

**VANUATU CONSTITUTIONAL CASES Nos 6 AND 7 OF 2015: ARTICLE 38
PARDONS AND MULTILINGUAL LEGAL INTERPRETATION PRINCIPLES**

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On 21 October 2015, the Supreme Court of the Republic of Vanuatu handed down a judgment on the validity of the pardon granted by the Speaker of Parliament, Marcellino Pipite in his capacity as Acting Head of State, issued earlier that month.¹ The decision was appealed and heard in the Court of Appeal on 20 November 2015² and was dismissed on all bases of the application. This comment briefly details the decisions of the courts in relation to the pardons under Article 38 of the Constitution of Vanuatu.³ It then considers in depth another approach to interpreting Article 38 not explored by the courts, which takes into account the translational differences between the three official language versions of the Constitution.⁴ This multilingual approach identifies general principles of interpretation particular to multilingual legal systems and then applies these principles to Article 38, resulting in a different interpretation to that taken by the courts.

CONSTITUTIONAL CASES No. 6 AND 7 of 2015⁵

On 17 August 2015, 14 Members of the Vanuatu Parliament (MPs) were charged with corruption and bribery, and pleaded not guilty. The Speaker of Parliament, Marcellino Pipite, was included in the 14 charged. On 9 October 2015, all 14 MPs were subsequently convicted for ‘offences of bribery of officials contrary to section 73(2) of the Penal Code Act.’⁶

The day after the conviction, the Speaker of Parliament and at the time Acting President, having been appointed by the President in accordance with Article 37(1) of the Constitution a few days beforehand,⁷ exercised the power under Article 38 to pardon himself along with the other 13 applicants. The instrument of pardon was gazetted on that same date.⁸ On 14 October 2015, an

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¹ *Natuman v President of the Republic of Vanuatu; Vohor v President of the Republic of Vanuatu* [2015] VUSC 148; Constitutional Case 6 & 7 of 2015 (21 October 2015) (hereinafter ‘Constitutional Case 6 & 7 of 2015’)

² *Vohor v President of the Republic of Vanuatu*, above in 1

³ The Constitution of the Republic of Vanuatu (1980) (Vanuatu Constitution)

⁴ Article 3, Vanuatu Constitution

⁵ Constitutional Case 6 & 7 of 2015, above in 1

⁶ *ibid* at 4

⁷ *ibid*, at 3

⁸ *ibid*, at 5

application was filed by Hon Joe Natuman, a former Prime Minister, challenging the legality of this pardon. On 16 October 2015, the President returned from his overseas mission and revoked the pardon and caused the Revocation Order⁹ to be gazetted on the same day. On 19 October 2015 an application was filed by Hon Serge Vohor, challenging the legality of the revocation of the pardon. The following day the Supreme Court heard arguments relating to both applications, and the following day delivered judgment.¹⁰

The Court considered the following constitutional issues in relation to the applications:

1. Did the Speaker of Parliament in his capacity as Acting President have the power to pardon himself and 13 others by the instrument of Pardon dated 10th October 2015?
2. If the Acting President did have that power, was the instrument of Pardon valid?
3. Did the President have the power to revoke the pardons granted by the Speaker as Acting President on 16th October 2015?
4. If the President did have the power to revoke the pardons, was Revocation Order dated 16th October 2015 valid?
5. Were the constitutional rights of the applicants in Constitutional Case No. 6 of 2015 infringed and if so, what were those rights?
6. Did the Court have the power to review the grant of pardon made by the Speaker as Acting President made on 10th October 2015?¹¹

In dealing with these issues, a number of relevant constitutional provisions were referred to, including Article 38, which deals with the Presidential powers of pardon, commutation or reduction of sentences. The English version states:

“The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function.”¹²

The Supreme Court first stated that it did have the jurisdiction to review the pardon. Saksak J decided that the Speaker of Parliament in his acting capacity as Acting President did not have the

⁹ Pardon (Revocation) Order No. 144 of 2015

¹⁰ n. 1

¹¹ Constitutional Case 6 & 7 of 2015, above in 1, at 1-7

¹² Article 38, Vanuatu Constitution

power to pardon himself and the 13 other MPs. He stated, ‘the Speaker as President had exercised the powers of pardon of the President to pardon himself and the other 13 convicted persons on 10th October 2015 wrongly and unlawfully. His action was ultra vires the power of the President under Article 38 of the Constitutional, and I so declare it unconstitutional, invalid and of no force or effect.’¹³ The Speaker of Parliament’s actions in issuing the pardon was ultra vires because power to pardon under Article 38 was a ‘power’ rather than a ‘function’, which is the term used under Article 37(1) of the Constitution referring to the delegation of the Presidents ‘functions’. Although Saksak J acknowledged that the terms were ‘intertwined’, he ultimately decided that the terms did have separate meanings and therefore the ‘power’ to pardon was available to the President alone and it could not be delegated unless ‘clearly expressed or stated and conveyed by any instrument of appointment or delegation’.¹⁴ This was not the case with the letter dated 5 October 2015 from the President appointing the Speaker as Acting President.¹⁵

Furthermore, the second sentence of Article 38, allowing Parliament to provide for a committee to advise on exercising this ‘function’, inferred that the power be “*used in a principled, transparent and consistent way.*”¹⁶ However, the Speaker had not taken any steps to consult the President before exercising his powers of pardon, which is one of the reasons that the President provided for revoking the pardon. His Honour also rejected arguments that there were no requirements for advice or consultation under Articles 37 and 38 and cited *Public Prosecutor v Willie*¹⁷ as authority that every power must be exercised in a way consistent with the Constitution and used in a ‘principled, transparent and consistent way’.

The Court of Appeal disagreed with the distinction made by Saksak J between the delegation of ‘functions’ under Article 37 and non-delegable ‘powers’ of pardon under Article 38, finding that there were no limitations on the power of pardon being delegated to the Speaker set out under Article 38.¹⁸ The Court of Appeal did agree with Saksak J on the other grounds of his decision,

¹³ Constitutional Case 6 & 7 of 2015, above in 1, at 18.16

¹⁴ *ibid*, at 18.7

¹⁵ *ibid*, at 18.3 and 18.7

¹⁶ *ibid*, at 18.9 – 18.13

¹⁷ *Public Prosecutor v Willie [2004] VUCA 4*

¹⁸ *Vohor v President of the Republic of Vanuatu [2015] VUCA 40; Civil Appeal Case 40 of 2015 (20 November 2015) (hereinafter ‘Vohor v President’)*, at 26

stating that ‘the decision of the Speaker to pardon himself and other offenders was a clear misuse of public power and a flagrant breach of art 66 of the Constitution’.¹⁹

Interpretation issue: Can a pardon be issued prior to sentencing?

The most interesting part of this case, from the perspective of interpreting multilingual legal texts, relates to the arguments on the timing of the pardon. The Supreme Court and the Court of Appeal considered the validity of pardons being issued between the time of conviction and sentencing, and ultimately decided that a pardon could still be valid even if sentencing had not yet taken place.

Saksak J in the Supreme Court briefly commented on this issue in response to defense counsel’s arguments that the court did not have jurisdiction to review the pardon. The defense counsel relied on the case *De Freitas v Benny*²⁰ where the court stated, ‘Mercy is not the subject of legal rights. It begins where legal rights end’.²¹ His Honour stated:

*“With respect to counsel this case does not assist them. They have no rebuttal that Criminal Case No. 73 of 2015 has come to its end. The reality is that this case is still alive. The 14 convicted persons have been convicted and not yet sentenced. Their sentence is due on 22nd October 2015. To submit therefore that their legal rights have ended is misconceived. After their sentences, they may yet choose to appeal. Only after any such appeal would it be said that their rights have ended. Any pardon granted thereafter would be perfectly proper as it happened in Sope v Republic [2003] VUVA 5. But yet again that case is clear authority that a pardon does not acquit a convicted person of his convictions.”*²²

This comment by Saksak J left open the question of whether a pardon issued prior to sentencing could still be valid. His Honour referred to the case of *Sope v Republic*,²³ which dealt with an issue of constitutional interpretation in relation to pardons. The Court of Appeal found that a pardon issued under Article 38 could not remove a conviction *i.e.* acquit the person subject to the pardon but could release that person from all of the consequences of the conviction.

¹⁹ *Ibid*, at 31

²⁰ *De Freitas v Benny* [1976] AC 239

²¹ *ibid*, at 247

²² Constitutional Case 6 & 7 of 2015, above in 1, at 23.5

²³ *Sope v Republic* [2003] VUVA 5 (hereinafter ‘*Sope v Republic*’)

The Court of Appeal referred to a number of textbooks and cases from the United Kingdom and Tasmanian Supreme Court, to come to the conclusion that the pardon had no ‘retroactive effect’.²⁴ It stated:

*“In the present case the meaning and effect of a pardon is of crucial importance. If the pardon totally removes the conviction then there is as a matter of law thereafter no conviction... This is a simple case of constitutional interpretation... In our judgment, Article 38 provides a power in two ways for the President. First he may pardon a person convicted of an offence. Secondly, he can commute or reduce a sentence imposed on the person convicted of an offence.”*²⁵

*“We heard an argument that the power in Article 38 is restricted solely to dealing with the sentence in some way. Such a reading would mean that the word ‘pardon’ before the comma is redundant. ‘Pardon’ would add nothing to the other words of the Article. There is a fundamental rule of interpretation that every word in a Constitution, a statute or a contract is to be given a meaning. We have no doubt that there is the power to ‘pardon’ a person convicted of an offence which is separate and distinct from the power to ‘commute or reduce a sentence imposed’.”*²⁶

Therefore, it is clear from the court’s interpretation that the power to ‘pardon’ is separate and distinct from the power to ‘commute or reduce a sentence’. This implies that sentencing need not have taken place for a pardon to be issued validly.

A similar argument to that made in *Sope v Republic*, that Article 38 was restricted to dealing with a sentence in some way, was raised again in *Vohor v President of the Republic of Vanuatu*.²⁷ The third respondents submitted that the words of Article 38 implied that pardons could only be validly issued after sentencing. Once again the court referred to *Sope v Republic* and, based on the power of pardon being distinct from the power to commute and reduce sentences, decided that ‘a convicted person can be pardoned before sentence’. It stated, ‘*The power to pardon set out in art 38 can be read disjunctively from that which follows, the commuting or reducing of sentence*’.²⁸

²⁴ *Ibid*, at 11

²⁵ *ibid*, at 9

²⁶ *ibid*

²⁷ *Vohor v President*, above in 18, at 27

²⁸ *ibid*

Therefore, the Court of Appeal held that pardons are still valid even if issued prior to sentencing or any consequences of the conviction being established, based on a disjunctive reading of the text in the English version of the Constitution.

DIFFERENT VERSIONS OF ARTICLE 38 IN THE OFFICIAL LANGUAGES OF VANUATU

In all cases mentioned above, the courts' interpretations were based exclusively on the English version of Article 38. The Court of Appeal in *Sope v Republic* looked at jurisprudence in other jurisdictions, based on different circumstances and governmental systems, without first looking at other sources of Vanuatu law, such as the official versions of the Constitution in French and Bislama. Interestingly, there are clear differences between the three versions. This comment therefore explores the possible outcomes that could be arrived at when the three versions are taken into consideration and how the courts could possibly deal with multilingual text issues in the future.

The French version of Article 38 is worded as follows:

Droit de grâce et de réduction des peines

*“Le Président de la République dispose du droit de grâce et du droit de commuer ou de réduire les peines infligées à tout condamné. Le Parlement peut instituer une commission chargée de conseiller le Président de la République dans l'exercice de cette fonction.”*²⁹

As stated above in *Sope v Republic* there is a ‘fundamental rule of interpretation that every word in a Constitution’ be given a meaning, including the use of commas in the order of words. It is this that led to the court’s interpretation of pardon being a distinct power. The English version of Article 38 is worded as, ‘The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence’. The comma following the pardon can therefore also be read as being one of the options in relation to a sentence. However, the Court of Appeal in *Sope v Republic* considered that pardoning a sentence had the same meaning as commuting or reducing a sentence. To give the word ‘pardon’ meaning, it had to be interpreted as being a distinct power in itself. Therefore, it would be important to highlight that in the French version of Article 38 the word “pardon” is not followed by a comma. Instead the President has the power to pardon and a power to commute or reduce a penalty (or punishment), which could

²⁹ Art 38, Constitution de la République de Vanuatu

have been relied on to strengthen the interpretation taken by the court in *Sope v Republic* and *Vohor v Republic*.

The Bislama version on the other hand, would support the contrary interpretative arguments put forward by counsel in both *Sope v Republic*³⁰ and *Vohor v Republic*;³¹ that a sentence was instrumental to the power to pardon. It refers to the Presidents power to pardon only in relation to persons ‘long kalabus’ *i.e.* persons in prison. Article 38 in Bislama is worded as:

PRESIDEN BLONG RIPABLIK I SAVE KATEM PANIS BLONG MAN

“Presiden blong Ripablik bambae i save sore long man we kot i putum hem long kalabus, i save letem i gofri. Mo i save jenisim panis blong hem, mo i save katem taem blong kalabus blong hem i kam sotfala. Palamen i save putumap wan komiti blong i givhan long Presiden blong i mekem wok ya.”

The Bislama version does not appear to have the same distinction between the power to pardon convictions and the power to commute and reduce sentences as interpreted by the courts. It can be understood in English as, ‘the President can let a person that has been put in prison by the court go free. The President can also change the punishment of that person, and reduce a prison sentence’.³² The references to ‘kalabus’ and punishment in relation to the powers of the President imply that the person subject to the pardon must actually have a sentence to be freed from, changed or reduced. In other words, it could be interpreted to require that the person subject to the pardon have a custodial sentence. The interpretation is also open to the possibility of the person being in prison only on remand, as the court only needs to ‘put’ the person in prison, rather than ‘punish’ the person with prison time. It would be contrary to the interpretation of Article 38 taken by the Court of Appeal in relation to pardons being valid prior to sentencing.

Given the differences in the wording and implied meaning between the three language versions, the need for an approach to reconcile those differences arises

LAW OF VANUATU REGARDING DIFFERENT LANGUAGES

³⁰ *Sope v Republic*, above in 25, at 9

³¹ *Vohor v President*, above in 18, at 27

³² Art 36, Konstitusin blong Ripablik blong Vanuatu, available at: http://www.paclii.org/vu/legis/num_act/kbrbv413/

The laws governing the official languages and interpretation of laws in Vanuatu are the obvious place to start. The Vanuatu Constitution provides for the national and official languages of Vanuatu. Article 3(1) states:

3. National and official languages

(1) The national language of the Republic of Vanuatu is Bislama. The official languages are Bislama, English and French. The principal languages of education are English and French.

The Vanuatu Constitution is silent on which language prevails when inconsistencies arise, unlike other multilingual constitutions in post-colonial contexts where provisions exist to determine which languages arise in case of inconsistencies between the language versions. For example, the Constitutions of South Africa and Fiji both specify that where inconsistencies exist between the texts, the English prevails.³³ The only legislation that refers to interpretation issues in relation to the official languages is found in Section 17 of the *Interpretation Act (1981)*, which states:

17. Authentic version

(1) In construing an enactment, all its versions in the official languages of Vanuatu shall be equally authentic.

(2) Where there is a difference between two or more versions of an enactment, preference in construing such enactment shall be given to the version which, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects.

(3) In this section –

"enactment" means any provision in an Act of Parliament or in any order, rule, regulation, notice, proclamation or other instrument made or issued under the authority of any Act of Parliament;

"version" means a version published by, or under the authority of, the Government or any public authority of Vanuatu.

The provisions within the *Interpretation Act* imply that it is not intended to apply to constitutional interpretation. The first sentences for example, state that the purpose of the act is to 'provide for the interpretation and construction of Acts of Parliament, subsidiary legislation,

³³ Article 3, *Constitution of the Republic of Fiji (2013)*; Article 240, *Constitution of the Republic of South Africa (1996)*

other laws and documents.’ No reference to the constitution is made here, in section 1, which outlines the application of the *Interpretation Act*,³⁴ or in section 9, which distinguishes every act from the Constitution.³⁵

However, it could be argued that section 17 of the *Interpretation Act* is a general principle of interpretation in multilingual legal systems. There are no constitutional or legislative provisions or jurisprudence in Vanuatu to the contrary. Vanuatu’s approach to multilingualism is quite unique in post-colonial contexts. To the author’s knowledge, all other multilingual legal systems, as provided for by the constitution, also include specific interpretation provisions to determine which language text prevails when inconsistencies arise, like in the Fijian and South African examples provided above. However, the section 17 interpretation approach used in Vanuatu is widely adopted in other contexts and accompanied with considerable jurisprudence. It is mostly based on the Vienna Convention of the Law of Treaties and within the European Union.

GENERAL PRINCIPLES OF INTERPRETATION IN MULTILINGUAL LEGAL SYSTEMS

Approaching multilingual interpretation based on the notion of language equality as Section 17 of the *Interpretation Act* does, is a well-established general principle in other multilingual legal systems. The Vienna Convention on the Law of Treaties (VCLT) for example, deals with the interpretation of treaties within the international legal system.³⁶ It has 114 state parties,³⁷ and

³⁴ Section 1, *Interpretation Act 1981: Application*

- (1) Subject to the provisions of this section, this Act shall apply for the construction and interpretation of –
- (a) Acts of Parliament and statutory orders including this Act and Acts enacted before the commencement of this Act;
 - (b) for the construction and interpretation of orders or by-laws made by bodies or persons empowered by Parliament to make orders or by-laws;
 - (c) for the construction and interpretation of documents and writings purporting to give rights or impose obligations on any person; and
 - (d) in all other cases where its provisions are relevant and capable of being applied.

³⁵ Section 9, *Interpretation Act 1981: Acts subordinate to the Constitution*

- (1) Every Act shall be read and construed subject to the Constitution and where any provision of an Act conflicts with a provision of the Constitution the latter provision shall prevail.
- (2) Where a provision in an Act conflicts with a provision in the Constitution the Act shall nevertheless be valid to the extent that it is not in conflict with the Constitution.

³⁶ Vienna Convention on the Law of Treaties (1969) 1155 U.N.T.S. 331, 8 I.L.M. 679 (hereinafter ‘Vienna Convention’), available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

most of its provisions are accepted as general principles of customary law including Articles 31 – 33, which provide for the interpretations for treaties.³⁸ Article 31 sets out the general rule of interpretation i.e. that interpretations of laws should be undertaken in good faith in accordance with the ordinary meaning given to the words, in their context, and in the light of its stated object and purpose. Article 32 provides for the use of supplementary means of interpretation such as the preparatory work and circumstances of the treaties conclusion to ‘confirm the meaning resulting from the application of article 31’ or if an interpretation according to article 31 results in ambiguity, obscurity or an interpretation that is manifestly absurd or unreasonable.

Most relevant is Article 33, which provides for interpretation of treaties authenticated in two or more languages, stating that ‘the texts are equally authoritative in each language’ unless an agreement has been made to the contrary. It also provides that where differences arise between authentic texts, which are not removed by Articles 31 and 32, the ‘meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted’.

International bodies such as the World Trade Organisation and the European Court of Human Rights use Article 33 of the Vienna Convention when there is a divergence of treaty language among the authentic texts³⁹ and the approach taken by the European Court of Justice (ECJ) is also inspired by article 33 of the Vienna Convention.⁴⁰

Section 17 of the *Interpretation Act* appears to likewise be inspired by Article 33 of the Vienna Convention. However, unlike the ECJ, the Vanuatu courts have not developed any jurisprudence on how Section 17 should be approached. To analyse how Article 38 could be interpreted using the multilingual interpretation principles found in Article 33 of the Vienna Convention and Section 17 of the *Interpretation Act*, we can draw on the experiences and jurisprudence of the ECJ for guidance.

³⁷ See status of Vienna Convention, available at:

https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en

³⁸ For a brief overview of the status of the VCLT as customary law see Aust A, *Vienna Convention on the Law of Treaties (1969)*, Oxford Public International Law, available at:

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498>

³⁹ Bradley Condon, ‘Lost in Translation: Plurilingual Interpretation of WTO Law’ at 2, available at:

<http://cdei.itam.mx/CondonPlurilingualInterpretation.pdf>

⁴⁰ Summary report on the lecture by Advocate General Francis Jacobs, ‘How to interpret legislation which is equally authentic in twenty languages’, Brussels, 20 October 2003, European Commission Legal Service, available at:

http://ec.europa.eu/dgs/legal_service/seminars/agjacobs_summary.pdf

PRINCIPLES OF MULTILINGUAL INTERPRETATION IN THE EUROPEAN COURT OF JUSTICE

The approaches to interpretation developed by the European Court of Justice (ECJ) have been argued to ‘actually *assist* the ECJ in its interpretation of statutes’.⁴¹ Like the courts in Vanuatu,⁴² the ECJ takes purposive approach to statutory interpretation. The purposive approach typically ‘reflects, at various levels of abstraction, but particularly at the highest levels of abstraction, the intention of the text’s creator(s)’.⁴³ Using the purposive approach in relation to legislation drafted in various languages where all versions are authentic involves ‘a comparison of the different language versions’.⁴⁴ Lawrence Solan in his article discussing the use of multilingual interpretation by the ECJ⁴⁵ states that the ‘ECJ does not ignore language in favor of ascertaining the legislative purpose. Rather, language provides a somewhat unique kind of evidence of purpose, and the court regards language differently for that reason.’⁴⁶

Distinguishing interpretation in monolingual contexts from multilingual contexts supports this argument. In a monolingual context, the purposive approach to interpretation requires that the court look at the words of the statute, whether the plain meaning undermines the intent of the legislature and if there are any procedures for resolving ambiguity, should the court risk compromising the rule of law to further legislative purpose.⁴⁷ In a multilingual context, this task is more complicated. Solan explains, ‘authentic versions in different languages means that there will not be a coherent history leading from a statute’s purpose to its language, since a process of translation must intervene...Courts may still endeavor to find the purpose of a law, but they must do so without the luxury of resort to a single, authoritative text.’⁴⁸ This is a point that has been generally overlooked by the courts in Vanuatu.

⁴¹ Solan L, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’, 34 *Brook. J. Int’l L.* (2009), at 279

⁴² Section 8, *Interpretation Act (1981)*

⁴³ See, e.g., Fennelly N, ‘Legal Interpretation at the European Court of Justice’ (1997) 20 *Fordham Int’l L.J.* 656 – 665; Barak A, ‘Purposive Interpretation in Law’ (2005), at 87 *as cited in* Solan L, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’, above in 41, at 281-2

⁴⁴ Case C-265/03, *Simutenkov v. Ministerio de Education y Cultura*, 2005 E.C.R. I-2579 (Opinion of the Advocate General), at 14

⁴⁵ Solan L, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’, above in 41

⁴⁶ *Ibid*, at 283

⁴⁷ *ibid*

⁴⁸ *ibid*, at 286

a) The use of translation history in multilingual approaches to interpretation

The translation history of a law is one such way that courts can select which versions or versions should be given preference. This approach was used by the ECJ in *Stauder v City of Ulm*.⁴⁹ The French and Italian versions differed from the German and Dutch versions in relation to benefits received under subsidies in the dairy industry. By referring to the translation history, the court was able to determine that the German and Dutch versions must have had translation errors as the original draft was in French and therefore better reflected the intent and meaning of the provision.⁵⁰

The benefits of this approach are that it makes it relatively simple for the court to determine which version should be preferred. Despite the determinacy of this approach, it is not used frequently by the ECJ and at times when translation histories have been referred to, it has only been as a last resort by the ECJ. For example, in *Simutenkov v Ministerio de Educacion y Cultura*⁵¹ a difference in the official texts existed with the English and Spanish versions between the words “ensure” and “endeavour”. The approach taken by the court first considered the narrowest reading of the words, which was decided not to be justifiable following any legitimate theory of statutory interpretation. The court then considered eliminating one of the languages as an outlier and then finding an interpretation that was reflected in the majority of the languages, both of which were not possible in this case. This ultimately led to the translation history, “to consider the intention of the parties and the object of the provision to be interpreted.”⁵²

The reason for the reluctance towards relying on translation histories is because it is inconsistent with the principle of language equality.⁵³ As stated by Solan, ‘the EU has not established an official language or given additional status to the three working languages...[and] reference to the translation history is the functional equivalent of selecting an official language.’⁵⁴

⁴⁹ Case 29/69, 1969 E.C.R. 419

⁵⁰ *ibid*, at 3-7

⁵¹ Case C-265/03, *Simutenkov v. Ministerio de Education y Cultura*, 2005 E.C.R. I-2579 (Opinion of the Advocate General)

⁵² *ibid*, at 15-20

⁵³ Solan L, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’, above in 41, at 292

⁵⁴ *ibid*, at 287

However, when other approaches have not produced results, it at least provides the court with a determinative course of action.

b) The Augustinian approach to multilingual interpretation

In the example of *Simutenkov v Ministerio de Educacion y Cultura*⁵⁵ the court compared the version in the different languages in an attempt to find an ‘outlier’ before resorting to the translation history. This approach is used more frequently by the ECJ.⁵⁶ What this approach aims to do is establish consensus on the meaning and scope of the framer’s intentions to determine whether a particular interpretation in one of the languages is ‘a matter of linguistic happenstance rather than legislative deliberation’⁵⁷ or establish an underlying purpose behind the words by putting together various threads running through different versions.⁵⁸ Solan terms this the ‘Augustinian Approach’ and describes the use of this term as follows:

*“the concept of Augustinian interpretation: the use of multiple versions of the same law as an advantage in discovering its intended meaning. The term reflects the similarity between this approach to interpreting statutes and the same method, developed by St. Augustine in the fourth century, for interpreting scripture.”*⁵⁹

The Augustinian approach is a useful alternative to the translation history approach, primarily because it is not inconsistent with the principle of language equality in multilingual legal contexts. It can also work to confirm the purpose of a law determined on other grounds by demonstrating consensus among the versions and as mentioned, outliers may be identified. In such cases, a historical account may be unnecessary. A benefit of only referring to the different language versions of the texts is that interpretation is based on documents that have official status with more evidentiary weight than supplementary sources typically used with the

⁵⁵ Case C-265/03, *Simutenkov v. Ministerio de Education y Cultura*, 2005 E.C.R. I-2579 (Opinion of the Advocate General)

⁵⁶ See Greet Van Calster, ‘The EU’s Tower of Babel – The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in More Than One Official Language’, (1998) 17 Y.B. Eur. L. 363

⁵⁷ Solan L, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’, above in 41, at 290

⁵⁸ *Ibid*, at 292-3

⁵⁹ *Ibid*, at 281

purposive approach. This would reduce the risk of the court ‘straying too far from the legislative process in their analysis’.⁶⁰

INTERPRETATION OF ARTICLE 38 ADOPTING MULTILINGUAL INTERPRETATION APPROACHES

The relevant interpretative issues in relation to Article 38 considered by the courts in *Constitutional Cases No. 6 & 7 of 2015, Vohor v Republic* and *Sope v Republic* that could potentially be interpreted differently with reference to the French and Bislama versions of the Constitution are: 1) can a person be pardoned prior to sentencing; and 2) is the power to pardon a distinct power from the power to commute or reduce sentences.

a) Applying the translational history approach to Article 38

In applying the translational history approach, to Article 38 we can refer to the Constitutional Committee’s Minutes.⁶¹ The deliberations of the provisions of the Vanuatu Constitution were undertaken in English to assist the foreign advisors to the Committee. Interpretation facilities were requested to enable the members of the constitutional committee to speak in Bislama. However, it “had not been possible to find Bislama interpreters and ... these interpreters would cost 8000FNH per day”⁶² so the Committee adopted English as the working language. The majority of the constitutional provisions were drafted in English and then later translated into French. The remaining provisions appear to have been drafted in French and translated into English for the deliberations of the committee. Only the final version of the draft Constitution was then translated into Bislama by some of the committee members themselves.

It is not clear from the minutes whether the provision on pardons was drafted in French or English. However, the complete final version of the Constitution was prepared in English and then translated into French and Bislama. The English version would therefore be the preferred version.

As mentioned above, this approach does amount to the ‘functional equivalent of selecting an official language’, thereby inconsistent with the principle of language equality. There is another

⁶⁰ *ibid*, at 296-7

⁶¹ Constitutional Committee of the Republic of Vanuatu, Minutes and Working Documents April – September 1979

⁶² *ibid*, at 23-24

possible difficulty with this approach in the context of Vanuatu. Whilst the European Union has given no additional status to any of the working languages, the Vanuatu Constitution has given additional status to Bislama as the national language, which was intended by the drafters to recognize Bislama as the ‘cultural expression of the country’.⁶³ This may bring into question the conceptual homogeneity between the three official languages and intended meaning behind the versions of Article 38. Therefore, an argument could be made on this basis that the translation history approach, which results in English being the preferred version because the Constitutional Committee were unable to discuss and draft the provisions in Bislama, may not be appropriate in Vanuatu.

b) Applying the Augustinian approach to Article 38

The Augustinian approach requires that the court give attention to all three versions of Article 38 and determine which one was an outlier or find underlying purpose by putting together various threads running between the three versions. In applying this to Article 38 one could start with identifying the outlier. The English and French versions are similar, the only difference being a comma substituted for an ‘and’. This results with the power to pardon and the power to commute and reduce sentences being distinguished by the ‘and’ in between, which is less obvious in the English version, but not an unreasonable interpretation. The Bislama version would then be left as the outlier, strengthening the courts’ interpretation of Article 38.

One argument against the suitability of this approach can be made with regard to the significantly lower number of official languages in Vanuatu to the European Union. There are only 3 official languages in Vanuatu in contrast to the 23 official languages of the European Union. The reason this presents as a difficulty is because a ‘proliferation of languages’ can serve to assist the interpreter. The more versions there are that are consistent with each other, the easier it becomes to identify issues such as syntactic or conceptual ambiguity in an outlier.⁶⁴ Therefore, even if a majority could be determined within the three official language versions, it might be questioned whether a two-thirds majority of only 3 texts would be sufficient for the resulting legal consequences to be based on.

⁶³ *ibid*, at 61

⁶⁴ Solan L, ‘The Interpretation of Multilingual Statutes by the European Court of Justice’, above in 41, at 294

Having recognized this limitation, if the approach was identifying a common thread between the three rather than eliminating an outlier, then so long as there is consensus between the three versions to establishing that common thread, the number of versions to compare between becomes less of an issue.

c) A purposive multilingual approach

Given the complexities with applying the translation approach identified above, and no common thread between the three versions being established under the Augustinian approach, ambiguity remains and therefore the purposive approach to interpretation could be used to reconcile the differences. Section 8(4) of the *Interpretation Act* provides for the use of the ‘legislative history of the Act or provision in question’ and other supplementary means of interpretation where application of the plain meaning of ordinary words, technical words, grammar, rules of language and punctuation are produce an ambiguous result.⁶⁵ Articles 32 of the Vienna Convention also provides for the use of preparatory work in cases where the general rule of interpretation⁶⁶ results in ambiguity, obscurity, absurdity or unreasonableness.

Applying this to Article 38 would require further inspection of the Constitutional Committee Minutes. Unfortunately, the Constitutional Committee did not produce a full constitutional history in the minutes and there is no record of any discussions relating to pardons, however annexed to the minutes are the final drafts of the pardon provision, in all three languages. In these final drafts, the English version uses the same words as Article 38 in the Vanuatu Constitution whereas the French version is different. It states:

“Le Président de la République dispose du droit de grace, du droit de commuer ou de réduire les peines infligées à tout condamné. Le Parlement peut instituer une commission chargée de conseiller le Président de la République dans l'exercice de cette fonction.”⁶⁷

Note that in this version, the first sentence states ‘droit de grace, du droit de commuter ou de réduire les peines’. There is only a comma rather than an ‘and’ between the power. This could

⁶⁵ Section 8(2) and (3), *Interpretation (Amendment) Act (2010)*

⁶⁶ Article 31, Vienna Convention

⁶⁷ Constitutional Committee of the Republic of Vanuatu, Minutes and Working Documents April – September 1979, at 296

signify a translation error between this version and the final version. However it would also be read as ‘power to pardon, power to commute or reduce a sentence’. Although the common is replacing an ‘and’ in the final draft versions, the use of the word ‘pardon’ again after the comma, still infers more than the English versions that the ‘power to pardon’ is distinct from the ‘power to commute or reduce a sentence’. This can be seen by contrasting it to the English version that uses the term ‘power’ only once: ‘*The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence.*’ Therefore, it is arguable that the difference in ‘and’ and a ‘comma’ between the French version makes any substantial difference and is more of a translation mishap or correction.

The Bislama version is worded substantially different. It states:

“Sapose wan man o woman I mekem wan bigfala trabol ale cot I panisem hem blong stap long staem long kalapus Presiden blong Ripaplik I kat raet blong cutem panisment blong hem. Baebae Parliament I putum ap wan komiti blong lukluk long hem mo advasem President wanem dicisem baebae I tekem.”⁶⁸

The relevant sentence of this version can be understood as, ‘If a man or woman creates a big problem and the court punishes him or her with a custodial sentence, the President of the Republic has the right to reduce the punishment’. Whilst the wording is once again different between the versions, the choice of words reflects the same concept, that a person must have been ‘punished’ therefore convicted in a court and given a custodial sentence and only then can the President reduce that person’s punishment. Furthermore, this version was translated by members of the Constitutional Committee themselves, rather than professional translators not present during the deliberations, which would contribute to the argument that the Bislama version best reflects the conceptual meaning of the provision.

How much weight should be given to these supplementary materials and arguments would ultimately be up to the courts to decide. However, what is highlighted by this approach is that the arguments that the power to pardon was limited to dealing with sentencing in some way put forward by counsel in *Sope v Republic* and *Vohor v Republic*, is supported in the Bislama version

⁶⁸ *ibid*, at 315

of the Constitution. If this point was argued, the courts would have had a range of different interpretation approaches to take into consideration, including this multilingual purposive approach, which may have resulted in a different outcome.

CONCLUSION

Based on the first instance application of the translation approach and the Augustinian approach to Article 38, it appears that a multilingual interpretation of the power to pardon is consistent with the courts' interpretations in *Constitutional Cases No. 6 & 7 of 2015, Vohor v Republic* and *Sope v Republic*. However, limitations to these approaches have also been identified, particular to the Vanuatu context. In the case of the translation approach, aside from the approach being inconsistent with the principle of language equality, Bislama has the additional status under the Vanuatu Constitution as being the national language, which differentiates it from the European Union. Taking this into consideration, it is suggested that Bislama would be a more suitable language version to determine the 'true intent, meaning and spirit'⁶⁹ of the Constitution. The grammar and ethos of Bislama is inherently ni-Vanuatu and in the broader sense Melanesian, built on the cultural experiences and concepts of ni-Vanuatu in contrast to the English and French languages handed down from the former colonial powers. Whereas the translation history approach results in the English version being given preference as a result of accommodating foreign advisors without Bislama language skills during the drafting process.

The Augustinian approach also had limitations in its application to Article 38. The fundamental limitation to the approach itself lies in the fact that Vanuatu only has 3 official languages and a majority of 2 may not be sufficient grounds on which to base an interpretation, particularly in contrast to the 23 available language versions available to the ECJ. The additional national language status of Bislama may further complicate taking a majority decision where it is not included in the majority as is the case with Article 38. However, the approach itself could still be used to confirm or strengthen interpretations based on other factors, provided there is consensus among the three versions on the interpretation issue.

Therefore in cases where the Augustinian approach does not establish a common thread between the three versions, a purposive approach with reference to supplementary means of interpretation

⁶⁹ Article 8, *Interpretation Act*

can provide another avenue for courts to reconcile those differences. As seen with Article 38, final drafts of the Constitution in the Constitutional Committee Minutes demonstrated inconsistencies between the final drafts and official versions as a result of possible translational error resulting in syntactic ambiguity, and in other versions highlighted conceptual clarity.

There are a number of different interpretation outcomes that can result from the use of the multilingual interpretation approaches explored in this comment when applied to Article 38. What this comment aimed to demonstrate are the benefits and importance of using multilingual interpretation in a multilingual legal system, and identify some approaches to strengthen arguments on interpretational issues in the future. Using these approaches in different cases of interpretation would provide another perspective for the interpreters to consider and enrich the jurisprudence of the courts in Vanuatu.