

SORCERY AND THE CRIMINAL LAW IN VANUATU

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This paper examines the problems of incorporating norms of customary law into the substantive criminal laws of a Melanesian state system. It focuses on the particular crime of sorcery in Vanuatu. It explores the historical and sociological contexts to the belief in sorcery in society today, and also how behaviour generated by the belief (allegations of sorcery and sorcerer-related attacks) is dealt with by the non-state customary legal system. It then investigates how the state has treated the issue of sorcery, discussing both legislative initiatives and also a number of cases brought before the courts in recent years. The paper argues that merely transplanting substantive norms from the customary system into the state system without consideration of the procedural and institutional framework those norms were developed within, or the ramifications the law may have on other aspects of the legal system, is doomed to failure. Finally, it highlights a number of issues that must be considered in order to successfully initiate a more fruitful process of legal pluralism.

1 INTRODUCTION

Police in Lakatoro have arrested three men in connection with the strange death of a young man from their area in Big Nambas in northwest Malekula. One of the three suspects reportedly confessed to police that they did kill the youth with 'black magic'. It has been reported by the Norsup hospital that the young man was rushed in for emergency treatment when his body was said to be already decaying although the heart was still beating. The youth eventually died. (1)

Belief in witchcraft or sorcery (2) has traditionally been a salient feature of Melanesian society, and despite the increasing modernisation of the various societies throughout Melanesia, and their widespread conversion to Christianity,

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'Police Arrest Three in Northwest Malekula', *Vanuatu Daily Post* (Port Vila), 21 April 2004,3.

2 There are many different words for sorcery used in the region: witchcraft, black magic, 'posen' (poison) and *nakaemas* (the last two are both Bislama words, one of the three national languages of Vanuatu besides English and French). It should be home in mind that the concept of distinguishing belief in sorcery from other types of belief is very much an introduced idea: traditionally the Melanesians did not draw distinctions between the worlds of the natural and supernatural and so did not consider sorcery or witchcraft as a separate category. The term sorcery is the term that is most widely used in the legislation and case law so it will be used in this paper, although where sources referred to use other terminology these will be retained. In the region the term is not gender specific as sorcery can be practised by both men and women. Possibly because of this, the term 'sorcerer' is not widely used, rather practitioners of sorcery are most generally referred to as people who engage in sorcery or, to use the Bislama expression, 'karem nakaemas' ('carry or bring sorcery'). In Vanuatu another term used to refer to practitioners of sorcery is 'klevas'. See Tomas Ludvigson, *Kleva: Some Healers in Central Espirito Santo Vanuatu* (PhD Thesis, University of Auckland, 1981).

such beliefs continue to be widely held. The belief takes many forms, but these can generally be divided into two categories: belief in evil or 'black' sorcery, where magical powers are used to cause harm to someone or something, and in extreme instances, to kill; and belief in good sorcery, where magical powers are used for positive purposes, such as healing, 'flying' from place to place, finding lost property and curing infertility. There are also a number of types of sorcery that can be either good or evil depending on the circumstances in which they are used, such as weather control magic and magic for attracting lovers. (3) Good sorcery is generally welcomed, but black sorcery often creates fear, tension and hostility in the communities in which it appears. Throughout Melanesia today it is not uncommon for an individual suffering from some kind of misfortune or illness to blame their condition on sorcery, and for the suspected sorcerer to be attacked, banished or even killed.

In the region today most, if not all, communities have two different legal systems: the state system, based on the British common law system introduced during the period of colonialism and grounded in values such as agnosticism and rationalism; and a customary legal system, based on customary law and administered by traditional leaders such as chiefs. However, in all the countries in Melanesia the customary system exists outside the state system (except in the case of land), in that it is neither recognised nor given any powers by the state system. Despite the fact that all the state legal systems profess a desire in their constitutions to create an indigenous legal system, adapted for their particular circumstances and culture, rather than continuing with a system that is essentially foreign, this desire has remained largely unsatisfied. This author has argued elsewhere that one of the reasons for this is that there has not been sufficient consideration given to the question of the relationship between the two different legal systems. (4) Rather, the problem has been formulated as the question of how to take norms of customary law and integrate them into the state legal system without consideration of the customary system. (5) While this

In many communities there are many more different classifications of different types of sorcery. See for example Law Reform Commission of Papua New Guinea, *Sorcery Among the East Sepiks*, Occasional Paper No 10 (1978) 2 - 10.

Miranda Forsyth, 'Beyond Case Law: Kastom and Courts in Vanuatu' (2004) 35(2) *Victoria University of Wellington Law Review* 427.

See for example David Weisbrot, 'Law and Native Custom in Vanuatu' (1988) 3 *Law and Anthropology* 103; David Weisbrot, 'Custom, Pluralism and Realism in Vanuatu: Legal Development and the Role of Customary Law' (1989) 13(1) *Pacific Studies* 65; Paul De Deckker and Jean-Yves Faberon, *Custom and the Law* (2001); Guy Powles, 'The Common Law at Bay? - The Scope and Status of Customary Law Regimes in the Pacific' (1997) 21 *Journal of Pacific Studies* 61; Bruce Ottley, 'Custom and Introduced Criminal Justice' in Rudy James and Ian Fraser (eds), *Legal Issues in Developing Society* (1992) 128; Bruce Ottley and Jean Zorn, 'Criminal law in Papua New Guinea: Code, Custom and Courts in Conflict' (1983) 31 *American Journal of Comparative Law* 251; Jennifer Corrin Care, 'Customary Law and Human Rights in Solomon Islands: A Commentary on *Remisio Pusi v James Leni and Others*' (1999) 43 *Journal of Legal Pluralism and Unofficial Law* 135; Jennifer Corrin Care, 'Customary Law in Conflict: the Status of Customary Law and Introduced Law in Post-Colonial Solomon Islands' (2001) 21(2) *University of Queensland*

paper also focuses on the adoption of norms of customary law by the state system, it does so in a way which takes account of the customary legal system, thus allowing some broader questions to be explored: should norms of customary law be brought into the state legal system?; what are the sociological considerations that should be taken into account in making such a determination? And finally if customary norms are adopted by the state system, what type of consideration should there be of procedural and evidential issues?' These general issues are discussed in the context of a consideration of one particular example where a norm of customary law, namely the prohibition against sorcery, has been incorporated into the state legal codes in the region.

The particular jurisdiction these issues are explored in is the country of Vanuatu, an archipelago of more than 80 islands and around 250,000 inhabitants which gained its independence from both Britain and France in 1980. The first part of the paper discusses the nature and extent of sorcery beliefs in Vanuatu on the basis of ethnographic materials. Due to the limited amount of relevant anthropological material available, reference is also made to characteristics of the belief in sorcery in Melanesia as a whole. It shows that the belief in sorcery is complex and fundamentally related to reciprocity and control, two of the most powerful principles in Melanesian society. Second, the paper investigates how sorcery is regulated by the customary legal system in Vanuatu. This discussion demonstrates that the substantive customary laws have developed, and make sense, within a particular institutional and procedural framework. The third part then turns to the way in which the state system has responded to the issue of sorcery in respect of the criminalisation of the practice of sorcery, and the use of

Law Journal 167; Jennifer Corrin Care, 'Wisdom and Worthy Customs: Customary Law in the South Pacific' (2002) 80 *Reform* 31; Jennifer Corrin Care and Jean Zorn, 'Legislating Pluralism: Statutory 'Developments' in Melanesian Customary Law' (2001) 46 *Journal of Legal Pluralism* 49; Jean Zorn and Jennifer Corrin Care, 'Barava Tru: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific' (2002) 51(3) *The International and Comparative Law Quarterly* 612; Richard Scaglione, *Customary Law in Papua New Guinea: A Melanesian View* (1983); Ian Fraser, 'Legal Theory in Melanesia: Pluralism? Dualism? Pluralism Long Dualism?' (1999) 3 *Journal of South Pacific Law* Article 3; Bernard Narokobi, 'Law and Custom in Melanesia' (1989) 14(1) *Pacific Perspectives* 17; Bernard Narokobi, *Lo Blong Yumi Yet* (1989); Don Paterson, 'South Pacific Customary Law and Common Law: Their Interrelationship' (1995) 21(2) *Commonwealth Law Bulletin* 660; Michael Ntumu, 'The Dream of a Melanesian Jurisprudence: the Purpose and Limits of Law Reform' in Jonathan Aleck and Rannells (eds), *Custom at the Crossroads* (1995) 7; Tess Newton Cain, 'Convergence Or Clash? The Recognition Of Customary Law And Practice In Sentencing Decisions Of The Courts Of The Pacific Island Region' (2001) 2(1) *Melbourne Journal of International Law* 48; Saleimoa Vaai, 'The Idea of Law: A Pacific Perspective' (1997) 21 *The Journal of Pacific Studies* 225.

6 For those readers wanting more detailed analysis of the specific theoretical issues surrounding the relationship between custom and law and between 'rational' and 'irrational' beliefs raised by the issues of sorcery please refer to Jonathan Aleck, *Law and Sorcery in Papua New Guinea* (PhD thesis, Australian National University, 1996).

7 Attempts have been made to take into account the dangers of extrapolating conditions and beliefs that apply in one part of Melanesia to other parts, given the enormous cultural diversity of the region.

belief in sorcery as a defence or as a mitigating factor in sentencing. It shows how taking a norm of customary law and transplanting it in the state criminal law without consideration of the procedural and evidential issues it raises, as well as the social and cultural complexity of the issues surrounding it, is doomed to failure. However, it then goes on to consider what the possible benefits or disadvantages are in the state system taking account of such norms, and discusses how it could best do this, arguing that in some circumstances such an approach may indeed advance the `dream of a Melanesian jurisprudence."

2 THE NATURE AND EXTENT OF THE BELIEF IN SORCERY IN VANUATU TODAY

2.1 The Historical Context of Sorcery

In pre-contact Melanesian societies sorcery was important in all domains of social life, as was first made clear by Malinowski's work on the Trobriands (9) and then by successive anthropologists.¹⁰ In Vanuatu, sorcery represented a legitimate use of power by influential men, and was seen as being capable of working for the public interest as well as having a capacity for evil. (11) Thus many leaders were considered either to have extensive supernatural powers themselves, or had magic men working for them who were able to manipulate these powers on their behalf. In relation to Tanna, one of the islands in Vanuatu, Bonnemaïson refers to magic as being the `prison of the chiefs' in traditional ideology, representing the means of enforcing obedience and punishing those who disregarded the code of social relations. (12) Spriggs also finds on Aneityum, another island, that the chiefly power was based `on ritual rather than physically coercive powers - power of sorcery against enemies, power over the elements to control success in agriculture and fishing.'¹³ Finally, Tonkinson writes in relation to southeast Ambrym, another island, that the chiefs' alleged possession of a variety of sorcery techniques and their

⁸ Ntomy, above n 5, 7.

⁹ Bronislaw Malinowski, *Crime and Custom in Savage Society* (1967).

¹⁰ The majority of the work has, unfortunately, focused on Papua New Guinea rather than the whole of Melanesia. See Ian Hogbin, 'Sorcery and Administration' (1935) 6(1) *Oceania* 1; Michele Stephen (ed), *Sorcerer and Witch in Melanesia* (1987); Mary Zelenietz, 'Sorcery and Social Change: An Introduction' (1981) 8 *Social Analysis* 1; Papua New Guinea Law Reform Commission, *The Effects Of Sorcery In Kilenge, West New Britain Province* Occasional Paper No 11 (1979); and Papua New Guinea Law Reform Commission, *Sorcery*, Occasional Paper No 4 (1977).

Knut Rio, 'The Sorcerer as an Absented Third person: Formation of Fear and Anger in Vanuatu' (2002) 46(3) *Social Analysis* 129, 131.

Joel Bonnemaïson, *The Tree and the Canoe: History and Ethnogeography of Tanna* (1994) 179.

Matthew Spriggs, *Vegetable Kingdoms: Taro Irrigation and Pacific Prehistory* (1981) 59.

exclusive right to resort to sorcery was a vitally important element in maintaining control over their followers.¹⁴

However, during the time of colonialism, sorcery radically changed its character in Vanuatu in two major ways. First, the practice became available to all people through inter-island exchange, rather than just being practiced by traditional leaders. (15) The second major change followed from this, and also from the introduction of Christianity, and was that sorcery began to be perceived as less of a legitimate method of control by a leader and more as an evil, immoral act. Rio comments, '[t]he situation was hence out of control because people could no longer appreciate the agency of the sorcery act as an expression of power, since it was no longer seen as the tool of the socially constitutive high men of the hierarchy.'¹⁶

Early colonisers had expected that the combination of the 'civilising' effect of western culture and Christianity would result in the belief in sorcery dying out. However it seems to be widely accepted that throughout the region there has been an increase rather than a decrease in sorcery since contact with the modern world. Mortensen notes, 'Christian converts have often accepted the new religion without disbelieving in ancestral ghosts, tabus, and the power of sorcerers.'¹⁷ He continues:

Anthropologists now believe that European contact has increased the incidence of sorcery in Melanesia. Pacification led to the conduct of inter-village warfare by less visible means [as the use of force was outlawed by the colonial governments]. Fewer external threats to village cohesion also allowed greater tolerance of sorcerers, usually regarded as misfits.¹⁸

There is, however, a good deal of evidence that the expression of the beliefs has changed as a response to modernity and in particular the new inequalities that have arisen with incorporation into cash and market economies. (19) Today sorcery is closely associated with issues of jealousy and envy. Eves argues that traditionally wealth was not displayed in Melanesian societies except in certain limited circumstances and so envy was able to be controlled. Today, however 'new forms of wealth are displayed outside these contexts and this effectively undermines the regulation of sociality, giving rise to a perception of an increase

14 Robert Tonkinson, 'Church and Kastom in Southeast Ambrym' in Michael Allen (ed), *Vanuatu: Politics, Economics and Ritual in island Melanesia* (1981) 237, 241.

15 Rio, above n 11, 137.

16 *Ibid* 139.

17 Reid Mortensen, 'A Voyage in God's Canoe: Law and Religion in Melanesia' (2001) 4 *Current Legal Issues* 509, 511.

18 *Ibid* 524.

19 Richard Eves, 'Sorcery's the Curse: Modernity, Envy and the Flow of Sociality in a Melanesian Society' (2000) 6 *Journal of the Royal Anthropological Institute* 453, 454.

in sorcery.' (20) The new forms of wealth moreover are not suitable for exchange as traditional goods were and therefore they also `negate sociality and undermine the control of its flow.' He concludes:

Belief that sorcery is on the rise and is, indeed, a curse, are symptoms of this loss of control. This is not a commentary on inequality as such, but refers more exactly to a failure of the morality and management of exchange in the new context of modernity. (21)

2.2 The Nature and Prevalence of Sorcery in Vanuatu Today

In Vanuatu today, sorcery is blamed for most unexpected deaths, and often also for seemingly random illnesses, misfortunes and natural disasters. As a member of the community in the capital of Port Vila for five years now, I was at first surprised by, and am now used to, the fact that whenever someone dies young or suddenly, people explain that it was due to `jealousy' which led to sorcery being used against them. The lack of facilities to perform autopsies and the lack of understanding about modern principles of medicine certainly contribute to such beliefs as there is often no other way of explaining such deaths. The current prevalence of the belief in Vanuatu is also illustrated by its continuing appearance in newspaper reports. For example, in October 2005 the Vanuatu Daily Post reported a high chief as stating:

People in Vanuatu must not deny the fact that '*Posen*' [sorcery] does exist in our community even after Christianity and it is one of the major things affecting family life, development in the community and the government as a whole. (22)

An earlier article stated:

Indigenous Chiefs Land Custom Association (ICLCA) have issued firm warnings against the practice of black magic in Luganville. ... [A representative said] the practice of black magic is becoming popular in the rural areas and also the urban areas. ICLCA has found out that there are chiefs and people in Santo practicing the use of black magic to killing [sic] local businessmen and expatriates ... there are people who have tried to stop the rights of an individual to enter business by resorting to black magic. (23)

20 Ibid 460.

21 Ibid 466.

22 Esther Tinning, 'Constitution Should Provide Provision for Sorcery: Chief Wass', *Vanuatu Daily Post* (Port Vila), 10 October 2005, 5.

23 Eslyn Kaltongga, 'Indigenous Group Warns Against Black Magic', *Vanuatu Daily Post* (Port Vila), 8 October 2004, 6. See in addition Esther Tinning, 'Judge Defers Sentence for 17 Hog Harbour Men', *Vanuatu Daily Post* (Port Vila), 7 October 2005, 6; and Elenor Waiwo, 'Community Worried Over Quick Release of Alleged Sorcery Practitioners', *Vanuatu Daily Post* (Port Vila), 26 November 2005, 11.

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The variety of acts suspected to be committed by practitioners of sorcery are many and varied and a description of them all is beyond the scope of this paper. However, one act of sorcery that is described by an anthropologist as being the 'prototypical act' of a sorcerer is as follows:

[The sorcerer will] ambush someone who is out in the forest by himself. The victim is blinded by spells and magical remedies and made unconscious. The *abio* [the vernacular name for a practitioner of sorcery] then cuts open his belly, removes his intestines, replaces them with magical herbs, patches up the open wound and then brings him back to consciousness. The victim will then continue on his path, not knowing that anything has happened to him. When he returns to his house, he will later die a sudden death. Thus, when someone dies unexpectedly, people are immediately suspicious about the cause of death: a sudden demise without warning is a sure sign of *abio*. (24)

A very similar set of facts was said to have occurred in one of the cases discussed below, *Malsoklei v Public Prosecutor* [2002] VUCA 28.25

Practitioners of sorcery are said to use magical objects, particularly stones, to aid them, and such objects generate considerable fear in communities in which they are found. It is said that they also use various concoctions painted onto their bodies to render them either invisible or powerful. An anthropologist working in Ambrym has described another type of magical object widely believed to be used by sorcerers as follows:

The man accused of sorcery is believed to dig up the grave of a mother who has died in childbirth in order to take a bone from the corpse of the baby who is buffed [sic] with her. He touches the head of the victim with this bone, and the victim then loses his mind, walking around in a haze. (26)

Such a use of dead babies is also practised in Fiji Islands, as is illustrated by a recent article concerning the disappearance of the bodies of two dead babies from a Fijian Hospital. The relatives of the babies reportedly suspect that there is a sorcery cult operating out of the hospital and they have stated '[w]e Fijians know that newborn babies who die are something very strong for sorcery. A newborn baby who dies without setting foot on the ground is a powerful tool for

24 Rio, above n 11, 135.

25 Interestingly, Hogbin reported very similar practices amongst certain populations in Papua New Guinea in 1935, above n 10, 12.

26 Rio, above n 11, 143.

27 Avinesh Gopal, *Sorcery Fear on Stolen Babies: Family Suspects Evil Doers Raided Morgue* (2006) The Fiji Sun <www.sun.com.fj> at 23 February 2006. Nanise Nawalowalo, *Second Baby Disappears: Mystery as Mothers Bury Empty Coffins* (2006) The Fiji Sun <www.sun.com.fj> at 26 February 2006.

2.3 The Societal Functions of Sorcery

Although sorcery is today seen primarily as 'evil', many commentators argue that on a societal level sorcery beliefs help maintain social control within the community in a number of ways. First, sorcery accusations bring tensions within the community into the open, often allowing for a traditional leader to mediate conflicts. Second, fear of being accused of sorcery or angering a sorcerer is an incentive for individuals to treat each other well and to share wealth. Menses argues in relation to the Mozambique context:

Accusations of witchcraft are a form of social control. Witchcraft acts as a 'levelling force' (Geschiere, 199: 213) in as far as it undermines inequalities in wealth and power. It happens when, given the fear of attack by jealous mates, people desist from accumulating or displaying amounts of wealth that might elicit envy and jealousy from potential witches. It acts as a pacemaker, a means of fixing and limiting the rhythm of social change. If this argument is to be accepted, by arresting social differentiation, witchcraft prevents the growth of social tensions that might arise from it. (28)

A Papua New Guinea Law Reform Commission Report similarly notes that 'sorcery operates as a legal sanction against wrong doing.'²⁹ It states:

If a person tries to dominate the village or the clan in any way, he may be killed by sorcery. If a person becomes too rich or powerful and forgets the needs of others or undermines or exploits others, he may be sorcerised ...³⁰

Such comments also have resonance in Vanuatu.

However, there are many negative consequences to society as a result of the belief in sorcery. Acts of sorcery are perceived to cause immense social disruption and people who are thought to be engaging in the practice are consequently often thought to deserve death. (31) Mitchell comments that sorcery in Vanuatu 'is a powerful and prevalent discourse and its effects are perceived to be as deadly as any other type of physical violence.'³² This has given rise to people being attacked and even killed as a result of allegations of sorcery. An example of this occurred in a community in Hog Harbour on the island of Santo where the following events took place. A man had an affair with a woman in

²⁸ Maria Meneses, *Towards Interlegality? Traditional Healers and the Law in Postcolonial Mozambique* (2003) Center for Social Studies, University of Coimbra 18
<<http://www.ces.uc.pt/publicacoes/oficina/202/202.pdf>> at 15 November 2005.

²⁹ Law Reform Commission, above n 3, 18.

³⁰ Ibid.

³¹ Mortensen, above n 17, 525.

³² Jean Mitchell, 'Violence as Continuity: Violence as Rupture - Narratives from an Urban Settlement in Vanuatu' in Sinclair Dinnen and Allison Ley (eds), *Violence in Melanesia* (2000) 189, 199.

his village. The woman got a job on another island as a teacher and left the man. He was distraught and threatened her that if she left him and went somewhere else she would die. The third week after she started teaching she got sick and told the other teachers that she had been warned she would die and she told them the man's name. When she was dying she called out the man's name. She eventually died and her body was brought back to her home village. After her funeral someone who had heard what she had said about the man spoke out about it and a big meeting was held. The man heard about the meeting and ran away. At the meeting it was decided that the man had killed the woman using sorcery and the chief gave an order for him to be found. He was brought back to the village and tied up and beaten. The chief also gave the order that the man's mother and father must leave the village. They did so but later returned, although their son has not. (33) The legal consequences of these actions for the state system are discussed below, but for present purposes this story shows the disruption and fear caused by the belief in sorcery, as well as the frequent consequence of retaliation against alleged sorcerers.

Even if accusations of sorcery do not result in physical violence, they cause significant social disruption. Rio reports that in Ambrym:

The force of [sorcery] allegations is very strong, and in most cases the accused also feel that they are guilty, admitting that they did conspire with the 'devils', so to say. Many people cannot bear these charges, and instead of trying to mend the damage, they leave. In many instances they have never come back, instead spending the rest of their lives away from their closest relatives, outside the Ambrym universe of sharing and jealousy. (34)

This brief discussion has demonstrated that widespread belief in sorcery is a social reality in Vanuatu which is unlikely to disappear in the near future. Further, although the belief does have positive consequences in that it acts as a 'release valve' for community tensions, allowing them to be aired and also encourages people to act well towards each other, it has serious negative consequences. These include the generation of fear and distrust in communities as well as physical and verbal attacks on those accused of sorcery, attacks which may result in death or in the accused or his/her family being alienated from their community. As a consequence, belief in sorcery is likely to continue to generate types of behaviour which will come before the state criminal justice system in a variety of ways.

33 Interview with Dr Path (Espirito Santo, 16 November 2004).

34 Rio, above n 11, 147.

3 HOW DOES THE CUSTOMARY LEGAL SYSTEM IN VANUATU DEAL WITH SORCERY?

The customary legal system in Vanuatu is a system of 'grass-roots' dispute resolution administered by chiefs, either sitting alone or as a council of chiefs or with other elders. This system is not formally recognised by the State, but it currently resolves the majority of disputes in every village and town in Vanuatu through a mixture of adjudication and mediation, generally resulting in the payment by the parties of fines of varying weight to each other.

3.1 Norms of Substantive Customary Law

Unfortunately there is very little information in the ethnographic record of Vanuatu concerning the current treatment of sorcery by the customary system. This is possibly due to the cloud of secrecy that hangs over the issue of sorcery and also people's fears about openly discussing it. However, there are a few pieces of information available which shed some light on how it is treated. The example in Hog Harbour mentioned above is one instance where the customary system responded to accusations of sorcery by a chief ordering the person accused to be captured, beaten and exiled with his family. I was also told of another case that occurred two years ago when a boy was accused of killing five people through sorcery. The chiefs held a meeting and decided to kill him. They invited him to kava and drank his last kava with him and then sent him home, having previously organised for someone to be waiting for him in the dark. He was killed '*stret olsem wan pig*' (immediately, like a pig). Other approaches to the issue can be seen from two *kastom* 'laws' that have been written by the chiefly community on Tanna and the National Council of Chiefs respectively. These laws are not recognised by the state system; rather their existence is an attempt by the different chiefly organisations to increase their legitimacy in matters of dispute resolution among their communities. (35) The *Tanna Law* states in art 5:

Law Concerning Killing: ... it is forbidden to practice sorcery, *Nakaimas* (other islands of Vanuatu sorcery) and all new methods (made up ways) of sorceries. If one man disobeys and practices sorcery and kills someone, he must give a girl to the chief. If he practices sorcery and the person does not die, he must pay a fine of one pig and one head of kava. If he continues to practice sorcery and someone dies, then there is no place for him in Tanna and TAFEA because he is taking life, see Article 5 (A).

The *Malvatumauri Kastom Law* states in art 3(4):

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A chief whom I had asked about the production of by laws told me that the people were not responding to his authority as they told him that his laws weren't written down in 'black and white'. So he decided to write his laws down in 'black and white' in order for them to be obeyed.

No person has the right to ensorcel or poison another. If a person kills another through sorcery, he will be tried in a custom court. If the court finds proof that he killed through sorcery, he must compensate that person's life according to the judgment of the court.

These laws and cases suggest a few tentative conclusions about the treatment of sorcery in customary law. First, it is the practice of sorcery that is the principal concern and which is seen to warrant serious sanctions. Second, the focus is on sorcery that causes harm to other people, and particularly death. Third, in the two written laws the consequence of being found to have practised sorcery is restorative, namely an obligation to pay compensation for the dead person's life. In Tanna this is done by giving a daughter to the chief and in other islands by the payment of pigs, money, kava and other goods. (36) The Hog Harbour example shows a different response where the sanction for committing sorcery is a public beating. Given the scarcity of information it cannot be said how widespread such a practice is, but it is possible to say that it is reasonably anomalous in relation to other types of wrongdoing where the restorative approach of payment of compensation is far more usual.

There is no written information available which sheds light on how the customary system would deal with those who take revenge themselves on suspected sorcerers without the imprimatur of the chief or community. In part this is due to the nature of the traditional legal system in which the distinction between individual and community or state was not clearly demarcated. Extrapolating from my general understanding of customary law in Vanuatu, however, I would imagine the approach taken by the chiefs would be to punish acts of revenge or protection at the same time that the sorcerer was being punished. In such a way both parties to the dispute would pay each other fines of varying weight according to their culpability. There would, almost certainly, be a great allowance given to the fact that the assault was provoked by a belief that the other was practicing sorcery. (37)

3.2 Procedural and Evidentiary Methods

There is little information available about how custom courts go about determining cases of sorcery, and indeed little has been written about customary procedures in general. Customary cases are generally dealt with by the holding of a public meeting, presided over by community leaders, and the issues are worked through by public discussion and questioning. The meetings are generally free-ranging, in that the broader picture behind the actual incident is teased out, and blame allocated for other behaviour as well as that which precipitated the actual meeting. The aim of the meeting is more to restore peace

36 Needless to say, if enforced the penalty in Tanna would breach the state criminal law.

37 I have checked my assumptions about this with a number of chiefs and they have agreed with my understanding of how such a matter would proceed.

and harmony and good relations in the village than to establish the 'truth' of what has actually occurred.

That said, however, there are a number of ways that the claim of sorcery may be tested. First, proof of sorcery is often found in the discovering of magical objects, such as stones, (38) and also through the recounting of dreams. A man who was convinced that his wife had been killed through sorcery told me that his wife had come to him in a dream and had told him the names of the men who had killed her and how they had done so. He told me that this was the evidence he would be presenting to the chiefs, along with the facts that she had died suddenly and mysteriously and that there were a lot of people who were jealous of her as she had a few different jobs. Another way that proof is found is through a diviner who is able to 'see' what sorcery has been committed. ³⁹ For example, an anthropologist working on the island of Maewo informed me that people who practise sorcery on that island are revealed by certain men known as 'Gore' who have 'faculties in dreaming'. (40) A further method is through confession evidence. There is another facet of the customary legal system which is relevant to matters of proof. This is that there is no such thing as the presumption of innocence or the obligation for a crime to be proven beyond reasonable doubt. Rather, it is often the case that the accused person finds him or herself in the position of having to defend themselves against accusations and prove their own innocence. (41) In such a situation circumstantial evidence may be enough to constitute the requisite proof. This brief discussion has thus demonstrated that the procedural and evidentiary framework in the customary law system is very different from the state. As a result, many of the problems which arise when dealing with sorcery in the state system as discussed below do not arise in customary law.

4 THE TREATMENT OF THE BELIEF IN SORCERY BY THE STATE SYSTEM

There are two main ways the state system deals with the issue of sorcery: (i) the prosecution of suspected sorcerers and (ii) the use of a belief in sorcery as a defence to charges of assault and murder, or as a factor going to mitigation in sentencing. Both these situations have involved the courts grappling unsuccessfully with the difficulty of accommodating a ni-Vanuatu social reality into a western legal framework.

³⁸ See Public Prosecutor v Tupun [2003] VUSC 62.

³⁹ Rio, above n 11, 139.

⁴⁰ Interview with Gaia Fisher, anthropologist (Port Vila, 11 November 2004).

⁴¹ Interview with Chief Ngwele, Secretary Lakalakabulu Council of Chiefs (Port Vila, 27 February 2006).

4.1 The Criminalisation of Sorcery

Vanuatu, like most other countries in the Pacific, prohibits the practice of sorcery in its *Penal Code*.⁴² Section 151 provides that 'No person shall practise witchcraft or sorcery with intent to cause harm or detriment to any other person'. The penalty is imprisonment for 2 years. At first glance such a provision appears to fit the requirements of ni-Vanuatu society well, and in fact resembles the two customary laws discussed above, as it seems to penalise conduct which is viewed as both immoral and harmful to society by the vast majority of the population. However, once the provision is investigated in detail and considered in the context of the entire state legal system with its rules of procedure and evidence, it becomes apparent that it is unlikely to ever result in a successful prosecution. The difficulties for the prosecution in proving this offence are illustrated by the only case that has ever been brought to the courts under this section, *Malsoklei v Public Prosecutor*.⁴³

4.2 *Malsoklei v Public Prosecutor*

The *Malsoklei* case involved a number of defendants who were charged with a variety of offences including sorcery, rape and murder. The facts as found by Justice Saksak, the trial judge, took place on the island of Malekula in December 1995. A young and possibly mentally unbalanced adolescent wanted to join a group of men who were reputed to engage in sorcery. He was told that they would accept him if he named someone for them to sacrifice and so he named his sister, Roslyn, during an initiation ceremony. Arrangements were made and she was brought to a clearing at night where she was raped by all the men and then one of them killed her and removed her intestines by using a pandanus leaf pushed up her anus. The leader of the group then cut a piece of her liver or heart and gave it to the brother to eat. Another member of the group then had a leaf waved over him and magical words were said to make him resemble Roslyn and he was then sent home in Roslyn's place. A few days later the leader of the group came to her home and asked 'Roslyn' to go to the local night club with him and at the nightclub they started to dance. Then suddenly 'Roslyn' fell down and the body was replaced by that of the real Roslyn, who was taken to the local hospital where she was pronounced to be dead, but no autopsy was carried out. In April 1996 the brother went to the police and talked to them about the death of his sister and events which had occurred in the days

⁴² *Penal Code*, Cap 135, ('Penal Code'), s 151. All forms of sorcery or witchcraft are an offence in Cook Islands (*Crimes Act 1969*, s 165); Nauru (*Queensland Criminal Code 1899*, s 432); Niue (*Niue Act 1966 (NZ)*, s199); and Tokelau (*Crimes, Procedure and Evidence Rules 2003*, r 65); but in Fiji Islands (*Penal Code*, Cap 17, s 232); Kiribati (*Penal Code*, Cap 67, s 183); Solomon Islands (*Penal Code*, Cap 26, s 190); Tuvalu (*Penal Code*, Cap 8, s 183); and Vanuatu (*Penal Code*, s 151), it is only sorcery or witchcraft that is designed or believed to harm another person that is designated a criminal offence.

⁴³ (Unreported, Court of Appeal of Vanuatu, Lunabek CJ, Robertson, Von Doussa, Fatiaki and Coventry JJ, 24 October 2002), accessible via www.paclii.org: [2002] VUCA 28.

prior to her death. Four years later, each of the defendants were committed by the Senior Magistrates' Court at Lakatoro to the Supreme Court in 2000. The reason provided for this long delay was that the police did not investigate the matter immediately but waited for five years because they wanted time to let the issue cool down. (44)

The *trial* began in September 2000 but did not conclude until November 2001 due to many adjournments. The only real evidence that was produced was the uncorroborated evidence of the brother. There was no medical evidence as to the cause of death and the defendants gave alibis. Eventually however all the defendants were found guilty of rape and sorcery, the principal defendant guilty of intentional homicide, and the rest of complicity to intentional homicide. His Honour dispensed with the need to produce evidence to the court by using the doctrine of judicial notice, finding that 'In this case we see clear evidence of the ritual that becomes a covenant initiating a person into the covenant relationship with the mastermind'. After convicting the men his Honour noted that the men had spent more than twelve months in custody and that when they had been on bail they had basically remained faithful to their conditions. His Honour therefore said that the most appropriate way to deal with the men was under section 43(4) of the *Penal Code* which allows a court to convict and then discharge defendants.

In 2002 the Public Prosecutor appealed on the basis that the sentence was manifestly inadequate and the Public Solicitor also appealed on a number of grounds which all boiled down to the fact that the evidence taken as a whole was insufficient to fulfil the onus on the prosecution to prove the charges beyond reasonable doubt. The Court of Appeal quashed the convictions of the defendants for a number of reasons, holding that the evidence of the brother was so unbelievable that it was not credible. The court noted:

It appears that the reasoning in the case started from the proposition that there had been magical behaviour and activity which amounted to black magic. Therefore anything which was otherwise contrary to normal human experience and inconsistent with the physical realities of life as lived and experienced was to be swept under the carpet on the basis that black magic explained such factors that seemed to be inexplicable⁴⁵

The court did note, however, that if the convictions had not been quashed the sentence would have been found to have been manifestly inadequate.

44 The author was the prosecutor working on the appeal case and was told this by the police officers in charge at the time.

45 *Malsoklei v Public Prosecutor* [2002] VUCA 28.

4.3 Proof of Sorcery in State Courts

This case raises the important issue of how the first element of the offence of sorcery in the *Penal Code*, namely that the accused has practised sorcery, can be proven in a state court. The trial judge clearly found himself in a very difficult situation: he was confronted with facts of supernatural events which perhaps he and certainly many of the parties believed in; he had to deal with a legislative provision that required the prosecution to prove that sorcery or witchcraft had been practised; and he had to approach these facts and law in a manner consistent with the common law of evidence. His answer to the conundrum he was faced with was, at least, creative: he used an accepted common law doctrine, that of judicial notice, to avoid the obligation of proof. The Court of Appeal rightly held that this was an inappropriate approach, but unfortunately it did not provide any alternative approach for judges dealing with the same situation. Rather, the court's response was that '[t]here was no evidence that this sort of thing [changing bodies] occurs in black magic nor that there was sorcery practiced here. It is supposition and conjecture which has no place in a court of law'. (46) Yet how else could sorcery be proven?

Although the Court of Appeal did not say so directly, it is clear that it is impossible to prove that sorcery took place before a state court using normal evidentiary principles. The only acceptable form of evidence for a state court in a matter of sorcery would be confession evidence, and even that may be difficult to accept as was shown in the case of *Malsoklei* where the Court of Appeal stated:

We cannot accept that the mere fact that a person goes to the police and voluntarily tells an inculpatory story necessarily means that what he then says and later repeats in Court is an accurate and truthful recollection of events which occurred. It appears that some people may have been heavily consuming kava and alcohol and one is left with the distinct impression that [the brother's] evidence might have been influenced by such factors. ⁷

The Law Reform Commission ('LRC') of PNG also noted in a report on the issue that direct testimony is 'in truth quite unreliable on its own'. (48) It explained that this was because:

Very often, a man will boast of having sorcerised a victim in the hope of gaining status and prestige. A person may die of natural causes, but a self-styled sorcerer will boast that he sorcerised the victim in order to build up his big image. (49)

46 Ibid.

47 Ibid.

48 Law Reform Commission, above n 3, 11.

49 Ibid.

The *Malsoklei* case makes it clear that section 151 as it currently stands is defective in that it makes it impossible for the prosecution to ever obtain a conviction, or at least one that will withstand scrutiny in a higher court. It also shows that the state legal system has to date failed the people of Vanuatu in a serious way, being unable to competently deal with conduct that is widely considered to be of the utmost danger to the community. In this case a girl died and yet, due to failures on the part of the police in gathering evidence and the legislation itself, no-one was found to be guilty. This case raises two fundamental questions: (i) should sorcery continue to be a crime; and (ii) if so, how can it be criminalised in a way which will work in the state criminal justice system?

4.4 Should Sorcery be Criminalised by the State?

There are a number of factors that indicate that the practice of sorcery should continue to be criminalised in Vanuatu. Sorcery is considered to be a serious crime by the majority of the population and as discussed above is a source of considerable community disorder and fear. As the Papua New Guinea Law Reform Commission observes '[w]hat is important about the existence of sorcery is not that it can be proved objectively and mathematically, but rather that the subjects and the objects of sorcery believe it exists and is effective, for good or for ill'.⁽⁵⁰⁾ Other types of behaviour which cause people to feel unsafe, such as threats to kill,⁽⁵¹⁾ unlawful assembly,⁽⁵²⁾ and threatening language⁽⁵³⁾ are all criminal offences. Further, the criminal law has always recognised through the doctrine of attempt that a person who intends to harm someone but is stopped before they actually cause harm is just as guilty as someone who actually causes the harm.⁽⁵⁴⁾ Given that legitimacy is a major issue for the state legal systems in Melanesia, effectively criminalising behaviour widely perceived to be evil would certainly be a step in the direction of giving ownership of the state system to the people. The fact that sorcery was included in the *Penal Code* when it was drafted as a *sui generis* piece of legislation for the newly independent country as recently as 1980 is also an indication that there is support for its continued criminalisation. Finally, if sorcery is not criminalised then people who honestly believe that they are the victims of sorcery will have nowhere to turn and may as a consequence engage in vigilantism.⁽⁵⁵⁾ It would appear to be manifestly unfair for a legal system to provide no means of redress for a person who believes his

50 Ibid 13.

51 *Penal Code of Papua New Guinea* s 115.

52 *Penal Code of Papua New Guinea* s 69.

53 *Penal Code of Papua New Guinea* s 121.

54 The preamble to the *Sorcery Act 1971* (Papua New Guinea) (the *Sorcery Act*) provides:
There is no reason why a person who uses or pretends or tries to use sorcery to do, or to try to do, evil things should not be punished just as if sorcery and the powers of sorcerers were real, since it is just as evil to do or to try to do evil things by sorcery as it would be to do them, or to try to do them, in any other way.

55 See for example Waiwo, above n 23.

or her life is at risk, but then to punish that person if he or she takes steps to protect themselves from that risk.

4.5 How Can Sorcery be Effectively Criminalised by the State?

If the state continues to criminalise sorcery, the legislation must be changed to make it possible for convictions to be attained. There are three possible courses that can be followed: change the evidentiary laws in relation to the offence of sorcery; devolve jurisdiction over sorcery to the customary legal system; or write legislation in a way that obviates the need to prove that sorcery was in fact practised.

The first reform option is to change the evidentiary requirement for cases of sorcery to allow for evidence other than direct testimony to be given, for example, customary forms of proving sorcery such as divination and dreams. In Papua New Guinea ('PNG') the innovative lawyer, law reformer and former judge, Bernard Narokobi has argued that divination to detect sorcery should be used as a method of proof in trials, although he adds that 'no person should be convicted on this evidence alone, without corroboration'. (56) Mortensen states that

while this has not become law, custom methods of proof are certainly used in lower courts. In March 2000 a District Court in the Highlands dismissed a prosecution for making a false accusation of sorcery, accepting that the prosecutrix actually was a sorceress on the basis of the evidence of a New Britain medium who used divination to establish that. (57)

This possibility is unsatisfactory for a number of reasons, the most obvious of which is the likely unwillingness of state judges to accept such evidence.

The second possibility is to devolve jurisdiction over cases of sorcery to customary courts. This possibility is subject to many possible advantages and disadvantages and would need to be investigated in the context of a complete re-assessment of the relationship between the state and customary legal systems. (58) At present the customary legal system lacks any punitive enforcement mechanisms (the parties 'agree' to the punishment determined by the chiefs or the community through a process of discussion) and chiefs are at risk of contravening the *Constitution* or breaking the *Penal Code* themselves if they take actions such as imprisonment or banishment against suspected sorcerers. Consequently, it is therefore only the state that has the power to remove suspected sorcerers from their communities, and this is often the best way to

56 Law Reform Commission, above n 3, 25.

57 Mortensen, above n 17, 526-527.

58 The author is currently engaged in writing a PhD which does exactly this in the context of criminal law in Vanuatu.

stop fear and further violence in a community from continuing. For example, in 2005 there was an incident reported in the newspaper involving three men who had allegedly caused the death of a 19 year old boy through sorcery. As a result of these allegations there was high tension in the community which led to a number of properties being damaged. (59) The only way the violence was stopped was by the police arresting the alleged sorcerers and taking them to a different island for a period of time. It is unlikely, even if power to deal with cases of sorcery is given to the customary legal system, that the chiefs will also be given the necessary financial resources to be able to remove people from their communities for a period of time. Thus a degree of state involvement in cases of sorcery would appear to be in the best interests of public order, whilst the customary system continues to lack the right to use coercive force itself or to request the state to do so on its behalf.

There is some indication that the community would welcome state intervention in this area as well, although given the absence of a quantitative study it is impossible to state this with any degree of certainty. A high ranking Vanuatu chief is reported to have

[urged] the court to provide provision [i]n our constitution that will allow for sorcery cases to be taken to court not only on facts or evidence to make the case true, but ... what someone heard about an act of sorcery to be taken as evidence in court. (60)

His stated reason for this was that 'sorcery is real in our society despite the fact that nobody will ever see the real act of sorcery performed'. (61)

In another newspaper article the Indigenous Chiefs Land Custom Association are reported as suggesting that section 6(2) of the Constitution which protects individuals rights could be used to counter the threat of black magic. (62) This also indicates that traditional leaders are looking to the State to take action against sorcery.

The third possibility, namely re-wording the legislation to obviate the need to actually prove that sorcery occurred, is the preferable approach as it would involve minimum changes to the existing system. For example, in Papua New Guinea the *Sorcery Act 1971* (the '*Sorcery Act*') provides in section 6(2) and (3).

(2) A person who, directly or indirectly, pretends to be, holds himself out to be, or professes to be a sorcerer is guilty of an offence.

59 Waiwo, above n 23.
60 Tinning, above n 22.
61 Tinning, above n 22.
62 Kaltongga, above n 23.

A person who influences or attempts to influence the acts of another person by the use or threatened use of the powers or services of a sorcerer as such is guilty of an offence.

Such a formulation concentrates on the belief of the members of the particular community in regard to whether a person's actions are those of a sorcerer, rather than having to prove that the person actually has such powers. However, an approach that may work better in Vanuatu, where not all magic is black magic and so being a sorcerer *per se* is not an offence, (63) is to create an offence such as:

A person is guilty of the offence of sorcery if that person:

- (a) acts in a way which would reasonably cause a member of his or her community to believe that he or she was practicing sorcery; and
- (b) the person so acts with the intent to cause harm to a person or persons.

Such a formulation will also depend on the members of the particular community's belief as to the significance of the person's action, but includes the requirement of some malevolent intent. In addition, as the ways in which acts of sorcery are carried out differ from community to community, such a formulation will allow the necessary flexibility.

Either of these two formulations, or both, could be used in the legislation in place of the existing section 151. Such provisions would allow the prosecution to bring cases of sorcery before the court and to secure convictions where the evidence is strong enough, thus providing an effective response to behaviour widely considered to be evil and harmful. In order to emulate, as closely as possible, the autochthonous approach to the crime of sorcery, the legislation should also be amended to provide that the punishment for the crime should be in the form of customary compensation to the victims, rather than a fine to the state or imprisonment.

4.6 Belief in Sorcery as a Defence or as Mitigation

The belief in sorcery has also come before the state courts through the prosecution of people who have attacked or killed suspected sorcerers. The issues raised for the state system include whether such defendants should be entitled to rely on such a belief as a defence or as a mitigating factor in sentencing. These issues are important both because of the community attitudes to such behaviour and the way it is treated by the customary legal system, but also as a matter of consistency of approach in the state system. It would seem

⁶³ This difficulty is overcome in Papua New Guinea where the Sorcery Act draws a distinction between 'innocent' and 'forbidden' sorcery.

reasonable to accept that if the state recognises a belief in sorcery to the extent of criminalising the practice, it will also do so in relation to other parts of the criminal law.

4.6.1 *Is a Belief in Sorcery Currently a Defence in the State System?*

To determine this, two factual scenarios should be differentiated. The first is where someone is killed or hurt in some way through a suspected act of sorcery and the relatives of that person take revenge on the suspected sorcerer by assaulting or killing him or her. The second is where a person kills or assaults a sorcerer not from revenge, but from fear that the sorcerer is going to cause him or her or someone else harm.

Although there is no specific sorcery-related defence under the *Penal Code*, three general defences are potentially relevant to these scenarios: insanity, provocation and self defence. The first of these can be quickly dismissed. In Vanuatu the belief in sorcery is widely held and therefore does not suggest that the particular offender is suffering from a 'disease of the mind' as perhaps would be the case in different cultural contexts. The defence of provocation is also unlikely to be of much avail. It requires that the defendant must have been 'immediately provoked by the unlawful act of another' against him or herself or 'in his presence, his spouse, descendant, ascendant, brother, sister, master or servant, or any minor or incapable person in his charge'.⁶⁴ In order for a defendant to rely on the defence therefore they would need to prove to the court that an act of sorcery had taken place, which would give rise to the difficulties of proof mentioned above. Even if this could be done, there are two further difficulties. For the first scenario, which involves a defendant reacting against an act of sorcery against a relative, the section requires that the act of sorcery must have been carried out in the presence of the defendant, and for the defendant to have reacted immediately. It is extremely unlikely that this will ever be the case as acts of sorcery are renowned for their secrecy. Even in regard to the second scenario where a person is reacting against a belief that an act of sorcery has been directed at him or her, the requirement that the reaction 'immediately' follows the act of sorcery is likely to be fatal because not only would it be impossible to prove exactly when the act took place, it is often the case that acts of retaliation against sorcerers are not acts taken 'in the heat of the moment' but more often are carefully considered and follow a decision made by a group of people.

The third defence to consider is self defence. Section 23(1) of the *Penal Code* provides that:

No criminal responsibility shall attach to an act dictated by the immediate necessity of defence of the person acting or of another, or of any right of himself

⁶⁴ *Penal Code (Vanuatu) s 27.*

or another, against an unlawful action, provided that the means of defence be not disproportionate to the seriousness of the unlawful action threatened.

Self defence can only be considered in the context of the second factual scenario, but even then there are considerable difficulties in seeing how it could apply. First there would be the same difficulties of proving that the act of sorcery had taken place. Second, there is the problem of the requirement that the response was in reaction to an 'immediate' threat. Given the secret nature of sorcery it is unlikely that a defendant would be able to prove that an act had taken place which required immediate autonomous action, rather than recourse to the state. Of course, this response pre-supposes that the state can effectively deal with threats of sorcery, something that it has been shown not to do. However, the realities of the weaknesses of the state system are unlikely to be accepted by the courts as a justification for what would otherwise be criminal conduct.⁶⁵ This brief discussion of the legislative provisions shows that it is unlikely that the law as it currently stands would permit any court to find that a defendant who claimed that their assault was based on a belief in sorcery had a valid defence. Thus, it is not surprising that it appears that no defendant has ever attempted to plead it as a defence.

4.6.2 *Is a Belief in Sorcery Currently Accepted as a Mitigating Factor by the Courts?*

There have been two cases in recent years whose facts raised the possibility of the courts viewing a belief in sorcery as a mitigating factor. In *Public Prosecutor v Tupun*⁶⁶ 14 defendants were charged with a number of offences arising out of the intentional killing of a woman on the island of Tanna. The facts as found by Chief Justice Lunabek, the trial judge, were as follows. In October 2003 a man died in the village in which the events took place. The evening after his death his brother, Tupun, went to the house of the woman whom he believed had killed his brother. He claimed that she had done this using a magical stone which he had found in her house. This stone was produced as evidence but the court rejected it, stating that it had been found somewhere else. A number of different groups of people became involved with the questioning of the woman over whether she had used black magic. The situation got out of control and finally Tupun ordered men to kill her. The evidence was very confusing in relation to who actually assaulted the woman, but she was seriously wounded and later died of the injuries. The judge found Tupun guilty of the offence of aiding and abetting intentional homicide and sentenced him to eight years imprisonment. Nine of the other defendants were found guilty of unlawful assembly and sentenced to eight months imprisonment

⁶⁵ For example the courts have traditionally been reluctant to extend the defence of self defence to battered women despite the reality of the high number of deaths caused by domestic violence.

⁶⁶ [2003] VUSC 62.

and one of the defendants was found guilty of intentional assault and sentenced to eight months imprisonment. In his judgment and sentence the judge did not even discuss the possibility that the defendant's belief that the deceased had killed his brother through sorcery could be a defence or a mitigating factor.

The second reported time this same issue arose before the courts was in the case of Public *Prosecutor v Kuvu Noel et ors* [2005] VUSC 115. The facts of this case which took place in Hog Harbour, Santo, were outlined above. When the case came before the court all defendants were charged with unlawful assembly and some with intentional assault and kidnapping. They all pleaded guilty to the charges against them. Rather than sentencing the defendants, Justice Saksak employed the same solution that he had in the case of *Malsoklei*, deferring the sentence for a year on the condition that the defendants do not commit the same offences for which they have been charged and keep the peace in their villages.⁶⁷ The only reason that he gave for this decision was that 'this is a special case with its peculiar circumstances' although he did not explain what these circumstances were. It is possible to read into this decision the judge's dissatisfaction with the current law relating to the issue of sorcery. This is because he has attempted to manipulate the sentencing provisions to create an outcome which presumably he considered fair. Unfortunately, he too avoided any mention of the possibility that a belief in sorcery could operate as a defence or a mitigating factor.

These two cases show that no allowance is currently made for a defendant who kills or assaults someone because they believed that person had caused harm through sorcery. They further show unwillingness on the part of the courts to deal openly with the issue. As a result they have failed to provide any guidance to future courts and to the people of Vanuatu about how the state should deal with people who commit crimes through fear of sorcery. Before moving on to consider the question of whether, and if so how, a belief in sorcery should be with a defence or a mitigating feature, it is instructive to consider how other courts in the region have approached this issue.

4.6.3 Belief in Sorcery as a Defence or a Mitigating Feature in Melanesia Generally

The issue of a belief in sorcery has come before the courts in the Solomon Islands once⁶⁸ in the context of a rape case. In *Regina v Sisiolo*⁶⁹ the accused

⁶⁷ The judge relied on s 45 of the *Penal Code* which provides that a court may, 'having regard to the circumstances, including the nature of the offence and the character of the offender instead of passing sentence, order the offender to appear for sentence if called upon to do so, on such conditions as the court thinks fit.'

⁶⁸ Due to the lack of adequate reporting of case law in the region it is hard to say whether the issue has arisen more than this. However, this is the only case available from the Pacific Islands Information Institute, which is the main collection of case law for the region.

made the complainant agree to have sexual intercourse with him by telling her that he could use sorcery to make the complainant's boyfriend love her and marry her. The court stated that:

It would not be consistent with justice to excuse unlawful acts committed in pursuance of the power of sorcery the perpetrator believes in it. That would be repugnant to justice as provided by schedule 3 to the Constitution made under s76. Whatever belief there may be in sorcery or 'custom medicine', it must not include the carrying out of actions which are unlawful under the Penal Code or any other enactment. ... Belief in sorcery has never been accepted as defence in law in any part of the world.⁷⁰

In Fiji Islands the defence of sorcery similarly received a short reception in the case of *State v Wakilau*.⁷¹ In that case one of the defendants, who was found guilty of manslaughter after having set fire to a house in which the deceased sustained severe burns to the body from which he later died, claimed that he had set fire to the house because he had been ordered to do so by his chief as the deceased was a suspected sorcerer. The court stated:

The law administered by this court exists for the protection of all members of this society both villager and chief and even those whom it might be thought whether rightly or wrongly practise 'sorcery' and no one no matter his chiefly status or traditional duties is permitted to take the law into his own hands and act as accuser, judge and executioner much less will this court countenance the taking of a human life by unlawful means whether it be in a rural village or an urban centre.⁷²

The country in the region with by far the most number of cases involving sorcery is PNG. For example, last year a PNG newspaper reported that on one occasion the police had arrested 320 people for practising sorcery and religious cults.⁷³ However, the PNG courts have consistently rejected attempts to found defences to sorcery killings on the well-established criminal defences of insanity, provocation, or self-defence.⁷⁴ In addition, it appears that even the sorcery-related special defences created by Part IV of the Sorcery Act are not

⁶⁹ (Unreported, High Court of Solomon Islands, Lungole-Awich J, 16 June 1998), accessible via www.paclii.org: [1998] SBHC 30.

⁷⁰ Ibid.

⁷¹ (Unreported, Supreme Court of Fiji, Fatiaki J, 10 November 1993), accessible via www.paclii.org: [1993] FJSC 105.

⁷² Ibid.

⁷³ PNG Arrests 320 on Sorcery, Cult Charges (2005) ABC Radio Australia <<http://www.abc.net.au/ra/news/stories/s1497086.htm>> at 11 September 2006.

⁷⁴ Rob O'Regan, 'Sorcery and Homicide in Papua New Guinea' (1974) 48 Australian Law Journal 176.

often used.⁷⁵ The most relevant of these defences (the others being concerned with adultery) is the provision that attempts to extend the defence of provocation to meet situations involving sorcery.⁷⁶ However, it appears that this formulation has not been very successful in proving a defence for sorcery-related killings, mainly because the extension of the doctrine of provocation has not removed the requirement that the provocation causes the person to kill 'in the heat of passion', which is not common for sorcery-related killings as discussed above.⁷⁷

The PNG courts have, however, always been prepared to accept that a belief in sorcery can be taken into account as a significant mitigating factor in sentencing, often reducing the sentence by up to a third.⁷⁸ In *Secretary for Law v Ulao Amantasi*⁷⁹ the Supreme Court set out the rationale for this approach:

It seems that in all Papua New Guinea societies the killing of an acknowledged sorcerer, who has repeatedly been responsible for or has boasted of causing deaths, has been regarded as a benefit to society (unlike the payback which rebounds not on the offender personally but with cruel uncertainty, possibly on some innocent member of his line). The punishment of sorcerer killers has always been comparatively light. The Judges imposing it have no doubt been conscious they were administering an imposed law which in this aspect receives little or no approbation from primitive villagers, comparable to the relief which many of them would receive from the elimination by that law of the payback.⁸⁰

⁷⁵ The *Sorcery Act* has been subjected to considerable criticism as a result of its ambivalent attitude on the issue of the existence of sorcery. For example, the Supreme Court recently stated:

We consider that the Act was poorly drafted. For instance, the opening statement on the purposes of the Act stipulates the Act as being one to prevent and punish evil practices of sorcery and other similar evil practices. Then in the preamble it unequivocally states that: 'There is a widespread belief throughout the country that there is such thing as sorcery and that sorcerers have extraordinary powers that can be used sometimes for good purposes but more often for bad ones.' Whilst the rest of the body of the Act in Pt III deals with offences relating to sorcery, s 5 then suggests that 'even though this Act may speak as if powers of sorcery really exist ..., nevertheless nothing in this Act recognizes the existence or the effectiveness of powers or sorcery in any factual sense'. We find this to be inconsistent with the purposes of the Act stipulated in the preamble and the general body of the Act which deal with offences and various practices of sorcery: *Kwayawako v The State* [1990] PNGLR 6.

⁷⁶ In summary, the *Sorcery Act*, s 16 provides that:

- (1) an act of sorcery may amount to a wrongful act or insult within the meaning of Section 266 of the Criminal Code 1974;
- (2) it is immaterial that the act of sorcery did not occur in the presence of the person allegedly provoked; or was directed at some person other than the person allegedly provoked;
- (3) the likely effect of an act of sorcery relied on by virtue of this section shall be judged by reference, amongst other things, to the traditional beliefs of any social group of which the person provoked is a member.

⁷⁷ See for example *The State v Mole Manipe* (Unreported, National Court of Papua New Guinea, Wilson J, 1 June 1979), accessible via www.paclii.org: [1979] PGNC 8 and O'Reagan above n 74, who discusses the courts rejection of these defences in detail.

⁷⁸ See for example *Kwayawako v The State* [1990] PNGLR 6.

⁷⁹ [1975] PNGLR 134.

⁸⁰ *Ibid* 136-137.

This brief discussion of approaches in other jurisdictions reveals a number of interesting points. First, there are far fewer cases concerning sorcery-related assaults and killings in the region, with the notable exception of PNG, than would be imagined given the prevalence of the belief. It is possible that this is due to the lack of reporting of cases in the region, as magistrates cases are generally not readily publicly available and not even all higher court cases. This theory is supported by an article that appeared in *The Fiji Times* in October 2005 which reported that a Magistrate had stated that:

[H]e is concerned by the increasing number of sorcery cases in which people suspected of such practices are either attacked or their property damaged. Magistrate Syed Mukhtar Shah said ... he had heard 30 cases involving sorcery in the Western Division in the last five years. He said this number was high for a small country like Fiji where there were many people in society who were superstitious.⁸¹

It is also possibly attributed to the hesitation that judges may have in discussing matters such as belief in sorcery in their judgments. Finally it may be that such cases do not come before the state system either because they occur in remote areas or because people perceive that any revenge attacks on sorcerers were justified and therefore do not alert the police to them.

The second point that the cases demonstrate is that nowhere in the region would a belief that the person killed was a dangerous sorcerer who had committed a serious wrong be accepted as defence to murder or assault. Moreover, only in PNG does it seem that there has been a tradition of treating such beliefs as a weighty mitigating factor.

4.6.4 *Should a Belief in Sorcery be a Defence or a Mitigating Factor?*

Turning once more to Vanuatu, and to a consideration of how the state law could best be moulded given the widespread belief in the reality of sorcery, it is helpful to once more consider the two factual scenarios set out above. In relation to the first scenario, which is essentially a revenge attack or killing, it is hard to see any justification in law or in custom for the creation of any special defence, provided of course that there are penalties under the law for engaging in acts of sorcery. To create such a defence may, in fact, be considered to be tantamount to encouraging vigilantism, something that is especially problematic in states with weak governments. It may also be seen as a licence to attack suspected sorcerers, which may in turn lead to unjustified attacks on those who live at the margins of societies and who are often viewed with suspicion. However, it would be appropriate for the defendant's genuine belief in the fact that the person assaulted had killed or harmed their relative through sorcery to

⁸¹ *Fiji Judge Notes Rise in Sorcery Cases*, *Fiji Times* (Suva, Fiji), 18 October 2005 (no attributed author).

be taken into account by the courts as a significant mitigating factor during sentencing. Evidence about the genuineness of the belief and of its reasonableness could be proved to the court, provided the judges approached the issue with open minds. Narokobi's suggestion that assessors from the local area sit with judges in sorcery cases could also be considered in this context. ⁸²

The second scenario in which the defence of sorcery is likely to arise - where a person kills or assaults a sorcerer not from revenge, but from fear that the sorcerer is going to cause him or her or someone else harm - is far more difficult. In such a situation it is hard to see how the person's moral culpability is not the same as someone who kills or assaults a person they honestly and reasonably believe is going to cause them or someone else injury or death. It therefore may well be appropriate for the legislature to consider drafting a special extension of the doctrine of self-defence which would allow a defendant to rely on a well-founded belief that the only course of action available to him or her in order to protect him or herself from an act of sorcery was to act as he or she had done. In order to protect against the dangers of being seen to give a licence to attack suspected sorcerers, it may be appropriate for such a defence not to be absolute, but rather just to diminish responsibility in the same way as for provocation.

5 CONCLUSION

The treatment of the crime of sorcery by the state system is an illustration of the broader problem of the place of customary law in state legal systems, and the associated question of the relationship between customary legal systems and state legal systems. This paper has shown that such issues cannot be resolved simply by transplanting norms from one system into another, as they are highly dependent on their own institutional and procedural systems. It has demonstrated that in Vanuatu the incorporation of the customary prohibition on the practice of sorcery has failed to take into account these differences and, as a result, the relationship between customary law and the state system has not been advanced. Further, the state system has failed to provide for the broader consequences of such a reform, creating a situation which is both logically inconsistent and manifestly unfair - on the one hand, sorcery is recognised to the extent of prohibiting it and yet, on the other, no allowance is made for the effect of the belief in sorcery on people who kill or harm alleged sorcerers. Thus, although the belief in sorcery is widespread and very real in Vanuatu today, such beliefs have not been properly accounted for by the state justice system. It is scarcely a surprise, therefore, that one of the greatest problems with the state legal system is the lack of ownership of it by ni-Vanuatu themselves.

However, the paper has also demonstrated that it is possible for the state system to accommodate a social reality such as the belief in sorcery by making a few

⁸² Law Reform Commission, above n 3, 25.

small legislative changes, and perhaps, some greater changes in the mind-set of those who are tasked with the operation of the legal system. As Aleck has stated, 'there is [nothing] inherent in the constituent nature of the adopted common law tradition which necessarily renders that tradition irreconcilably or irremediably inimical to a culturally appropriate and responsive accommodation of changing Melanesian jurial attitudes, values and beliefs'.⁸³ A developing country in the position of Vanuatu with its combination of an inherited colonial state legal system and laws, and a customary legal system developed for small, stateless communities, is starting from a difficult position. In order to move forward a strong commitment to law reform by the courts and by the legislature is required. Moreover, in addition to the will for law reform, there also needs to be a sound understanding of the beliefs and values of the people in the jurisdiction, as a just legal system must be soundly based on the social realities and moral values of the people it governs. One of the many weaknesses of this paper is that it has had such a scanty collection of ethnographic materials to work from. This will continue to be a major pitfall in any law reform endeavour until there is more commitment given to research into indigenous beliefs and practices and their ramifications for law and order. It is therefore to be hoped that future governments will put far more effort into law reform than has hitherto been the case. Such efforts must surely be justified in the interests of building a legitimate legal system which will, in turn, strengthen the legitimacy of the state.

⁸³ Aleck, above n 6, 357.