

CODIFICATION OF CUSTOMARY LAW IN PAPUA NEW GUINEA

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INTRODUCTION

The PNG government through the Judiciary and CLRC are currently under taking Customary Law Codification project. The aim of this project is to develop an Indigenous/Melanesian Jurisprudence, a legal system that best suits/fits Melanesians but not deviating from the introduced common law legal system.

ABSTRACT

- **Aim**
 - Give the reason(s) of codification (i.e. Melanesian/Indigenous Jurisprudence)
 - -Point out practical challenges

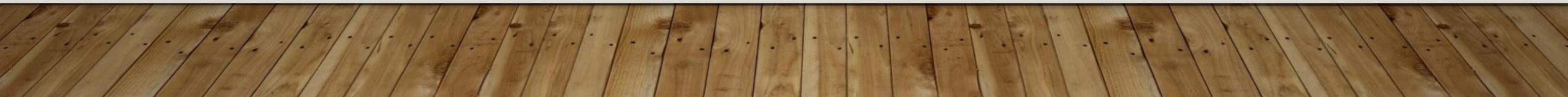
- **Purpose**
 - to provoke thought and create discussion on the effectiveness of the research agenda (collating custom & codifying).

WHY CODIFYING CUSTOM?

- Indigenous/Melanesian Jurisprudence to run along side the introduced legal system

CPC, Ch 8, paragraph 88 – calling for the development of an indigenous jurisprudence

Prior to independence, the CPC saw the need to develop our own jurisprudence therefore recommended for a Law Reform Commission to be established at Independence.

- 1979 – 1983 First Customary Law Development Project
 - 1980 – Customary Compensation (draft bill of 1980 is a good example of Codification).
 - 2012 – Conversations re-emerged for development of a Melanesian Jurisprudence for Melanesians therefore the current project.
 - Difficulty Establishing customary law at the Courts when custom is pleaded.
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CODIFICATION IN PNG

- Goal number 5 of the NGDP of the PNG *Constitution* calls for PNG Ways. Until after 40 years CLRC and the Judiciary under the leadership of Sir Salamo Ijia and Dr. Kwa respectively have equally realised our founding fathers dream of a PNG Way by beginning the process of realising our ways through recording and Codifying Custom.
- The CJ issued Terms of Reference (TOR) under Section 169(3) of the *Constitution* by way of a Judicial Determination to start collating/recording, compiling, analysing customary practices, rules, usages, etc and of course codify. Manus province was chosen as the Pilot. Lead by the judiciary and CLRC is a major stake holder/partner.
- Manus recordings are now going through Analysis, ie. Extracting customary principles for a Code.
- At CLRC, Dr. Kwa initiated a mini pilot in Siassi Island, Morobe Province to run parallel the Manus project. We are about to produce the first set of recordings in a Monograph form in a couple of weeks time therefore a Code for the Siasii people.
- Provincial Codes and National Codes of customary law.

THE JUDICIARY'S AND CLRC'S ROLE IN THE DEVELOPMENT OF UNDERLYING LAW

JUDICIARY

- Judicial development through Courts
- CJ's Determination per Section 169(3) in the Codification project

CLRC

- CLRC' has three main functions under the *Constitution*, *CLRC Act* and the *Underlying Law Act, 2000*. Its functions include;
- 1. Constitutional Law Review (Reviews the Constitution upon direction by the Governor General through the NEC or Parliament). Eg; current OLNLLGE
- 2. Terms of References issued by the Minister for Justice and AG. A ministerial direction to review a particular *Law*.
- 3. Monitor the development of Underlying Law and to Report it's development to the NEC and/or Parliament.

CONT.....

- Apart from the judiciary led Manus project, the current Codification project in Siassi Island is in itself a delivery of the 3rd mandate of the Office.
- CLRC's mandate – Sect 20, 21, Sch 2 and *Underlying Law Act, 2000*
- according to the combined effect of these provisions, there are 3 pronged approaches; 1. Development of the UL by the Judiciary, 2. Monitoring of UL by CLRC through research, and Declaration of UL by NEC upon recommendation by CLRC.
- CLRC is given a very special role by the Constitution under section 21 and Sch 2.6.14. This special role is;
- To investigate and report to the Parliament and to the NEC on the Development, and on the Adaptation to the circumstances of the Country, of the Underlying Law and on the Appropriateness of the Rules and Principles of the Underlying Law to the circumstance of the country from time to time.

RESEARCH METHODOLOGY

- Qualitative Research – Participatory Action Research is the methodology employed in both Manus and Siassi–
- Recording from village chiefs and elderly people giving stories orally of their custom.
- Transcribing, compiling, analysing same to see whether a particular custom is widely practiced and accepted by that particular community, clan, tribe. If it appears to be present right throughout the province then it qualifies to be a Provincial Custom.
- That Provincial Custom is then codified. If that particular custom appears in all of PNG, then it further qualifies to be a National Custom hence a National code. Which the courts can easily resort to = that in itself is what our fore fathers conceived as PNG Ways therefore; a Melanesian/indigenous jurisprudence.

CHALLENGES

- Custom is **evolving** as time changes;

When will PNG finally have a National Customary Code as anticipated for the Melanesian/Indigenous jurisprudence? How long will it take for Manus Code to be ready? How long will it take to cover the entire country?

- **Research tools;** Questions were technical that a laymen could not manage to give relevant answers as he/she could not to understand them. We then called for focus groups, like the village chiefs, elders, village court officials, land mediators.
 - **Short Time,** we should have spent more time communicating with village people rather than spending a week in Lorengau town with the focus group. We still believed there were old people who are well versed back in villages but were unable to make it to Lorengau.
 - **Team Composition-** we had judges sitting as facilitators at the recording session – participants may have withheld information feeling intimidated by the presences of judges therefore, not fully collecting what is custom in some or most areas.
 - **Financial implications;** We initially planned to visit outer Islands of Manus province however, we could not afford to fund those visits therefore at Lorengau town.
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CONCLUSION

- We are building a concrete start to realising PNG Ways as per Goal number 5 but with challenges as pointed out. We therefore need your thoughts so that we are mindfully guided to codifying custom in PNG.

Please send your views/thoughts through to;

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