Unrecorded judgments of the Joint Court of the New Hebrides

To understand the somewhat unique legal system of Vanuatu, called the New Hebrides before independence, one needs to look briefly at its history.

Arrival of Europeans and Colonisation

The New Hebrides were named by Captain James Cook, after his arrival in the archipelago in 1774. The first European settlers arrived towards the end of the 18th century and acquired lands by any means possible, while traders brought diseases, guns and alcohol which had devastating impacts on the local population of Melanesian stock. A large part of this population were recruited by the thousands to work as slave labour in the sugarcane plantations in Fiji and Queensland, as well as labourers in European plantations in the New Hebrides. Presbyterian missionaries who had arrived at the same time as settlers and traders and were worried about their impact on the Melanesian population, requested the British government to place the archipelago under British protection. There was little interest in economic terms, but in view of the annexation of neighbouring New Caledonia by France in 1853, the British claim remained to counteract French influence in the region. The claim was pressed on by the colonial authorities in Australia and New Zealand. France pressed on her own claim with the view to settle large tracts of land with former convicts from New Caledonia.

Since neither France of Great Britain were prepared to fight for their personal claim, and were at the same time worried of combined Japanese and German moves in the area, they eventually agreed to an Exchange of Notes in 1887 for a joint control of the New Hebrides.

Thus the idea of the Franco-British Condominium of the New Hebrides was born, with its inherent contradictions that were to survive well after independence, when the country became known as Vanuatu, in 1980.

French and British interests were different, and since neither government was pressing for annexation, individuals and companies stepped in. Under the impulse of John Higginson, an Irish man turned French, the Compagnie Caledonienne des Nouvelles Hebrides acquired vast tracts of land, attracting French settlers, and leading to long lasting conflicts over land claims between settlers and Melanesians. The Societe Francaise des Nouvelles Hebrides (SFNH) was set up in 1894 with support from the French government to stimulate and promote economic activities amongst French settlers

Meanwhile, a group of Australian investors had formed the Australian New Hebrides Company in 1889, to engage in trading activities throughout the islands. This company was later taken over by Burns Philp.

By 1900, it was said that French settlers controlled all the prime lands, while the English, through Australian settlers, controlled the commercial and trading activities.
The Anglo-French Condominium Administration

Britain and France eventually agreed to place the archipelago under their "joint influence" after concluding the Protocol of 1906 (ratified in 1914). The Protocol, otherwise known as the Convention, gave the two administering powers separate jurisdictions over their own citizens and other nationals opting for their respective legal protection within the territory.

Administratively, the islands were to be run under three administrative structures; British, French and Joint (Condominium) Services. Joint services concerned those services which touched the public domain. Private sector activities were administered separately, primarily in view of the desire of the two powers to control and protect the colonisation process.

Indigenous Melanesians were neither British nor French protected persons. They had no personal status and remained stateless until independence in 1980. They were "natives" placed under the joint influence of the two administering powers. The definition of native included "any aboriginal native of the New Hebrides and of any island in the South and Western Pacific Ocean" ¹. The Protocol did not contemplate the fact that some natives under this definition would in fact be assimilated to another status, such as New Caledonian natives who were given French protectorship, and therefore had to later come under laws designed for non-natives. Under the law, natives were considered as "minors and incapable, and therefore placed under the control and protection of the Joint Administration" ². Under this category, native women were unable to engage in employment without the authorisation of their husband or the Head of their tribe, as the Convention signed by the Joint Administration was designed "to safeguard the protectorship of the husband or the authority of the chief in regard to native women" ³.

The Protocol established a Joint Court, initially under the Presidency of a Spanish judge, assisted by a British judge, a French judge and a Belgian legal advisor. A Native Advocate was appointed to represent Melanesian interests.

If the defendant or the accused was a native, he was to be tried under either national law, "as the Court thought fit" ⁴. The Convention was only applicable to non-natives. The first cases of natives committing similar offences to non-natives, were adjourned as the law did not contemplate such eventuality ⁵.

¹. Unrecorded judgments of the Joint Court of the New Hebrides. Judgment of 29 March 1912.
². Opt-Cit. Judgment of 7 January 1916
³. Opt-Cit. Judgment of 4 June 1912
⁴. Opt-Cit. Judgment of 7 May 1912
Certain actions such as supplying liquor to natives or recruiting native labourers had only been legislated with non-natives in mind ⁶. Arguments were raised in court about offences committed by natives when the law only catered for non-natives ⁷. The classification of native excluded any person of mixed European/Melanesian blood ⁸. The Convention could also be applied to natives married to either French or British subjects and to their offspring ⁹. Cases were adjourned when the nationality of the accused could not be properly established ¹⁰. Charges were dismissed when the accused was wrongly classified as a native whereas he was mixed-race ¹¹.

In criminal cases committed by natives, different laws applied to judge the same offence, depending on the personal status of the victim. If the victim was under British protection, the Queen’s or King’s regulations applied. If the victim was under French protection, the French Penal Code applied. If the victim was a native, the Native Criminal Code applied. The nationality of the victim therefore determined the law applicable. In one case, the accused was charged under the French Penal Code for robbing French persons, but could not be charged for robbing a British person in the same case, as only the French Penal Code had been used when drafting the charge ¹². In another case, the Public Prosecutor had to withdraw his charge, as the identity of the victim was unclear ¹³. In cases of crimes committed jointly by natives and persons of other status, the law applying to both was the law applicable to the person of French or British status. For example a crime committed jointly by a native and a French dependent had to be referred by the Joint Court to the French National Court ¹⁴. The status of the Condominium was questioned as to which national law was to be used. The jurisdiction of the Joint Court was used in every offence committed by natives against non-natives, but what would happen in the case of offences committed against the Condominium? As the Condominium could not be assimilated to a native, the Native Courts were incompetent ¹⁵. It was finally decided that

the law applicable would depend whether the offence was reported to the French or the British police. In cases of locally created organisations, such as cooperatives, if they were qualified as being New Hebridean, they came under the Native Code.

The British and French did not think of introducing a Native Code in civil matters even though civil cases occurred throughout the Condominium period. In some cases the Joint Court decided to deal with cases in accordance with native customs. In other cases, the Court simply reached its own decisions without referring to any particular law. In cases such as adultery, which were no longer considered as offences under French and British laws, and where custom had been incorporated in the law, custom was deemed to be applied. As there was no customary law codified, and as customs differed from area to area, the Court made decisions based on hearsay rather factual elements.

Apart from the peculiar nature of the Joint Court, Britain and France did not share the same perspective on foreign land claims in the New Hebrides. The British view, based on her policy applied to protect native land rights in neighbouring Fiji, was that any claims by British nationals or protected persons had to be reviewed and examined on the basis of circumstances of sale before being validated. The French took the opposite view, recognising all claims made by French nationals, subject to being contested by Melanesians. Melanesians who objected to French claims did not understand the technical and western legal procedures involved, nor could they accept the legal implications of land alienation. Land disputes logically bred deep anti-French feelings and resentments amongst Melanesians which, in turn, shaped negative perceptions and images associated with French colonialism in the South Pacific amongst Vanuatu’s nationalist leadership.

In the 1960s, Britain and France suddenly boosted spending on infrastructure and services, competitively rather than cooperatively, after decades of reluctance to invest in the archipelago. French spending far outstripped that of the British. This reflected two underlying oppositely directed colonial policies. Britain was on the path of her policy to scale down her colonial presence east of the Suez after 1964, while France under President Charles de Gaulle was gearing up to consolidate her presence in the South Pacific as part of her global ambition to

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become a middle-level world power. French spending were aimed at boosting flagging French influence, since it was found in 1960 that there were only 2000 French speaking children as compared to 8000 in English schools. The French Resident Commissioner was instructed to cooperate with his British counterpart to ensure that any "evolution" of the New Hebrides was delayed until the French position was firmly based. It was during this era that Melanesians were able to win some concessions by playing one administering powers off the other.

Transition to Independence

Melanesian resistance to outside influence and encroachment on ancestral lands had a long history, although initially the sentiments involved failed to gained nation-wide momentum and organisation. As early as 1939, Melanesians on the island of Malekula set up the Malekula Native Company (Malnatco) in partnership with a European businessman, Donald Gubby, to penetrate the foreign controlled copra trade. Inspired by the aims of Malnatco, the Nagariamel Movement was founded on the island of Santo in 1964 by Chief Buluk and Jimmy Stevens - a bulldozer driver in the US base during the war of mixed Scottish and Tongan parentage. The term "Nagariamel" denotes sentiments for the revival of traditional ways of life, but the movement itself arose as a reaction against further attempts by French plantation and livestock developers to expand their existing holdings and activities into undeveloped Melanesian ancestral lands. Initially Chief Buluk and his followers demonstrated their resistance by cutting erected property fences, killing livestock. They eventually "reclaimed" the disputed lands where the Nagariamel headquarters was established. Politically, the movement aimed to defy the authority of the Condominium Administration. Through its Union of Labour Office, Jimmy Stevens distributed the reclaimed lands amongst the movement followers, where he tried to launch self-reliance economic development projects - including cultivation of rice. A Supreme Governing Council was set up comprising a Council for Land Affairs, a Council for Village Affairs, a Council for Customary Affairs and a Council for Foreign Affairs. By 1968, inspite of his imprisonment in connection with the land occupation, Jimmy Stevens sought independence for the New Hebrides. He recruited a Fiji Indian Lawyer, R. C. Ramraka, who assisted him to petition the UN in 1971 for the independence of the New Hebrides - an act of


ultimate defiance of the Anglo-French authority.

Jimmy Stevens alienated potential Melanesian followings in Presbyterian and Anglican areas through his blasphemous claim to be the incarnated biblical Moses and reintroduction of polygamy. His support was limited in the northern part of Vanuatu, especially in Church of Christ areas. His decline as a nationalist/charismatic leader in mid-1970s saw him turning to French and American ultra-rightwing business adventurers for the realisation of his dreams for independence and economic self-reliance. It was through this connection that he gained material and financial support for an attempted breakaway of the biggest island of Santo from the emerging Republic of Vanuatu in 1980.

Resistance by traditionalist political movements in the southern part of Vanuatu, was located on the island of Tanna and directed mainly at the Presbyterian Church. Further inspired by the materialistic extravagance of the US armed forces during the war, these emerged as cargo-cult movements. The John Frum movement was founded on the belief of an imminent return of John Frum (sometime believed to be a black American) to unify the southern islands, ensure the exit of Presbyterian missionaries and to deliver material goods currently enjoyed by Europeans for the benefits of its followers. To ensure his return, John Frum dictated the abandonment of the ways of life prescribed by Presbyterian missionaries. Fundamentally, John Frumism represented a rebellion against Presbyterian western values which were perceived to threaten traditional core values and basis of security. These movements also fell prey to French business adventurers hoping to derail the final transition to independence in 1980.

Western educated Melanesians had watched the rise of rural based resistance movements with mixed-feelings. While they shared the expressed sentiments, most of them were civil servants, teachers and employees in private sector firms. The persistent problem of land alienation during the 1960s caused two English speaking teachers, Donald Kalpokas and Peter Taurakoto, in early 1971 to conceive the idea of setting up a New Hebridean Cultural Association as a forum to articulate and assert Melanesian views on land and development issues. The Association was "...to promote, to preserve, to revive and to encourage New Hebridean cultural and...to seek the advancement of the New Hebrides socially, educationally, economically and politically in relation with New Hebridean culture and western civilisation".

With Presbyterian standings, Kalpokas and Taurakoto met an Anglican trained priest, Father Walter Lini, in June 1971 and recruited his literary skills as an editor of a monthly newsletter to disseminate information about the Association and


its aims. On 19 August 1971 founders of the Association staged a public demonstration in Port Vila, the capital, in support of a newly enacted Condominium regulations to curb growing land speculations - activities seeking to take advantage of the Finance center status of the territory. An American buyer, Eugene Peacock, had acquired large tracks of disputed (from French settlers) and ancestral lands for subdivisions for the purposes of settling thousands of retired Americans, especially Vietnam war veterans. This posed a serious threat to the future customary lands rights and economic wellbeing of Melanesians, for whom population pressure on land was already a pressing issue. The public demonstration effectively transformed the Association into a political party - the New Hebrides National Party (NHNPC).

Father Walter Lini took leave from the Anglican Church to run the NHNP from Port Vila. With funding assistance from Australian Churches and the World Council of Churches, NHNP leaders toured all the 80 islands and the South Pacific region to explain the fundamental aim of the party: to press for immediate political reforms to facilitate immediate transition to independence in 1977. This received positive support in Presbyterian and Anglican areas where 65% of the Melanesian population was located. In 1974, the NHNP Secretary-General, Barak Sope, attended the Conference of East African States in Tanzania where wider international support was sought for transition to independence. Consequently, an invitation was issued by Tanzania and Jamaica for the NHNP to petition the UN Committee of 24. The NHNP President addressed the Committee on 24 May 1974 26.

In June 1975, the NHNP articulated its nationalist policy principles. These emphasised return of all alienated lands to customary owners, maintenance of the English and French languages as medium of instructions in schools, localisation of all posts, stringent immigration and nationality laws, development of a self-reliant national economy, more balanced internal development and growth and effective control of the economy by Melanesians. On foreign policy, emphasis was placed on regional co-operation on economic and trade matters, support for freedom movements, a Pacific Nuclear Free Zone, diversification of sources of aid and Non-Alignment 27. In 1977 the NHNP changed its name to Vanua-aku Pati (VP) - party of my land - and continued to apply pressure for political reforms, including the establishment of its Peoples Provisional Government (PPG) which immediately maintained effective control throughout the country.

The emergence of the nationalist movement set off far-reaching undercurrents amongst the European, Catholic and Francophone communities. Their response was the emergence of several political groups opposing the nationalist policies of the VP and the demand for independence in 1977. These were called "moderate" parties by expatriate controlled newspapers.


27. Ibid, p. 41.
The Union de la Population des Nouvelles Hebrides (UPNH) was founded in 1971 as a direct reaction to the emergence of the nationalist movement and the action of the Condominium authorities to curb land speculations. Representing the interests of expatriate settlers, it stood to safeguard the Condominium system, protect individual ownership of land and the elimination as far as possible property litigations. The Mouvement Autonomiste des Nouvelles Hebrides (MANH) was founded in 1973 to protect the interests of Francophones in the northern town of Luganville, especially mixed-blood French nationals who felt threatened by the VP nationalist policies and opposed independence. The Union des Communautés des Nouvelles Hebrides (UCNH) was founded in 1974 by French settlers involved in the short-lived UPNH and progressive francophones under the leadership of a Catholic priest, Père Gerard Leymand. The UCNH was not fundamentally opposed to the VP nationalist policies, but disagreed on strategies for their implementations. It preferred, for instance, independence in 1984 to give more time to prepare Melanesians to take over responsibilities, especially francophones 28.

By 1979, Britain and France finally introduced significant political reforms for greater participation by Melanesians in the political life of the emerging Republic. In return, the VP dismantled its PPG and participated in a Government of National Unity headed by the leader of the moderate parties, Père Gerard Leymang. A constitution was negotiated and promulgated in October 1979. The VP went on to capture 62% of votes cast in the general elections held on universal suffrage for the first time, which was observed by a UN mission. This victory was regarded by the VP leadership as the popular mandate to lead the territory into independence. The VP’s victory, however, was not accepted by custom movements, francophones, expatriates and the French government, primarily in view of the implications of its nationalist policies. Amongst the Moderate opposition groups it was a victory for the Protestant/Anglophone camp. For the Nagariamel and Custom Movements in Tanna, it was a Presbyterian/Anglican victory, especially since the VP leadership was dominated by Church clergymen. Their choice was between negotiations and rebelling against the democratically expressed wishes of the majority expressed through newly established political institutional.

They chose to rebel. Amidst different initiatives for political conciliation, externally backed secessionist moves were hatched by the end of 1979 to break away the economically important islands of Santo, Malekula and Tanna from the emerging Republic. For its part, the VP was not in a mood for further political concessions, especially in regards to power-sharing with moderate minority parties being demanded by France. In desperation, the VP led Vanuatu government requested the assistance of the South Pacific Forum meeting in Kiribati in mid-July 1981. Responding positively, the Forum called on Britain and France to grant independence on 30 July 1980 as requested by the Vanuatu government, put down the rebellious activities and to promote the

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integrity and stability of the new state of Vanuatu. The Vanuatu Government had to wait after independence for the deployment of 400 Papua New Guinea military personnel (with Australian logistics and communications support) to put down the rebellion.

For France, the independence of her former joint colony with Britain posed an undesirable precedent for its remaining territories in the South, especially New Caledonia where Melanesian Kanaks agitating for independence have developed close fraternal links with the VP. French officials warned against prospects for totalitarian rule under the VP government, where the rights of francophones and French settlers would be infringed and denied. For many French people, independence was attained in a climate of repression owing to the arrest, trial and imprisonment of moderate leaders for their role in organising the rebellion, and the deportation of over 2000 French nationals to New Caledonia for their active support of the secession movements.

All these perceptions set the scene for independence aid negotiations with Britain and France, and the stage for Vanuatu’s ambivalent relations with France during the first ten years after independence.

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