



The Hybrid Courts of Melanesia

A Comparative Analysis of Village Courts of Papua New Guinea, Island Courts of Vanuatu and Local Courts of Solomon Islands

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Legal Vice Presidency
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Foreword

The World Bank's Justice for the Poor program has been active in undertaking research into the relationships between state courts of justice and customary mechanisms of dispute resolution. This paper is an example of the program's contribution to the widening of knowledge about this area of justice system development research. The authors are specialists in the field of justice and dispute resolution in Pacific Island societies. The findings they reach in this paper are not only relevant within the region, but are also likely to have relevance in other regions and communities that are affected by significant poverty and limited access to state-sponsored services.

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**By Daniel Evans and Dr. Michael Goddard
with Professor Don Paterson**

Abstract

This paper examines three systems of courts of justice, each in a different country in the region of South Pacific islands known as Melanesia, where state legal systems have been adopted from former European colonial governments. The systems discussed are, by comparison, “hybrid”, each of them having been established with the intention of addressing disputes among small-scale social groups by less formal means or by taking greater heed of customary forms of dispute resolution. The paper applies a comparative analysis of these systems, covering their distinct history and the variances in structure, funding, personnel and jurisdictional coverage that impact on their effectiveness as state-sanctioned courts. Conclusions are offered with observations about the strengths and weaknesses of these hybrid systems and their potential for development as instruments of community-owned justice in Melanesia.

1. Introduction

Community-based justice systems operate in many parts of the developing world. The degree of engagement between these systems and the state varies. Some systems exist independently of the state, using traditional dispute-resolution methods. Other systems are recognized by the state and may have a legislative foundation, often regulating the type of matters that can be heard and the sanctions imposed. In defining community-based justice systems and, indeed, justice systems more broadly, a distinction is often drawn between “formal” and “informal” systems. However, we prefer to call them “state-based” and “nonstate-based.” The state justice system comprises those state institutions that are commonly found in contemporary Western societies: the court hierarchy and relevant criminal and civil state justice apparatuses. Nonstate justice systems lack those features common to the state sphere and exist independently of the state; they typically apply their own unique procedures, often based on local custom and mores.

The focus of this paper will be on a third type of system, that is, systems that possess many nonstate hallmarks, yet also have a legislative basis and incorporate a degree of state

engagement. In the decision-making context, these systems have been variously described as “quasi-informal,” “intermediate,” “first-level jurisdiction,” or “hybrid” courts. While often operating independently of the state, they are constrained by a legal framework that governs their operation. They may also be subject to a degree of state oversight, interact with external state agencies, and receive some, albeit often limited, state assistance.

The hybrid courts of three Melanesian countries—Solomon Islands, Papua New Guinea (PNG), and Vanuatu—are discussed and compared in this paper. The three court systems have suffered different fortunes due to political, governance, and economic circumstances. The PNG village courts system has grown and spread over more than three decades and is a popular resource. The Vanuatu system is much smaller, with a modest profile and less organized governance. The Solomon Islands system has suffered from the effects of the country’s recent civil conflict as well as moves to centralize administrative arrangements and concentrate courts in provincial centers. However, in each case, the courts show either the ability (for example, in PNG) or the potential (in Vanuatu and Solomon Islands) to work successfully. That is to say, they can manage a fruitful compromise between the introduced law and customary systems, and between the individual rights-oriented justice of Western societies and the sociocentric orientation of traditional notions of dispute settlement.

Recognition of the potential value of hybrid courts resonates with the broadening of interest in legal pluralism, particularly in societies such as those of Pacific Island countries, to which Western law was introduced in the colonial period. It is now commonly recognized among scholars that most, if not all, societies are legally plural. Merry wrote in 1988 that legal pluralism was “a central theme in the reconceptualization of the law/society relation” (Merry 1988, 869). Legal pluralism acknowledges the coexistence of multiple regulatory systems in many societies (Griffiths 1986; Merry 1988), and can be contrasted to a previous tendency to legal centralism, which was reluctant to acknowledge the validity of alternatives to Western law.

In particular, the establishment of hybrid courts challenges us to reconsider conventional dichotomies of the Pacific’s colonial period that often opposed “custom” or “customary law” to Western law. The constitutional legacy of these dichotomies is particularly evident, for example, in directives that hybrid courts established in the past few decades should always apply “custom” or “customary law” except where it is at odds with formal laws or with “principles of humanity.” With the advent of development aid policies aimed at the capacity building of community-level institutions, including those seen to be potentially useful to the governance of law and order and human rights issues, a comparative review of Pacific hybrid courts is timely. Obvious questions are: how do multiple regulatory systems commonly interact? How can this interaction be constructively managed in hybrid courts? How should the culturally variable notion of human rights be managed in hybrid courts?

Historically there has been some distrust of hybrid systems in the Pacific, based on a concern that the mix of “customs” and “customary law” with the introduction of Western law could be volatile (Aleck 1993). An underlying suspicion that customary ideas of justice and rights might contrast negatively with those regarded as fair in Western society was prevalent in colonial times and delayed the official recognition and institutionalization of any locally run courts for decades (Sack 1989; Strathern 1972); indigenous adjudicators were trusted to deal only with matters that

appeared too trivial for colonial officers' attention. In some quarters, there is still a hesitancy to trust hybrid justice systems, manifesting in a desire to closely monitor those that already exist with regard to adherence to the rule of law and possible breaches of individual human rights (see, for example, Garap 2005; Macintyre 1998).

This paper is exploratory and not intended to be interpreted as a policy document. It is oriented to the possibility of establishing accessible community-level justice systems that integrate the needs of people in village societies and the capabilities of states. The inference invited from the following comparative examination is that with sensitive guidance, rather than intrusive and transformative directives, hybrid courts can function efficiently to integrate culturally variable understandings of justice with the principles of the state judicial order. We begin with a descriptive review of the three types of courts, followed by an examination of their various strengths and limitations, and conclude with suggested broad directions for future engagement.

2. Hybrid Justice in Melanesia

The hybrid courts in Melanesia are the lowest in the judicial hierarchy. They help to fill the void between the professionally staffed courts at the central, provincial, district, or national centers and the largely unregulated, disparate island populations. The three courts discussed here share various common traits. First, they are all presided over by laypeople and have a mandate to apply their communities' unique customs. Second, civil and criminal jurisdiction is limited so that they hear only minor matters, typically those that are appropriate for community-based resolution. Finally, none of the courts apply formal rules of evidence; instead, a method of review and appeal ensures a degree of state judicial oversight.

2.1 Village Courts of Papua New Guinea

PNG's village courts have been described as “[a]rguably the most significant institutional innovation in the law and justice sector since independence” (Dinnen 2005, 9), though they were actually inaugurated before independence. The system enjoys a degree of legitimacy and engagement not found among the higher courts, and has come to fulfill a role between the higher courts—whose legal technicalities often provide a disincentive to “grassroots” people pursuing minor disputes—and more parochial forums. Unlike the other two systems discussed in this paper, PNG's village courts grew less out of a concern for dealing with customary land disputes (in fact, they are not permitted to hear land cases) and more out of a recognition that the indigenous population was failing to engage with the introduced legal system. By the late 1960s, there was a belief in PNG that “unofficial courts, over which the Administration had no systematic control, were flourishing” (PNG Justice Advisory Group 2004, 35). There was a growing recognition by the Australian administration that a more inclusive form of justice was required—a form of justice that was sympathetic to the realities of life for the majority of the populace (see, for example, Derham 1960, Lynch 1965). Coupled with this recognition was a fear that if left unchecked, other unregulated systems would quickly fill the void. The solution for the departing Australian administration was to devise a stratum of courts at the village level, below the (now obsolete) “local courts.” This was not a particularly new idea, as discussions about the establishment of such institutions predated the Second World War, but their efficacy and reliability had been doubted until the late colonial period (Goddard 2009, 35–48).

The first courts were established in 1974, and for about two years the magistrates operated without any immediate guide to their practice beyond verbal instructions from staff of the newly established Village Court Secretariat. In 1976, a *Village Court Handbook* was issued, which became an important guide and resort for magistrates in the early days of the system. It listed the types of offenses and disputes they could deal with, the penalties they could impose, their duties, and the limits of their jurisdiction. It also contained examples of how summonses should be filled out and decisions recorded. Today, there are more than 1,000 village courts across PNG, with approximately 12,000 officials. Existing in both rural and urban communities (the latter include the informal housing areas popularly called “settlements,” as well as traditional villages around which urban areas have grown), they are the state dispute-resolution mechanism closest to the people. Importantly, village courts are regulated by statute,¹ and discussion hereinafter refers to “official” village courts and not to unofficial courts in contemporary PNG, which are sometimes, confusingly, also called “village courts” in popular discourse.

Village court magistrates are intended to be persons respected by the community, with good knowledge of local customs and locally trusted to make fair decisions (VCS 1975). The local community elects magistrates, although in some places, community selection is often dictated or influenced by local and provincial governments. Magistrates are not required to have any formal educational or Western legal qualifications. To offset legal “technicalities” in what was intended to be a grassroots system, lawyers are not allowed into village court proceedings. Frequently, people who become village court magistrates are already fairly prominent within their community—for example, “big men” or former public servants—although research shows, on the one hand, that traditional hereditary leaders (chiefs) in some areas exclude themselves from such roles and, on the other, that getting involved in village courts work is a strategy used by community members who aspire to higher status (Goddard 2009, 145–46). Reflecting the male-dominated orthodoxy of PNG, few magistrates are women. Donor and government-funded efforts are currently being made to redress this perceived gender imbalance, although anthropological research suggests that among PNG’s approximately 750 culturally diverse societies, there are some in which women reflectively prioritize other types of community service as more appropriate for themselves and may not necessarily want to be magistrates (Goddard 2009, 151).

Other officials who make up a village court are a clerk and several “peace officers.” With little force behind their putative authority, the latter largely find it too difficult to carry out their legislatively prescribed quasi-policing duties (arresting people, breaking up fights, and so on) and do not do much more than provide security during court sessions and assistance with basic administrative tasks. The types of cases the courts can hear are typically village-based or community problems such as gossip, swearing, sorcery accusations, minor instances of assault, drunkenness, and disturbing the peace. They exclude, for example, divorce applications, offenses involving motor vehicles, and land claims, as well as indictable offenses such as manslaughter and murder. The cases are commenced by aggrieved individuals who bring their complaints directly to court officers, almost always without police or legal assistance. The relatively minor nature of the offenses largely obviates the need for village courts to distinguish between criminal and civil cases in their day-to-day operations.

¹ Papua New Guinea, *Village Courts Act 1989* and *Village Courts Regulations 1974*.

An important and often misunderstood feature of the system is its mandatory mediatory jurisdiction. All matters, including criminal cases, are to be initially mediated if possible, which is usually done by a single magistrate. If a resolution acceptable to the parties cannot be reached, the matter will proceed to a full court hearing. Partly to avoid split decisions, an odd number of magistrates comprise a full court. The minimum is three, but it is not unknown for up to seven to sit, and joint sittings of courts (if disputants come from two different communities) can be large affairs. The penalties that village courts can apply are limited to a fine of up to 200 kina (approximately US\$80) in criminal matters and, with some exceptions, up to 1,000 kina (approximately US\$390) compensation for civil matters. In view of the lack of differentiation between criminal and civil cases, it is not uncommon for losing disputants to have to pay both a fine and compensation. Monies collected through fines must be deposited with the local-level government of the area in which the court is located. Provisions exist for the imposition of community work orders, although these are rarely used, as village courts are not well enough resourced to provide all the tools that might be necessary, or to provide supervision of the work. Decisions of the full court are binding. Village court magistrates can write prison orders against disputants who fail to abide by court decisions, though the orders have to be countersigned by a district court magistrate. Disputants can appeal against village court decisions in district and higher courts.

From the outset, custom was intended to be an important feature of the system. Village courts are tasked with applying custom in accordance with the *Custom Recognition Act 1963*.² This is a problematic aspect of the system, since no analytically useful definition of either custom (or customary law, another popular term) is given in any legal documentation related to the *Village Courts Act*. Whether village courts—and the other hybrid systems discussed in this paper—actually apply custom, and what custom comprises, will be dealt with below.

Funding for the system is almost exclusively provided by the national government, with the subnational government (with the exception of the Eastern Highlands province) providing little additional monies. Recurrent funding exists in the form of a “function grant” to individual provinces for the operation of their courts. In 2010 this amounted to a total budgeted distribution of 2.33 million kina (approximately US\$885,000). In addition, the national government pays the small allowances of the court officials. In 2010 some 6.36 million kina was budgeted for allowance payments (approximately US\$2.415 million). Historically, a lack of actual delivery of funds has been an ongoing weakness, due to confusion over administrative departmental responsibility at state level since the system’s inauguration and the chronic breakdown of delivery mechanisms one way or another (Goddard 2009, 57–71). More recently there has been some improvement, after interventions by donors. Donor funding is provided by the Australian Agency for International Development (AusAID) under the Australian-PNG “Law and Justice Partnership.” In 2010 this amounted to approximately 920 thousand kina (roughly US\$360,000), including technical assistance provided in the form of an expatriate adviser. Additional donor monies for village courts are allocated to the Autonomous Region of Bougainville.

² Papua New Guinea, *Village Courts Act 1989* s 57(1). Following the passage of the *Underlying Law Act* in 2000, it is probable that village courts must apply custom in accordance with the new law. However, the new Act does not expressly repeal the *Custom Recognition Act 1963*.

Although the system is not without its flaws, which will be discussed below, the village courts fulfill their mandate in most instances. There are still unofficial courts of the kind described by Strathern (1972) before the advent of the village courts system, and “informal justice systems” (see above), such as community-level dispute-management procedures, are still developing throughout the country. These include mediation or arbitration by local church officials, dispute settlement by self-help associations set up by regional groups in urban areas, and the work of settlement committees made up of concerned individuals and aimed at preserving stability in migrant settlements in urban areas (Goddard 2009, 93–94). For grassroots people the village court is frequently an arena of justice to be utilized when other resources fail or are insufficient.

The intimate relation between village courts and their local communities has been a major factor in the success of the village courts system over the past three decades. In the early period, their magistrates had no law books (beyond the simple *Village Courts Handbook*) and no recourse to recorded precedent. They drew on a sophisticated understanding of the social and historical background of the disputes they heard, being themselves members of the local communities they served, and this has been their strength in delivering grassroots justice, guided in practice by an organic understanding of the wider social implications of disputes. Their practice integrates very simple legal procedure (as catalogued in the handbook) with a refined sense of local community understandings of what is fair and just. A survey of the body of anthropological fieldwork-based research concerned to any degree with village courts since the mid-1980s reveals that after uncertain beginnings in the mid-1970s, they have come to manifest a successful adaptation by local societies of a legislatively introduced grassroots justice institution (see, for example, Goddard 2009; Scaglione 1990; Westermark 1985, 1986; Zorn 1990).

2.2 Island Courts of Vanuatu

While less numerous than their PNG counterparts, island courts in Vanuatu are currently operating on 11 of the larger and more populated islands,³ and partly operating on two others, with the latter hearing only outstanding customary land cases.⁴ This leaves two other significant islands, Loh in the northernmost Torres group and Aneityom, the southernmost island, where the courts are in the design stage but not yet under warrant. When island courts are introduced in these two islands, the coverage of the larger and most populated islands will be complete.

Island courts were established in 1983 shortly after independence, possibly with the expectation that they would deal mainly with customary land disputes.⁵ The chief justice of the time, Frederick Cooke, had come to Vanuatu from Solomon Islands, and as Weisbrot has noted, the island courts of Vanuatu were modeled on the local courts of Solomon Islands (Weisbrot 1989,

³ Vanuatu is comprised of approximately 83 islands, 65 of which are inhabited. Island courts are located on the islands of: Vanua Lava, Santo, Ambae, Pentecost, Malekula, Ambrym, Efate, Epi, Tongoa, Tanna, and Erromango.

⁴ Maewo and Paama.

⁵ This is even though the legislative basis for establishing what were referred to as “village,” “island,” and “town” courts actually came about in 1980 pursuant to the New Hebrides *Courts Regulation 1980*. It appears that no courts were ever established under the Order, and it was only when the *Island Courts Act* was passed in 1983 that island courts were established. Town courts (described as a “special type of customary court in urban areas”) have never been established in Vanuatu. The Order was repealed in 2000. Further, under Article 8 of the 1914 *Protocol Relating to the New Hebrides between Britain and France*, provision was made for the establishment of “native courts” composed of two “Agents of the administrative district” where the court was located and two “native assessors”: art 8, sub-art 5.

65, 79). The first island courts commenced sitting in 1984, their establishment partly fulfilling the requirement imposed by the constitution that:

Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters, and shall provide for the role of chiefs in such courts.⁶

Records of the island courts system are historically incomplete, but figures available from recent years indicate that in 2006, island courts completed 388 cases (Garae 2007).⁷ This dropped to 292 cases in 2008 (Joshua 2009). In 2009, a total of 461 cases were filed in the island courts; at the beginning of 2010, 352 cases were completed and 447 were still pending (Vanuatu 2010b).

Like PNG village courts, Vanuatu's island courts are regulated by statute, the *Island Courts Act*, which was enacted in 1983 and has been amended a number of times.⁸ Island courts are, again like village courts, comprised of laypeople, called justices, who are selected for their knowledge of custom. A minimum number of three justices comprise the court, one of whom must be "a custom chief residing within the territorial jurisdiction of the court."⁹ Unlike PNG's village courts, island courts were legislated to determine matters of customary land ownership. In 1989, parliament required that in cases involving land ownership, island court justices must be joined by a magistrate.¹⁰

On December 7, 2001, parliament stipulated that island courts would no longer hear any claims about the ownership of customary land, as such claims would henceforth be heard only by customary land tribunals established by the *Customary Land Tribunals Act*, which came into force on that date.¹¹ However, this system has been fraught with difficulties. In 2002, the Court of Appeal held that only a constitutionally established court was capable of resolving land disputes (in the absence of an agreement between the disputing parties).¹² At present, moves are being considered as to how customary land tribunals can be given the status of a constitutionally established court or, alternatively, whether the constitution should be amended (requiring a two-thirds majority of parliament) to make an exception for customary land tribunals. At the beginning of 2010, it was recorded that there were still 83 customary land cases yet to be determined by island courts (Vanuatu 2010b).

Island courts are authorized to exercise such jurisdiction as is defined in their warrants of establishment,¹³ which typically authorize them to hear and determine certain minor criminal offenses under the Penal Code and other specified legislation. For example, their criminal jurisdiction might include damage to property, criminal trespass, abusive and threatening

⁶ *Constitution of the Republic of Vanuatu* art 78 (2) and 52.

⁷ Some 764 cases were "registered" with island courts in the same year.

⁸ In 1989, 2001, and 2006 (twice).

⁹ Vanuatu, *Island Courts Act 1983* s 3.

¹⁰ *Ibid.* s 3(4)(a).

¹¹ See Vanuatu, *Customary Land Tribunal Act 2001*. Under section 5, cases that are pending before an island court can be transferred to the new system with the consent of both parties. For a detailed analysis of the *Customary Land Tribunal Act 2001*, see Lunnay et al. (2007, 22).

¹² *Valele Family v Touru* [2002] VUCA 3 (Unreported, Lunabek CJ, von Doussa, Robertson and Fatiaki JJ, 26 April 2002).

¹³ Vanuatu, *Island Courts Act 1983*, s 1.

language, adultery, and theft. From 1995 these courts have been authorized to hear minor traffic offenses such as driving without due care or failure to comply with traffic signs (in practice, this applies primarily to the island of Efate, containing the capital town, Port Vila). Their civil jurisdiction often extends to minor contractual disputes and certain civil claims, for example, disputes concerning ownership of land (until December 6, 2001); claims in tort and contract not exceeding 50,000 vatu (approximately US\$530); civil claims under provincial bylaws; and applications for child maintenance.

Another interesting feature of the jurisdiction of island courts is that although their warrants do not expressly so authorize, several island courts are exercising jurisdiction to determine disputed claims to chiefly title. In 2009, it was recorded that 18 claims to chiefly titles and names were dealt with by island courts, especially the island courts of Efate and Malekula (Vanuatu 2010b). This seems to indicate that disputing parties sometimes prefer that claims to chiefly title be determined by a state court in the absence of a clearly accepted alternative forum. There is currently a variety of views about how chiefly title disputes should be resolved, with some proposing the island courts and others suggesting an alternative tribunal.

In the exercise of their jurisdiction, island courts were intended to apply customary law, provided it is not in conflict with any other written law or contrary to “justice, morality and good order.”¹⁴ In practice, because of the narrow scope of matters specified in the warrants as being within their jurisdiction, they do not determine cases in which customary law is relevant, except, as discussed, land cases filed before December 7, 2001 (and also disputes about chiefly titles, which do not appear to be within their jurisdiction). As concerns land cases and chiefly title matters, custom is not reflected in court procedure but in the substance of decisions that are based upon rules of custom. There is no provision for island courts to determine offenses under custom, and both Weisbrot and, more recently, Forsyth, have commented on the courts’ lack of a general customary law jurisdiction (Weisbrot 1989, 81; Forsyth 2007, 224–25). Weisbrot contends that due to the failure to adequately incorporate customary law, island courts have become little more than “less formal magistrates’ courts” (Weisbrot 1989, 81). Indeed, since statistics reveal that in 2009 no criminal proceedings of any kind were filed in any of the island courts, and that the majority of civil proceedings filed and cases determined related to child maintenance (Vanuatu 2010b), one could go further and say that the island courts now function mainly as child maintenance courts.

Nevertheless, in exercising much of their criminal jurisdiction, island courts must:

...encourage reconciliation and promote amicable settlement, according to custom or otherwise ... and if satisfied that the settlement is adequate and fair, may order the prosecution to be stayed or terminated.¹⁵

The procedures of island courts are more formalistic than those of the other two courts discussed in this paper. Recent observation of the Efate Island Court (Port Vila) by one of the authors¹⁶ found it to be conducted in a very similar manner to a magistrate’s court. The chief justice has

¹⁴ Ibid. s 10.

¹⁵ Vanuatu, *Island Courts (Criminal Procedure) Rules 2005* r 5.

¹⁶ Goddard in 2010.

prescribed rules of procedure for both civil and criminal proceedings.¹⁷ Criminal matters are commenced by a police officer filing a charge following an investigation of a complaint, and a police prosecutor presents the case. Civil matters require pleadings, which, although less detailed than the original rules of procedure, do require that the basis of the claim be stated in writing and served on the defendant. The chief justice of Vanuatu is responsible for establishing such island courts “as he thinks fit,”¹⁸ and, unlike the village courts of PNG, there is no mention of the role of the community in the establishment or location of island courts. Appointments of justices are made by the president acting on the advice of the Judicial Services Commission,¹⁹ but nominations are usually submitted by the clerk or the supervising magistrate.

Island courts do not seem to be used to their full capacity. In some areas this may be a result of hostility from chiefs who see them as infringing upon their own roles as adjudicators of disputes in their communities. More significant is the fact that island courts usually have their office and hearing place in the same location as magistrates’ courts, and so are in competition with them. Island courts have an advantage over magistrates’ courts on minor civil cases from a cost point of view, because the court filing fees are lower and the absence of lawyers means that there are no legal expenses. Also, although written pleadings are used in civil cases, those pleadings were simplified in 2005 and court clerks are usually ready to help claimants formulate their claims. In practice, however, most minor civil cases are filed in the magistrates’ courts, while more than half of the civil cases filed in island courts, as noted above, are claims for child maintenance. With regard to criminal cases, island courts tend to give lighter penalties; thus, police prosecutors prefer to file criminal cases in the magistrates’ courts. Statistics referred to earlier show that no criminal cases were filed in island courts in 2009.

Appeals from island courts lie to the magistrates’ courts, except in the case of land matters, which must go to the Supreme Court.²⁰ As with Solomon Islands’ local courts (see below), this avenue of appeal in land cases has proved problematic. One study in 1997 noted that 100 percent of land cases heard by island courts were being appealed (Hardy-Pickering 1997). In early 1997, with a massive backlog of cases, the current chief justice put a stop to land appeals being heard by the Supreme Court:

.... the newly appointed chief justice... informed the government that unless extra funding was provided to allow for the appointment of extra judges to deal with land cases he would give directions that no more land cases were to be heard by the judges of the Supreme Court. The government did not respond, and the chief justice was as good as his word. In February 1997 he announced... that the Supreme Court would hear no more land appeal cases... (Paterson 2005, 8–9)

Island courts do not receive any regular donor funding. Aid funds were provided by the UK government for a 2004 survey of the courts and a training program for the justices, as well as a revision of court rules to be completed in 2005, but since then, no further aid funding has been provided. Recurrent funding for the courts’ operation was budgeted at 24,588,025 vatu in 2009

¹⁷ Vanuatu, *Island Courts (Civil Procedure) Rules 2005* and Vanuatu, *Island Courts (Criminal Procedure) Rules 2005*.

¹⁸ *Island Courts (Civil Procedure) Rules 2005* s (1)(1).

¹⁹ *Ibid.* s 3(1).

²⁰ Vanuatu, *Island Courts Act 1983* s 22(1).

(approximately US\$260,000), around half of which was payroll. In 2010, the figure increased to 30,353,025 vatu (approximately US\$320,000), with no projected increase in payroll but an increase in operational costs (Vanuatu 2009, 2010a).

2.3 Local Courts of Solomon Islands

The final system discussed in this paper is the oldest of the three types of courts. It is also currently the weakest. Local courts in Solomon Islands exist in limited form and have been the subject of little empirical research. Some historical background is necessary here. Local courts are a postcolonial modification of a preexisting system of “native courts,” which evolved from a body of native tribunals and “native arbitration courts” permitted on an *ad hoc* and informal basis by the British administration in the 1920s and 1930s to deal with local customary disputes (Bennett 1987, 281–82). The following description from a 1939 Ysabel [Isabel] Annual Report is illustrative of these nonstate forums:

The District Headman, apart from their strictly official duties, frequently sits with elders to discuss local matters and out of these meetings native arbitration courts have gradually grown. The latter’s great attraction is that they are a purely native development and of such an informal nature to be well within the comprehension of the people. (White 1991, 199)

Native courts were established under the *Native Courts Ordinance* of 1942 and were given express power to deal with “native customs.”²¹ They also had complete jurisdiction over matters relating to customary land. There were more than 50 of these courts in operation by 1970, presided over by local headmen and “chiefs” (Talasasa 1970, 14–15). The courts’ place in the structure of district administration (at least as it relates to Guadalcanal) has been summarized by Kabutaulaka (2002, 52–54). The (usually European) district officer was assisted by a “district headman,” who, among other duties, was president of the native court in the subdistrict. He was not supposed to “meddle in religious affairs” but was to keep order, with the aid of subordinates including an “assistant district headman,” who was similar to a village constable (Kabutaulaka 2002, 52). Both the assistant district headman and the constable were members of the native court, which also had a native clerk. The court was required to meet at least once a month, and decorum similar to that of a magistrate’s court was enforced (Kabutaulaka 2002, 53–4).

Talasasa has notably argued that there were very few land disputes in “olden times” and he linked the rise of such disputes historically to colonial land alienation (Talasasa 1970, 25–26). In a taste of things to come, Scheffler noted in the early 1970s that people often refused to accept native court judgments on land disputes and repeatedly appealed cases (Scheffler 1971). He said that the courts were often indecisive and were not backed up when they were resolute: “At this stage ... the courts need considerably more support of their decisions if they are to become the effective legal bodies on the local scene” (1971, 289). He advocated more customary authority for the courts.

²¹ Solomon Islands, *Native Courts Ordinance 1942* s 10. The Native Administration Regulation that came into effect in 1922 had already authorized the appointment of indigenous district headmen, village headmen, and village constables. See Solomon Islands, *King’s Regulation No. 17 of 1922*, “To Provide for Native Administration in the British Solomon Islands Protectorate,” *WPHC Gazette* 1922.

Upon independence in 1978, native courts were replaced by local courts (essentially a change in name only) (McDougall 2005, 81). Like Vanuatu's island courts, local courts were primarily meant to deal with customary land disputes. Individual warrants are required to establish local courts. While warrants exist establishing some 33 courts, in practice, there are some 18 courts "on the books" following a consolidation in 2008, spread across five court districts.²² The majority of these courts exist in name only, however, having no place to sit, few or no personnel, and no individual budgets. There is some confusion as to how many local courts sat in 2010. Records from the Central Magistrate's Court indicate that some six local court hearings occurred across the country. Despite having extensive civil and criminal jurisdiction, the courts are presently hearing matters related only to customary land disputes.

The current obscurity of local courts has been caused, in part, by the onset of what has been termed the "tension" in the late 1990s, a period of civil conflict that saw a contraction of government services. The courts reportedly ceased sitting when the conflict escalated (Scales 2003, 18; PIFS 2004, 6).²³ In addition, area councils (local governments), which had played an oversight role for local courts similar to that played by local-level governments over PNG village courts, were suspended in March 1998.²⁴ However, these factors alone do not explain the current stultification. Writing in 1985, Premdas and Steeves pointed out that owing to staff shortages, area councils had already voluntarily returned their responsibilities for local courts to the national judiciary (Premdas and Steeves 1985, 101).²⁵ A further centralization process occurred in the early 1990s, resulting in a system of Honiara and provincial capital-based clerks and a concentration of day-to-day logistical support in the capital, both of which contribute to what has become an expensive and ineffective structure.

When they were operative, local courts were presided over by laypeople. Subject to the chief justice's oversight, the composition of each local court was "in accordance with the law or customs of Islanders of the area in which the court" has jurisdiction. Lay decision makers are variously termed "presidents," "vice-presidents," or "justices" (with the latter two offices collectively known as "members"). The *Local Government Act* gave power to area council officials known as "council messengers" to arrest people within their council area and bring them before the court, fulfilling a function similar to that carried out by peace officers under the PNG village courts system.²⁶ In the colonial period, this function was carried out by court officers known as court messengers or area constables. The abolition of area councils makes the council messenger or area constable positions redundant (the exception being Renbel province, which has retained area constables).

²² The Western District is comprised of Ghorena Local Court, Shortlands Local Court, Lauru Local Court, and New Georgia Local Court. The Central District is comprised of Isabel Local Court, Ngella Local Court, Savo/Russell Local Court, Rennell/Bellona Local Court, Honiara Local Court, and Guadalcanal Local Court. The Malaita District is comprised of the Malaita Local Court. The Eastern Inner District is comprised of the Makira Local Court and the Ulawa/Ugi Local Court. The Eastern Outer Islands District is comprised of the Reef Islands Local Court, the Duff Islands Local Court, the Vanikoro Local Court, the Utupua Local Court, and the Santa Cruz Local Court. By contrast, in 1988, there were 42 local courts across Solomon Islands, hearing approximately 1,800 cases annually, while in 1977, there were some 65 local courts functioning (Takoia and Freeman 1988, 74; Campbell 1977, 45).

²³ In fact, it is probable that no courts were sitting prior to this time.

²⁴ *Kongungaloso Timber Co Ltd v Attorney-General* (High Court of Solomon Islands, Civil Case No. 229 of 1998, per Muria CJ).

²⁵ No year for the handover of powers is provided.

²⁶ Solomon Islands, *Local Government Act 1996* s 95.

The process for appointing decision makers is not detailed in the legislation. In practice, recommendations are made by provincial premiers to the resident principal magistrate who will then make a recommendation to the chief justice (based in Honiara). A cursory examination of court forms shows that like PNG village courts, decision makers are typically male, former public servants, chiefs, or elders. There are, to date, no female local court members. Interestingly, in some places, church leaders have also sat as decision makers. Like PNG and Vanuatu, clerks are also a feature of the local court system, with a prescribed role that includes keeping “proper” minutes and records and collecting fines.²⁷ As discussed above, the current process of appointing clerks has been centralized; instead of each court having its own court clerk—like PNG’s village courts system—a number of clerks are appointed for each of the five court districts that span Solomon Islands, although in practice, outside of Honiara, clerks are located in only three districts: Malaita and Western and Eastern Outer Islands. It is intended that they travel to court sittings. These clerks are paid as full-time public servants, despite the fact that courts do not sit in the places where they are stationed.

Similar to the Vanuatu system, and unlike PNG’s village courts, criminal cases in local courts have historically involved prosecutors presenting cases, although generally only in more serious matters. In colonial times, this role was often fulfilled by headmen or village constables. Today, a member of the police force would carry out this role. However, as local courts have not heard any form of criminal case since the 1990s, the prosecutor position is redundant. Like Vanuatu island courts, the jurisdiction of each local court is as prescribed by its individual warrant.²⁸ Triable offenses include affray (or public brawling), drunk and disorderly, simple larceny, damage to property, and refusing to pay rates. The warrants of all established local courts provide that they may hear a civil dispute where the amount at issue is not greater than SI\$1,000 (approximately US\$135). Unlike the two other hybrid court systems discussed, local courts are specially limited to hearing cases involving parties who are “islanders.”²⁹ Like the other two, lawyers do not appear on behalf of parties (although the legislation is silent on this issue).³⁰

Of particular interest are the penalties that local courts can apply, including a fine, imprisonment, a bind over, or, “any punishment authorized by the law or custom of Islanders, provided that such punishment is not repugnant to natural justice and humanity.”³¹ Where a fine or imprisonment is imposed, it is not to be “excessive,” but is to be proportionate to the nature and circumstances of the offense. In effect, imprisonment is limited to six months and a fine to

²⁷ Solomon Islands, *Local Courts Act 1996* s 5. It has been held that the absence of a clerk does not necessarily invalidate proceedings, unless there is a challenge to the accuracy and correctness of the records of proceedings: *Kela v Aioro* (Unreported, per Palmer J, High Court of Solomon Islands, civil case no. 4 of 1996).

²⁸ The warrants of each court provide that their criminal jurisdiction is as per a schedule attached to the *Local Courts (Criminal Jurisdiction) Order*. This provides for local courts to hear a number of offenses contained in the *Penal Code*; the *Local Government Act*; the *Firearms and Ammunition Act*; and the *Public Health Act*.

²⁹ This means parties whose parents are or were “members of a group, tribe or line indigenous to Solomon Islands,” or where one of their parents or ancestors was “a member of a race, group, tribe or line indigenous to any island in Melanesia, Micronesia or Polynesia and who is living in Solomon Islands in the customary mode of life of any such race, group, tribe or line”: *Interpretation and General Provisions Act 1987*, s 17.

³⁰ In practice, while lawyers do not appear in local courts, they often advise parties. In somewhat of an anomaly, lawyers are explicitly prevented from appearing in customary land appeal courts (which are higher up the court hierarchy than local courts): Solomon Islands, *Land and Titles Act* [CAP133] s. 255(6).

³¹ *Ibid.* s 18.

SI\$200 (approximately US\$27).³² Imprisonment of less than two months can be served by way of community work.³³ Terms of greater than two months must be confirmed by a magistrate of the magistrate's court.³⁴

Dealing with customary land disputes has historically been a large part of the work of local courts. Even before the current unofficial practice arose of the courts dealing only with customary land cases, land disputes were becoming a dominant part of their work. Local courts can hear all civil matters “affecting or arising in connection with customary land.”³⁵ However, several riders exist. Local courts cannot adjudicate a dispute about whether land is customary. In addition, a local court may deal only with a land dispute where the parties had initially referred the matter to the chiefs, where “traditional means” of dealing with the dispute had been exhausted, and where an acceptable chiefly decision was not forthcoming.³⁶ A certificate must be filed before a local court showing that this procedure has been followed before a land matter can be entertained. Unfortunately, this has proven a flawed process, as it has been suggested that around 98 percent of disputes in the past have failed to result in chiefs reaching a mediated outcome (Palmer 2005, 8).³⁷

Appeals from local courts in relation to land disputes lie to customary land appeal courts. Appeal grounds are wide, with “[a]ny person aggrieved by any order or decision of a Local Court given in exercise of its jurisdiction” being able to appeal.³⁸ A further avenue of appeal lies to the High Court on matters of law, but not custom. The role that local courts play in relation to customary land disputes is extensive and—like the process that Vanuatu island courts went through a decade ago—may soon be subject to substantial reform. The current cumbersome and protracted process for dealing with customary land disputes has resulted in an essentially moribund system, leading the incumbent chief justice to champion reform. Under the proposed *Tribal Land Disputes Resolution Panels Bill 2008*, the jurisdiction of local courts in “tribal” (customary) land disputes will be removed.³⁹ Instead, decisions are to be made by a new form of hybrid institution: “tribal land dispute resolution panels.” Perhaps the most important feature of the new bill is the abolition of the right of appeal to the Customary Land Appeal Court and only a limited right of appeal to the High Court.⁴⁰ This will help to prevent the inevitable appeal process—although curbing appeals to state courts may create a new set of problems without securing the finality of disputes (see below).

³² Solomon Islands, *The Local Courts (Criminal Jurisdiction) Order* s 3.

³³ Solomon Islands, *Local Courts Act 1996* s 19.

³⁴ *Ibid.* s 20.

³⁵ Solomon Islands, *Land and Titles Act 1969* s 254.

³⁶ Solomon Islands, *Local Courts Act* s 12(1). These provisions were introduced by the *Local Court (Amendment) Act 1985* (sometimes referred to as “Nori’s Act,” after politician and lawyer Andrew Nori, who introduced the Bill in parliament).

³⁷ In addition, McDougall has pointed out that the procedure proved unworkable in Ranongga-Simbo (Western Province, Solomon Islands) because in many cases, chiefs were also local court justices and followed the same procedures in both chief’s and local court hearings (McDougall 2008).

³⁸ Solomon Islands, *Land and Titles Act 1969* s 256(1).

³⁹ At the time of writing, the Bill was said to be the subject of public consultation.

⁴⁰ Solomon Islands, *Tribal Land Disputes Resolution Panels Bill 2008* s 71–73. Parties can seek a magistrates’ court “order” in instances where a panel is not properly constituted: s 43.

Like in PNG, handbooks have been produced to assist local court officers. In 1953, the first of what was to be various editions of a *Native Courts Handbook* was produced for use in Malaitan courts. In 1966, a government issued handbook for use across all of Solomon Islands was released. Like the subsequent 1976 PNG *Village Court Handbook*, this handbook included (in an accessible format) the type of cases native courts could hear, the penalties they could impose, and various court rules. At around the same time, simple written case study narratives, including illustrative photos for use by courts in the Eastern District, were issued, accompanied by film slides and tape recordings for teaching purposes. Gradually, however, the court handbooks have become less user-friendly. The latest iteration, issued in 2005, shares similarities with the 1979 version but tends towards being prescriptive and written less for the layperson and more for those with some form of legal training. The various editions reveal a local court system that has always been more formal than the PNG village courts.

Recent donor efforts in strengthening and reforming justice institutions have come predominantly under the auspices of the Regional Assistance Mission to Solomon Islands (RAMSI), a multilateral effort initially aimed at restoring law and order following the period of civil conflict. To date, RAMSI and the Solomon Islands Government have focused largely on building the higher levels of the state justice system. There have been past calls by various bodies to strengthen local courts, including by the bar association, youths, and civil society (PIFS 2004, viii, 10). In late 2006 a recommendation paper on justice mechanisms at the village level was prepared and some initial work carried out (SIJSCC 2006).⁴¹ In 2007, RAMSI indicated that the rejuvenation of the local court system was being investigated (Winter and Schofield 2007, 12). The World Bank's Justice for the Poor program is currently supporting the Ministry of Justice and Legal Affairs in Solomon Islands on an initiative known as "Justice Delivered Locally." A component of this work will entail looking at the possibility of reviving or reforming some form of hybrid court system.

There is some degree of government support for local courts. Throughout the period of civil conflict, governments continued to budget for the courts and it appears that some money was provided each year except 2001 (Solomon Islands 1999, 2000, 2001, 2003). Funding extended to the training of a limited number of local court presidents from 2006 to 2007 (Winter and Schofield 2007, 34). In 2010 SI\$792,369 (approximately US\$108,000) was budgeted between four districts for their local courts, although historically, portions of recurrent budget allocation for these courts have been diverted to other activities, especially the functioning of the magistrates' courts.

Various government policies over the last 15 years have included the goal of strengthening local courts.⁴² As discussed, local courts are currently hearing matters related only to customary land disputes; however, given that the courts rarely sit, there remains a backlog of these cases. In

⁴¹ The Solomon Islands Justice Sector Consultative Committee includes the heads of the various law and justice agencies and is chaired by the chief justice.

⁴² These include the Solomon Islands National Unity, Reconciliation and Progressive Pati Government of Solomon Mamaloni (see SINURP 1994, 86–87); the Solomon Islands Alliance for Change Government of Bartholomew Ulafa'alu (see SIAC 1997, 28–29); the Grand Coalition for Change Government of Manasseh Sogavare (see, SIJSCC 200, 1–2); the Coalition for National Unity and Rural Advancement government of Dr Derick Sikua (see Waena, 2008, 38–39), and the current National Coalition for Reform and Advancement Government of Danny Philip (see NCRA Policy Statement 2010, Errata).

2007, there was reportedly a backlog of approximately 403 cases across the country, excluding Temotu province and Honiara (Krone, Rausi, and Idufu'oa 2008). Moreover, the contemporary local court system is far from “local”; when sitting these courts share attributes with the centralized magistrate’s court system and, in fact, under their present guise are perhaps less accessible than magistrates’ courts.

3. Perceived Limitations and Strengths of Melanesian Hybrid Courts

A growing body of literature has emerged, particularly over the last 10 years, analyzing indigenous customary rules systems. Much of this has focused on Latin America, Asia, and Africa. With a few notable exceptions, little has been written about Melanesia in this period. This part of the paper will draw from the literature and practice to discuss a number of limitations and strengths of the Melanesian hybrid courts. From a Western legal perspective, these systems often appear dogged by an abundance of problems, so much so that any mention of hybridization in donor and government literature is usually followed by entreaties that they be strengthened or reinvigorated.

3.1 The Application of Custom

One of the most common critiques of the hybrid courts discussed is that they end up being little more than clones of their state curial counterparts. All of the courts detailed in this paper are legislatively mandated to apply custom and are presided over by decision makers said to be chosen for their knowledge of custom. Nevertheless, it has been argued that the Melanesian systems fail in this regard, and that the processes and procedures adopted by hybrid courts are overly formalistic and seek to emulate those of Western legal institutions, by, for example, applying individualistic and punitive fines or imprisonment and having strict procedural rules, sometimes preventing interested parties from voicing their views.

The other side of this critical argument is a concern about the application of custom. For many people unfamiliar with Pacific Island societies, “custom” connotes a set of folk rules representing “tradition” and therefore an impediment to progress. A linked argument is that “custom” (taken to be a bounded set of beliefs and values) is used by powerful elements in village societies to justify social behavior based on static tradition or “culture.” In PNG, for example, from the early days of the village courts system magistrates were legislatively encouraged to follow “custom,” yet were finding themselves vulnerable to criticism by legal conservatives if they were considered to have applied it (Goddard 2009, 78–88). This generally negative attitude toward imagined local attitudes has been labeled the “demonization of culture” by one commentator (Merry 2003, 70). A similar concern about the law-versus-custom dichotomy can be found among early colonial administrators in Solomon Islands and the New Hebrides (now Vanuatu), who believed that “customary law” had to be codified before government sanctioned native courts could be established (Bennett 1987, 281–2).⁴³

⁴³ See also Article 8 of the 1914 *Protocol Relating to the New Hebrides between Britain and France*.

More recent examples of the two sides of the custom/law problem can be found in contrasting comments about PNG village courts. Amberg says that “due to lack of proper training and administrative support, the system failed to become a court applying custom. Instead, it became another formal court...” (Amberg 2005, 1). On the other hand, McLeod charges that “Village Courts demonstrate ‘excess traditionalism’ when dealing with cases of violence against women” (McLeod 2005, 115). With respect to Solomon Islands’ local courts, the law/custom problem is exemplified by comments such as Nori’s that the courts are, “foreign creatures dressed in local costumes” (Akin 1999, 52), while Corrin Care has said that they are “only ‘customary’ in the sense that they administer customary law...their constitution and their procedure being tainted by Western concepts” (Corrin Care 1999, 99). And regarding Vanuatu’s island courts, Forsyth says:

... the island courts have by and large not achieved either deep or weak legal pluralism on even a theoretical level. As a result... the island courts presently “float nomo” [just float], being neither satisfactory state courts nor *kastom*⁴⁴ courts. (Forsyth 2007, 226)

Embedded in the above views is a dichotomy involving conceptions often seen as antithetical: “law” (that is, Western jurisprudence, strictly applied) and “custom” (local, traditional folkways that may be driven by values at odds with those of Western “developed” countries). These kinds of criticisms require us to consider the notions of “custom” and “customary law,” for the dichotomy is largely an oversimplification of the interplay between indigenous and introduced systems, a dynamic historical process typified by constant modification and innovation.

First, although legislative definitions of custom exist in PNG, Vanuatu, and Solomon Islands, they are tautological and unspecific.⁴⁵ A great deal has been written about custom and customary law in Melanesia, focusing largely on its intersection with the introduced law. A perceived progressive erosion in what can be described as “customary ways” since the early 1970s has coincided with increasing hybridization in PNG and Vanuatu (coupled with a large increase in the population), which may mistakenly be regarded as having a causal relationship. However, “noncustomary” behavior, such as imitating the procedures or processes of Western courts, is not, as some seem to argue, necessarily synonymous with a failure to employ custom. Indeed, this may, as some Pacific scholars have suggested, be evidence of an evolving custom: “[c]ustomary processes have... changed, adopting some of the formalities that characterize the state courts of the introduced legal system” (Zorn 2003, 98).

This resonates with a common view among academics today that the conventional notion of customary law was in fact generated in the course of colonialism. In other words, the dualistic idea that in countries like PNG there is “law” on the one hand and “custom” on the other is itself a legacy of colonial attitudes. As one commentator noted, “it almost goes without saying that customary law did not exist until the introduction of a sphere of political activity from which it had to be differentiated” (Demian 2003, 97). In addition, “custom” is notoriously difficult to define. If it is conceived as a set of formal traditional rules that can be applied to a given situation, then directing courts to follow “custom” is likely to be counterproductive, and in the

⁴⁴ “Kastom” is the Bislama (Vanuatu lingua franca) word meaning “custom.”

⁴⁵ For example, custom is legislatively defined in PNG as meaning “the custom or usage of the aboriginal inhabitants ... regardless of whether that custom or usage has obtained from time immemorial.”

extreme can lead them away from commonsense practice toward the invention of socially stultifying traditions.

One way of avoiding this is to view custom as a reflection of the dynamic, ever-changing, and hybrid nature of local cultures. Custom, if it can be usefully defined at all, could be identified as a series of accumulated, nonstatic, and sometimes conflicting values and habitual activities specific to a group (see Zorn 2003, 97). For example, there are a number of areas where aspects of custom (using the above revised definition) could be said to be typically applied by hybrid courts in the countries discussed. These include marriage and bride-price, customary land ownership or usage, succession, adultery, custody of children, polygamy, and sorcery or witchcraft.

Hybrid courts do not apply custom in a uniform manner and custom may become relevant at different stages of the resolution process. Custom may also be incorporated or reflected in the very process of dispute resolution (and may be mixed with Western-styled dispute-resolution processes). In this regard, the custom applied by hybrid courts may not be what some would envisage as “pure.” Instead, custom may be intermingled with Western processes and procedures, as noted by Goddard with respect to findings from different parts of PNG that village courts do not apply static, definable “customs,” but reflect the dynamic and changing sociality of the particular local societies they serve:

Village Court praxis has come to be a complex integration of formal legal procedure and a great variety of contemporary local mores popularly regarded as custom. (Goddard 2005, 52)

However, despite academic caution about defining “custom,” we cannot avoid the popular, subjective notion among Pacific Islanders that the term refers to their traditional ways, in contrast to Western influences. In this respect, the work of a number of writers who avoid stereotypical notions of custom counters the previously noted arguments that hybrid courts apply too much “law.” For example, from 1979 to 1981, Scaglione oversaw a study of custom in PNG using student researchers, much of which involved observing village courts and questioning magistrates about how they applied customary law. One conclusion reached was that village courts routinely applied procedures reflective of customary dispute resolution:

Mediation and reconciliation are the basis for Papua New Guinea customary law. The Constitution calls for the use of Melanesian principles of participation, consultation and consensus. Research showed that, with a few exceptions, Village Courts are successfully integrating such principles into a western legal format. (Scaglione 1983, vii)

In 1976, a select committee on lands and mining toured districts across Solomon Islands, interviewing villagers on issues related to customary land. Perhaps reflecting the subjectivity of custom, their consultations revealed that “all” local courts were accused of not following custom (Solomon Islands 1976, 12). However, following a review of local court records, Tiffany, writing just one year later, formed the impression that custom was, in fact, being applied by local courts (Tiffany 1978, 34). He pointed to the evidentiary issues coming before the courts:

...burial sites, testimony of village residents, location of sacrificial places and ceremonies held for ancestral spirits, transfers of land in payment for homicides that avenge deaths, who planted and used trees and who currently occupies land... (Tiffany 1978, 27)

More recently, the current chief justice of Solomon Islands has supported the role of local courts in determining matters of custom, stating that due to their locality, they are in a far better position to determine such issues than the magistrates' or high courts.⁴⁶

We have questioned the validity of discursively convenient phrases like “customary law” and “custom,” which have uncertain connotations. Further, the use of “law” in reference to the norms and dispute-management processes of stateless societies “imposes a Western category on something that may have very different aims and effects” (Zorn 1991, 27n). Yet, as we see from perspectives like that of the Solomon Islands' chief justice, we cannot deny the presence and importance of influential local mores among Melanesian peoples, whether we call them “custom” or something else.

Finally, if we do accept arguments that hybrid courts are not applying custom, or apply a “weak” or “adapted” form of custom, what does this tell us about the courts and their users? It does not necessarily mean that the system is somehow discredited, as Amberg, for example, would seem to suggest (Amberg 2005, 67). Instead, it may mean that people want accessible mechanisms that do not necessarily apply custom or apply only an “adapted” form of custom. It may mean that people prefer a system that is a fusion of both the nonstate and state approaches. Or maybe it means that hybrid courts are being called upon when nonstate customary-based systems have failed (which is often the case, for example, in PNG). The shortcomings of the “law versus custom” dualism, with its built-in assumptions about what “custom” means, illustrates an important point about generalizations: it is difficult to make any overarching assertions about custom and hybrid systems in Melanesia. A lack of comprehensive empirical data, the remoteness of many of the dispute-resolution forums, and community idiosyncrasies make dogmatism dangerous.⁴⁷

3.2 Gender Bias and Favoritism

All of the hybrid court systems discussed have, at some time or another, been accused of bias (see, for example, Paterson 2005, 7; Forsyth 2007, 220; Campbell 1977, 46). Given the small communities in which they serve, it is almost inevitable that there will be some form of relationship between decision makers and parties. For instance, a frequent accusation of gender bias—specifically, a patriarchal oppression of women—has been made against PNG village courts in general. One often-repeated anecdote involves a court in the Southern Highlands exceeding its jurisdiction by imprisoning women for questionable “offenses” like smoking “store-bought” cigarettes (see, for example, O'Collins 2000, 8).

The “cigarette” report provides an interesting example of the recycling of a single instance as alleged evidence both of village courts' *ultra vires* practice (see below) and their oppressive use of putative custom, particularly with respect to women. The origin of the “cigarette” story is an incident that occurred in 1975, when village courts were still being introduced and had no handbooks or systematic guidelines as to their jurisdiction, types of punishment, or other aspects

⁴⁶ *John To'ofilu v Oimae*, SBHC 33 (Unreported, High Court of Solomon Islands, Palmer J, June 19, 1997).

⁴⁷ A tendency for decision makers to modify their behavior or what they record when being observed by “outsiders” is an added complication for researchers in this field (see, for example, Goddard 2005, 51–75).

of practice, and were under intense scrutiny by legal critics. Precise details and rigor have long since disappeared from the various versions of this anecdote (Goddard 2009, 86), which as late as 2005 was still used as an argument that village courts treated women unfavorably (see McLeod 2005, 115)

The chronic reproduction—for over three decades—of the “cigarette” story indicates a tendency in some quarters to prejudge the village courts with generalizations based on scanty and mostly unreliable evidence.⁴⁸ Indeed, a 1992 review of literature on village courts noted the relative absence of a truly balanced appreciation of local cultural contexts or the technical administrative and legal determinants of village court practice, and that claims of demonstrably corrupt or prejudicial practices were “rather more a matter of cultural perspective than of objective fact” (Aleck 1992, 114). More reliable evidence of excessive legal zeal comes from the reportage of several instances in which women were sent to jail for some months by some highlands village courts in 1998 and 1990 for what seemed to be very minor offenses (though this should have been qualified with the observation that district court magistrates actually signed off on the imprisonment orders).⁴⁹ Findings from follow-up research invited the inference that the courts involved had become so apprehensive of negative legalist comments to the effect that they were too “custom” oriented, they thought the application of maximum penalties as listed in their handbook (regarded by them as proper “law”) would counter any such criticism (Goddard 2009, 82–83).

These instances highlight the problem for village courts with legislative directives to apply “custom” at the same time as they adhere to the “law”: damned if they do and damned if they don’t. Yet they are, nevertheless, rare occurrences when it is considered that collectively, village courts throughout PNG deal with thousands of cases weekly and are overwhelmingly popular among villagers as a local dispute-settlement forum. The real extent of such bias (in a country long portrayed as having unequal gender relations) is difficult to determine and—as will be seen below—it is a generalization with untrustworthy foundations. At the same time, it needs to be recognized that despite the homogenizing effect of legislated guidelines, the embedded nature of village courts within local communities results in significant variations in the way local sociality affects both their practice and their place in the strategies of individuals who use them (or sometimes deliberately avoid them). This applies to matters of gender as much as other aspects of social life (age, local politics, acquisition of desired resources, and so forth).

We can exemplify the complexity in relation to gender with reference to some research findings in PNG. Westermark found that the advent of village courts in Agarabi in the Eastern Highlands had provided women with an effective and previously unavailable forum to pursue disputes (Westermark 1985), and Scaglione found in the Abelam area of the East Sepik province that women were more successful users of village courts than men (Scaglione 1990). By way of comparison, Goldman found a subtle irony in the case of village courts among the Huli of the Southern Highlands: the courts had eroded a previously high degree of male physical violence against women and provided a new avenue for complaint, but during the hearing of these cases, they had subjected women to more aggressive interrogation than men, a “verbal degradation

⁴⁸ Further examples of poorly evidenced rhetoric, suggesting a significant dominance of assumption over rigorous research where village courts are concerned, are given by Goddard (2009, 77–88, 255–57).

⁴⁹ The legally technical aspects of the cases were discussed by a legal scholar (Jessep 1991).

ritual” that Goldman suggested represented “a new form of ‘violence’ against women” (Goldman 1988, 138). Wardlow, in later research on women’s agency in the same area, indicated that while women can achieve success in village courts, their access to the courts sometimes requires extreme tactics to negotiate through unfavorable male attitudes and they are liable to resort to alternative remedies (Wardlow 2006). In comparison, Neuhaus, researching in the Markham Valley (Morobe province), found that women fare well in the village courts there, and that they combine use of the village court with customary processes to advantage (Neuhaus 2009).

These examples suggest that cultural variation, rather than village courts as an institution, is an important factor in women’s different experiences in the courts around PNG. It should be noted, moreover, that rigorous research in several parts of the country has indicated that *overall*, women disputants fare as well as, and frequently better than, male disputants (Goddard 2009, 255–62). Also, some critical rhetoric is based on a misunderstanding of village court jurisdiction. For example, blaming court prejudice for reports that women were unsuccessful in gaining divorces when village courts are in fact not permitted by law to give divorces suggests that local communities are liable to imagine that the courts have greater jurisdictional authority than they actually do.⁵⁰

Regarding other forms of bias and favoritism, with the exception of Solomon Islands’ local courts, these are addressed in legislation. Vanuatu island court justices are not allowed to sit on a case in which they have a “personal interest or bias.”⁵¹ PNG village court magistrates who “have a substantial interest in the subject matter of any proceeding” cannot sit.⁵² Goddard reports, for example, about a court in a small village where each magistrate would occasionally leave the bench during a day’s hearings because he was related to one or both parties in a dispute (2009, 122). With regard to Vanuatu courts, Jowitt has questioned these kinds of legislative provisions, arguing that they show a “lack of commitment to customary methods of dispute resolution” (Jowitt 1999, 9). Demonstrating how difficult it can be to graft aspects of the dispassionate common law system onto the realm of custom, she contends that it may not be in the best interests of parties to have completely disinterested adjudicators. Instead, resolution of matters in custom requires a “holistic consideration of matters and accordingly decision-makers with a degree of local knowledge” (Jowitt 1999, 9).

The dangers of dogmatism in relation to hybrid systems are shown in Donner’s contention that in the local court of Sikianna (a small outlying Polynesian atoll that is part of Malaita province in Solomon Islands), justices would in fact take a tougher stand against their own kin. Likewise, area constables would be more likely to bring their own kin to court rather than nonkin (1985, 349). He argues that this was because of a sense of shared responsibility and a belief that kin

⁵⁰ Marital issues are a difficult area for village courts, given the restrictions on what kinds of cases they can hear and the way in which the discord might be framed by complainants. It is common for women seeking to escape from a marriage to be asked by village court magistrates whether a bride-price has been paid. If the bride-price has been paid, courts will usually refuse the woman’s application, as completed bride-price transaction is taken for legal purposes as the mark of marriage, rendering the village court unable to give a subsequent divorce. These definitions of marriage and divorce have been generated by the influence of colonial rules and policies and should not be regarded as reflecting “traditional” ideas. For discussion on the social complexities involved, see Marksby (1993) and also, with regard to the difficulties created for village courts, Goddard (2010).

⁵¹ Vanuatu, *Island Courts Act 1983* s 26.

⁵² Papua New Guinea, *Village Courts Act 1989* s 82(2).

should be punished for crimes committed against their own community (Donner 1985, 349).⁵³ Banks made a similar point in discussing common features of traditional forms of conflict in Melanesia, suggesting that those involved in mediating conflict are almost “invariably interested” and that those with links to all sides have “the greatest motivation to resolve the dispute” (Banks 2008, 26).

In a similar vein to Jowitt’s questioning of the need for complete impartiality, the imposition of nonprescribed fees by court officials cannot automatically be dismissed as based purely upon self-interest. In keeping with the reciprocal nature of Melanesian society, it is likely that in many communities, there is an expectation that decision makers will impose a fee for their services. The practice of imposing what are commonly named “table fees” is said to be widespread in PNG village courts (as too is the “borrowing” of village court monies by court officials). The actual incidence is impossible to research, but Goddard has noted some occurrences during several years of monitoring court practice. In the same body of research it has been found that village court officials are used as scapegoats when money is actually misappropriated by provincial staff and others into whose care it is delivered.⁵⁴

3.3 Acting in Excess of Jurisdiction

Directives that courts should follow “custom”—and thus accommodate local notions of wrongdoing and justice—dispose them to a flexibility that can result in *ultra vires* practice. A lack of training (see below) and the consequent failure to correctly apply the law also contribute to the jurisdiction of courts being occasionally ignored. For example, perhaps the most commonly heard matter in PNG village courts is adultery, despite the fact that these courts do not have the legislative power to deal with this offense. *Ultra vires* practice is often a result also of community pressure on decision makers in the absence of access to higher courts or a resistance to intrusion in community problems from “outsiders.” Some village courts have been known to deal with serious crimes such as murder and rape under local community pressure (Goddard 2009, 87; Wiessner 2010, 9).

One jurisdictional matter that has always been equivocal is whether hybrid courts should deal with children. The jurisdiction of village courts with respect to children has never been completely clarified, despite some legislative adjustment in 1989. The original village courts legislation of 1973⁵⁵ left the subject of children unaddressed. Whether this was deliberate or not is unclear, but it may have reflected the ambiguous traditional perceptions of the transition from childhood to adulthood, which employed physical and social criteria rather than calendric age (indeed, it is still the case that many Papua New Guineans, like Solomon Islanders and ni-Vanuatu, do not know their calendric age and simply guess when asked).

Legislative ambiguity also characterizes the situation for Solomon Islands’ local courts in dealing with “juveniles.” The *Local Court Act*, like the PNG legislation, is silent on the issue. On one reading, the *Juvenile Offenders Act* [CAP 14] could be argued to cover the field when it

⁵³ It should be noted that the population of Sikianna today is approximately 300 people.

⁵⁴ M. Goddard, field notes, 1994–2006.

⁵⁵ The *Village Courts Act* was written in 1973 and came into force in 1974, leading to ambiguous date citing in subsequent documents.

comes to the treatment of children and young people by the state court system. The act, which establishes detailed processes for the treatment of juveniles, expressly does not apply to local courts.⁵⁶ However, by the same token, the act does not state that local courts are not allowed to hear matters involving juveniles. The current chief magistrate is of the view that because local courts have exclusive jurisdiction to deal with matters involving “Islanders,” they can also deal with children, since the definition of Islanders is not confined.

The above legal problem in PNG was illustrated by a Supreme Court case in 1981 following the writing of an imprisonment order by a village court after a “child aged 14” pleaded guilty to theft and failed to pay the court’s imposed fine on the same day, as demanded by the court. The prison order was endorsed by a district court. An appeal led to a legal debate over whether village courts had jurisdiction over children if offenses occurred outside the area of any children’s courts. In the end, two judges out of three decided that the village courts did have jurisdiction over children under 16 years, and one decided they did not (PNGLR 1989). Amendments to the *Village Courts Act* in 1989 clarified the jurisdiction slightly by allowing village courts to make out a prison order with respect to a child under 17 if there were no children’s court in the area. It also stipulated that village courts could make custody or guardianship orders with regard to children who were born of parents married under customary law or who were illegitimate.⁵⁷ Nevertheless, there is still a lack of precision regarding children and village court jurisdiction.

Children are often bracketed with women (“...women and children...”) in generalized literature on courts and human rights, giving the impression that the village courts’ purported oppression of women (see above) extends to children as well. Whether children really do suffer under village courts is in fact hard to determine. Field researchers have not reported significant instances in which children (that is, according to a conventional Western view of childhood) were discriminated against—or even appeared—in village courts.⁵⁸ Overall, it remains unclear whether village courts deal with children to any significant degree or not. If they do not (an inference invited by the lack of reference to children in fieldwork-based research literature), the reasons for avoidance could be numerous: it may be the lack of clarity about their jurisdiction, the proximity of a children’s court, the fact that disputes typically brought to village courts are between adults, or the cultural attitudes toward the responsibility, liability, and punishment of children. This is an area obviously requiring more research in PNG.

Interestingly, in 1977, Campbell stated, with respect to the Solomon Islands system, that it was “rare” for a local court to exceed its jurisdiction (Campbell 1977, 46). Arguably, this does not sit well with the later writings of a local courts officer and the former acting registrar of the High Court who asserted that under their civil jurisdiction, local courts had been known to hear the somewhat oblique matter of “impregnation of girls” (Takoia and Freeman 1988, 75). This is described as a matter involving a breach of custom.

⁵⁶ Solomon Islands, *Juvenile Offenders Act* s 2.

⁵⁷ Papua New Guinea, *Village Courts Act 1989* s 47, 69.

⁵⁸ Goddard, in unpublished field notes from observing a village court in 1994, records a group of small children complaining that a drunken man had chased and threatened them. The man was found guilty, fined, and required to pay compensation to the children. M. Goddard, field notes, 1994–2006.

Excess of jurisdiction is, with one significant exception, not a feature of the island courts of Vanuatu. In explaining why, Jowitt has stated that “clerks do not accept matters that fall outside of the specific jurisdiction of the warrant” (Jowitt 1999, 6–7). The one exception—by, it appears, popular demand—is, as mentioned earlier, claims to chiefly titles. These matters are not within the terms of their warrants, but nevertheless, 18 such claims were filed in 2009 (Vanuatu 2010b).⁵⁹ The reason for this seems to be that disputes about chiefly titles have become quite common, fuelled, no doubt, by the money that can be derived from involvement in the leasing of land, especially to outside investors. There is no state court that is expressly given jurisdiction to determine chiefly title disputes, nor does the island council of chiefs seem to wish to assert jurisdiction to do so. This, plus the fact that Vanuatu island courts are the only courts expressly authorized to apply custom, and the fact that decisions that have been made by island courts seem to have found acceptance in the community, have meant that disputants about chiefly title seem anxious for island courts to determine their claims and the island courts have shown themselves willing to respond to the demand.

In the absence of nationally encompassing data, it is difficult to determine if jurisdictional compliance is a greater problem in PNG than elsewhere. There is arguably less jurisdictional compliance in PNG because courts are not regulated by warrants that individually prescribe their jurisdiction, as occurs in Vanuatu and Solomon Islands. Also, the geography and number of courts in PNG, which generally translate into a lack of official oversight, may mean that nonstate norms more easily take root, evolving into “law.” Insufficient training, or an absence of training, does not fully explain the fact that hybrid courts act in excess of their jurisdiction, as there are other factors at play. These include a lack of any other accessible and appropriate forum to deal with matters, community pressures to hear cases,⁶⁰ the growth of “new” village-based infractions (such as growing and using cannabis and fermenting illegal alcohol), and a distrust of the distant district or magistrates’ courts presided over by outsiders. Among decision makers there also seems to be little understanding of the strictures created by statute, especially when decisions about legislative details are made in geographically and culturally remote parliaments or bureaucracies by faceless men. The concept of *stare decisis* (precedent), which underpins the common law system, is even more foreign, such that it has virtually no application in the courts discussed.

Being creatures of statute, hybrid courts are accountable to the legislative regimes. However, this is not to say that the courts actually adhere to their jurisdictional limits or operate in the prescribed manner. Arguably, the genesis of failing to adhere to legislative requirements lies not so much in a calculated disregard of constricting rules; rather, it rests on more prosaic foundations: a scarcity of relevant legislation and a lack of training. As concerns the former, Weisbrot pointed out that in Vanuatu, legislation was often “physically unavailable” (Weisbrot 1989, 78). The situation is not the same now, however, and copies of the act and the rules are readily available at offices of the island courts. Conversely, the majority of PNG village courts

⁵⁹ There are conflicting views among legalists over island court jurisdiction with respect to chiefly titles. The current chief justice has expressed no objection to island courts dealing with such matters, and the warrants he issued to establish courts make no direct reference to chiefly title cases either positively or negatively.

⁶⁰ This has been particularly noted in PNG rural highland areas, where villagers do not have access to higher courts and are apprehensive about heavy-handed interventions by the police and other state agencies in local disputes (see Goddard 2009, 87–88).

today do not have a copy of the *Village Court Act*, or the accompanying regulation, nor do they necessarily have the ability to obtain copies. While the advent of legal websites such as PACLII⁶¹ have assisted those living in populated centers, for the vast bulk of the population, they remain completely inaccessible.

Even when courts possess the required legislation, this does not mean that they will then miraculously function as mandated. As mentioned, laypeople staff the courts. Some decision makers are illiterate or unable to read or write English. Most are unfamiliar with following and applying written rules. The legislative regimes governing all of the courts are written in dense and complex “legalese” and frequently cross reference other equally unobtainable and impenetrable acts. Like much Pacific legislation, the current versions of the hybrid court acts were initially drafted in the 1970s and 1980s, before current trends towards plain English drafting emerged. Since their inception, the acts have undergone only minor amendments, none of which made any substantive changes to their language or ease of comprehension. Given the barriers that the legislation creates, it is perhaps surprising that any degree of compliance exists.

3.4 Enforcement

Traditionally, the enforcement of the decisions of “big men” or leaders within Melanesia relied on the societal repercussions that flowed from nonadherence, such as shame, combined with a relatively static community and the projection of colonial power through appointed native representatives. Today, it is arguable that a dilution of traditional powers, a weakening of “localization,” and a shrinking state have contributed to a situation where the enforcement of the orders of hybrid courts is a major challenge. Forsyth has cited enforcement as a “fundamental problem” with the court system of Vanuatu, including island courts, so much so that some people simply do not care if a matter goes before court, knowing there will be no follow-up if fines are not paid (Forsyth 2007, 217–19).⁶² Campbell, writing in 1977, presented similar sentiments in relation to Solomon Islands’ local courts, stating that all local courts struggled with this issue (Campbell 1977, 46).

Enforcement is also a weak element of the contemporary PNG village courts system. Village court officials routinely complain about not being able to enforce orders and the scarcity of assistance they receive in this regard. Some courts have hundreds of unenforced orders.⁶³ With minimal police presence outside of the main towns, clerks and magistrates do not know where to turn to if a party continuously ignores a summons or a defendant fails to pay a fine or compensation. While the architects of the system believed that peace officers would play an enforcement role, this has not eventuated. A lack of transport is almost universally raised as the key obstacle. Village courts throughout PNG have complained for decades about a lack of support from higher courts and police, even though such reinforcement was embedded in legislation and the *Village Court Handbook* instructed magistrates that the support was there. Village peace officers have no reinforcement when trying to intervene in violent disputes or arrest people, unless they are operating in an urban situation where police are close by.

⁶¹ Pacific Islands Legal Information Institute, available at <http://www.paclii.org>.

⁶² In 2009, the chief justice assigned island courts supervision of magistrates, and it is expected that this will improve enforcement of island court decisions.

⁶³ D. Evans, personal observation, based on village courts in the Gazelle District, East New Britain Province, PNG.

The efforts of village courts to operate effectively over the past three decades in the face of neglect from state agencies that are supposed to cooperate with and support them have been documented by Goddard, who regards this as testimony to their resilient efficiency and value to local communities that continue to sustain them (Goddard 2009). Occasionally, local-level governments in PNG will, with police cooperation, conduct what are known as “village court operations,” which entail collecting fines and compensation under the threat of imprisonment. The ability to collect thousands of kina in a relatively short period of time is seen as a boon for cash-strapped governments. Campbell stated that Solomon Islands’ local courts facing difficulties with enforcement would also seek police assistance in apprehending “petty criminals” (Campbell 1977, 46).

An unwillingness to abide by court orders is perhaps most manifest in customary land disputes. This is not simply a matter of enforcement in the sense of finding a party and physically serving court documents; rather, it reflects a steadfast refusal by the “losing” party to accept the court’s decision. The intractable and open-ended nature of land disputes routinely sees the same matter litigated over and over in any forum that is willing to hear it. Cases often span generations. Zorn and Corrin Care portray the problem as reflective of the broader underlying differences between customary law and the common law (or, in this context, institutions molded out of the common law tradition) and the fact that finality is not part of customary law (Zorn and Corrin Care 2002, 61).

The absence of finality in custom was observed by Oliver in the 1950s in relation to the Siuai of Bougainville. “During my stay [amongst the Siuai], I witnessed cases involving land ownership which were at least three generations old and which had been many times ‘decided’” (Oliver 1955, 326). In the context of Solomon Islands’ local courts, it has been said that parties in land cases will sometimes bide their time, waiting a year or so before relitigating their case (Campbell 1977, 46). This observation accords with that of a businessman on the Guadalcanal Plains who was interviewed in the late 1970s. He opined that local courts were not stopping land disputes because parties refused to believe that a court decision meant the end of a claim: “the losers carry on claiming and won’t give up” (Waita et al. 1979, 65).

PNG’s village courts are not permitted to hear land disputes, but they can hear disputes involving gardens (for example, theft from gardens, damage to gardens, and so forth). The village courts, then, can be seen as relieved of some of the burdens facing Solomon Islands local courts and, up until 2001, Vanuatu’s island courts, in that local land disputes brought to them can immediately be redirected to land courts. On the other hand, disputes over gardens—even seemingly spontaneous disputes (violent altercations, insults)—are often manifestations of deeper, long-running contestations related to land ownership. Village courts often work hard to prevent an underlying land dispute from emerging in cases they hear and are cognizant that disputants can reappear in court with serial problems that are actually driven by underlying, irresolvable, and historical land issues (see, for example, Goddard 2009, 174–180, 245–251). Enforcement difficulties can arise from these connections, though land-related enforcement issues seem less of a problem for village courts than they have been for the Vanuatu and Solomon Islands courts.

Problems with enforcement are not unique to the hybrid systems discussed but mirror problems found within the state justice sector in Melanesia. An inability to enforce court orders at all levels is linked to issues including the lack of resourced and effective police and sheriff staff, transient and disparate populaces, obfuscation by relatives and friends of defaulters or absconders, problems with identification, high rates of illiteracy, and the often perceived illegitimacy of the dispute-resolution forums in question.

In the case of the PNG village courts, claims of obfuscation at community level, local illiteracy, and corruption among court officials are commonly used to shift the blame for systematic problems onto the courts themselves. In many parts of the country, though, village courts have managed to operate successfully, despite a lack of administrative support, chronic nonpayment of their allowances, and other impediments (Goddard 2009, 74–5). This suggests that the model of village courts developed in the 1970s, accompanied by the simply worded handbook, was basically sound and can be sustained in local communities by the people themselves.

3.5 Training

Training is one way to overcome the hurdles of unsuitable or incomprehensible legislation. Experience demonstrates that this has been problematic for all of the courts discussed. In Vanuatu, both Forsyth and Jowitt have commented on the unsatisfactory level of training for island court justices (Jowitt 1999, 9; Forsyth 2007, 220). In recounting the problems associated with this, Forsyth quotes a state prosecutor based in Santo in 2004 who suggested that where justices were faced with an educated defendant, “he [the defendant] can easily ‘turnturnem olgeta’ (confuse them) and they get lost” (Forsyth 2007, 220). Undoubtedly, the same would be true when faced by a police prosecutor—the only real manifestation of the state in the court and perhaps the only individual with any legal training.

In 2005, a UK-funded training program by members of the University of the South Pacific Law School disclosed the quite complex civil and criminal procedure rules applied by island courts. Two members of the school undertook a project (again, UK-financed) to simplify the wording of the civil and criminal procedure rules, and also to provide rules to regulate the work of the clerks of island courts and the responsibilities of supervising magistrates. More recently, there have been *ad hoc* donor funded initiatives. In 2006, the Pacific Judicial Development Program, jointly funded by the New Zealand Agency for International Development (NZAID) and AusAID, supported training for justices. In 2008, an extensive training program was undertaken by two magistrates who travelled the length of Vanuatu.⁶⁴

PNG, like Vanuatu, has seen efforts made to deliver training to village court officials. This is typically carried out by the small staff of the Village Court and Land Mediation Secretariat using annual development budget funding. Due to the frequent inadequacy of the budget and a lack of appropriate staff, training programs over the decades have been intermittent and often regionally limited. Their practical limitations were noted by a team conducting a review of the system in 1992, who commented that “[t]he courts work well *despite* the training provided.” The team suggested that some aspects of the training process actually impaired the abilities of the

⁶⁴ It is hoped that now that supervising magistrates for island courts have been appointed, they will provide training on a regular basis.

magistrates to carry out their jobs correctly and recommended an improved training program be developed and administered with more regularity (Eyford et al. 1992).

Subsequent interventions by international development aid agencies in the late 1990s and early 2000s produced more structured and focused village court training modules in PNG. However, the basic problem of dissemination has remained and the training programs have tended to inconsistency in content and focus, depending on the preoccupations of the donor agencies and the approach of the institutions and individuals involved in training. Recent training philosophies have deemphasized, for example, punitive or win/lose court decisions, in favor of “restorative justice”⁶⁵ and the development of more conciliatory behavior such as mediation and listening skills, guiding disputants through a presentation of their case. Linked to this is a tendency in more recent training programs to direct the PNG village courts away from their “custom”-oriented sensitivities (see discussion of custom above) towards more Western ideas of dispute settlement and legal informality.⁶⁶ The latter are mostly linked, however, to specifically Western notions of justice, human rights, and the law and risk the displacement of the qualities that have made village courts successful, that is, the employment of their organic understanding of the wider social implications of disputes and their refined sense of local community ideas of what is fair and just.

For the past three years, approximately 1,000 village court officials in PNG have received some form of training annually.⁶⁷ Less frequent is training conducted and financed by subnational governments, although this does occur. Even allowing for the training described, it still accounts for only a small number of court officials across a small number of provinces. With approximately 12,000 court officials and only eight trainers largely based out of Port Moresby, it is an impossible task. Efforts to move greater training responsibilities to the provinces are yet to take root, as the requisite degree of ownership does not currently exist.

3.6 Co-Option and Rejection

It is likely that some of the systems discussed are, to some extent, captured by “big men,” politicians, local government actors, or others. Co-option refers to a process whereby the hybrid court is used in ways not provided for under the legislation but instead to further the objectives of particular individuals. This may be as straightforward as an unofficial person issuing court forms or wearing a court uniform, to whole courts being presided over by local government officials who are neither correctly nominated nor elected. In the Gazelle Peninsula of East New Britain (PNG), for example, it is the norm for elected ward councilors to take over the compulsory mediatory role of village courts.⁶⁸ This may involve a ward councilor, or ward councilor in combination with magistrates, attempting to mediate a matter, and is done under the apparent authority of the village courts system. In some respects, a village court is then used as an avenue of appeal when parties are unhappy with the mediation, which frequently takes the form of an imposed decision. In Ranongga island in the Western Province of Solomon Islands,

⁶⁵ “Restorative Justice” has been adopted as a policy by the PNG Government. See Papua New Guinea (2000). For an overview of the concept see Strang and Braithwaite (2001).

⁶⁶ These are often imagined by donor and development agencies to be compatible with Pacific Island societies’ traditional informal settlement procedures, but are frequently far removed from them.

⁶⁷ Figures provided by the Village Court and Land Mediation Secretariat, Port Moresby, October 22, 2010.

⁶⁸ D. Evans, pers. observation.

McDougall, quoting late 1980s correspondence from the clerk of the Ranongga Simbo Local Court and a member of the Simbo Chiefs' Committee, discusses the overlap in personnel between the two institutions and their work, concluding that "Local Courts and chief's committees were not clearly distinguishable" (McDougall 2008).

It may be that in various places, hybrid courts fail to take root and are rejected by communities. This need not be seen as a negative development, as it may indicate that particular groups already possess adequate dispute-resolution mechanisms or prefer to resolve matters purely on a customary basis. Another form of rejection may be complete co-option, so that the hybrid court ends up becoming a different creature, albeit wearing the cloak of government authority. In some rural parts of PNG, where official village courts have atrophied through lack of support from the responsible state agencies, unofficial village courts have emerged to replace them. Examples of complete rejection are rare, though perhaps not surprisingly, an exception can be found in the Kwaio of central Malaita in Solomon Islands.⁶⁹ The Kwaio, Akin writes, "continue to exclude government courts from their mountains" (Akin 1999, 51). More broadly, using figures provided by Naitoro, Akin states that Malaitans have, since the 1980s, been infrequent users of local courts:

In 1986, local courts on the entire island, by then home to some seventy thousand people, reportedly heard a mere 104 cases. By comparison, during the previous year local courts in the country's Western Province, with a much smaller population, heard 901 cases. (Akin 1999, 52)⁷⁰

Perhaps reflecting the long-standing nature of Malaitan indifference to "government law," Hogbin, writing in 1944, recounts an anecdote from North Malaita. A visiting resident commissioner was concerned about whether an intended visit to the government-established native court would be seen as interference. Hogbin quotes the response of a village headman:

But the Court doesn't belong to us: we never had Courts before: it's a Government affair: the people would be offended if the Commissioner stayed away. (Hogbin 1944, 266)

In parts of Vanuatu, there has been some hostility and suspicion of island courts expressed by chiefs who see them as *kot blong waetman* (white men's courts) and a threat to their own authority and power. There are some parts of Pentecost, Santo, and Tanna where any state court, even island courts (one member of which is required to be a chief), is regarded as foreign and contrary to custom, and members of the communities are discouraged, expressly or covertly, from taking their disputes there.

3.7 Duplication of Regular Courts

One of the main advantages of hybrid courts is that they are more readily accessible to the "grassroots" people than regular state courts and can deal with matters that cannot be dealt with by the formal court system. If, however, hybrid courts are located in the same places as state courts and have jurisdiction to deal with the same kinds of matters, they may merely duplicate

⁶⁹ The Kwaio are frequently cited in ethnographic literature for their rejection of governmental and Western influences.

⁷⁰ Cf. McDougall (2005), who describes the willingness of Ranonggans (Western Province, Solomon Islands) to use government apparatuses for the resolution of land disputes.

state courts and thereby lose much of the “edge” or advantage that they currently possess. This has been well demonstrated by the island courts of Vanuatu since 2001. As mentioned earlier, the island courts were given jurisdiction by their warrants to hear and determine certain specified criminal offenses, civil claims for ownership of land, and civil claims under the common law. In 2001, their jurisdiction to hear new civil claims to land ownership was removed and given to customary land tribunals. Accordingly, since 2001, island courts have had the same jurisdiction as a magistrate’s court, although many still have, in practice, a backlog of pre-2001 customary land cases to hear.

Island court offices, with one exception, are located in the same towns as magistrates’ courts, and they conduct their hearings in the same places—very often in the same buildings and with the same kind of procedures. As regards civil proceedings, island courts have the advantage over magistrates’ courts of being less expensive due to lower fees for filing court documents and the absence of lawyers, meaning no lawyers’ bills. But claimants in civil cases often have more confidence in magistrates’ courts that are presided over by magistrates with law degrees. Moreover, in criminal proceedings, island courts tend to impose penalties that are less than those imposed by magistrates’ courts; accordingly, police prosecutors tend to file criminal proceedings in the latter, where they feel more confident of obtaining more appropriate penalties.

Island courts in Vanuatu have, therefore, lost much of their advantage over magistrates’ courts, at least as regards criminal cases and also, to some extent, civil cases. The business of island courts has consequently fallen away in favor of magistrates’ courts,⁷¹ and island courts are becoming not much more than minor civil magistrates’ courts, and in some cases, basically just child maintenance courts (as noted above). What is really needed is for the island courts to go out further into the communities, beyond the places that already have magistrates’ courts, to make their presence felt and their facilities widely known, either by permanent relocation or by regular circuit.

Solomon Islands’ local courts are currently also very much a centralized system and also occupy the same buildings as magistrates’ courts in at least two provinces. However, the duplication problems described in relation to the Vanuatu experience are presently of less relevance, given that the courts deal only with customary land disputes.

⁷¹ In 2006, some 764 civil and criminal cases were registered with island courts (Garae 2007); in 2007, 500 cases were filed with island courts (Joshua 2009); in 2009, no criminal cases were filed in island courts, and only 461 civil cases were filed, of which 236—more than half—were claims for child maintenance (Vanuatu 2010b).

4. Potential Attributes of Effective Hybrid Courts

There are a number of attributes that arguably contribute to the effectiveness or, at the very least, the basic functioning of the hybrid courts. What follows is a brief analysis of four traits. It is difficult to gauge the operation of the courts on the basis of criteria adopted from a Western jural perspective, therefore the criteria reflected below should be regarded as embryonic and open to further analysis and debate.

4.1 Oversight

An effective hybrid order is potentially one that is overseen by an independent body, not by an incumbent judicial officeholder, such as a chief justice or a chief magistrate. Oversight here refers to matters of executive administration and policy. From a purely administrative viewpoint, the time required to meaningfully engage with the systems discussed is great and requires the services of a full-time administrator or group of administrators, as is the case with PNG's village courts via the Village Courts and Land Mediation Secretariat. In Vanuatu and Solomon Islands, both systems are overseen by the countries' chief justices, who administer a raft of legislatively prescribed responsibilities. In the case of Vanuatu, there is also an island courts coordinator, who is a full-time public servant, and supervising magistrates. Likewise, in Solomon Islands there is a national local courts officer who is answerable to the chief magistrate. The decision-making and logistical requirements involved in keeping a system of courts operating is onerous; whether an incumbent judicial officer has the necessary time to dedicate to it is questionable.

Furthermore, judicial officers in Melanesia are schooled in the English common law tradition, which naturally frames the manner in which they interpret and process legal issues. In such instances there is a greater risk that the solutions provided will be formalistic. For some of the reasons discussed, the imposition of a black letter law, rules-based resolution is unlikely to gain traction in Melanesia. Instead, the appropriate response is one that is flexible, simple, and situationally appropriate. Potentially, those from outside the state judicial system are more appropriate in any key oversight role.

Guidance is obviously necessary with respect to keeping the courts aware of their jurisdictional limits and the unavoidable dictates of paperwork, record-keeping, and the like. Simple handbooks and regular inspection visits should be adequate to this end. However, it is desirable that with regard to the courts' strategies for mediating, resolving, and adjudicating cases, a degree of *laissez faire* should be allowed. That is to say, since hybrid courts are expected to apply "custom"—meaning, realistically, to be sensitive to dynamic and changing local values and mores—and that the latter are significantly variable among the many hundreds of small societies of the Western Pacific, oversight should not extend to interference in the way courts come to decisions over disputes.

The various aspects of oversight should be centralized as much as possible. A lesson can perhaps be learned from the case of the PNG village courts, which for years have been hindered by the splitting of administration among several state agencies and the lack of communication and cooperation between those agencies. Some improvement was seen in this respect with

intervention from the AusAID-funded law and justice program, particularly from about 2000 to 2004. An institutional strengthening project staffed by politically and juridically neutral expatriate advisers drew together the disparate threads of administration and began rebuilding neglected data bases and monitoring processes, producing a new and updated handbook for magistrates and improving resource delivery systems (see Goddard 2009, 72–74). This was an example of what could be done with good, centralized governance, and some optimism developed around the country among village courts officials who had felt administratively neglected for some years. Unfortunately, as with many such projects, promising beginnings faded when contracted staff finished and initiatives atrophied. However, it indicated that the village courts system was basically very sound and could be enhanced with systematic and relatively centralized support.

4.2 Resourcing and Local-Level Support

Linked with oversight is appropriate resourcing. An effective hybrid system is one that will ensure that: officials are paid and appropriately trained; a chain of communication with any oversight body exists; and court officials have logistical support close at hand from local government, police, state courts, and relevant government agencies. This is easier said than done in the countries under discussion, however. In most places, government does not exist outside of the capital and provincial centers; where it does exist, service delivery is weak. The inability of police to provide transport or personnel to enforce orders, for example, has a deleterious effect. Similarly, a lack of court inspections by trained officials means that problems in individual courts are not quickly identified and remedied.

One of the key requirements of an effective hybrid system is engagement with, and assistance from, subnational government and, in particular, local government. This, however, should be coordinated nationally; otherwise, differences in provincial government policies and attitudes can lead to the uneven and unequal distribution of resources, as happened in PNG with the transfer of responsibility for resourcing to provincial governments in the mid-1990s. In theory, all of the courts discussed should be linked to a form of subnational government, as this is the closest government body to the courts and the geographic jurisdiction of the courts will often be linked to the borders of local government areas. Depending on the delineation of responsibilities, practical assistance extended by local governments may include transport for officials, the collection and distribution of court revenue, maintenance of courthouses, and the provision of basic supplies, such as stationery. Without assistance at this level, it is difficult for the courts to operate effectively. Unfortunately, problems with capacity and funding constrain support.

We have seen that in the case of Solomon Islands, area councils were suspended in 1998. Underscoring the importance of subnational engagement with local justice systems is the suggestion that there may have been a correlation between the causes of the recent civil conflict in Solomon Islands and the demise of local government:

Not long after the [local government] system was junked, trouble began in Guadalcanal. Whether the link is direct or not is hard to say. Some people are of the opinion that removal of local policing and justice systems removed restraints on anti-social behaviour that were formerly available. (Scales 2003)

Recent events in PNG have shown that the payment of officials is extremely important. Following the introduction of a new *Organic Law on Provincial and Local-level Government* in 1995, the system of allowance payments for court officials broke down, with the result that the village courts system teetered on the brink of collapse. This was due to the fact that responsibilities for payment were transferred to provincial administrations that failed to adequately carry out their role. The payment problem was partially alleviated by the injection of national monies in 2005; however, during the interim period, it was difficult to plan for any form of broader systemic support.

An important aspect that is frequently overlooked is the provision of symbols of authority, such as simple uniforms, hats, or badges. Village court officials in PNG were originally issued with these in the 1970s, realizing that colonial experience had led villages to show respect for such signs of authority. Supplies gradually ran down, however, and a common complaint of contemporary village court officials is that they cannot get respect or obedience from villagers because they no longer have appropriate symbols of dress and instead, “look like ordinary village people.”⁷²

4.3 Flexible and Simple Legislative Provisions

An effective hybrid system will have a legislative regime that is easy to comprehend, is locally relevant, provides for procedural flexibility, and decentralizes responsibility for logistical support. The legislation must also clearly delineate the responsibilities of each level of government as they relate to the functioning of the courts. At present, all three systems fail in this regard. The reasons for the failure to adhere to overly complex legislation have already been discussed. Part of the solution lies in devising legislation that is drafted with “end users” in mind—lay decision makers and parties coming before the court. This requires drafting to be done in a manner that is cognizant of low literacy levels and the generally limited understanding of the workings of the state legal system. This is a difficult task. To be most effective, legislation should be widely distributed, accompanied by simple awareness materials, and cited in training programs.⁷³

A failure to follow legislation is also linked to its being outdated and not adequately reflecting the realities of contemporary Melanesian life. As mentioned above, the current legislation governing the courts is over 20 years old; when legislation is this dated there is a risk that decision makers will make up their own rules. The jurisdiction of the courts must be such that it incorporates those matters that are most appropriately dealt with at a local level. Typical village-based disputes and infractions, both of a customary and noncustomary nature, should be accommodated. Legislation must clearly spell out the customary jurisdiction of the court, which, given the nonstatic nature of custom, must be sufficiently broad. Legislation must also allow for customary procedures of dispute resolution and recourse to customary remedies. This needs to be nonprescriptive, allowing individual courts to mold processes in accordance with local norms.

⁷² M. Goddard, field notes, 1994–2006, various locations in PNG.

⁷³ For an overview of the importance of training in the context of hybrid dispute-resolution systems (in this instance, Vanuatu’s customary land tribunals), see Paterson (2005, 16–17).

Cognizance of human rights standards is essential. However, this is a complex issue that needs sensitive handling in Pacific Island societies, where there is a tendency to prioritize sociocentric rights and obligations over those of the individual. Social scientists have pointed to the problems of trying to universalize the conceptualizations embedded in the *UN Declaration of Human Rights* of 1948. The declaration acknowledged the need to respect cultural differences, but at the same time essentialized an individualistic approach to human rights that not all cultures would fully subscribe to.⁷⁴

Fears that the “rights of the individual” would be undermined in hybrid courts where custom is recognized have fuelled concerns about training village court magistrates in PNG on more Western understandings of human rights (see, for example, Garap 2005). However, anthropological research has suggested that over the 35 years since village courts became operational, their magistrates have become skilled at negotiating between individualistic approaches to rights and justice and the sociocentric concerns of the communities they serve (Goddard 2009, 251–65). This indicates that intercultural accommodation and compromise are possible with respect to human rights, and again points to the value of a light-handed approach in governance, rather than a dogmatic application of principles that may be foreign to local communities and dissuade them from using the hybrid courts. In PNG, the original *Village Court Handbook*, when it was distributed two years after the inauguration of the court system, was a model of simple instruction that delineated in uncomplicated terms the jurisdiction and principles of the village courts. An updated replacement was produced in 2004 that was also excellent in its simple presentation. Village courts that had copies of these books felt confident in their practice and operated with the efficiency and sensitivity intended by the original planners of the system. Unfortunately, many courts no longer have access to these handbooks.

4.4 Local Ownership

While it is difficult to “graft” local ownership onto any institution, there are various practical steps that can be taken to ensure that ownership of hybrid courts is more likely to occur. Foremost, it must be recognized that communities want to be able to govern themselves and resolve their own disputes. To this end, support should be responsive, not directive. The ideal system is one that has been established after extensive community consultation and involvement. As we have seen, sometimes, for various reasons, communities will reject any form of government intervention.

In PNG, while some interventions by donors and government to improve the village courts system have been useful, others have tended to impose what the institutions think is best practice, rather than simply to respond to the expressed needs of local communities. To return to a theme raised earlier in this paper, the intimate relationship of the village courts to their local community (community-chosen magistrates, deep understanding of social and cultural contexts of individual disputes, sensitivity to community concerns) has been integral to their undeniable success over three decades. Training and administrative programs that guide them away from this localized sensitivity toward Western-oriented ideas of justice (both state and nonstate) risk undermining the basis of their acceptance by communities and thus their efficacy and success.

⁷⁴ The problem was still not solved in the modifications under the *Vienna Declaration of Human Rights* of 1993.

Concrete initiatives to foster ownership at the local level include:

- ensuring local communities have a say in the membership of their courts;
- giving individual courts jurisdiction to hear disputes arising from local bylaws or ordinances;
- fusing appropriate existing nonstate processes into court procedures;
- providing for customary jurisdiction and customary procedures, including the application of humane customary remedies;
- ensuring courts operate in an open, transparent, and accessible manner;
- ensuring that any revenue generated from the courts remains in the local community, preferably to fund the further operation of the court/s;
- actively encouraging the appointment of women officials, especially decision makers, so as to encourage greater court usage by women.

5. Conclusion

Customary dispute mechanisms, where mentioned in donor and government literature, are frequently raised as adjuncts to state institutions and processes. They are seen as an amorphous mass of sometimes competing individuals and groups that are clearly doing something—though just what they are doing, nobody outside of the system seems to know. Meaningful engagement is fraught with challenges, since by its very nature, it automatically transforms the institutions being engaged. Hybrid courts represent an intermediate path. They straddle the divide between state and custom: their legislative foundation provides a degree of certainty and oversight, while an incorporation of custom, mediation, and informal decision making means that they can be responsive to, and accommodating of, local values and mores.

If we measure success by criteria such as durability, a high degree of utilization by local communities, and the ability to administer justice with a sensitivity to local social exigencies, the village courts of PNG are worthy of consideration. They have been under-resourced, historically hindered by administration problems, and frequently targeted by critics on various grounds. Yet they have been remarkably effective and locally popular despite their impediments. The planners of the system at the end of the colonial period were canny in their understanding of what grassroots communities needed and meticulous in their preparation of a workable model for hybrid courts. Island courts and local courts have fared less well, especially over the last 20 years. The reasons for this vary, but clearly include a lack of resourcing (and a corresponding centralization in the case of local courts); complex legislative regimes and court procedures; replication of services available from magistrates' courts; and a lack of community ownership. Fortunately, both systems are currently the focus of government attention, with various efforts to strengthen the systems being explored.

Administrative shortcomings and (well-meaning) interventions by critics and others, sometime based on a distrust of “illiterate” and “uneducated” villagers' ability to administer justice, have sometimes frustrated the work of experienced and customarily knowledgeable lay decision makers. There is much to suggest that good administrative support and resource delivery, with minimal interference, are the main requirements for hybrid court systems to perform with the

flexibility, customary sensitivity, and simple yet appropriate legal principles of a successful hybrid justice system.

While not without their flaws, the hybrid courts discussed provide a blueprint for accessible, quick, representative, and community-owned justice in Melanesia. They present an avenue into communities for donors and governments alike and ease the burden on the state justice system. However, their effectiveness is preconditioned on a number of evolving criteria. This paper has attempted to explore, in a very embryonic sense, what some of those criteria might be. Any reform initiatives should be informed by comparative analyses, thorough community consultation, and further research of the individual court systems and the communities they serve.

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