

PACIFIC JUDICIAL CONFERENCE
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INSTITUTIONAL JUDICIAL INDEPENDENCE -
DIFFERING MODELS OF JUDICIAL INDEPENDENCE
IN THE PACIFIC: VANUATU EXPERIENCE ⁽¹⁾
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I. Introduction

I bring greetings from the Judges, Magistrates and the Court support staff of my country. It is my honor to represent the Republic of Vanuatu at this important Conference. I wish to express my gratitude to the Right Honorable Robert Torres, Chief Justice of Guam and the Conference Organizing Committee for inviting me to speak on Institutional Judicial Independence — Differing Models of Judicial Independence in the Pacific. I also acknowledge the presence of very distinguished Chief Justices, Judges and other dignitaries at this conference. I do not have the full and detailed knowledge of differing models of judicial independence in the Pacific. I am, therefore, limiting the extent of my intervention to Vanuatu's own experience. The purpose of this paper is to share with you Vanuatu's difficulties, experiences and the challenges in the establishment of a court administration based on a hybrid institutional judicial independence model.

II. The Constitutional Foundations

Vanuatu is the former Condominium of the New Hebrides situated in the South Western part of the Pacific Ocean. It was jointly ruled by France and Britain ⁽³⁾. Vanuatu became an independent State Republic on 30th July 1980 with a written Constitution as its supreme law. The Constitution provides a Westminster type parliamentary system of government with the Legislature, the Executive and the Judiciary.

It guarantees and protects the fundamental rights and freedoms of the individuals [Article 5]. It vests the Supreme Court with the powers to enforce

the breaches of these fundamental rights and breaches of any provision of the Constitution by the Government or Agencies of the Government [Articles 6 and 53] through application in the Supreme Court, independently of any other possible legal remedy. Further, the Constitution gives the Supreme Court power to control the constitutional validity of Parliament Bills before their promulgations through Presidential Constitutional Reference.

Under Chapter 8 of the Constitution, the administration of Justice is vested in the Judiciary who are subject only to the Constitution and the law. Judges are appointed by the President of the Republic. They hold office until they reach the age of retirement. They are only promoted and transferred by the President of the Republic. The salaries and other benefits of the Judges are determined by the Government Remuneration Tribunal. They are to be reviewed every two years and any review must not be to the detriment of the Judges. They shall only be removed by the President of the Republic in the event of —

- (a) conviction and sentence on a criminal charge; or
- (b) a determination by the Judicial Service Commission of gross misconduct, incapacity or professional incompetence.

Article 48 of the Constitution sets up a Judicial Service Commission composed of the Minister responsible for Justice as Chairperson, the Chief Justice, and the Chairperson of the Public Service Commission and a representative of the National Council of Chiefs. The Judicial Service Commission provides advice to the President of the Republic on:

- the appointment of Judges;
- the removal of Judges from Office;
- the promotion and transfer of members of the Judiciary.

The Supreme Court has unlimited jurisdiction with all criminal and civil matters (including constitutional), except for disputes involving customary ownership of land, and hears appeals from the magistrates court. It is composed of the Chief Justice and other Judges. It is constituted by a Judge sitting alone. Appeals from the island courts involving customary ownership of land are dealt with by the Supreme Court with the assistance of two custom assessors and they are final. Appeals from original and appellate jurisdictions of the Supreme Court are dealt with by the Court of Appeal which is constituted by a panel of two or more Judges

of the Supreme Court sitting together. Judges are a combination of those from the Supreme Court and Judges from overseas, (with judges from New Zealand, Fiji, Solomon Island and Australia (and at some stage Papua New Guinea)) who are appointed as Acting Judges of the Supreme Court to sit in the Court of Appeal. The Court of Appeal sits three times a year. The Constitution makes reference to subordinate courts and village or Island Courts and Parliament by enactments establishes the Magistrates Courts and the Island Courts of Vanuatu.

III. The Past Difficulties

Vanuatu Parliament enacted the Courts Act in 1986. However, there were no specific provisions on court administration, in this legislation.

From 1980 to year 2000, the courts were administered through and by the Public Service Commission and the budgets for the courts were allocated to the Public Service Commission and the Public Service Commission, in turn, provided resources for the courts. This meant that the courts were staffed, resourced and managed by the civil servants who reported to the senior government officials and not to the Judiciary. The fact that the courts were largely managed by the government, whose representatives are most frequently litigants before the courts, created a potential for interference. The Head of the Judiciary experienced anxiety about having to go to the government in order to remedy deficiencies in administrative resources which impacted on the operations of the courts and on the ability of the Judiciary to provide the high level of justice which the public expect and deserve. There was then a danger for government to regard Judges and court support staff as a branch of the Public Service Department, particularly when the government exercised control and administrative life of the courts and when court staff reported directly to civil servants and not to the Judiciary. We have realized that if the Judiciary lacks control over its processes, it will appear subservient to those who control the processes. An example was on government policies imposed on court staff which impacted on the operations of the courts. In 1997-1998, the Judiciary expanded its services of justice throughout the remote islands of the Republic of Vanuatu. This plan and effort were curtailed by the recruitment processes of the Judiciary being frozen by the Public Service Commission circulars and instructions despite attempts made by the Judiciary in explaining to the Public Service Commission that the Judiciary was

subject only to the Constitution and the law — not to government administrative policies. It was clear to Vanuatu Judiciary that this traditional model of court administration which was entirely controlled by the executive was eroded.

From 1997 to year 2000, the Judiciary was committed and took the lead for a change of the system of court administration. For the Judiciary to fulfill its constitutional mandate, and to do so effectively and efficiently, the Judiciary must have control over the courts support staff, its budget and financial management and other administrative functions of the courts.

IV. Search for a new model of Court Administration

The search for a new model of Court Administration was undertaken on the following fundamental basis that:

- The power of the purse was with the government;
- The expenditure of public funds must always be approved by the Legislature; and
- Judicial Independence will always be maintained and strengthened by a full control of the court administration vested in the Judiciary.

In the consultation processes, considerations and focuses were placed on some important principles and issues, namely, the supremacy of the rule of law; Vanuatu constitution as the supreme law of Vanuatu; the constitutional duty of the Supreme Court must be effective and efficient to enforce the breaches of the fundamental rights of the people in Vanuatu society where there are many customs and traditions (more than 100); the right of the people to have access to competent, impartial and independent (including functional) courts and to receive quality services from the courts; maintaining people's confidence in the courts; the value of democracy; the importance of the separation of powers principle between the Legislature, the Executive and the Judiciary; of crucial importance the strengthening of the principle of judicial independence so vital in the maintenance of the rule of law in Vanuatu as a young sovereign State Republic; it is important to note that during the period 1990-2000 important and critical constitutional pronouncements were issued by the Courts in Vanuatu on the constitutional development of the Republic, constitutional and democratic values, Fundamental rights issues, separation of powers issues between the three arms of the

government, and the principle of judicial independence, to name just the few.

As part of the process, we had references on comprehensive international legal instruments such as Declarations or Principles on the judicial independence recognizing the importance of court autonomy on financing, budgeting and administration of Courts⁽⁴⁾. We had also sought assistance and obtained relevant and comparable information on the models of court administration developed in other countries on institutional judicial independence and this included Papua New Guinea, the Federal Court of Australia, Court of Appeal of Noumea, New Caledonia, and State Supreme Court of South Australia.

In the quest for a model, we have come to realize that there are two fundamental elements of the administration of courts. The first element is judicial administration and the second is court administration.

Judicial administration is the term used for the system of governance of courts and for the system of arranging judicial work. The way judges list cases for hearing is a component of judicial administration.

Court administration is about the efficient and effective administration of courts in accordance with the particular system of governance provided to the judiciary. Court administration also supports the listing systems and other practices and procedures which are the components of judicial administration.

There are some necessary overlaps between judicial administration and court administration which make it impossible to deal with court administration in isolation of the existing or desirable system of judicial administration.

After considerations, the Judiciary of Vanuatu opted for a self administration court system between two [2] models of self court administration. The first is the model of self administration by an authority responsible to a judicial council and the authority, on behalf of the council, obtains its budget from the Legislature. The second is the model of the self court administration which is directly responsible to the Legislature and obtains its resources [through a portfolio Minister] directly from the Legislature. Vanuatu Judiciary has established a hybrid model of self court administration in 2000 by Parliament enactment.

V. The model of Court Administration established by the Judicial Services & Courts Act of 2000 and its Application

As mentioned above, the hybrid model system of court governance has been implemented in Vanuatu commencing in 2002 when the Judicial Services and Courts Act of 2000 (“the Act”) came into operation. This model of Court Administration provides the Judiciary with administrative and financial management autonomy while the Judicial Service Commission performs its constitutional advisory responsibilities as described earlier in relation to the Judges and other responsibilities set under the Act. This includes the appointment, promotion and discipline of the members of the court personnel. The administration of the courts is the responsibility of the Judiciary in conjunction with the Judicial Service Commission.

The Chief Justice (with the assistance of the Registrar of the Supreme Court and the Chief Magistrate) is responsible for the management of the administrative affairs of the Vanuatu courts and the Chief Justice (with the assistance of the Registrar of the Supreme Court and the Chief Magistrate) provides at the beginning of each year a Management Improvement Plan for the efficiency and effectiveness of the operations of the Judicial Service and Vanuatu courts.

The members of the court personnel and court employees are responsible to the Judiciary through the Registrar of the Supreme Court. This is the relationship in those places in the world that have adopted a Judicial Council or where courts are self administered. At the present time, the management of the court personnel is entirely done by the Judicial administration in terms of staff needs assessment, advertisement of positions declared vacant, design of selection criteria for the position, interviewing of applicants and formulating a recommendation to the Judicial Service Commission for appointment of the successful applicant.

One specific aspect of the hybrid element is the power given to the Judicial Service Commission to make statutory orders (section 70 of the Act), which result in a necessary consultative approach between the Commission and the Judicial

Service Administration.

The Commission may make statutory orders in relation to many matters in court administration including, for example, the terms and conditions of service of Court Personnel, training and continuous education of Court Personnel and matters relating to the duties, responsibilities and functions of the Court Personnel.

The Act also sets up a Court Personnel Disciplinary Board with an appellate process to the Judicial Service Commission.

VI. Budget and Financial Management

The Act provides for the government to provide adequate budget to the Judiciary for the Judiciary to perform its functions as provided in the Constitution and the Judicial Service and Courts Act and any other law. Every year, the Judiciary through the Office of the Chief Justice with the assistance of the Registrar, designs and submits its annual budget to the Ministerial Budget Committee of the Government of the Republic before it is authorized by Parliament.

The budget is under the day to day responsibility of the Registrar to manage on behalf of the Judicial Service. At the end of each financial year, the Chief Justice submits to the Minister responsible for Justice, a report of the management of the administrative affairs of the Judicial Service and Vanuatu Courts and the financial statements in respect of that financial year. The Minister of Justice has the responsibility to cause a copy of the annual report with the financial statements to be laid before Parliament.

The Judiciary has progressively developed and implemented self administering and financial management policies, systems and practices which include three volumes of Financial Operation Manual produced in March 2007. Volume 1 covers the initial and preliminary stages of budget formulation and submission. Volume 2 focuses on the processes that underlie the execution of the Judiciary's annual budget and the management of the Judiciary's financial resources and sets up procedures from procurement to revenue collection. Volume 3 concentrates on the financial reporting after auditing of accounts. In July 2008, a Handbook for Administrators on Financial Operations Manual was also produced.

VII. Expansion of Court Administration services

The enactment of the Judicial Services & Courts Act of 2000 points to an expansion of the Registry to take up the central administration and management role envisaged in the Act. Additional administrative and management functions are created to support the Central Court Registry through relevant unit corporate services. These include the Magisterial Administration Service function, the Budget/Finance and Accounts function; the Human Resource Management (HRM) function, the Administration of Island Courts function, the Library Management function, Judicial Development and Training function and the Enforcement function. The units are primarily tasked with these functions and they then use the management and administrative tools in a concerted and collaborative way to assist the whole Court Administration to achieve its strategic objectives as articulated in its Vision.

A Chief Magistrate has been appointed to be responsible for the operations and administrative management of the Magistrate's Courts. In 2003 an Accountant and a Human Resources Officer have been appointed. These are foundational and strategic recruitments because they form the basis for the Court Administration to develop and consolidate its functions so as to be able to meet its objectives. The Finance and Accounts section is further strengthened by the recruitment of an additional officer to assist with procurements. The Finance and Accounts section enables the Court Administration to utilize its Finance Operation Manual and the Government Treasury to plan, draw up and submit its payroll and operational expenditure budget each year.

The HRM function is strengthened by engaging in Job Analysis and therefore drawing up better job descriptions to better match the skills and knowledge of the employees with the requirement of the job. This is ongoing. The HRM function also encompasses the induction programs that the Court Administration runs as part of the recruitment of new staff.

The function of managing the Island Courts is a part of the corporate structure of the Court Administration. This function is tasked to a unit headed by the Senior

Administrator of the Island Courts. They assist the Court Administration to support the responsibility of the Chief Justice who is directly responsible for these Courts. This function has become more effective and efficient with the passage of time as it coordinates the operations of 11 Island Courts around the country and about 240 lay justices of the Island Courts.

For the time being, the Court Administration does not have an elaborated corporate structure and these functions are carried out by units or sections manned by 1 or 2 people. It goes without saying that as the Court Administration grows, the units tasked with these functions will grow in size and in complexity.

Administrative activities that the Court Administration carries out as its corporate structure and functions begin to establish processes and systems which include: efficient and timely procurement of goods and services; planning, drawing up and submission of annual expenditure budget; successful execution of court circuits according to annual plan; annual reporting; annual financial reporting; recruitment of staff; induction of staff; in-service training of staff; managing the processes of retirement or termination of staff; management of all court assets except for tied-houses allocated, however, the judiciary manages the maintenance and repairs of such houses while occupying it; maintaining of adequate premises for judicial functions.

VIII. Better Planning of Judicial Activities

Since 2000, the Judiciary of Vanuatu issues an annual court calendar of events for judicial activities at the beginning of each year. This calendar of events include: Supreme Court, Magistrates Courts and the Island Courts' tours and circuits around the country, training dates, Court of Appeal session dates, criminal Plea dates, Court Users Group meeting dates, Conference dates and so forth. There is need to refine and improve the planning process of annual judicial activities.

IX. Judicial Reform Program / Strategic Plan Objectives

In 2006, the Judiciary issued its Vision and Mission statements with standard principles which form the blueprint of the Judicial Reform Program that Vanuatu is undertaking after the enactment of the Judicial Services & Courts Act of 2000. The

Judiciary drew from international and regional experiences, started to strategize its reform program or plan objectives. It started to focus on the four (4) following points: 1. Judicial Systems: this point is to develop effective and efficient judicial systems, procedures and practices and to consolidate with appropriate technology to assist courts to perform their functions; 2. Rules and Procedures: this aspect focuses on the review, adjustment and adoption of rules and procedures to meet the socioeconomic development needs of the nation; 3. Human Resource Development: this aspect is to recruit/appoint, train, appraise and retain appropriately qualified and skilled staff; 4. Institutional Development: this last point is to expand courts infrastructures to enhance access to physical and functional court buildings, access to justice, provide quality and timely service and maintain confidence in the courts.

The implementation process was carried out, step by step, through the Courts Annual Management Improvement Plans and the Judiciary annual budgets. The Judiciary implemented some aspects of the 4 points referred to above. With assistance, the Judiciary developed judicial, administrative and financial systems and standard practices, Court Rules and procedures. The Judiciary involved in the process of construction of buildings to accommodate the Island courts in some of the remote islands of the Republic. This was followed by the recruitment and training of the clerks/administrators of these courts and the provision of necessary equipments to administer these courts.

In 2009, the Judiciary has set up a 3 year plan strategic objectives concentrating only on human resource and assets management. It is a cyclic process.

After the tragic destruction of the Supreme Court building by the fire on June 2007, the Judiciary (in 2008) has undertaken fact-finding missions to New Zealand Ministry of Courts of New Zealand and held discussions with the Manager of the court services including the Project manager of the new Supreme Court of New Zealand building that was built on the Lambton Quay site. Discussions included the process of building a new court building. The Judiciary extended its fact-finding missions to the Federal Court of Australia. This included a meeting with the Right Honorable Michael Black then Chief Justice of Federal Court of Australia in Melbourne and Adelaide. There were detailed discussions on modern courts

building design concept, the processes and governance structure. Further fact-finding missions were undertaken by the Judiciary to the Court of Appeal of Noumea, New Caledonia.

The fact-finding missions culminated in a formal report by the Judiciary and this gave substance to the formulation of a philosophical concept design of a New Supreme Court Hall of Justice Building Project. It constituted the basis of a Preliminary Design Brief. It was recommended by the Government Central Tender Board and the Council of Ministers endorsed the award on this basis. A Project steering Committee (called Project Management Group) was jointly appointed by the Minister of Justice and the Chief Justice which includes representatives from the Judiciary. In October 2010, a Project Manager was contracted by the Government to oversee the building project. The Judiciary contributes to the process of designing and constructing the new Supreme Court Hall of Justice Building which will be a visual testament of the rule of law. The project is on its very beginning with no doubt its own challenges.

As part of the Judiciary's development strategies, the Judiciary develops and maintains judicial relations and cooperation with other Judiciaries in the Region either by formal or non formal arrangements or understandings.

X. Rules of Courts and Case Management

The Act provides also for a Judicial Committee entrusted to make rules of courts. In 2002, Civil Procedure Rules for the Supreme Court and the Magistrates Courts in Vanuatu were launched. Case management is integrated into and is part of the Civil Procedure Rules of 2002. It is a first for Vanuatu as an Island country to make its own rules of procedures with case management controlled by the Courts. It is to be noted that at the very beginning, the integration of case management by the courts in the rules was resisted by some practitioners and others. The Case management technique was then advanced through Practice Directions on Pilot basis from 1998-2001. It was gradually and progressively understood and accepted. The Judicial Committee then launched officially the Civil Procedure Rules in 2002. It was also through Practice Directions that the Supreme Court issued Rules on Domestic Violence Protection orders which had the support of the wider community. They were then integrated as part of the Rules. Recently

Parliament intervenes to legislate by enacting the Family Protection Act.

Case Management has provided the catalyst to active case management by the Courts and has improved the performance of the courts in the number of outputs of judgments and disposition of cases. It has also improved the quality of access to justice and to the courts as the rules are simple, clear and easily readable by the general public. In addition to the Civil Procedure Rules of 2002, the Judicial Committee issued in 2003, the following special Rules:

- Constitutional Petition Rules.
- General Election Petition Rules — used for petitions relating to the election of members of the national Parliament.
- Election of Chiefs Petition Rules — used for petitions relating to the election of Chiefs to the national Council of Chiefs.
- Probate and Administration Rules.

In 2005, the Island Courts Rules were reviewed and following new rules were launched and implemented:

- Island Courts (Civil Procedure) Rules 2005;
- Island Courts (Criminal Procedure) Rules 2005;
- Island Courts (Court Clerks) Rules 2005;
- Island Courts (Supervision Magistrate) Rules 2005.

At the present time, the Civil Procedure Rules 2002 need to be reviewed.

XI. Individual List [Dockets]

A system of individual list [docket] is implemented in the Vanuatu Supreme Court and Magistrates' Courts. Since the implementation in 2003 to the present time, the individual list [docket] operates well. However, the individual list dockets experiences some weaknesses in terms of rigidity of responsibility

compared to other system. In 2006, the Judicial Service and Courts Act was amended with the creation of a Master and Deputy Masters of the Supreme Court positions to deal with costs determinations, general applications including case management with power to mediate cases. This brings in the beginning of a general list case management in conjunction with the individual list dockets of case management by the Judges.

XII. Final Observations on Self Administration

Self administered courts have a record of success in different parts of the world. Some commentators suggest that the establishment of self administered courts give not only the necessary independence but also accountability which creates, among the judiciary, a greater emphasis and willingness for effective and efficient operation. The Vanuatu experience of developing its model of self-administered court has humble but sure beginnings. Its foundation is grounded in the Vanuatu Constitution and the general framework and important aspects of the court administration system which are conducive to institutional judicial independence, are provided by Parliament legislations. Once the system is in place, the Judiciary proactively administered it to consolidate the position. It is now an on-going process. Institutional dialogue also plays an integral role in the daily management of the administrative operations of the judicial service and the courts to maintain the necessary institutional independence envisaged in the Constitution and the relevant legislative framework. There are loopholes to be vigilant of and systems and procedures need to be drawn up and appropriately issued to cover areas that may be prone to be process driven. Some of these process driven areas and initiatives are counterproductive to judicial institutional independence; therefore, it is imperative that a little as possible is left to human discretion. Formal rules or regulations or standard practices and automated systems will be of great assistance. It is important to note the importance of the capacity to affect budget processes and procedures. It is through basic and small budget compilation, submission and management that a lot of these principles of judicial independence are realized. They contribute to an environment of confidence in the Court Administration System and its sustainability.

XIII. Conclusion

The reform for self administration is an ongoing process. That process affects different areas of priorities as assessed by local circumstances.

A. The Vanuatu experience shows the reform through:

- legislation
- restructure of administration of courts
- budget administration and financial management [including asset management]
- court personnel disciplinary board
- court rules and case management
- development and training
- management improvement plan

B. Fundamental Principles:

- (a) The role of courts as arbiter of government legislation requires greater judicial control over court administration.
- (b) The aspects of court administration which impacts on judicial function must be clearly identified by legislation and must be the responsibility of the judiciary under the supervision of the head of the judiciary.
- (c) The public interest is protected by retaining responsibility for budget approval for court administration in government, while vesting responsibility with the judiciary.

The success of any judicial reform depends on the willingness, commitment and leadership of the Judiciary with the support of the executive government and community at large. There must necessarily be national judicial drive, ownership and sustainability. To illustrate my point, I attach a drawing of a fish and a little palm tree representing the saying that: "knowing how to fish" is more important than "just eating the fish" and "the little palm tree will grow and bear lots of fruits" to sustain any judicial reform program on institutional judicial independence models in the Pacific⁽⁵⁾.

Thank you for your attention.

REFERENCES

(1) This paper is a further reformulation of a paper presented by the Author on: “self court Administration: Vanuatu Experience” at Putrajaya, Malaysia, on May 2007 (Asia Pacific Judicial Reform Forum).

(2) The Author acknowledges the contribution of the Registrar of the Supreme Court in the relevant part of this paper. The Author assumes fully the responsibility of any mistake or omission.

(3) The Attachments provide information on the condominium legacy.

(4) Following are some of International Legal Instruments or judicial Declarations or Principles referred to:

- The Tokyo Principles on the Independence of the Judiciary in the Lawasia Region, 1982 (Lawasia Human Rights Standing Committee);
- The International Bar Association Code of Minimum Standards of Judicial Independence, New Delhi 1982 (International Bar Association);
- Te UN Basic Principles on the Independence of the Judiciary, 1985 (General Assembly endorsement);
- The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, 1995 (Conference of Chief Justices of Asia and the Pacific Region);
- The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, 1998 (Commonwealth Parliamentary Association, Commonwealth Magistrates and Judges’ Association, Commonwealth Lawyers’ Association and Commonwealth Legal Education Association);
- The European Charter on the Statute for Judges, 1998 (Council of Europe).
- Bangalore Principles on the Domestic Applications of International Human Rights Norms, 1998 (Bangalore, India, 26 February 1998);
- Pacific Island Judges Declaration on Gender Equality in the Courts, 1997 (Denarau, Fiji, 4 July 1997);
- The Tanoa Declaration on Human Rights in the Law, 1999 (Tanoa Hotel, Nadi, Fiji, 7 March 1999).

(5) For more information on Differing Models of Court Administration – see Canadian Judicial Council Report on Alternative Models of Court Administration (September 2006).