission must be sought and granted from the head of the family before anyone carries out activities on the land: “Customary laws govern the ownership and use of customary land in the country. The land is communally owned by a clan or a tribe, but individual members of these groups have right of use. After their use, the land goes back to the ownership of the group.”²¹

Ownership and Property

Like the Arapesh, the Nagum Boikens consider “exclusive rights to ownership and use of songs and names” as belonging “to the lineage or clan concerned,” with permission sought before any performance: “Names here do not mean the names of individuals, but rather the names of clans—for instance, the wama clan (or *pisin*), *wama* meaning the white cockatoo.”²² The Nagum Boikens are also particular with names of individuals, especially in selecting and naming children

21. Matui, *Handbook on Papua New Guinea Laws*, 44.

22. Kamanabi, “Amahop (Balif) Arapesh, East Sepik,” 10-11.

③ It is customary for boys and men to make *sago* (palm starch) on traditional Nagum Boiken land. © Steven Winduo

within the family line. When disagreements on naming rights occur, the name in question is immediately withdrawn. When a name is given by someone outside of the family line, a certain payment is executed at the time of naming. Without observing such practices, the turn of events in the lives of all those concerned can have tragic endings or misfortunes.

In terms of personal and family property, there are general rules to follow. Personal items such as clothes, gardening tools, weapons, and personal hygiene products remain the same in many Melanesian societies. In terms of ownership of items with family value and properties belonging to the family, a certain degree of communal sharing is involved: “The land owning groups also have economic rights such as spiritual rights and cultural rights.”²³

Power and Authority

The construction of power and authority in Nagum Boiken societies is complex and abstract in a lot of senses. In terms of law and its application in the interplay of power and authority, the Nagum Boikens observe the same general trends as many Melanesian societies. Leadership in the Arapesh societies is “in the hands of influential big men and not all the big men . . . succession to leadership is one of achievement and it is not ascribed.”²⁴

Each of the specific areas in ritual life such as *holombo* (initiation), *piangangi* (menstruation), pregnancy and childbirth (*yali le* and *nien hala*), sorcery and witchcraft, death, hunting, and deviance has specific laws that define what to do and what not to do and direct people to follow a certain path and way of participation. The laws of the Nagum Boikens are lodged within their own cultural institution such that even modern ways have a hard time disrupting the continuity of much of the ritual life in the village environments.

Family Law

Even in the areas of sex and prohibited relationships, the Nagum Boikens are very specific and strict on observation of rules of conduct and ways in which men and women, boys and girls, uncles

23. Matui, *Handbook on Papua New Guinea Laws*, 44.

24. Kamanabi, “Amahop (Balif) Arapesh, East Sepik,” 12.

and aunts, father and daughters, and mothers and sons relate to each other, talk to each other, and position themselves in regards to each other. Similarly, issues of family law in Nagum Boiken societies are determined through the process of observing the culturally accepted rules of conduct and managing family life. The Nagum Boikens are very clear and specific about issues such as age and parental consent when it comes to marriage, bride-wealth, dissolution of marriage, sexual rights, polygamy and polyandry, and adoption.



CO-EXISTENCE OF LAWS

In general, customary law co-exists with introduced Western law, but these are often not compatible: “Western law is generally seen as autonomous, separate to other areas of life. Traditional Melanesia,

4 Settling a customary obligation between a powerful village elder, Florian Lihofi, and the author in Ulighembi Village, Kubalia District, East Sepik Province.
© Steven Winduo

on the other hand, took an all-encompassing view of life. Law or custom was simply the way things worked and was dictated by the environment, the elders, and the spirits. That is, “law and moral religion and spirituality, economics, politics and government were practiced as a single system.”²⁵ In the Melanesian worldview, customary law plays a central role in keeping the system together and functional in all societies. Without customary law, Melanesian systems of organization and structured relations would be impossible.

CONCLUSION

Our discussion of customary law as a living law with a direct connection to the people is short to the point of including a few areas of interest at this time. Much research is needed to cover all aspects of customary law as it applies to our case in Papua New Guinea. The importance of customary law is expressed in the Constitution, given statutory recognition in the Underlying Law Act and the Customary Law Act of Papua New Guinea.

25. Owen Cox, *Papua New Guinea Laws and Legal System* (Port Moresby: Pacific Adventist University, 2004), 18.

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