

**REPORT ON VANUATU JUDICIARY
CONFERENCE 2006: THE RELATIONSHIP
BETWEEN THE *KASTOM* AND STATE JUSTICE
SYSTEMS**

**Conference held at USP, Emalus Campus Port
Vila
28 – 29 August 2006**

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Executive Summary

A two day conference on the topic of the relationship between the state justice system and the customary justice system (“the *kastom* system”) in Vanuatu was held at USP, Emalus Campus Port Vila on 28 and 29 August 2006. This conference was the first time that the judiciary, chiefs, police and lawyers had come together to discuss the issues relating to the existence of the two systems of dispute resolution in Vanuatu. As such, it was very much an exploration of the issues involved, a discussion of the possible tensions, and a sharing of ideas about future directions that could be explored. One participant likened it to the process of starting to cut the bush in order to plant and then grow a garden.

The main message to come from the conference was the importance many of the participants placed on discussing these issues, and the feeling of the majority that these are issues that need to be taken forward. It was also clear that the relationship of the two systems touches upon extremely sensitive issues, such as state powers and the role of *kastom* and chiefs in Vanuatu today. This indicates that any developments in the future need to allow a lot of time for wide community consultation and forums for robust debates amongst the various stakeholders.

The first part of the conference involved a description of the current relationship between the two systems and this was facilitated by a series of papers presented by members of the judiciary, police and the chiefs as well as through group discussion. The papers demonstrated the fact that there is a significant informal relationship between the two systems, as well as some limited avenues for a formal relationship. The limited role of the *kastom* system in the state Constitution was contrasted with the extensive role the *kastom* system plays in reality in resolving disputes in Vanuatu today. The point that was emphasized by the Secretary of the Malvatumauri and other speakers was that the resources of Vanuatu which are spent on the justice system all go to the formal system and none to the *kastom* system, and yet the majority of the population have their disputes resolved by the *kastom* system.

The second part of the conference was devoted to a discussion of the current problems with the relationship, which was managed through a series of papers and then by group discussion in small groups. There was a great deal of agreement amongst the participants in relation to what the problems are, some of the most significant being: lack of communication between the two systems; lack of clear pathways between the two systems; lack of clear guidelines about which system should deal with which cases; the fact that the two systems undermine each other in a variety of ways; and also the problem of people being punished twice for the same offence, once by the state system and once by the *kastom* system.

The final part of the conference was concerned with a consideration of what steps could be taken to improve the relationship between the two systems and involved small groups considering a series of questions designed to provoke and focus discussion, as well as plenary discussion of the findings of each group. Perhaps unsurprisingly, the participants were far more divided in their views about what the possible solutions to these problems are.

There was a very clear feeling amongst the participants that the issues that had been raised by the conference should be acted on in some way, and so the final two hours were devoted to a discussion about how to progress the issues. At the close of the conference the Chiefs Justice called for, and received, undertakings by the chiefs, the police and the judiciary that they would each separately move forward with these issues in various ways he identified for them.

The general comments made by participants about the conference was that it had been a very valuable experience and that although it should not have taken 26 years for the chiefs and judiciary to “sit down” together it was good that at last it had happened.

Introductory Comments

The Vanuatu Judiciary Conference 2006 marked a watershed in the relationship between the customary system of justice in Vanuatu (“the *kastom* system”) and the state justice system. For the first time in the history of Vanuatu as an independent nation, judges, lawyers, police and chiefs met together to discuss the issues arising from the existence of two justice systems in the country and to consider what steps could be taken to improve their relationship in the future. In his opening address the Chief Justice stated:

The challenge is how the two systems can interact or interconnect so that Vanuatu society can live in peace, individuals are secured in their persons and property, community values are enhanced and protected commerce and investment – particularly foreign investment is encouraged, and relationship between trade partners are conducted in confidence throughout the islands of the Republic.

The conference was attended by the New Zealand High Commissioner, the Chief Justice, most of the Vanuatu judiciary and magistrates, lawyers from the state law offices and private lawyers, a number of senior police officers, the Director of the Correctional Services Department and some of his senior staff, the President and Secretary of the Malvatumauri, chiefs from North Efate, the President of the Vaturisu Island Council of Chiefs, the President and a number of members of the Port Vila Town Council of Chiefs and a number of other chiefs, representatives from AUSAID, and others involved and interested in the issues.

The conference was jointly organized by the Chief Justice and USP and was facilitated by two members of the law faculty at USP, Professor Don Paterson and Miranda Forsyth. It was generously funded by the New Zealand High Commission and took place over two days in the conference room at USP. The language of the conference was Bislama. On the first day the participants learnt about the current relationship between the two systems through a series of papers presented by members of the judiciary, police and the chiefs as well as through group discussion. In the afternoon the attention turned to the current problems with the relationship and this was facilitated by a series of papers and then by group discussion in small groups. The second day was entirely devoted to a consideration of what steps could be taken to improve the relationship and involved small groups comprised of a mix of police, chiefs, judiciary, lawyers and others considering a series of questions designed to provoke and focus discussion, as well as plenary discussion of the findings of each group.

In terms of the success of the methodology employed at the workshop, generally the participants stated that they enjoyed the ability to speak together, but at the end the chiefs requested a group of “just chiefs” as they felt that they would be freer to express their true opinions if they could sit together. This experience suggests that at future conferences or workshops a good format may be to have a combination of mixed groups and groups where just one interest group is

represented to ensure that the true views of all the participants are able to be voiced.

This report was prepared on the basis of recordings made at the conference, notes and the records made by the participants. The presenters of papers have had the opportunity to correct the summaries of their papers which have been made. While every effort was made in the writing of the report to be as comprehensive and accurate as possible, the consideration of conciseness has meant that not everybody's full comments have been included.

Part 1: The Current Relationship Between the *Kastom* System and the State System

(1) Police and the *Kastom* System

The relationship of the police with the *kastom* system was explained in a presentation given by the Acting Commander of the Southern District, Kelson Bule. He explained that generally there are two main areas where they work together. First, when complaints are made to the police about behavior which is not a criminal offence, they send these cases back to the chiefs to deal with. Second, the police seek the assistance of the chiefs to deal with tensions in the community which lead to people committing criminal offences. He gave as an example the current tensions relating to the sea front in Vila, and said that while the police deal with criminal activities which come out of these tensions, it is the responsibility of the chiefs to deal with the underlying issues. He emphasized that the police appreciate the help of the chiefs in dealing with such problems.

However, he also highlighted a number of challenges that currently exist in the relationship between the chiefs and the police. The first is the problem of what happens when people do not respect a chief's decision and come to the police to ask for assistance. At present the police can only assist such people if it is a criminal case, and in this case the police have to go back to "the beginning of the story," which may have been two or three months before, and then have to deal with the case using state procedures. There is no way to take the case forward from where the chief has taken the matter, to work together.

Another set of challenges arise when both the police and the chiefs feel that they should deal with a particular case, and the police refuse to allow the chiefs to deal with it by themselves. At such times when cases progress to court, the chiefs ask "why has the case gone to court when I have dealt with it?" Commander Bule said that he does not have an answer to this question. In such situations sometimes the police tell the chief that after the case has gone to court the parties can go back to the chiefs to make a reconciliation to make sure that life, peace, and respect can all be "put back." But he commented that these are just individual initiatives; there is not at present a procedure to follow to do this.

He concluded by commenting that he hoped that over time we will be able to find answers to these questions.

The participants then worked in small groups to discuss the issues raised by the Commander and their own thoughts about the relationship between the police and the chiefs. The groups made the following comments about the positive elements of the relationship as it currently exists: in many ways the chiefs can and do support the police, such as during the VNPF riots; many police have good relations with the chiefs and many police officers are also high-ranking chiefs which also strengthens the links between the two systems.

However, the groups also identified a number of problems with the current relationship. The problem that every group voiced was that there is no clear dividing line between the power of chiefs and power of police, and no clear guidelines or procedures setting out how chiefs and police should work together to solve particular problems. Additional problems that were raised were: there are often conflicts between the chiefs and the police, for example during the escaped prisoners incident when the chiefs tried to speak with the police but they refused to speak with them, and no way of resolving these conflicts; the police say that they rely on chiefs to resolve tensions in the community, but this is difficult when the chiefs' authority is not backed up by legislation; the community generally is not sure whether they should go to chiefs or to the police first and there is a concern that if people go to the police first then it may be too late for the *kastom* system to deal with the matter afterwards; there is a lack of understanding by police of the role of chiefs and vice-versa; there are no regular meetings between the police and the chiefs to discuss the issues between them; the police sometimes push the chiefs out of the way and say that "this is a state issue, the case has to go to court" as for example happened recently with the incidents involving the market house/ sea front which leads to the chiefs feeling demoralized; and finally there was a question about how the police and the chiefs should work together when dealing with domestic violence.

(2) Courts and the *Kastom* System

Justice Ham Bulu presented a paper on the relationship between the courts and the *kastom* system. In his address he explained the position of customary law in the Constitution, stating that the Constitution provides that customary law is part of the law of the republic of Vanuatu. However, article 47(1) obliges the judiciary to resolve proceedings according to the law, and only where there is no rule of law available must they resolve them "whenever possible in conformity with custom." He also explained that although the Constitution provides that parliament may provide for the manner of the ascertainment of the relevant rules of custom, this has not as yet been done. Finally he drew the participants' attention to two provisions in the Criminal Procedure Code which allow the courts to take account of the *kastom* system. The first is section 118 which provides that a court may in criminal causes promote reconciliation through customary

processes or otherwise and may thereupon stay or terminate proceedings. The second is section 119 which provides that courts must take into account a customary settlement when determining the sentence and may postpone the sentence to allow such a settlement to take place.

The major comments that were made in response to Justice Bulu's speech were to the effect that some participants were concerned that the Constitution provides that customary law can only be used by the judges as a "last resort," and also that the Constitution and written laws of the country only provide for customary law to be administered by state courts and not by the chiefs.

(3) The Chiefs and the State Justice System

Chief Mormor gave a short presentation in which he made the comment that when you look at a chief you look at a *kastom* law. He stated that when he stands on top of the highest mountain in Efate and looks in all directions and even up to the moon and the stars, all that he sees is governed by *kastom* law and it is the *kastom* chief that owns the *kastom* law. This view was an interesting counterpoint to the explanation of the place of customary law given by Justice Bulu.

Chief Motarilavo Hilda Lini next gave a paper in which she raised a number of important points. First she asked what in fact the Vanuatu *kastom* system is and queried whether such a thing exists or whether in fact there is just a *kastom* system of every island which is different from the others and unique. She commented that there needs to be more research done into this question in order to find out what *kastom* really is in Vanuatu today. She also stated that even though it is the *kastom* system that governs the everyday life of ninety percent of the population, the Constitution and written laws do not recognize it and the government, parliament and judiciary have not made an effort to study it or to develop any bodies to investigate how to apply it in its true spirit. She stated "*Long absence blong clear legal direction, plante taem state judicial system mo Kastom system togeta isave mistinterpretem, abusim mo misusim kastom.*" Finally she observed that disappointingly 26 years after Independence the *kastom* system is still called the "informal" system, and there are no funds to run courses in it or to develop it and administer it. She noted that the state expects the chiefs to ensure peace but it does not provide any transport or funding to help them with their work.

Chief Selwyn Garu, Secretary of the Malvatumauri then addressed the participants. He referred to Justice Bulu's presentation and made two comments about it. First he said that although the Constitution and written laws recognize customary law, they do not recognize chiefs. This means that it is up to the state courts to decide what *kastom* law is, rather than for chiefs. He said that this is wrong because it is not possible to separate chiefs from the *kastom* system – "when you talk about chiefs, you talk about the *kastom* system." Chiefs are the

ones who understand *kastom* law and so they should be the ones to administer it. This is why the chiefs are asking for power to apply *kastom* law. Second, he stated that customary law is given the last place in the sources of laws in the Constitution, and this low place is also shown in the relationship the government has with the *kastom* system as the government has not made it a priority. He observed that the resources of Vanuatu which are spent on the justice system all go to the formal system and none to the *kastom* system, and yet the majority of the population live under the *kastom* system and chiefs are expected to work hard at administering it. There should be resources directed to the system that governs the majority of the population.

He concluded by briefly outlining the new chiefs' legislation that has recently been passed and he stressed that it only provides for the administrative structure of the chiefs from National Council down to village councils. The Act tries to support the fact that the real work of the *kastom* system is done down at the bottom levels, at the village and *nakamal* level, not at the higher levels, unlike in the state system where the power is at the top. Later Chief Garu explained that the Act which had finally been passed through parliament was like a dog that had had all its teeth removed as all the powers the Malvatumauri had wished to be included had been amended out of it – and yet the dog was still expected to go and hunt pigs (in other words, chiefs are still expected to preserve peace in their communities). The particular powers that he referred to were the powers of area and island councils to make by-laws. He stated that a possible reason for these powers to have been taken from the Bill was the concern that chiefs would abuse their power. However Chief Garu explained that such a concern was misconceived because the by-laws, as state legislation, would need to conform with all higher state laws. He concluded by saying that chiefs still do not have the powers to implement *kastom* law.

Part 2: Problems and Issues with the Relationship between *Kastom* System and State System

(a) Papers Presented

The first paper was presented by Miranda Forsyth. She explained that following a study she had made of the relationship between the *kastom* system and the state system over the last four years she had found that while there was a great deal of support in the community for both systems, their current relationship was causing problems. The major problems that she highlighted were: there is considerable dispute and confusion about which system should hear which types of cases; this confusion puts complainants in a vulnerable situation; there is an unresolved problem of which system should deal with a case first (this is problematic when a case goes to both systems and for example the chiefs want to hold a reconciliation ceremony before the defendant makes his plea); the problem of “double jeopardy” (often defendants feel they have been “doubly punished” if they are sentenced in the court as well as in *kastom*); the operation

of the state system creates feelings of disempowerment on the part of chiefs and also frustration as they are told to be responsible for their communities but hindered by the state system in carrying out their duties; the ability to “appeal” to the state system undermines the enforcement power of the chiefs and increasingly people are challenging the chiefs on the basis that what they do is not in the Constitution. Finally, she noted that the existence of the *kastom* system also hinders the operation of the state system in a number of ways.

Michael Taurakoto from Wan Smolbag then gave a presentation on some issues that he identified as being present in both systems. He focused on three issues: the treatment of women, youth and leaders. The main problem in the treatment of women by both systems is the way they fail to deal properly with domestic violence. Domestic violence is very prevalent in Vanuatu today and is increasing. The chiefly system deals with it by prioritizing keeping the family together, but this may mean that women are not really helped. Women find it hard to go and seek help from both systems, and sometimes even when the woman goes to the chiefs and a fine is given this does not prevent the behavior from continuing.

The relationship between the police and youth is not good, both in Vila and in the islands. For example, a boy told Michael that last year he was caught stealing on Tanna and the police there put him in the middle of a circle of policemen and then they beat him. Then they put him in a police cell and handcuffed him to the bars so that he could neither stand-up nor sit down and they left him there for an entire night. Incidents like this make young people afraid of the state system. The issue of freedom of movement is a related issue as every time there is serious crime in town the chiefs always want to send the youth back to the island. But Michael argued that sending someone to a place where they are not happy will create more problems than it solves. A further problem youth have with the *kastom* system is the problem of arranged marriage. This is a serious issue, especially for young girls and is one of the reasons why many run away from the islands to town.

The third weakness of both systems is the failure to deal with corruption and leaders who break the law of the country. The Leadership Code Act seems to be like a flower only - there are lots of good ideas and principles in it but it is not enforced. Public Reports released by the Office of the Ombudsman are rarely followed up with corrective action. The only two reports to have been taken to Court are the 'Ex Gratia Payments' Case which first went to Court in 1997 and is currently awaiting judgment while the other case ended with a prominent leader being jailed but later pardoned by the then Head of State. And here the chiefs were actively involved in pressing for the pardon because of the community need for maintaining peace and treating national leaders with respect. He contrasted the light way that leaders are treated by both systems with the way that women and youth are treated and commented that it is very sad.

Professor Paterson presented the final paper on some Constitutional issues in relation to the *kastom* system. He explained that the parameters of section 95(3) which provides that “Customary law shall continue to have effect as part of the law of the Republic of Vanuatu” is not clear – does it extend to all people who live in Vanuatu? and to all elements of life or only to “traditional” ones? He also reiterated some comments made Justice Bulu about the problem of parliament failing to provide for how the courts should determine what custom is. Finally he commented on the fundamental rights and freedoms in Vanuatu and commented that one of the rights is the protection of the law. He commented that everyone has the right to a fair hearing within an independent and impartial court within a reasonable time. The Constitution also provides that no person should be tried twice for the same crime.

(b) Break-out groups’ discussion of the problems and issues with the relationship between the two systems

Each mixed group was asked to consider the questions in the two boxes below and then they presented their answers which they had written on large sheets of paper to the group. Later these answers were displayed and people were given a chance to agree or disagree with them by placing a yellow or a green dot beside the point. Most points were agreed with many times and so these have not been recorded. Rather, in the summary below I have indicated the points that many groups on their answer sheets raised by use of an asterix “*” and the points that some people indicated they disagreed with by use of a question mark “?”.

<p>How does the operation of each system support the other system? Is this enough?</p>	<p>How does the operation of each system undermine or conflict with or not support the other system?</p>
<ul style="list-style-type: none"> • Police can assist chiefs to carry out some decisions, eg Land Disputes in some situations • Chiefs/ custom system assist to maintain peace within and between communities. For example the VNPF riot and the VMF/ Police dispute • Land Tribunal Act supports customary resolution first of all • Island Courts have chiefs knowledgeable in <i>kastom</i> on them** -? (but they do not have enough knowledge and 	<ul style="list-style-type: none"> • Police assistance is restricted to state criminal matters and so the police cannot assist the chiefs in other matters, such as sending people back to the islands • There is confusion and a lack of clarity about which system should deal with particular cases and this puts pressure on families, communities and institutions • People are punished twice by the two systems (the courts ignore the custom settlements)*** • Policy makers within the formal system don’t take into account the role of chiefs and do not consult with them before enacting laws which undermines the power of chiefs*

<p>do not receive adequate support and training)</p> <ul style="list-style-type: none"> • There is recognition of both systems under the law, particularly in: the Constitution, the Criminal Procedure Code, the Judicial Service and Courts Act, the Island Courts Act and the Land Tribunals Act** • Supreme and magistrates Court can refer matters back to chiefs -? • Section s119 CPC means that if reconciliation ceremony has taken place then courts can take this into account*** • Chiefs assist in bringing the accused into custody • Not enough support, there needs to be amendments to the legislation ** • It is generally accepted that there are two systems and each acknowledges the other* • Custom operates where the law is silent and has a jurisdiction that is extended by community acceptance of the chiefs right to deal with cases and so they are not given to the police • The two systems have the same goals of solving problems/ conflicts • Some co-operation between police/ courts and chiefs • Police carry out awareness in cooperation with chiefs and involve the chiefs in stopping crime at the village level and deal with domestic violence issues at lower levels 	<ul style="list-style-type: none"> • There is not enough discussion with chiefs about major projects and initiatives occurring in their territory • The custom systems is not resourced or supported as the state system is, and there is only training for the state system*** • The state system does not recognize/ take into account the diversity of customs in different provinces and villages • The formal system in most cases fails to recognize and address the root causes of disputes, whereas in <i>kastom</i> the chiefs will look behind the incident and ask “why did it happen?” • The chiefly system is flexible and its main role is to maintain peace but the state system is inflexible and concerns strict rules and punishment. • Police should approach the chiefs before they go and arrest a member of their community as this is more proper • The <i>kastom</i> system is oral whereas in the state system everything is written down and sometimes people take cases to the state system after they have been dealt with by chiefs • Sometimes the state system refuses to suspend proceedings to allow custom proceedings to go ahead even though all the parties want to deal with the matter in <i>kastom</i> • The law is clear: the chiefs do not have power. But in fact 80% of the community have no awareness of the law and chiefs are involved in resolving matters without any real support • Chiefs think that a matter is finished after a reconciliation but the state system sometimes goes ahead with a case which undermines the chiefs in their communities • The courts do not accept <i>kastom</i> fines as a penalty, they accept it only as compensation • Lack of awareness about the roles of the two systems
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<ul style="list-style-type: none"> • <i>Kastom</i> process addresses minor offences before charges are laid which means less work and cost for the courts • There is respect between the chiefs and the courts • Without the <i>kastom</i> system the state system would not cope with having to deal with everything • Courts can support the <i>kastom</i> system by exercising power to stay proceedings or dismiss charges where this has occurred (s118)* • There is new legislation as part of the Correctional Services Act which allows the courts to send matters back for customary settlement at local level 	<ul style="list-style-type: none"> • In the <i>kastom</i> system both parties win but in the state system one side loses* • Conflict when the court looks at individual rights and the <i>kastom</i> system looks at community rights and this leads to a lack of respect for custom and undermining of each system* • Courts have got enforcement powers but custom does not • The island court justices make decisions that don't take into account custom law • Sometimes the police don't work with the chiefs when dealing with serious offences, such as riots and arson • Sometimes witnesses will not give evidence to the police against another member of the community and so cases fail • Disagreement between two systems about what is an offence • Lack of enforcement in both systems - ? • Dispute about what is a serious offence. For example in <i>kastom</i> domestic violence is something that is not important. Also rape and incest there is dispute about which system should deal with it. • Island courts undermine the power of chiefs as they are like an alternative village court -? • Use of all the courts undermines the <i>kastom</i> hierarchy • When complainants take part in and achieve a customary settlement but then make a formal police complaint that undermines <i>kastom</i> • In <i>kastom</i> the process is quicker, there are no prisons and there are consensus judgments rather than a decision being made by a single person • Chiefs and police have got different expectations about which each should do which means they do not have a good connection. • Orders of formal courts restraining parties from approaching each other means the chiefs cannot reconcile the parties eg
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	<p>Domestic Violence Protection Orders -?</p> <ul style="list-style-type: none"> • When relatives put pressure on victims to withdraw the case the prosecution is forced to do so as victim's refuse to testify
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Part 3: Possible Solutions – Building Links

The questions that the discussion groups considered are set out in the appendix to this report. Each question contained many sub-questions and not all of these were answered. Question six was also not discussed due to time factors. The summary below therefore sets out the parts of the questions that were answered together with the answers given by the various group, and the points of agreement and disagreement are noted.

Question 1: Should the matters that each system or both systems deal with be specified?

No group was in favour of writing down a list of matters that each system should deal with as they all found that this was an impossible exercise, and quickly realized that if chiefly power is codified then it will be limited as well. In addition, as one group noted, chiefs find it difficult to codify their offences – “in custom a wrong is a wrong.” Some groups proposed that the decision of which system should deal with a particular case should rest with the chief, who should decide if he can deal with the case or not (another way of putting this was whether the case is “easy” or “difficult”). Another group suggested that in urban areas, state law should apply whereas in rural areas, *kastom* law should apply unless there is no *kastom* law which covers the situation. Other groups proposed that chiefs should deal with minor matters and the state with serious matters. A further group stated that although there should be no list, there should be clear procedures and guidelines for both to work together. Some groups felt that *kastom* should always be used to deal with matters relating to natural resources, even in urban areas.

There was disagreement about whether individuals should have the right to opt-out of being dealt with by the *kastom* system, with some feeling there should be no opt-out as this undermines the chiefs’ authority, while others stated that there should be freedom of choice. Others said that a person should always be able to go to the state system afterwards.

Most groups did not address in detail the question of how a right to a fair trial can be ensured in the *kastom* system, but the group that did said that it was up to the chiefs to ensure that there is impartiality and fair hearing in the *nakamal* but they need training for this. One group commented that at the end of a case the chiefs should tell a defendant that he can appeal to the state system if not satisfied with the decision.

Question 2: Should it be possible to appeal from the *kastom* system to the state system?

Almost every group said that there should not be the possibility of an appeal, in the sense that a case should not move from the *kastom* system to the state system without the necessity of starting from the beginning of the state system's process (ie lodging a complaint). However, the answers of some groups suggested they may have misinterpreted this question and answered the question of whether *at present* there is a right of appeal rather than the normative question of whether there *should* be a right of appeal, and so this appearance of uniformity in the answers should not be given too much weight.

Many groups expressed the view that the *kastom* system should be final and that it should be up to the person making the complaint to decide at the outset which system they want to use and then be made to stick to that. Groups who adopted this view supported their position by saying that appeals undermine *kastom*, that people need to show respect to the *kastom* system, that they should honour what they started in *kastom*, and that the two systems operate with different principles and so an appeal would not make sense. A modified version of this approach was that appeals should be limited to certain matters, such as land disputes. An alternative view was that there should be the possibility of an appeal, but only where there has been bias in the *kastom* system, or the punishment is too heavy or the correct *kastom* has not been applied.

However, some other groups said that although there should not be an appeal this should not stop the defendant starting an entirely new case in the state system.

Only a few groups considered whether there should be an appeal if the *kastom* system is given state resources (which was an additional question posed to them orally by the facilitators) and there was more acceptance of an appeal if state resources had been used to punish someone. There was concern, however, that if appeals are allowed they must be managed in ways that ensure the chiefs keep their respect, such as by judges sending cases back to chiefs to decide again rather than just substituting a decision.

There were mixed views on whether chiefs should keep records, with some groups stating that this is something that could be developed, while others said it would be better for chiefs to go and give oral evidence of what has occurred to state courts.

This question of appeal raised the difficult issue of to whether the two systems can and should operate together or whether they should remain separate. This issue is discussed below in the section on general comments.

Question 3: How can the *kastom* system be used more by the state system?

Most of the groups supported the idea of the re-introduction of assessors into the state courts. Other ideas were: there should be amendments to the *Police Act* to provide for guidelines about when the chiefs and when the police should be involved in cases; there should be diversionary sentences in the community managed by chiefs; the state system should assist in enforcing *kastom* decisions; chiefs should handle more matters to reduce the time and cost of using the state courts and to maintain good relationships within the community; chiefs should advise courts about sentencing; chiefs can assist in civil cases, in particular family and property law, through mediation; chiefs should be fully consulted on government projects and policies; and that there should be an office established within the government to ensure that the state system uses the *kastom* system as much as possible. This office could be established within the Ministry of Justice and its role would be to monitor and ensure coordination of projects and the two systems, provide funding, training and consultation.

Question 4: How should the courts treat customary compensation and reconciliation ceremonies?

It was generally agreed that the fact that a customary compensation had been undertaken should be proven to the court by having the chief come to court and give details of it. Some groups also felt that the victim should come as well, while others thought the chief alone was sufficient. Many groups felt that there should be some criteria for the court to judge the value of the compensation provided, and one group suggested this criteria could include the implications of the crime on the community and the extended family and the chiefs. Some groups felt that the court should be able to dismiss a case without imposing a further sentence if the court is satisfied that settlement already paid is sufficient.

In relation to the difficult question of when a reconciliation ceremony should be held when a state proceeding is also going ahead, one group argued strongly that the correct place for it is after a determination or a plea of guilt but before sentencing. It should not take place before the plea because if someone conducts a reconciliation ceremony and then pleads not guilty this would not look right in the eyes of the people. One group said that it should take place before the court hearings and another that it should occur after.

There was a discussion about the fact that one of the purposes of a *kastom* settlement is to “*cleanim fes*” of the defendant in front of the community and that therefore it should take place before a defendant returns to the community.

There was a discussion about the fact that many chiefs are not aware of section 119 of the Criminal Procedure Code and that they should be aware of this

provision as this will make them handle reconciliation between the parties more effectively.

A further discussion was had about the difference between a fine and a reconciliation/ settlement in *kastom*. One group proposed that the difference was that a fine went to the chief and/or the wider community while the reconciliation payment went from one part to the other in order to restore their relationship. Another way of putting this was stated to be that there are two levels in *kastom* – to “*cleanim fes*” which is a collective action, and to apologize to the victim. These two different functions may be a way of moving the issue of the relationship of both systems forward.

Question 5: How can the *kastom* system use the state system more?

The groups in this session included one that was a “chiefs-only” group, while the other groups were mixed but generally did not include chiefs.

There were mixed responses in relation to the issue of whether a council of chiefs should be able to request the police to arrest people if they do not attend meetings or fail to pay fines. Some groups felt that this was not desirable. One group commented that chiefs should be able to proceed in the absence of a defendant if he has been adequately notified about the hearing but still refuses to come. Other groups suggested that the police can assist chiefs by providing security at meetings and by requesting people to attend but they should not use force to compel attendance. Another group suggested that perhaps island courts could be used to enforce chiefly decisions.

Some groups, including the chiefs-only group, on the other hand argued that such assistance should be available. One group argued “If the wrongdoer after several attempts has failed to attend the meeting then chiefs can apply to a Magistrate for an arrest warrant and after the magistrate has checked their application and found that it is reasonable for an arrest warrant to be granted the magistrate can order the police to arrest the wrongdoer.” The chiefs-only group commented that chiefs have their own police and they would prefer to use these first, with the state giving them authority to use force, before using the state resources. The chiefs stressed that these powers would not need to be used often and chiefs should not be encouraged to use them often as this would erode respect. In order to avoid the problem of abuse the group suggested that only the highest ranking chiefs should be able to request police assistance, and suggested that a register should be made and given to the police so they know who these people are. The comment was also made that in some islands there is no police presence and so such powers would not assist.

Most groups felt that a council of chiefs should not be able to apply for a warrant to compel a defendant to return to their home island, although the chiefs-only group argued this power would be useful. Another group argued that such a

reform may be possible but it should be very clearly specified what type of behavior could order such a warrant being issued, such as failing to respect rights, or threatening public safety, order and health. Other groups suggested that a way of dealing with such situations is for a council of chiefs to inform the police of the possible threat to public safety and leave it to them to take further steps. It is possible that there was also confusion in answering this question about whether it meant doing this would breach the law as it currently stands rather than being a normative question.

General Comments

A theme running through some of the comments was that some participants strongly believed that the *kastom* system should remain separate from the state and resisted the idea of state resources being used by the *kastom* system or the state interfering with the *kastom* system. However, these views seemed to be in the minority, with other participants stressing the need for the two to work together. The Chief Justice in particular stressed the fact that the reality is that Vanuatu is a Republic with a Constitution and a written common law-based legal system, and that no-one can block the power of the state. He explained that the real challenge is how to make sure that *kastom* survives in the complexity of the modern world and so the participants should engage only in practical thinking rather than dreaming about some unrealistic future in which only *kastom* exists. Michael Taurokoto similarly argued that although the Indigenous system is important, there have been some important changes introduced into Vanuatu from outside, such as Christianity and the Constitution which have "*leftemap yum!*" and that it is important that Vanuatu finds a way for the two systems to work together.

A number of comments were also made about the fact that there is a need for more research in order to find out what *kastom* is, and also care needs to be taken not to try to treat all of Vanuatu as if only one *kastom* exists.

There were also some comments made about the differences between the state system, where the focus is on justice for the individual and one person wins and the other loses, and the *kastom* system where the focus is on the community and peace and attention is paid to the aftermath of the dispute. Chief Motarilavao Hilda Lini stated:

"Anda long kastom system pis is collectively owned by a group or community mo community igat collective accountability to peace. Wok blong potektem pi semi priority. Taem igat disturbance long pis, imas gat compensation or peim bak pis kuiktaem blong mekem se inogat conflict."

The different focus of the different systems means that people involved in the different systems make different decisions. Also the comment was made that there needs to be different options for the different provinces as different customs exist throughout the country and there is a different reach of the state in different places due to geographical factors.

Future Directions

As there was a very clear feeling amongst the participants that the issues that had been raised by the conference should be acted on in some way, the final two hours were devoted to a discussion about how to progress the issues. There were many ideas offered including: the need to train chiefs so they understand the state systems and so can contribute more in the future to a national discussion; the need for chiefs to stop disputing chiefly title; the need to improve the working of those systems which currently exist which bring the two systems together, such as the Customary Land Tribunals; the need to have more research into the operation of the *kastom* system throughout the country; consideration of changes to the Constitution to lift the position of customary law in the hierarchy of laws that apply in the country; and the need to build bridges between the two systems. There was also a suggestion that Vanuatu should build a new system that took *kastom* as its foundation. The President of the Malvatumauri commented that *kastom*, the courts and the government could all assist each other to ensure peace inside the community, but also warned that care must be taken to ensure that each island can “*walkabaot long rod blong olgeta.*”

The Chief Justice concluded the conference by drawing together many of the strands of discussion and commented that the challenge for Vanuatu is to build a justice system in which both the public have confidence and in which foreign investors will also have confidence. He drew attention to some steps that could be taken by the three main groups involved in the conference to deal with some of the problems which had been highlighted. He suggested that the Malvatumauri could take steps to improve the structures of chiefs and chiefly councils and their organization and management processes, and also ensure that the chiefs are provided with more training and awareness about the existing state legal structure and laws. The police were advised to work on sorting out their relationship with the chiefs, and the main identified for the judiciary to move forward was to improve their relationship with the chiefs in relation to compensation and customary settlements. At the close of the day the Chiefs Justice called for, and received, undertakings by these three bodies that they would move forward with these issues. The USP facilitators undertook to write a report of the conference to assist the groups in their endeavors and also offered to act as a resource and to provide any assistance needed to each of the three groups. The conference finished in a traditional Vanuatu manner around a bowl of USP's famously strong kava.

Attachments

- **Program**
- **Photos from the conference**

VANUATU JUDICIARY LAW CONFERENCE

USP Conference Room,
Emalus Campus,
Port Vila, Vanuatu
28-29 August 2006

Monday 28 August 2006

8.30 -9.15am **Welcome - New Zealand High Commissioner, Mr Paul Willis**
Official Opening – Chief Justice

Theme 1: Current Situation with Relationship between Kastom System and State System

9.15 -10.0am **(Member of the Police):** Paper on the way the police work with the chiefs in Vanuatu

10.00 – 10.30 *Morning tea*

10.30 – 12.00pm **Justice Bulu:** Paper on the relationship between the courts and the *kastom* system
Chief Mormor and Chief Selwyn Garu: Papers on relationship between the chiefs and the state justice system and on the Chiefs Legislation.

12.00 – 1.00pm *Lunch*

Theme 2: Problems and Issues with Relationship between Kastom System and State System

1.00 – 2.00 pm **Miranda Forsyth:** Paper on problems in the relationship between the two systems
Michael Taurokoto: Paper on problems with both systems
Don Paterson: Some Constitutional Issues in relation to the *kastom* system

2.00 – 3.00 **Break-Out Groups discussing the problems and issues with the relationship between the two systems:**

- how does the operation of each system support the other system? Is this enough?
- how does the operation of each system undermine or conflict with or not adequately support the other system?

3.0 – 3.30pm

Afternoon Tea

3.30 – 4.30pm

Reporting of Groups and Plenary discussion

Tuesday 29 August 2006

Theme: Possible Solutions – Building Links

8.00 - 8.15am

Setting the Scene and the Issues - USP Law Staff

8.15 - 9.00am

Break-out group

Question 1

- (a) Do you think it would be helpful to specify the matters (civil and criminal) which only chiefs should deal with?
 - a. Which matters are these?
 - b. How can we ensure that the Constitutional right of a person to the protection of the law?
 - c. How can we ensure that the Constitutional right of a person charged with a criminal offence to a fair hearing before an independent and impartial court, be protected?
 - d. Should a defendant always be able to “opt-out” of a matter being determined by chiefs and have the matter decided by a state court?
- (b) Do you think it would be helpful to specify the matters (civil and criminal) which only state courts should deal with?
 - a. Which matters are these?
- (c) Do you think it would be better if there are matters (civil and criminal) which both chiefs and state courts can deal with?
 - a. How can the Constitutional right of a person not to be tried twice for the same, or substantially the same, offence be protected?
 - b. Should parties be obliged to choose their forum initially and then be required to stick with it (except for an appeal)?

9.15 -9.45

Morning Tea

9.45 – 10.00

Reporting of Discussion of Question 1

10.00 – 10.45

Break-out group

Question 2. Should it be possible to appeal from the *kastom* system to the state system?

- Should there be any limitations on the right to appeal (eg only for issues related to bias or unfairness)
- What should the courts do when hearing an appeal from a chief? (send the case back to the chiefly council for re-decision, make a substitute decision?)
- How would a state court know what has happened at the level of *kastom*? Should chiefs be required to make records of proceedings?

10.45 – 11.00 Reporting of Discussion of Question 2

11.00 – 11.45 Break-out group

Question 3: How can the *kastom* system be used more by the state system?

- Should chiefs sitting as assessors in state courts be re-introduced?
- What role would they play? (would they assist with the adjudication of guilt or just help with sentencing?)
- Should courts order customary compensation or reconciliation ceremonies to be performed?
- Should courts give offenders back to the chiefs for sentencing? How could this work?

11.45 – 12.00 Reporting of Discussion of Question 3

12.00 – 1.00pm *Lunch*

1.00 – 1.45pm Break-out group

Question 4: How should the courts treat customary compensation and reconciliation ceremonies?

- Should customary settlements be proved to the court through the calling of witnesses? Should a victim have to testify that they have accepted the settlement with no pressure from anyone?
- What criteria should courts apply to determine the weight to be given to a customary settlement?
- Should a court be able to dismiss a case with no further punishment if satisfied that the customary settlement is sufficient?
- Should reconciliation ceremonies be held before or after court hearings?

1.45 – 2.00 Reporting of Discussion of Question 4

2.00 – 2.45 Break-out group

Question 5: How can the *kastom* system use the state system more?

- Should a council of chiefs be able to request the police to arrest people if they do not attend meetings or fail to pay fines?
- What checks need to be placed on the awarding of these sorts of powers? (should a request come through a magistrate first of all? Should it be a power given just to high levels of chiefly councils? Should such councils have to follow any types of procedures? If so, what?)
- Should a council of chiefs be able to apply to a State court for the issue of a warrant of arrest to compel the return of a person to his or her island of origin if that person has failed to respect the rights and freedoms of others or is a threat to public safety, order, welfare or health?

2.45 – 3.00

Reporting of Discussion of Question 5

3.0 – 3.30pm

Afternoon Tea

3.30 – 4.15pm

Break-out group

Question 6: What other ways can you suggest for the relationship between the state system and the *kastom* system to be improved?

- What would an ideal justice system in Vanuatu look like to you?
- Can you draw a diagram to show it?

4.15 – 4.30

Reporting of Discussion of Question 6

4.30pm

Official Closing - Chief Justice

Financial support for this conference has been kindly provided by NZAid

Photos from the Conference



Justice Bulu and Chief Mormor



Chief Justice Lunabek and President of the Malvatumauri, Chief Paul Tah



Participants at the conference