

LAW AND CUSTOM IN VANUATU

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Introduction

The status afforded to custom prior to independence was minimal indeed but this was changed immensely when Vanuatu gained independence from her colonial rulers. Custom is now given higher status especially in relation to land matters, such as the mechanisms for dispute settlement and compensation payment, and chiefly authority.

The theme of this paper is the relationship between law and custom in Vanuatu. It is descriptive rather than argumentative and looks mainly at the legislation which provides for the administration of custom, namely, the Constitution, the Island Courts Act, the Joint Regulation No. 16 of 1970 and the Criminal Procedure Code.

Constitution

The preamble to the Constitution draws attention immediately to the importance of custom today. It provides, *inter alia*, that the new Republic of Vanuatu is 'founded on traditional Melanesian values'.

Section 93(3) provides that 'customary law shall continue to have effect as part of the law of the Republic' but its application when considered in conjunction with s.45(1) seems quite weak. S.45(1) says that 'if there is no rule of law applicable to a matter before [a court], [it] shall determine the matter according to substantial justice and whenever possible in conformity with custom'. Custom would only apply as a last resort to determine such a matter. The other option open to the court to use before turning to custom is to determine the matter in accordance with substantial justice. However s.5(2)(f) should also be noted as it provides that 'no one shall be convicted in respect of an Act or omission which did not constitute an offence known to written or custom law at the time it was committed.'

British and French laws in force or applied before the day of independence continue to apply to the extent that they are not expressly revoked or are incompatible with the independent status of Vanuatu and wherever possible to take due account of custom'.

Section 49 places a duty upon the Parliament to provide for the manner of the ascertainment of relevant rules of custom, (which is yet to be done), particularly to provide for persons (assessors) knowledgeable in custom and having advisory functions to sit with the judges of the Supreme Court or the Court of Appeal and to take part in its proceedings in both Civil and Criminal cases. The judge shall in every case record the opinions of the assessors but the decision shall be vested exclusively in the judge. In Civil proceedings if a judge of the Supreme Court is of the opinion that the case before him is of such a nature that it is unsuitable that assessors shall sit with him, he may dispense with them.² Parliament also has the duty to establish village or Island Courts with jurisdiction over customary matters by virtue of S.50. Up to date there are four Island Courts in operation and others still to be established throughout the different Island Government Council regions.

A brief mention of the National Council of Chiefs is inevitable when talking of custom in Vanuatu. This is provided for in Chapter 3 of the Constitution. The Council is composed of

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1. Section 93(2) of the Constitution of the Republic of Vanuatu provides: 'Until otherwise provided by Parliament, the British and French Laws in force or applied in Vanuatu immediately before the day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the Independent Status of Vanuatu and wherever possible taking due account of custom'.

2. Section 29(1) and (2) of the Courts Regulation No. 34 of 1980 supplements the Constitutional provision.

'Custom Chiefs elected by their peers, sitting in Regional Councils of Chiefs.' It 'has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of Vanuatu culture and languages'. Further, it may be consulted on any question, particularly in relation to tradition and custom, in connection with any Bill. It has no legislative or executive power. It functions as an advisory body in matters relating to custom, culture and tradition.

The Council has other functions which emphasize its standing. It appoints a representative to the Judicial Service Commission³ and it must be consulted before Parliament makes the national land law required by the Constitution;⁴ its chairman must be consulted on appointment of an Ombudsman⁵ and its members are entitled to request investigations by him.

Chapter 12 of the Constitution deals with land and provides that 'all land in the Republic belongs to the indigenous custom owners and their descendents' and the 'rules of custom shall form the basis of ownership and (usage)'.⁷

Island Courts

The Island Courts Act⁸ provides for the establishment of Island Courts and empowers each with jurisdiction to 'administer the customary law prevailing within its territorial jurisdiction . . . so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order'.⁹ A lot of difficulty is encountered in this area due mostly to the fact that the Constitution and the written law place emphasis on individual rights and privileges whereas custom places a lot of importance on group or community rights. There is always bound to be a conflict between the formal state institutions and laws and those existing under custom. The case of *Public Prosecutor v. George Lingbu*¹⁰ perhaps is a good example of this difficulty. The respondent was from the Island of Ambrym; whilst in Vila she had three different boyfriends. This was considered by the chiefs of Ambrym living in Vila to be misbehaving and against the custom of Ambrym. The appellant, a Chief, was instructed by other chiefs to have the respondent sent back to Ambrym. This he did, through the help of two other men as he was too busy to attend to it himself. Upon returning to Vila the respondent took the matter up in Court and the appellant was charged with aiding and abetting the offence of false imprisonment of the respondent, (a young girl), contrary to s. 118 and s.30 of the Penal Code. The Magistrates Court found him guilty and sentenced him to a fine of VT 10.000 (\$Aus100.00) or one months imprisonment for aiding and abetting the arrest of the respondent without lawful authority. On appeal to the Supreme Court before the Chief Justice, the decision of the lower court was upheld but the fine was reduced to VT 5.000 (\$Aus50.00) or two weeks imprisonment. The case confirms that where there is conflict, written law will take precedence over unwritten customary law.

Each Island Court has three Justices appointed by the President of the Republic on the advice of the Judicial Service Commission who must be 'knowledgeable in custom' and 'one of whom [must] be a custom chief residing within the territorial jurisdiction of the court'. Section 17 empowers the Court to 'direct any fine, or such part thereof as it deems fit, to be paid to the person injured or aggrieved by the act or omission in respect of which the fine has been imposed on condition that such person, if he shall accept the same, shall not have

3. Constitution, s.46(1).

4. *Ibid.* s.74.

5. *Ibid.* s.59(1).

6. *Ibid.* s.71.

7. *Ibid.* s.72.

8. No. 10 of 1983.

9. Section 10, Island Courts Act.

10. Appeal Case No.3, 10 March 1983.

11. *Ibid.* s.3.

or maintain any action for the recovery of damages for the loss or injury sustained by him by reason of such act or omission'. This is more in line with the traditional patterns of settlement of disputes.

In Criminal proceedings custom is taken into account for mitigating purposes only. If a defendant, before final judgment is made, pleads that customary arrangements have been made or are about to be made the court is bound by the Constitution and s.119 of the Criminal Procedure Code to take that into account. Section 119 provides that 'upon conviction of any person for a criminal offence, the court shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if he is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose'. Section 118 supplements s.119 in that it provides for the Supreme Court and the Magistrates Court in criminal causes to 'promote reconciliation and encourage and facilitate the settlement in an amicable way, according to custom or otherwise, of any proceedings for an offence of a personal or private nature punishable by imprisonment for less than seven years or by a fine only, on terms of payment of compensation or other terms approved by such court, and may thereupon order the proceedings to be stayed or terminated.' This empowers a court to terminate the hearings of a criminal cause either under this section or s.129 if in its opinion satisfactory arrangements in accordance with custom have been made or are about to be made.

Marriage

Marriage in accordance with custom is permitted by law. Section 1 of Joint Regulation No.16 of 1970 provides, inter alia, that 'every marriage between persons . . . celebrated after the coming into operation of this Regulation shall be valid if celebrated . . . in accordance with custom . . .' A person who opts to be married solely by custom must fulfill the pre-marital requirements of the customs under which he desires to be married.¹² If any person wishes to contest the validity of such a marriage he must first prove that these requirements have not been fulfilled.

Conclusion

The Constitution requires the courts to take account of custom wherever and whenever possible, and where custom conflicts with the written law then written law prevails. But in relation to ownership and use of land or the settlement of disputes over ownership of custom land, or in case of marriages which were celebrated in accordance with custom then the rules of custom apply.

12. Section 3(4), Joint Regulation No.16 of 1970.