

Codification and creation of community and customary laws in the South Pacific and Beyond

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Codifying Customary Law on Ambrym Island, Vanuatu

Abstract

Between 2014 and 2016, the Malmemeli Ambrym Island Council of Chiefs piloted the Vanuatu Chiefs' Legal Education Programme, funded by the World Justice Project. A series of workshops were facilitated in different locations around Ambrym Island, attended by the Chiefs and community members, which covered topics identified and requested by the Chiefs. One of these topics focused on the codification of customary laws.

During the workshops, the various chiefs' area councils passed resolutions deciding to draft the customary laws for their 'custom area'.

This first part of this paper reflects on the piloted programme, focusing on the 'drafting customary laws' workshop in particular, and discusses the workshop content, discourse, issues raised, and challenges from the author's experiences being involved in the facilitation of the workshops and perspectives shared by the participants themselves.

The second part of the paper analyses the content of the various customary laws drafted by the councils, as well as the participation, consultation and drafting processes used by the councils.

Introduction

The process of drafting and codifying customary laws and community by-laws in Vanuatu is in an era of rapid development. Although there has been a 'long tradition of colonial authorities codifying the customary law of indigenous people, both in the Pacific islands region and elsewhere', communities around Vanuatu are now attempting to codify their own customary laws and community by-laws.¹ Some communities have already codified their customary laws² and others are in the process of drafting theirs³. The Malvatumauri National Council of Chiefs is also actively promoting the agenda of drafting customary laws at the community level through its *Kastom Governance Roadmap Resolutions*, one of which recommends that Chief Councils around Vanuatu '*raetem ol custom loa mo ol rul*' i.e. write all the custom laws and rules.

Between 2014 and 2016, the Malmemeli Ambrym Island Council of Chiefs (Malmemeli) piloted the Vanuatu Chiefs' Legal Education Programme (VCLEP). A series of workshops were facilitated in different locations around Ambrym Island and attended by the Chiefs and community members. One of the topics in the workshop series, at the request of the Malmemeli, focused on drafting customary laws.

Following the workshops, the various area councils passed resolutions deciding to draft the customary laws for their 'custom area'. To date, all of the draft customary laws remain in draft form and have not been passed into 'law' by council resolution.

Part I – Drafting customary laws workshop

¹ Miranda Forsyth, *The Writing of Community By-Laws and Constitutions in Melanesia: Who? Why? Where? How?*, SSGM/ANU In Brief, 2014/53, available at: http://ssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/IB-2014-53-Forsyth-ONLINE_0.pdf

² Nikoloten Council of Chiefs Tanna, Epi Council of Chiefs, Vaturisu Council of Chiefs

³ Fan Council of Chiefs, West Ambrym, Torsope Council of Chiefs, North-West Santo (on file with the author) and Nguna, Ambrym, Pentecost and Epi, see Forsyth above at 1, at 1

The VCLEP Pilot commenced in 2014, after the Malmemeli won a seed-grant through the World Justice Project, World Justice Challenge.⁴ The intention was to empower customary leaders to strengthen and promote the rule of law through educational workshops on areas of law and customary governance.⁵ The workshop on 'drafting customary laws and dispute resolution processes' started with a brief background on the discussion of writing customary laws in Vanuatu and highlighted the absence of any legislation provisions giving chiefs the right to draft customary laws. Mention was given to sections of an earlier draft of the Bill for the National Council of Chiefs Act, which gave power to chiefs to write customary laws,⁶ but was subsequently removed from the Act, possibly due to concerns about this power being abused.⁷

The workshop followed with information on some documented commonalities, or generalisations, of Melanesian custom and its underlying principles, as well as of the possible advantages and disadvantages of drafting customary laws, dispute resolution processes,⁸ and customary law principles.⁹ Examples of codified customary laws from other custom areas and dispute resolution processes were also shared and discussed by the participants.¹⁰

⁴ World Justice Project, *2014 World Justice Challenge Grantees*, available at: <https://worldjusticeproject.org/our-work/engagement/world-justice-challenge> (accessed 17 July 2018)

⁵ World Justice Project, *Program Summary, Vanuatu Chief's Legal Education Pilot Program*, available at: <https://worldjusticeproject.org/our-work/programs/vanuatu-chiefs-legal-education-pilot-program> (accessed 17 July 2018)

⁶ Sections 14(2) and (3), 15 and 16, *Bill for the National Council of Chiefs Act*, referred to in *Miranda Forsyth, A Bird that Flies with Two Wings: The kastom and state justice systems in Vanuatu* (ANU Press, 2009) Ch 5.

⁷ Miranda Forsyth, *Report on the Vanuatu Judiciary Conference 2006: The Relationship between the Kastom and State Justice Systems*, (USP Emalus Campus, 28-29 August 2006) available at: http://www.paclii.org/vu/2006_jud_conf_report.html at Part 1(3)

⁸ Identified by the Pacific Judicial Development Programme, *Report on Customary Dispute Resolution, 'The Processes (and Impact) of Customary Dispute Resolution Processes'*, (2012) available at: http://www.fedcourt.gov.au/data/assets/pdf_file/0005/18698/CDR-Final-Regional-Strategy-and-Recommendation-Report-2012.pdf, at 23

⁹ see Erica Harper, *Customary Justice: From Program Design to Impact Evaluation*, (IDLO 2011), available at: <https://www.idlo.int/sites/default/files/Customary%20Justice%201%20-%20From%20Program%20Design%20to%20Impact%20Evaluation.pdf>, at 43

¹⁰ Lee-Anne Sackett, VCLEP Workshop Slides, *Raetem Kastom Loa mo rod blong mekem disisen (stretem raorao)*, (2014), on file with author, at 11-15

The workshops were facilitated in four custom areas around Ambrym Island and each area decided that clarifying and documenting some kastom¹¹ in their area was a necessary activity to undertake, particularly in relation to resolving customary land disputes. The participants discussed other reasons for taking this action and agreed that drafting customary laws was also necessary to: preserve of customary law; provide more consistency in decision-making between different chiefs; clarify and provide guidance to organisations and government courts of the different customary laws and processes in each area; clarify the jurisdiction of each custom area, distinguish customary law from other laws; improve respect for customary law and the chiefs; and to create a more inclusive system of governance with respect for government and church organization.¹² Opposition to the codification of custom was vocally expressed by only 2 chiefs (of 34 in attendance) in the North Ambrym area¹³ for concerns commonly cited in literature on codification of customary law.¹⁴

Each area developed an action plan that established a committee to for the purpose of codifying custom.¹⁵ At the subsequent workshop, the committee produced a report of their progress, and the workshops participants reviewed the drafts and carried out further discussions on their content.¹⁶ This workshop also provided guidance on inclusive participation and community consultations,

¹¹ The reference to kastom here is inclusive of customary laws, principles, rules, processes and ceremonies, and is not intended to be definitive concept in this paper.

¹² Fan Council of Chiefs, *By-Law Drafting Committee Strategic Plan 2013*, Planning Meeting, 4 June 2013, Craig Cove, Ambrym (on file with author). Many of these same reasons were discussed in the other areas around the island as observed by author during workshops.

¹³ As observed by author during attendance (September 2014)

¹⁴ see e.g. Kenneth Brown, *Customary Law in the Pacific: An Endangered Species?* Journal of South Pacific Law (1999) Vol. 3; Janine Ubink, *Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia*, International Development Law Organisation 'Traditional Justice: Practitioners' Perspectives' Working Paper Series (2011) available at: <https://www.files.ethz.ch/isn/137099/WP2UBinkFinal.pdf> at 1

¹⁵ Vatihou Council of Chiefs (SE Ambrym), Fan Council of Chiefs (West Ambrym), Wolap Area Council of Chiefs (West Ambrym), Molmolnewere Council of Chiefs (North Ambrym), *Action Plans for Customary Land Dispute Resolution*, (2014), on file with author

¹⁶ see Lee-Anne Sackett, VCLEP Workshop Slides, *Kastom Loa: Lukluk long work blong raetem ol kastom loa* (2015) on file with author, workshop facilitated by Irene Luan, Chief Luwi Mera Melip and Chief George Massing

where participants identified special participation measures for particular groups such as women and youth.¹⁷

Part II – Content and community participation processes

The approach to codifying the customs was broken down into three broad categories: 1) custom ceremony protocol; 2) dispute resolution processes; and 3) customary land management (ownership and usage rights).¹⁸

The content of the custom ceremony protocols generally focused on the process of custom ceremonies such as births, deaths, marriages etc and the role and responsibilities people have in those ceremonies as determined by relationship.¹⁹

Dispute resolution processes in one area established a hierarchical system that started at first instance with the head of the nasara, and if unable to resolve, escalated to the village or area council. The exception to this were disputes considered serious and not related to land (examples given were rape, incest and murder), which were to be directed to the police. In this situation, the role of the head of nasara, or nasaras, would be limited to reconciliation between the parties to the dispute.²⁰ Another area took a different approach in not defining specific disputes or crimes that had to be directed to the police, but instead gave chiefs the right to send disputes directly to the police or government system if the chief needed assistance from the same. Parties to the dispute were also given the right to select the ‘government’ or ‘kastom’ system to resolve the dispute, however, if the former was opted for, the chiefs still had the right to facilitate reconciliation between the parties. Penalties were also considered by this area. The Drafting Committee sought to remove monetary penalties or reconciliation gifts from the dispute resolution process and included items with *kastom* value, such as mats, chickens, pigs and cattle,

¹⁷ Vatihou Council of Chiefs (SE Ambrym), Fan Council of Chiefs (West Ambrym), Wolap Area Council of Chiefs (West Ambrym), Molmolnewere Council of Chiefs (North Ambrym), *above in 15*

¹⁸ Lee-Anne Sackett, *above in 10*, at 16

¹⁹ see Fan Council of Chiefs, *Stret Fasin blong Kastom Seremoni (draft)*, Wolap Council of Chiefs, *Oi Stret Fasin blong Kastom Seremoni (draft)* (on file with author)

²⁰ Wolap Council of Chiefs, *Stret rod blong stretem raorao (draft)* (on file with author)

the last of which was recognized as being new *kastom*.²¹ Clarifying the rules for recognition of chiefly title was included in the work of the committee for all four areas.²²

The customary land management (ownership and usage rights) category included provisions for determining who had rights to land ownership and land usage.²³ For example, in the Fan area of West Ambrym, this was categorised into bloodline rights, rights of women, recognition of adoption and rights of the adopted, sale of land and other agreements relating to *kastom* land.²⁴ Action plans then included activities to clarify and define 'nasara', sub-custom area and custom area boundaries.²⁵

As mentioned above, the drafting process was detailed in the action plans that were developed, reviewed and updated in all three of the workshops in all four areas. A drafting committee was nominated and appointed by each of the area council of chiefs, which was predominately made up of male chiefs. In areas where other community members were included in the committee, e.g. senior community members, police, court clerks, church representatives, all were male.

The community consultation processes took various different approaches and did include the wider community and as mentioned above, special participation measures for women. For example, in the Fan area, in some villages held separate consultations for women only but in others women preferred to have only one consultation session with other community groups to facilitate better debate over the drafts. All consultations took place at the village level, however, in most instances the village chief facilitated consultations and the author has limited information on what measures were taken to accommodate

²¹ Fan Council of Chiefs, *Draft By-Loa, Stret Rod Blong ol Kot long Fan Eria* (on file with author)

²² Vatihou Council of Chiefs (SE Ambrym), Fan Council of Chiefs (West Ambrym), Wolap Area Council of Chiefs (West Ambrym), Molmolnewere Council of Chiefs (North Ambrym), *above in 15*

²³ Workshop drafts from each area on file with author

²⁴ Fan Council of Chiefs, *Draft Kastom Rul mo Prinsipol long Fan Eria* (2013) on file with author

²⁵ Vatihou Council of Chiefs (SE Ambrym), Fan Council of Chiefs (West Ambrym), Wolap Area Council of Chiefs (West Ambrym), Molmolnewere Council of Chiefs (North Ambrym), *above in 15*

opportunities for marginalized groups to participate and contribute to the development of the drafts.

Conclusion

This summary aimed to provide a brief overview of the *kastom* codification initiatives that took place around Ambrym Island, in Vanuatu between 2014-2016. It lacks analysis and critique but hopes to prompt discussion in this regard to inform further research, from both practical and theoretical perspectives. As far as the author is aware, all area councils' attempts to codify *kastom* remain in draft form, and it is not certain whether little progress has been made because of the difficult nature of the task and no follow on support after the completion of the pilot, or because of a lack of motivation, capacity or urgency from within the communities involved, or due to a change in support or direction in codification. Collecting further information on this aspect may identify context specific challenges that can inform the wider discussion on codification.