

CUSTOM AS A SOURCE OF LAW IN VANUATU: A CRITICAL ANALYSIS

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INTRODUCTION

Vanuatu has been experiencing a situation of legal pluralism where several legal orders coexist since its independence in 1980. Different laws such as colonial law (English laws and French laws in force in 1980), common law, statutory law (written laws enacted by the national Parliament since 1980) and custom apply in Vanuatu.¹ This paper will focus on the latter. As some commentators have stressed, Custom or *Kastom* (custom or tradition in Bislama) is a polysemic and a contested concept.² It is however, possible to identify in the literature two general views about the meaning of *Kastom*.³ Firstly, it refers to certain distinctive features of a way of life – the way mats are woven for instance. Secondly, the notion of custom has expanded over time to include a whole way of life – a culture distinctive of a local group, or a generic

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¹ There is an extensive literature on legal pluralism in the Pacific, including Vanuatu. See for instance Miranda Forsyth, *A Bird that Flies with Two Wings, Kastom and State Justice Systems in Vanuatu* (2009); Miranda Forsyth, 'Beyond Case Law: Kastom and Courts in Vanuatu' (2004) 35 *Victoria University of Wellington Law Review* 427; Jennifer Corrin, 'Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific' (2017) 48 *Victoria University of Wellington Law Review* 305; Ian Fraser, 'Legal Theory in Melanesia: Pluralism? Dualism? Pluralism Long Dualism?' (1999) 3 *Journal of South Pacific Law* <http://www.paclii.org/journals/fJSPL/> (Accessed on 21 December 2017); David Weisbrot, 'Custom, Pluralism, and Realism in Vanuatu: Legal Development and the Role of Customary Law' (1989) 13(1) *Pacific Studies* 65; Jennifer Corrin, 'Bedrock and Steel Blues: Finding the Laws Applicable in Vanuatu' (1998) 24(1-2) *Commonwealth Law Bulletin* 594; Jennifer Corrin and Jean Zorn, 'Legislating Pluralism, Statutory 'Development' in Melanesian Customary Law' (2001) 46 *Journal of Legal Pluralism & Unofficial Law* 49; Sue Farran and Jennifer Corrin, 'Developing Legislation to Formalise Customary Land Management: Deep Legal Pluralism or a Shallow Veneer?' 10(1) *Law Development Review* 1; Sue Farran, 'Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific' (2006) 52 *Journal of Legal Pluralism & Unofficial Law* 77; Jennifer Corrin, 'Cultures in Conflict: The Role of the Common Law in the South Pacific' (2002) 6(2) *Journal of South Pacific Law* <http://www.paclii.org/journals/fJSPL/> (Accessed on 21 December 2017).

² Margaret Jolly, 'Custom and the Way of Land: Past and Present in Vanuatu and Fiji' (1992) 62(4) *Oceania* 340; Miranda Forsyth, *A Bird that Flies with Two Wings*, above note n 1, 76; Siobhan McDonnell, 'Exploring the Cultural Power of Land Law in Vanuatu: Law as a Performance that Creates Meaning and Identities' (2013) *Intersections: Gender and Sexuality in Asia and the Pacific*, Paragraphs 40-44 <http://intersections.anu.edu.au/issue33/mcdonnell.htm> (Accessed on 21 December 2017); Roger Keesing, 'Kastom in Melanesia: An Overview; and Kastom and Anti-Colonialism on Malaita: Culture as Political Symbol' in Roger Keesing and Robert Tonkinson (eds), *Reinventing Traditional Culture: The Politics of Kastom in Melanesia* (1982) 357-373.

³ Margaret Jolly, above n 2, 340-341; Miranda Forsyth, *A Bird that Flies with Two Wings*, above n 1, 76

indigenous culture opposed to the ways of foreigners.⁴ A number of legal scholars have elaborated further on this second view and have defined custom as what is expected to be done in a given community.⁵ It is not only a practice, but a rule that must be observed (or a rule of law). People will be penalised if they fail to respect it. In this paper, this second definition or view will be adopted.

There is no doubt that custom is a source of law in Vanuatu. Article 95(3) of the Constitution provides for instance that ‘Customary law shall continue to have effect as part of the law of the Republic of Vanuatu’.⁶ Article 47(1) of the Constitution recognise that custom is a source of law in dispute resolution.⁷ Then, article 95(2) provides that the application of colonial laws should, wherever possible, take into account custom.⁸

With regard to land transactions, article 74 of the Constitution provides that rules of custom form the basis of ownership and use of land in Vanuatu.⁹ It should be noted that due to significant problems related, among other things, to the failure by the Government to protect the interests of customary land owners, the Constitution was amended in 2014 to pass jurisdiction to customary institutions, termed ‘nakamals’, to resolve land ownership and disputes over custom land.¹⁰

⁴ Margaret Jolly, above n 2, 341.

⁵ See for instance Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (4th ed, 2017) 51; Miranda Forsyth, *A Bird that Flies with Two Wings*, above note n 1, 429; Paul de Deckker and Laurence Kuntz, *La bataille de la coutume et ses enjeux pour le Pacifique* (1998) 87; Vincent Lunabeck, ‘Adjudication of Customary Law in the Pacific’ (2004) 15 *Commonwealth Judicial Journal* 25; Geoffrey Palmer, Warren Young, Eddie Durie et Helen Aikman, *Converging Currents: Custom and Human Rights in the Pacific* (2006), 46 http://www.lawcom.govt.nz/sites/default/files/publications/2006/10/Publication_120_340_SP17.pdf (Accessed on 22 December 2017).

⁶ *Constitution of the Republic of Vanuatu 1980*, article 95(3).

⁷ It provides: ‘The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom’. As we will see below, custom is clearly a source of law in Vanuatu, but how this is done remains questionable. See Miranda Forsyth, *A Bird that Flies with Two Wings*, above note n 1, 139.

⁸ It 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’.

⁹ It states: ‘The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu’.

¹⁰ *Constitution (sixth) (amendment) Act N.27 of 2013*. On the issues of land in Vanuatu, see Ralph Regenvanu, ‘Issues With Land Reforms in Vanuatu’ (2008) 12 (1) *Journal of South Pacific Law* 64; Morsen Mosses, ‘Le pluralisme juridique et le droit foncier des propriétaires coutumiers et des femmes au Vanuatu’ (2014) 20 *Comparative Law Journal of the Pacific* 65; Justin Haccius, ‘The Interaction of Modern and Custom Land Tenure Systems in Vanuatu’ (2011) *School of International, Political and Strategic Studies* https://digitalcollections.anu.edu.au/bitstream/1885/9886/1/Haccius_InteractionModern2011.pdf (Accessed on 21 December 2017); Chris Lunnay, Jim Fingleton, Michael Mangawai, Edward Nalyal and Joel Simo, ‘Vanuatu :

However, the specific topic of custom related to land ownership and land use is beyond the scope of this article. This piece will focus on the rules of custom other than those relating to land.

The first and second parts of this paper will use critical postcolonial theory, particularly the theories developed by Said, Spivak and Bhabha,¹¹ to demonstrate that Vanuatu courts and institutions have not accorded to custom the importance it deserves. One of the major critics of these commentators is that postcolonialism is in fact the continuation of colonialism in the sense that institutions and norms of colonial rulers continue to be imposed and maintained by postcolonial elites and institutions as they were by the colonial rulers during the period of colonisation.¹² In the area of custom (as a source and rule of law), postcolonial elites, courts and institutions continue to uphold colonial laws to the detriment of customary rules. As argued later in this paper, the status afforded to custom by the drafters of the Constitution does not reflect the importance given to it by most of Ni-Vanuatu people; that the chiefs are only given an advisory role in the area of custom; and that a number of institutions including island courts also play a role in imposing and maintaining colonial norms. Furthermore, although the constitutional reforms of 2014 were adopted to address, among other things, some of these weaknesses, a number of criticisms remain. Those ideas will be further discussed below briefly. An analysis of these constitutional reforms would provide some important, and perhaps different, perspectives on the arguments discussed below; however, the research parameters of this paper limit the depth the analysis here.

Review of National Land Legislation, Policy and Land Administration' (2007) http://www.ausaid.gov.au/publications/pdf/vanuatu_land.pdf (Accessed on 21 December 2017).

¹¹ Edward Said, *Orientalism* (1978) 13-30 and 201-225; See also Edward Said, *Culture and Imperialism* (1994); Spivak Gayatri Chakravorty, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Maxism and the Interpretation of Culture* (1988) 271; Bhabha Homi, 'Postcolonial Authority and Postmodern Guilt' in Lawrence Grossberg, Gary Nelson and Paula Treichler (ds), *Cultural Studies* (1992) 56; Bhabha Homi, 'Postcolonial Criticism' in Stephen Greenblatt and Giles Gunn (eds), *Redrawing the Boundaries: the Transformation of English and American Literary Studies* (1992) 437; Also see Jacques Pouchedass, 'Les Subalternes Studies ou la critique postcoloniale de la modernité' (2000) 156 *L'homme* 165; Ranajit Guha, *Subaltern Studies I* (1982); Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 *Adelaide Law Review* 342; Martin Gallié, 'Introduction - Des analyses - tiers-mondiste - aux postcolonial studies - théories critiques du pouvoir et revendications politiques' (2012) 2 Hors-série *Revue du Québec de Droit International* 2; Gyan Prakash, *After Colonialism: Imperial Histories and Postcolonial Displacements* (1995) 3.

¹² Edward Said, above n 11, 13-30 and 201-225; Spivak Gayatri Chakravorty, above n 11, 271; Bhabha Homi, 'Postcolonial Criticism...', above n 11, 437-440. Bhabha uses the interpretation of language to criticise the colonisation and the dominating culture. He has demonstrated that stereotypes such as the idea of fixity in the construction of otherness creates an identity in the postcolonial world which is in defense of the dominating culture.

Moreover, it is worth noting that the legislation and the case law in Vanuatu have clearly set up a validity test of customary law as a source of law. Indeed, article 10 of the *Island Courts Act* provides that Island courts will not apply customs if they are inconsistent with written law or with the principles of justice, morality and good order.¹³ The case law has also developed the same reasoning in many cases where rules of custom contrary to written law or human rights were held to be invalid.¹⁴ Surely, this validity test is useful and will still be useful in many future cases. However, considering the importance of the rules of custom for many local communities in Vanuatu, one may be tempted to question this validity test in some circumstances. Based on a legal pluralism approach which examines the legitimacy of customary rules that defy or resist human rights law,¹⁵ the third part of this paper will seek to revisit the above validity test. In fact, for commentators who defend the conception of hard legal pluralism, non-state normative orders like customary rules are regarded as law just like state made law.¹⁶ Based on this conception, one may argue that in some cases where the rights, the need and the interest of indigenous people are at stake, it is legitimate that customary law defies or resists conflictual statutory law or human rights law. An analysis of both Vanuatu relevant case law and some foreign relevant courts' decisions is needed here to demonstrate our view.

¹³ *Island Courts Act 1983* [Cap 167] (Vanuatu), article 10 provides: 'Subject to the provisions of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order'. Also see Miranda Forsyth, *A Bird that Flies with Two Wings*, above note n 1, 427.

¹⁴ See for example *Public Prosecutor v Walter Kota and Ten Others* [1993] VUSC 8; *Public Prosecutor v George Lingbu (SCCrAppC)* [1983] 3 (Unreported).

¹⁵ Fabrice Hourquebie (ed), *Pluralisme juridique et droits fondamentaux* (2017) ; Ghislain Otis, 'L'individu comme arbitre des tensions entre pluralisme juridique et droits fondamentaux chez les peuples autochtones' (2015) 2 *Revue de droit constitutionnel appliqué* 171; Ghislain Otis, 'Les figures de la théorie pluraliste dans la recherche juridique', in Ghislain Otis (ed), *Méthodologie du pluralisme juridique* (2012) 9; Ghislain Otis (ed), *Méthodologie du pluralisme juridique* (2012). For the Pacific region, see Leulua'iali'i Tasi Malifa, 'The Rights Conflict in the Constitutions of the South Pacific: Seeking Toleration into the 21st Century' in Nin Tomas (ed), *Collective Human Rights of Pacific Peoples* (1998) 120; Yash Ghai, 'Constitutional Making and Decolonisation' in Yash Ghai (ed), *Law, Government and Politics in the Pacific Island States* (1988)1 ; Ah Angelo, 'Lo Bilong Yumi Yet' (1992) 22 *Victoria University of Wellington Law Review* 40; Wickliffe Caren, 'Cultural Rights, Culture and Human Rights Education' in Margaret Wilson and Paul Hunt (eds), *Culture, Rights, and Cultural Rights Perspectives from the South Pacific* (2000) 129.

¹⁶ Martha-Marie Kleihans and Roderick Macdonald, 'What is a Critical Legal Pluralism' (1997) 12 *Canadian Journal of Law and Society* 25; Jacques Vanderlinden, 'Réseaux, pyramide et pluralisme ou regards sur la rencontre de deux aspirants-paradigmes de la science juridique' (2002) 49 *Revue Interdisciplinaire d'Etudes Juridiques* 23-24; Jacques Vanderlinden, 'Pluralisme juridique radical, révélation et common law anglaise' in *Libres propos sur les sources du droit, Mélanges en l'honneur de Philippe Jestaz* (2006) 583; Étienne Le Roy (ed), *Les pluralismes juridiques* (2003) 10-12; John Gilissen (ed), *Le pluralisme juridique* (197) 7-8; Bary Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975) 1 and 119; John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal pluralism & Unofficial Law* 1; Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal pluralism & Unofficial Law* 1.

I – STATUS AND IMPORTANCE ACCORDED TO CUSTOM

1. Status afforded to custom in the Constitution of Vanuatu

Using the above postcolonial theory, one can argue that the way constitutional provisions on customary rules (excluding those on land ownership and land use) were drafted, reflect the continuation of the imposition and the maintenance of colonial institutions and norms. The status afforded to custom does not reflect the importance given to it by most of Ni-Vanuatu people. Recent field research on hybrid justice in Vanuatu shows that customary regulatory systems (which are usually regarded as traditional) predominate, especially beyond urban areas and that chiefs are commonly recognised as the most accessible mediators or adjudicators of disputes.¹⁷ Indeed, custom is crucial to the vast majority of Ni-Vanuatu people. Most of them live in the islands and villages according to their customs and culture. In most of the villages, there is no court or police. Custom is used by the chiefs to maintain peace and order in these rural communities. This has been the case since before Europeans discovered and colonised the country.

In 1980, a new Constitution was adopted and Vanuatu gained its political independence. As already mentioned, a number of constitutional provisions recognise custom as a source of law. However, in a postcolonial point of view, questions can be asked whether these provisions afford to custom the same status they give to colonial laws. An analysis of the relevant constitutional provisions on custom and colonial laws can answer this below. Article 95(2) of the Constitution provides that ‘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’. This provision rather implies a weak legal pluralism where custom is recognised but the state is clearly

¹⁷ Michael Goddard and Leisande Otto, *Hybrid Justice in Vanuatu: The Island Courts* (2013) 13 <http://documents.worldbank.org/curated/en/338761468309296867/pdf/801920NWP0J0D00Box0379802B00PUBLIC0.pdf>, (Accessed on 21 September 2017).

the source of authority of laws.¹⁸ As noted by Jennifer Corrin, this legal pluralism is a legacy of colonialism.¹⁹

In this provision, the drafters of the Constitution seem to afford to custom a lower status than what was given to colonial laws. In this sense, in the matters before them, the courts would be required to first and foremost apply written laws including colonial laws. Only when there is no written law (including colonial law) applicable they would be required to take due account of custom. Therefore, whenever custom conflicts with colonial laws, the latter would prevail. This interpretation has been confirmed in the case *Banga v Waiwo* in 1996 (this decision will be discussed in the second part of this paper). However, considering the importance of custom for the vast majority of Ni-Vanuatu people, a couple of questions can be legitimately raised here. Why did the drafters of the Constitution give custom a lower status than what was given to colonial laws? Should it not have a higher status to reflect the reality of life for Ni-Vanuatu people?

Looking at this from a postcolonial point of view, it could be argued that the drafters of the Constitution have ensured that institutions and norms of colonial rulers continue to be imposed and maintained in the postcolonial era.²⁰ Surely, one must not deny that the application of colonial law in Vanuatu is crucial because it helps to fill the gap in many areas where custom is not applicable. But does this reason justify the lower status given to custom? At the very least, why was custom not afforded the same status as colonial laws? Perhaps too many rules of custom were regarded as barbaric at the time of the drafting of the Constitution. However, these harmful customs were limited with the inclusion of provisions in the constitution protecting fundamental rights and freedoms. These are some of the questions that arise when adopting the above postcolonial theory.

¹⁸ Jennifer Corrin, 'Exploring the Deep...', above n 1, 307-308; Siobhan McDonell, above n 2, Paragraph 54; Morsen Mosses, *La rencontre entre les droits fondamentaux, notamment le droit à l'égalité des femmes et la coutume: Le cas du Vanuatu comme exemple du pluralisme juridique* (2016) 35.

¹⁹ Jennifer Corrin, 'Exploring the Deep...', above n 1, 308.

²⁰ See commentators mentioned above n 11.

2. The role of the Parliament and the Council of Chiefs in relation to Custom

The role given to Parliament and the Council of Chiefs in relation to custom can also be criticised using the above methodology of postcolonial theory.

Article 51 of the Constitution states that ‘Parliament may provide for the manner of the ascertainment of relevant rules of custom...’. Parliament however has never exercised their powers under this provision. This is a serious problem when it comes to the application and the determination of the evidence of custom before formal courts. As Jean Zorn and Jennifer Corrin explained,²¹ the judges know where to find the law. It can be found in official gazettes, law reports, codes, libraries, online resources... However, this is not the case with custom because it is mainly oral and not written. For many judges in the Pacific and in Vanuatu, custom is a mystery. The judges are not trained on how to find and use custom; they are afraid to apply a custom that is not a custom for one of the litigants or is not a custom at all. For many of these judges, custom is not really law and that ‘true law’ emanates only from the state.

Article 51 of the Constitution gives the power to Parliament to adopt legislative measures permitting the courts not only to find, but also to apply custom. Had the Parliament complied with this provision, many of the questions surrounding the application and the evidence of custom before formal courts would have been answered. The inaction of the Parliament gives the sentiment that this matter is not that important; and that parliamentarians do not accord to custom the importance it deserves given the fact that the vast majority of Ni-Vanuatu people still live according their customs.

The Constitution also gives the Council of Chiefs a role to play in the matters relating to custom. Prior to the 2014 constitutional reforms, article 30 of the Constitution provides that the Council has general competence to discuss matters relating to land, custom and tradition and that it may be consulted on questions relating to land, custom and tradition.²² Although the constituents may have intended to give an important role to chiefs, the reality is that the latter are only given an

²¹ Jean Zorn and Jennifer Corrin, *Proving Customary Law in the Common Law Courts of the South Pacific* (2002) 1-2.

²² Article 30 of the Constitution provides that: ‘(1) National Council of Chiefs has a general competence to discuss all matters relating to land, custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages. (2) The Council may be consulted on any question, particularly any question relating to land, tradition and custom, in connection with any bill before Parliament’.

advisory role and have considerably less influence than the Council of Chiefs in Tonga, Samoa or the Marshall Islands.²³ As noted by Chief Justice Vincent Lunabeck, since Independence, the Government has rarely seen fit to consult the Council of Chiefs on pending legislation or policy matters sometimes pointedly noting that the Council has no expertise in ‘modern’ matters such as policing, social services, finance...²⁴

In 2014, this article 30 of the Constitution was amended and the Government must now consult with the Council of Chiefs in areas related to land, custom and tradition. However, this still falls short of the recognition given to the national councils of chiefs in other jurisdictions in the region because there is no requirement that the Government follow the advice of the Council.

3. Custom and Island Courts

Article 52 of the Constitution requires Parliament to establish village and island courts with jurisdiction over customary and other matters and to provide for the role of chiefs in such courts.²⁵ A system of island courts was established in 1983 by the Island Courts Act.²⁶ These island courts are established with jurisdiction to determine minor civil claims and criminal matters and administer customary law prevailing within their territorial jurisdictions.²⁷ However, in practice, these island courts are not usually authorised to enforce customary law. In fact, the jurisdiction of these courts which is to be specified in the warrants issued by the Chief Justice (to establish the island courts), is usually confined to minor criminal offences prescribed by the legislation and to minor civil claims under common law.²⁸ As pointed out by some commentators, the island courts warrants have not clearly recognised the courts as having a general custom law jurisdiction, nor a general power to make legally recognised orders of custom remedies.²⁹ Despite the administration of customary law being one of their primary functions of the islands courts is to administer customary law, this function has not been executed adequately.

²³ Vincent Lunabeck, above n 5, 33.

²⁴ *ibid*

²⁵ *Constitution of Vanuatu*, article 52.

²⁶ *Island Courts Act 1983* [Cap 167] (Vanuatu).

²⁷ *ibid*, article 10. See also Jowitt Anita, ‘Island Courts in Vanuatu’ (1999) 3 *Journal of South Pacific Law* <http://www.pacii.org/journals/fjspl/> (Accessed on 21 September 2017).

²⁸ See for example the Warrant establishing the Efate Island Court 30 April 1984.

²⁹ Michael Goddard and Leisande Otto, above n 17, 29; Weisbrot David, ‘Custom, Pluralism, and Realism in Vanuatu: Legal Development and the Role of Customary Law’ (1989) 13(1) *Pacific Studies* 81; Vincent Lunabeck, above n 5, 32; Miranda Forsyth, *A Bird that Flies with Two Wings*, above note n 1, 224-225.

Consequently, from a postcolonial theoretical viewpoint, one could argue that island courts as postcolonial institutions also play a role in imposing and maintaining colonial norms, procedures and values to the detriment of custom.

Further supporting this argument is the fact that some of these island courts only exist by name and warrant.³⁰ Due to lack of funding and personnel, only 10 of the 12 island courts that are supposed to exist are in operation.³¹ It is also unclear whether those in operation function effectively. One can criticize the government and the relevant authorities for allocating more funding and personnel for formal courts than for customary institutions. This is despite recent field work findings that state institutions (including the courts) have limited effectiveness in Vanuatu, in part due to the culturally varied populations being dispersed among a number of islands typified by difficult terrain and minimal infrastructure.³²

The formal courts are not immune to criticism in this regard. They also play a role in undermining customary law and imposing and maintaining colonial laws and values in Vanuatu.

II - VANUATU FORMAL COURTS AND THE ROLE OF CUSTOM

As mentioned, under the Constitution, formal courts are required to take due account of customs in the matters before them. Therefore, custom has a role to play in the formal courts. Using the above postcolonial theory, the following analysis questions whether the courts have complied with the above constitutional provisions (article 95(2), article 47(1)) to ensure that due account is taken of custom.³³

It is evident that the courts have tried to give due account of custom in various cases. In 1992, the Supreme Court of Vanuatu applied article 47(1) of the Constitution in the case *In Re the Nagol Jum, Assal & Vatu v Council of Chiefs of Santo*³⁴ to dismiss the claims of an association attempting to export land diving from Pentecost Island to Santo Island. As mentioned, this article provides that ‘... The function of the judiciary is to resolve proceedings according to law. If there

³⁰ Anita Jowitt, above n 27.

³¹ Michael Goddard and Leisande Otto, above n 17, 19.

³² *ibid*, 3.

³³ For more details on the relationship between custom and state law, see Miranda Forsyth, *A Bird that Flies with Two Wings*, above note n 1, 139.

³⁴ *In Re the Nagol Jum, Assal & Vatu v Council of Chiefs of Santo* [1992] VUSC 5 <http://www.paclii.org/>

is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom’.

The said association claimed that the Pentecost chiefs’ refusal to allow land diving to be practiced on Santo was contrary to their constitutional rights to freedom of assembly and association, freedom of movement and equal treatment under the law. The Supreme Court held that such a practice is particular to the island of Pentecost, with particular meanings in custom. Therefore, the association needed to seek and obtain the authorisation of Pentecost local chiefs before exporting the practice to Santo. This decision was consistent with the customary procedure, and demonstrated that at this particular point in time, it was the will of the Court to comply with the Constitution and make sure that due account was given to custom where necessary.³⁵

Four years later, in 1996, the current Chief Justice of Vanuatu, Vincent Lunabek (then senior magistrate) decided the case of *Waiwo v Waiwo*,³⁶ a divorce case involving adultery. To give effect to these constitutional provisions, he applied a rule of custom to give the petitioner an award of punitive damages. He stated that on the basis of Vanuatu custom adultery is regarded as a serious offence. Therefore, the party that committed adultery should pay punitive damages to the petitioner. The senior magistrate held that the interpretation of article 17(1) of *Matrimonial Causes Act* of 1986³⁷ should follow this same line of reasoning. He refused to interpret this article in the same way it was under UK *Matrimonial Causes Act*³⁸ on which the above Vanuatu Act was based.

The former senior magistrate also held that custom should be used in all cases involving Ni-Vanuatu and whenever there are no statutes or case law applicable. He also stated that article 95(2) that permits the application of French laws and English laws should only be applied to English and French subjects. For Ni-Vanuatu, the only relevant laws are Vanuatu statutes or laws declared by its courts and custom. It is clear from this decision that the senior magistrate had reflected on some of the above constitutional provisions and found that custom had a significant role to play in the formal courts.

³⁵ See Sue Farran, ‘Is Legal Pluralism...’ above n 1, 77-78.

³⁶ *Waiwo v Waiwo* [1996] VUMC 1 <http://www.paclii.org/>

³⁷ *Matrimonial Causes Act* 1986 [Cap 192] (Vanuatu), article 17(1).

³⁸ *Matrimonial Causes Act 1965 (UK)*. Under this Act punitive damages were not awarded against the respondents (only compensatory damages).

However on appeal, the then expatriate Chief Justice refused to apply custom in such a situation.³⁹ He stated that article 95(2) of the Constitution applies not only to English and French subjects but also to Ni-Vanuatu citizens. Therefore, whenever there is no Vanuatu statute or Vanuatu case law, the judges should refer to colonial laws applicable in Vanuatu rather than applying rules of custom. Being a court of appeal decision in a common law jurisdiction, the decision set a precedent in Vanuatu. Viewing this decision through a critical postcolonial lens, this decision was detrimental to the recognition of custom's important role under the Constitution. Before this decision, in terms of the hierarchy of norms in Vanuatu, it was not clear whether the rules of custom could prevail over the colonial laws if a conflict arose between them; although article 95(2) of the Constitution did seem to indicate that colonial laws should prevail over customs. Therefore, the opportunity for the above constitutional provisions (article 95(2) and article 47(1)), to reflect the high status that custom holds in Ni-Vanuatu people's lives was lost. Decided differently, it would have given scope for the courts to apply custom in some cases where the customary interests of local communities are at stake, and break the continued imposition of colonial laws in Vanuatu.

Now as a result of this case, it was clear that in the event of conflict, colonial law should prevail over customs. As the Court stated, all colonial laws applicable in Vanuatu should be regarded as national laws and therefore should apply to English subjects, French subjects and Ni-Vanuatu people. Therefore, Vanuatu Courts must now first seek to apply written law (or case law) and colonial law. Only when there is no written law (or case law) or colonial law applicable, can they seek to apply customs. This precedent has been followed in subsequent cases.

In the case of *In Re MM, Adoption Application by SAT*⁴⁰ for instance, it was found that since there was no written national law applicable to the particular adoption matter at hand, and the Supreme Court first sought to apply colonial law which in this case was the *Adoption Act 1958* of United Kingdom.⁴¹ It then sought to apply custom to the same matter. The Court ultimately applied both colonial law and custom to reject an application for a same-sex couple from New Caledonia to adopt a female Ni-Vanuatu child. Custom was consistent with the colonial law in

³⁹ *Banga v Waiwo* [1996] VUSC 5 <http://www.pacii.org/>

⁴⁰ *In Re MM, Adoption Application by SAT* [2014] VUSC 78 <http://www.pacii.org/>. For a critical analysis of the case, see Sue Farran, 'Child Adoption: A Dilemma in a Plural Legal System: A Critical Comment on Recent Case Law' (2014) *Journal of South Pacific Law* 14.

⁴¹ *Adoption Act 1958* (UK).

this case and therefore available for the court to use. However, if it were inconsistent with the colonial law, the Court would be bound by precedent and only apply the latter.

The recent decision in *Public Prosecutor v James*⁴² also undermined the role of custom in formal courts. In this case, the issue was not directly about the application of custom. A local chief from Pentecost Island and his nine men appeared in the Supreme Court for criminal charges including riot, arson, threats to kill, intentional assault and malicious damage to property. Rather than hearing the matter, the Court instead charged the chiefs and his men with contempt of court because they were dressed in custom dress in court. The Supreme Court judge interpreted this customary clothing as a form of disrespect to the authority of the Court and sentenced the men to 72 hours imprisonment. The actions of the court in this case clearly reflected a colonial attitude undermining customary values and authorities, which was met with strong criticism from many Ni-Vanuatu, and not surprisingly, customary chiefs.⁴³

These cases demonstrate that the Vanuatu formal courts have not consistently reflected the role given to custom by the Constitution and by the vast majority of Ni-Vanuatu people. On the contrary, some cases such as *Banga v Waiwo*, undermined significantly the role of custom in formal courts.

To make things more complicated, custom as a source of law in Vanuatu faces additional challenges. One of these challenges is a ‘validity test’ in order to be applied by the courts.

III – REVISITING THE ‘VALIDITY TEST’ OF CUSTOM AS A SOURCE OF LAW?

It is important to note that Vanuatu’s cultural identity (like most of the Pacific Island States) is founded on collective customary values.⁴⁴ At the time of independence, as noted by Jennifer Corrin and Don Paterson, these countries experienced a great upsurge of interest in national

⁴² *Public Prosecutor v James* [2016] VUSC 142 <http://www.paclii.org/>

⁴³ Thompson Marango, ‘Pentecost Group Bailed’ *Vanuatu Daily Post* (Port Vila, Vanuatu) 21 October 2016 http://dailypost.vu/news/pentecost-group-bailed/article_f3ee17aa-266b-57e9-98b5-7b04c8ac3451.html (Accessed on 20 October 2017).

⁴⁴ See for example Konai Helu Thaman, ‘A Pacific Island Perspective of Collective Rights’ in Nin Tomas (ed.), *Collective Human Rights of Pacific Peoples* (1998) 1; Margaret Wilson, ‘Cultural Rights - Definitions and Contexts’ in Margaret Wilson and Paul Hunt (eds.), *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (2000) 13.

identity and everything that emphasized it, such as culture, custom and tradition.⁴⁵ Indeed, the Preamble of the Constitution of Vanuatu provides: ‘We, the people of Vanuatu...hereby proclaim the establishment of the united and free Republic of Vanuatu founded on traditional Melanesian values...’. Such a call to respect custom and tradition has also been made in the area of law. Some Pacific Island jurists and judges have openly called for the establishment of a regional jurisprudence⁴⁶ based on custom and tradition and on the development of a national identity. In Vanuatu, Chief Justice Vincent Lunabeck has called for the creation of Vanuatu national jurisprudence. In the above case of *Waiwo v Waiwo*, he stated: ‘Custom must be discovered, adopted and enforced as law. This case is the testing point of this process, bearing in mind that the fact that Vanuatu jurisprudence is in its infancy and we have to develop our own jurisprudence’.

It is important to note that recognition of the importance of custom in the Preamble of the Constitution, and the call for the establishment of a national jurisprudence, point out to the idea that custom is obviously part of Vanuatu’s national identity. As already discussed, constitutional provisions also recognise it as a source of law, albeit one that is held to be inapplicable if colonial laws can be applied,⁴⁷ or found to be inconsistent with human rights.⁴⁸ It is argued here that the continued influence of colonial institutions and norms within Vanuatu’s developing legal system, through the prioritisation of colonial laws over custom, is detrimental to Vanuatu developing in line with its national identity. Therefore, this criteria for the application of custom or ‘validity test’ should not be strictly applied and at some point it may be necessary to revisit this test given that custom continues to have importance in Vanuatu today. In some cases, cultural considerations and interests of groups or communities in the country should be taken into account

⁴⁵ Jennifer Corrin and Don Paterson, above n 5, 7.

⁴⁶ Vincent Lunabeck, the current Chief Justice of Vanuatu (see his decision in the case *Waiwo v Waiwo* above n 36; see also Vincent Lunabeck, above n 5, 25); Bernard Norokobi (see Bernard Norokobi, *Lo Bilong Yumi Yet, Law and Custom in Melanesia* (1989) 15-16); David Gonol (see David Gonol, *The Underlying Law of Papua New Guinea* (2016)).

⁴⁷ *Banga v Waiwo*, above n 39.

⁴⁸ See *Noel v Toto* [1995] VUSC 3 <http://www.pacii.org/>; *Public Prosecutor v Walter Kota and Ten Others*, above n 14. For more details on the tensions between custom and human rights, see Parkinson Wirrick, ‘Restricting the Freedom of Movement in Vanuatu: Custom in Conflict with Human Rights’ (2008) 12 (1) *Journal of the South Pacific Law* 76; Miranda Forsyth, ‘Banishment and Freedom of Movement in Samoa: *Leituala v Mauga, Kilfifi et al*’ (2004) 8(2) *Journal of the South Pacific Law* <http://www.pacii.org/journals/fJSPL/> (Accessed 8 September 2017); Kenneth Brown and Jennifer Corrin, ‘Conflict in Melanesia: Customary Law and the Rights of Women’ (1994) 24 *Commonwealth Law Bulletin* 1334; Jennifer Corrin, ‘Reconciling Customary Law and Human Rights in Melanesia’ (2003) 4 *Hibernian Law Journal* 53.

rather than applying colonial laws or human rights norms which are not well suited to the local context.

The analysis of the case law above demonstrates that it was not necessary, nor relevant, to apply and follow the interpretation of the colonial law to the exclusion of custom. In the appeal case *Banga v Waiwo* the previous Chief Justice refused to apply custom. Yet, in interpreting English colonial matrimonial laws and *Vanuatu Matrimonial Causes Act*, he arrived at the same conclusion as the senior magistrate: in the case of adultery, wronged parties were able to obtain punitive damages. The relevance and necessity of using colonial laws was therefore questionable, as much as the Chief Justice's long and detailed recount of the history and development of English statutes and English Common Law in his decision.⁴⁹

It is also questionable whether it was necessary to apply colonial law in the case *In Re MM Adoption Application* where the Supreme Court sought to apply the UK *Adoption Act of 1958* before considering a rule of custom. According to the interpretation of the Court, both laws prohibited the adoption of a child by a homosexual person or same-sex couple. There is no dispute about whether these laws were applied correctly or not. However, given the fact that custom is an important source of law and that is a crucial element in the lives of many Ni-Vanuatu people, is it necessary to apply the law of other independent nations, in this case the UK *Adoption Act of 1958*. Considering the above constitutional provisions on the recognition of custom and the fact that Vanuatu is a sovereign independent nation, it would be sufficient to apply only custom to reject the adoption application. The Supreme Court Judge clearly recognised the importance and the necessity to apply custom to this matter. Yet, he applied colonial law before invoking custom. With regard to the importance and the necessity to apply custom to the matter, he stated:

The French and British laws continue to apply after Independence *but only* on the basis that wherever possible due account is taken of custom. This is a case on which it is not only possible but in my view appropriate to take account of the way that custom views this proposed adoption, indeed to do so in a substantial way. As in most cultures, family life is central to the Ni-Vanuatu communities. The views of the

⁴⁹ The judgment takes about 19 pages. For more details on this case, see Jean Zorn and Jennifer Corrin, above n 21, 26-32.

Malvatamauri on a critical issue such as "gay adoption" must be taken very seriously indeed, especially because the question of "gay marriage" has so recently been the subject of a resolution. Internationally there are now 15 countries which permit same-sex marriage; 8 of these have moved to permit it since 2010. I expect that that recent groundswell is what caused the Malvatamauri to consider the matter in October 2013. They have clearly and firmly resolved against that international trend. There is uncontradicted evidence from the President of the body which the Constitution recognizes as the repository of customary wisdom and advice which unequivocally states that this application would not be tolerated by custom...That said, in this particular case, especially given the family-related subject matter of the application and the strong and recent rejection of the wider question of same-sex marriage by the Malvatamauri, I consider the President's evidence is, independently of my earlier conclusion, fatal to this application because the applicant is homosexual.⁵⁰

Turning to the idea of tensions between custom and human rights, again an analysis of some of the relevant case law based on the above legal pluralism approach demonstrates that in some circumstances, it may be necessary to revisit the validity test, given the importance of custom in Vanuatu. Although they are important, human rights are not absolute with the exception of *jus cogens* norms.⁵¹ Therefore, in appropriate cases cultural considerations and interests of groups or communities should be taken into account, rather than applying certain human rights norms in ways that do not suit the local context of Vanuatu. In the case above, *In Re Adoption Application*, there is a conflict exists between a customary rule prohibiting adoption a same-sex couple and the right to equality (in particular, the right to not be discriminated on the basis of sexual orientation). The Court clearly explained why it was important (for Vanuatu's society) to apply the custom to the matter. The Court rejected of the application on the basis that family life is central to Ni-Vanuatu communities and that adoption by homosexuals or same-sex couples is prohibited under custom. It must be noted that in this decision, the Court refused to apply article 5 of the Constitution because the discrimination on the basis of sexual orientation is not prevented under equality clause. However, its explanation of the importance of applying custom because it is in

⁵⁰ *Waiwo v Waiwo*, above n 36.

⁵¹ Peremptory norm of which no derogation is permitted such as the prohibition of torture, prohibition of genocide, prohibition of slavery... (see Hugh Thirlway, 'The Sources of International Law' in Malcom D Evans (4th ed), *International Law* (2014) 91, 114.

the interest of Vanuatu families and communities clearly supports the argument that there is a need to revisit the validity test of custom as a source of law in some circumstances.

Further support can be found in some decisions where Vanuatu courts have taken into account compensation or reparation made under custom.⁵² Some may argue that customary reconciliation according to which compensation and reparation are made, do not take into consideration the fundamental rights of the victims but rather the interest of the community. However, one must realise that in the local communities of Vanuatu where villagers continuously help each other in their daily works, the practice of customary reconciliation is absolutely important and necessary to help re-establish the harmony and order whenever disputes arise. As Jennifer Corrin points out, ‘particular customs that may appear objectionable when considered in a vacuum may be justifiable in the light of the operative infrastructure. For example, deterrent customary punishments may be the only options in places where there are no rehabilitative programmes’.⁵³ Therefore, it may be sometimes necessary to focus on the collective interests of the communities rather than on individual interests.

This same line of reasoning has been supported by a number of courts decisions from other postcolonial jurisdictions. For example, in *Alberta v Cunningham*⁵⁴ the Supreme Court of Canada held that the provisions of Alberta’s *Metis Settlement Act*⁵⁵ that prohibit Indians from being members of a Metis settlement were contrary to the right to equality clause, but were justified by the necessity to protect a distinctive culture and identity for Metis group.

In *Sparrow v Regina*,⁵⁶ the Supreme Court of Canada held that violation of the *Fisheries Act*⁵⁷ by Edward Sparrow, an indigenous Canadian (because he used a net longer than what permitted

⁵² The practice of customary reconciliation is legalised by *Penal Code (Amendment) Act 2006* (Vanuatu), ss 38 and 39. For courts’ decisions taking due account of customary reconciliation, see *Public Prosecutor v Atuary* [2006] VUSC 98 <http://www.paclii.org> ; *Public Prosecutor v Peter* [2006] VUSC 27 <http://www.paclii.org> ; *Public Prosecutor v Isaiah* [2007] VUSC 15 <http://www.paclii.org> ; *Public Prosecutor v Nako* [2006] VUSC 38 <http://www.paclii.org>. See also Don Paterson and Anita Jowitt, ‘More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences’ (2008) 12(2) *Journal of South Pacific Law* 39; Don Paterson, ‘Customary Reconciliation in Sentencing for Sexual Offences: A Review for Public Prosecutor v Ben and others and Public Prosecutor v Tarilingi and Gamma’ (2006) 10(1) *Journal of South Pacific Law* <http://www.paclii.org/journals/FJSPL/> (Accessed le 8 September 2017).

⁵³ Jennifer Corrin, above n 48, 75.

⁵⁴ *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* [2011] SCC 37

⁵⁵ *Metis Settlement Act, R.S.A. 2000, c. M-14* (Canada), ss 75 and 90.

⁵⁶ *R v Sparrow* [1990] 1 SCR 1075.

under the law) was justified by the fact that he as an indigenous person, was exercising a cultural right that existed before the enactment of the said legislation. The Court also noted that indigenous Canadians must be given special rights to fish given that fishing has always been an important element in their way of life and physical survival.

In *Mayelane v Ngwenyama*,⁵⁸ the South African Constitutional Court held that in some local South African communities the practice of polygamy has always been an important part of their culture and not prohibited under customary law; therefore, the validity of the latter should not be disputed unless the first wife does not give her consent.

In *Tepulolo v Pou*,⁵⁹ the Supreme Court of Tuvalu based its decision on, among other things, customary values recognised by the Constitution to grant to an unmarried father custody of his son aged 2 years who had been living with the mother (separately from the father) since his birth. The decision was based not the best interest of the child at the time, nor on the idea that the mother should be given the equal rights with the father in terms of child custody, but rather on the assurance that ‘the child will not be disinherited or become an outcast in its community’. This interpretation is in line with Tuvaluan custom.

CONCLUSION

It may be concluded that although custom is recognised as a source of law by the Constitution and has been given a role to play in formal courts, Vanuatu courts and institutions have not accorded to custom the importance it deserves. Instead, they continue to uphold colonial laws and values to the detriment of customary rules, values and authorities.

This is not the only challenge faced by custom as a source of law. As a result of a precedent set by the former Chief Justice, custom may be held to be invalid if it is inconsistent with colonial law, written law or human rights norms. This paper does not dispute this test. It argues however that moving forward, it should not be applied strictly and it may be important and necessary to revisit this validity test of custom in the future. If this were to take place, recognition could be

⁵⁷ *Fisheries Act R.S.C. 1970* (Canada), Section 34; see also the regulation under this Act, *British Columbia Fishery (General) Regulations SOR/84-248* (Canada), ss 4, 12, 27(1) and (4).

⁵⁸ *Mayelane v Ngwenyama and Another (CCT 57/12)* [2013] ZACC 14

⁵⁹ *Tepulolo v Pou* [2005] TVHC 17 <http://www.paclii.org/>

given to the importance of custom in Vanuatu. Furthermore, cultural considerations and interests of the local groups and communities could be taken into consideration rather than applying colonial laws or human rights laws that do not often suit the local context of Vanuatu.