



## **Interfaces between Formal and Informal Justice Systems to Strengthen Access to Justice by Disadvantaged People**

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## Introduction

My research and policy work in the area of law and justice has focused on the Pacific Island countries of the South West Pacific. I have a particular interest in the independent Melanesia states of Papua New Guinea, Solomon Islands, Vanuatu, and Fiji. Currently, I work as a full-time researcher at the Research School of Pacific and Asian Studies at the Australian National University in Canberra. Prior to my work at ANU, I taught law at the University of Papua New Guinea and was, for three years, head of the Crime Studies Division at the National Research Institute in Port Moresby. Over the past four years I have undertaken extensive policy work in PNG directed at law and justice reform. A significant part of this has involved looking at ways of improving linkages between formal and informal justice systems as a way of promoting peace and good order, and improving access to justice by the bulk of the population living in rural areas and disadvantaged urban communities.

This short paper provides the historical and social background to these ongoing efforts at law and justice reform in the Melanesian context. The significance of informal justice systems in Melanesia needs to be appreciated in light of the following factors:

- The vast majority of citizens in PNG, Solomon Islands, and Vanuatu, continue to live in rural villages where access to the formal justice system is often extremely limited.
- Melanesian communities have strong traditions of self-regulation including in respect of dispute resolution. This is the realm of 'tradition' or 'kastom'. Traditional forms of dispute resolution, as with other areas of 'kastom', have changed and adapted in line with the larger transformations that have taken place in these countries. While some of these continue to operate reasonably well, others have been eroded in the face of rapid social and economic change.
- The type of justice offered by the formal system is often viewed as inappropriate for the resolution of disputes between people living in rural villages or urban settlements where the breaking of individual social relationships can cause conflict within the community and affect economic cooperation on which the community depends.
- The formal (state) justice system in these countries operates with an extremely limited infrastructure which does not have the resources to deal with minor disputes in villages or settlements. In practice, the reach of the formal system is largely restricted to the urban areas.

One of the key areas of debate in relation to 'traditional' and informal justice systems is whether justice can be made more accessible by encouraging such systems, by adopting or transforming some of their processes, or by facilitating a more collaborative approach between such systems and formal justice systems.

The role of 'traditional' and informal justice remains a contentious issue for a number of reasons. In the Melanesian context, these include:

- The fact that most 'traditional' and informal justice systems are dominated by older men. There have been widespread criticisms that their processes and decisions discriminate against, and breach the human rights of, women and young people;
- That 'traditional' and informal justice systems are prone to nepotism and corruption;
- That 'traditional' and informal settlements of disputes may allow serious offenders to escape legal responsibility for their actions;
- That 'traditional' and informal justice systems operate on completely different principles to those embodied in state law and that granting them recognition risks undermining the already fragile formal justice system and, thereby, the rule of law;
- That 'traditional' and informal justice systems may be appropriate in remote rural village settings but are inappropriate in urban and peri-urban environments.

It is important to emphasise at the outset that 'traditional' and informal justice systems should only be recognised and supported when they are consistent with the rule of law and respect for human rights. The operations of both formal and informal justice systems should ideally be complimentary. In this respect:

- There should be no discrimination on the basis of sex or any other status by either formal courts or informal justice forums;
- Punishments imposed by formal courts and informal justice forums should be consistent with relevant Constitutional and legal provisions (e.g no inhumane or degrading treatment);
- Informal justice forums should be prohibited from trying persons for serious offences such as rape or murder;
- The decisions of informal justice forums should be open to some form of regulation and review by formal courts.

Most 'traditional' and informal justice systems are dominated by men and tend to apply customary norms which discriminate against women and young people. While very few women preside over 'traditional' and informal justice forums, it is also the case that women are grossly under-represented throughout the formal justice system in the Melanesian countries, as in many other parts of the world. The difference between the formal and the informal systems as regards the equal treatment of women should, therefore, be seen as a matter of degree.

Although traditional forums are on the whole more prone to discrimination than formal systems, there are examples of non-discriminatory informal forums, as well as of discriminatory formal courts. It would be misleading to attribute

discrimination to the informal process itself, rather than to the prevailing attitudes which lie behind discriminatory customary norms and laws.

Just as the formal justice system has become less discriminatory towards women in many parts of the world over the last century, in line with changing attitudes to women, so 'traditional' and informal justice systems in some parts of the Pacific Islands have witnessed some improvements. Although change has been less pronounced in some areas (e.g. the PNG Highlands), the pace of change could be increased through education, regulation and increased resources. Simply outlawing discriminatory practices, without addressing underlying beliefs, will not hasten a change in attitudes, and may in fact harden them. The aim must be to tackle the root causes of discrimination and not simply its consequences.

Most Melanesian states do not have the resources necessary to extend the formal system to village level to deal with all types of disputes, or to provide the additional legal aid and interpreters that this would require. However, even if resources were not an issue, 'traditional' and informal justice systems have their merits which may vary according to factors such as the nature of the dispute and the relationship between the parties.

'Traditional' and informal justice systems are best suited to conflicts and disputes between people living in the same community who seek reconciliation based on restoration (e.g. restorative justice) and who will have to live and work together in future. Formal justice, on the other hand, is best able to provide the legal and procedural certainty required where serious penalties such as imprisonment are regarded as appropriate, or where the parties are unwilling or unable to reach a compromise.

Every individual, whether rich or poor, should be able to freely exercise their right to seek redress in a formal court of law. The choice must rest with the parties. The aim in providing assistance to 'traditional' and informal justice systems should be to encourage satisfactory alternatives which offer more appropriate solutions, not to promote a substitute to formal courts for the poor. Support for 'traditional' and informal structures therefore, needs to be accompanied by support for legal aid organisations and legal literacy programmes, as well as appropriate assistance to the formal legal sector. Particular efforts must be made to ensure that to ensure that women and other vulnerable groups are guaranteed a choice through access to legal aid, advice and education.

Support for 'traditional' justice mechanisms is often greeted with charges that such a position romanticises the past. It should be made clear, however, that 'tradition' and 'kastom' do not stand still and, in practice, are constantly evolving as the social, cultural, political, and economic circumstances in which they operate change. Providing appropriate forms of support is in itself an important way of influencing the manner of their evolution. The fact is that 'traditional' and informal justice systems already deal with the vast majority of disputes involving ordinary villagers in Melanesia, while the reach of the formal system remains extremely limited. Building the capacity of, and, in particular, linkages between, the two systems is an appropriate way of improving access to justice among the

grassroots population, as well as ultimately strengthening the rule of law, in these pluralistic and transitional environments.

If those concerned with criminal justice reform in the Melanesian countries, and similar nations, wish to have any real impact on improving access to justice for the majority, then the vital role already played by 'traditional' and informal mechanisms in providing justice for the majority of citizens needs to be acknowledged. They will also need to seek to broaden understanding of how and where these forums operate and to pursue policies which take full account of their existence. The provision of training and resources, and the regulation of 'traditional' and informal justice forums are also required. There should be cooperation between informal justice and relevant state institutions – such as the police, those responsible for social welfare issues and others – as well as cross referrals between state courts and informal forums. Simply ignoring informal and 'traditional' justice systems that already contribute so much in the area of dispute resolution is hardly a realistic policy option.

### **Terminology**

*Formal justice systems:* state law and its principal institutions of law and justice (e.g. police, courts, and prisons).

*'Traditional' justice systems:* non-state justice systems which have existed, subject to continuous evolution, since pre-colonial times.

*Informal' justice systems:* refers to any non-state justice system. Includes 'traditional' justice mechanisms but may also include community committees, NGOs, churches etc..

*Hybrid justice systems:* systems that involve a combination of state and non-state elements (e.g. PNG's Village Courts)

### **Justice Without State - 'Traditional' Justice in the Pacific Islands**

The indigenous societies of the Pacific islands had ways of dealing with disputes and infractions long before the arrival of outsiders and the imposition of the first colonial states. These varied according to location, scale, leadership and authority structures, relationships to land, and the belief systems of different societies. The extent of this variation makes generalisation difficult but, at the risk of over-simplification, some broad observations can be made. Most societies were small and acephalous, lacking the centralized political and administrative structures associated with modern states. Power was diffused widely (at least among the adult men) rather than being concentrated in a single authority. There were no written laws in what were (and continue to be) predominantly oral cultures or discrete systems of justice comprising institutions and bodies of specialists dedicated to the enforcement of rules and the adjudication of disputes. Rather than constituting a separate domain administered and enforced through discrete institutions and personnel, 'law' and 'justice' constituted an undifferentiated aspect of everyday social and political life.

Whereas Western law treats the individual as a homogenous and isolated unit, a person's status, gender, kinship affiliations and relationships were integral to the

determination of his or her rights and obligations in respect of others in Pacific Island societies. Disputes were defined and addressed within an elaborate complex of kinship, status and social relations. Women generally had a subordinate status to men, particularly in Melanesian societies. In the absence of centralized authority, there was no distinction between public and private spheres. Notions of reciprocity and equivalence were crucial to the redress of wrongs, as they were to other aspects of social and economic life. Such approaches typically entailed a strong element of bargaining and compromise, in contrast to the 'win-or-lose' adjudication under Western common law. Resolutions of inter-group conflict were the outcome of protracted negotiations and were subject to re-negotiation when circumstances changed.

Given the high level of social inter-dependence in small-scale societies, the restoration of stable relationships ruptured by conflict or infraction was an important object of dispute settlement. Settlement processes were likely to involve protracted discussions and negotiations brokered or mediated by chiefs or other prominent local figures. In the case of larger disputes, settlements could take the form of ornate peace and reconciliation ceremonies involving the payment of compensation or the exchange of gifts. Compensation was a major component of peacemaking among groups. The main purpose of settlement in such cases was to re-establish a stable relationship between groups. Restorative resolutions were adopted in disputes involving parties bound together through kinship or other forms of social or economic association. Punitive or retributive approaches were more likely in the case of the most serious breaches of social norms or in situations where there was no morally binding relationship between the parties, as in the case of traditional enemies. Cycles of warfare and peacemaking characterised relationships between many groups.

### **Colonial Interludes**

Set against the background of thousands of years of pre-contact history, less than a hundred years of colonial administration in Melanesia was a remarkably short period of time. While the advent of the colonial state was a portent of major social and economic transformations ahead, it is little surprise that the pre-colonial past continues to pervade the post-colonial present. In the larger territories, the expansion of the administrative frontier was a gradual and uneven process hindered by lack of funds, inter-group warfare and the challenges of local topography. In many areas, it was the missions and plantations that had the most profound impact on Pacific islanders. As elsewhere, European colonization involved the arbitrary partitioning of territories with little concession to existing social and political groupings. Different external powers brought their own values, priorities, institutions and styles of administration.

The extent and nature of the recognition of local institutions and *kastom* by colonial authorities varied from territory to territory. In some cases, as in Fiji, deliberate attempts were made to adapt and co-opt elements of indigenous power structures – in the form of chiefs - into the maintenance of colonial order and pursuit of other instrumental ends. Elsewhere, including most of the Melanesian territories, colonial authorities found it more difficult to identify suitable local structures through which to work. There was perceived to be a lack of authoritative local leaders and group identity and membership were uncertain

and mutable. From the perspective of colonial authorities, there was no obvious local power point to plug into.

Colonial rule entailed the introduction of selected Western laws and legal institutions. These included a combination of Western-style courts administering the introduced law, special courts or tribunals to administer 'native regulations' to indigenes, an armed constabulary and a rudimentary prison system. Reflecting the meager resources available to most administrations and tenuous character of colonial authority, Western-style courts were largely confined to small expatriate enclaves in the urban centres. These Courts, staffed by professional magistrates or judges, dealt with the most serious offences and managed commercial disputes arising within the European community. 'Native Courts' dealt with disputes and offences involving indigenes as provided for under specially designated 'native regulations'. These relatively informal forums would also draw on the district or patrol officer's knowledge of local *kastom*, often as explained to him by an indigenous policeman or other official who might be from a different area. Colonial justice of this kind entailed the subordination of many of the formal attributes of legal justice to the administrative imperatives of the colonial project. Administrative officers often combined law jobs, serving simultaneously as magistrates, police, and jailers, in an undifferentiated system of 'native administration'. The principal aim was to establish a semblance of order and administrative control rather than to build a system of justice.

Western law had an extremely limited influence and most indigenous communities continued to deal with conflicts, disputes and infractions according to local *kastom*. Traditional structures were only interfered with when perceived as a threat to colonial authority or European prestige and continued to shape the daily existence of most Melanesians. Ironically, while official thinking maintained that indigenous institutions were inadequate to the task, in practice colonial administrations were highly dependent on them for the maintenance of peace given the minimal reach of weak colonial states. Informal interactions between isolated district officials and indigenous groups were often conducive to dispute resolution at local levels. The former could draw on a range of agency powers extending well beyond official magisterial powers. Dispute resolution could thus be linked to the provision or withdrawal of various 'government' services allowing officers' to persuade and reward, as well as to punish. Remedies could be addressed to either individuals or groups. European officials rarely spoke the local language and this increased their dependence on intermediaries. In a broad sense, the 'administrative justice' practiced on the colonial frontiers accorded with indigenous practices because it approached dispute resolution in a more holistic way than was possible under formal western juridical practice. In doing so, it produced outcomes that were generally acceptable in local terms. There are continuities between this form of justice, particularly its holistic and problem solving approach, and many of the informal restorative justice practices that have sprung up in recent years.

### **Post-independence and State Justice**

The establishment of the modern framework of Western justice only commenced in earnest in the later stages of colonial administration. It involved the gradual repeal of discriminatory and paternalistic systems of 'native administration', replacement of the dualistic approach to dispute resolution with a unitary court

system, and the separation of the administrative and judicial powers of the colonial state. Police forces that had been created originally as the key instrument for the extension and consolidation of colonial authority were to be transformed into professional and neutral law enforcement agencies. These changes were part of a larger project of institutional modernization aimed at transforming colonial institutions into those of the modern nation-state as a prelude to eventual independence and nationhood. When independence finally arrived in the 1970s, the Pacific island countries inherited the familiar institutional framework of the Western justice system with written laws, formal courts, police forces, and prisons. While this system was reasonably well entrenched and understood in some places, the transition was less straightforward in others.

This was particularly the case in Papua New Guinea, the Solomon Islands and Vanuatu. These countries shared a much higher degree of social and political fragmentation than Fiji and had a shorter and more uneven experience of centralized administration. Vanuatu (formerly the New Hebrides) had the additional legacy of being subject to two separate systems of colonial law under the administration of the British and French Condominium. In each case, however, local systems of self-regulation or *kastom* continued to exert a more direct influence on the daily lives of their predominantly rural inhabitants than did the formal laws and institutions introduced by weak and under-resourced colonial regimes. Encounters between these different systems of justice inevitably gave rise to misunderstandings and issues of compatibility in the area of dispute resolution. While it is easy to overstate the differences, the more obvious sources of tension included:

- different perceptions of right and wrong between traditional values, mission teaching, and the prescriptions of state law;
- central state control of justice processes and the idea of 'crime' itself, as opposed to the more diffuse quality of customary regulation;
- discrete institutions and professional personnel vested with authority to enforce and administer the law, as opposed to the authority of chiefs, elders and 'big-men';
- a narrow focus on individual responsibility, as opposed to the significance of relationships and the broader context of wrongdoing in customary proceedings;
- reliance on the imprisonment of individual offenders, as opposed to compensation between parties, as the standard redress for serious wrongdoing;
- neglect of victims or aggrieved parties;
- the finality of formal legal adjudications, as opposed to the negotiated and often provisional quality of local resolutions;

- the exclusionary and adversarial character of formal judicial proceedings, as opposed to the more participatory and consensual character of local approaches;
- different perceptions of evidence and proof in the determination of responsibility and culpability;
- the apparent absurdity of the overthrowing of the obvious on a technicality.

Dissatisfaction with the processes and outcomes of Western justice led to the revival of older forms of self-help in some areas. For example, so-called tribal fighting that had been suppressed temporarily by *kiap* justice re-emerged in parts of the PNG Highlands in the years immediately preceding independence. This was, in part, a response to the perceived inadequacies of state justice administered by the courts and, in particular, its apparent inability to address the underlying causes of inter-group conflict.

The architects of the independence Constitutions sought to accommodate, as far as possible, the existence of both state (modern) and customary (traditional) authority. *Kastom* and tradition were prominent constructs in the rhetoric of decolonisation, providing important markers of national identity in the discourse of early nationalist leaders. The aspiration to build on the rich legacy of social and legal pluralism was reflected in the Constitutions of most newly-independent Pacific Island countries. It was envisaged that *kastom* or customary law would play a significant role in the post-colonial legal order although exact details as to how this was to be achieved remained elusive. In Fiji, Papua New Guinea, and the Solomon Islands, *kastom* was not only recognised as a source of law but was also accorded a high ranking in the Constitutional hierarchy of national laws. Vanuatu's Constitution also recognised *kastom* as a source of law, while the customary authority of chiefs was acknowledged in the Constitutions of both Fiji and Vanuatu.

The goal of building on indigenous social foundations was most explicit in the Constitutional vision of Papua New Guinea, the largest and most diverse of the Melanesian countries. While the courts were urged to forge an "indigenous jurisprudence" (S.21 of the Constitution), the National Goals and Directive Principles of the Constitution expressly called for "development to take place through the use of Papua New Guinean forms of social and political organization" (S.1(6) of the Constitution). They also recognised the importance of community structures, calling for "traditional villages and communities to remain as viable units of Papua New Guinea society, and for active steps to be taken to improve their cultural, social, economic and ethical quality" (S.5(4) of the Constitution). The constitutional scheme was thus receptive to the development of a more holistic and restorative approach to crime control and conflict resolution including a greater degree of community participation.

In addition to provisions that sought to encourage the consideration of *kastom* in formal legal proceedings, a number of Pacific Island countries established courts or tribunals that were designed specifically to deal with local disputes and be responsive and accessible to predominantly rural village communities. The latter were often empowered to apply *kastom* subject to qualifications. In the Solomon

Islands, for example, Local Courts comprising members appointed from the designated court area were established to deal with a range of disputes arising at the local level (Takoia and Freeman 1988). These included offences provided for by legislation, local bye-laws and, in certain circumstances, *kastom*. Local Courts were also given unlimited jurisdiction in customary land matters subject to appeals to Customary Land Appeals Courts.

Vanuatu established Island Courts consisting of three or more justices knowledgeable in *kastom*, at least one of whom was to be a *kastom* chief residing in the court area (Bulu 1988). Lawyers were excluded from proceedings. Island Courts administer *kastom* prevailing in their area so far as it is not in conflict with any written law or contrary to justice, morality and good order. Despite calls for their reinstatement, the Fijian Courts that applied *kastom* to local disputes during the colonial administration were abolished in the lead-up to independence (Nadakitavuki 1988). Shortly after independence in 1975, Papua New Guinea established a system of Village Courts. The primary role of these courts is to “ensure peace and harmony” and endeavour to obtain “amicable settlement of disputes” and apply custom “as determined in accordance with the Native Customs (Recognition) Act of 1963” (Village Court Act). They are presided over by village leaders appointed as Village Court magistrates. Under the enabling legislation, the Court should attempt to reach a settlement through mediation prior to exercising its formal jurisdiction. Magistrates can impose fines, issue community work orders, or order that compensation be paid to an aggrieved party. While designed primarily for rural areas, these courts now also operate in most urban centres.

Alongside the courts and tribunals of varying degrees of formalism established by the state, numerous unofficial forums for dealing with local disputes with little or no formal connections to state institutions continue to exist. These have not been supplanted by the gradual expansion of the state’s regulatory system and they remain an important source of continuity linking the present to the colonial and pre-colonial pasts. Chiefs, elders and other local authority structures, such as *komitis*, also play a significant role in the settlement of disputes and maintenance of order in most rural communities. While the state constitutes a remote presence in the lives of many rural inhabitants, the Churches provide the most tangible manifestation of a national civil society at local levels and play a significant role in the mediation of local disputes in many areas. For villagers living far from the urban centres, encounters with state law often take the form of heavy-handed police operations or occasional exposure to the complexities of formal justice processes. These experiences reinforce perceptions of difference and incompatibility between local and state processes of social control rather than promoting the complementarity envisaged by the Constitutional fathers.

The effectiveness of informal processes of dispute resolution and social control is largely a consequence of the degree of social cohesion of local communities. Rapid change has had a seriously corrosive impact in many places. This is most apparent in the vicinity of large-scale extractive or commercial projects, along major highways, and in the urban and peri-urban areas. Declining levels of respect for village leaders and customary authority are evident, particularly among youngsters exposed to the urban oriented education system and the hedonistic values of global culture. Likewise, alcohol and other forms of substance abuse have weakened social cohesion in both rural and urban

communities, as well as becoming a major source of violence against women and children.

The reach of state justice in the Melanesian countries has been constrained by the challenges of geography, lack of resources, and the escalating and diverse demands placed upon law and justice agencies. Disappointing economic performance has limited the capacity of governments to strengthen and extend their law and justice systems in line with population expansion and other developments. Given the low base from which they started, this has had a major impact on their effectiveness. For example, at the time of PNG's independence in 1975, the coverage provided by the 'national' police force extended to only 10 per cent of the total land area and 40 per cent of the population. The force of approximately 5000 officers has not grown significantly since independence despite the population having more than doubled to 4.6 million people in the intervening years. While successive governments have promised to spend more on policing in the face of growing law and order problems, necessary funds have not been forthcoming. As well as hampering operational capacity, this has contributed to low morale and serious lapses of discipline among police personnel. The courts have tended to fare better, particularly at the higher levels of the hierarchy where sensitivities about protecting judicial independence are most apparent. Shortage of resources has nevertheless impacted on the performance of lower courts that deal with the majority of cases involving ordinary citizens.

Papua New Guinea's Village Courts provide a good illustration of both the advantages and the limitations of attempts to institutionalise informal approaches to dispute resolution. Viewed by some as a relatively cheap and accessible alternative to the more formal court system, there are now 1,082 Village Courts covering approximately 84 per cent of the country. They are by far the busiest courts in terms of the sheer volume of cases dealt with and remain the most accessible forum for dealing with minor disputes. Some observers have complained about the formalism of Village Court proceedings. Others point out that this formalism is more a reflection of local expectations than a deliberate ploy by magistrates to slavishly imitate the national court system. Given that Village Courts usually operate alongside a number of unofficial community-based forums, many villagers expect them to be more formal in character.

The operation of these Courts varies significantly between different parts of the country. This variation is, in part, evidence of how well these Courts have adapted to local circumstances as intended originally. At the same time, adaptability can also become a source of injustice. For example, there have been many complaints of Village Courts using *kastom* to discriminate against women and children, particularly in parts of the Highlands. Women accused of adultery have been imprisoned while their male accomplices have gone unpunished. Likewise, children have reportedly been locked up for minor offences. These abuses have attracted considerable criticism, not least from women's groups and human rights advocates. In this situation, Village Courts have become overly responsive to local power structures that are almost invariably dominated by older men. In the process, they have served to compound the grievances of the least powerful groups in the community, notably women and children. Such decisions are not only inequitable and discriminatory; they are also in breach of

state law. They often involve Village Court magistrates exceeding their jurisdictional powers under the Village Courts Act, and they are also likely to be contrary to human rights provisions under the Constitution.

However, the solution to this problem is not simply to abandon the Village Courts as an institution that inevitably promulgates divisions and inequities rooted in traditional or customary beliefs. This would be to ignore the significant contribution made by these Courts to the maintenance of order at local levels. The legislation establishing Village Courts views them as part of a larger national system and provides for the review of their decisions and supervision by District Court magistrates. In practice, lack of resources and inadequate systems of supervision have contributed to these problems. Confusion as to which level of government is responsible for funding Village Courts under the Organic Law on Provincial and Local Level Government has aggravated these problems. In some Village Court areas, magistrates are charging litigants up-front fees for dealing with their disputes on the grounds that they have not received their government allowances, in some cases for several months. In 1999, 130 District Court magistrates were expected to supervise the work of 1,082 Village Courts. This is quite unrealistic, particularly given the inaccessibility of many rural Village Courts and other constraints on District Court magistrates. The remedy for these deficiencies of the Village Courts lies in strengthening their linkages to the formal court system, principally through the provision of adequate and practical processes of review and supervision.

Dissatisfaction with the workings of formal criminal justice systems has grown as their deficiencies have become more apparent. It is clear that many ordinary citizens have little faith in either the efficiency or fairness of formal justice. There is a popular perception of a widening gap between 'law' and 'justice' in many places and a view that those with power and influence can manipulate the formal system to their own advantage. In this respect, the deficiencies of the state system relate as much to its lack of legitimacy, as to its lack of institutional capacity. In Vanuatu, local perceptions often emphasise the limitations of "white man's" justice and the superiority of *kastom*. This is particularly evident among young people who provide the main target of 'law and order' solutions. The following recommendation appeared among resolutions of a recent National Summit on Juvenile Justice in Port Vila:

- "1. Young people of Vanuatu want custom laws and custom courts to deal with them when they commit offences. This is because:
  - (i) they are mistreated by the police when taken into their custody;
  - (ii) the state law court process is too expensive and takes too long;
  - (iii) young people are not stigmatised by going through the custom court process, and have the opportunity to redeem their reputation;
  - (iv) young people know their chief and the other members of their community who witness the custom court, and are therefore not intimidated to the degree that they are by state courts;
  - (v) only custom law can fix problems and restore peace to communities"

The fragility of formal law and justice institutions and processes in parts of the Pacific Islands is undeniable and has been demonstrated most dramatically in

the calamitous collapse of the Solomon Islands police during the recent conflict in that country. As a significant regional donor, Australia has been involved in major capacity-building projects with the law and justice sector in PNG for many years and has extended this work to other Pacific Islands countries. While this assistance is critical and necessary, it is equally important to strengthen those informal mechanisms and institutions that are capable of dealing with minor infractions and conflict at community levels. Empowering communities to take responsibility for maintaining peace at local levels will enable the formal sector to concentrate on more serious matters. Building appropriate linkages between formal and informal sectors will help build the social foundations and legitimacy whose absence is a significant contributor to the weakness of the former. This is not simply a question of returning to some romanticised vision of customary regulation but entails a careful approach to building the capacity of the informal sector in a way that is consistent with the rule of law and respect for human rights.

## Conclusions

For many Western-trained economists and technocrats, the resilient 'cultures' of Melanesia are often viewed as a major source of the inefficiencies and incapacity of state structures and a hindrance to 'rational' processes of economic accumulation and growth. A powerful counter message is how these very same 'cultures' can be an important part of the solution to current problems. There is a distinct resonance between restorative processes and indigenous traditions of dispute resolution, peacemaking and reconciliation. The implicit proposition here is that approaches to conflict that work *with* and *through* local cultural beliefs and practices hold out greater prospect of success than those that work *against* them. This is not a case of returning to some idealised world governed by pre-colonial *kastom*, even were that possible. *Kastom* can be oppressive and discriminatory, just as it can be respectful and empowering. For most of our contributors, the way forward is neither a singular reliance on *kastom* or Western justice but a creative integration of the best of both.

While drawing attention to the limitations of narrow state-centred approaches to justice in the Melanesian context, developing restorative approaches should not be seen simply as an alternative to building the capacity of state institutions. On the contrary, the promotion of restorative strategies can be an important way of enhancing the effectiveness of the latter. Lack of state capacity is often viewed as a 'technical' problem to be remedied by strategic inputs targeted exclusively at state institutions. The question of a state's relations to its wider society and the extent to which these might themselves be a source of its limited capacity is rarely raised. At the same time, it is clear that a large part of the weakness of state institutions in the Melanesian countries, including the formal justice system, is as much a consequence of their limited legitimacy, as it is a shortage of resources, 'technical' or otherwise. Strengthening the capacity of the formal justice system requires that priority be given to improving relations with the wider society it exists to serve. Community participation in justice processes, as entailed in restorative approaches, is a necessary part of building the social foundations whose absence is a significant contributor to the current weakness of state processes. Another attraction of restorative initiatives is the prospect they hold out of more direct engagement with the underlying causes of conflict,

including the structural conditions that contribute to crime (e.g. by providing pathways back to legitimate economic activities). An important source of the weakness of formal justice lies in its inability to address broader issues of social justice. Indeed, many local critics view the formal system as reinforcing underlying injustices. The potential to engage with social justice issues provides another way of building the legitimacy and effectiveness of justice and conflict resolution practices.

Appropriate support and engagement with 'traditional' and informal justice systems can provide an important way of enhancing access to justice on the part of rural and disadvantaged urban communities. There is no single formula for doing so and account must be taken of the particularities of different social and national environments.

## Appendix

### Examples of Informal Justice Initiatives in Papua New Guinea

#### *Kup Women for Peace, Simbu Province*

One of the most remarkable peacemaking initiatives in recent years has been the work of the Kup Women for Peace (KWP) in the volatile Kup sub-district of Simbu Province in the Highlands. The sub-district comprises approximately 25,000 people divided into 12 distinct tribal groupings living in a relatively undeveloped part of rural Simbu. Feeder roads connect with the Highlands Highway but their condition is generally poor. People survive through a combination of subsistence agriculture and cash cropping. Coffee is the major cash crop though average incomes tend to be low owing to a combination of poor road conditions, lack of market infrastructure, and law and order problems. Intermittent fighting has occurred between different tribal, clan and sub-clan groups since the early 1970's and the area has acquired considerable notoriety for its 'cowboy country' reputation. Fights have often been triggered by relatively minor disputes including adultery and drunken brawls but also by rapes, murders and election-related disputes. Fighting has increasingly involved the use of high-powered firearms and has led to many deaths and serious injuries, as well as extensive damage to property, gardens and livestock. Government services are withdrawn when major fighting erupts and this has deprived many of basic services including health, education, and policing. There has also been extensive criminal activity unrelated to the fighting that has emerged but also the use of guns. As elsewhere in the Highlands, women and children have suffered disproportionately from high levels of violence and insecurity.

A group of local women activists formed the Kup Women for Peace in March 2000. Their stated mission was to create a peaceful society and promote sustainable livelihoods. Three main goals were set:

- To stop tribal fighting;
- To protect women's human rights; and
- To promote sustainable livelihoods.

In order to achieve these goals, KWP adopted the following strategies:

- Increase local understanding of the dangers and adverse outcomes of tribal fights and all forms of violence against women and children through awareness and education, conflict resolution training, and some referral work;
- Creating an environment conducive to the elimination of violence against women, including tribal fighting, by mobilising community support and advocating legal and policy reform;
- Assisting in the introduction of appropriate technology to promote self-reliance and income generating activities among the Kup community.

Through their patient and extraordinarily courageous work KWP have had a major impact in the Kup area. They have received support from many local leaders, particularly older people, and others who have grown tired of the fear, insecurity, violence, and lack of development. Educated leaders from various groups have formed the Kup Restoration and Development Authority to help direct the rebuilding work and ensure a sustainable peace. People are now able to move around beyond their own tribal land without fear of attack. Communities that had previously been at war with each other have reconciled and are slowly beginning to regenerate. Families who were displaced because of the fighting are beginning to return. Government officials have been re-visiting the area after many years of absence to prepare for the restoration of services. A small number of police (4) returned in mid-2001 and this number has since grown (now 7). As the larger community has begun to mobilise, KWP has continued to work with women on health issues, food production, education, and human rights. KWP organised a major event to celebrate International Human Rights Day on 10<sup>th</sup> December 2002 attended by approximately 4,000 people including representatives from the Simbu provincial government. In August 2003, KUP organised the first of a planned series of surrender ceremonies where local criminals surrendered publicly before a large audience including representatives from the provincial government, police, and magistracy. There have been no major fights in the area since KWP began their campaign.

## ***The Surrender of Criminal Gangs***

An incipient restorative practice that is in many ways unique to Papua New Guinea is the phenomenon of criminal gang surrenders. Surrenders have occurred regularly in different parts of PNG over the years. Unusually, they are a resolution to crime proposed and initiated by the criminals themselves! Community and church groups often act as brokers, engaging in protracted negotiations with leaders of local criminal gangs. Gang leaders negotiate the conditions of their surrender and abandonment of crime. These are likely to include a plea for leniency in the event of subsequent prosecutions, as well as access to legitimate income-generating opportunities. A formal agreement will be drawn up and signed by gang members, community representatives, local government officials and, often, by the police. The gang will surrender formally at a public ceremony and hand their weapons over to the police. In most cases, those who surrender will be less serious offenders who genuinely wish to abandon crime in favour of more productive activities. In addition to the obvious issue of moral hazard, the main challenge with this innovative strategy is making it sustainable by linking it to skills training and sustainable forms of support.

### ***Example – The Rigo Informal Sector Youth Association***

The Rigo Informal Sector Youth Association was registered with the Investment Promotion Authority in April 2003. In the previous year, 30 young men from the Rigo District (Central Province) who had been involved in crime along the Magi Highway formally handed over their weapons at a surrender ceremony at Kwikila. The youths made a public apology for their criminal activities while expressing their frustrations at lack of development and income generation opportunities in the Rigo area. The surrender was witnessed by the Minister for Social Welfare, Lady Carol Kidu, senior officers of the Central Province police, the Rigo District Administrator, and members of the community. A Memorandum of Agreement was signed between the youths and the Minister, as well as by representatives from the district administration, the church, the Acting National Youth Commissioner, and the Central Police Commander. The Welfare Department, through the National Youth Commission, sponsored training courses for the youth in people skills, win-win mediation, and restorative justice, run by the Peace Foundation Melanesia. After the graduation, the Port Moresby City Mission agreed to assist the group start a duckling project. The group is currently seeking additional assistance to expand their activities to other areas.

### ***Saraga Peace and Good Order and Community Development Committees, Port Moresby***

Saraga (6-Mile Settlement, Port Moresby) used to be a place police only went during daylight usually to search for criminals. It had the reputation of being one of the most lawless places in the city. Conflicts between the approximately 34 ethnic groups living in the settlement were commonplace. The total population is approximately 18,000 people. Most residents are unemployed and survive precariously on the fringes of the informal urban economy. A minority are employed as security guards, domestic servants, and in other low income occupations in Port Moresby. Saraga Peace and Good Order and Community Development Committee (SPGO & CDC) was established in 2001 after a little girl was killed by *raskols* in the settlement. This committee is made up of the chairpersons of 34 Peace and Good Order sub-committees representing the various ethnic groups in the settlement. The sub-committees try and settle disputes within their ethnic groups. Disputes between groups, more serious offences, and matters affecting the entire settlement community are dealt with by the larger Saraga Peace and Good Order and Community Development Committee. The initial aim of these structures was to reduce crime and conflict at the community level through mediation and the restoration of peace between ethnic groups in conflict.

The SPGO & CDC has established good working relationships with local business houses and the 6-Mile police. Various companies (e.g. Downer Construction Pty Ltd, Hebou Construction Pty Ltd, Lark Construction Pty Ltd) located in the Saraga/6-Mile area have been the target of criminal activities in the past but these activities have largely subsided as a result of the work of the SPGO & CDC. The management of Kuima Security Services Ltd attends SPGO & CDC meetings on a regular and voluntary basis, and provides technical advice and support to the group as part of its contribution to the community. Peace Foundation Melanesian (a local NGO) has provided training in conflict resolution and restorative justice to various members of the group over the years. These members, in turn, have applied these skills in their work in the community.

Previously there were no services such as water and electricity in the settlement. This has now been made possible after negotiation between SPGO & CDC, Eda Ranu (water), and PNG Power (electricity). The group organised the community to pay the rents to the service providers, as well as for land rentals to the traditional owners of the land occupied by the settlement. The group has been so successful in mediating disputes that it was recently selected by the Port Moresby Family and Children's Court to take part in the Juvenile Justice Pilot Project at the beginning of 2003. The goal of the juvenile mediation program is to divert first-time and minor juvenile offenders away from the formal justice system and back to the community for mediation. The court was interested in the restorative justice techniques used by SPGO & CDC in dealing with conflicts. If the trial is successful, then the method may be extended to other courts.