Constituting Vanuatu: Societal, Legal And Local Perspectives,

Benedict Sheehy, RMIT University
Jackson Maogoto, University of Manchester

Available at: https://works.bepress.com/benedict_sheehy/12/
Constituting Vanuatu: Societal, Legal and Local Perspectives

Benedict Sheehy* and Jackson Nyamuya Maogoto**

Abstract
Governance in Vanuatu has been a source of concern for Australia as it forms part of Australia’s ‘Arc of Instability.’ Vanuatu has adopted a modified Westminster system as that system is often advocated as the model for constitutions and governance around the world. In various former colonies local populations were expected to simply absorb its liberal democratic principles apparently on some assumption that such principles were an innate part of human nature. Most readings of history would come to a different conclusion. Vanuatu illustrates this error and the complexities of a society that not only creates a broad challenge for governance, but undermines the credibility of simplistic, universalist approaches of liberal solutions, including institutional transplants, to these challenges. This paper asks questions about the nature and status of law in and governance of society in Vanuatu and then examines various answers, from broad social perspectives and academic sources to interviews conducted among members of the Vanuatu community. It concludes that the system fails as insufficiently attuned to the realities of the society that makes up Vanuatu. That is to say the system fails to effectively address the needs and interests of the population, and fails to sufficiently incorporate the indigenous systems in situ.

* Benedict Sheehy, BTh, MA, LLB, MA, LLM, is Senior Lecturer, Law, RMIT University, Melbourne (Australia). Benedict practiced law in Canada and has taught in Canada, Mexico, Hong Kong, Malaysia and Australia. His research interests include corporate law, international law and jurisprudence.

** Dr Jackson Nyamuya Maogoto, LLB, LLM, PhD, LLM, GCertPPT, is Senior Lecturer, School of Law, University of Manchester (UK). Jackson hails from Kenya, has studied in Kenya and the UK and has taught in Australia and the UK. His research interests include international law, human rights and jurisprudence.
1. Introduction

Vanuatu, like many other South Pacific nation states, is a nation state constituted by the adoption of a Westminster-based constitution. Also like those states, it suffers from a number of economic, social and political problems. Some of these problems can be traced to the long standing issue of the existence two parallel, discrete and unintegrated, simultaneous governments operating in a single nation state. This state of affairs is an interesting problem for those proposing to impose a nation state type solution to the governance problems of coordination and control over a group of people. The basic problem faced by governments in such places is that the pre-European tribal forms of governance are strong, vibrant and effective—indeed what twentieth century jurist Hans Kelsen would recognise as necessary conditions for the existence of valid legal systems—because those forms of governance are an integral part of the fabric of those tribal societies.

At one level, the situation can be explained by reference to Max Weber’s ideas on social organisation. Weber argued that there were three main types of governance in society. These he identified as ‘charismatic domination’ (familial and religious), ‘traditional domination’ (patriarchs and feudalism), and ‘legal domination’ (modern law, state and bureaucracy). Each of these forms of organisation relies on a different source of power for social control. In those societies where the tribe has been destroyed by the changes of modernity—the end of feudalism, the rise of capitalism, and the rise of the nation state—forms of governance other than ‘charismatic’ and ‘traditional’ are not only imaginable, but desirable. Indeed, to avoid despotism, corruption and oppression particular institutions restraining government power are necessary. This restraint on government, referred to as the rule of law, is law’s second salutary contribution to the maintenance of democratic nation states—the first being the creation or constituting of the legal entity of the nation state by way of a constitution. However, to suggest that ‘legal domination’ is a form suitable and sufficient for all societies, including those societies with a tribal system still in place and

---


effective, is to ignore the reality on the ground.

Despite this apparently obvious fact, the social Darwinists of today, that is neo-classical economists and neo-liberal politicians, continue to insist that legal domination is the evolutionary and hence inevitable end of human development. There are two streams of social Darwinian discourse: marketbased solutions to distribution of economic goods and services; and liberal democratic solutions in terms of distribution of governance power. This social Darwinian view is espoused by powerful institutions in the West, such as the World Bank in its 'good governance' discourse. The idea is that the Western institutions of governance, ie free markets and liberal democracy, are sui generis, that is a selfcreating or spontaneous order. Nature, they argue, will bring these forms of order about and it is only consistent with nature that Western powers act to create and support efforts to bring such governance regimes about. Law is the foundation for the liberal democratic state and provides the basis for a market economy. Such states have constitutions which not only create the nation state and provide the already noted empowerment of and limitation on government, but also grant governments power to create law to provide a private wealth-generating private property regime forming the foundation of market based economies.

This liberal view is based on the notion that every individual has a basic right of liberty—the freedom to act as one chooses. This right finds its expression on a grand scale of governance through some form of democracy. Each person is presumed to have some innate desire to govern and to have a right to contribute to the governance of society as a whole. Further, private property rights creating the basis for the market economy are deemed the unassailable right of each individual. Yet seldom is it asked: ‘Is this view shared by all members of the human race all over the planet?’ Reflection on this question suggests that some other form of democracy or indeed governance may well be operative in some nations, and that where liberalism wishes to extend itself it must work in conjunction with other forms of governance and economic system if it is to be consistent with its own aspirations of respecting the views of the people in question.

---

4 Huffer and Molisa, op cit note 1, p 3.
5 Hayek discusses the price mechanism as a ‘marvel’, a spontaneous response solving certain economic problems. For the price mechanism to work, of course, one must have well functioning markets. F A Hayek, ‘The Use of Knowledge in Society’ (1945) 35 (4) American Economic Review pp 519-30.
6 Argued most eloquently in Francis Fukuyama, The End of History and the Last Man (Free Press, New York, 1992) following Alexandre Kojève among others.
7 The lack of such is evident in P Sack’s comment: ‘The bells of autochthony have a hollow ring to it in the Pacific. The cycle which started two hundred years ago in North America and France seems to be reaching its mechanical completion instead of giving way to much needed new departures.’ P Sack, ed, Pacific Constitutions: Proceedings of the Canberra Law Workshop VI (ANU Press, Canberra, 1982), p 1.
It is a truism to state that governance arrangements must reflect the cosmological beliefs of the people governed. In this regard it is significant to note that the myths of the South Pacific express a cosmology markedly different from the myths of Western liberalism. South Pacific myths follow a cosmic ordering of gods, lands, seas, collective goods, chiefs and people, not the cosmology of nation-states, democracy, elections, individualism and liberalism. Believers in one cosmology do not hanker after forms of governance appropriate to another cosmology. In one cosmology, leadership is conceptualised as the innate role of a certain category of people rather than a career choice. In the same way a fisher’s role in life is to fish, it is the leader’s role to lead. Accordingly, just as a non-fishing person does not tell the fisher how to fish, it is not a non-leader’s role to tell the leader how to lead.

The effects of the clash between cosmologies can be seen in an examination of the constituting and constitutions of various South Pacific countries. For example, Peter Larmour’s study of the imposition of Western institutions, including legal systems and constitutions, on the South Pacific catalogues a wide array of problems. Anthony Regan, in a more detailed examination of four Melanesian constitutions—Fiji, PNG, Vanuatu, and the Solomon Islands—shows with marked clarity that the underlying issues related to the clash between the indigenous culture and the imported constitution-based legal system will undermine any such grand project. Explaining one aspect of the problem, Regan notes that, contrary to the universalist liberal assumption, Westminster-based constitutions were not ahistorical; rather, they had distinctive socio-historical roots which provided fertile ground for their conception, rooting and growth. In particular Regan notes that an emergent middle class gave rise to the notion of separate public and private interests, and that this development took place over a number of centuries. This separation forms the necessary foundation for a constitution dealing with the limitation on government action, succession and accountability. Without such basis, ideas of efficacious constitutions are a
fantasy when run up against authority emanating from violent power. Western liberal democratic governments were founded by civil war and military conquest, and are not constrained in military action by constitutions and courts. Yet the Western expectation is that governments elsewhere will accept limits on their actions based on some purported belief in separation of powers doctrine or a *sui generis* understanding of liberal democratic ideals.

This leads to the central question of this study: how is a society like Vanuatu constituted and is law, as the social ordering of Western liberal democracy, sufficient to create a functioning liberal democratic society? Implicit in this question is the larger question of whether a Western-style liberal democratic constitution and its institutions are adequate to address humankind’s governance issues in all parts of the world. According to liberal theory the constitution should do just that, providing a fertile ground in which the institutions will take and blossom. Yet one must question whether this is the case, and whether things appear the same from the heights of the throne of law’s empire as they do from the perspective of law’s subjects eking out a living from the dirt. On the ground in Vanuatu it would appear not to be the case. In Vanuatu, as in most of Melanesia, the emperors on law’s throne have been European powers with cultures markedly different from the cultures of the majority living on the islands. The European powers under domestic and international pressure, and at times in response to violent rebellion, have drafted and prepared constitutions which then ‘surprisingly’ fail to live up to their promises of the creation of civil society, liberal democracy and private wealth though the institutions of Western liberalism.

In this article we will turn to examine the constitution of a society from social, legal and local perspectives and the potential for law in such an endeavour. Our examination and suggestions are based on both documentary research and a series of interviews conducted in Vanuatu in 2007.

---


14 See, for example, Martin Krygier’s discussion in ‘The Uses of Civility’ in Martin Krygier, *Civil Passions: Selected Writings* (Black Ink Press, Melbourne, 2005) p 163.


17 See the interesting discussion in Crocombe, *op cit* note 10, pp 127-131.
2. Societal Perspective

Vanuatu was not recognised as a nation state by the international community until 1980. Yet, to state the obvious, it was in existence well before that time. It is a collection of 83 islands in the Melanesian archipelago and has been inhabited since about 1,500 BCE.\(^{18}\) European explorers came to the islands some 3000 years later, in the early 17th century CE. They began settling there in the late 18th century. Plantations of cotton, maize, and sugar were established from 1863.\(^ {19}\) The islands and their inhabitants were placed under a joint administration by the European powers, Britain and France. But what is Vanuatu? To answer this question one must move away from the politico-legal notion of a ‘republic founded on a constitution’ to examine the social order on the ground.\(^ {20}\)

From a social perspective the islands are inhabited by a few hundred thousand people who form some one hundred different ethnic groups, each with their own distinctive culture including political ordering, languages (more than one hundred languages are still in use in the nation),\(^ {21}\) customs and arts. From the traditional Naghol or ‘land divers’ of Pentecost Island in the north, who inspired today’s popular bungee jumping, to the active volcano Yasur of Tanna Island in the south, with its related dances and rituals, each island retains its distinctive culture. The differences are not simply matters of material culture. Indeed, the differences go deep into the social order. For example: in the north, chiefs tend to be chosen on the basis of wealth and power, whereas in the south, chiefdom is a hereditary office.\(^ {22}\) This abundance of diversity is difficult to imagine in an island grouping with a land mass of some 14,760 km\(^2\) in an area of the ocean about 900 kilometres by 1200 kilometres.\(^ {23}\) The archipelago’s inhabitants rely

---

\(^{18}\) Crocombe, op cit note 10, p 45.


\(^{21}\) Crocombe, op cit note 10, p 445. Vanuatu is described as ‘one of the most culturally diverse nations in the world’ in Hill, ‘The Vanuatu Ombudsman’ in Jowitt and Cain, *op cit* note 11, p 74.


\(^{23}\) The ten largest islands are, in descending order: Espiritu Santo (3,956 km\(^2\)), Malakula (2,041 km\(^2\)), Efate (900 km\(^2\)), Erromango (888 km\(^2\)), Ambrym (678 km\(^2\)), Tanna (555 km\(^2\)), Pentecost (491 km\(^2\)), Epi (445 km\(^2\)), Ambae or Aoba (402 km\(^2\)), Vanua Lava (334 km\(^2\)).
largely on subsistence agriculture and fishing, and remain connected to their traditional, clan-based, island-based ethnic identities. In other words, Vanuatu is an ethnically diverse country—a multi-cultural collection of societies with all the benefits and challenges that entails. This diversity is neither a new phenomenon nor an unprecedented problem. Indeed, the premier historical figure of the nation is Roy Mata, a 13th century chief, warrior and diplomat who brought peace to the warring nations through diplomacy. The singular significance of this accomplishment is attested to not only in surprisingly accurate folklore which survived more than half a millennium.\(^{24}\) Despite these differences, the peoples share culture as well through such things as pigs, trading grass skirts, drinking of kava, and the drawing of sand pictograms indicating such themes as kinship and numbers.\(^{25}\)

Yet culture is not some form of rigid, fossilised tradition which allows no divergence from the norm. Indeed, one of the contributions of archaeology has been a clearer understanding of the nature and breadth of such changes.\(^{26}\) Although the traditional form of governance across the societies of Vanuatu would be described in Weberian terms as ‘traditional domination’, the European invasion altered radically the dominant focus of culture, social activity and social ordering. Today’s Vanuatuan society bears evidence of the ongoing stresses resulting from that invasion.\(^{27}\) The European liberal democratic social organisation with its individualistic, capitalist focal points has created significant challenges for those living with the traditional worldview of traditional domination. The creation of the nation state of Vanuatu thirty-odd years ago did not suddenly sweep away millennia of diversity. Indeed, as noted by noted


\(^{27}\) For an excellent overview of these changes see the masterful work of Crocombe, *op cit* note 10. For a review of this change in Micronesia, a culture formed in part by Melanesian cultures, see the classic B Finney, Polynesian Peasants and Proletarians (Schenkman Press, 1973), and for a more recent treatment from 1950 to 2000, see Francis X Hezel, *The New Shape of Old Island Cultures: A Half Century of Social Change in Micronesia* (University of Hawaii Press, Honolulu, 2001). For changes in law and culture, see Jean Zorn, ‘Issues in Contemporary Customary Law: Women and the Law’ in Jowitt and Cain, *op cit* note 11, pp 95-124.
Australian scholar Stephen Firth: ‘[Melanesian countries] consist of hundreds of different identity groups thrown together by the experience of colonial rule but with little else to foster a sense of common national destiny.’

3. Legal Perspective

(a) Early European System and Developments

Vanuatu, known prior to its independence as the New Hebrides or Nouvelle Hebrides, was considered a colony of both the British and French Empires. Neither found the island group to be of much significance, as demonstrated by a fledgling population of just 299 French citizens and 146 British citizens in 1901. The colony was ruled by two resident representatives who cooperated by setting up a third body to administer the colony jointly. Thus there was a British Residency, a French Residency and a Joint Condominium Government. It was ruled under ‘The Condominium’ from 1906 until independence in 1980. While the Condominium served the interests of the ruling powers, it may well have established a view of law as a series of commensurate alternative systems to be applied as seen fit. Indeed, it was a common practice under the Condominium to shop between the legal systems for favourable decisions.

Keith Woodward, an administrator with the British Residency for twenty-five years, notes that the Condominium was ‘far from constituting a unified system of government’. He explains it as follows: ‘British and French nationals were to be subject to the authority of their own governments and to come under their own national law and courts. Neither power could exercise separate authority over the indigenous inhabitants, and the New Hebrideans could not, while residing in the [Island] Group, acquire British or French status’.

Eventually a Joint Court was set up, but that too lacked legal actions as between Melanesians, leaving jurisdiction over them to the naval commanders who also conducted retaliation raids against the same Melanesians. In other words, the legal system was a shambles.

(b) Laws, the Constitution and Independence

Relations between the Europeans and the indigenous were marked by violence from the outset, but this particularly escalated once it was clear that the

28 Firth, op cit note 9, p 3 (emphasis added).
30 See Job Delesa in ibid, pp 189-191.
Europeans were not prepared to respect prior indigenous occupation of the land. Violence was threatened and did on occasion occur, although the two powers which governed the then colony had agreed to some form of withdrawal. Independence in Vanuatu was not gained without struggle. The people had to organise under the ever watchful eye of the governors who shared the Anglo-French Condominium.

Upon gaining independence (for the second time, it should be noted, as the colony at Port Vila was given the right to self-governance in 1889 as ‘Franceville’), Vanuatu took on a legal system drawn predominantly from the law in force at the time of independence. That was the UK law in the Western Pacific which provided that ‘the civil and criminal jurisdiction of the High Court [of the Western Pacific] shall, so far as circumstances admit, be exercised upon the principles of and in conformity with: ... the substance of the English common law and doctrines of equity’.

Upon achieving independence the newly formed nation state, like the other newly independent states in the South Pacific, adopted a constitution. A constitution is purportedly a special kind of document. As noted, it is to be the foundation document of a nation state, creating or ‘constituting’ that nation state, setting up authority structures in society, granting powers and placing limitations on the people participating in the governing of society. It creates a government of the state, and as Weber has it, ‘legal domination’. The installation of a constitution has certain consequences, including an acknowledgement of certain individuals’ powerful positions in the existing social structure and an empowerment of those individuals by law, that is a reifying as well as reformation and institutionalisation of their power. In Vanuatu the constitution

32 Ibid, p 22.
33 See, for example, the first hand accounts of marine Colonel Carter and British Police office Cook, in ibid, p 2.
35 Donald Kalpokas in ibid, p 345.
36 See the first hand account of Vanuatu’s first president, Ati George Sokomanu, and former Prime Minister, Donald Kalpokas, in ibid, see particularly Sokomanu at pp 479-482 and Kalpokas at pp 343-5.
had been drafted more or less by the reigning European powers,\textsuperscript{39} although with input from locals.\textsuperscript{40} Acceptance of the European-influenced constitution by local people pursuing independence was a condition for the grant of independence.\textsuperscript{41}

The constitution itself was based on UK and French principles. The drafters explicitly recognised its pluralistic origins. Section 95 states as follows: ‘... all Joint Regulations and subsidiary legislation made under the joint regulations which were in force immediately before independence ... [and] British and French laws in force or applied in Vanuatu immediately before independence ... continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom’. Indeed, in certain areas of law, the legal system recognised, in addition, church law.\textsuperscript{42}

The constitution, as part of the new legal system formed upon independence, has been described as one of the ‘foreign flowers’ of the South Pacific.\textsuperscript{43} Despite its foreign origins the constitution of Vanuatu was not drafted without special consideration of the powers that existed. Indeed, Chapter 5\textsuperscript{44} creates a special parliamentary body not found in Western countries. That body, which is

\textsuperscript{39} Larmour observes that the Colonial executive often exercised their powers in a less than even-handed manner, favouring the settlers over the indigenous people: Larmour, \textit{Foreign Flowers}, \textit{op cit} note 10, p 45, and the former Inspecteur-General Jean-Jacques Robert noted France’s interests leading its whole approach to the sovereignty issue, in part requiring the local replacement government to accept certain priorities prior to agreeing to a hand-over of power. Inspecteur-General Jean-Jacques Robert in Bresnihan and Woodward, \textit{op cit} note 29, p 427.

\textsuperscript{40} Inspecteur-General Jean-Jacques Robert summarises it as a ‘constitutional committee, composed of representatives of the political parties, the custom chiefs, representatives of the Churches, and of village communities, succeeded, with the help of two experts in constitutional law ... on the fundamental charter of the future state.’: \textit{ibid}, p 431. Further detailed discussion is in Woodward’s ‘Historical Notes’ in the same volume, pp 66-67. The reality of consultation and participation by local people in constitution drafting has been questioned in J M Herlihy, ‘Rituals, Rhetoric and Reality: Decolonisation and Associated Phenomena’ and N Meller, ‘Technical Expertise and Cultural Differences: The Consultant’s Role in the Pacific Examined’ all in Sack, \textit{op cit} note 7; Larmour, \textit{op cit} note 10.

\textsuperscript{41} Inference drawn from former Prime Minister Donald Kalpokas in Sack, \textit{op cit} note 7, pp 346-7.

\textsuperscript{42} See, for example, the discussion of marriage law in Sue Farran, ‘Pigs, Mats and Feathers: Customary Marriage in Vanuatu’ (2004) 27(2) \textit{The Journal of Pacific Studies} pp 245-276.

\textsuperscript{43} Originally used to describe the constitution in Fiji, applied more broadly to the South Pacific by Larmour, \textit{op cit} note 10, p 80.

common to a number of South Pacific nations, is the Council of Chiefs.\footnote{Larmour, \textit{op cit} note 10, p 22. See a critical discussion of the role of chiefs in South Pacific in legal terms in post-independence society in G Powels, 'Traditional Institutions' in Sack, \textit{op cit} note 7.} To have a sense of that body, one cannot do better than to quote the sections pertaining to same in their entirety.

**National Council of Chiefs**

29. (1) The National Council of Chiefs shall be composed of custom chiefs elected by their peers sitting in District Councils of Chiefs.
   (2) The Council shall make its own rules of procedure.
   (3) The Council shall hold at least one meeting a year. Further meetings may be held at the request of the Council, Parliament, or the Government.
   (4) During the first sitting following its election the Council shall elect its Chairman.

**Functions of Council**

30. (1) The National Council of Chiefs has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages.
   (2) The Council may be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament.

**Organisation of Council and Role of Chiefs**

31. Parliament shall by law provide for the organisation of the National Council of Chiefs and in particular for the role of chiefs at the village, island and district level.

**Privileges of Members of Council**

32. (1) No member of the National Council of Chiefs may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him in the Council in the exercise of his office.
   (2) No member may, during a session of the Council or of one of its committees, be arrested or prosecuted for any offence, except with the authorisation of the Council in exceptional circumstances.

The constitution grants this body a carefully circumscribed competence. It provides the right to ‘discuss all matters relating to custom and tradition’. The constitution also grants the right to ‘make recommendations for the preservation and promotion of ni-Vanuatu culture and languages’. Further,
the constitution assigns it a consultative role ‘on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament’. The Council has no legislative, judicial or executive roles. Further, it has no monitoring, reporting, investigative, adjudicative or enforcement powers. In legal terms, it is an empty, powerless body—providing advice when the politicians desire it. In fact, despite the constitutional role granted to the Council of Chiefs, it appears that the Council is generally not consulted on legislation. 46

The constitution’s silence, however, can be read in another way. While not empowering the chiefs as actors within the national sphere, they are not precluded from acting within their traditional spheres of power, namely, at local regional and village levels. 47 Certainly, this function has yet to be displaced by the nation state and is an area in which the traditional institution of chiefdom maintains its dominance. This local power is not insignificant on a national level. One example of its significance is in the control of politicians who for the most part, it must be remembered, are still members of local indigenous groups. The chiefs have been successful particularly when called in to resolve internecine quarrelling between politicians—a regular and difficult problem as politicians are elected along ethnic lines rather than on policy (which is largely the same from party to party). 48 Chiefs continue to operate effectively, unconstrained by the constitution, at sub-national levels.

Another conclusion which could be drawn from this important mediating role of the chiefs is that the state governmental mechanism is but another layer or system parallel to that which is operating along customary lines. Chiefs retain an important place in Vanuatu’s governance landscape, and indeed, in interviews, they have been identified as potentially having a role in controlling politicians. 49 Indeed, Powels was prescient writing in 1982 of the competition between chiefs and national government in the South Pacific as the sources of services and power. 50 These competing powers are in many respects antithetical to each other (as one would expect between Weberian traditional and legal alternatives)—explaining in part why the constitution may be viewed as neither overtly hostile to nor inclusive of the institution of chiefdom. 51 The chiefs’ conflict resolution powers are an important part of political resolution in the system of legal domination, and further, chiefly powers are too deeply embedded in the socio-cultural fabric to be extracted therefrom. Thus, legal

48 Larmour and Barcham, op cit note 46.
49 Interview with Kalsakau, 12 July 2007 and with Seru Kirokanu, of Vanuatu Association of NGO’s and Lai Sakita of TAFEA Council interviews, 13 July 2007.
51 Ibid, p 347.
domination set up by the constitution does not seek to expel or displace chiefly powers or traditional domination, despite the challenge such power poses to legal domination. This constitution has served both good and ill in the country. Perhaps the best illustration of its effectiveness has been the crisis in 2001 which nearly tipped the country into civil war. We turn next to examine that crisis.

4. Local Perspectives — Law in Action in Vanuatu

(a) Constitutional Crisis In Vanuatu

Politics in Vanuatu, as in most South Pacific countries, seems to follow a path somewhere between traditional indigenous power structures and those structures one would expect to find in liberal representative democratic states of legal domination.\textsuperscript{52} Politics in a state as diverse as Vanuatu will never be easy. It is marked by continual shifting. Indeed, the horse trading among politicians in Vanuatu is historic\textsuperscript{53} such that the government has been at best only marginally effective in governing the country,\textsuperscript{54} and indeed political loyalty of MPs has been described as ‘a tradable commodity’.\textsuperscript{55}

The combined lack of economic opportunities and limited efficacy of law to control politicians make election to parliament a most enticing opportunity for self-enrichment and enrichment of one’s clan. As previously noted, ‘different [parties’] policies are not clearly distinguishable, which is not particularly surprising, given the shared roots of most of the major parties. Voting appears to be based more upon linguistic or kinship ties than policies. Personalities are also important, and certain politicians have reputations for being more corrupt or less corrupt than others.’\textsuperscript{56} In other words, the traditional dominance which undermines legal dominance is too firmly rooted to be displaced by the legal framework which forms Weber’s legal dominance.

Among the influential power brokers of Vanuatu is Barak Tame Sope

\textsuperscript{52} See discussions in Larmour, Crocombe and Godleir and Strathern, \textit{op cit} notes 10 and 23.
\textsuperscript{56} Larmour and Barcham, \textit{op cit} note 46, p 8.
Mau’utamate. Sope, who began his career as a representative of the former New Hebrides Condominium Administration, was involved in the independence movement. He was a supporter of the moderate group supporting the English but, as would be expected, inflammatory in his approach to the slower, paternalistic French. Sope was a leading National Party activist who nearly came to power as a result of some questionable conduct by his uncle, the first president of Vanuatu, Ati George Sokomanu. After having held various posts in different prior governments Sope came to power as the Prime Minister of Vanuatu in 1999. As we will demonstrate, in the hands of a wily politician like Barak Sope, the western liberal democratic Constitution is but one more tool to manipulate a system and a populace poorly served by Western institutions.

Sope, having been dismissed from his position as Minister of Tourism, Immigration and Transport, started the Melanesian Progressive Party in October 1999. He was Prime Minister from December 1991 to November 2001. Sope held power by way of a coalition government. His spurning of the main coalition partner, the Union of Moderate Parties, led to a vote of no confidence. The Speaker of the House, Paul Tari, an open ally of Sope, refused to let the motion be debated leading the opposition to take the matter to court. Tari, upon being ordered to allow the motion to be debated then attempted further delay by claiming constitutional protection for his position. Sope’s government finally lost the motion. The new Prime Minister, Natapei, initiated an investigation into Sope’s activities and caused him to be arrested. Although at the time it appeared that a violent uprising might be occasioned by Sope’s arrest, nothing materialised. Tari in response to the arrest suspended the new Prime Minister and deputy Prime Minister for alleged breaches of the constitution and standing orders. Tari set himself up as the interpreter of the constitution—denying all comers on the basis of ‘the constitution’.

Michael Morgan notes the law court’s contribution to the solution: ‘He [Sope] consistently misrepresented or ignored the laws and regulations of parliament and turned a blind eye to the separation of powers principle under which Vanuatu’s Westminster-style system operates. In his April 2001 judgement, Chief Justice Lunapek noted that the “interpretation of the constitution ... is

59 Ati George Sokomanu in *ibid*, n 15, p 486.
60 *Ibid*, p 482.
61 This narrative is based on Morgan, *op cit* note 55.
self-evidently ... entrusted to the Court by the people of this country through the Constitution.” 63

The court’s condemnation of Sope and his crony, Tari, were a positive contribution to the undermining of their efforts to manipulate the institutions of government for their own personal gain. The investigation ultimately led to Sope’s arrest, trial, conviction and imprisonment for forging bank guarantees. He was sentenced to three years of incarceration, but received a presidential pardon in 2003. Upon his release he was re-elected.

(b) Western and Indigenous Law and Governance

The whole Sope affair, from his rise, scandal, arrest and later pardon, was based on his rhetoric as a grass-roots leader, following a tradition going back to independence leader, Jimmy Stephens. 64 His rhetorical attacks have been directed against ‘foreigners’, including World Bank officials, foreign investors and members of the Australian Federal Police. 65 He purports to be a traditional-type leader attacking the Weberian social order of legal dominance as contrary to the people. Yet in evaluating his claim one must consider how handsomely Sope has benefited from the system he purports to reject.

The underlying scepticism of Western institutions finds resonance elsewhere. Hilda Lini, a chief of the Turaga nation of Pentecost Island, parliamentarian from 1987-1998, former Minister for Justice and former Minister for Health has called for Melanesian women to reject Western approaches in two important areas: conflict resolution and governance. Lini believes Western approaches are leading Melanesia in the direction of ‘uncontrolled crime, violence and poverty’. 66 While Lini does not advocate a complete renunciation of Western ideas, she takes a cautious approach toward them. She writes: ‘While all Pacific countries are governed by Western systems of governance, there is a growing sense within the Pacific community to identify models that will best suit the Pacific. A new network, with the membership of six indigenous nations, is seriously looking into the use of indigenous models of governance as the foundation for state governments. This would mean borrowing only certain aspects of foreign systems of governance that will contribute to upholding the collective ownership of peaceful co-existence.’ 67

A most revealing discussion broadcast on the ABC’s Time to Talk illustrates the vitality of the indigenous system in the face of the institution of the Western

63 Morgan, op cit note 54, p 219.
64 Miles, op cit note 20, p 20.
65 Morgan, op cit note 54, p 223.
legal system. Each of the participants, Chief Justice Lunabeck, Public Prosecutor Lini-Leo and Chief Numake, see law differently; each respects the other’s domain. The interview bears extensive quotation for illustration it provides of the radical differences between the systems and the complementarities of those same systems.

Vincent Lunabeck: We have the Constitution and the Constitution is the basic law, the fundamental law of course. The Constitution provides for justice system to be administered by the tradition. The Constitution provides also that custom shall be part of the laws of the republic. So we have that duopoly legal system as to whether the written law conflicts with the traditional system. First of all before the conflict believe that there are room, big room for the two systems to coexist. The general observation of Vanuatu is simply that on a number of islands there are no police, so the question is who or which institution maintains peace and order in lieu and place of the police? The chiefs - the answer is the chiefs.

Heather Lini-Leo: In some islands they are very effective and they can hold customary courts to resolve problems, disputes, even classified as both civil and criminal. In other islands where the chiefs are not effective then they use the Western justice system more often.

...  

Heather Lini-Leo: For example, Torba in the north has scattered islands. Ships don’t usually go there and the last criminal court session was three years ago. But then we don’t receive any major cases or minor cases, any complaints coming in because the chiefs play a role in trying to keep their people within the customary code of practice let’s say, and even the Church plays a bigger role too in trying to keep their church members within the Christian conduct.

Chief Tom Numake: Chiefs always had their own custom laws before Christianity arrived in Vanuatu. Actually our custom law, which has been there a long, long time before the Condominium government formed in Vanuatu, and also before we had our independence we had these laws.

...  

Chief Tom Numake: For an example if you steal a pig then we say you have to kill a pig and you have to swap the live pig to swap that one you kill. And also for other things like if you murdered a person, if you killed someone, kill him dead according to our custom, we have different customs in each island of Vanuatu and for Tanna, if you kill someone, then you have
to give pigs and kava, vegetables, mats and grass skirts, and on top of that you have to swap the person you killed, even by accident or you meant to do it, you have to give a girl and the girl for Tanna is the last peace making equipment we use, but that’s the last tool we use for peace making in our islands. So if you give only a pig or kava, that is not enough, you have to give a girl and it has to be over 21 years old so that once it goes with the family of the dead person then she’s married at the same time and raise up the family of the dead person. And that’s our punishment and people in Tanna they always respect and it’s still going on until today.

**Vetuna:** However what constitutes a settlement under customary law is not always acceptable under introduced state laws. In some cases, police investigation and criminal proceedings are perceived as double and unfair punishment.  

For example:

**Chief Tom Numake:** Custom laws is absolutely different because we don’t have jails and the difference is that for us once we shake hands, we drink kava together, that’s the end of it. But the other laws, if you put someone in jail for an example who is married, has got children, wife and children back at home, once you put that person into jail we say in custom that it looks like you’ve put more burden on the whole family now because he should be at home to look after the kids, the woman cannot look after the children by herself. So we say in custom, putting people in jail you put more burdens on the whole family.

It appears that a Western legal system is useful where traditional systems are not functioning (for whatever unspecified reason), and where traditional systems are functioning, there seems to be no need or demand for Western systems. From an administrative as well as a theoretical point of view, where the legal system is viewed as a unitary whole, the system is in a state of chaos; yet from the perspective of these participants, and interviewees with their own understanding of the culture and experience on the ground, it seems to be a workable system.

---

69 Ibid.
70 Mentioned by various people informally as well as in in-depth discussion with the Vanuatu Association of Non-Governmental Organizations, representatives Seru Virokanu and Lai Sakita, commenting specifically on the role of the chiefs in community problem solving and indigenous ‘democracy’, July 2007.
Although participants may be able to navigate their respective spheres, inevitably there must be clashes readily resolved. The cases indicate numerous tensions existing particularly in the larger centres and where considerable wealth is at stake. Anthropologist William Miles observes: ‘Criminal proceedings in Vanuatu are invariably ‘black’; but civil cases are ‘white.’ ... [In the courts it is] the money that counts, the interests of the outside world, are decided, in English, by and among whites,\textsuperscript{71} and in those instances it is all but impossible for indigenous systems to be heard.\textsuperscript{72} In other instances the fundamental objectives of the law have yet to be resolved. For example, the Western system’s focus on individual culpability and punishment undermines Melanesian dispute resolution which is focused on compromise and reconciliation.\textsuperscript{73}

\textit{(c) Ongoing Societal Issues—Voices on the Ground}

The governance dialogue has been described as a thinly veiled euphemism for ‘politics’—that is the politics of Western powers seeking to ensure accountability for aid dollars and secure opportunities for their firms looking to invest—basically the advance of a liberal, representative democratic form of governance,\textsuperscript{74} to create economic opportunities through forcing markets open to foreign exploitation. To gain a better understanding of how these systems and institutions were working, the researchers conducted interviews in July 2007 with representatives of government,\textsuperscript{75} civil society,\textsuperscript{76} labour\textsuperscript{77} and NGOs.\textsuperscript{78} The interviews revealed a difficult relationship between those in power supported by the Western institutions representing fulfilment of Western promises, and the populace struggling to cope with the difficulties of living in a developing country, with a burden of a corrupt, ineffectual, self-interested national government. In broad terms, the issues identified were corruption, education, employment and gender equity at the national level.\textsuperscript{79}

\textsuperscript{71} Miles, \textit{op cit} note 20, p 186.
\textsuperscript{72} See Corrin Care, \textit{op cit} note 37.
\textsuperscript{73} Miles, \textit{op cit} note 20, p 167.
\textsuperscript{74} Huffer and Amolisa, \textit{op cit} note 3 p 3.
\textsuperscript{75} Mr M Naparau, Principal Economist of Vanuatu; Mr Suhas Joshi, Public Financial Management Advisor (PFMA) of the IMF executive agency, Pacific Financial Technical Assistance Centre, Suva, Fiji; Mr Martin Brownbridge, an IMF consultant attached to the PMFA; Mr Rave Nikah, Secretary to Head of State; and informal interview with William Edgell.
\textsuperscript{76} Various people encountered in shops, markets, restaurants, and government offices were pleased to speak on an informal basis about the situation.
\textsuperscript{77} Efraim Kalsakau, the General Secretary of the Vanuatu Council of Trade Unions, interviewed 12 July 2007.
\textsuperscript{78} Jenny Ligo, CEO of the Vanuatu National Council of Women, interviewed 13 July 2007.
\textsuperscript{79} Our study confirms similar findings by Huffer and Grace in interviews conducted in 1999. Huffer and Amolisa, \textit{op cit} note 3, p 3.
Vanuatu has a constitutionally-created Ombudsman. Although Vanuatu adopted its Constitution in 1980, there was no subsidiary legislation creating the office until 1994 and no Ombudsman appointed until 1995. The first Ombudsman was active against corruption, popularly supported and outspoken. The politicians, seeing their error, appointed a new Ombudsman Peter Taurakoto who was chosen to be largely silent, even refusing an interview once he understood that it was not a press opportunity but a research interview. Yet, it is important to note that corruption as understood by the West is a difficult concept in Vanuatu which has a culture of gift giving.

Several interviewees indicated the severe problem posed by a lack of education for the ni-Vanuatu. Indeed, even the politicians fail to grasp the nature of the system and hence their responsibilities, as noted by Efraim Kalsakau, the General Secretary of the Vanuatu Council of Trade Unions. Kalsakau observed: ‘Our leaders are not prepared to enter politics, people are elected to Parliament with very little knowledge of what is happening out there. People really don’t understand what globalisation is all about. They have not studied economics, so people are voting for bags of rice and that is not good. So, I think that the Government has to educate the people.’

Some interviewees saw education as the key to reduced corruption. Their view was that a better educated populace would understand, identify and oppose corruption more readily. Kalsakau explained that one of the main thrusts of the labour movement was the education of villagers about democratic government. He speaks to people on various islands about how democracy works and finds the populace interested in and agreeable to the system. Yet, he finds that the government does not support civic education.

Much was made of the lack of economic opportunities in terms of employment, and particularly so for young people. From casual observation it is evident that there are groups of unemployed and underemployed young men on the streets of the capital Port Vila. Community leaders identified lack of jobs as a major source of concern and unrest. Interviewees believed that the lack of jobs correlated to an increase in crime and increased potential for civil unrest,

---

81 Ibid.
82 Larmour and Barcham, op cit note 46, p 8.
83 Jenny Ligo, CEO of the Vanuatu National Council of Women; Rave Nikah, the Secretary to the Head of State and Efraim Kalsakau, the General Secretary of the Vanuatu Council of Trade Unions.
84 Efraim Kalsakau, the General Secretary of the Vanuatu Council of Trade Unions, interview 12 July 2007.
85 Views of Kalsakau, Ligo, Naparau et al and Nikah.
86 Interview 12 July 2007.
87 Kalsakau, and interviews with Seru Kirokanu, of Vanuatu Association of NGOs and Lai Sakita of TAFEA Council, interviews 13 July 2007.
which combined with a general sense of injustice did not bode well. With extra
time on their hands, young men spent time watching violent action movies and
plotted and planned ways of engaging in criminal activity in the country.\footnote{Noted by Kalsakau in his discussion with and observations of young men at the trade hall.}

The lack of economic opportunity was tied to lack of educational
opportunities by all interviewees. Concerning the education and employment
connection Jenny Ligo, CEO of the National Council of Women had this to
say: ‘Everybody have to pay [for school] and nobody pays because they can’t pay.
Even 1000 vatu is not easy. They need to educate the people to use their own
resource like, help them to grow crops, or help them how to use their resources.
... So, they come here ... to Vila, they don’t have a proper place. ... There will be
more, not qualified, many people will be putting out from school. But, there is
not enough employment [for unskilled labour].’\footnote{Interview 13 July 2007.}

There is also the matter of an injustice going back to the era of Australia’s
policy of ‘black birding’ in the last century. At that time, indigenous people
were essentially kidnapped from Vanuatu (and other Pacific islands) and forced
to work in the cane fields of Australia. However now, when they are no longer
needed by Australian interests, migration from Vanuatu to Australia is very
difficult.\footnote{Views of Kalsakau and Ligo.}

Interviewees recalled this history and contrasted it with their current
needs and the obstacles to immigration placed by Australia. There is a strong
sense of being the poorer cousin on the one hand, baited by the images of
television, movies and wealthy foreigners, while denied access to opportunities
on the other. As Professor Ron Crocombe, the father of Pacific studies, describes
it: ‘Australia and New Zealand have always—Australia particularly—always
tried to kill any question of labour mobility. Australia says, “You must open up
everything where Australia will benefit from—your markets, your investment,
your everything else”. But anything that you will benefit from—and about the
only thing they will benefit from is some labour market access—“No, you can’t
have that”.’\footnote{Quoted in Sean Dorney, ‘Concerns over Pacific Plan implementation’, Sunday, 25 September 2005: http://www.abc.net.au/correspondents/content/2005/s1467529.htm.}

Despite the manifest injustice of this stance, it remains Australian
policy.

In contrast to the promises of the institutions of Western liberalism,
interviewees saw hope in the institution of the chiefs. The chiefs seem more
connected to the people, more interested in balancing community needs and
resources, and they hold more authority. While the state politicians may be out
of control, self-interested manipulators of the state system, the chiefs seemed to
be the true leaders of the people. In other words, traditional dominance is the
preferred form of governance in many respects. Chiefs were believed to have a contribution to democratic governance. The process was explained to the interviewer in the following terms: 'It is not like they [chiefs] just come from their house and say what they want to the people and then go. They listen to every individual member of the community, even the woman and there is a meeting place for men. After every meeting, the men will go back to the home and say what comes out of the meeting, in their own home and the woman will have the final say. [If she does not like it, she will advise the man who will then return to a reconvened meeting.] Chiefs, they are just like spokesmen. There are certain times when things get out of hand and they come in with general orders, but not all the time. Most of the time, in the afternoon they drink kava and they share ideas and then they come up with some consensus and the chief will say, this is what we are going to do.' 

Interviewees were not of the view that chiefs were the solution for everything. Some suggested that the chiefs’ contribution would be strongest in subsistence economies still operating on many islands. One of the problems noted by Ligo was that the Council of Chiefs was composed exclusively of males and that this perpetuated longstanding problems of power imbalance between the genders. Yet, in terms of overall control of violence and control of politicians, there was a consensus that the chiefs are part of the solution.

Despite the confidence in the institution of chiefdom, it has inherent contradictions with the institutions of the Western liberal state. As Powels observes: ‘... to those who regard chiefship ... as inconsistent with the egalitarian principles upon which participatory democracy should be based, the sooner chiefship receives the 'kiss of death' the better. For others, it seems that small-scale non-Western societies lacking expensive infrastructure cannot afford to lose too quickly any institutions which contribute to the quality of daily life in a manner acceptable to the people concerned’.

This tension is readily clarified by reference to Weber’s conception of ‘traditional dominance’ versus ‘legal dominance’ but one should note that Weber did not see them as mutually exclusive or ‘pure’ types. Weber suggests that the reality is a mix of types. Given the strength, efficacy and important role of chiefs in traditional dominance, until there is some real need or benefit shown causing a shift to legal dominance, the efforts to extinguish and replace traditional dominance appear unhelpful if not actually harmful in addressing governance.

---

92 Interviews with Seru Kirokanu of Vanuatu Association of NGOs and Lai Sakita of TAFEA Council (13 July 2007).
93 Ibid.
94 Powels, op cit note 45, p 347.
5. Conclusion

The society described by Geertz fifty years ago has much in common with the society thriving in the islands today denominated as ‘Vanuatu.’ The concerns remain much the same, the social structures much the same, but increased contact with the rest of the world as a result of telecommunications, membership in the state-based international system, and an increasing shift to a market-based economy suggest that the awkward straddling between social systems will continue and the movement will continue to toward legal domination. That awkward straddling, which results from insiders’ changing needs in response to participation in the international system and globalisation and from outsiders who as members of the international system and as donors call for certain forms of governance and accountability, leads us to believe that a shift toward legal dominance will continue. For it to continue effectively, however, some new thinking needs to take place.

Professor Robert Hughes argues that particularly in the context of the South Pacific the state needs to be reconceptualised. He states: ‘what the state presupposes is not some all-embracing unity as such. What it should be taken to presuppose is, rather, an identity; but an identity understood in a particular way that is consistent with the idea of the state as a substantive association rather than as an abstract of formal corporate institution. .... In the South Pacific states, given their size and the relative familiarity involved in social relations between their citizens, the abstract conception seems immediately inappropriate’.96

Yet, outside parties seeking ‘good governance’ limit their remedies to the institutions of a Western liberal democratic society. The situation has been described as ‘jurisprudential schizophrenia’.97 The traditional dominance holds and will not be displaced simply because foreign influence has demanded legal dominance through the creation of a nation state with liberal democratic principles enshrined in a constitution.

Nevertheless, it would appear that legal dominance through the creation of the nation state and its Western legal system does hold certain attraction and offer certain strengths to Vanuatu: the alternative, a return to a pre-Western history several hundred years ago is an undesirable to and in all likelihood impossible for ni-Vans. Vanuatu’s multiculturalism and pluralistic legal traditions will require some form of system that allows accommodation of its various traditions.

The nation state system has been roundly criticized as ‘irrelevant to the day

97 Miles, op cit note 20, p 167.
to day lives of many people—a criticism which extends to the legal system. No governance system can survive long if it is not relevant to those governed by it. The lack of buy in and corollary rejection of traditional systems, the manipulation of the nation state system by wily politicians, the failure of that system to address the needs of the people or serve their interests, while being little more than window dressing for aid donors suggests that the system is a hollowed out, still-born transplant, failing to address the needs and interests of the local populace or those of outside interested parties.

If Vanuatu is to be 'constituted' as a nation among the nation states of the world, to be organised along the lines of legal domination, it is going to have to do so on its own terms, recognising itself as a pluralistic but personal society, cognisant of its highly diverse traditions and the deeply imbedded cultural heritages from both the South Pacific and Europe. Constituting Vanuatu will not occur as the result of the imposition of some black letter law by outside powers, nor will it occur as a result of outsiders in collusion with certain interested insiders via a constitution under the rubric of good governance. Rather, it will take a collective decision from those under traditional dominance that a move to legal dominance and the adoption of its corollary distributions is preferable and indeed necessary for their collective survival in the twenty-first century.

98 Noted in interviews with Kalsakau and Ligo, and identified by Larmour and Barcham, *op cit* note 46, p 10.