

## VANUATU PENAL CODE

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The Penal Code of Vanuatu is provided in the Penal Code Act 1981 which was enacted within twelve months of the country becoming independent from the joint administrations of Britain and France. It was an important piece of legislation marking as it did for the first time an attempt to provide a Penal Code which would apply to all the people of Vanuatu who had previously been regulated by the separate enactments applying to British French and New Hebridean inhabitants.

Since 1981 the Penal Code has been amended once only, in 1982, to provide an additional offence, adultery, which amendment was the result of a private member's bill.

After almost five years operation, it is timely to review this important piece of legislation, and this is the purpose of this article. It is not proposed to set out each provision in detail and discuss it: that would be beyond the scope of an article of this size. What will be attempted instead is to draw attention to some of the main features of the Penal Code as they appear to the writer, and to assist the reader to obtain an overall view of the provisions of the Code, a copy of the summary of contents is attached as an appendix.

Like many other Penal Codes in the Commonwealth, the Penal Code of Vanuatu is divided into two Parts, Part I, which deals with general principles of criminal liability, and Part 2, which sets out the definition of the individual offences. The presentation has the advantage of orthodoxy and conformity, but whether it is the most helpful method of presentation is another question of course. The form of presentation requires that the persons charged with applying the Code, either as magistrates or as police, and the persons wishing to ascertain the extent of their liability as citizens, must read the contents of the first Part, and carry them in their mind, and apply them where appropriate into the definitions of individual offences in the second Part. This is not an easy feat when the contents of the first Part are few in number, and when the readers are very familiar with the English language and with the art of implication. Neither of these circumstances is present with regard to the Penal Code of Vanuatu, which cannot help but render it difficult to understand and to apply in this country.

### **Part I – General Provisions**

With that preliminary comment, we may turn now to consider Part I. This Part, as indicated above, deals with general principles at some length, and certainly to a much greater extent than do the Penal Codes of the neighbouring countries of Fiji or Solomon Islands. Slightly over one third of the provisions of the Penal Code of Vanuatu are devoted to general principles of criminal liability, whilst the proportion in the other two Codes mentioned is of the order of one eighth. The fact that greater attention has been given to the general principles of liability, and that a greater effort has been made to spell these out in express provisions, rather than to rely upon implications or on the common law, is to be welcomed and applauded. Some of the individual provisions may however be open to other comment.

The scope of application of the criminal law of Vanuatu is expressed in ss. 1-5 in very wide terms. The criminal law of the Republic is stated to extend not only to conduct within the land and territorial sea of Vanuatu and the airspace above, and within ships and aircraft registered in Vanuatu, but also to any offence, wherever committed against the external security of the Republic, and any offence of counterfeiting the currency of the Republic; to any act anywhere of piracy, hijacking of aircraft, traffic in persons, slave trading and traffic in narcotics; and to any act anywhere by a citizen of Vanuatu which would constitute an

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offence against the law of Vanuatu if committed within the Republic, when the citizen has already been prosecuted overseas for that act.

Section 6 contains in subs. (1)–(3) express provisions stating that criminal intention or recklessness on the part of the accused must be proved to establish criminal responsibility unless legislation expressly states or contains a necessary and distinct implication otherwise. Intention is defined as an intention ‘to do the very act which is prohibited by the criminal law and for which a specific penalty is prescribed’, and recklessness is described as occurring when a person ‘knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk and it is unreasonable for him to take it’. It will be noted that the definition of recklessness is narrower than the description which the House of Lords considered appropriate for people of the United Kingdom in *R v. Caldwell*.<sup>1</sup> There must also be doubts as to whether intention and recklessness as thus defined are in accordance with the general principles of liability of ni-Vanuatu who tend in customary law to place less emphasis upon the intentions or knowledge of a wrongdoer.

Sections 8-10 of the Penal Code contain provisions setting out basic principles as to the burden of proof. Section 8 provides that ‘No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted’, and s.9 states that ‘the burden shall rest on the prosecution to disprove beyond reasonable doubt any plea of provocation, compulsion, coercion, self defence, necessity, consent, accident or mistake of fact which has been sufficiently raised by the defence’. Section 10 then provides that ‘if a person charged with the commission of a crime pleads any defence by which he may exculpate himself if he proves certain facts, it shall be sufficient for such a person to prove the same on the balance of probabilities’. Although provisions as to the burden of proof are not often to be found in Penal Codes their importance is such, that their inclusion is in principle welcomed. It must be acknowledged however that while the purport of these three separate provisions is tolerably clear to the experienced lawyer, their interrelationship and overall effect is by no means so clear to persons without such experience.

Closely related in content to those sections, but unfortunately separated from them physically is s.14 which confirms what is stated in the Criminal Procedure Code that after the closing of the evidence for the prosecution, the accused may choose whether to give evidence or remain silent, and that the fact that he remains silent shall not of itself give rise to an inference of guilt. Again this is a procedural provision of very basic importance which it is useful to reiterate in the Penal Code, but it would be more helpful to place it alongside the provisions relating to procedure.

Defences to criminal responsibility are to be found in Part I, but they are not collected together in one group or division of the Part as would be helpful for the reader: consent (s.7), mistake of fact (s.12), youth (s.17), insanity (s.20), voluntary intoxication (s.21), superior orders (s.22); self defence (s.23).

The provision about consent is rather curiously worded in that it provides that ‘it shall be no defence to any charge that the victim prior to the criminal act has expressed his consent to it, if the purpose of the act was to inflict serious physical or mental injury incompatible with the wellbeing of the victim’. Apart from the difficulty of knowing exactly what kind of injuries are being described in the last phrases of the sentence, there is the fact that the section does not expressly state that in other cases consent is a defence. The implication that consent is a defence in other cases would seem not unreasonable, and this is strengthened by subs. (2) which states that ‘in other cases, the victim shall not be taken to have consented . . . if . . . he was incapable of or was prevented from forming the necessary

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1. [1982] A.C. 341.

consent'. The less, however, one has to resort to implication in a criminal code the better, especially one which is to apply to, and be administered by, people for whom the notion of implication of words is not familiar or easy. The defence of mistake of fact is stated to be more widely available than in many countries, and under customary law in Vanuatu – mistake of fact is stated by s.12 to be a defence 'if it consists of a genuine, even though not reasonable, belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent'.

The provision about the defence of insanity in s.20 is also worthy of note. It is stated that it shall be a defence that the accused was 'suffering from a defect of reason, due to a disease of the mind which rendered him incapable of appreciating the probable consequences of his conduct'. The reader of the English law reports will be aware that this definition of insanity is different from, and narrower than, the definition adopted by the courts in England, inasmuch as it does not allow for insanity where the accused does not know what he is doing nor where he knows what he is doing but does not know that it is wrong. On the other hand the definition of the Penal Code may be closer to traditional ni-Vanuatu concepts of the extent to which a wrongdoer should be able to escape liability by reason of unsoundness of mind.

Diminished responsibility is provided with a wider rule by the Penal Code of Vanuatu, than it has in many countries. Despite a divisional heading which appears to have been misplaced, diminished responsibility is stated to apply where the accused was suffering from an abnormality of the mind not amounting to insanity, where the accused was acting under compulsion or threats of death or grievous harm, or under the coercion of a person having actual or moral authority over him, or where the accused was provoked to such a degree as would deprive a normal person of his self control. The effect of diminished responsibility is that 'the punishment shall be mitigated at the discretion of the Court'.

Sentencing is the subject of twenty-two sections which are placed rather misleadingly under the heading of Participation in Criminal Offences. The sentences authorised by the Code include the orthodox forms of imprisonment, fine and periodic detention, and there is provision for a suspended sentence. There are however two points of special interest. One is the provision for discharge without a conviction even although the charge has been proved against the accused (s.43), a provision which can lead to some imprecision of thinking on the part of a court. The other point of interest is the provision in s.57 for rehabilitation of offenders by the expurging of their criminal convictions after a certain period of time: five years where the sentence was a fine or single term of imprisonment up to six months; seven years where there was a single sentence of imprisonment of up to five years; ten years where there was more than one sentence for an aggregate period of one year or less; and fifteen years where there was more than one sentence for an aggregate period of more than one year but not more than two years.

## **Part 2 – Offences**

The second Part of the Penal Code of Vanuatu which describes the individual offences, includes much the same general categories of offences as other Penal Codes in the Commonwealth, but it is obvious that it provides for them in much greater brevity than is adopted in other Penal Codes. Part 2 of the Penal Code of Vanuatu contains ninety-two sections establishing criminal offences, as compared with 340 sections in the Penal Codes of Fiji and Solomon Islands, and these ninety-two sections are contained in 24 pages as compared with some 82 pages in the other two codes. Such brevity is very commendable, provided, of course, that it has not been obtained at the expense of adequate control of criminal conduct or of certainty as to the scope of the individual provisions. Offences against public order are stated to include treason, inciting to mutiny, communicating military or scientific information, sabotage, sedition, unlawful assembly, riot, forcible entry upon and detainer, of property, corruption of and by public officials. The Penal Code does not attempt

to make special provision for the rather archaic offences of affray, challenge to fight a duel, and assembling for the purpose of smuggling, nor the rather archaic process of reading the riot proclamation, which grace the Penal Code of Fiji. Nor does it provide, more significantly, for offences such as the making of false statements by public officials, the abuse of office by public officials, the false assumption of authority by public officials and the personation of public officials.

Offences relating to the administration of justice and to religion are although reduced in number much the same as those provided in other Codes, as regards effect.

In the category of offences against morality one observes some points of interest. There are several forms of conduct which are regarded as criminal in neighbouring countries but have not been established as criminal offences in Vanuatu: bigamy, non forcible indecent assault of a person over thirteen, homosexual acts with a person eighteen years and over; unnatural sexual acts with persons or with animals. It is open to serious doubt as to whether these forms of conduct would be regarded by ni-Vanuatu as appropriate to de-criminalise. It is also open to doubt whether the scope of prohibited relationship for incest is sufficiently wide to reflect community standards in Vanuatu. When the Penal code was first enacted it did not include adultery as an offence, although that had previously been constituted as an offence under the Native Criminal Code, but that deficiency was rectified by an amendment made the following year.

Offences against the person are as can be seen from the summary of sections, quite fully provided for. Perhaps the most striking feature in this category of offences is the definition provided for intentional homicide. This definition, which is adopted from the Native Criminal Code, states that 'No person shall by any unlawful act or omission intentionally cause the death of another person' and then provides that the penalty 'if the homicide is not premeditated' is 20 years imprisonment, and 'if the homicide is premeditated' is imprisonment for life. The word 'premeditation' is defined to 'consist of a decision made before the act to make a homicidal attack on a particular person or any person who may be found or encountered'. Two difficulties seem to arise here: one is to distinguish between 'intentional' and 'premeditated', and the other is that the definition of premeditation requires that there be a homicidal attack, which would not always be the case where death was premeditated. It would seem that some elaboration on this definition is desirable. On the other hand the Code does contain a quite lengthy exposition, adopted from the Penal Code of Fiji, as to when death is to be regarded as being caused by the action of a person, which is very helpful.

The category of offences against property has been made much shorter and simpler than the corresponding categories in Fiji and Solomon Islands by not constituting various kinds of larceny according to the property that is stolen e.g. larceny of fish, larceny of dogs, larceny of trees, or according to the person who offends e.g. larceny by tenant or lodger, larceny by clerks. The omission of these myriad offences in the Vanuatu Penal Code is to be commended. More questionable however is the inclusion in the provisions relating to theft, misappropriation and false pretences of the definition of those offences which were adopted in the Larceny Act 1916 of the United Kingdom and which had incurred a great deal of criticism in that country, before being eventually replaced by the Theft Act 1968.

The Penal Code of Vanuatu concludes with a category of offences described as being against the public interest, although why these require to be singled out for special categorisation on this ground is not altogether clear: most, if not all, of the offences contained in that category could equally, if not more appropriately be included within other earlier categories in the Code. The only offence amongst them which seems deserving of special mention is that of witchcraft which is defined as the practice of 'witchcraft or sorcery with intent to cause harm or detriment to any other person'. In many parts of the country witchcraft is regarded as performing a useful social function in maintaining social order and

punishing offenders against customary law. Whether an outright prohibition of such a practice is appropriate in the community at this stage is debateable.

Mention should be made of some features relating to the presentation, rather than to the content, of the provisions in Part 2. A number of important words are used which are capable of more than one meaning, but no definition is provided – intentionally, wilfully, recklessly, maliciously, dishonestly, fraudulently, with intent to deceive, with intent to defraud, indecent and unlawful. Some of these words would seem to be very similar in meaning to others, but the meaning of each, and its relationship to others, is left in a state of uncertainty which is bound to cause difficulty and confusion, especially for those for whom the English language is not merely a second language, but is at best a third language or a fourth language. Bearing this in mind, it is also unfortunate that many of the marginal section headings are misleading. The Interpretation Act of Vanuatu makes it clear that marginal section headings do not have any legislative effect, but it is well known that in practice marginal headings are often relied upon as indicating the scope of sections. It is also very unfortunate that throughout this Part the sections almost invariably begin with the words ‘No person shall . . .’ but the word ‘shall’ is almost universally understood by ni-Vanuatu in the sense of ‘should’, so that what were intended by the draftsman to be words of prohibition are read by ni-Vanuatu as words merely of request, or, at the most, of exhortation – not a very appropriate meaning for the sections of a Penal Code.

Finally, it is to be noted the Penal Code expressly repeals the Native Criminal Code of 1962, it says nothing about the British or French criminal legislation which are expressly continued in existence after independence by s.93 of the Constitution until repealed by Parliament. The British Penal Code Regulation of 1973 is a very comprehensive document which establishes a number of offences which are not constituted by the Penal Code Act of 1981. Is this Regulation to be regarded as impliedly repealed either in part or in whole?

#### **Conclusion**

The Penal Code Act 1981 of Vanuatu is an important piece of legislation marking as it does the first criminal code for all people of Vanuatu. It was drafted and enacted at a time when the limited resources of the Attorney-General’s offices were under great pressure to draft legislation for the newly independent country, including a General Procedure Code and a Courts Act, to conduct prosecution of grave social and political implications arising out of the civil disorders, and to give opinions and advice upon the many substantial constitutional and legal issues that arose in such times. Many of the provisions of the Penal Code are commendable in this aim and purpose. Some could however now with advantage be re-examined and reviewed in circumstances which are more conducive to ensuring that the Penal Code of Vanuatu is, both in content and presentation, fully appropriate for use by the courts, police and people of Vanuatu.

## **APPENDIX REPUBLIC OF VANUATU**

### **THE PENAL CODE ACT No. 17 OF 1981**

#### **Arrangement of Sections**

#### **PART 1 – GENERAL PROVISIONS**

##### **Application of the Criminal Law**

1. Offences within Republic.
2. Offences partly or wholly abroad.
3. Complicity and attempts.
4. Offences abroad.
5. International Offences.

**Principles of Criminal Law**

6. Criminal intent, recklessness.
7. Consent as a defence.
8. General rule as to burden of proof.
9. Burden of proof in certain cases.
10. Discharge of burden of proof by accused.
11. Ignorance of law or fact.
12. Mistake of fact, reasonable belief.

**Principles of Criminal Proceedings**

13. Unfitness to plead.
14. Rights of accused at trial.
15. Limitation in criminal prosecutions.

**Criminal Responsibility**

16. Punishment and responsibility.
17. Age of responsibility.
18. Liability of corporations.
19. No vicarious liability.
20. Insanity.
21. Voluntary intoxication.
22. Superior orders.
23. Self-defence necessity, prevention of offences etc.
24. Effect of diminished responsibility.
25. Failure of plea of insanity.

**Diminution of Responsibility**

26. Compulsion and coercion.
27. Provocation.

**Attempts and Conspiracy**

28. Attempts.
29. Conspiracy.

**Participation in Criminal Offences**

30. Complicity.
31. Co-offenders.
32. Punishment of accomplices and co-offenders.
33. Foreseeable consequences.
34. Accessory after the fact.
35. Inciting and soliciting commission of offence.
36. Commencement of sentence.
37. Calculation of sentence.
38. Imprisonment of minors.
39. Concurrent sentences the rule.
40. Consecutive sentences.
41. Custody pending trial or appeal.
42. Power of court to order offender to come up for sentence if called upon.



43. Power of court to discharge offender without conviction or sentence.
44. Nature of periodic detention.
45. Probation.
46. Nature of probation.
47. General conditions of probation.
48. Special conditions of probation.
49. Duties of probation officer.
50. Breach of conditions.
51. Fine.
52. Imprisonment in default of payment of fine.
53. Confiscation of property.
54. Restitution of property.
55. Addict or partially insane persons.
56. Review of confinement.
- 57.
58. Lapse of time.

## **PART 2 - OFFENCES**

### **Offences Against Public Order**

59. Treason.
60. Inciting to mutiny.
61. Communicating secrets.
62. Sabotage.
63. Seditious offences defined.
64. Seditious conspiracy.
65. Seditious statements.
66. Seditious publications.
67. Restrictions on prosecution for seditious offences.
68. Unlawful assembly and riot defined.
69. Unlawful assembly.
70. Riot.
71. Forcible entry.
72. Forcible detainer.
73. Corruption and bribery of officials.

### **Misleading Justice**

74. Perjury defined.
75. Offence of perjury.
76. False statements etc.
77. Fabricating evidence.
78. Destroying evidence.
79. Conspiracy to defeat justice etc.
80. False statements by interpreters.
81. Deceiving witnesses.
82. Offences relating to judicial proceedings.

### **Escapes and Rescues**

83. Rescue.
84. Escape.

- 85. Aiding prisoners to escape.
- 86. Removal of property under lawful seizure.
- 87. Obstructing court officers.

### **Offences Relating to Religion**

- 88. Insult to religion of any class.
- 89. Disturbing religious assemblies.

### **Offences Against Morality**

- 90. Rape defined.
- 91. Punishment of rape.
- 92. Abduction.
- 93. Indecent matter.
- 94. Indecent act in public place.
- 95. Incest.
- 96. Sexual intercourse with girl under care or protection.
- 97. Unlawful sexual intercourse.
- 98. Indecent assault.
- 99. Homosexual acts.
- 100. Gross indecency.
- 101. Prostitution.

### **Offences Against the Person**

- 102. Slavery.
- 103. Abandonment of incapable persons.
- 104. Duty to provide the necessaries of life.
- 105. Kidnapping.
- 106. Intentional homicide.
- 107. Intentional assault.
- 108. Unintentional harm.
- 109. Causing death defined.
- 110. When child deemed to be a person.
- 111. Limitation as to time of death.
- 112. Killing by influence on the mind.
- 113. Killing unborn child.
- 114. Criminal nuisance.
- 115. Written threats to kill person.
- 116. Aiding suicide.
- 117. Abortion.
- 118. False imprisonment.
- 119. Endangering transport.

### **Offences against Reputation**

- 120. Criminal defamation.
- 121. Abusive or threatening language.

### **Offences against Property**

- 122. Theft defined.
- 123. Misappropriation defined.



124. Obtaining property by false pretences defined.
125. Prohibition of theft, misappropriation and false pretences.
126. Offences resembling theft.
127. Obtaining credit fraudulently.
128. Fraud by trustee.
129. False statement by promoter.
130. False accounting.
131. Receiving property dishonestly obtained.
132. Demanding money etc. with menace.
133. Malicious damage to property.
134. Arson.
135. Wrecking.
136. Maltreatment of animals, birds or fish.
137. Robbery.
138. Extortion.
139. Forgery defined.
140. Prohibition of forgery.
141. Uttering forged documents.
142. Counterfeit currency.
143. Unlawfully entering dwelling house.
144. Criminal trespass.
145. Piracy.
146. Hijacking.

#### **Offences against Public Interest**

147. Obscene publications.
148. Idle and disorderly.
149. Unlawful carriage of weapons by night.
150. Unlawful discrimination.
151. Witchcraft.
152. Repeals.
153. Transitional.
154. Commencement.